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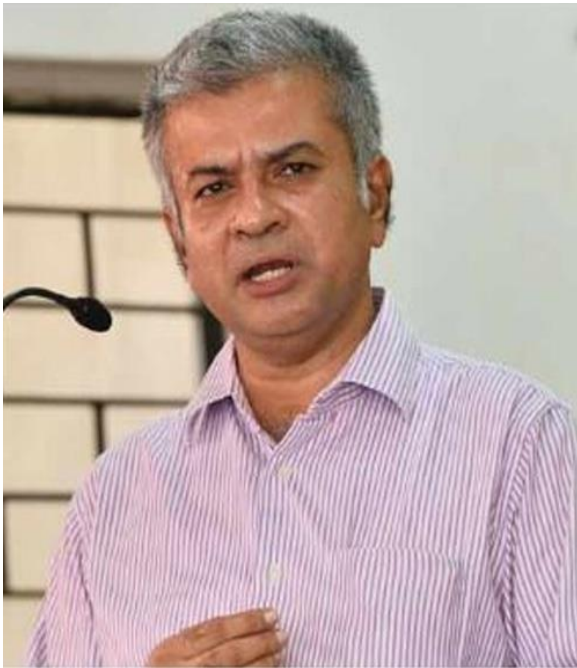
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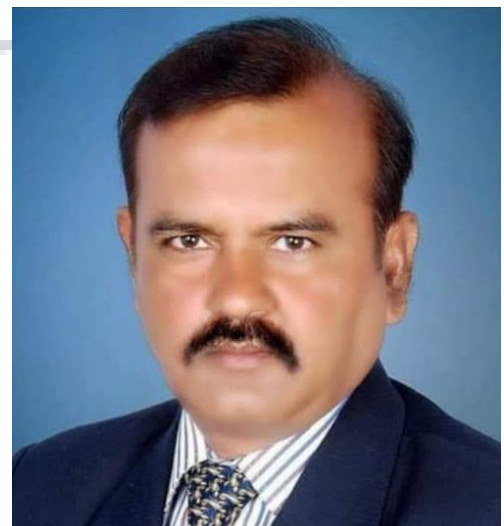
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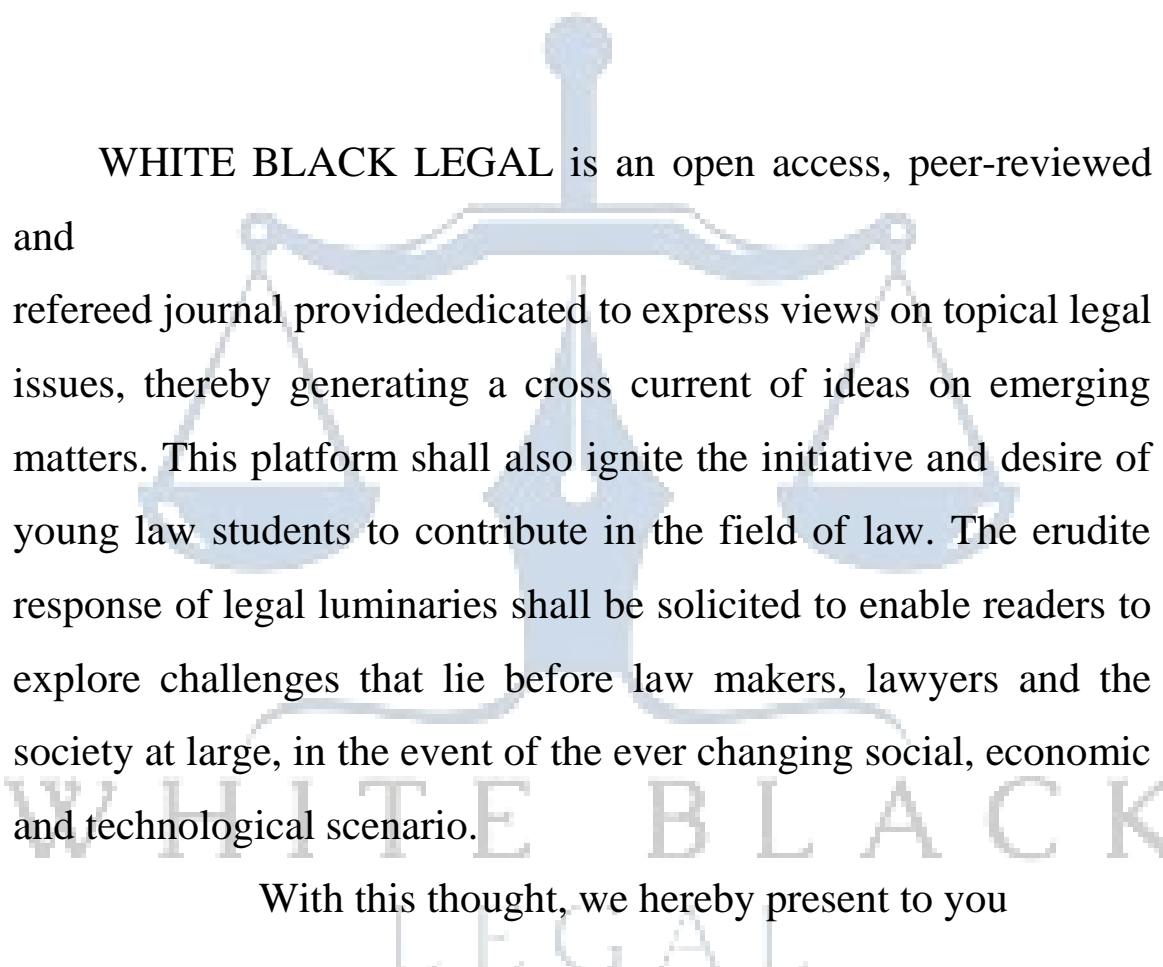


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE DEATH PENALTY IN HISTORY: ITS EVOLUTION, LEGAL FOUNDATIONS, AND MODERN REFORMS

AUTHORED BY - DR TAUHEED ALAM*

Abstract

This research paper delves into the historical evolution and jurisprudence of capital punishment, tracing its origins from ancient civilizations to its contemporary applications. It examines how the death penalty has been deeply influenced by cultural, religious, and political frameworks, highlighting the legal codes of Hammurabi, Rome, and ancient India, among others. The paper explores the shifting justifications for capital punishment, including deterrence, retribution, and public safety, while juxtaposing these with philosophical and moral critiques, particularly those emerging during the Enlightenment era.

