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“CAPITAL PUNISHMENT: A BOON OR A BANE?”

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I. ABSTRACT:

“No, no, we are not satisfied, and we will not be satisfied until justice rolls down like water and righteousness like a mighty stream.”¹ A paraphrase from the ‘*Book of Amos*’ that *Dr. Martin Luther King Jr.* used in his famous ‘*I Have a Dream*’ speech. India is a well - developing country with an increasing crime rate. There are lots of legislation in India to stop and control crimes, but the crime rates still are increasing because the punishments are not sufficient. According to some Lawmakers the punishment if severe may reduce the crime rate. All punishments are based on the same motive to give a penalty to the wrongdoer. There are different kinds of punishment in India such as capital punishment, life imprisonment, imprisonment, etc.

Capital punishment is known as the most severe form of punishment. The death penalty is one of the most debated, ancient forms of punishment in almost every society. Awarding capital punishment on the rarest of rare cases includes a lot of controversies in different judgments. India is a democratic country that guarantees Human Rights to its citizens; the debate on capital punishment gathered much heat at present times. This paper says about the status of capital punishments all around India and explains about the modes of it. This article presents a detailed view of capital punishment and also the methods of execution in India. The study marks, though

¹ Luther, M. (1967): About quotes on Justice: American Baptist Minister and Civil Rights Leader (1929 -1968).

the judiciary has the discretionary power to award capital punishment, but follows the public demand so that one may live safely without fear.

Keywords: *Capital Punishment, International Human Rights, Law Commission of India Report,*

II. INTRODUCTION:

All punishments are based on the same proposition, i.e., there must be a penalty for wrongdoing. There are two main reasons for inflicting punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages others from doing wrong. Capital punishment has been defined as the 'execution of a condemned criminal under a death sentence imposed by a competent authority'. The word 'Capital' is derived from the Latin word 'capitalis', which implies 'of the head'. In times of yore, the death penalty was carried out by beheading someone and so it was called capital punishment. It is a long-established element of the criminal justice system of most of the countries of the planet.

Capital punishment also rests on the identical proposition as other punishments.² **Capital punishment** is a legal penalty in **India**.³ It forms an integral part of the Indian criminal justice system. Thanks to the increasing strength of the human rights movement in India, the existence of capital punishment is questioned as immoral. However, this is an odd argument as keeping one person alive at the cost of the lives of numerous members or potential victims in society is unbelievable and in fact, is morally wrong.⁴ The Supreme Court in *Mithu vs. State of Punjab* struck down Section 303 of the Indian Penal Code, which provided for a mandatory

² <http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html>

³ Majumder, Sanjoy. "India and the death penalty." BBC News

⁴ <http://www.allsubjectjournal.com/archives/2015/vol2issue4/PartK/62.pdf>

death sentence for offenders who committed murder whilst serving a life sentence.⁵ Death Penalty has been carried out in nine instances since 1995,⁶ while a total of thirty executions has taken place in India since 1991, the most recent of which was carried out in 2020.⁷ The number of people executed in India since the nation achieved Independence in 1947 is a matter of dispute. Official government statistics claim that fifty-two people had been executed since Independence. However, research by the People's Union for Civil Liberties indicates that the particular number of executions is way higher, as they located records of 1,422 executions within the decade from 1953 to 1963 alone.⁸

In colonial India, the death penalty was prescribed as one of the punishments in the Indian Penal Code, 1860 (IPC),⁹ which listed several capital crimes. It remained in effect after independence in 1947. The first death penalty by hanging in Independent India was that of Nathuram Godse and Narayan Apte in the assassination of Mahatma Gandhi's case on 15 November 1949.¹⁰

III. MEANING OF CAPITAL PUNISHMENT:

Capital punishment, also called the death penalty, is the execution of an offender sentenced to death after conviction by a court of law for a criminal offence. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though the imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment.¹¹ The term "Capital Punishment" stands for

⁵ VENKATESAN, V. (7 September 2012). "A case against the death penalty". *Frontline*.

