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ON THE ABOLITION OF THE DEATH PENALTY

By M. H. DE JOYA,

Associate Professor, University of the Philippines.

The wisdom and necessity of capital punishment have been discussed and debated by criminologists, philosophers and legislators for more than a hundred years. Diverse theories have been set forth; yet up to the present time it is still an unsettled question, none of the theories propounded having received universal sanction and approval. In many a jurisdiction it has been abolished for reasons more or less sentimental in their nature, to be re-established and revived again after a few years undoubtedly of sad experience and failure in the experiment. And even in our own days public opinion and legislation on this subject have been more or less fluctuating.

In our own country, this important question has awakened the interest of many a thoughtful citizen, due to the modern reforms that have been embodied in the project for a Correctional Code recently submitted to the consideration of the Legislature by the Code Committee. It is there provided, among other things, that capital punishment may be inflicted only upon those convicted more than once for the crime of murder. Its authors undoubtedly must have been greatly influenced by the Religion of Humanity, or Humanitarianism, the highest expression of Christian thought, which has brought about the abolition of slavery and has been working for half a century to secure the abolition of the death penalty, under the leadership and inspiration of Comte and his disciples.

But before any satisfactory discussion and treatment of the subject can be attempted, we believe that a brief consideration of the object of criminal legislation and its penalties is necessary. Criminologists, penologists and publicists on Criminal Law have advanced different theories as to the province of penal legislation. Some consider that retribution is its real object, and that penalties are imposed as retaliation and punishment for the wrong-doers and as a vengeance as well. Others believe that the object of penalty is deterrence, making it serve as a warning not only to the offenders but also to the public at large. Still others find the object and purpose of criminal legislation in what is called social defense, that is the defense of society from the attacks and menace of the criminal class, for the preservation of individual and collective safety and the maintenance of public peace and order. But some of the more modern writers think that the true object of criminal legislation is the reformation of the criminal himself, considering him as a degenerate, having fallen below the normal man, and trying to bring about his regeneration.

In our opinion, however, the real object and purpose of the whole body of Criminal Law is the attainment and realization of justice, which is secured, in the first place, by the proper defense of the whole social fabric from the attacks of the vicious and criminal to whom punishment is meted out for the purposes of retribution and deterrence at the same time; and, in the second place, by the reform of the great majority of the morally infirm in general so that they might properly fulfill their duties as good and law-abiding citizens.

Now, in the discussion of the wisdom and advisability of the preservation on the statute books of the death penalty, we must also bear in mind three postulates relative to the condition of man: Normality, Degeneracy and Regeneration. Considering the members of the criminal class as degenerates, as persons who have fallen below the level of the average man, and the possibility of their regeneration and return to normal life, how is their regeneration going to be brought about? Humanity may be regenerated by the reform of its abnormal members and also by the elimination of the undesirable and the unfit. (1) But modern standards of Morality and Codes of Ethics as well as the teachings of Christian Religion will not countenance the wholesale and indiscriminate elimination or extermination of the unfit and undesirable, either morally, physically and intellectually. Yet there exists a constant demand for the improvement of the individual and of society, and a constant and fierce struggle for existence between man and Nature and intense competition of life between man and man, in which the existence and improvement of the individual are made possible only by the survival of the fittest; and the less fortunate succumb. What has been the fate of the once happy peoples inhabiting the different parts of the globe which have been colonized by the European races? And are not famines, floods, wild beasts and pestilence the constant source of dangers to the life and safety of primitive man? And have not men been executed for crimes, and for religious and political motives? So has the death penalty been justified by Nature as well as by History, and on the principle of self-preservation. (2)

Writers on this subject may be naturally divided into three classes: the conservatives advocating its preservation and effective use, to which class belong such distinguished writers as De Flury, (3) Garofalo, (4) Beccaria, (5) Romagnosi, (6) Hackel, (7) Ferri (8) and Tarde, (9) at times; the radicals advocating its abolition

(1) Garofalo's *Criminology*, pp. 220, 376, 410.

(2) Ferri's *Criminal Sociology*, p. 528.