The study further analyzes significant reforms and abolitionist movements across various legal systems, focusing on the role of thinkers like Cesare Beccaria and landmark judicial decisions, such as those in the United States. By evaluating the interplay between law, morality, and societal values, the research underscores the complexities of retaining or abolishing the death penalty in modern societies. Ultimately, the paper aims to provide a comprehensive understanding of capital punishment's role in legal history, offering insights into its continuing relevance and contentiousness in contemporary debates.

Keywords: Death Penalty, Legal History, Criminal Justice, Jurisprudence, Deterrence and Retribution, Abolitionist Movements

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Introduction

Death was one of the earliest methods of establishing one's dominance and deterring one's enemies. It was by instilling the fear of death that man kept his possessions and prevented others from taking control over them. Hence, the struggle for existence was invariably centered on the question of death. Before the centrality of the state was established, and human life began to be organised around it, leadership and respect in human societies was conferred upon whoever was able to instill fear and terror in the hearts and minds of his adversaries and subordinates¹.

References to capital punishment in ancient India are found in world most ancient texts including Sanskrit, Buddhist and late Pali texts. It has been mentioned that King rules the world and he can censure, impose fine and even execute those who transgress his commands.

According to Manu, the great Hindu Legal thinker, *danda* alone protects people and the wise declare *danda* to be just and lawful. Giving reason for the validity of *danda*, Manu explains that if ruler fails to punish wicked, the strong people will perish the weaker ones. So when *danda* destroys the sinners, the common people are not disturbed. However, such *danda* must be applied with great care. Manu therefore laid emphasis upon the king's obligation to detect culprits and punish them including the death penalty.² Kautilya emphasized that the punishment must be just and when it is so it does not destroy righteousness. According to him punishment is the most universal means to ensure public security.³

China was one of the earliest civilisations to have had capital punishment in its law-books, which was in the form of beheading.⁴ The first record of a death sentence being executed is found in ancient Egypt. Almost fifteen hundred years before the birth of Christ a criminal was punished to death, in a method as per his wish, for the crime of having practiced magic.⁵

In Jewish law we find the mention of several forms of capital punishments. Stoning to death was the most central among them, beheading- which was given to conquered adversaries, crucifixion which was derived from Roman Law and burning alive. Other prominent forms of

¹ John Laurence, *History of Capital Punishment*, 1 (Sampson Low, Marston and Co. Ltd., London, 1935)

² U.N. Ghoshal, *A History of Indian Political Ideas*, 180 (Oxford University Press, Bombay, 1959).

³ Id at 117-18.

⁴ *Ibid.*

⁵ Id at 2.

capital punishment included throwing the criminal from a rock, starvation and pouring of molten lead⁶.

The following sections of this chapter will provide a historical analysis of capital punishment from the ancient times, through the middle ages to the modern period. These sections apart from discussing the methods of capital punishment will also delineate the changes in administering capital punishment and how these changes reflect the juridical structures and the political systems and beliefs of those respective periods.

History of Capital Punishment Laws

In modern world, capital punishment means the execution of a condemned person by the concerned state's authority for the crimes punishable with death under the law known as capital crimes. The word "capital" is derived from the Latin word *capitalis* which literally means "concerning the head", consequently, capital punishment figuratively means to lose one's head. Capital punishment is different from murder (though life is taken away in both) as murder is "to kill (a human being) unlawfully and with premeditated malice."⁷ On the other hand, in capital punishment the element of unlawfulness and malice is absent (though many countries execute people in a wrongful and out of political motives) which makes it different from murder. Capital punishment remained in existence in almost every nation and society, so long as the historical records are concerned. It is an established phenomenon that crime and punishment (which includes mode of punishment also) co-relate to the culture and form of civilization from which they emerge. It is true that it is difficult to precisely ascertain the existence of capital punishment in pre historic era but it seems very likely that capital punishment existed in some form or another throughout the history of human being and it is as old as human society itself. It has been used as a method of punishment to ensure justice on the principle of *lex talionis*: "an eye for an eye, a life for a life" since the earliest societies. Capital punishment remained a mode of punishment for various forms of crimes which include murder, rape, adultery, treason, espionage, spreading anarchy in a land, etc. Among these crimes murder usually warrants this ultimate form of punishment.

⁶ *Ibid.*

⁷ Murder, In *Merriam-Webster's dictionary*, available at: <https://www.merriam-webster.com/dictionary/murder> (visited on Jun 4, 2024).

Early Death Penalty Laws

The first ever written code which prescribed death penalty in the history was the **Code of Hammurabi**⁸ written on stone tablets around 1760 B.C. The sixth Babylonian King, Hammurabi, enacted the code. The code consists of 282 laws with scaled punishments depending on the social status of the wrongdoer. The Code of Hammurabi prescribed capital punishment for twenty-five different crimes, interestingly, murder was not one of them. The prime concern of the Hammurabi code seems to prescribe a proper measure of compensation for injuries committed against slaves, domestic slaves and property. Furthermore, capital punishment was prescribed to serve as a back-up punishment for thieves without the ability to pay restitution and fines.⁹ In the recorded history of mankind the first ever sentence of capital punishment was awarded in sixteenth century BC in Egypt. The criminal was from the noble class and accused of practicing magic. As a punishment, he was asked to take his own life.¹⁰ Similarly, other ancient societies in due course developed their own set of written laws that incorporated the capital punishment for example, the Hittite Code of fourteenth century BC, or the Roman law of the Twelve Tables in the fifth century B.C. or, then again, more importantly the Code of Athens of seventh century B.C. Among these codes, all the more vitally, was the Draconian Code of Athens which prescribed capital punishment for every crime committed by any transgressor.¹¹ Draco was an Athenian legislator in Ancient Greece. He substituted the ubiquitous system of oral law and blood feud by a written code to be applied only through a court although Plato contended that it should be used only for the incorrigible offenders.¹² The word draconian comes from Draco's laws. On the other hand, the Roman Law of Twelve Tables which goes back to 450 BC included capital punishment for the wide range of offences which were applied differently upon people belonging to noble class, freemen and slaves. Capital punishment was prescribed for crimes, for instance, the publication of libels and insulting songs, the cutting or grazing of crops planted by a farmer, the burning [of] a house or a stack of corn near a house, cheating by a patron of his client, perjury, making disturbances at night