⁶ "Yakub Memon case: Death penalty in India, by the numbers"

⁷ "'Just 4 of 26 hanged since '91 Muslims'

⁸ "Number of executions much higher than 52." *Times of India*.

⁹ "THE INDIAN PENAL CODE, 1860" (PDF). 6 October 1860. Archived from the original (PDF) on 18 April 2013.

¹⁰ "Yakub Memon first to be hanged in Maharashtra after Ajmal Kasab". 30 July 2015.

¹¹ <http://www.britannica.com/topic/capital-punishment>

the foremost severe variety of punishment. It is the punishment that is to be awarded for the most heinous, grievous, and detestable crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, the age to age, the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology, and penology, the *capital sentence means a sentence of death*.¹²

IV. METHODS OF EXECUTION IN INDIA:

In India, capital punishment is executed by hanging or shooting.

i. Hanging:

All capital punishment in India is implemented by hanging. After independence in Mahatma Gandhi's case, Godse was the first person to be executed by capital punishment in India. The Supreme Court of India suggested capital punishment must be given only to the rarest of rare cases in India.¹³

ii. Shooting:

In India, the Army Act and Air Force Act also provide the implementation of capital punishment.¹⁴ In Air Force Act, 1950, section 34 allows the court-martial to thrust the death sentence for the unlawful act mentioned in section 34(a) to (o) of The Air Force Act, 1950.

Though the Indian government mostly uses the hanging method to execute capital punishment.

V. HISTORY OF DEATH PENALTY IN INDIA:

Capital punishment or the death penalty has been an integral part of the penal systems of the world and India is not any exception to that, therefore, the practice of the death penalty is

¹² Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

¹³ 45 Sakhrani, Monica; Adenwalla, Maharukh; Economic & Political Weekly, "Death Penalty – Case

¹⁴ A consultation paper on the mode of execution of death sentence and incidental matters" (PDF). Law commission of India

witnessed since time immemorial. To be more systematized allow us to study the history of the death penalty under the four following heads:

- 1) *Death Sentence under Hindu Law*
- 2) *Death Sentence under Muslim law*
- 3) *Death Sentence under the Mughal Empire*
- 4) *Death Sentence under the British rule in India*

VI. DEATH SENTENCE UNDER HINDU LAW:

Punishment has been an essential element of society ever since the primitive era of mankind. Death Penalty was present along with exile as two cheapest methods to eliminate the antisocial elements from the society which were the best examples of retribution likewise the deterrence of the society. The instances of the death penalty are as old as the Hindu society. The frames of Hindu Law did not find abhorrent in the punishment of the death penalty and it was awarded the infliction of torture as much as possible to generate the deterrent effect among the society. Glimpses of the death penalty are found as back as the 4th century in the epics like Ramayana & Mahabharat. Kalidas beautifully observed the necessity for the death penalty in Shakuntalam.¹⁵

The need for the death penalty has been reflected in the historical, mythological epics - stating that it is the highest priority of the king to safeguard the society from any kind of danger and this can be gained over by taking the life of the wrongdoer. Katyayana and Brahaspati both were supporters of the death penalty when needed for the protection of the many, and it was possible only by the execution of offenders for religious merits. In the Buddhist age when Ahimsa was the rule conduct, even then Ashoka did not consider capital punishment wrong. The fundamental basis of the *Dandniti* in India was deterrence and mental rehabilitation. The concept of social defence clearly and non-correctional theory is very much apparent factor in the Hindu Penal System. Manu had very elaborately taken account of objective & subjective circumstances of the

¹⁵ Quoted in Shukla Das, Crimes and Punishment in Ancient India, Abhinav Publications, New Delhi 1977 p.56

offence and limitation of the offender in his legendary work *Manu Smirti*. We discover the mention of the death penalty even in the work of Kautilya.¹⁶ He believed that punishment was the universal means of ensuring peace. According to some scholars of law, the Brahmans were exempted from the death penalty and that they were awarded banishment. While we still see some examples in the history where the death penalty was awarded to a Brahman, and thus they cannot be called to be exempted.¹⁷

According to Mrechakatika records, Charudatta who was a Brahman was convicted of the death penalty for the murder of Vansantasena. Women were also dealt with strictly and similarly as men. In the end, it can be summarized that the death penalty and corporal punishment both were equally adhered to for ensuring law and order within the society.

