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DEATH PENALTY A NECESSARY EVIL OR VIOLATION OF HUMAN RIGHTS

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Introduction

It is generally said that, the life of the law has not been logic it has been experience. The law reflects the story of a nation's development through many centuries and evolves out of the felt necessities of the time, along with the prevalent moral and political theories. The origin and development of the criminal justice in India has an antiquarian past in the history of penal thought. We have had a glorious history of Manu and an ancient wisdom of Shrutis and Smritis. The history of crime in India clearly indicates that the concept of crime and Criminal Justice System of today owes its origin to the authoritative sources such as Manusmriti, Nyaya Mimamsa and Kautilya's Arthashastra. These sources clearly exhibit that a well-defined criminal policy existed in the early days of Hindu Society. The concept of crime is transforming and has mutated along with the socio-economic fabric of the society. The concept of crime is essentially concerned with the conduct of the individuals in society. Moreover, it has always been determined by the zest and movements of public opinions and social sanctions in the realm from time to time.

Although, Thomas Hobbes is usually remembered for his principle that, life is 'solitary, poor, nasty, brutish and short', he actually said in his famous work, Leviathan, that this was the condition of the man before the social contract, i.e. in his natural state. Natural law, he contends, teaches us the necessity of self-preservation: law and government are required if we are to protect order and security. Everyone as a member of the society owes certain duties

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towards his fellowmen and at the same time have certain rights and privileges which the other has to ensure for him.

In ancient times there was no comprehensive definition of crime. Crime was simply perceived as disobedience of the king's command or non-performance of the moral duties. Manusmriti prescribes for crimes, various punishments to be applied to different Varna's Crime was dealt with harshly in the ancient world. Early human settlements had no legal codes, courts, prisons or other systems for dealing with crime, so most often crime was punished by family retribution. If someone committed a crime against another person, that person's clan would hunt down the perpetrator and mete out punishment. Crime was always a personal matter.

Meaning of Capital Punishment

The term Capital punishment stands for the most severe forms of punishment. It is the penalty which is given for the most terrible and serious crimes. The word capital refers to the "head or top of the column." Thus the Capital punishment has reference to the head and is also top most among the grade of punishments. It is one of the most severe types of the punishment because of nothing can be more painful to an individual than being deprived of the very life and existence. Meaning of the "Capital Punishment" is being practice of deliberately putting offender to a death as a measure of social policy imposed by governing authority of community. By common usage in jurisprudence, criminology and penology capital punishment means a sentence of death.

Aims and Objectives of punishment

The objectives of the death penalty are found in making the evil doer an example and deter other likeminded people. Out of the various theories of punishments the two i.e. the retributive and deterrent provides justification for death penalty²¹. Retributive theories emphasize retention of the death punishment for heinous types of crimes. This theory is based on the principles "An eye for an eye a tooth for a tooth". It consists not in simple but in proportionate retaliation, that is in receiving in return for a wrongful act not the same thing but its equivalent. Deterrent theory set an example for the wrong doer.

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This theory operates on two counts: i.e.

- When the offender is punished by infliction of death, the society gets rid of him.
- It impresses the consciousness of the people at large and thus serves the purpose of preventing others from committing crimes.

The aims of the punishment are now considered to be retribution, justice, deterrence information and protection and modern sentencing policy reflects the combination of several or all these aims. The retributive element is intended to show the public repulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of the punishment growing emphasis is laid upon it by much modern legislation but the judicial opinion towards this particular aim is varied. Rehabilitation will not usually be accorded precedence over deterrence, means both the punishment should fit the offence and also that like offence should receive the similar punishment.

- **Punishment in Ancient Period**

Legal norms are the basis on which criminals and non-criminals are distinguished. The law laid down by Gautama, Vasistha etc. Represent an earlier stage than those of Manu. One of the forms of substitutes for an individual action is the law of equal retaliation, which was a common element in many of the ancient codes of law. Amongst the oldest of the known legal codes with schedules of penalties for specific crimes are those of ancient Sumerians and Babylonians. Of these the Code of Hammurabi, the sixth King of Babylon, has been most completely preserved. The criminal law of ancient and primitive society appears to be haphazardly explained, but on a focused and clearer study, it reveals to us that they are very scientifically placed.

