

Deeming the death penalty

Why is the death penalty considered reprehensible, given that it has been abolished in many countries, particularly in the West?

It would appear that this disapproval had its origins in Enlightenment Europe, if we are to give credit to the Marquis Cesare Beccaria (*Dei delitti e delle pene*, 1764) and, subsequently, to Voltaire (*Mémoire Prix de la justice et de l'humanité*, Gazette de Berne, No. XIV, 1777).

It is true that Thomas More, in his *Utopia* (1516), had previously argued in favour of proportionality in punishment, advocating against the death penalty for non-lethal crimes: 'Punishing theft with the death penalty goes far beyond the demands of justice, and in no way serves the public interest. This punishment is far too cruel to adequately punish such an offence, whilst at the same time being ineffective in preventing it. Theft, pure and simple, is not a crime so serious that it must be paid for with one's life, and no punishment will deter from stealing those who have no other means of avoiding starvation' (Book I, Clássicos Ipri, Ed. Universidade de Brasília, p. 13). Further on, in the chapter on Punishments and Legal Procedures in his utopian city, the author states: 'The most serious crimes are punished by enslavement, as this is considered to be as effective in deterring the criminal as immediate capital punishment, whilst being more beneficial to the State. Moreover, slaves remain permanently visible to the public to remind them that crime does not pay. Slaves who rebel against their condition, like wild beasts whom bars and chains are no longer sufficient to restrain, are immediately executed' (ibid., p. 96). In his view, therefore, it would be absurd – and even dangerous for the State – to impose the same punishment for the acts of a thief and a murderer.

The Italian jurist and philosopher, for his part, in his pamphlet - initially published clandestinely - wrote more incisively: 'The death of a citizen can be necessary for only two reasons. The first is when, even whilst deprived of his liberty, he has such connexions and such power that it is in the interests of national security; when his existence might bring about a dangerous revolution in the established form of government. The death of any citizen therefore becomes

necessary when the nation regains or loses its freedom, or in times of anarchy, when disorder itself takes the place of the laws... Now, there is no one who, upon reflection, would choose the total and perpetual loss of their freedom, however advantageous a crime might be. Therefore, the mere prospect of the penalty of perpetual slavery, in place of the death penalty, is sufficient to deter any resolute spirit' (chapter 28, On the Death Penalty).

As for Voltaire, in the third of his propositions, he argues as follows regarding crimes: "If I were to put the man who killed your brother to death in agony, would your brother be brought back to life?... As for your brother (who was murdered), he (the murderer) will be your slave for as long as he lives. I shall make him useful to you, to the public and to himself".

Marx and Engels have always been against the death penalty, if we base ourselves on their 1848 articles in the *Neue Rheinische Zeitung*. The rejection that both express there seems to be based on the atrocious or violent character of the punishment. In an August issue of that year, Marx sternly rebuked plans to introduce Prussian criminal law into the Rhineland, criticizing the claim that this would lead to fewer executions and warning against "the shameful corporal punishment that would have been carried out with old Prussian sticks here on the Rhine, from which we were liberated forty years ago". The following month, Engels also published an article protesting the death sentences imposed on seventeen Belgian citizens who had participated in a failed attempt to overthrow the monarchy and form a republic. Engels noted that "the brutality of the Belgian government, jury and Belgian courts lies precisely in the fact that they play with death sentences"! On November 17, 1848, Marx referred to a list of "items from the old misery," which reactionary forces in Berlin intended to reintroduce: "the feudal hunting rights, all the moldy waste of other feudal burdens, the differences between the properties of the kingdom, censorship, fiscal inequalities, aristocracy, absolute monarchy and the death penalty, which Frederick William IV loves passionately".

On another occasion, commenting in the *New York Daily Tribune* (January 1853) - for which he was a London correspondent - on an article about the death penalty that had previously been published in *The Times*, Marx wrote: "It is surprising that the article in question does not even put forward a single argument or pretext to support the barbaric theory proposed therein; and it would be very

difficult, if not entirely impossible, to establish any principle upon which the justice or propriety of capital punishment might be founded in a society that prides itself on its civilization. Punishment in general has been defended as a means of reforming or deterring... To put it plainly, and dispensing with all circumlocutions, punishment is nothing but a means for society to defend itself against the infringement of its vital conditions, whatever their nature. Now, what sort of society is it that knows of no better instrument for its own defense than the executioner, and which proclaims, through the 'world's leading newspaper', its own brutality as an eternal law”?