VII. DEATH SENTENCE UNDER MUSLIM LAW:

The provision associated with crime and punishment is available in some form or another and is revealed in sacred books such as Holy Quran. The Muslim Law or Islamic law believes that the main aim of punishment is to come up with a deterrent effect in society.

The Islamic Doctrine mainly propagates the good of humanity and protect men from the wrongful deeds by giving penalties against the wrongdoer.

There are three types of crimes under Islamic law.

1. *Had Crimes*
2. *Tazir Crimes*
3. *Qisas Crimes*

All these three forms of crime have a prescribed punishment and these differ in the gravity of the offence and punishment.

¹⁶ Arthashastra of Kautilya, 4.11

¹⁷ Dr. Sen P.N. Hindu Jurisprudence p. 242-43

VII.I HAD CRIMES:

The crimes that affected the society were called the Had or the Huhud i.e., the punishment ordered by Allah himself. The crimes under this category are adultery, imputation of adultery, larceny drinking wine, shedding of blood, apostasy, and rebellion. These crimes shall be dealt very strictly and not even the judge or the victim had no right to forgive the crime or remit the punishment.

VII.II TAZIR CRIMES:

The second category of other crimes is those that tazeer or penal punishment applies. For these forms of crimes, the courts are empowered to make a decision the punishment unlike the primary category of crimes.

VII.III QISAS CRIMES:

The third category of social offences was these involving Qisas (retaliation) and Diyut blood money or the compensatory mullet. The cases of homicide, willful or unintentional injury or to be specific the offences covered under Qisas. These offences shall be punished with Qisas or the diyut and in such cases, the victim or his lawful guardian or heir can forgive or change the amount of punishment.

Islamic states view capital punishment in line with the principles embodied in the Koran. It describes capital punishment as “a divine right in Islam”.¹⁸ In a discussion on Human Rights by the General Assembly of UNO 1982, several countries with a strong Muslim population voted against the abolition of the Death Penalty saying that it would counter Islamic laws.

VIII. DEATH SENTENCE UNDER MUGHAL EMPIRE:

The medieval history of India was ruled by the powerful Mughal rulers. They mainly administered the country based on Quranic laws. There was no uniformity in the law and the problems were resolved by the judges based on Quranic precepts but they had discretionary

¹⁸ Sudan in 1985, General Assembly discussion on injection of a new element, the international law of human rights.

punishments with the officer who was deciding the case. The Quzes had their digests of all the Islamic law that was being propounded outside the country. Many such digests were being prepared and the last was the “Fatwa-i-Alamgiri” compiled under the order of Aurangzeb.

The views of Akbar the Great were very lenient and according to him, the death penalty should be the last order after all matured deliberations. According to his order only under serious offences of sedition death could be ordered and which should be offered by the Emperor himself and no death should be followed by mutilation and other cruelties. The same was the rule in Jahangir’s and Aurangzeb’s reign where a death sentence was not to be ordered in a hurry or anger and passion.

The final order of the death penalty was executed with furious and painful methods like throwing the offenders in the scorching sun while he was dressed in freshly slain fluffed slim to shrink rawhide and eventually reach death in agony and pain or the criminals were mailed in the walls along with lively bodies. These methods were overtaken by legally hanging the criminal to death in the British system of criminal justice and administration.

IX. DEATH SENTENCE UNDER BRITISH RULE IN INDIA:

The advent of the British East India Company to the Indian Territory during the Mughal reign in India saw the statutory modifications within the Muslim criminal law that was in practice. The Bengal resolution of 1773 introduced some changes regarding homicide and there were only such minor modifications as were very required to get rid of the prevailing defeats. The most important aspect was the motive of the act, not the method of execution of the crime that would decide the punishment. The sentence of punishment could be extended to the death penalty if Muslim law prescribed so. In the British Era, the government was given the power to commute the death sentence. ‘Murder’ & ‘Culpable Homicide’ for the first time differentiated by the law commission in 1846. In 1857 read for the first time the penal code which was passed by the

legislative council and was assented by the governor-general on 6th October 1860 which is now called Indian Penal Code, 1860. Britishers were responsible for designing a systematic penal code and procedure for criminal trials which was uniformly followed all over the country.