Tarde's *Penal Philosophy*, p. 529.

Lombroso's *Crime, etc.*, p. 426.

(3) De Flury's *L'Ame du Criminal*, (1898).

(4) Garofalo's *Criminology*, p. 380.

(5) Ferri's *Crim. Sociology*, p. 528.

(6) Ferri's *Crim. Sociology*, p. 528.

(7) De Quiros' *Modern Theories of Crime.*, p. 193.

(8) Ferri's *Crim. Sociology*, p. 532.

(9) Tarde's *Penal Philosophy*, pp. 546-7.

to which class belong the no less distinguished jurists such as De Quiros,⁽¹⁰⁾ Aschaffenburg⁽¹¹⁾ and Mittermaier; and a middle class worthily represented by Lombroso,⁽¹²⁾ advocating its retention and application only in extreme cases, preserving it as a sword of Damocles.

The partisans of the preservation and effective use and application of the death penalty, finding some of its justification in Nature and History, further justify it on the ground of deterrence⁽¹³⁾ and the consequent decrease and diminution of criminality,⁽¹⁴⁾ and the so-called artificial selection⁽¹⁵⁾ eliminating the undesirable and unfit to secure the improvement of the individual and society, considering the penalty imposed as a retribution for the proper defense of society.

On the other hand, the advocates of its abolition absolutely deny the defensive efficacy of the death penalty as a deterrence,⁽¹⁶⁾ and allege that by making public executions more or less dramatic, they tend to increase criminality by force of example and imitation, converting the criminal into a sort of a hero among the uneducated classes;⁽¹⁷⁾ that, at most, it has no effect on the increase or decrease of criminality and its suppression⁽¹⁸⁾; that it is inhuman and revolting and might cause irreparable loss in case of mistake or miscarriage of justice⁽¹⁹⁾; and that its abolition would decrease criminality,⁽²⁰⁾ citing furthermore the reluctance of courts and juries in imposing the death penalty, often-times acquitting the defendant rather than take the responsibility for his death, and invoking likewise the ever growing regard for human life and personality.

And those holding the middle ground, such as Lombroso, although contending for the retention of capital punishment, argue that it should be applied only in extreme cases—in meritorious cases—preserving it as a sword of Damocles, and a warning to everybody as a punishment that might be possibly inflicted at any time.⁽²¹⁾

Let us now analyze the arguments set forth, in support of their respective views, by the writers on this subject. Statistics generally prove that the application of the death penalty deters criminals and consequently has a tendency to diminish crimi-

⁽¹⁰⁾ De Quiros' *Modern Theories of Crim.*, p. 194.

⁽¹¹⁾ Aschaffenburg's *Crime and Its Repression*, p. 267.

⁽¹²⁾ Lombroso's *Crime et al.*, p. 426.

⁽¹³⁾ Garofalo's *Criminology*, pp. 249, 378.

⁽¹⁴⁾ Garofalo's *Criminology*, p. 380.

⁽¹⁵⁾ De Quiros' *Modern Theories of Criminality*, p. 193.

⁽¹⁶⁾ Ferri's *Crim. Sociology*, p. 530.

Aschaffenburg's *Crime and its Repression*, p. 266.

⁽¹⁷⁾ Aschaffenburg's *Crime and its Repression*, p. 267.

Lombroso's *Crime, etc.*, p. 426.

⁽¹⁸⁾ Aschaffenburg's *Crime and its Repression*, p. 267.

⁽¹⁹⁾ Aschaffenburg's *Crime and its Repression*, p. 266.

⁽²⁰⁾ Tarde's *Penal Philosophy*, p. 543.

⁽²¹⁾ Garofalo's *Criminology*, p. 380.

