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## HISTORICAL BACKGROUND OF RIGOROUS IMPRISONMENT IN INDIA: A STUDY

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### Introduction

History of human civilization, everywhere, knows no period of time death sentence was discarded completely as a mode of punishment and it were only the number of offences which have varied from time to time, State to State according to the prevalent notion of justice and needs of the society<sup>1</sup>. A careful scrutiny of the Ancient Hindu Scriptures and law books reveals that the death sentence was stringent mode of punishment for getting rid of crime and criminal. It has generally been regarded to embody society's strongest condemnation for specific acts of the individuals to make them disentitled even for continuing as a member of the orderly or civilized society. The term capital punishment stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, age to age, the implication of capital punishment has always been the death sentence.

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<sup>1</sup> Nishtha jaswal, role of supreme court with regard to the right to life and personam liberty,(1990) p165

## Capital Punishment in Historical Perspective

The history of the notion of death sentence in India is as old as the Hindu society itself. We find references to the penalty of death in our ancient scriptures and law books. It goes back to the age of later Samhita where king was considered as the protector of Dharma<sup>2</sup>.

### Position regarding Capital Punishment at the each stage of Hindu period

The capital punishment was in vogue at almost every stage during the Hindu period. The emphasis on "Danda" (coercive authority of the king) during the Vedic period (1500 to 600 B.C)<sup>3</sup>, led to the doctrines of the divine affinity of temporal ruler. The fundamental basis of Danda niti is deterrence and mental rehabilitation. Danda is that by which righteousness is maintained. On proper analysis it will appear that the ruling idea is the protection of society, while correction of individuals may be means to that end. Evidently it does not mean any retaliatory affective idea which enters in to the commutation of that English word punishment. Its object is not to inflict pain but to eradicate evils. The authority of the king was coupled with his obligation towards his subjects and the coercive authority of the ruler was recognised as the cause of Dharma<sup>4</sup>.

In the pre-Maurya period (600 to 325 B.C.), the obligation of the king to protect his subject was developed. In one of the earliest Smritis the list of offenders punishable with death includes those who caused injury to the seven constituents of the state, and those who forged Royal edicts<sup>5</sup> etc. A king who fails to inflict punishment on a guilty man, or who punished an innocent man, was, required to undergo a fasting. Some of the pali Texts of that period, while emphasizing the importance of righteousness, also emphasised the duty of the king to protect his people<sup>6</sup>. Kautilya emphasis that danda is the surest and most universal means of ensuring public security<sup>7</sup>. During the Maurya period (325 B.c. to 320 A.D.), following kautilya the law of treason was developed, various acts of treason attracted the death penalty<sup>8</sup>.

The Ancient Smriti writers were quite aware of the several purposes served by punishments for crimes. The smritis of Manu and yajnavalkya emphasized the kings duty to protect his subjects. An oft. quoted text of Manu says, "that danda rules all people, danda alone protects them, danda is awake when others are asleep, and the wise declare danda to be identical with the law, through fear of danda ail movables and immovable, yield themselves for enjoyment, and swerve not from their duties". when danda is applied after due consideration, it makes all people happy, but apply without consideration, it destroy everything. If the king does not firmly apply the danda against the wicked, the strong would roast the weaker like a fish in a spit. When danda walks about destroying sinners, the people are not disturbed, provided that its wilder discerns well. Manu, therefore,

<sup>2</sup> R C majumdar, the history and indian culture of indian people, the vedic age ( the age of later samhita) (1965), vol-1 p 438,439

<sup>3</sup> U N Goshal, a history of indian political ideas (1956) p 24

<sup>4</sup> Ibid,p 29

<sup>5</sup> Ibid,p51

<sup>6</sup> Ibid,p 68

<sup>7</sup> Kautilya,300 book IV 8,9,10, refered to in U N. Ghoshal, a history of indian political ideas

<sup>8</sup> Ibid,p 180

emphasized the obligation of the king to detect and punish all culprits, and included among those punishable with death, even thieves caught with stolen goods and the implements of theft<sup>9</sup>.