It was held in the case of *V.D Dhanwatey v. Commissioner of Income Tax*²⁵, that, 'while interpreting the ancient texts, the courts must give them a liberal construction in furtherance of the interest of the society. Our great commentators in the past bridged the gulf between law as enunciated in the Hindu law texts and the advancing society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions. To an extent, that function has now been discharged by our superior courts'.

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- **During Hindu Period**

The dawn of history was the golden age. In Satyayuga, the rules of conduct were strictly observed by all including the King, or the headman of the tribe. Where there was no infringement of any rule or law, there was no question of punishment. Men were not wicked, and they adhered to truth and virtue. They never departed from established customs and traditions. That era was of complete happiness for all because even if anyone erred at all, he ratified his errors by prayers and sacrifices. In fact, they were ruled by Dharma and they even did not find it necessary to have a King or his laws. This period was followed by the intrusion of the Aryans in the country. Some rules of social conduct were needed to prevent the growth of brutish instincts in man. To prevent an anarchical state in society, the rules of conduct were promulgated. Hence, it leads to the existence of the concept of sin and crime. The administering authority had to punish both after due enquiry and investigation.

The main end of punishment according to the Hindu law was deterrence and retribution. The fundamental idea of severe punishment recommended against criminals perhaps was to strike terror in the hearts of all potential criminals by the infliction of sure and swift punishment. The ‘tooth for a tooth and an eye for an eye’ concept had a strong hold. In Matsya Purana, it is stated that if the King did not inflict the punishment, the strong would oppress the weak just as big fish swallow the smaller one. In ancient India, Danda was considered to be an essential constituent of a social and legal society. It basically, signified the punishment for violation of any law.

- **Penal Policy in Ancient Hindu Period**

The original conception of crimes in Hindu law has begun with the violation of religious and social rules followed by elaborate enjoinder of Prayaschitta. While in the law of many ancient and medieval states, a distinction was drawn between the noble and common, here in India this distinction took a different shape, with respect to that of the caste. A man accusing a Brahmin of a crime was deemed to have committed a similar crime himself and in case of the Brahmin’s innocence, his guilt was regarded as doubly sinful. A man who assaulted a Brahmin with hands or weapon was said to be banished from heaven for one thousand years; and if blood falls from the body of a Brahmin, he will lose heaven for an uncertain number of years. A Brahmin who

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was not otherwise permitted to use weapons and arms could do so when his life is threatened, in the exercise of his right to private defence. If a man received or retained the stolen property, he was to be treated as a thief. A woman who committed adultery with a man of lower caste was caused to be killed by dogs. The adulterer also was to be killed. If the King did not strike or punish the guilty person, the guilt fell upon him. It is quite clear from above, that the earliest conception of criminal justice administration was blend of the religion and law.

Whenever a crime was committed, the most viable punishment was to outcast the sinner. Other than this, the punishment imposed in ancient India was severe or lenient according to the gravity of the offence or in view of other considerations. The most common punishment was of course fine and next was Capital punishment and mutilation, because the society believed in the eradication of the evil doers rather than the rehabilitation and reformation. The imprisonment and fetters were rarely prescribed. Beating or whipping was recommended for light offences or for those committed by infants, aged persons etc. public disgrace including branding is another kind of punishment. Censure, mild or strong was applied in comparatively light offences or in the case of young and first offenders. Punishment was also recommended in serious offence committed by the Brahmin.

- **Brief Summary of Punishment and Sentencing Policy in Ancient India**

Sources	Main offences	Punishment	Basis of sentencing
Dharmshastras	Violation of religious and social rules offences against the King	Outcaste Ordeals Public disgrace Bearing/ whipping Fine Imprisonment Censure for young or first time offenders Capital punishment Mutilation Banishment/ Exile	Distinction with respect to caste Severe punishment for violation of faith and trust of the King and less for misdemeanors

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Arthshastra	Robbery/ theft Defamation Assault Gambling Betting miscellaneous	Capital punishment Corporal punishment Fine	Distinction with respect to that of caste Gravity of offences
Manusmriti	Offences by lower caste against the upper caste Murder of a Brahmana	Death Mutilation Fines	Distinction with respect to that of caste. Factors like, time and place of the offence, the strength and knowledge of the offender, ability of the criminal to suffer, motive and nature of the crime
Yajnavalkya	Abuse Theft Adultery Assault on plants and animals etc.	Censure Rebuke Pecuniary punishment Corporeal punishment	Gravity of the offence Nature, time, place of the offence Strength, age, volition and wealth of the culprit

The main important works which have influenced the punishment and sentencing policy in ancient India are Dharamashastras, Arthashastra, and Manusmriti and Yajnavalkyasmriti. Though there are few more which are formulated on the basic principles laid down in above mentioned texts.