⁸ The Code of Hammurabi is a legal document from ancient Babylonia (now the modern-day Iraq), which contains the first known death penalty laws. Under the code, written in the 1700s B.C., twenty-five crimes were punishable by death. These crimes included adultery, helping slaves escape. Murder was not one of the twenty-five crimes, *available at:* <https://deathpenalty.procon.org/sourcefiles/Hammurabi.pdf> (visited on Jun 4, 2023).

⁹ Joseph A. Melusky and Keith Alan Pesto, *Capital Punishment* 8 (Greenwood, California, 2011).

¹⁰ Michael H. Reggio, "History of the Death Penalty" *Frontline*, *available at:* <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html> (last visited on Jun 4, 2024).

¹¹ *Supra* note 1 at 1-3.

¹² [Roger Hood](#), "Capital Punishment" *Encyclopaedia Britannica*, Oct. 26, 2017, *available at:* <https://www.britannica.com/topic/capital-punishment> (last visited on Jun 5, 2024).

in the city, wilful murder of a freeman or a parent, or theft by a slave.¹³

During Vedic Period in ancient India (1500 BC to 600 BC) the system of punishing wrongdoers witnessed a gradual development. The doctrine of divine affinity of King seems to have originated in this period. The ruler's authority was not unlimited and it was subject to his obligation towards people. The coercive authority of the king, also known as *danda*, received recognition as the basis of *Dharma* i.e. justice.¹⁴ In the period of Pre-Maurya (600 BC to 325 BC) the King's obligation to protect his subjects was further developed and a King who failed to punish guilty or who punished an innocent had to undergo fasting.¹⁵ Rulers of Maurya dynasty developed the law of treason and capital punishment was prescribed for various treason acts.¹⁶

It seems that in the 4th century BC, the death penalty was in force during Buddhist rule in ancient India and it was awarded for the criminal acts accompanied with cruelty.¹⁷ Despite the fact that Buddhist rulers prominently adopted the practice of non-violence (*Ahimsa*), the King Ashoka reportedly did not abolish death punishment totally. References to death punishment can be found in the edicts of Ashoka.

According to Vincent Smith¹⁸, even the most pious Jain and Buddhist rulers did not hesitate to inflict death penalty upon their subjects and King Ashoka himself sanctioned capital punishment throughout his reign. Vincent observes that Ashoka, however, in order to satisfy his humanitarian feelings, gave three days grace period to those condemned with capital punishment to prepare for death.

The abovementioned three days grace period to culprits condemned with death is evident from Ashoka's Pillar Edict IV, which has been translated by different authorities in due course of time. As per a recent study of the Edict¹⁹, the respite of three days given by King Ashoka was to secure greater welfare of his subjects. This grace, in certain cases, may afford opportunity to prove innocence of culprit or may secure his repentance. The study further highlights an

¹³ *Supra* note 1.

¹⁴ *Supra* note 2 at 24.

¹⁵ *Id.* at 51.

¹⁶ *Id.* at 167.

¹⁷ B.R. RamchandraDikshitar, *Mauryan Polity* 167-68 (Madras University Historical Studies, India, 1953).

¹⁸ Vincent Smith, *Early History of India* 185 (Atlantic Publishers & Dist, New Delhi, 4th edn., 1999).

¹⁹ RomilaThapar, *Asoka and the decline of Mauryas* 176-77 (Oxford University Press, USA, 1961).

interesting point that despite the fact Ashoka was a firm believer of Buddhism, he did not abolish death penalty. The reason behind non abolishment of death penalty by Ashoka was, doubtlessly, the fact that he considered death penalty essential for the maintenance of law and order. Ashoka, despite having personal convictions towards Ahimsa, was of the view that justice must be founded on recognition of pleasurable rewards or painful punishments.

Besides, Kautilya also advocated capital punishment but only in specific cases. Also, King Harsha awarded death penalty for slaying any living creature.²⁰

Recorded facts of capital punishment during Maratha rule in India can easily be found. James Grant Duff in his work, 'History of the Mahrattas'²¹ observes that Sursoobedars had the authority to inflict capital punishment for big crimes. But the Mamlitdars in such cases had to require the authority of Peishwa. Also, the big Jagherdars, within their respective jurisdiction, were empowered to punish capitally. The state prisoners were put to death by administering poison or by deleterious food such as mixture of flour and salt in equal quantity. To execute criminals, their confession was generally regarded necessary but there were no prescribed rules for trial and torturing accused in order to extort confession was a common practice. One noteworthy fact of this period was that the Brahmins were exempt from capital punishment and women were rarely awarded death penalty.

In reference to legality of capital punishment during Maratha period, an important incident may be cited when the celebrated Chief Justice of Poona named Ram Sastri refused to serve under Peshwa Ragunathrao. Peshwa was privy to murder of his own nephew and he reportedly asked the Chief Justice what was the punishment for his act? Ram Sastri not only declared that death penalty was the only punishment for the act but also refused to serve under Ragunathrao.²²

According to a prominent work contributed on the administration of justice in Maratha period, no harsh punishment was awarded to culprits without seeking approval from Peshwa. The work further highlights that the gangs involved in murder, house breaking and highway robbery were punished capitally and their bodies hung up by the sides of roads.²³

²⁰ James Hastings (ed.), IV *Encyclopedia of Religions and Ethics*, 284 (T.&T. Clark, Edinburgh, 1911).