In the Buddhist, Sanskrit and late Pali texts, one finds references relating to death sentence. One work states, the king is one who rules and guides the world, he censures, fines and executes the man who transgresses his commands, ruling in righteousness, and he becomes dear to his people<sup>10</sup>. But in another work Asvaghosha states, that after the birth of Buddha, Buddha's follower, Shuddhodhana, while not executing criminals, kept them under mild restraint, as their release would not have been good policy<sup>11</sup>. Though in the Buddhist period, the doctrine of Ahimsa (non-violence) became prominent the Emperor Ashoka does not seem to have abolished capital punishment. Reference to capital punishment is found in its edicts<sup>12</sup>. It is stated that the greatest king of the satavahana Dynasty, Gautamiputra Satakarni, refrained from hurting the life even of an offending enemy, and that Rudradaman of the Saka Dynasty never took life except in battles<sup>13</sup>.

"Yajnavalkya speaks of four classes of punishment, that is censure, rebuke, pecuniary punishment and corporal punishment and says that these should be used either separately or jointly according to the nature of the crime. The corporal punishment included imprisonment, banishment, branding, cutting of offending limbs and lastly death sentence. It goes without saying that the measure of punishment depended chiefly on the gravity of the offence. If the offence is not serious, the punishment must be light; while if the offence is serious the punishment must be severe too. In the feudal Indian days the Brahman and the Kshatriyas (warrior community) lorded it over the vaisyas (commercial) and the shudras (workers). The punishments meted out to the lower castes were brutal. If a shudra killed a Brahmin, he was made to drink alcohol heated to boiling point. The Brahmins were immune from the death sentence" women, in the Dharma sastras, have a raw deal by way of death by burning and Muslim law stoned the adulteress to death<sup>14</sup>. During the succeeding periods, the old practices were faithfully adhered to, capital and corporal punishments were regarded as the two effective measures for enduring law and order in society.

### **Arguments against Capital punishment under the Hindu Law**

The sentiment and reasoning against capital punishment is found in sukra, according to whom, this bad practice violates the Vedic injunction against taking any life, and should be replaced by imprisonment for life, if necessary criminal should be transported to an island, or fettered and made to repair the public roads, Fa Hsien did not find any capital punishment in India but fines were there, and mutilation in cases of treason<sup>15</sup>.

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<sup>9</sup> Ibid,p 180

<sup>10</sup> Ibid,p 268

<sup>11</sup> Ashvad ghosha, bhudda charitha-II p 1-16

<sup>12</sup> The edict of ashoka collected ny D C Sirkar, inscription of ashoka, government of india, (1957)

<sup>13</sup> Law commission 35<sup>th</sup> report vol II p 196-197

<sup>14</sup> Dr.Hiranandinin, the sentence of death, the illustrated weekly of India, Aug. 29, (1970) p 12

<sup>15</sup> Supra note 13

Following extract from an authoritative study by Dr. Sen is reproduced here below to indicate that the problem of capital punishment had also raged the minds of Hindu rulers: It would be no exaggeration to say that the mind of the intelligentsia has been agitated on the propriety or expediency of capital punishment. An interesting evidence of it is to be found in the Mahabharata (chapter CCLVII of the Santiparva) in which there a discussion between king Dyumatsena is and his son prince satyavan, given vent to his thought thus:

### **Position regarding Capital Punishment in the Mughal Period**

During the Muslim times (Mughal Times) the main system of criminal law administered was the Quranic one. The system had originated and grown outside India. its main sources were the Quran as supplemented and interpreted by case law and opinion of jurists. Since all the three sources were 'trans-Indian'<sup>16</sup>. It became necessary for the Indian quazis to have the digest of Islamic Law. The last such digest was Fatawa-i-Alambiri compiled by a syndicate of theologians under the orders of Aurangzeb<sup>17</sup>.

In the Mughal period, Muslims sovereigns used to administer justice in person" Thus Sultan Muhammad Tuglaq constituted himself the Supreme Court of Appeal and used to keep four Muftis, to whom he used to say that they should be careful in speaking that which they considered right, because if anyone should be put to death wrongfully, the blood of that man would be upon their head. If they convicted the prisoner after the long discussion, he would pass orders for the execution of the prisoner<sup>18</sup>.