Dharamshastras: In Dharamshastras it is interesting to observe that for them the crime principally meant an evil act done with a certain degree of violent attitude. The criminal was said to be a person who being unaffected by the physical or spiritual effects of his acts was promoted by the absolute spirit of violence and openly engaged himself in causing, suffering to others by his acts such as theft, hurt, adultery, etc. for them. The offences against the King were the most serious particularly joining hands with the enemy, and they also punished severely those who violated the faith and trust. Such offences could be compared with treason and

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felony. All the offences were punishable with fine or imprisonment. Punishments varied according to whether an offence was against the King or the ruling authority, or against a person to whom the offender owed a duty or allegiance or amounted to only misdemeanors.

Kautilya's Arthshastra: After the earliest Dharamshastras, the text that must be paid attention to is that of Arthshastra of Kautilya. Kautilya or Chanakya was the famous minister of Chandragupta Maurya and is believed to be responsible for the over-throw of the Nanda Kings. In Arthshastra, Kautilya devoted two chapters to law. One is known as the chapter on Dharamsthiya (Civil law) and the other is known as the chapter on Kantaksodhanam (Criminal law).

Arthshastra deal with crime such as robbery, defamation, assault, gambling, betting and other miscellaneous offences relating to crime. Robbery or Sahasa has been defined by Kautilya as sudden and direct seizure of person or property and as such it has got to be contrasted with theft which implies only fraudulent or indirect seizure. Kautilya again conceives a criminal element in robbery when he says that the fine or punishment shall be in accordance with the gravity of crime rather than to the value of the article involved.

For this purpose, Kautilya describes the different kinds of fine – first amercement, middle most amercement and the highest amercement. For abetment of robbery, an abettor has to be fined twice or four times accordingly as he causes another man to commit the robbery and if they are robbers on highway, who rush upon travelers, restrain, attack, threaten to kill and actually kill them, and shall be hanged. In case of defamation, Kautilya includes a false charge, contemptuous talk and intimidation. If a man, capable of doing harm to another, out of enmity, intimidates him, he shall be compelled to furnish lifelong security and safety to the person intimidated. Defamation of one's own nation or village was to be punished with the first amercement, that of one's caste or guild with the middle most and that of Gods and temples with the highest amercement. The crime of assault was committed by touching, striking and hurting. Rank also played an important part in determining the nature of punishment for assault.

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Section 86 of the eleventh chapter of Arthshastra provides the law of Capital punishment simple or with torture against the criminals. The technical sense of torture meant only corporal punishment inflicted on the guilty and not torture inflicted for

getting a confession from a suspect. Corporal punishment includes imprisonment, banishment, mutilation and death. There were also different forms of death: death with torture for murder in a quarrel; death by impaling for theft of royal animals; death by burning hands and skin for treason; death by drowning for breaching dams or reservoirs, for poisoning or for women who administered poison; death by tearing off the limbs of criminals, for women who set fire to houses. Arthshastra recommends: cutting off the nose and ears for abetting in theft and adultery; chopping off one hand and leg for kicking preceptors and using royal coaches; blinding by poisonous ointments for Shudras pretending to be Brahmins or for slandering the King; chopping off one hand or foot for freeing culprits, forgery or sale of human flesh; cutting off the tongue for slandering preceptors, parents and the King and for defiling a Brahmin's kitchen. Kautilya prescribed death for selling human flesh, stealing images of goods or animals, for abducting human being and for wrongfully seizing fields, houses, gold, gold coins, jewels and crops. Death with or without torture is provided for murdering a man in quarrel. But when the wounded man dies a fortnight or a month after the quarrel, the highest fine and expenses of medical treatment is prescribed.

The Criminal Justice Administration during the Kautilya's time had reached a comparatively higher stage of development. The numbers of offences dealt with are large and indicate an advanced stage of society. Punishments prescribed to be given to the criminals, though often brutal, reveal the great anxiety of the law giver to suppress crimes by making them correspond as far as possible with the gravity of the offence.