²¹ James Grant Duff, *History of the Mahrattas* (Vol.II) 236 (Longman, London, 1826).

²² D.B. Parasnis, and C.A. Kincaid, *A History of the Maratha People* 475-76 (Oxford University press, London, 1918).

²³ *Ibid.*

The famous Chinese traveller FaHsien, reportedly, did not witness any death sentence in India during the period 399-400 AD and what he found was the imposition of fines, and mutilation in the crime of treason.²⁴ In spite of this, it is well established that at various periods in ancient Indian history, death sentence has been a recognized mode of punishment.

In ancient Indian texts death penalty is usually referred as Pramapana, which may be either pure or of mixed variety. In pure form, the capital punishment is not associated with other punishments. Whereas, in mixed form, the death penalty may be combined with mutilation or some other sort of punishment. The pure form of Pramapana may be further divided into Avictram (ordinary) and Vicitram (extraordinary). In AvictramPrapana, ordinary weapons like sword, etc are used to execute culprits while in the latter case, the execution is done employing awe-inspiring methods.

Execution of capital punishment was often cruel in nature including crucifixion, drowning to death, burying alive and battering to death. Submersing the culprit in water in a sack containing dog, rooster, viper and an ape was usual practice among Romans for awarding punishment to parricides (person who murdered ones parent).²⁵

The most infamous death execution in BC was of great Greek philosopher Socrates around 399 BC when he was forced to drink the poison for corrupting the minds of the youth of Athens and impiety.

Death penalty has received sanction of most of the world's major religions at some point of time. In Jews law, capital punishment is prescribed by the Torah also known as Pentateuch for homicide, kidnapping, blasphemy, magic, violation of Sabbath and several sexual offences.²⁶ Jews used different methods to capitally punish the offenders which included beheading, hanging, stoning to death, throwing down from a rock, putting under saw and crucifixion. Crucifixion of Jesus Christ by Romans at around 29 AD has been the most shameful execution of history. However, the crucifixion and other cruel modes of capital punishment were abolished in Roman Empire by Emperor Constantine some three hundred years later. The Code

²⁴ D.M. Dutta, "Political, Legal and Economic Thought in Indian Perspective" in C.A. Moore (ed.), *Philosophy and Culture—East and West* 579-90 (University of Hawaii, Honolulu, 1962).

²⁵ Md. Rafijuddin Shah "Norms on Capital Punishment" 2:4 AJHSS 117 (2014).

²⁶ William Schabas, *The Abolition of the Death Penalty in International Law* 3 (Cambridge University Press, U.K., 3rd edn., 2002).

of Theodosius (438 AD), which was the compilation of Roman laws, prescribed capital punishment for more than 80 offences.²⁷

In ancient India, according to earliest Smiritis²⁸, the Capital Punishment in Pre-Maurya period was awarded to those who inflicted bodily harm to seven constituents of the State or who committed forgery of royal edicts, etc. As per the text of Manusmriti, death sentence was given for theft exceeding 10 kumbhas. Death penalty was also awarded for the crime of rape of the woman of higher caste by a man of lower caste.²⁹ Manu also prescribed mutilation of offending limb of the accused.³⁰ But one thing is noteworthy that Brahmins were not subject to capital punishment.³¹

As per the observation made by Jolly³² regarding capital punishment in ancient India, it was stated that in all cases of serious theft crimes, the guilty is sentenced to death by impaling, hanging or drowning. Even the hands of guilty are hacked off or other tortures are inflicted often to aggravate the punishment for such crimes. The same punishment is awarded for committing burglary, frequent repeated crime of picking pocket, robbery and stealing certain animals, grains and precious metals. Also, forgery of royal grants or even private documents attracted capital punishment. Reportedly, King ordered a dishonest goldsmith to be put to death who was involved in fraudulent weighing and measurement practices. Interestingly, as regards punishment, there was no difference between theft and robbery. Moreover, rendering assistance or taking part in such crimes or even abetting such crimes was considered as equally criminal act.

After the advent of Islamic law as expressed in Quran around **632 A.D.** prescribes Capital Punishment for certain heinous offences also. The Qur'an evidently illustrates the possibility of capital punishment in chapter 5 verse 32 for two group of crimes namely **Intentional Murder** and *Fasadfil-ardh* (spreading mischief in the land). “.....*If anyone kills a person - unless it be for murder or for spreading mischief in the land - it would be as if he killed all*

²⁷ Michael Kronenwetter, *Capital Punishment: A Reference Handbook* 71-72 (ABC-CLIO, Inc., Santa Barbara, 1993).

²⁸ *Supra* Note 2 at 50.

²⁹ Manusmriti 8, Verse 366.

³⁰ Manusmriti 8, Verse 125.

³¹ Manusmriti 8, Verse 379 and 380.

³² Jolly, *Hindu Law and Custom* 273 (The Greater India Society, Calcutta, 1928).

*people. And if anyone saves a life, it would be as if he saved the life of all people*³³. The aforesaid directive, therefore, makes it clear that a human life can only be taken in two cases viz. Intentional killing of a human being and in cases of rebellion against the collective system by damaging the life, wealth or honour of others. This latter act is referred above as “spreading mischief in the land”. The killings which do not fall under these two categories, are not justified. Islamic law clearly says that such unjustified killing is a crime not only against the family of the victim but also against the Almighty as well as the society and the government. . It is notable here that in the recorded history of mankind probably it was Islam which had made first attempt to reform the law relating to capital punishment. Islam has limited the application of death penalty only for the two group of offences namely intentional murder and FasadfilArdh (spreading mischief in the land). However, it was generally believed that first reform of capital punishment happened between 1776-1800 A.D. when great thinkers and writers of America and Europe has called for the restricted application of death penalty for the heinous offences like murder and treason only which is not totally correct to say.