The capital offences were strictly limited under this penal code of India and therefore the Britishers can be held partially responsible for abolishing the death penalty. Since then, various amendments have been made in the Penal Code as well as the procedural laws to systematize the awarding of the death penalty. The Indian Parliament has witnessed the issues of the abolition of the death penalty over and over, but still, Indian Penal law has the provision of capital punishment and death sentence both in theory and practice. The Indian Penal Code, 1860 remained in effect after independence in 1947. The first hanging in Independent India was that of Nathuram Godse and Narayan Apte in the Mahatma Gandhi assassination case on 15 November 1949. The records of death penalty execution after independence are not confirmed by authorities, and there is a difference of opinion on the total number of executions since independence. Dhananjoy Chatterjee was executed in 2004 which was the first execution after a long break since 1995. Mohammad Ajmal Amir Qasab was hanged to death on November 21, 2012. He was the gunman in the 26/11 Mumbai attack in 2008. On February 8, 2013, Muhammad Afzal Guru was hanged who was convicted of plotting the 2001 attack on India's Parliament. Then Yakub Menon's execution took place on July 30, 2015, who was convicted of financing the 1993 Mumbai bombings. The last execution was on 20 March 2020 of Pawan Gupta, Vinay Sharma, Akshay Kumar, and Mukesh Kumar who were convicted for Nirbhaya's gang rape and murder.

X. INDIAN STATUTE:

Under Indian Penal Code (IPC), 1860 the sections under which death penalty is awarded are as follows:

- ❖ Section 120 B - Punishment for Criminal Conspiracy.

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- ❖ Section 121 - Waging or attempting to wage war or abetting waging of war against the Government of India.
- ❖ Section 132 - Abetment of mutiny
- ❖ Section 194 - Giving or Fabricating false evidence with intent to produce conviction of a capital offence
- ❖ Section 195A - Threatening any person to give false evidence
- ❖ Section 302 - Punishment for Murder
- ❖ Section 303 - Punishment for murder for life convict. It proves unconstitutional and held its a violation of Article 14 and 21 of the Constitution of India
- ❖ Section 305 - Abetment of suicide of child or insane person
- ❖ Section 364 A - Kidnapping for ransom
- ❖ Section 396 - Dacoity with murder

Other legislation in Indian Law related to armed force:

- ❖ Air Force Act, 1950
- ❖ Army Act, 1950
- ❖ Navy Act, 1950
- ❖ Indo Taliban Border Police Force Act, 1992
- ❖ Schedule Caste and Schedule Tribe (Prevention of Auto cities) Act 1989
- ❖ Prevention of Terrorism Act, 1987
- ❖ Defense of India Act, 1971
- ❖ Explosive Substance Act, 1908
- ❖ Arms Act, 1959
- ❖ Unlawful Activities Prevention Act, 1967 (amended 2004)

Section 366 of Criminal Procedure Code, 1973 says “Sentence of death to be submitted by Court of Session for confirmation”.

XI. CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS

TREATIES:

- The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of the death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life and contains important safeguards to be followed by signatories who retain the death penalty.¹⁹
- The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991 and has 81 states parties and 3 signatories.
- Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC.
- The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention'), and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of the death penalty per se as a form of torture or cruel, inhuman, or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.²⁰
- In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts have excluded the death penalty as a permissible punishment.

¹⁹ India. Law Commission of India, Report No.262 on Death Penalty, August 2015

²⁰ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45

XII. LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY:

The Law Commission of India in its 262nd Report (August 2015) recommended that the death penalty be abolished for all crimes other than terrorism-related offences and waging war.