Manusmriti: Smritis formed an important part as a source of knowledge of law in ancient India. Of these Smritis, Manusmrit is the comprehensive treatise on the conduct of Hindu society, Hindu ways of life and Hindu polity. According to Manusmriti law owes its existence to god. The King is simply to execute that law and he himself is bound by it and if he goes against the law or becomes Adharmik he should be disobeyed. Puranas are full of instances where the

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Kings were dethroned and beheaded when they went against the established principles of law. 'A King who punishes those who do not deserve it and not punish those who deserve it, brings great infamy on himself and sink into hell.

Manu also advocates different degrees of punishment beginning from simple admonition and intermediate with harsh order and fine. In awarding punishment, Manu says the time and place of the offence, the strength and knowledge of the offender, ability of the criminal to suffer, motive and the nature of the crime are factors to be considered for inflicting the due measure of punishment. When a Brahmin committed an offence, he was not to be sentenced to death but his head was to be shaved. Brahmin was not to be inflicted to sentence of death but for the murder of a Brahmana, Shudra was to be branded on the forehead with the sign of private organs, for drinking liquor, with the sign of wine cup and for theft of gold with sign of the foot of a dog. Manu has selected ten (10) places on the body where punishment should be inflicted in the case of non Brahmanas, but the Brahmanas were to be banished without inflicting the least hurt. Manu says that the punishment must always be just.

The severest punishment was reserved for the Shudras, especially who defamed the Brahmins. A Shudra insulting a twice-born man (Brahmin) with gross language shall have his tongue cut off, the reason being that he is of low caste, if he mentioned the name of twice born classes with contempt, an iron nail ten fingers long shall be thrust red hot into his mouth and if he arrogantly teaches Brahmin their duties, the King shall punish him by pouring hot oil into his mouth and ears. As in defamation so also in assault, nearly the whole of law is mainly determined by reference to the question of caste. Manu also provides for criminal punishment in the shape of fines or those who hurt trees, plants, animals and even inanimate goods. Adultery was regarded as one of the most heinous offences for which deterrent punishments were provided for, so that it may create awe and fear in the minds of the people at large. Apart from actual sexual intercourse, any act or action with immoral sexual desire was deemed to be adultery. A Shudra, guilty of adultery with a woman of any caste especially of the twice born class shall be sentenced to capital punishment. A wife violating her duty towards her husband was to be

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devoured by dogs in public place and male offender was to be burnt on a red hot iron bed by potting logs under it.

Manusmriti have laid down that every human being were to suffer the consequences of sins committed by him either during his life in this world or after death in hell or the other world and again, owing to remnants of such evil deeds, to take a re-birth and suffer the consequences of offences committed in the past life and so on. Great importance was attached to confession and Manu prescribes half the punishment in case of one who confessed.

Yajnavalkya Smiriti: Yajnavalkya's work is more systematic than Manu. He has divided his work into three parts: Achara (conduct), Vyavahara (law) and Prayaschitta (expiation). Yajnavalkya speaks of four classes of punishment namely, censure, rebuke, pecuniary punishment and corporeal punishment and says that these should be used either separately or jointly according to the nature of the crime. Of these mere censure was the lightest form of punishment and rebuke came after it pecuniary punishment included fine and forfeiture of property and corporal punishment included imprisonment, banishment, branding, cutting of offending limbs and lastly death sentence. The measure of punishment depended on the gravity of the offence. Thus, Yajnavalkya says that the King should inflict punishment upon those who deserve the same after ascertaining and taking note of the nature of the offence, time, and the place of the offence and the strength, age, vocation and wealth of the culprit. Abuse, assault, theft and adultery were the different types of crime, as counted by Yajnavalkya.

Abuse or defamation was to be adjudicated chiefly with reference to the question of caste of the different parties. The maximum fine shall be imposed for abusing a Brahmin. He also makes provision for assault committed on plants and animals. The fines shall be doubled when the injury is done to a tree in a sacrificial place, boundary or temple. A *Sahasa* or a heinous offence is committed when a common or another's property is taken by force. For *Sahasa*, the fine shall be double the value of the thing taken, but four times when the offence is denied.

The punishments in early societies were personally administered and were retaliatory, vengeful and usually severe and swift. The Hindu law gave ample power to the judge for imposing punishment in his discretion. The punishments recommended by the law givers are either

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maximum or minimum or a mere standard which should be followed as a guide. The judge was to take various things into account when he has to determine the amount and nature of punishment, for example, the age of the offender, his knowledge, caste, status, wealth, physical power, mental condition, motive and nature of the offence, time and other extenuating or aggravating circumstances. Measure of punishment varies according to the gravity of the offence. If the offence is not very serious, lighter punishment may be given while if the offence be serious, the punishment must be severe too. A woman killing her husband or child, burning a house or a village should be killed by a bullock.