During Medieval Period

It is difficult to ascertain accurately the prevalence of death penalty in ancient period but evidences are there to show that it was frequently practiced across the societies. However, in some societies death penalty was avoided by means of alternative punishments such as by banishing or by making to pay compensation. For an instance, commutation of death sentence by the emperor to deportation to a remote place was common during the period of peace in Japan (Heian period from 794 to 1185). But execution of offenders was reinstated after the happening of civil war in the middle of 11th Century. The colonial countries were greatly influenced by the Great Britain which has a long history of awarding death penalty. At around 450 BC, the death penalty was usually executed by throwing the culprit into a quagmire but in the course of time the mode of execution witnessed several changes and by the 10th century the most common mode of execution was the hanging the offender from the gallows. However, William the Conqueror of 11th century banned death penalty for any offence except during war. Nevertheless, he gave permission to mutilate offenders for specified offences.

In medieval India, the Quranic criminal justice system, which had a foreign origin, was mainly in force in during Mughal era. The Quran and the precedents and the opinions of jurists made

³³ Holy Quran, Chapter 5 verse 32.

in the light of Quran were the main sources of the criminal law. As the abovementioned sources were Trans-Indian, it became a necessity to have a digest of Islamic law in India. Fatawai Alamgiri, which was compiled under the instructions of Aurangzeb, is an example of such digest. Muslim rulers in medieval period used to administer justice in person. For example, Muhammad Tughlaq declared himself to be the highest court of Appeal and he kept four Muftis for this purpose. He reportedly made it clear to Muftis that they should be very careful in pronouncing judgement and if an innocent is executed then his blood would be upon the head of Muftis.³⁴

The great emperor Akbar, in order to ensure justice, used to appear in front of his window every morning and anyone could seek justice from him personally.³⁵ He was the final court of Appeal. Akbar had given clear instructions that death penalty should never be awarded in exercise of immature deliberations. Moreover, his governors were required to send proceedings to him for confirmation before inflicting death sentence. However, such confirmation was not required in case of dangerous sedition. Akbar was opposed to the idea of awarding mutilation or other sort of cruelty to be combined with the punishment of death sentence.³⁶

Similarly, in the period of Jehangir, capital punishment could be inflicted only after being confirmed by the Emperor.³⁷ It is stated that death penalty was not in practice during the time of Aurangzeb. He, reportedly, never passed death sentence even under the influence of anger and passion.³⁸ However, the part of Islamic law of crimes, covering acts which were regarded as crime by all the nations e.g. murder, adultery, theft, etc., was made equally applicable to non-muslims as well by the muslim rulers. Reportedly, Timur ordered the robbers and thieves to be put to death regardless of the place they were found and regardless of the fact by whom they were detected. This is noteworthy that abovementioned practice was not in strict accordance with the Quranic law (Islamic law).

In order to have a better understanding of capital punishment prevalent during muslim rule in medieval period, it will be expedient to briefly discuss the classification of crimes and kinds of punishment under Islamic law. According to Islamic Jurisprudence, crimes can broadly be

³⁴ Wahed Husain, *Administration of Justice during the Muslim Rule in India* 20 (University of Calcutta, 1934).

³⁵ Pringle Kennedy, *History of the Great Moghuls* (Vol. I) 308 (Thacker Spink & Co, Calcutta, 1905).

³⁶ *Supra* note 36 at 33.

³⁷ *Id.* at 41.

³⁸ *Id.* at 53.

classified into three categories, namely: i. Crimes against God; ii. Crimes against the State; and iii. Crimes against private persons.

For crimes against God, there is violation of right related to Almighty that is called Haqq Allah and for these crimes there are no provisions for forgiveness or compounding of offences. On the other hand, for the crimes against the State as well as the private individuals, the offender can be forgiven or his act can be compounded by the aggrieved party. For example, homicide is neither a violation of Haqq Allah nor a violation of King's peace, but it is a damage only to the family members of the victim and can be settled by paying them the monetary compensation by the guilty which is generally called as the "price of blood". The criminal proceeding against the offender is initiated only when the next kin of the murdered man refused to accept price of blood and insisted that the culprit should be punished for the crime and in that case, the Quazi, on proof of guilt, would pronounce death sentence.

According to Islamic Law, the punishments prescribed for offences were mainly of four classes—

(i) Hadd

Hadd is a punishment that is prescribed by Canon law and is regarded as the 'right of God' and hence a human judge has no authority to alter the same.

There are certain prescribed forms of punishment which comes under the category of Hadd, viz.—

- (a) Stoning to death for adultery;
- (b) Scourging (hundred stripes) for fornication;
- (c) scourging (eighty stripes) for false accusation of adultery on married woman;
- (d) Scourging for drinking liquor;
- (e) Amputation of right hand for committing theft;
- (f) Amputation of hands and feet for committing robbery on highway. If robbery is committed with murder then death punishment by crucifixion or by sword.

(ii) Tazir

Tazir is a kind of punishment that mainly aims to reform the guilty person. It is inflicted for those offences for which neither the hadd punishment is prescribed nor there provision for expiation. It is entirely upon the discretion of judge to decide the kind and quantum of punishment under tazir. Judge has got the authority to even completely remit the punishment. The procedure of trial in tazir is simple as compared to that of hadd. These were the reasons

for attempt to escape tazir by bribery.³⁹

Tazir could be inflicted by any of the following four forms—

- (a) tadib (public reprimand)
- (b) Jirr, where culprit is dragged to the door of court-house and is exposed to the public scorn.
- (c) imprisonment or exile
- (d) Scourging and boxing on the ear. The stripes in scourging must not exceed 39 but in no case it should be less than three. However, as per Hanafi School the stripes must not exceed 75.

(iii) Qisas

Qisas (retaliation) is based upon the personal right of the victim or his next kin and this right can be exercised in certain offences notably murder. If the person demanded that offender should be punished as per law, the Qazi was bound to punish him accordingly and in such cases even the king could not exercise royal clemency by altering or abrogating the sentence. On the other hand, if the next kin of the deceased pardoned the murderer either unconditionally or by accepting price of blood from him then neither the Qazi nor the King had authority to take cognizance of the crime. For minor crimes, the Qisas as laid down by Mosaic Law was, “a tooth for a tooth and an eye for an eye” with some exceptions.

