



**Souvenir**

**International Seminar**  
*on*

**Relevance of the Indian Penal Code in  
Controlling and Combating Crime in  
Modern Age**

(Commemorating the Hundred fiftieth Anniversary of the Indian Penal Code, 1860)

**December 14-15, 2010**

Organized by :

**Centre for Criminal Justice Administration**

**Dr. RML National Law University, Lucknow**

डा. राम मनोहर लोहिया राष्ट्रीय विधि विश्वविद्यालय, लखनऊ





International Seminar  
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**"Relevance of Indian Penal Code in Controlling and  
Combating Crime in Modern Age"**

(Commemorating the Hundred fiftieth Anniversary of the Indian Penal Code, 1860)

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Judge, Supreme Court of India

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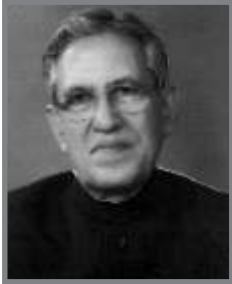
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**B.L. Joshi**

Governor, Uttar Pradesh



Raj Bhawan  
Lucknow - 227 132

Date : 08 December, 2010

## MESSAGE

I am happy to know that the Dr. Ram Manohar Lohiya National Law University, Lucknow is organizing an International Seminar on "Relevance of the Indian Penal Code in Controlling and Combating Crime in Modern Age" on December 14-15, 2010 to commemorate the 150th year of Indian Penal Code.

Penal Code is one of the most important statute in the Criminal Administration of Justice in the country. It is still adequate and appropriate to meet the day to day needs. But with the nature and facets of crime, particularly in the field of terrorism, international crimes, cyber crimes and environmental crimes, it is needed to assess and scrutinize the needs of the society. I am sure that this seminar will deliberate on these vital issues and suggest the way forward.

I extend my greetings to the organizers and all the participants and wish the seminar all success.



**(B.L. Joshi)**

*Justice A.K. Patnaik*  
*Judge*  
*Supreme Court of India*



*1, Rajaji Marg,*  
*New Delhi - 110 011*  
*Phone : 23017380*

## MESSAGE

Dr. Ram Manohar Lohiya National Law University is organizing an International Seminar on December 14-15, 2010 to commemorate the 150th year of the Indian Penal Code.

The Indian Penal Code has been drafted with precision on the law of crimes. The provisions of the Indian Penal Code read with the judgements of the Privy Council and the Supreme Court of India amply demonstrate the great wisdom of the authors of the Code.

I have no doubt that the Indian Penal Code will continue to hold the field in criminal law in India for another 100 years if not more requiring only a few amendments warranted by the needs of the time.

I wish the International Seminar, in which Judges, Lawyers and Academicians with vast knowledge and experience in criminal law are going to participate, a great success.

New Delhi,  
10.11.2010

A handwritten signature in black ink, appearing to read 'A.K. Patnaik' with a stylized flourish at the end.

**(A.K. Patnaik)**

**Prof. Balraj Chauhan**  
Vice-Chancellor



Dr. Ram Manohar Lohiya  
National Law University, Lucknow



## **MESSAGE**

On behalf of Dr. Ram Manohar Lohiya National Law University, I extend you all a very warm welcome for taking trouble to participate in International Seminar on 'Relevance of the Indian Penal Code in Controlling and Combating Crime in Modern Age' organized by us. This university is actively involved in generating as well as disseminating knowledge information so that we may transform our society into a knowledge society.

Are our existing laws able to protect and punish the persons who are creating threats and challenges to the society ? To discuss upon these things in detail, this seminar would prove seminal for further upcoming discourses in this reference, and I am hopeful that your active participation will provide us opportunity to evaluate the strength and weaknesses of the existing laws so that useful recommendations may be made to the departments concerned for its effective implementation.

I would like to thank Chairperson of the General Council, Hon'ble Chief Minister of Uttar Pradesh Ms. Mayawati, Department of Higher Education, Government of Uttar Pradesh, and other sponsors for their support.

**Prof. Balraj Chauhan**

**INTERNATIONAL SEMINAR**  
**ON**  
**"RELEVANCE OF INDIAN PENAL CODE IN CONTROLLING**  
**AND**  
**COMBATING CRIME IN MODERN AGE"**

(Commemorating the Hundred fiftieth Anniversary of the Indian Penal Code, 1860)

**Background**

The Indian Penal Code, 1860 is the earliest, comprehensive and codified Criminal law that the British Indian Administration enacted primarily for India and later on extended to other Asian countries like Singapore and Malaysia. It is to the credit of this unique Code that even after one hundred and fifty years, it has continued to occupy the position of basic Criminal Law of India and other countries that have undergone significant social and political transformations during the course of past one and a half centuries. This has been possible, both, because of inherent normative qualities of the Code, as well as its amenability to creative interpretations that the judiciary has fully deployed. This has enabled the Code to remain alive and socially relevant document.

For a Penal Code to remain alive and socially relevant even after one hundred and fifty years is no mean achievement and calls for a grand commemorative event. The forms and styles of commemorations can differ, depending upon the objective at hand. The National University of Singapore in their commemoration of the Penal Code, on June 9 to 11, 2010 had mainly focused on: A Model Indian Penal Code Adhering to the Philosophy of Macaulay. The seventeen presentations to the symposium (fifteen in person and two through video conferencing) from scholars drawn from Australia, U.K., Canada, Malaysia, India and Singapore primarily focused on the great contribution of Lord Babington Macaulay to the drafting of the Penal Code, but also deliberated on the continuing relevance of Macaulay's Philosophy to Criminal Law reform and a Model Penal Code. Since the symposium was a part of a project on the same theme the Penal Code commemoration event was heavily influenced by the project objective.

We propose to commemorate the Penal Code in the light of its utility for the community and the actual users like judges, lawyers, criminal justice agencies like Police, Prosecutors, Prison functionaries, etc. Since each of the user of the Penal Code will have a different perspective on the merits and demerits of the Penal Code, it is hoped that at the end, the commemoration deliberations would present a broad picture of criminal law reform agenda, which will be grounded on actual ground level realities. Thus, it is hoped that the Conference/Seminar would not only make the commemoration exercise a celebration but also a serious exercise on meaningful Penal Code reforms. Obviously, the success of such a commemoration event with twin purpose

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would depend upon the cooperation, participation and involvement of the members of the Bench, Bar, Academics, criminal justice professionals and the civil society organizations. Law students would be an integral part of such a commemoration event.

**Objectives of the Seminar**

1. To sensitize the participants with a view to make them aware of the relevancy of the Indian Penal Code.
2. To study and analyze the implications and effects of the provisions of IPC in the light of changing societal structures and new types of offences entering into.
3. To educate Civil Society groups about the legal and constitutional issues and stakes involved.
4. To assure citizens regarding their concerns on privacy, personal liberties and freedoms.
5. To identify the possible areas of conflict and operational problems
6. To draw a mechanism for modification of provisions of Indian Penal Code.

**Level of Participants**

1. Distinguished members of the Bench and Bar
2. Senior Prosecution Officials
3. Senior Police Officers
4. Criminal Justice Academicians
5. Civil Society Groups
6. Students

**Number of Participants**

The expected number of participants in the seminar is approximately 200 (out of which 50 may be Students).

**Methodology**

It is proposed that the 2-day Seminar will be divided into 6 (six) interactive sessions/focused group discussions. Each session shall be Chaired and Moderated by a Chair & Co-Chair. Every session will have a key theme paper presentation.

**Sessions**

1. Ideology, History and Philosophy of IPC.
2. Law and morality debate in the context of IPC with special emphasis on suicide and homosexuality.
3. Punishment in IPC with special emphasis on death penalty.
4. Reforms in Homicide Law.
5. Offences against religion and public tranquility.
6. IPC, Judicial Law Making and Agenda for reform.



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**December 14-15, 2010**  
**Venue : Seminar Hall, RMLNLU**

**Session Plan**

**Day 1 – December 14, 2010**

9:00 A.M.	Registration of Participants and Distribution of Kit
9:45 A.M.	Assembling of Participants in the Seminar Hall
10:00 A.M.	Welcome of Guests
10:10 A.M.	Lightening of Lamp followed by Saraswati Vandana
10:15 A.M.	Welcome address by Prof. Balraj Chauhan
10:25 A.M.	Address by Prof. B.B. Pande about the Seminar
10:35 A.M.	Presidential Address by Hon'ble Dr. Rakesh Dhar Tripathi, Hon'ble Minister, Higher Education, Government of Uttar Pradesh
10:45 A.M.	Address by Hon'ble Prof. (Dr.) N.R. Madhava Menon
10:55 A.M.	Inaugural Address by Hon'ble Chief Justice F.I. Rebelló, Chief Justice, Allahabad High Court
11:05 A.M.	Vote of Thanks by Mr. K.A. Pandey, Organizing Secretary
11:10 A.M.	<b>High Tea</b>
11:30 AM – 12:00 P.M.	Plenary Session 1 on 'Rewriting the Indian Penal Code' by Prof. N.R. Madhava Menon Chairperson – Prof. B.B. Pande Co-Chairperson – Prof. M. Zakaria Siddiqui

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- 12:00 P.M. – 2:00 P.M.    Session-1 (Seminar Hall)  
Theme of Session 1 – Ideology, History and Philosophy of IPC
- 12:00 P.M. – 2:00 P.M.    Session-2 (Video Conferencing Hall, Library Building)  
Theme of Session 2 – Law and Morality Debate in the Context of IPC with special Emphasis on Suicide and Homosexuality
- 2:00 P.M. – 2:30 P.M.    **LUNCH**
- 2:30 P.M. – 4:00 P.M.    Session 3 : (Seminar Hall)  
Theme of Session 3 – Punishment in IPC with special emphasis on Death Penalty
- 2:30 P.M. – 4:00 P.M.    Session 4 : (Video Conferencing Hall, Library Building)  
Theme of Session 4 – Reforms in Homicide Law
- 4:00 P.M. – 5:30 P.M.    Session 5 : (Seminar Hall)  
Theme of Session 5–Offences against Religion and Public Tranquility
- 4:00 P.M. – 5:30 P.M.    Session 6 : (Video Conferencing Hall, Library Building)  
Theme of Session 6–IPC, Judicial Law Making and Agenda for Reform
- 5:30 P.M. – 7:00 P.M.    Cultural Evening (Performances by Students and Faculty of Bhatkhande University) and End of Day 1

**Day 2 : December 15, 2010**

- 10:00 A.M. – 1:00 PM    Plenary Session -2
- 1:00 P.M. – 2:00 PM    **LUNCH**
- 2:00 P.M. – 4:00 PM    Valedictory Session & Certificate Distribution

## **PHILOSOPHY AND HISTORY OF THE INDIAN PENAL CODE AND CRIMINAL LAW REFORMS IN INDIA**

**Professor B.B. Pande**

Former Professor of Criminal Law and Criminology,  
University of Delhi

As the most comprehensive, complete, deliberated and debated legal measure enacted by the British colonial administration, the Indian Penal Code, 1860 stands out for its qualities of analytical rigour and philosophical integrity. Lord Thomas Babington Macaulay, the chief architect of the Code describes the rationale for going in for a Code, thus

I mean a Code which deserves the name, is not a mere series of unconnected provisions; it is one great and entire work symmetrical in all its parts and pervaded by one spirit. It is not sufficient to consider whether a rule appears in itself to be unexceptional. It is also necessary to consider how that rule may affect other rules which are scattered over every part of the code.<sup>1</sup>

It is not the analytical rigour alone, to which the statement of Lord Macaulay alludes, but also the quality of philosophical integrity that makes the code a unique document. The Codes' uniqueness lies at the root of its ready acceptance both by the ruler and the ruled not only during the colonial rule but in the post colonial independent India as well. That is the main reason why even after one hundred and fifty years of its initial enactment by the colonial administration, the present democratic, secular, socialist, republican Indian Government finds nothing wrong not only in its continuance immediately after the establishment of the Indian Republic<sup>2</sup>, but even after six decades. As a consequence in the present day to day criminal justice administration the Penal Code constitutes the basic framework for criminalization of behaviour and imposition of appropriate sanctions. The IPC crimes are the major crimes investigated by the Police and other investigatory agencies, they constitute the bulk of crimes prosecuted and tried by the trial and appellate courts and a large majority of prison population are those who are being processed for Penal Code offences. All this raises certain significant issues: why did the British colonial administration consider the enactment of the Penal Code so vital in 1860? Why the Penal Code was subjected to a few changes in the course of the remaining period of colonial administration? Why the Independent Indian State find nothing inherently wrong in being subject to the colonial Penal Code? Why even after the growing, impact of constitutional rights and aspirations the Indian society, by and large, approves the Macaulay's philosophy underlying the Penal Code? We propose to seek answers to aforesaid issues by exploring the philosophical and historical premise of the Penal Code and other Criminal Law Reforms.

