

## BRUTALITY OF A LEGAL SENTENCE

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Violence is an act we conveniently compartmentalize to remain in certain arenas of social life. We have developed a legal system wherein the popular thought is that it is, in many ways, a mechanism to fight violence and provide ‘justice’ for the victims of violence. However, this whole worldview of the legal system falls apart when we think in terms that Robert Cover has so eloquently introduced in his path-breaking essay, *Violence of the Word*. The very idea of what ‘justice’ entails can be legitimately asked and this is the very task Cover has undertaken by illustrating how violence takes place in unexpected places. Law is a mechanism people turn to when violence has already occurred, but Cover depicts how violence occurs once this process has been set in motion. “Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.”<sup>1</sup>

In this essay, Cover talks about the violence involved in the act of legal interpretation, ultimately stating that law and violence are intimately connected and cannot be separated. This practice of legal interpretation is rather incomplete without its accompanying violence to the point wherein it depends upon this social practice of violence for its efficacy.<sup>2</sup> The connection between law and violence is a theme that has been grappled with by many other philosophers, three important ones being Walter Benjamin, Micheal Foucault and Jacques Derrida. Benjamin, in his *Critique of Violence*, attempts to deconstruct the relationship between violence, law and justice

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<sup>1</sup> Robert M. Cover, *Violence and the Word*. Page: 1601.

<sup>2</sup> *Ibid.* Page: 1613

and states that both natural law and positive law agree that violence as a means can be justified if it is in accordance with the law.<sup>3</sup>

Benjamin argues that the relationship between law and violence is twofold. “Violence is the means by which law is instituted and preserved.”<sup>4</sup> Also, “domination is the end of the law.”<sup>5</sup> Political and social processes that created law, as we now know it, can substantiate both these ideas. It is known to us that the constitutions of various nations have the blood of several wars behind them, these ‘freedom struggles’ as they are proudly called, have all been illegal in terms of the forces that established laws on these lands precedent to their formation. In order to breakaway from these forces, certain violent acts were sanctioned and justified. However, they still remain illegal and violent in technical terms. Therefore, it can be rightly stated that violence was the very means by which law of the land as it is now was created. Furthermore, law making as a process of domination can be understood when law is looked at in terms of power. Law making is thus a sense of assumption of power and to that extent it will always remain violent.<sup>6</sup> “In capital punishment and police violence alike, the state reaffirms itself: law is an immediate manifestation of violence or force and the end of the law is the law itself.”<sup>7</sup>

The concept of power and its many manifestations in law can be further deliberated upon by taking a look at Foucault and his ideas propounded in *Discipline and Punish*. Force, which can also be understood as power, for Foucault is what is exercised by and between individuals. Law is a series of institutions wherein; officials and those who come in contact with it are related to each other by exertion of this very force.<sup>8</sup> Foucault relates this power to prison systems in a similar manner in which, Cover relates violence and legal interpretations. He states, “At the turn of the century, a new legislation defined the power to punish as a general function of society that was exercised in the same manner over all its members, and in which each individual was equally

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<sup>3</sup> Signe Larson, *Notes on the Thought of Walter Benjamin: Critique of Violence*  
<http://criticallegalthinking.com/2013/10/11/notes-thought-walter-benjamin-critique-violence/>

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Anthony Beck, *Foucault and Law: the Collapse of Law's Empire*, Page: 492-493

represented: but in making detention the penalty *par excellence*, it introduced procedures of domination characteristic of a particular type of power.”<sup>9</sup>

Foucault talks about how we are aware of all the inconveniences and problems that arise out of prisons, that it is “dangerous when it is not useless” and yet one cannot simply see a way to replace it. “It is the detestable solution, which one seems unable to do without.” This relates to Cover’s understanding of the intimate relation between violence and law. Wherein, we simply cannot imagine law without intrinsic violence attached to, as the very idea of a legal decision, loses its legitimacy without the deed that follows, which is the violent act. This “self-evident” character of law and prison, for Foucault, is something we cannot seem to abandon.<sup>10</sup>

Derrida in his *Force of Law: The Mystical Foundation of Authority*, wherein he differentiates between law and justice stating that law is not justice and in fact law is force, further elaborates the connection between force and law. It is pertinent to note that law is force not just in the sense that it leads to certain judicial sanctions and decisions but rather by virtue of the fact that law is based on the enduring possibility of a certain violence to enforce laws, that is, on a force (or violence) by means of which it ensures its very applicability as a rule or a law.<sup>11</sup> This very same idea is the one replicated in Cover’s essay wherein he states that in understanding the relation between violence and law it is useful to note that the very prominence of law is based on its applicability, and this applicability is what translates into violence, which is inflicted on the defendant or prisoner.

Therefore, it can be rightly stated that the foundational authority of law rests on its monopoly of violence itself<sup>12</sup>, wherein sanctioned or “legal” forms of violence are protected under the garb of righteous law. Those who fall within the nexus of this violence are left with no means to question this violence. In understanding the extent to which this violence is close to legal

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<sup>9</sup> Micheal Foucault, *Discipline and Punish*. Page 231-232

<sup>10</sup> *Ibid.*

<sup>11</sup> Petra Gehring, *Force and “Mystical Foundation” of Law: How Jacques Derrida Addresses Legal Discourse*. Page: 155.