(iv) Tashhir

Tashhir or public degradation was a popular practice of punishment universally applied throughout the muslim world and was even in practice in Hindu India and Medieval Europe. Though Tashhir was not recognized as a form of punishment in legal texts of Islam, it was not condemned either and almost all muslim kings and qazis used to inflict Tashhir. Shaving off the offender's head and mounting him on an ass covering his face with mud and sometimes placing garland of old shoes around his neck and parading him through the streets with loud music was a prevalent practice in India. Whereas, blackening the face of the guilty by judge, cutting his hair or having led him through the streets etc., was prevalent form of tashhir in Arab.⁴⁰

Following are the offences for which Capital Punishment was Prescribed or Permissible under Islamic Law:

(i) Qatl-i-Amd (Wilful Homicide)

³⁹ E. Van Donzel (ed.), *IV Encyclopedia of Islam* 710 (Brill, Netherland, 1990).

⁴⁰ M.I. Siddiqui, *Penal law of Islam* 145 (Adam Publishers, New Delhi, 1979)

The essential conditions for proving the offence of wilful homicide were the intention to kill followed by a voluntary act by a sane and adult person. Notably, homicide was not distinguishable on the basis of provocation or cold-blood murder and only proof of intention to kill was material in establishing the guilt of wilful homicide. However, the weapon actually used was a significant factor to determine the intention. If blood drawing weapon was used in wilfully striking another person that consequently resulted in death of victim, it was regarded as wilful homicide.⁴¹

(ii) Zina (Unlawful Sexual Intercourse)

Death penalty by lapidation or stoning to death was prescribed if zina was committed by a married man of mature age and sound understanding with a woman of same description. However, for carrying out the punishment there were detailed provisions to avoid cruelty and indecency in execution of sentence. The sentence of death was imposed only when four respectable witnesses actually saw the guilty person while involved in the act. In stoning to death, the stoning had to be commenced by the witnesses. It is necessary to mention that if zina was committed by a non-muslim or unmarried then punishment was 100 stripes and in case of slave it was 50 stripes.⁴²

(iii) Repeated commission of Sariqa (Larceny)

In case of repeated offence of larceny, if the value of property is not less than 10 Dirhams then death penalty could be awarded as an exemplary punishment.⁴³

(iv) Sariqa-i-Kubra (Highway Robbery)

While committing robbery on highway if murder is committed then Death penalty was permissible. It was immaterial whether robbery is actually committed or not.⁴⁴ For crimes against the State viz. rebellion, peculation and failure to pay revenue, the king used to inflict punishment at his pleasure because in such cases Quranic law gives no guidance.

Beside capital punishment exercised during medieval India by Islamic rulers, death penalty was accompanied by torture throughout the middle ages in most of the societies. For instance, drowning pit and gallows were usually present in barons to be used for major as well as for minor offences. Burning to death was the usual punishment for women, whereas, hanging, drowning and quartering were meant for male offenders. Beheading was generally done to the criminals belonging to upper class. Burning to death was punishment for marrying a Jew. For

⁴¹ Tapas Kumar Bannerjee, *Background to Indian Criminal Law* 38 (Orient Longmans, New Delhi, 1963).

⁴² Holy Quran, Chapter 24 Verse 2 prescribes 100 lashes and Chapter 4 verse 25 mandates for half punishment of 100 lashes i.e.50 lashes

⁴³ *Supra* note 40 at 108

⁴⁴ *Id* at 131

offenders who would not make confession of their crime, pressing was made the punishment. In this punishment, the executioner would place heavy weights on the chest of the person and would give small bread to him to eat on the first day and on the second day, he would be given small amount of bad water to drink and so on until confession is obtained or the person dies. Approximately 72000 persons were awarded death penalty during the reign of Henry VIII. Boiling the offender to death was another approved mode of capital punishment in 1531 and evidences are there to show that some offenders were boiled up to two hours for putting them to death. For burning a woman, the executioner used to tie her to a stake and then put a rope around her neck so that she could be strangled from outside the fire-ring but this method often failed because many women were burnt alive before they could be actually strangled.⁴⁵

The execution of Captain George Kendall of Virginia in 1608 on charges of spying for a foreign country was the first ever documented execution in United States. Every early colony had its independent legal system and they were free to declare what sort of offences would entail capital punishment. For example, the Divine, Moral and Martial Laws incorporated by the governor of Virginia, Sir Thomas Dale in 1612 prescribed capital punishment for even minor offences like stealing of grapes, killing of horses and dogs without seeking permission, killing of chickens and doing trade with Indians. However, after seven years relaxation was made in those laws fearing that no one would like to settle in Virginia.⁴⁶ First legal execution in Virginia took place in 1622 for the offence of theft.⁴⁷ The application of death penalty was not uniform in colonies; some were very strict while some adopted lenient approach. First execution in Massachusetts Bay Colony was carried out in 1630, but the earliest capital statutes do not occur until later. The laws in force in New England between 1636-1647 prescribed capital punishment for pre-meditated murder, rape, statutory rape, sodomy, bestiality, adultery, witchcraft, assault in anger, blasphemy, idolatry, man-stealing, perjury made in capital trial, poisoning, manslaughter and rebellion. Such laws were greatly influenced by the scriptures from the Old Testament. However, in the course of time a significant relaxation was granted in Commonwealth of Massachusetts and by 1780, the death penalty was prescribed for seven offences only which were murder, rape, sodomy, buggery, arson, burglary and treason.⁴⁸ The Duke of York's Laws (1665-75) of New York, declared the capital punishment mandatory for

⁴⁵ *Supra* note 1.

⁴⁶ Joseph A. Melusky and Keith Alan Pesto, *Capital Punishment 7* (Greenwood, California, 2011).