### **(i) Inherent Tension Between Philosophical and Historical Approaches to Criminal Law**

Critiquing the American legal scholarship M.J. Horwitz (1981 at 1057) writes:

By and Large, the Dominant tradition in Anglo-American legal scholarship is unhistorical It

attempts to find universal rationalizing principles... The ideological 'tilt' of the current legal scholarship derives from this attempt to suppress the real contradictions in the world. To make the existing world seem to be necessary... to be part of nature of things. It is history that comes to challenge this approach by showing that the rationalizing principles of the mainstream scholars are historically contingent<sup>3</sup>.

The aforementioned quote of Horwitz is a pointer to the two distinct approaches to crime and criminal justice administration all over the world. The tension between the two approaches relates to the core issue namely: What Criminal Law ought to be and what criminal Law is in reality, a tension between juridical and real.

### **The Philosophical Premise**

George Fletcher in his book *Rethinking Criminal Law*<sup>4</sup> states: "Criminal Law is a species of moral and political philosophy". The sense in which moral philosophy gets reflected, apart from the general theory of criminalization of behaviour such as Suicide, Euthanasia, Abortion, Homosexuality, is in the attribution of fault and moral blameworthiness. Similarly political philosophy that deals with the relationship of the state with the individual is at the root of all the individual responsibility and criminal liability theorisations. Relying upon the philosophical approach much of the work of the British doctrinal criminal law theorists seeks accounts of the moral or intellectual justifiability of the criminal law and assumes that a general account may be derived of what the criminal law principles of responsibility should be in all places for all times. In this tradition fall some of the foremost thinkers of criminal Law such as J.S. Mill (*On Liberty*), H.L.A. Hart (*Punishment and Responsibility* (1968), Glanville Williams (*Text book of Criminal Law* (1983), *Sanctity of Life and the Criminal Law* (1958), Jerome Hall (*General Principles of Criminal Law* (1960), *Law, Social Science and Criminal Theory* (1982) and Antony Duff (*Trial and Punishment* (1986), *Intention, Agency and Criminal Liability* (1990), *Criminal Law: Principles and Critique* (1997)

### **The Historical Premise**

Alan Norrie states the historical premise in his book *Crime, Reason and History*<sup>5</sup> thus:

The Modern criminal Law was formed in a particular historical epoch and derived its characteristic 'Shape' from fundamental features of the social relations of that epoch. Its principles therefore are historic and relative rather than natural and general. Furthermore, these principles are established in the crucible of social and political conflict and bear the stamp of history in the always – contradictory ways in which they are formulated. Historical analysis shows that, far from being free-standing foundations for a rational criminal law, the central principles of the law are the cite of struggle and contradiction... Thus it is that the fate of law as a rationalizing enterprise is tied up with the nature of law as a social and historical force<sup>6</sup>.

Thus, Criminal Law is both a rationalizing enterprise that is premised on Universal moral and political philosophy and also a product of social and historical force that get manifest in political and social events. In the foregoing pages we shall briefly examine the contributions of the philosophical as well as the historical approach in the formation of the Penal code and the subsequent Criminal Law reforms.

**(ii) Lord Macaulay's Philosophical Legacy and the Penal Code**

As a student and later as a teacher of Criminal Law for five decades, I scarcely realised the profound value of philosophy and history of Laws till I received an invitation from the National University of Singapore in early April 2009 for an International Conference on: A Model Indian Penal Code Adhering to the Philosophy of Macaulay, to be held in June 9 to 11, 2010. The conference was a part of an on going project on Model Indian Penal Code. The primary objective of the Project was to "argue for a modern set of general principles of criminal law that is consistent with the spirit of Macaulay's original draft, and which could be incorporated into an up- dated version of the Indian Penal Code" The Project description goes further to elaborate "The IPC was intended by Macaulay and his fellow Code framers to be regularly revised whenever gaps and ambiguities were found. Unfortunately, this did not occur, with the result that the courts had to undertake this task, sometimes with unsatisfactory outcomes. This was in part due to the failure of the courts to recognise or follow the philosophical underpinnings of the IPC."

It might not have been possible for me then, and even now, to fully agree with the project objectives and description, but the Project did give me a valuable insight for understanding and appreciating a branch of law that I thought I knew so well. More importantly the Project turned me into a Macaulay reader, with much less prejudice.

**Philosophical Underpinnings of the Penal Code in The Making**

The 19<sup>th</sup> century was the era of Classicalism that perceived every criminal conduct as freely willed; men by nature, self seeking and liable to commit crimes; consensus in society to protect private property and personal welfare; contract with state to preserve peace within consensus; prerogative of state to deter criminals by punishment; punishments to be tested in the touchstone of utility. To the Classicalists, the criminal justice system was perceived as a system of freely chosen contracts between men and liberal society. Deviations from these laws, provided the criminologists a criteria for identifying deviant men, the pathological individuals in a more or less perfect society. Under the influence of classicalism, Bentham advocated a comprehensive Code of universal applicability, taking a reductionist view of human behaviour and public policy that propagated 'enlightened despotism'. Unlike Bentham and Mill, Macaulay who followed libertarian Whig values that realised the dangers of arbitrary powers and the values of gradualism. However, Macaulay did derive full advantage from Bentham's theory of jurisprudence and Science of Legislations as well as legislative absolutism.

The 'Watershed' Charter Act 1833 re-organised British government in India by creating a unified legislative body in the form of an appointed Legislative council which was headed by the governor general and had provisions for centralizing and coordinating military and civil authorities and commercial interests of the company. With the appointment of Thomas Babington Macaulay as the Council's legal representative a special law commission was appointed under his direction. Macaulay's liberal yet authoritarian initiatives ultimately culminated in the Penal Code. The post-1833 policy shift is captured in the following statement of Eric Stokes:

The physical and mental distance separating East and west was to be annihilated by the discoveries of science, by commercial intercourse and by transplanting the genius of English

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laws and English education. It was the attitude of English liberalism in its clear, untroubled dawn, and its most representative figure in both England and in India was Macaulay<sup>7</sup> .

Macaulay's philosophy that motivated the enactment of the Penal Code is reflected in the following quote:

There is a bad judicial system; there is bad police. There are people accustomed for ages to be plundered and trampled upon and ready to cringe before every resolute and energetic oppressor. The system of dacoity and the system of Thuggee are more malignant evils of the same family. They are evils which never could exist to the same extent to which they exist here in a country where the tribunals and police were more efficient or in a country peopled by a manly and highly spirited race<sup>8</sup> .

Macaulay saw no hope in the prevailing legal system that he considered most inappropriate in these words:

All those systems are foreign. All were introduced by conquerors differing in race, manners, language and religion from great mass of people. The criminal law of Hindus was long ago superseded, through the greater part of the territories now subject to the company, by the Mohammedans and it is certainly the last system of criminal law which an enlightened and humane government would be disposed to<sup>9</sup> .

Why did Macaulay, a product of British common law tradition go all out for codification? The following quote provides an answer:

The principle is simply this: uniformity where you can have it; diversity where you must have it, but in all cases certainty<sup>10</sup> .

It is an enigma that liberal and egalitarian Macaulay agreed to enact a Penal Code that was not free from repressive elements. Perhaps, the following quote could give some insight into Macaulay's state of mind:

We know that India cannot have a free government. But she may have the next best thing—a firm and imperial despotism. The worst state in which she can possibly be placed that in which the memorialist would place her. They call on us to recognise them as privileged order of free men in the midst of slaves. It was for the purpose of averting this great evil that Parliament, at the same time at which it suffered the English men to settle in India, armed us with those large powers which, in my opinion, we ill- deserve to possess if we have not the spirit to use them now.<sup>11</sup>

The underlying philosophy of the makers of the Penal Code has been diversely understood. T.K. Vinod Kumar and Arvind Verma see it as a ploy of disguising the legal power in these words.

The Indian Penal Code and other laws were overtly portrayed as measures to provide justice to the natives. Though security to life and property was important, equally and more important to the British was the acquiescence and compliance by the natives to provisions protecting the state. The British were 'euphemizing' their legal powers, as acts of providing justice to the natives for extracting compliance to all legal codes<sup>12</sup> .

Barry wright is more forthright in his appreciation of philosophy of the Penal Code in the following observation:

Thus the IPC was also about power in the broader sense. It was a manifestation of rationalized and modernised forms of authority which placed rule of law at the centre and aimed to make the British governance more effective and legitimate in what had seemed to be the inheritable complexities of India<sup>13</sup>.

Therefore, broadly the philosophical premise underlying the enactment of the Penal Code were:

- (i) That every crime being 'freely willed' enables the law maker to distinguish diverse shades of human will in the form of mens rea or mental element required for each offence.
- (ii) That is possible to deter every crime by effectively imposing the appropriate punishment that will reduce the criminal's pleasure incentive.
- (iii) That the state is under a positive obligation not only to up- date the existing law, but also to enact new laws as per the needs and aspirations of the society.
- (iv) That state has an obligation to assume moral leadership role in matters of criminalization and decriminalization of conduct constantly.
- (v) That new criminalization must go side by side with the task of classification and categorisation on the basis of interest protected and their significance for the society.

### **Historical Underpinnings of the Penal Code:**

Why do crime concepts, doctrines and sentencing principles get mildly or substantially altered in diverse country jurisdictions following the common law tradition? The answer lies in the historical and social context in which crimes arise and concepts, doctrines and principles are applied<sup>14</sup>. This requires us to recognise the value of historical approach. Thus, at the time of enactment of IPC, Macaulay and his fellow members were serving the needs to the dominant colonial administration that was keen to legitimize their rule through a singular standard of justice that was superior to the existing Muslim, Hindu and Company Regulation laws. However, as the colonial rule progressed into the 20<sup>th</sup> century the growing labour and political dissent, as well as mass discontent arising from economic distress and sheer misgovernance created pressures to go in for change that criminalized combinations and created new offence of conspiracy (adding ss. 120A and 120B) in 1913, on the one hand, and, repeal of all the breach of contract offence legislations (the Workmen Breach of Contract Repeal Act, 1925), on the other. However, the most significant events to impact the Penal Code are:

- (a) The end of colonial rule and grant of independence in 1947
- (b) The enactment of the constitution with guaranteed rights to the citizens, including the accused.
- (c) The growth of national and international terrorism.