<sup>12</sup> In a Field of Pain and Death: Course on Law, Literature and Violence <http://altlawforum.org/pedagogy/in-a-field-of-pain-and-death-course-on-law-literature-and-violence/>

process, no other stream of law is more apparent than criminal law. Cover agrees with this proposition and in fact states in his essay that he relies on criminal law to explain his thesis for this reason. Within criminal law itself, the death penalty is an area where the violence of legal interpretation is very much in the forefront. A literal situation of life and death based on the words pronounced by a judge is the most indisputable scenario wherein law showcases its violence. Due to these reasons, the author relies on the *Death Penalty India Report* produced by National Law University, Delhi to relate Cover's understanding of Violence and Law to her own.

Using personal interviews of the prisoners and their families, the report focuses on the death penalty in India, going into its manifestation in their lives in various forms. In doing so, it produced a very telling report on the violence that these lives face even before the ultimate violence of a life being taken away occurs. The report rightly states that the "every-day uncertainty of between life and death is what sets capital punishment apart from imprisonment of any other kind."<sup>13</sup> Living with this uncertainty is extremely difficult in itself; however, the report states how these prisoners are left in this uncertain situation sometimes for years together. Most of prisoners interviewed had spent extremely long durations in prison accompanied by several other factors of violence which they face on a daily basis.

In Cover's terms, the 'roles' played by various officials in the legal process is a matter of consideration. Apart from the judges, whose word becomes prisoners' fate; there are several other people in the process who inflict extreme violence on them. Right from the police officials to the wardens in prison, there are numerous violent roles, which exist within the legal system. The report has a section dedicated to the prisoners' experience in prison, which we come to see was dominated by custodial violence. The report states that 80% of the prisoners interviewed reported some or the other form of custodial violence. This direct infliction of violence using barbaric methods such as waterboarding, forcible stripping, hanging, electric shocks to mention a few causes extreme mental and physical pain and suffering to the prisoner. In addition to this, the prisoners are exposed to solitary confinement and their conditions of incarceration is harsh to say

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<sup>13</sup> Death Penalty India Report: Summary, National Law University, Delhi. Page: 6.

the least. They are made to live in extremely cramped spaces without any exposure to light, adequate food and with utterly poor medical standards.

Another important finding of the report is with relation to the socio-economic profile of the prisoners. Most of them come from poor socio-economic backgrounds belonging to marginalized sections of the population. This makes them especially vulnerable to the situation wherein the families of the accused face difficulties of various kinds including paying for the lawyer of the prisoner to the charges that they incur from prison visits. The report states that, “Amongst the economically vulnerable families who had hired private lawyers at the trial court or High Court, and who spoke about expenditure on the case, many had borrowed money or sold their assets like house, land, jewellery, livestock, or other belongings, to afford the private legal representation. Families that had borrowed money for paying private lawyers were still in debt at the time of our interviews.”<sup>14</sup> This situation shows the extreme violence faced by the families of the prisoners along with the emotional and mental stress that is inflicted on them to evaporate all their resources fighting a case, which may ultimately result in the death of their dear one, making the entire exercise absolutely futile.

The impact of this violence on the family members of the accused translates into a range of social, economical, psychological problems that they ultimately face throughout the whole process of a trial. They face shame and abandonment by the society due to the fact that one of their family members is in prison. However, their need to comply with structures and expectations of the society in certain cases leads to abandonment of the family member in prison, which further perpetuates this cycle of violence.

Cover describes how a dominant and submissive role exists between the judge and the prisoner, wherein even if the two do not share the same philosophy or understanding of a punishment, the judge’s perspective is what manifests into reality. It is important to notice that the violence faced by the submissive goes far beyond this to the point where the prisoner faces a kind of violence by not actually even being an active party to the whole proceeding. The report states

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<sup>14</sup> *Ibid.* Page: 28.



the educational background of the prisoners and it is evident from the fact that most of the prisoners aren't educated that they are unequipped to even understand the proceedings. Due to this they experience an alienation from the legal process in which the future of their own life is being decided. This lack of agency is an extreme violence in itself.

The report further states how the conditions of legal assistance only worsen their sense of alienation. The prisoners and their families complained of the lack of communication between the lawyers and them. This lack of interaction adversely affects the quality of representation that they receive in court. They have little to no opportunity to engage with the criminal system. Even when they are present in court, most of the prisoners complained of their lack of understating of the proceedings. The language barrier produced by the process being carried out in English is another factor that affected this sense of alienation. It is also stated that even though some of proceedings and witness examinations happened in local languages, some of the matters were simply beyond their comprehension. Therefore, they have very little idea as the evidence that is being used against them.

One of the prisoners interviewed, Umang, was convicted and sentenced to death stated that, "I was beaten in the police lock-up for five days and was taken to court for another five", shared the boy, who had never been to school. He was not aware of the charges against him and could not understand court proceedings as they were conducted in English."<sup>15</sup> Law can therefore never be the same for a judge and a prisoner.

This "deliberate infliction of pain in order to destroy the victim's normative world and capacity to create shared realities"<sup>16</sup> is absolutely sanitized by the civil proceedings and the process of the trial. Legal interpretation results in the loss of lives and it is horrific that in certain situations, the one bearing the brunt of this organizational activity does not even feel included in the process. In my opinion, there can only be a very few helpless and violent situations than that. There is violence in the language of the law and the victim then becomes incapable of language. On this

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<sup>15</sup> *Ibid.* Page: 16.

<sup>16</sup> Robert M. Cover, *Violence and the Word*. Page: 1603.

note, the Scottish poet, Tom Leonard's poem is revealing:

“And their judges spoke with one dialect,

But the condemned spoke with many voices.

And the prisons were full of many voices,

But never the dialect of the judges.

And the judges said:

“No one is above the Law.”