⁴⁷ *Ibid.*

⁴⁸ Hugo Adam Bedau, *The Death Penalty in America 7* (Oxford University Press, New York, 1982).

even those who denied the true God and his Attributes. South Jersey and Pennsylvania were however rather tolerant in regard to death penalty. In South Jersey, excepting treason and murder, capital punishment was not prescribed for any crime.⁴⁹

In Britain, there was a persistent rise in number of capital crimes till the eighteenth century when death penalty was attracted for 222 offences. Such offences included theft equal to the value of 40 shillings from house or five shillings from shop, robbery of rabbit warren, counterfeiting tax-stamps and cutting down a tree. However, judges were not inclined to award conviction when the punishment was comparatively greater than the crime. Later, in the course of time, reforms started to take place and in 1823, five laws were incorporated by which around hundred offences were exempted from capital punishment. In a short span of time from 1832 to 1837, many more capital crimes were eradicated. Further in 1840, it was attempted to abolish all capital offences but that could not succeed. The period of 19th and 20th centuries witnessed the abolishment of more and more capital offences not only in Britain but across the whole European region. The present scenario is that the capital punishment is retained by few European countries only.⁵⁰

Death Penalty Law Reforms

Abolition of death penalty and capital punishment law reforms are not to be understood the phenomena which developed in modern world only. Traces can be found even of ancient world concerning strong opposition against death penalty and questioning its validity. Famous king of Satavahana dynasty of ancient Indian sub-continent refrained from awarding capital punishment even to an offending enemy. Similarly, King Rudradaman of Saka dynasty never put someone to death except in battlefield.

A vivid example of arguments questioning the validity of capital punishment is evidenced in Mahabharata wherein discussion about death penalty takes place between Prince Satyavan and his father King Dyumatsena. Prince Satyavan argues that execution of individuals can never be a virtuous act. In reply, King Dyumatsena makes an observation that there will remain no distinction between virtue and vice if those, who should be killed, are spared. Then Satyavan adds that Capital punishment not only kills the wrongdoer rather it kills a large number of

⁴⁹ Phillip English Mackey, *Voices Against Death: American Opposition to Capital Punishment, 1787-1975* Xi-Xii (Burt Franklin & Co., Inc., N.Y., 1976).

⁵⁰ *Supra* note 1 at 9-14.

innocent people. According to him, if a robber is killed it results into killing of his parents, wife and children hence, therefore, King should seriously think about the award of punishment. He further says that killing of wicked is not in conformity with the eternal law and awarding punishments, other than death penalty, can make the culprits expiate their offences and it will ensure that the innocent relatives of the wrongdoer are not punished by inflicting death penalty to him.⁵¹

The text of Sukra says that the bad practice of death penalty is violative of Vedic injunction which prohibits taking any life. It affirms that the capital punishment should be replaced with life imprisonment and if the necessity demands, the person should be transported to an Island.⁵² However, the early reforms of the death penalty happened during 1776-1800, when Italian jurist *Cesare Beccaria* who is considered to be the most influential personality in the death penalty abolition movement published a series of essays titled, "*On Crimes and Punishments*." His point of view was that since the man was not his own creator, he did not have the right to destroy or take the human life individually or collectively. Beccaria described the death penalty as "the war of a nation against a citizen ... It appears absurd to me that the laws, which are the expression of the public will and which detest and punish homicide, commit murder themselves, and in order to dissuade citizens from assassination, commit public assassination"⁵³. Capital Punishment, he said, would be justified only in one case,

When, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government. But even in this case, it can only be necessary when a nation is on the verge of recovering or losing its liberty; or in times of absolute anarchy, when the disorders themselves hold the place of laws. But in a reign of tranquillity; in a form of government approved by the united wishes of the nation; in a state fortified from enemies without, and supported by strength within, and opinion, perhaps more efficacious; where all power is lodged in the hands of the true sovereign; where riches can purchase pleasures and not authority, there can be no necessity for taking away the

⁵¹ Dr. P. K. Sen, *Penology Old and New* 93-4 (Longmans, Green & Co., London, 1943).

⁵² *Supra* note 24 at 569-90 (University of Hawaii, Honolulu, 1962).

⁵³ Cesare Bonesana di Beccaria, *An Essay on Crimes and Punishments* 98 (W.C. Little & Co., Albany, 1872).

life of a subject.⁵⁴

As a consequence, the ideas propounded by Beccaria spread throughout European region resulting in some reforms. In U.S., Thomas Jefferson along with four other officials, accredited to carry out comprehensive review of laws of Virginia, made recommendation to prescribe capital punishment only for the offence of murder and treason. That recommendation could not take shape of law as the proposed bill failed just for a single vote after a heated debate in the legislature. Other founding fathers, such as Benjamin Franklin, Benjamin Rush and General William Bradford too were influenced by Beccaria's ideas. Dr. Rush who was a renowned Philadelphia citizen made a proposal to completely abolish the death penalty. The Attorney General of Pennsylvania, William Bradford under directions to investigate death penalty, published a report in 1793 named '*An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*' Bradford strongly supported that the capital punishment be retained, but he did not hesitate to admit that it was futile in prevention of certain offences. In fact, he said that capital punishment made convictions harder to achieve; the reason being the mandatory nature of capital punishment in Pennsylvania and other states which would often force jury not to return a guilty verdict. His views regarding death penalty are as follow:

IT being established, That the only object of human punishments is the prevention of crimes, it necessarily follows, that when a criminal is put to death, it is not to revenge the wrongs of society, or of any individual-"it is not to recall past time and to undo what is already done:" but merely to prevent the offender from repeating the crime, and to deter others from its commission, by the terror of the punishment. If, therefore, these two objects can by any penalty short of death, to take away life, in such case, seems to be an authorized act of power.⁵⁵

Consequently, in 1794 Pennsylvania became the first State which limited the enforcement of death penalty. Death penalty was abolished for all offences except "murder in the first degree". It was the first occasion that the offence of murder was categorised on the basis of 'degree'. In a similar instance, in 1796, the law makers of New York approved to construct the first ever penitentiary of the state, scrapped whipping and brought down the number of capital crimes to two only from the earlier figure of thirteen. Similar legislations were passed by Kentucky and Virginia. In the course of time, four more states brought down the number of capital offences