The capital sentence (qatl) under the Muslim law is inflicted, after the offence has been legally proven, in the following cases:

- (i) when the next of kin of murdered person demands the life of the murderer (Qisas) and refuses to accept the alternative of money compensation (diya or Price of blood);
- (ii) in certain cases of immorality; the women sinner is stoned to death by the public;
- (iii) On highway robbers.....

The Muslim criminal law compared more favourably with the English criminal Law as it was in force at that time. The English law still prescribed barbarous punishments and contained some glaring anomalies, while as Hastings had declared, the Muslim law was founded on the most lenient principle and an abhorrence of bloodshed<sup>19</sup>.

<sup>16</sup> Jadunath sarkar, mugal administration ( 1952) p 100

<sup>17</sup> Ibid,p 21

<sup>18</sup> Washid hussain, administration of justice during the muslim rule in india,( 1934) p 15

<sup>19</sup> Moncktones jones ,( hasting in Bengal ) p 331

## Position regarding Capital Punishment in the British Period

We may now consider the statutory modifications made in the Muslim criminal law during British times, in the period before the commencement, of India Penal Code. The policy of the British being to interfere as little as possible with the Muslim penal law, only such modifications were made as were required to remove glaring defects. Regarding homicide, by a Bengal Resolution of 1793 (Sections 50,52,55,70 Bengal Resolutions 9, 1793 substituted by regulations, 1797).

- (a) Nature of the instrument as signifying the intention was made immaterial in homicide; the intention was to be gathered from the general circumstances and the evidence; and
- (b) The discretion left to the next of kin of the murdered person to remit the penalty of death was taken away.

Thus, the motive, not the method should determine the sentence. In 1791, the punishment of mutilation was abolished. All criminals adjudged in accordance with the Fatima of Law Officers to lose two limbs were to suffer, instead of it, imprisonment with hard labour for 7 years<sup>20</sup>.

The reasons given by the framers of the 1837 draft in support of the various provisions relating to the death sentence suggested by them were as follows:

First among the punishments provided for offences by this code stands death. No argument has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very sparingly inflicted, and we purpose to employ it only in cases where either murder or the highest offence against to state has been committed. (Emphasis added). Regarding the power of commutation it was observed that it was evidently fit that the government should be empowered to commute the sentence of death (without consent of the offender) for any other punishment<sup>21</sup>.

The law commission in 1846 dealt with the subject of death caused by words during the discussions in 1837 draft and come to the conclusion that if death is certainly caused deliberately used by a person with intention to cause that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that the words will make such an impression on him as to cause death, and without any such excuse as it admissible under "General Exceptions", such person should suffer the penalty of culpable homicide.

On 30th May, 1851, the revised edition of the code was circulated to judges for comments. Later in 1854, a committee consisting of Barnes, Peacock, Sir James Colville, Grant, E.D. Elliot etc." was asked to consider the revised code. The Committee did not recommend any substantial alterations in the original code. The code was read for the first time on 28th December, 1857, and referred to a select committee. it was then passed by legislative council in India; it received the assent of the Governor General on 6th Dec, 1860. Thus, it was left to

<sup>20</sup> Aspinall Cornwallis in Bengal ( 1931) p 14

<sup>21</sup> ibid

the Britishers to give the country a systematized penal code which strictly limited the number of capital offences and laid down the procedure for criminal trials. In a sense, the Britishers were responsible for partial abolition of capital punishment.