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- (d) The maturing of the Indian democracy and sustained economic growth and development in all spheres of political and social life.

A full assessment of the aforesaid and many other political and social events in the changes on the Penal Code and law reform initiatives in the need of the hour. Are the Indian criminal Law scholars responding adequately to this need?

**Endnotes:**

- 1 Lord Macaulay's Legislative Minutes, Geoffrey Cumberlege, OUP (1946) selected by C.D. Dharkar, 'The Law Commission and the Penal Code' No. 28 (no date), p. 256
- 2 Article 372 of the Constitution of India, 1950 expressly provide for the "Continuance in force of existing law's and their adaptation"
- 3 Horwitz, M.J., 'The Historical Contingency of the Role of History', 90 Yale Law Journal at 1057
- 4 Fletcher, G. Rethinking Criminal Law (1978), Boston M.A: Little Brown, at p.1
- 5 Alan Norrie, Crime, Reason and History (1993), weidenfeld and Nicholson, London
- 6 Ibid at p.9
- 7 Stokes, Eric, The English Utilitarians and India, OUP, London (1959)
- 8 Lord Macaulay's Legislative Minutes, Miscellaneous Minute No. 30, 13 November, 1935 pp. 277-78
- 9 Ibid, Minute No. 28 (no date) at p. 260
- 10 Complete Works of Thomas Babington Macaulay (1989), Quoting the observation in House of Commons on July 10, 1833, at p. 579, Longmans Green & Co. London.
- 11 Lord Macaulay's Legislative Minutes, The Black Act no. 10 (no date) at p. 180
- 12 Vinod Kumar, T. K. and Verma, Arvind "Hegemony, Discipline and control in the administration of Police in colonial India," Asian Criminology (2009) vol. 4.pp. 61-78 at p. 67
- 13 Wright, Barry, "Macaulay's Indian Penal Code: Historical Context and Organizing Principles", Model Indian Penal Code Project, draft paper, at pp. 4-5
- 14 See Pande, B.B., "Paradoxes in the Common Law of Crimes: A Comparative Analysis in the Light of Criminal law of the United Kingdom, Hong Kong and India," (2008). Journal of the Indian Law Institute vol 50 July-Sept. 2008 pp. 303-320



## **ABOLITION OF DEATH PENALTY & FAILURE OF RAREST OF RARE DOCTRINE IN INDIA**

**Prof. (Dr) Faizan Mustafa<sup>1</sup> and Yogesh Pratap Singh<sup>2</sup>**

<sup>1</sup>Vice-Chancellor, National Law University, Orissa

<sup>1</sup>Faculty, National Law University, Orissa

There is practically no country in the world where the death penalty has never existed. Clarence Patrick, who studied 128 countries on the use of capital punishment, found that 109 countries resorted to it for a total of 109 crimes. About 90% of all the countries surveyed punished murder and treason by death Penalty.<sup>1</sup>

The term “capital punishment” stands for the most severe form of punishment. It is the punishment which 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, age to age the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology and penology, capital sentence means a sentence of death.<sup>2</sup>

In India it is as old as the Hindu Society itself. Hindu lawgivers did not find anything abhorrent in it; they justified it in the cases of certain serious offences against the individuals and the State. As far back as the 4<sup>th</sup> century B.C. the science of penology was a fully developed subject of study and statecraft in India. The death penalty occupies a peculiar place in discussions of punishments. The present situation in this matter as many others is largely linked with the past. This paper is an attempt to examine the death penalty in historical retrospect, focusing its attention on legislative and judicial response to it. It examines the legitimacy and constitutionality of mandatory death sentence, particularly its continuance in spite of our apex court’s disapproval of it.

We have to examine the effect of the ‘doctrine of rarest of rate’ on the rate of death penalty. The hypothesis which is tested here is that ‘after the doctrine of rarest of rate there is no substantive change in the award of death penalty’. In other words the doctrine which attempted to reduce the rate of capital punishments has, in fact failed or sometimes led its increase. The judges have now got a pliant doctrine which they can employ in any case whenever they want to justify infliction of death penalty. It should be noted that for centuries the death penalty was not debated so far as its legitimacy or its practical utility was concerned. Its acceptance in ancient societies seems to have depended on three fundamental principles:

- (a) Insignificant values attached to human life or at least, to the life of any particular individual, or class of individuals.
- (b) Death of the criminal was considered to be just and necessary under the principle of retribution.
- (c) The death penalty was to find natural support by the arrival or gradual establishment of an

all-powerful state, where the sovereign, considered so by divine right, was both the only source of justice and the guardian of peace or of public safety.<sup>3</sup>

These three reasons, historical and ideological, contributed to make recourse to the death penalty appear necessary, in the original sense of that word. But people had failed to note that certain primitive or ancient societies did not know the death penalty or accorded it an extremely restricted place. Such was the case of the very ancient Chinese Law as revealed in the famous book of "Five Punishments."<sup>4</sup> it was unknown in Slavic customary law before the Ukases of the Tsars and even then it was found only exceptionally in certain population group, such as the Cossacks, where it was provided only for the theft of horses. Finally, we know that it was rejected by the Canon Law, which only worried about penitence and left the death penalty to the secular branch.<sup>5</sup> The abolition movement can doubtless point to ancient precursors and, in that connection, one should not forget the activity of George Fox in the 17<sup>th</sup> Century. But, it was with the publication of the treatise "Crimes and Punishment" by Cesare Beccaria some two hundred fifty years ago that the movement brilliantly asserted itself. For the first time an authoritative and widely heard voice raised a doubt about the very legitimacy of the death penalty. In 1767 Catherine II ordered the commission that she had appointed to draft a new code to exclude the death penalty. In 1786 and 1787, respectively Leopold II of Tuscany and Joseph II of Austria removed the death penalty from their Corpus Juris Criminalis<sup>6</sup>. In England Sir Samuel Romilly began his famous campaign for reducing capital crimes. Which at the time numbered over 200, and in 1829 the first association for the abolition of the death penalty was formed in London.<sup>7</sup> The Austrian Code of 1805, the French Code of 1810 and the Bararian Code of 1813, lent strength to the abolition movement.

Thorsten Sellin has demonstrated a scientific study of crime rates and trends which shows that the abolition or the re-establishment of capital punishment in a country has never led to an abrupt and appreciable rise (or fall) in criminality.<sup>8</sup>

In India, the issue of the abolition of capital punishment was raised for the first time in the Legislative Assembly in 1931, when one of the members from Bihar, Shri Gaya Prasad, sought to introduce a Bill to abolish death penalty, but it was defeated.<sup>9</sup> In 1933 again leave was granted to introduce a Bill to abolish capital punishment, but it was never moved.<sup>10</sup> The government's policy on death penalty in British India prior to independence was clearly stated twice in 1946 by the then Home Minister, Sir John Throne, in the Legislative Assembly: "The government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided"<sup>11</sup>.

In the post independence era, resolutions for the abolition of capital punishment were moved thrice in Parliament, twice in Rajya Sabha and one in the Lok Sabha, but nothing could be achieved.

In 1956 the central government sought the opinion of all the states in India on the issue of abolition of death penalty. All the states emphatically opposed abolition of capital punishment. In its 35<sup>th</sup> Report, the Law Commission of India favored a cautious approach and pleaded its retention as an exceptional penalty.<sup>12</sup>

## **Arguments For and Against Death Penalty**

Hackel regarded capital punishment as a process of artificial selection. And Garofalo even went to the extent of saying that elimination of criminals was a sort of moral war for the good of society. According to Lambroso capital punishment should be good as a threat to habitual and incorrigibles. Even George Ives was of the opinion that the incorrigible or hopeless criminal should be painlessly removed rather than that the State should have to maintain him unnecessarily.<sup>13</sup>

On the other hand highly convincing arguments have been made by the abolitionists.

Prof. H.L.A. Goodhart said, "It would be a terrible thing if a man has been hanged for a crime which he has not committed, in such a case law itself, would be a murderer."<sup>14</sup> Beccaria denounced capital punishment on the ground that the State has no right to put an individual to death, because the life of the individual was not surrendered to it as a part of the consideration for the social contract. Stutman also opposed death penalty.<sup>15</sup> Hentig opposes it because of the possibility of judicial error.<sup>16</sup> David Abrahamsen says that during the 18<sup>th</sup> century pick pocketing was punishable with death. Even when the offender was being hanged, there were sharpers ready to pickpockets of those who delighted themselves as spectators at the scene of the execution. This shows how "effective and deterrent", has been the punishment of death<sup>17</sup>.

Wendell Phillips says that the number of persons sent to execution by the courts, and afterwards proved to be innocent, has been counted by hundreds in Great Britain, and most probably be counted by thousands, taking into account even only the civilized states.<sup>18</sup>

Then death penalty results in sympathy for the criminal. It is rightly said that people forget the crimes of the prisoners and remember only what happens last, the execution of death sentence. The accused becomes to some extent a hero, his photograph is published in all papers.<sup>19</sup> The Kehar Singh case in India is the glaring example in this connection. All newspapers published his photographs and termed his execution in their editorials as "Judicial murder", "Shame" etc. Beccaria argues that it is not the intensity but the duration of punishment which has the greater effect upon man's mind, because our sensitivity is affected more easily and permanently by small but repeated impressions than by a strong but momentary shock.<sup>20</sup> Then, it is also questionable whether death is a punishment at all. Caesar's answer is in the negative:

So far as the penalty is concerned, I can say with truth that amid grief and wretchedness death is a relief from woes, not a punishment; that it puts an end; to all moral ills and leaves no room either for joy.....To kill is not to punish.... If by death we cut off his joys and happiness in the same measure we cut off his sorrows and humiliation....Death is an asylum, impregnable against punishment.<sup>21</sup>

Finally, no uniformity has been practiced in the award of death sentence. From the world survey report it can be said that between 1930 to 1980, 3860 persons were executed from eight different crimes. Almost all of them were males. Since 1930 only 32 women have been executed. A gross comparison of the death-sentencing rates for men and women suggests that women convicted of murder are unrepresented on death row. Two per cent of men but only one tenth of one per cent of women convicted of murder are condemned to die.<sup>22</sup>

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Similarly there has been a discriminatory treatment towards blacks as well. Thus in U.S., when charged with murder, black males stood twice a chance of conviction about that for white males. That chance was even greater when black and white females are compared.<sup>23</sup> But in a recent research it has been demonstrated that there will be no change in the fate of blacks even if more black judges are appointed because there are remarkable similarities in the sentencing decisions of black and white judges. In fact black judges punish black offenders more severely than the white offenders.<sup>24</sup>

The national records in the U.S. show that during the 20<sup>th</sup> century executions reached a peak in the mid-1930s after which they steadily declined. The annual average during the 1930s was 1967; during the 1940s, 128; in the 1950s, 72 and 19 in the 1960s. In the 1970s only three persons, all male and all white, were put to death.<sup>25</sup> But the decline in executions since the mid-1930s may be somewhat deceptive, in that the awarding of death sentences per se has not diminished at the same rate. During the 1970s, an average of 160 persons were sentenced to death annually, whereas during the previous decade the average was 113. Only a few of these sentences were carried out, owing primarily to appellate litigation over the constitutionality of the death sentence. Even during 1981 more than 800 persons in twenty nine jurisdictions were awaiting execution.<sup>26</sup>

The modern penology is changing from crime to criminal, objective to subjective and from retribution to real correction of individual. Various national and international forums have debated the issue e.g Economic and Social Council, 6<sup>th</sup> Congress on Crime and Treatment of Offenders and also in the 35<sup>th</sup> regular session of the General Assembly of the United Nations.<sup>27</sup>

The U.N. Declaration of December 1977 has given a call to declare death penalty illegal. The declaration observed that this sentence is frequently used as an instrument of repression against opposition i.e. racial, ethnic, religious and under-privileged groups. "It is really unfortunate that in the days of human rights and advanced civilization those in power make use of this sentence through judicial institutions to retain their position and therefore it should be abolished."