⁵⁴*Ibid.*

⁵⁵ William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* 6-7 (T. Dobson, Philadelphia, 1793).

which were: Vermont (1797) reduced the number to three; Maryland (1810) reduced the number to four; New Hampshire (1812) reduced the number to two, and Ohio (1815) reduced the number to two. Each of such states constructed state penitentiaries. However, some states adopted a reverse approach and showed favour towards capital punishment. For instance, in Rhode Island capital punishment was restored for the offence of rape and arson; Massachusetts, New Jersey, and Connecticut increased the number of capital offences from six to ten, which included robbery, maiming, sodomy and forgery. Similarly, many states in southern part declared more offences as capital and this practice was especially for slaves.⁵⁶

Before United States secured independence from Britain, all colonies had laws in force prescribing capital punishment for certain offences. Moreover, at that time, the only colony having less than ten capital crimes on the books was Rhode Island. The Eighth Amendment to the United States Constitution (ratified in 1791) which forms part of the 'Bill of Rights', prohibited "cruel and unusual punishments" for offences. The amendment expressly forbade certain punishments such as torture and also prohibited the punishments which were not proportionate to the offence committed.

Since Nineteenth century until today, the courts have had occasion to interpret the term "cruel and unusual" as challenged in several cases. As a result, some means of execution undoubtedly have been forbidden but in no way this helped the prohibition of death penalty as a response to offences. For example, when controversy over public-hanging first surfaced in 1830s on the premise of it being cruel in nature, the states started preferring private hangings.

In early Nineteenth century, many U.S. states started to roll back the use of capital punishment by reducing the number of capital offences. Michigan, in 1846, became the first state to abolish capital punishment for all offences excepting the offence of treason. The Rhode Island, after about six years, while following Michigan went one step ahead and abolished death penalty in entirety. Whereas, some states seemed uncertain about applying capital punishment and went 'back and forth', for example, Maine firstly abolished capital punishment then re-enacted the same and then again abolished it. It was also noticed that states started to give more room for judicial discretion to sentence offenders.

⁵⁶*Supra* note 49 at xvi-xvii.

However, when civil war broke out in mid-20th century, the opposition movement of capital punishment got slowed down. During 1919-20, Arizona, Oregon and Washington reinstated capital punishment. In 1924, the first death punishment using cyanide gas was given in Nevada by executing Gee Jon who was found guilty of Tong war gang murder. It was intended to pump the gas in a secret way into the cell of Jon while sleeping at night as a humanitarian way of execution but it could not succeed owing technical difficulties and a special “gas chamber” had to be constructed in haste. Other concerns developed when less "civilized" methods of execution failed. In 1930, Arizona became the first state to execute a female named Eva Dugan. While executing her, that hangman failed to judge the drop and consequently her head got ripped from the body. In backdrop of such happenings, more states started using gas chambers and electric chairs to execute criminals. During that time, a large number of organisations seeking abolition of death penalty came into existence all over United States but they could not make a significant effect. Execution of some offenders such as Julius and Ethel Rosenberg, convicted for committing felony attracted stormy protests but such protests were mainly against the individual cases of execution and did not oppose the capital punishment in itself. In fact, during the anti-communist period, Allan Shivers, the Governor of Texas made a serious suggestion that death sentence should be awarded to those joining the Communist party as a member.⁵⁷ However, by the end of twentieth century, the abolitionist movements witnessed revival again paving way for rolling back the death penalty.

In 1972, the United States Supreme Court suspended the use of the capital punishment in *Furman v. Georgia*⁵⁸ and called for state legislators to combat the arbitrary implementation of the capital punishment. However, this suspension remained only for the short period four years when United States Supreme Court in 1976 again reinstated this punishment in *Greg v. Georgia*⁵⁹. But in 2002 United States Supreme Court in the case of *Atkins v. Virginia*⁶⁰ again restricted the use of capital punishment on the mentally retarded person and held its use as unconstitutional.

The history of capital punishment demonstrates the general turning away from its use and helps illuminate the reason why the issue is so divisive. Death penalty is and has been used as a tool

⁵⁷Supranote 10.

⁵⁸ 408 U.S. 238 (1972).

⁵⁹ 428 U.S. 153 (1976).

⁶⁰ 536 U.S. 304 (2002).

in maintaining social order, and also to appropriately punish the heinous offences. After the enlightenment, people started arguing against the use of capital punishment in an advanced and civilised society. A higher value had been placed on human life and the rights of individuals, so the federally sanctioned killing of humans became a stronger moral issue. The human life and individual rights have been declared to be of higher value and importance and hence the federally sanctioned killing of human beings turned out to be a strong and bigger moral issue.

Conclusion

Capital punishment has a long and intricate history, interwoven with the cultural, political, and religious beliefs of various civilizations. Its practice dates back to the earliest human societies, where it served as a tool for maintaining order and deterring crime. Ancient legal codes such as the Code of Hammurabi, the Twelve Tables of Rome, and Manusmriti illustrate how death penalties were tailored to the societal norms and hierarchies of their times. From these origins, the evolution of capital punishment has mirrored shifts in political systems, religious doctrines, and moral philosophies.

The medieval and early modern periods saw both the widespread use of capital punishment and the gradual emergence of critiques against its brutality and arbitrariness. Thinkers like Cesare Beccaria laid the groundwork for abolitionist movements by questioning the moral and utilitarian justifications for state-sanctioned executions. The debates around the death penalty gained momentum in the Enlightenment era, where emphasis on human rights and the value of life began to reshape legal systems worldwide.

In the modern era, while some jurisdictions have abolished the death penalty or limited its application to the most heinous crimes, others continue to defend its use as a necessary deterrent and retributive measure. This divide reflects deeper societal values, where arguments for justice and public safety clash with calls for reform and humanity.

The history of capital punishment is a testament to humanity's evolving sense of justice. It underscores the need for continuous dialogue to reconcile its ethical implications with the demands of law and order. As nations progress, the debate over its legitimacy remains a critical question for policymakers, legal scholars, and society at large.