Lombroso's *Crime, etc.*, p. 426.

nality; and it cannot, therefore, be successfully denied that the imposition of the death penalty really intimidates and deters, as in England and France⁽²²⁾; and that its abolition or suspension naturally tends to authorize murders and increase criminality, as in Belgium, Switzerland, Prussia and Italy.⁽²³⁾ It is true that there have been instances in which it has been shown that the criminals have not taken seriously the death penalty imposed upon them; but they may be considered as exceptional cases—cases of abnormal men devoid of the normal feelings and emotions of the average individual. That the application of the death penalty is really an effective means of social defense, in different countries it has been seen that its effective use has suppressed many a military revolt, political conspiracies and organizations of criminals and bandits, as in Italy and Austria⁽²⁴⁾; and that it has been gradually re-established in many jurisdictions which had formerly abolished it, as in several cantons in Switzerland.⁽²⁵⁾

It is beyond dispute that murderers are a constant menace to society upon which they are a burden more than anything else; and that they may be naturally considered as unfit to live in the society of men; and that their elimination might help in bringing about the improvement of the individual and of the race through a process of artificial selection. It cannot be said that such a theory is inhuman. It must be borne in mind that the preservation and application of the death penalty have for their object the protection of the members of society, and the criminal class are among them; and their only duty is to be good and law-abiding citizens to receive its benefit and avoid its application. Nor is the application of the death penalty contrary to the principles of Justice. The eternal principles of Justice demand reward for good conduct and service, and punishment for wrong-doing; and if it is true that human personality and life are sacred and inviolable, there cannot be advanced any tenable argument why the murderer should generally be spared his life, after he has unjustly deprived another of what is dearest to the latter. The highest interests of public peace and order, and the safety of the whole social fabric demand that an adequate atonement should be made; that both the criminals and the public at large should be made to understand and realize the seriousness and gravity of the offenses committed, re-establishing the juridical order that has been altered and violated. Each and every man, woman and child has a perfect right to the full enjoyment of personal security; and its enjoyment should not be limited or curtailed by any consideration for the criminal class and murderers in particular. The argument that the death penalty, as a defensive measure, is defective and inadequate in that it does

(22) Garofalo's *Criminology*, pp. 249, 378, 380.

Tarde's *Penal Philosophy*, p. 544.

(23) Garofalo's *Criminology*, pp. 371, 379, 380.

Tarde's *Penal Philosophy*, p. 544.

(24) Tarde's *Penal Philosophy*, p. 544.

(25) Garofalo's *Criminology*, p. 380.

Tarde's *Penal Philosophy*, pp. 530, 542.

not deter and that it tends, on the contrary, to increase criminality by the force of example and imitation, making the victim a sort of a hero in the imagination of the untrained and the uneducated, due to the somewhat dramatic character of public executions, may be easily disposed of, by making the execution of criminals strictly private to be carried out only in the presence of the necessary government officials, religious advisers and the members of the criminal's family and counsel. Then the dramatization of the execution would disappear, and with it its baneful influence.

The argument that capital punishment does not diminish criminality; that it cannot stop its increase; that the most that it can do is to keep the number of capital cases stationary, is highly questionable; but statistics show that wherever it has been abolished or suspended, criminality has greatly increased, as in Belgium, Prussia, Italy and Switzerland⁽²⁶⁾; and that wherever it has been re-established or preserved criminality has diminished, or at least, it has become stationary, as in England and France.⁽²⁷⁾ We believe that such argument cannot be seriously taken into account. At least, it may be stated that the murderer who has been executed cannot again commit another murder, either on the person of a police officer or private individual trying to prevent his escape, or on the person of the prison officials having his custody.⁽²⁸⁾ That the death penalty is inhuman, demoralizing and revolting, and might cause irreparable loss and injury in cases of mistake and miscarriage of justice, is an argument that might have very much weight, if capital punishment were imposed systematically for the commission of offenses other than assassinations, parricide, and rape and robbery accompanied by murder; as, for instance, if the death penalty were to be imposed for the commission of such offenses as ordinary robbery or theft, as under the laws of England in the days of Bentham. In such cases, there being no reasonable proportion between the crime committed and the penalty inflicted, the offender would naturally receive and deserve pity and commiseration. But such is not the case, when the offender has committed any of the horrible deeds above indicated. The application of the death penalty will be but following the law of compensation, and the eternal principles of Justice. If execution is inhuman, is it not inhuman to commit cold blooded murder after honor or property has been robbed from the victim? Is not the act of depriving another of his life an act inhuman everywhere? If so, it is not more inhuman to make the offender pay for what he has taken. It is true that the methods now universally and generally used in carrying out executions, whether by strangulation or decapitation in different forms, and in public places are simply revolting and demoralizing; but this is a simple matter of procedure. Other means may be employed, such as electrocution and poison, and nay the criminal himself might be permitted and allowed the privilege of choosing the manner in which he shall die; and preferably it should be brought about by

⁽²⁶⁾ Garofalo's *Crimology*, pp. 371, 379, 380.