The Amnesty International, in its appeal for commutation of death penalty imposed on Mr. Zulfiqar Ali Bhutto, former Prime Minister of Pakistan, had stated, "we regard death penalty to be cruel, inhuman and degrading punishment" and a trial like Mr. Bhutto's conducted in ..... a true political atmosphere, there is a risk of miscarriage of Justice."<sup>28</sup>

But still there is a noticeable hesitancy on the part of many nations to concede to the abolition of death sentence because of the rising tide of terrorism, drug-trafficking etc. Thus, Articles 6(1) and (2) of the International Covenant on Civil and Political Rights do not abolish or prohibit imposition of death penalty in all circumstances. They only require that:

1. Death penalty shall not be arbitrarily inflicted;
2. It shall be imposed only for most serious crimes in accordance with a law which was given option of passing either the death sentence or life imprisonment depending upon the facts and circumstances of each particular case.

It is further provided by Art. 6(3) that anyone sentenced to death shall have the right to seek

pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

In addition, the United Nations Declaration of Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on December 9, 1975 and United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on December 10, 1986 also indicate the disapproval of death penalty.

### **Capital Punishment in India**

The framers of Indian Penal Code, 1860 (I.P.C) were of the view that capital punishment ought to be used sparingly.<sup>29</sup> The position of capital punishment in the Indian Penal Code has not changed as such<sup>30</sup> in hundred and fifty years of its existence but the trend in the direction of the abolition of capital punishment in many countries has affected legislative as well as judicial thinking on the subject.<sup>31</sup> Before the amendment in 1955 of the Criminal Procedure Code (Cr.P.C) of 1898 it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the new Cr.P.C of 1973 the court has to record reasons for awarding death sentence. It is evident that the revision regarding death sentence has gradually been liberalized in favour of the condemned person.<sup>32</sup>

The Supreme Court of India has also given many judgments showing its preference to life imprisonment in all cases except those which do not have extenuating circumstances at all. But in a series of cases the apex court has upheld the constitutionality of death sentence. In Jagmohan Singh<sup>33</sup> case, the question of constitutional impermissibility of death sentence based on provisions of Articles 16, 19 and 21 of the Constitution was raised for the first time. But the court negated the contention and held that deprivation of life is constitutionally permissible provided it is done according to procedure established by law,. However, the court tried to achieve the elimination of death sentence in an indirect manner.<sup>34</sup> In Ediga Anamma,<sup>35</sup> Justice Krishana Iyer commuted death sentence to one for life-imprisonment on the ground of delay of two years in execution.<sup>36</sup> the court again tried to abolish death sentence in Rajendra Prasad<sup>37</sup> when it referred to the history, humanize the law and said the social justice, projected by Article <sup>38</sup>, colours the concept of reasonableness in Article 19 and non-arbitrariness in Article 14. This interpretation of articles 14 and 19 validated death penalty in a limited class of cases only. May be terrorists, drug traffickers, train dacoit and bank robbery bandits, reaching menacing proportions, economic offender profit-killing in an intentional and organized way, are such categories.

The landmark decision was given by the apex court in Bachan Singh case when the court again upheld the constitutionality of the death sentence. But then the court also held that judges should not be blood-thirsty. "Facts and figures show that, in the past, courts have inflicted the extreme penalty with extreme infrequency a fact which attests to caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with more scrupulous care and

humane concern that courts, aided by broad illustrative guidelines indicated by us, directed along the high road of legislative policy outlined in Section 354 (3) of Cr. P.C that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare case when the alternative option is unquestionably foreclosed."<sup>38</sup> (emphasis supplied)

## **JUDICIAL RESPONSE TO MANDATORY DEATH SENTENCE**

The discussion in the aforesaid paragraphs referred to death sentence as one of the alternative sentences. Now we come to the question of mandatory death sentence which is a much graver matter than a provision of death sentence as one of the options available to the judge.

The Indian Penal Code has only one section (Section 303) which provides for the mandatory death sentence for the person who commits murder being under sentence of imprisonment for life. There are as many as 52 sections in the Indian Penal Code (I.P.C) which provide for the sentence of life imprisonment. These sections are : Sections 121, 121-A, 122,124-A, 125, 130, 131, 132, 194, 222,225,232,238,255,302,304 Part I, 305, 307, 311, 313,314,326,329,363-A,364,364-A,371,376,388,389,394,395,396,400,409,412,413,436,438.

A person who is sentenced to life-imprisonment for any of these offences incurs the mandatory penalty of death if he commits a murder while he is under the sentence of life-imprisonment. The reason, or at least one of the reasons why no discretion in such a case was given to the judge to impose a lesser sentence seems to have been that if, even the sentence of life imprisonment was not sufficient to act as a deterrent and the convict was hardened enough to commit murder while serving that sentence, he only punishment in consonance with the deterrent and retributive theories of punishment which he deserved was death. The severity of this legislative judgment was in consonance with the deterrent and retributive theories of punishment which then held sway. Though the Law Commission in its 35<sup>th</sup> Report considered mandatory death sentence under Section 303 but it did not suggest any change. In its 42<sup>nd</sup> Report, again, the commission did not recommend any change, saying that Section 303 is rarely used and in a hard case recourse can be had to mercy powers of the executive. The reformative theory of punishment attracted the attention of criminologists later in the day and, influenced by the theory, the full bench of the Supreme Court in *Mithu Singh V. State of Punjab*<sup>39</sup> held Section 303 as ultra-vires the constitution. Delivering the judgment of the court, the then Chief Justice, Y. V.Chandrachud, observed that "the framers of the I.P.C seem to have had only one kind of case in their mind and that is the commission of murder of a jail officials who were foreigners, mostly Englishmen, and, alongside other provisions which were specially designed for the members of the ruling class, as, for example, the choice of jurors, upon the white officers."<sup>40</sup> Even the Law Commission observed that "the primary object of making the death sentence mandatory for the offence under this section seems to be to give protection to the prison staff."<sup>41</sup>

### **REASONS FOR HOLDING SECTION 303 UNCONSTITUTIONAL**

- (a) The Court observed that there is no valid basis for classifying persons who commit murders whilst they are under the sentence of life-imprisonment as distinguished from those who

commit murders whilst they are not under the sentence of life-imprisonment for the purpose of making the sentence of death mandatory in the case of the former class and optional in the case of the latter class.

- (b) The circumstance that a person is undergoing a sentence of life-imprisonment does not minimize the importance of mitigating factors which are relevant on the question of sentence. Indeed, a crime committed by a convict within the jail while he is under the sentence of life-imprisonment may, in certain circumstances, demand and deserve greater consideration, understanding and sympathy than the original offence for which he has been sentenced to life-imprisonment. A life convict for instance may be driven to retaliate against his systematic harassment by a warden, who habitually tortures, starves and humiliates him.
- (c) The court did not find any rational distinction between a person who commits a murder after serving out the sentence of life-imprisonment and a person who commits a murder while he is still under that sentence. This classification proceeds upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death. A person who stands unreformed after a long term of incarceration is not, by any logic, entitled to preferential treatment as compared; with a person who is still under the sentence of life-imprisonment.
- (d) A standardized mandatory sentence of death fails to take into account the facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.
- (e) The self-confidence which is manifested in the legislative prescription of a computerized sentence of death is not supported by scientific data. There appears to be no reason why in the case of a person whose case falls under Section 303, factors like the age and sex of the offender, the provocation received by the offender and the motive of the crime should be excluded from consideration of the question of sentence.
- (f) Concurring with Chief Justice Chandrachud, Justice Chinnappa Reddy, observed: "Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened constitution like ours." mandatory death sentence: RECENT Legislative Changes

It is clear from the above discussion that mandatory death sentence is held as the negation of civil liberty jurisprudence and a relic of out-dated era<sup>42</sup>. But, unfortunately, recent legislative exercises appear to have completely ignored the apex court's observations and have made further provisions for such a draconian sentencing policy. Some illustrations are cited below.

The Arms (Amendment) Act, 1988: - During May, 1988, the Arms (Amendment) Ordinance (No.5) of 1988 was promulgated. It proposed, among others, an amendment to Section 27, keeping in view the violent conditions prevailing in several states in India. The ordinance became the full-fledged Act on 31<sup>st</sup> August 1988 and was enforced with effect from 1<sup>st</sup> September 1988<sup>43</sup>. The amended Section 27 stands as follows:

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1. Whoever uses any arms or ammunition in contravention of Se.5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.
2. Whoever uses any prohibited arms or prohibited ammunition in contravention of Se.7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.
3. Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of Sec. 7 and such use or act results in the death of any other person *shall be punishable with death* (emphasis supplied).

While Sec. 5 prohibits the use, manufacture, sale, transfer, test or possession of any fire-arm without a license prescribed in that behalf, Sec. 7 forbids acquiring of possession, use, sale, manufacture etc. of any prohibited arms or prohibited ammunition unless specially authorized by the Central Government in this behalf. But then clause(3)) of Sec.27 lays down mandatory death sentence in all cases where a person is dead by virtue of use of prohibited weapons and therefore even the requirement of case falling under Section 299 and 300 is not prescribed. This seems to be violative of apex court's ruling in *Mithu Singh* case.

The Narcotic and Psychotropic Substances( Amendment)Act, 1988<sup>44</sup> :- Section 31A which was inserted by this amendment provided for *mandatory death penalty* for any person who has been convicted of the commission of or attempt to commit, or abetment of, a criminal conspiracy to commit, any of the offences punishable U/Ss. 15 to 25 (both inclusive) or Section 27A, if he is subsequently convicted of the commission of or attempt to commit or abetment of, or criminal conspiracy to commit an offence relating to –

- a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table and involving the quantity which is equal to or more than the quantity indicated against each such drug or substances, as specified in column (2) of the said Table;
- b) financing, directly or indirectly, any of the activities specified in clause (a).

This is also a very broad kind of provision and imposition of mandatory death penalty here as well raises constitutional and human right questions.

The Scheduled Caste And Scheduled Tribe Prevention of Atrocities Act, 1989 : Sec. 2(1) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of any offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, *shall be punished with death*.



This is again a clear case of mandatory death sentence. Even otherwise, the provision does not seem to be reasonable because a similar provision (Sec. 194 Part II, I.P.C.) in respect of persons other than Scheduled Caste or Scheduled Tribe prescribes death penalty, albeit as an alternative sentence.