Complete recommendations of the Report are as follows:

- The Commission recommended that the measures suggested that police reforms, witness protection schemes, and victim compensation schemes should be taken up expeditiously by the government.
- The march of our jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.
- Although there is no valid penological justification for treating terrorism differently from other crimes, the concern is often raised that abolition of the death penalty for terrorism-related offenses and waging war, will affect national security. However, given the concerns raised by the lawmakers, the Commission did not see any reason to wait any longer to take the first step towards the abolition of the death penalty for all offences other than terrorism-related offences.
- The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism-related offences and waging war.
- Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.²¹

²¹ India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.217-218

XIII. CONCLUSION:

The preamble of India, which says “We the People of India” directly indicate it as a democratic country where the public at large prevails. Laws are made for human beings so that one may live their life with dignity without affecting other's rights. When any crime committed by the accused he must be punished by the state through law as it affects the public or the innocent victims. Capital Punishment is the most severe punishment of society. As being a member of the Universal Declaration of Human Rights, our country did not abolish capital punishment, but they limit its scope by awarding capital punishment on the rarest of rare cases. Capital punishment, which is seen as a cruel and inhuman in some jurisdictions is constitutional in India and many countries, and the right to life and human dignity as provided by the Indian Constitution does not prevent an offender from being executed if found guilty of certain crimes by a Court of competent jurisdiction. In other words, the same constitution that has provided for these rights has also provided death as a penalty for certain criminal offences. In India, the issue of death sentence is hotly debated and has attracted the attention of the general public as well as government and non-governmental organizations. Though India is an active member of the United Nations and has signed and ratified most of the International Instruments on human rights, capital punishment remains in our statute book. According to our judiciary, it must be imposed in exceptional cases i.e., in rarest of rare cases with special reasons.

The death penalty in the rarest of the rare case does not affect the human rights principles. As per the guidelines provided in ICCPR for those countries which do not want to abolish it says that one may award capital punishment but have to follow certain conditions. According to the time, the mentality of human beings also gets changed. Mahatma Gandhi, Father of Nation used to say that “the violence may harm the public” and “eye for an eye makes everyone blind” but that time the conditions and circumstances of the crime were not as brutal as now in the modern area. Nirbhaya Case which was termed to be the most brutal in history, because of which the country gathered together, demanding justice for the girl Damini and also demanding to save the future

of the nation. This revolution opened the eyes of the judiciary and they amended the criminal law. As per the deterrent theory imposing the harsh punishment will create fear and desist from criminal behaviour which may help to decrease the crime rates. In India, the deterrence theory has its existence. The scene of the rarest of the rare case to award death penalty in India came from the Macchi Singh v. State of Punjab²² case where on the demand of the public at large the accused was awarded the death penalty and SC laid down some principles to judge whether the act comes under the rarest of the rare case or not. The judiciary has discretionary power to decide when one must be sentenced to the death penalty or not, but by following the guidelines provided in Macchi Singh Case. Thereafter, in Bacchan Singh Case²³ the Supreme Court laid down two questions to judge the gravity of the case which says how uncommon the crime is and does the circumstances of the crime show the brutality of the case to award with death punishment. Therefore, instead of capital punishment the accused were awarded life imprisonment. In case Shiv Balakal v. State of Gujarat²⁴ where accused was held guilty of committing rape of a teenager girl where the court considered it as inhuman but does not provide capital punishment as it stated that the accused was a labour and the facts or circumstances did not establish that it will be a trouble maker for the society. Same as in Absar Ahmad Case²⁵ where the accused chopped off his mother's head, the court held that this act was committed due to poverty and he is no trouble for society so he should be awarded life imprisonment. India is a nation of a different culture, different types of people having a different way of thinking and living. The acts of crimes are not the trend of the modern era but it has taken place from the ancient period. Though in the ancient period death punishment was awarded on small offences, but the only logic behind it to save the public at large and create horror in their minds so they stop doing crime from the fear of capital punishment. As time changed many countries abolished the death penalty. Our country did not abolish the death penalty but awards it in the rarest of the rare cases only.

²² Macchi Singh v. State of Punjab AIR 1983 SC 957.

²³ Bacchan Singh v. State of Punjab AIR 1980 SC 653.

²⁴ Shiv Balakal v. State of Gujarat AIR 1985 SC 48.

²⁵ Absar Ahmed v. State of Bihar AIR 1985 SC 48.