⁽²⁷⁾ Garofalo's *Crimology*, pp. 371, 379, 380.

⁽²⁸⁾ Aschaffenburg's *Crime and its Repression*, pp. 265-6.

himself. The death of Socrates is familiar to every educated man; the practice introduced by Marcus Aurelius of permitting the criminal to choose the manner in which he should die was not inhuman; and furthermore there is the practice in Servia of carrying out the executions of criminals by means of firing squads.

But abolitionists say that there is a possibility of mistake and miscarriage of justice, and that irreparable loss and injury might be caused,⁽²⁹⁾ speaking as if it were possible in all cases to have and secure absolute certainty in the administration of justice. Proving one's case, by preponderance of evidence, or beyond reasonable doubt, does not imply absolute certainty. Besides, judicial errors, if committed at all, would generally be in favor of the accused. Furthermore, it is not easy to commit a judicial error against the accused. There are lawyers and appellate courts; and the natural feeling and tendency in man is not to cause any unnecessary injury or harm to another. Besides, prosecuting officers are not blood-thirsty officials; their sole duty is only so see that justice is done and no more. And in this case, we may ask, What about surgical errors and blunders? Yet they are hidden from the public view and very seldom the subject of public opinion and criticism. Mankind has been contradicting itself. It shrinks from the judicial executions of criminals; and yet it approves the conduct and act of a dishonored husband and woman who has taken justice into their hands.⁽³⁰⁾ It generally tolerates and approves the summary executions of pirates, spies, and dangerous thieves caught in the act and who assume a threatening attitude. In other words, Mankind approves extra-judicial executions, but not judicial executions; and the reason for this may undoubtedly be found in the revolting methods now employed.

Lombroso's theory that capital punishment should be imposed only upon murderers who are recidivists is as questionable as the theory of Ferri that to make it effective, at least 1500 executions should take place every year in Italy; or that of De Flury and Tarde that executions should be frequent, that is, more frequent than what they are now. To make capital punishment effective, we do not believe that number and frequency always have decisive effect. We believe that its imposition should be permitted whenever and wherever the facts and circumstances of the case demand such a measure, as in the cases of parricide and assassination, rape and robbery accompanied with homicide. We do not believe that a cold-blooded murderer should be given any further opportunity or chance of killing another, whether a private individual, a police officer or a prison official, before he could be compelled to pay the full penalty of the law.

In this connection there is another question worthy of consideration. The courts of Spain and France and the Penal Code of the Argentine Republic, faithfully representing the gallant character of their people, do not permit the execution of

⁽²⁹⁾ Tarde's Penal Philosophy, p. 539.

⁽³⁰⁾ Tarde's Penal Philosophy, p. 547.

any women; a rule worthy to be introduced into our system of penal legislation. Whether for sentimental reasons and greater regard and consideration for the gentler sex, or otherwise, we believe that such an attitude is a worthy one. ⁽²¹⁾

To summarize then, we believe in the justice and necessity of capital punishment in the cases we have enumerated, as justified by Nature and History as well, and for the improvement and defense of the individual and of the race; that it deters criminals and tends to reduce criminality; that women should never be executed; that executions should not be made publicly or in the view of the multitude; that other means should be employed such as electrocution or the use of poison; and that the criminal should be permitted to choose the manner in which he shall die, provided the one selected by him is one of the two; and that his death, if possible, should be brought about by himself. Then there would be no necessity for the executioner, and prison officials would be relieved of their most revolting and undesirable duty.

⁽²¹⁾ Tarde's Penal Philosophy, p. 557