The Indian Penal Code (Amendment) Act, 1992: The Act is in response to an unprecedented increase in the heinous cases of rape of minor girls. Such an offence is a stigma on the society. The victim of such a crime cannot lead a normal life because the traumatic past always haunts her. She feels withdrawn and helpless and is haunted by nightmare. Further our heads bow in shame when it is learnt that the girl has been raped by her close relative. She becomes the victim of her own trust on the relative. Such act by a relative beast must not be spared and needs to be hanged to death. The statistics are indeed grim. In Delhi, for example, in the first six months of 1994, nearly two out of three rape victims were children. Of the 162 rape cases registered, 98 are cases of child-rape. In 1993, out of total of 321 victims, 197 were minors of which 35 were less than seven years and 119 between 12 and 16 years<sup>45</sup>. And this is but the tip of the iceberg as rape cases specially rape within family is rarely reported. In view of such an alarming situation, the amendment provides that whoever commits rape on a woman when she is less than ten years of age shall be punished with death. Similarly whoever is a relative of a woman commits rape on such woman when this is again the case of making provision for mandatory death sentence. The amendment has given no definition of “relative” and therefore its ambit is very wide.

**Table – 1**

**DOCTRINE OF RAREST OF RARE**

Time Period	No. of Cases	No. of Cases in which Death Sentence was confirmed	%	No. of Cases in which Death Sentence was reduced to life imprisonment	%
1970-1980	61	23	37.7%	38	62.2%
1981-1990	101	40	39.6%	61	60.3%
1990-1999	72	30	41.6%	42	58.3%
2000-2010	56	20	35.7%	36	64.2%

**Table – 2**

**HIGH COURT DECISIONS**

Time Period	No. of Cases	No. of Cases in which Death Sentence was confirmed	%	No. of Cases in which Death Sentence was reduced to life imprisonment	%
1970-1980	103	60	59%	43	41%
1981-1991	194	126	65%	68	35%

## **Survey X-Rayed**

This survey was conducted to examine the effect of the doctrine of “Rarest of Rare” to test the hypothesis that the doctrine instead of bringing down the rate of death penalty has, in fact, contributed to its increase. The Bachan Singh decision in which the doctrine of rarest of rare was propounded was delivered in 1980. In this survey all reported decisions involving death penalty which had come to either High Courts or Supreme Court have been studied. High Courts survey is complete only till 1990 i.e. first decade after the Bachan Singh case was decided.

The two Tables have been prepared to show confirmation of death penalty or its reduction into life imprisonment, one each for the Supreme Court and the High Courts. It is evident from these Tables that in the decade just before *Bachan Singh case* i.e. 1970-80, 61 cases came to the Supreme Court in which the question of death penalty was involved. Out of these 61 cases, in 23 cases the court confirmed the death penalty and in 38 it reduced death penalty to life imprisonment. Thus in 37.7% cases the court confirmed death penalty. On the other hand in the decade after *Bachan Singh case* i.e. 1981-91, 101 cases were disposed of by the Supreme Court in which the question of death sentence was involved. Out of these in 40 cases, the apex court confirmed death penalty and in 61 cases it reduced death sentence into life-imprisonment. Thus in approximately 40% cases the highest court of the land has awarded death penalty. It is significant that there is an increase of 3% in the confirmation of death sentence by the Supreme Court itself. During 1990-99, in 41.6% of cases apex court confirmed the death sentence while during 2000-2010 Supreme Court confirmed death sentences in 35.7% cases. Thus there is hardly any significant impact on the award of death sentence. Moreover at times there is increase. The doctrine was an attempt to reduce death penalties but it seems it has not delivered the desired results.

As far as High Courts are concerned, in the decade just before *Bachan Singh case* i.e. 1970-80, a total of 103 cases came up before different High Courts and in 60 cases the High Courts confirmed the death penalty and in 43 cases the death penalty was commuted to life-imprisonment. Thus in 59% cases the court confirmed death penalty. On the other hand in the decade after *Bachan Singh's case* i.e. 1981-91, 194 cases were disposed of by the High Courts, out of which in 126 cases the death penalty was confirmed and in only 68 cases the High Courts changed death sentence to life-imprisonment. Thus in approximately 65% cases the High Courts awarded death penalty, an increase of 6%.

Similarly a study done by Amnesty International along with PUCL on the judgments of the Indian Supreme Court given between 1950 to 2006, where the court considered the award of death penalty reveals various crucial facts on “rarest of rare” application by the court. The research for this report involved the study of over 700 judgments given during this period. However, it was found that study is also subject to certain limitations. Despite virtually all recent judgments of the Supreme Court being reported in various journals, this has not always been the case and a large number of judgments prior to the last two decades may have never been reported at all. In some cases court may have marked certain cases as “not to be reported at all” for various reasons. Contrary to popular belief, not all the cases involving death penalty are granted leave to appeal by the Supreme Court and orders for dismissal of Special Leave petitions are almost never reported.

The report also mentioned that in the recent past most condemned prisoners have been able to access to Supreme Court even through assistance from prison authorities or through Supreme Court Legal Service and Legal Aid Committee, this was not always the case and therefore it cannot be assumed that all the cases in the past reached to the Supreme Court.

The impact of Bachan Singh case was palpable but it was not followed in all the cases consistently by the Supreme Court. In few cases some benches awarded death sentence without following the aggravating and mitigating circumstances approach prescribed by the constitutional bench or even discussing what the 'special reason' for the award was. In fact in *Gayasi v. State of U.P.* (1981)2 SCC 712, a two paragraph judgment and *Mehar Chand v. State of Rajasthan*, (1982)3 SCC 373, no reference at all was made to Bachan Singh Case or the 'rarest of rare' formula.

There are cases where benches have referred Bachan Singh case but showed no real understanding either of the "sentiment of rarest of rare" or of the obligation placed upon judges to compare aggravating and mitigating circumstances. In *Suresh Chandra Bahri v. State of Bihar AIR 1994 SC 2420*, the court found a number of aggravating factors as described in Bachan Singh v. State of Punjab and Macchi Singh v. State of Punjab, but there was no apparent attempt made to examine the mitigating circumstances and none are mentioned in the in the Supreme court judgment. Similarly in *Suresh v. State of U.P.*, the Supreme Court judgment is largely focused on discussion on a particular point of law but scant on sentencing. The judgment merely records the defense counsel arguments that the case did not fall within the "rarest of rare" requirement of Bachan Singh and further states that court does not agree with this arguments.

## **CONCLUSIONS**

The hypothesis which is tested here is that 'after the doctrine of rarest of rate there is no substantive change in the award of death penalty' is proved positively. In other words the doctrine which attempted to reduce the rate of capital punishments has, in fact failed or sometimes led its increase. There is a difference between the Supreme Court's attitude and that of High Courts. The High Courts appear to be more inclined towards awarding of death penalty in comparison with the Supreme Court. This difference can be explained by applying the theory that the greater the distance from the scene of the crime, the more lenient would be the attitude of the court in awarding the sentence. Because High Courts are closer to the scene of the crime they are less philosophical and more realist as far as death sentence is concerned. What is most discouraging is the fact that at times there was a split verdict on the issue of case falling under rarest of rare doctrine. In our opinion if there is split verdict, the case cannot fall under the rarest of rare doctrine and death penalty cannot be given in such a situation.

The increase in the number of death penalty cases can further be explained by looking into the overall increase in capital cases and deteriorating law and order situation in the country. Despite all this, it can be argued that the death penalty could not and will not bring down the rate of criminality. In fact there is much weight in the arguments for the abolition of death penalty. The argument of Roberspierce in the French Assembly still holds good:

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Listen to the voice of justice and of reason! It tells us and tells us that human judgments are never so certain as to permit society to kill a human being judged by other human beings ..... Why deprive yourselves of any chance to redeem such errors? Why condemn yourselves to helplessness when faced with persecuted innocence<sup>46</sup>.

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41. See Generally, Sellin, T. *The 'Penalty of Death'*, London (1980), according to the U.S. statistics, out of 6835 life-convicts who were released on parole, 310 were returned to prison for new crimes committed by them while on parole. Out of these 310, only 21 parolees were returned on the charge of murder, P. 115.
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43. Act No.2 of 1989, Received the Assent of President on 6<sup>th</sup> January, 1989.
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**ABSTRACTS OF PAPERS PRESENTED IN  
THE SEMINAR**



## **META NARRATIVES OF 'OBJECTS AND REASONS' OF IPC'**

**A.P. Singh**

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IPC traces its roots to the British colonial rule in India and draws heavily from the British legislation dating back to 1860. The first and the introductory draft of the Indian Penal Code was formulated in 1860s by the first law commission chaired by Lord Macaulay. Since then, the law has undergone lots of amendments in order to incorporate changes for the betterment of the justice delivery. The Indian Penal Code of the present day has done away with most of the flaws and has evolved into a modern law enforcing document. In spite of the striving efforts of the law makers as well as enforcers, the Indian Penal Code has been constantly tested and put under a critic's scanner at various instances. The present paper will examine the 'meta narratives' of the proclaimed Statement of Objects and Reasons of the Code.

## **JURISPRUDENTIAL ASPECT OF PUNISHMENT AND HEDONISTIC ASSUMPTION OF DEATH PENALTY**

**Anas Tanwir and Tahreem Khan**

Students  
RMLNLU, Lucknow

Punishment is defined as intentional infliction of harm by government on individuals for offences against the law. Punishment under all the legal system in a way compasses different issues and debates like of capital punishment, sentencing, substitution of capital punishment by life imprisonment and abolition of capital punishment. Punishment of criminal offenders usually involves inflicting harm on them in ways that would be unacceptable or immoral in other circumstances, competing theories attempt to justify or abolish the practice. A government in a country makes all attempts to ensure safety in the society and in that process makes attempt in enacting laws and investing a huge amount of money but despite such attempts also there is a lack of a safer society. There are lot of disparity between crime and punishment which raises fundamental questions about punishment, what justifies it? What are its objectives? How can those objectives compared to others, such as preservation of liberties and clash of fundamental freedom. Within the scope of punishment comes one of its ways that is capital punishment or death penalty. The discussion in the paper focuses basically on two areas one related with punishment and second related with death penalty.



## **ETHICAL, LEGAL AND PSYCHOLOGICAL THRESHOLDS OF SUICIDE AND EUTHENISIA**

**Pooja Singh and Vivek Bhadauria**

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Ideal School of Law, GGSIPU, Delhi

*"I am the master of my fate. I am the captain of my soul."*

William Hernest Horky

The life of a human being is the ultimate, peerless and remarkable gift of the Almighty. Life is like a stage on which we human being are the mere actors, whose entrance and exists are totally on the wish of the God. Though it is really a bitter reality that the life is not a bed of roses, at every walk there is a challenge to survive in the age of technological advancement, globalization where the human beings have become the prey of so many mental-psychological-economical and other alike crucial problems to be tackled. Some time these all pressures suppress the hopes and sail him towards to take the unethical step, which is to end his life by committing suicide. It is the example of perverse nature and the societal aloofness which inspire or rather force the person to condemn his life to overcome all the miseries of the life. Now –a-days the trend of suicide is very common among the students, debted farmers, the patients who are suffering from the incurable diseases, poverty, economic recession and similar other circumstances in which many of the families of in Indian population are forced to live and in such conditions many persons are accepting the inner instigated proposal to take away their own prestigious lives, to get rid of themselves from the anguish and agony of material life.