Gautama: Abuse and defamation constituted an important crime, Gautama state that a Shudra, who intentionally insults by criminal abuse or assault a member of the twice born caste, is to be deprived of the limb with which he offends and as a punishment the Shudras are sought to be excluded from learning the Vedas. If he listens to recitations of the Vedas intentionally, his ears are to be filled with molten tin or lac. If he dares to recite the Vedic texts his body is to be split. If a Kshatriyas abuses a Brahmana he is to pay a fine of hundred Karsapanas (Silver coins), but if in case of a Brahmana abusing a Kshatriyas only a fifty, a Vaishya only twenty-five and nothing in the case of Shudras. Apastamba mentioned that if a Brahmin drinks sura, he can have no expiation except by death caused by pouring hot Sura poured into his mouth. The Gautama recommended four factors to take into consideration for inflicting the punishment against a crime, the status of the offender his bodily strength, the nature of offence and whether it has been repeated.

Vasistha: According to Vasistha, the place and time of the occurrence, the duties, age and learning's of the offender and the seat of injury should be properly considered by the judge, when inflicting punishment.

Vishnu: As per Vishnu, the punishment should be proportionate to the gravity of the offence and should also be dependent on the caste, position and the age of the offender.

Brihaspati: Brihaspati enumerated the correlation between penalty and justice. He says, 'No sentence should be passed merely according to the letter of law. If a decision is arrived at without considering the circumstances of the case, violation of justice will be the result. Thus,

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the traditional reaction which regard a criminal as dangerous and for whom infliction of punishment is the only remedy so that he is totally eliminated from normal society, no longer find support in modern times. There are so many Smritis like Parasara, Narada, Katyayana etc. which also described various punishment and sentencing policies prevalent during the criminal justice administration in ancient time. The views of these Smritis were less or more dominated by the views of Manusmriti and Yajnavalkya Smriti. All these jurists exhibited a praiseworthy analytical insight and the most perfect acumen of elaborating and explaining the juristic principles and philosophy.

- **During Islamic period**

The glorious Hindu period was subjected to discontinuation after the attacks of the Muslims and the beginning was made by Mohamud-bin-Qasim in 712 A.D. who came to India as invader and returned thereafter. The real penetration into India was made by Qutub-uddin-Aibek who, in reality established himself firmly in India after waging series of wars and finally established his supremacy in the whole of Northern India. The Muslims thereafter continued to rule over India for centuries till the year 1857 when the last Mughal King Bahadur Shah Zafar was dethroned by the Britishers and the English established themselves as the next rulers of India. Mughal also inflicted atrocities on the Sikh gurus for disobeying the orders of the Mughal Sultanate, for instance; Guru Arjan Dev was tortured and killed by the Mughal rulers for refusing to make changes to the Guru Granth Sahib. During the period when the Muslims ruled over India, many significant changes were introduced by them in the Indian legal system from time to time. The Islamic jurisprudence was imported into India by Muslims with certain modifications to suit the circumstances of the age and to satisfy the needs of the people of the time.

The Islamic law is often viewed as relatively inflexible to changing social conditions in a society and as far more inclusive of all aspects of social and economic life of the individual. Islamic law is known as Sharia (The path to follow) and it prescribes what should be done to those who neglect their duties, abandon their faith, or break the law of the community. However, different interpretations of Islamic law exist among different sects of Muslims in terms of when and how law should be applied.

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Some Muslim jurists contended that the solution to every contemporary problem is found in the texts of Islamic Law. However, it is important to note that the western notion of 'hyperlexis' (i.e. the overextension of law in modern industrial society) also suggest that legal attempts to regulate all aspects of social life are not exclusively reserved to Islamic legal system.

- **Islamic Rule of Law**

From the time of the conquest in India by the Muslims, the victors imposed their own criminal law on those whom they conquered. The primary basis of the Islamic criminal law was the Quran, which is believed to be divine origin. But the laws of Quran were found inadequate as it was just few of the verses which contained provisions dealing with matters of civil or criminal nature.

From the perspective of law and social control, Mohammad's settlement in medina is important because of its implications for the subsequent development of a type of theocratic State. Specifically, religious doctrines became code of conduct for its followers and the expression of political and legal norms.

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