The main arguments put forward against the maximum sentence – although there are others of lesser significance – can be summarised as follows:

- 1 - The State or society must not act as a common murderer or avenger and therefore repeat the same original criminal act (murder, assassination); that is, the State must act in a punitive but not vindictive manner, avoiding the moral objectivism of past human history ("eye for eye, tooth for tooth");
- 2 - No justice is infallible, and when one is condemned to death, one may commit an insurmountable judicial error, because irremediable;
- 3 - No person is fully responsible for their actions, and social and historical circumstances may have contributed to the original crime;
- 4 - The death penalty is neither a deterrent nor an effective way to reduce the number of murders in society;
- 5 - It contradicts what is highest and noblest in society, namely, "the duty to be" of preservation and improvement of living conditions; therefore, it is ethically and morally unacceptable for human dignity.

Considerations such as these led to the abolition of the death penalty in Europe, beginning with the autonomous Grand Duchy of Finland in 1826, followed by the Netherlands in 1850, Portugal in 1867, Norway in 1875, Denmark in 1892, and Sweden in 1910. In Brazil, the last execution took place in 1855, although the law remained in force.

All the arguments listed above are rationally plausible and eminent, but it is still possible to refute them in an equally rational manner. The numbering that follows refers to the previous list.

- 1 - If the State or society should not act as a criminal, we are admitting that its maximum act, capital punishment, is not based on equal punishment, that is, that

the maximum crime committed does not deserve the maximum penalty of execution. This means that the offender or the person who ordered death acquires, in advance, a differentiated right or greater clemency of the right, which is the replacement of capital punishment by loss of liberty;

2 – It is well known that mistakes are part of the human condition, being one of its perpetual and indelible characteristics. Even so, decisions regarding the guilt of the accused, arising from legal proceedings, are statistically more accurate and common (provided there is no interference of another kind, such as ideological, economic or racist interference) than the legal errors committed in cases involving capital offences;

3 - If environmental and societal influences can drive an individual or a group to commit a lethal crime, then we deny or underestimate the unequivocal fact that every action is, at its core, a personal matter; that is, we exclude existential freedom (acknowledged by phenomenology) from the act itself and attribute blame-or primary responsibility-to the sociocultural environment, which, in turn, is present and equally influences any legal decision, whatever it may be. In short, one conceals the suspicion that no one is a free agent, thereby raising doubts as to whether anyone can be held fully accountable for the act committed;

4 - If the death penalty fails to deter homicide rates in a society, then neither do the other penalties imposed. In other words, fluctuations in statistics regarding violent, premeditated deaths may or may not occur as a result of various other factors unrelated to the existence or abolition of the death penalty. A wide range of statistical variations regarding this subject can be observed.

5 - It is absolutely certain that the death penalty contradicts the universal ethical principle of action, according to Kantian reasoning. Yet, one might ask: if an individual disregards or violates this fundamental ethical principle (through intentional homicide, robbery resulting in death etc.), it is evident that the specific, concrete act constitutes a direct assault on the abstract, general ideal. In other words, human dignity—grounded in the universal—is disregarded in the specific act of murder. Once again, we encounter a clear disparity in conditions and consequences, similar to that noted in point 1. At the same time, it becomes apparent that the life of the criminal is accorded greater importance - or higher value - than the life of the victim.

It is for this very reason that Kant defended the *lex talionis* (retaliation law) in his work *Metaphysics of Morals*, Part I (Metaphysical First Principles of the Doctrine of Right), under the topic Right of Punishment (or Penal Right) and Right of Pardon (or Clemency),¹ under the heading *The Right to Punish and to Grant Pardon*: "If the criminal has committed a murder, he must die. There is no substitute for the penalty that can satisfy justice; there is no comparison between a life, however painful, and death; and thus, there is no other way to apply the *lex talionis* to the crime than to legally impose the death penalty upon the criminal, while stripping it of anything that might outrage humanity in the person of the condemned... This equality between punishment and crime - which, according to the strict law of retaliation, is possible here only through a death sentence - becomes even clearer when one considers that such a sentence is the only means of punishing all criminals in a manner proportional to their inner wickedness (even in cases not involving murder, but rather any other crime against the state that only death can expiate)... The Marquis de Beccaria, out of a sense of humanity (*compassibilitas*),² objects that the death penalty is unjust because it could not have been included in the original civil contract. Otherwise, every individual in the population would have to consent to losing their life should they kill someone; yet such consent is impossible, since no one can dispose of their own life. All of this is mere sophistry and chicanery. No one is punished for having willed the punishment, but for having willed a punishable act; for punishment ceases to exist when only what is willed comes to pass, and it is impossible to will to be punished".