Various social compulsions, like the economy, religion and socio-economic status are responsible for suicides. There are various theories of suicide these encompasses to wit, sociological, psychological, biochemical and environmental. The causes of suicide are many and varying inasmuch as some owe their origin to sentiments of exasperations, fury, frustration and revolution; some are the result of feeling of burden, torture, misery due to sadness. Some caused by loss of employment, reversal of fortune, misery due to illness. It is the high time to make a unanimous consensus on the issue whether the suicide should be decriminalized or certain parameters should be adopted to give easy death to those whose life is not more than hell due to medico reasons in the form of euthanasia. Netherlands has acclaimed itself as the first for most country by accepting the provisions of euthanasia. The data shows that the Sweden is the country where the per capita income highest in the world, eventually it has been proved that the suicide rate is also highest in the world. Thus it proves that the economic prosperity is not the source of satisfaction and comfort.

## **INDIAN PENAL CODE: CONCEPTUALIZATION AND PHILOSOPHY OF CRIMINAL JUSTICE SYSTEM**

**Bindu Sangra**

Asstt. Professor in Law  
The Law School, University of Jammu

As stated by Friedman in his book "Law in Changing society": "State of Criminal law continues to be- as it should be- a decisive reflection of social consciousness of society." Indian Penal code truly fulfill this criteria since the days of its inception irrespective of the diverse cultures, religious and classes lived. In present times, the object of administering the penal law is deemed to strive for social defence as an end of socio-criminal justice. It constitute of both the deterrent and the reformative aspects of justice. And these aspects must be socially approved and socially controlled to maintain harmony in the society to strengthen social justice.

## **CONSENT OF MARRIED WOMAN: SECTION 375 VIS-À-VIS SECTION 376A**

**Swati B. Singh**

Project Co-ordinator, NLIU-UNFPA Project  
National Law Institute University, Bhopal

This paper examines the issue of 'consent' in Section 375 vis-à-vis 'consent' in Section 376A. The Indian Penal Code provides that sexual intercourse irrespective of the will/consent of the wife is not rape, the wife not being under thirteen years of age. However, it is noteworthy that under Section 376A the mere fact that the married woman is living separately under some decree of separation or under any custom or usage, gives her the right to consent to sexual intercourse with her husband. It naturally follows that the grounds for consenting to sexual intercourse by a married woman is determined by purely external factors like, decree of separations, usage, custom or co-habitation with the husband. Interestingly consent has been defined as a physical power, a mental power and free and serious use of them. None of these components are reflected in Section 375 and 376A. This irrelevance of 'consent' of a married woman in these two Sections of the Indian Penal Code reflects the hypocrisy and an overt attempt to perpetuate sexual inequality and gender regime.

## **‘LAW OF ADULTERY UNDER IPC : URGENT NEED FOR REFORM’**

**Dr. Rakesh Kr. Singh**

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University of Lucknow, Lucknow

Section 497 of Indian Penal Code perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman with the consent or connivance of her husband as an offence of adultery. But it is a punishable offence for men alone. The recent proposal to punish women too has generated much debate. Whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalised for her misdemeanour. Should this bias continue in future? Why should women remain immune to the law even till today?

However, the feminists in India today say that the Indian law relating to adultery is premised on the outdated notion of “marriage”. The law, according to them, is not only based on the husband’s right to fidelity of his “wife” but also treats “wife” merely as a chattel of her husband. Such a gender-discriminatory and proprietary-oriented law of “adultery”, they argue, is contrary to the spirit of the equality of status guaranteed under the Constitution of India.

The existing gender discriminatory penal law of adultery, against this backdrop, deserves a serious relook and revision to the effect that a person, male or female, who, being married, has sexual intercourse with a female or a male (as the case may be) not his or her spouses without the consent or connivance of such spouses be made criminally responsible. Similarly, the spouse of the errant spouse be allowed not only to seek divorce from the other life partner but also to initiate legal proceedings with a view to fixing criminal liability of the “outsider” for wrecking the marriage.

## **NEED FOR AMENDMENT IN RASH & NEGLIGENT DRIVING LAW**

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ILNU, Ahmedabad

We have entered into the 21st century we have moved in era of globalization, a lot of things have changed in all aspect of our life. It has changed our mode of transportation also, which has also been changed and moving fast as we are moving faster and faster... Due to the faster moving process the rash and negligent driving is also increasing day by day. This is a sensitive issue also because more and more life which is causing social problems also. And this graph is

increasing day by day. As in Indian penal code to punish this offence we provision of imprisonment and fine but it seems that it proves to be insufficient.

In this paper I propose to give amendment to this concept as there should be deterrent effect to this epidemic problem which will become a menace if not controlled. And also although we have lots of provision as usual in Indian law but why we are not able to control this problem.

There is also social effect to this problem because sometimes it happens that in an accident sole bread earner of a family lost it causes many problems like financial etc. which affect society in long run.

## **THE MEDIA FREEDOM VIS-A-VIS PUBLIC TRANQUILITY IN INDIAN PENAL CODE**

**Ashok Kumar**

Asstt. Professor

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The Constitution of India guaranteeing the right to Freedom of speech and expression. The constitution of India does not expressly mention the freedom of press. Freedom of press is implied from the Article 19(1) (a) of the Constitution. Before commencement of Indian Constitution, there was no constitutional or statutory provision to protect the freedom of press. However, Indian judiciary has inserted media rights as part of Art. 19 (1)(a) through interpretation of the different cases . . . Thus the press is subject to the restrictions that are provided under the Article 19(2) of the Constitution. The provisions of Indian Penal Code, 1860 Ss. 124A, 153A, 153B, 171G, 295 and 505 are also imposed some restrictions in the public interest. The Freedom of Media being a myth or a reality can never be justified. It has seen changing views ever since its existence. A restricted media will never serve its required purpose and absolute freedom of an entity is simply unacceptable. The different statute i.e. The Punjab Special Powers (Press) Act, 1956 Indian Post Office Act, 1898 The Police (Incitement to Disaffection) Act, 1922 Young persons (harmful publications) Act, 1956 Children Act, 1960 Criminal Law Amendment Act, 1961 Atomic Energy Act, 1962 The Civil Defence Act, 1968 Criminal Procedure Code, 1973 National Security Act, 1980 are also imposed restrictions.

This paper highlights the various aspects of Freedom of Media with reference to Indian Penal Code, 1860 and other statutory restrictions over Right to freedom of speech and expression in India.

## **LAW AND MORALITY DEBATE IN THE CONTEXT OF IPC WITH SPECIAL EMPHASIS ON SUICIDE AND HOMOSEXUALITY**

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In order to make the reader understand the crux of the topic an brief introduction to the topic is a basic requisite. In the introduction, we have incorporated the basic relationship between Law and Morality. The purpose to do so is to make the reader understand that law may be different from morality but they cannot be completely divorced. We have tried our level best to make sure that the latent essence of morality in our Indian Penal Code is also elucidated.

Now, coming to the topic or the main emphasis of the topic that is, SUICIDE and HOMOSEXUALITY, in order to do Justice with this topic all relevant case laws, provisions in the IPC have been highlighted in this article. Though suicide and homosexuality are very vast in their own arena, the authors have made sure that the readers are able to understand their relation with morality and their clashes with morality in a simplest of simple form.

## **COMBATING ADULTERY IN INDIA : EVOLUTION OF EXISTING LAW**

**Manish Khunger**

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Section 497 of Indian Penal Code perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman with the consent or connivance of her husband as an offence of adultery. But it is a punishable offence for men alone. The recent proposal to punish women too has generated much debate. Whether the woman is a victim of adultery or is herself an adulteress, she is completely free of being penalised for her misdemeanour. Should this bias continue in future? Why should women remain immune to the law even till today?

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serious relook and revision to the effect that a person, male or female, who, being married, has sexual intercourse with a female or a male (as the case may be) not his or her spouses without the consent or connivance of such spouses be made criminally responsible. Similarly, the spouse of the errant spouse be allowed not only to seek divorce from the other life partner but also to initiate legal proceedings with a view to fixing criminal liability of the “outsider” for wrecking the marriage.

## **HATE SPEECHES, COMMUNAL VIOLENCE AND THE INDIAN PENAL CODE**

**Saswat Subasit and Sumit Kumar**

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India is a land of diverse cultures, religions and communities. This diversity of religious belief is often exploited by certain nefarious elements to fuel discord between various co-existing communities, in order to further their own designs. Hate speeches are a popular tool among such elements, which have the effect of polarising the society and dividing it along communal lines. Such speeches have often acted as the precursor to communal violence and rioting, and are used to incite communal sentiments so as to disturb the peace and tranquillity of the society. In India, offences related to hate speeches are covered under certain specific provisions of the Indian Penal Code, 1860. The objective of this paper is to discuss the provisions of the Indian Penal Code relating to hate speeches with the aim of determining their adequacy in deterring, regulating and punishing them. The paper shall provide a brief introduction to the meaning of hate speeches and their relevance in the Indian context. Thereafter, the paper shall analyse the provisions of the Indian Penal Code applicable to hate speeches in order to come to a conclusion regarding the effectiveness of the existing laws in dealing with hate speeches.

## **EVOLVING PARAMETERS FOR IMPOSITION OF DEATH SENTENCE**

**Yogita Kumar**

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Imposing of death sentence is one thing that always gets more attention to be discussed, including from the view of constitutional validity in each countries. The imposition of capital punishment cannot be said to be unfair, unreasonable and unjust as it is awarded for acts that violates human rights. The death penalty may have had some justification in resource-scarce societies.

The Supreme Court's ruling that death sentence ought to be imposed in the 'rarest of the rare case' was culled out from guidelines indicated in the *Bachan Singh v. State of Punjab*. Death penalty is to be inflicted in gravest cases of extreme culpability, abetting suicide of child or insane person, Kidnapping for ransom, dowry deaths, committing murder in an brutal, diabolical or revolting manner etc. so as to arouse intense and extreme indignation of the community

Opponents of capital punishment see the death penalty as a human rights issue involving the proper limits of governmental power. In contrast, those who want governments to continue to execute tend to regard capital punishment as an issue of criminal justice policy. Modern opponents of capital punishment contend that sterilized and depersonalized methods of execution do not eliminate the brutality of the penalty.

## **LAW AND MORALITY DEBATE IN THE CONTEXT OF IPC WITH SPECIAL EMPHASIS ON SUICIDE AND HOMOSEXUALITY**

**Shivani Sinha and Aditi Raghuvanshi**

Students, RMLNLU, Lucknow

*"It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change."*

Charles Darwin (1809-1882) English Naturalist

Our paper focuses on the very need of change in the Indian Penal Code as well as the prevalent traditional societal norms. The two concepts of Homosexuality and Suicide require an urgent relook. The situation today calls for a better law in respect of both the subjects.

In context of Homosexuality, this sexual orientation isn't a preference or volition but a normal and positive variation in the same. Hence, by indulging in the disputed act of homosexuality, a homosexual is not committing any positive immoral act, but is acting in his own natural way. Therefore, it's practical for the society to change for him and not otherwise. The law in Section 377 of IPC is inconsistent with our highest law of the land i.e. The Constitution. Its Preamble talks about 'Justice, Liberty, and Equality to All'. Decriminalization of Homosexuality will further non-discrimination, individualism, human dignity and individual freedom.

Even Suicide when weighed in the 'balance' of morality and immorality, falls considerably towards immorality. It stands unjustified in the eyes of society. The society even condemns the law as contained in IPC on the subject. Penalizing 'attempt to suicide' is only adding to the grief of the concerned person. At The Stage when the person needs care and support, his being penalized for the failed attempt isn't reasonable.