### **Position regarding Capital Punishment in Great Britain**

According to Hume, 72000 great and petty thieves were executed during the reign of Henry VIII of England<sup>22</sup>. In 1533, it is reported, Henry VIII has 27 Protestants burned because they would not acknowledge him as head of the church. After 1571, an assault frequently sent the offenders to the gallows; women thieves were hanged although death by the sword (considered less shameful) was sometimes allowed; deliverance from the shameful rope (hanging) and substitution of execution by the sword were a matter of great gratitude. The penalty for stealing goods was death. Around 1552, person who sent letters of defiance or threat were beheaded, adultery and incest were punished by execution, seducers and petty thieves were executed by the sword; a witch was tied to the post, strangled and burned for conspiring with devil (1659); perpetrators of traitor stories were executed, insurrectionists and rioters were beheaded, specially pleasant and reformers; and disturbers of the peace were executed" As late as 1780, English law recognized over 100 capital offences, most of which are now considered minor in importance. At that time one could be hanged even "for associating for a month with gypsies<sup>23</sup>." Calvert also reports that capital punishment was repealed in England for cattle, horse and sheep, stealing, larceny and forgery in 1832; for housebreaking in 1833, for stealing letters in 1935, and for burglary in 1837; although for several years prior to these abolitions the death penalty had seldom been used for these offences" The exact number of capital offences during the period remains obscure, but is known, for example, that during the eighteenth century hangable crimes increased manifold from about fifty in 1700 A.D. to between 220 and 230 in 1800 A.D.<sup>24</sup>.

### **Status of Capital Punishment in Recent Times**

The use of capital punishment has declined in recent times, although it is still permitted by law; as in this country, for various kinds of offences like treason, murder etc. Even where it has been legally retained, capital punishment is now seldom employed except in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience. The decline in the infliction of this penalty is because of the fact that the penalty does not conform to the current standard of decency. The standards of human decency with reference to which the proportionality of the punishment to the offence is required to be judged vary from society to society depending upon the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of theft or a sentence of stoning to death for the offence of adultery were prescribed by law, there can be no doubt that such

<sup>22</sup> Cited in Marvin Hove, Christ on the gallows or reasons for abolishing capital punishment p 210

<sup>23</sup> Eric Roy Calvert, capital punishment in the 20<sup>th</sup> century, 1973 p 4

<sup>24</sup> Ibid p 5,6



punishment would be condemned as barbaric and cruel in our country; even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries.

There was a time when in the United Kingdom a sentence of death for the offence of theft or shop-lifting was regarded as proportionate to the offence and therefore quite legitimate and reasonable according to the standards of human decency then prevailing, but today such punishment would be regarded as totally disproportionate to the offence and hence arbitrary and unreasonable. Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty<sup>25</sup> Now in order to determine what are the prevailing standards of human decency, one cannot ignore the cultural and spiritual tradition of the country" To quote the words of Krishna Iyer, J. in Rajendra Prasad's case<sup>26</sup>. The values of nation and ethos of generation mould concepts of crimes and punishment. So viewed, the lodestar of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty".

### Existing Legal Frame Work of Capital Punishment

Punishment is the penalty for the transgression of Law. Chapter III, Indian Penal Code (Section 53 to 75) has laid down the general provisions relating to punishment. The code has provided for a graded system of punishment to suit different categories of crime. Section 53 provides for five types of punishment that can be awarded to a man convicted under the Indian Penal Code namely:

- (a) Death sentence
- (b) Imprisonment for life
- (c) Imprisonment with or without hard labour.
- (d) Forfeiture of property and
- (e) Fine.

The code does not, in general provide for a minimum penalty except in a few cases, such as murder sexual offences etc<sup>27</sup>. A wide discretion has been given to the courts to award any punishment within the maximum limits of punishment prescribed for an offence in each case on its individual merits. The court must take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation, the age, sex, character and antecedent of the criminal, and whether the accused is a first-time offender, or a habitual or a professional criminal<sup>28</sup>.

<sup>25</sup>AIR 1985 SC 1325

<sup>26</sup>AIR 1979 SC 916

<sup>27</sup>The Code Has Prescribed A Minimum Sentence Of Imprisonment For Life Under Section 302, Of Indian Penal Code For Seven Years Under Section 397 And 398

<sup>28</sup>See jaganmohan singh v state of uttar Pradesh AIR 1973,SC 941

## Death Penalty under the Indian Penal Code

Sentence of death is the most extreme punishment provided under Indian Penal Code. Regarding 'death' as a punishment, the figures of Indian Penal Code have categorically stated that it ought to be very sparingly inflicted and only in those cases where either murder or the highest offence against the state has been committed. This apart, the Indian penal Code prescribed 'death' as an alternative punishment to which the offender may be sentenced for the following offences:

- (1) Waging or attempting to wage war or abetting waging of war against the Government of India (Section 121)
- (2) Abetting mutiny, if committed in consequence thereof (Section 132).
- (3) Giving or fabricating false evidence upon which an innocent person suffers death (Section 194)
- (4) Murder (Section 302).
- (5) Murder by life convict (Section 303) – struck down by the Supreme Court in Mithu V. State of Punjab.
- (6) Abetment of suicide of a minor or insane or intoxicated person who commits suicide in consequence thereof (Section 305).
- (7) Attempt to murder by a life convict if hurt is caused (Section 307)"
- (8) Kidnapping for ransom (Section 364-A).

In addition to above stated cases, Indian Penal Code provides for death sentence in the following conditions, viz.

- (9) Criminal conspiracy to commit any offence punishable with death, if committed in consequence thereof for which no punishment is prescribed (Section 120 B).
- (10) Joint liability extending the principle of constructive liability on all the persons who co jointly commits an offence. Punishable with death, if committed in furtherance of common intention or common object of all (Section, 34 and 149).
- (11) Abetment of offences punishable with death (Section 109).
- (12) Dacoity accompanied with murder (Section 396).

## Death Penalty under Laws other than Penal Code

Besides the Indian Penal Code, death sentence is also provided under the following nine statutes listed below:

- (i) The Indian A.I.R. Force Act 1950.
- (ii) The Army Act 1950" a3
- (iii) The Navy Act 1957.4
- (iv) The National Security Guards Act 1986 and the Indo Tibetan Border Police Act 1992 both prescribes the death sentence as an alternative punishment for defined offences committed by members or the two armed forces.



- (v) The prevention of Terrorism Act 2002 (repealed) and the Terrorist and destructive Activities (Prevention) Act 1987a0 (repealed).
- (vi) The Commission of Sati (Prevention) Act 1987.
- (vii) The Narcotics Drugs and Psychotropic Substances Act 1985.
- (viii) The schedule castes and schedule Tribes (prevention of Atrocities) Act 1989.

### **Death Penalty under Defence laws**

As a rule, the members of the Forces of the Union of India are subject to the provisions of military law, but in certain situations an ordinary member of the public renders himself liable to be tried by the court martial for the violation of the provisions of the defence laws. The central court Martial constituted under the Defence Laws can pass a sentence of death on a person found guilty under section 34 and section 37 of the Army Act. The abetment of the offences punishable with death, if committed in consequence of abetment is also punishable with death under section 66 of the act Some of the offences punishable with death by the court martial are misconduct in action, delaying the service, disobedience in action, cowardice act and sleeping over duty, spying by a member of the forces or by a public man, who is not otherwise subject to defence laws, is also punishable with death.

A perusal of the various provisions of the defence laws, would reveal that in the absence of the proper safe guards, there is a possibility of miscarriage of justice by the court martial manned by the defence personnel who might not be well versed in modern concept of criminal justice. There is no provision of regular appeal and review against the death sentence as provided under the Penal code, except a provision of confirmation of the death sentence by the central Government. Even special leave to appeal against such order of the court martial does not lie under Act 136(1) of the Constitution in view of the bar contained Under Article 136(2).

### **Conclusion**

The death penalty amounts to cruel and inhuman punishment as the death penalty does not comply with today's standard on criminal penalties the death penalty infringes the right to life and dignity of man. In the face of the current social and economic state of development the threat and enforcement of the death penalty is not necessary any more, this underlined by constitutional court jurisdiction as well as legislatives moves towards abolition in various countries. There is no scientific evidence supporting the assumption of deterrent effects of the death penalty, long prison sentences or life term imprisonment will have at least the same degree of deterrent consequences as has the death penalty, therefore, threat and enforcement of death penalties are unproportional and excessive punishment. The offence statues which carry the death penalty sometimes allow for extensive discretion to the criminal court in the decision of whether to impose the death penalty or other punishments. Extensive discretion brings about problems in terms of discriminatory selection and equal treatment most probably resulting in disparity across time, across offences as well as offenders and across jurisdiction. They believe that there exists other less drastic and better suited means to convey messages of deterrence amoral disapproval.