Another philosopher who bears almost no resemblance to Kant nevertheless put forward a similar argument. In *The Social Contract*, Chapter V, On the Right to Life and Death, Jean-Jacques Rousseau argues: 'Whoever wishes to preserve his life at the expense of others must also give it up for them when necessary. Now, the citizen is no longer the judge of the danger to which the law requires him to expose himself when the sovereign tells him that it is in the State's interest that he should die; for it is only on this condition that he has lived in safety until then, and his life is no longer merely a natural right, but a conditional grant from the State. The death penalty imposed on criminals may be viewed from the same

¹ Editora Vozes e Editora São Francisco, 2013, pgs 118 a 120.

² *Aus theilnehmender Empfinderei einer affectirten Humanitaet* in the original.

perspective: it is in order not to fall victim to a murderer that one consents to die, should one become such a person. In this treaty, far from disposing of one's own life, the sole concern is to safeguard it, and it cannot be presumed that either party intends to be hanged. Indeed, any wrongdoer who attacks social rights becomes, through their actions, a rebel and a traitor to the nation; they cease to be a member of society, violating its laws and even waging war against it. The preservation of the State is therefore incompatible with their own; one of the two must perish; and when the guilty party is put to death, it is less as a citizen than as an Enemy". Even so, it would be better if society could put the murderer to some useful purpose, for example, by making him work whilst serving his prison sentence. For this reason, the philosopher adds: "One has the right to put to death, even as an example, anyone who cannot be kept alive without danger".

John Stuart Mill, too, advocated the maximum penalty in cases of deliberate cruelty. He stated as much in his *Speech in Favour of Capital Punishment*' (1868): "When there has been brought home to any one, by conclusive evidence, the greatest crime known to the law; and when the attendant circumstances suggest no palliation of the guilt, no hope that the culprit may even yet not be unworthy to live among mankind, nothing to make it probable that the crime was an exception to his general character rather than a consequence of it, then I confess it appears to me that to deprive the criminal of the life of which he has proved himself to be unworthy—solemnly to blot him out from the fellowship of mankind and from the catalogue of the living—is the most appropriate as it is certainly the most impressive, mode in which society can attach to so great a crime the penal consequences which for the security of life it is indispensable to annex to it. I defend this penalty, when confined to atrocious cases, on the very ground on which it is commonly attacked - on that of humanity to the criminal; as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime".

For Mill, the death penalty would be less painful for the criminal than life imprisonment, without taking into account the long-term costs of maintaining the prisoner: "What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards - debarred from all

pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?... Much has been said of the sanctity of human life, and the absurdity of supposing that we can teach respect for life by ourselves destroying it. But I am surprised at the employment of this argument, for it is one which might be brought against any punishment whatever. It is not human life only, not human life as such, that ought to be sacred to us, but human feelings. The human capacity of suffering is what we should cause to be respected, not the mere capacity of existing. And we may imagine somebody asking how we can teach people not to inflict suffering by ourselves inflicting it? But to this I should answer - all of us would answer - that to deter by suffering from inflicting suffering is not only possible, but the very purpose of penal justice”.

If the death penalty is not an absolute evil (*usque ad omne mori miserum est* – to what extent is it a misfortune to die?), one might still argue, as Benjamin Constant did, regarding the consequences of life imprisonment or prolonged prison sentences (*Principes de politique applicables à tous les gouvernements représentatifs et particulièrement à la Constitution actuelle de la France* - 1815): “The death penalty, even when reduced to the mere deprivation of life, has been the subject of criticism by several esteemed philosophers. Their arguments have not convinced me that this punishment has never been admissible, and I did not need their arguments to conclude that it should be applied only to a very limited number of crimes. The death penalty has the great advantage that few men devote themselves to odious and humiliating tasks. It is better for those deplorable agents of a necessary severity—shunned with horror by society—to devote themselves to the grim task of executing a few criminals than for a multitude to condemn itself to watch over the guilty and become the perpetual instrument of their prolonged misery... This consideration leads me to reject life imprisonment. It corrupts both jailers and inmates. It accustoms the accused to a capricious ferocity. It is inseparable from a great deal of arbitrariness. Furthermore, it can cloak a multitude of cruelties... Joseph II (of the Austro-Hungarian Empire) and Catherine II (of Russia) always spoke of abolishing the death penalty in the name of humanity, while inflicting punishments that were no

less deadly, yet longer and more rigorous" (Book IX, Chapter III, On Punishments).

Much more recently, the Catechism of the Catholic Church, published in 1992 during the papacy of John Paul II, stated: 'Preserving the common good of society requires the neutralisation of the aggressor. In this regard, the Church's traditional teaching has recognised the right and duty of legitimate public authority to impose penalties proportionate to the gravity of the offence, without excluding, in extremely serious cases, the death penalty. For similar reasons, those in authority have the right to repel, by force of arms, aggressors against the city for which they are responsible'. In 2018, however, the same Church, at the instigation of Pope Francis, abandoned its acceptance of capital punishment in all possible situations.