## **EXTRADITION & EXTRATERRITORIAL OPERATION OF IPC**

**Deepanshu Sharma and Pritanshu Shrivastava**

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The term 'Extradition' originates from the Latin words 'ex' and 'tradium'. It may be defined as 'surrender of an accused or a convicted person by the State on whose territory he is found to the State on whose territory he is alleged to have committed, or to have been convicted of a crime'.

Section 4 of IPC provides specifically that if any citizen of India committed crime anywhere, even out of India, will be prosecuted according to the Indian Penal Code. When offences are committed abroad, the state where the offender is found may be required to send him back, or extradite him, to the country where the offence was committed in order to stand trial. This is called the exercise of extraterritorial jurisdiction.

Extradition is a positive step towards suppression of crimes. Extradition acts as a warning to the criminals that they cannot escape punishment by fleeing to another State. Criminals are surrendered as it safeguards the interest of the territorial State.

But differences in language, political policies and police and legal systems of the States make extraterritorial jurisdiction difficult to apply through practice of extradition.

## **REFORM IN LAWS FOR HOMOSEXUALITY AND EUTHANASIA : THE LAW AND MORALITY DEBATE**

**Anshuman Srivastava and Shivang Raj Rathi**

Students, RMLNLU, Lucknow

"For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price"

This paper aims at first of all discussing the primary debate existent in the Indian legal scenario about the laws which have arisen issues in terms of law and morality. The paper aims at discussing the said head under two heated topics in the current legal scenario of euthanasia and homosexuality. The authors have tried to bring out the existing law and morals and their new challenges as in regards to the upcoming developed and changed society. The authors have also made a study of the recent judicial interpretations of Indian Courts to analyze the future prospects



of the existing law. An effort has been made to look down the line and the consequences hence, and for that purpose possible suggestions will be provided.

## **DECRIMINALIZING HOMOSEXUALITY: SEPARATING MORALS FROM LAW?**

**Nishant Bhaskar<sup>1</sup> and Kanchan Prabha<sup>2</sup>**

<sup>1</sup>Student, National Law University, Delhi

<sup>2</sup>Student, ICFAI University, Dehradun

Public morality is not the province of criminal law and Section 377 IPC does not have any legitimate purpose. Section 377 IPC makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody.

Thus it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people.

It is not the function of the law to intervene in the private life of the citizens, or to seek to enforce any particular pattern of behavior.

## **ABETTING SUICIDE: GRAPPLING WITH THE LEGAL AND MORAL ASPECTS**

**Monalisa**

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While a plethora of cases lies dedicated to "attempt of suicide", the significance of abetment of the crime seems to have waned in comparison. Abetment of suicide is contained in section 306 of the IPC while 'instigation' i.e. abetment of a crime has been defined under section 107. A person is guilty of abetment when a. He instigates someone to commit suicide (or) b. He is part of a conspiracy to make a person commit suicide.(or) c. He intentionally helps the victim to commit suicide by doing an act or by not doing something that he was bound to do.

The judicial interpretation of abetment has narrowed the constituents of abetment. The requirement, as per judicial interpretation, is that the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no

other option except to commit suicide. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. Or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. An attempt to understand the intricacies of such an interpretation and its consequence is being made.

The question of morality that hounds a discussion of such nature has been undertaken by delving into the practices of the ancient as well as contemporary times.

## **ATTEMPT TO COMMIT SUICIDE: A CRIMINAL OFFENCE OR A CRY FOR HELP**

**Dr. Bushra Alvi<sup>1</sup> and Dr. Rishi Pratap Singh Sengar<sup>2</sup>**

<sup>1</sup>Criminologist, Guest Faculty, Dept. of Social Work, Lucknow University

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Man naturally wants to live. He wants to maintain his body and prolong his life by all means available. In fact he spends good deal of his energy and resources towards finding ways and means to extend to the upper most limit of longevity of existence on this planet. He wants to avoid even minor hurts. As a matter of fact, the instinct of self preservation is primordial and pivotal to all other urges. Because without survival nothing can be worthwhile. All these facts, notwithstanding some persons do put an end to their lives, encyclopedia Britannica defines suicide as "the act of voluntary and intentional self destruction". The act of suicide is forbidden in all the religions. In India attempt to commit suicide is constituted an offence punishable under section-309, Indian Penal Code, although completed act was not a crime, surprisingly, attempt to commit the act was made an offence.

A lot of conflicting opinions have generated on the desirability of retaining or deleting Section 309 of Indian Penal Code because of some contrasting judgments given by our Courts. Article 21 of the Constitution of India is a provision guaranteeing protection of life and personal liberty and by no stretch of the imagination can extinction of life be read to be included in protection of life. By declaring an attempt to commit suicide a crime, the Indian Penal Code upholds the dignity of human life, because human life is as precious to the State as it is, to its holder and the State cannot turn a blind eye to a person in attempting to kill himself. Another set of people are of the opinion that the Section 309 of Indian Penal Code is cruel and irrational because it provides double punishment for a troubled individual whose deep unhappiness had caused him to try and end his life. It is cruel to inflict additional legal punishment on a person who has already suffered agony and ignominy in his failure to commit suicide.

What drives a person to end his/her life is acute mental depression born out of circumstances that make it miserable for him / her to continue to live. It has got to do with one's mental strength (or the lack of it) to withstand severe adversity. While sympathizing with those who succeeded in

their attempts, it is cruel to punish and treat him as a criminal those who survived. It would only amount to punishing them for their inability to succeed in dying! It would subject the person to further depression. And in many a case, the state's responsibility for the plight of the victims cannot be overlooked. He/she is the victim (and not a criminal) of circumstances that have driven him/her to resort to the extreme step and hence he /she deserves to be treated with sympathy and compassion. What the survivor deserves is proper counseling by experts and rehabilitation and not punishment (!), as he/she is not a threat to society.

## **TO BE HANG TILL DEATH: AN INQUEST ON THE REASONABILITY OF 'RAREST OF RARE' V. 'PUBLIC TRANQUILITY'**

**Deepak Kaushik and Anant Hajelay**

Students, RMLNLU, Lucknow

'An Eye for an Eye' a principle which in the past was the essence of laws of every land. However blindly following the trail left by the past practices had and may never result in a path destined for ultimate development. There is no doubt that the laws enshrined in the earlier statutes played a very crucial role in curbing crimes. But with respect to the contemporary conditions prevailing in the developed societies it would always be better for society's welfare and interest, to find a more humane solution to curb crimes which invite death.

Murder or Judicial Execution, the societies always seek justification for death. This long quest for justification has repeatedly advocated the reasonability of death penalty on the touchstone of public tranquillity. Death sentence is a horrendous and grotesque act which has been numerous times held with parlance of a 'cold-blooded judicial murder' by various luminaries.

Due to its irrevocability, gravity and seriousness there's a need to find a substitute for legalized killing which is not only humane but fair and just and which subsequently facilitates in giving more importance to human life, set a benchmark for its existence with dignity and above all abolishes Death Penalty.

## **APATHY OF VICTIMS IN INDIAN CRIMINAL JUDICIAL SYSTEM A LIFE ON THE DARKER SIDE**

**Sachin Upadhyay, Raghav Pandey and Sonal Upadhyay**

Students, RMLNLU, Lucknow

The study of criminal victimisation has its origins in the work of lawyers who fled Nazi regime prior to World War Two and they, alongside many others, were concerned to understand

how such mass victimisation could occur. However, the concepts that these early theorists employed focused very much on what it was about the victim that had resulted in the events that had happened to them. In other words they were looking to establish what made victims different from non-victims, thus mirroring early criminological work. It was not until the 1960s and 1970s that the interest in the victim of crime took a different shape as a result of the emergence of the feminist movement on the one hand and the development of the criminal victimisation survey on the other. These developments in their different ways clearly pointed to a patterning of victimisation and that such patterning could not be explained by reference to the individual alone. There had to be some structural explanation and this is the point on which the authors are trying to throw light upon through this paper.

## **ARE EUNUCHS GAY MEN? - PENAL LAW RELATED TO HOMOSEXUALITY VIS-À-VIS THIRD SEX (EUNUCHS): AN EVALUATION OF ITS RELEVANCE IN MODERN AGE.**

**Dr. Mithilesh Narayan Bhatt**

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Homosexuals and eunuchs both have existed from ancient in India. Ancient texts like Rig-Veda, the Kama-sutra have description about homosexuality as well as eunuchs.

Some major changes have been seen in the conception of homosexuality from last century. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973. In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses.

Even socio-legal sphere in India only recognises heterosexuals and denies homosexuals to the right to choose and freely live their lives. Eunuchs are too considered as homosexuals. At the core of the problem of this recognition is the law's demand that a person must prove essential sexual orientation subjectivity exists and which should be opposite but eunuchs as homosexuals are failed to do so.

This paper is proposed to discuss, whether eunuchs are homosexuals or not and what are the impact of section 377 of IPC along with Naz's case decision on the right and status of eunuchs in India.

## **MORALITY OF SUICIDE: THE RELIGIOUS CONTEXT**

**Dr. Seema Nargotra**

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There is a long standing debate that the legal provision punishing attempt to commit suicide should be repealed from the Indian Penal Code. While formulating policy, most of the times, the policymakers like to consider the standpoints in major religious followings. The present paper is an attempt to place the representative positions of some major religions on suicide. Hindu religion considers suicide or suicide attempt as a Mahapataka (cardinal sin) to be meted with severest punishments. However, religious suicides have been exempted from these punishments. In Jain religion also, suicide or suicide attempt is generally condemned but suicide for religious purposes has been eulogized. Sikh religion considers human body as a precious gift from God not to be wasted away in any case. Buddhism and Islam also disapprove the killing of self. The Christian religion holds that life is gift of God and no human being has any right to terminate it except in case of sacrifice for others. The study shows that suicide/ suicide attempt has been strongly condemned by almost all the religions barring a few exceptions in Hindu, Jain and Christian religions.

## **ESSENTIAL AND RELEVANT AMENDMENTS IN INDIAN PENAL CODE: A STUDY IN REFERENCE TO HOMOSEXUAL RIGHTS AND SHOTGUN MARRIAGES**

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Along with time society changes, so does its customs and practices so does the laws which governs the society. But law is not an automatic process. It does not change until amendments are not made to it, and until then society follows the unchanged laws. Indian Penal Code can be couched in the same frame. The objective of codification of laws is not only to provide permanent and definite laws but it is to provide permanent justice to the society. And to accomplish the objective of providing justice code has to undergo a definite change as per the need of the time. There are many provisions under IPC which needs a definite change. Homosexual rights are one of them. It is also true that such types of activities might not have been thought at the time of the birth of this code. But now it exists well in the society and even got a social recognition. Such type of new changes create a lot of problem in amendments of the codes and need a high level of anticipation but still, stands important for assuring immortality of the codes. Timely amendment of these provisions protects them from becoming a burden for the society.

## **PHILOSOPHY OF RELIGION IN INDIAN PENAL CODE ROLE IN PRESERVING SECULAR FABRIC OF INDIA**

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India is wedded to secular policy, if citizens of the country believe in the strategy of division based on religion; it may result in damaging the unity of nation and consequently would tinker with the integrity and security of the nation. The country is like a family having members of different ways of thinking and sometimes different ways of praying to the God. Merely because the ways to get the blessings of God are different, one cannot divide the family. The IPC punishes acts of violence or discrimination based on religion. The Penal Code in Chapter XV deals with offences relating to religion. This chapter has been framed on the principle that every man should have the full freedom to follow his or her own religion and that no man should be allowed to insult the religion of another or religious feelings of any class of persons. Everyone should respect the religious sensibilities of persons of different religious persuasions or creeds. The objective of this paper is to analyse the philosophical base of provisions relating to religion in the penal code which help in preserving the secular character of India, discuss cases reported under these provisions and how these provisions can be more powerful in strengthening the secular fabric of India.

## **MARITAL RAPE IN CRIMINAL LAWS (A) BILL, 2010: A TASK LEFT UNFINISHED**

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Marital rape is a unique problem that encompasses both physical violence and the psychological trauma of being raped by someone who has taken marriage vows to love and honor his or her spouse. Research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Further, it is imperative to note that unlike other sexual assault cases, the victim of marital rape is forced to undergo the indignity & trauma of the crime on a frequent and regular basis.

The amended provisions of the IPC do much to protect and bring relief to young brides and

estranged wives from their husbands. However, the Criminal Laws (Amendment) Bill, 2010 falls short on many fronts. While it recognizes marital rape in a limited form, it fails to criminalize it outrightly and thereby denying the protection of law to the many silent and unknown victims of the crime. There should be a genuine attempt made to recognize marital rape and introduce stringent punishments for the same.

## **HOMOSEXUALITY- A PUNISHMENT FOR BEING DIFFERENT**

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Homosexuality is not a new concept. In fact, since time immemorial, homosexual behaviour has been observed in the animal kingdom and amongst mankind. Yet, society has persecuted, ill-treated and neglected the homosexuals. Indian Courts had often interpreted Section 377 of IPC which punishes unnatural offences to include homosexual sex. Thus, homosexual sex was a punishable offence in India till the Delhi High Court came up with its path-breaking judgment in the Naz Foundation Case [2010 CriLJ 94] and decriminalised homosexual sex done privately. Same sex relationships are condemned by society as being immoral and it is argued that such immoral act should not be decriminalised. It is this law and morality debate that this paper makes an in depth study of. The paper also addresses the Hart-Devlin debate and the contentions and the judgment of the Naz Foundation Case. Homosexuality is after all, a matter of choice, a right and often, more than that- a necessity. Criminalising it, is sacrificing the rights of homosexual minority in the alter of public notions of morality. The paper analyses their fundamental rights violations under Section 377 IPC and the Naz Foundation judgment has given a ray of hope to these unfortunate individuals.

## **MODUS OPERANDI OF “RAREST OF THE RARE CASE” FOR CAPITAL SENTENCE: A CRITICAL TESTING OF THE PRUDENCE OF THE JUDICIAL DOCTRINE**

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Death Penalty is the harshest of punishment provided in IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. It has always been a contested issue between moralist who feel that the capital punishment is required as deterrent measure, and progressive who argue that judicial taking of life is nothing but court mandate murder. However

the Apex Court has evolved a formula to inflict capital punishment in “rarest of rare cases”. In fact, the doctrine of rarest of rare case is superfluous as it is vague and incomplete. The judicial approach in inflicting the sentence has become subjective particularly in death penalties. A vast discretion is used by the judiciary thereby resulting in uncertainty of judgments. This paper is an attempt to test the application of this judicial doctrine in similar cases differently. For this testing some relevant case laws are also discussed and analysed. The paper is divided in five parts that is introducing the topic; various types of punishments; capital punishment; the use of the “rarest of rare cases” rule and the final conclusion with suggestions.

## **DEATH PENALTY-JUSTICE, SAFETY AND DETERRENCE : REVISITING ABOLITION OR RETENTION DEBATE**

**Neha Gangwar and Jyotima Nagvanshi**

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Crime has rightly been described as an act of warfare against the community touching new depths of lawlessness. The object of imposing deterrent sentences is threefold: (1) To protect the community against callous criminals for a long time. (2) To administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow, and (3) To deter criminals who are forced to undergo long-term imprisonment from repeating their criminal acts in future. Even from the point of view of reformatory form of punishment “prolonged and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when he responds to the treatment and can be regarded as safe”<sup>1</sup> for the society.

The death penalty, because it is such an extreme expression of retributive justice, has clearly demonstrated the inherent flaws of retributive justice. States all over the world have abolished the death penalty on two main grounds. because (a) it is cruel, inhuman, and degrading and (b) it has proven not to deter would be offenders.

## **DEATH PENALTY IS A BOON TO THE SOCIETY**

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Love for life is a basic feature of human behaviour. It is the most valuable treasure for an human being and not only an human beings even an animal does not want to lose it. Everyone wishes to enjoy it up to the fullest extent. For an human being nothing can be dearest than life



and death penalty is that form of punishment which snatches this dearest property.

Capital punishment means a sentence of death. It is the severest i.e. an extreme point of sentence. The punishment is extreme because it extinguishes the very existence of human life. This irreversible punishment is to be awarded only for very wicked, gruesome, horrifying, grievous and disgusting crime against humanity. Though the definition and extent of such crime vary from country to country and time to time, the implication of capital punishment has always been death sentence. There is probably no country in world where death penalty has been existed. The very object of punishment has always been to guard the society against the criminal and unsocial elements. A punishment awarded to a particular person becomes a source of security to all and helps in instilling some kind of fear or apprehension in like minds.

## **MARITAL RAPE**

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The idea of the “sacrosanct” institution of marriage dished out by the mainstream Indian cinema is a myth and is contrary to women’s perceptions of reality. Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Social practices and legal codes in India mutually enforce the denial of women’s sexual agency and bodily integrity, which lie at the heart of women’s human rights. Rape is rape. Be it stranger rape, date rape or marital rape. The law does not treat marital rape as a crime. Even if it does, the issue of penalty remains lost in a cloud of legal uncertainty. The legal system must be forced to accept rape within marriage as a crime. Further, women themselves must break free of societal shackles and fight for justice. They must refuse to comply with the standards applied to them as the weaker sex. This paper is an attempt to expose the discrimination, shortcomings and fallacies of the criminal justice system in India as regards marital rape. It goes on to provide arguments and reasons necessitating criminalization of marital rape. Lastly, the paper suggests certain legal reforms essential to achieve the desired objectives.

It is conceded that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law. Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable.<sup>25</sup> The immediate need is criminalization of marital rape under the Indian Penal Code. But, mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is also a need to educate the masses about this crime, as the real objective of criminalizing marital rape can only be achieved if the society acknowledges and challenges the prevailing myth that rape by one’s spouse is inconsequential.

## **SHOULD CAPITAL PUNISHMENT BE ABOLISHED?**

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THE DEBATE whether the death penalty should be abolished or not is one of most long lasting and impassioned debates going on in the civil society and political sphere in India. Some subscribe to the “eye for an eye” or “life for life” philosophy, while others believe that sanctioned death is wrong. Former Chief Justice of India and now NHRC Chairperson K G Balakrishnan has favored continuance of this provision, but he seems to have forgotten the other side.

In India, death sentence was last carried out in 2004 when one Dhananjay Chatterjee was hanged for rape and murder of a 14-year-old girl in Kolkata. Here the question to ask is, has the execution of Dhananjay Chatterjee stopped rapes in our society? Has the number of rape cases declined? No, these crimes are increasing day by day. If we look at previous hanging cases, there is hardly any positive effect of death penalty.

I strongly feel, we have to reform our laws especially for death penalty. Our laws should be such that a punishment should be so rigorous that it should remind not only to the offenders/terrorists/culprits but also it should be a living example for the people around him about his inhuman acts. Each day and night, he should regret his acts of crime and at the same time it should act as deterrent.

## **ON ACTS OF DESPERATION & CONSENT : A CRITIQUE ON THE SUICIDE & HOMOSEXUALITY LAWS AS PER THE IPC WITH RESPECT TO MORALITY**

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This paper aims to bring about a healthy discussion on the issue of morality in the context of homosexuality & suicide under the Indian Penal Code. Criminal Law must be confined within the narrower limits of morality & can be applied to only certain overt acts or omissions. The basic premise, this research is based on, is the urge for updating the law regarding the above mentioned offences of suicide & homosexuality. The issue of morality and law in the light of the Hart-Fuller debate, has been discussed, and henceforth, a comparison of criminal law vis-à-vis morality. The realities behind the offences committed have also been analyzed so as to assist in amending the provisions from a realistic point of view. The authors have then proceeded to the jurisprudential aspect of the two landmark decisions (P.Rathinam & Naz Foundation case), and have drawn an analogy of the laws in the UK & USA. The issue of privacy in relation to homosexuality has also

been dealt with. The paper concludes with recommendations & suggestions on how the contentious sections should be amended to suit the changing times.

## **DISCRETION IN PUNISHMENT : NEED FOR SENTENCING GUIDELINES**

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The legitimate expectation of the society is that the law will maintain the balance between the crime and punishment. Consistency in the punishment is the anvil on which the success or failure of the law could be perceived and assessed by the society. This is truer in the case of criminal law as the failure of which will raise the questions of public safety and the very existence of the administration of justice i.e., the State. The disproportionate punishment either excess to the crime or lenient to the crime will mar the judicial process and the image of justice in any society.

The Indian Penal Code has provided the punishments for different offences where the discretion was given to the judge not only to fix the criminal liability but also the quantum of punishment fixing the maximum, (fine and imprisonment including the death penalty) but not the minimum sentence to any offence except for Rape etc., The judicial discretion leading to discrimination as the judiciary giving varying sentences for the same offence. For example, the recent instance of Priyadarshini Mattoo's case (Rape and Murder) the Apex court has commuted death penalty into life imprisonment.(6<sup>th</sup> Oct.2010). However, in the Shivaji of Pune's case (Rape and Murder) the Supreme Court has upheld the death penalty (3<sup>rd</sup> Sep.2010). The difference is in the former the victim is in her early 20s and in the later a girl about 9 years old. It is beyond comprehension how the apex court has quantified the pain and agony of the tragic end of the victims. So far no theory whether it is Prescientific, Classical School, Moral Insanity or Imbecility, Sociological or Psychological didn't propound how to quantify the pain and the scale for determination for punishment. The social impact on variation of life and death in punishment only reflect the personality of judges rather than principles of justice. The grave variations in the punishments reflect the need for guidelines for sentencing under the criminal law. The first step in this direction was taken by the judiciary in Bachan Singh's case (1980 SC) by formulating the doctrine of 'Rarest of Rare Cases' for death penalty. Now the time has come to review the sentencing policy of various crimes by establishing Sentencing Commission for formulating and reviewing the sentencing guidelines from time to time similar to the system introduced in USA.

## **DEATH SENTENCE: A STRUGGLE FOR ABOLITION**

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*"Law is mainly a system of licensed revenge".*

James Stephen

A society seeks revenge against a criminal by inflicting different kinds of punishments including the death penalty upon him. In the process of revenge, mere elimination or extermination of a criminal has not satisfied the thirst of society for revenge.

However the father of modern criminology, the young Italian jurist Cesare Beccaria in his work on "Crimes and punishments" severely criticized the torture and the death penalty. He firmly held that the state has no right to put an individual to death sentence because the life of the individual was not surrendered to it as a part of the consideration of social contract.

The only method of execution in India is death by hanging, a practice which violates the universally recognised right to be free from torture and other forms of cruel, inhuman and degrading treatment. At a time in which the international trend is moving strongly towards the progressive abolition of the death penalty, the Government of India continues to pursue capital punishment without much hesitation.

It has become apparent to the vast majority of the world's democratic States that the death penalty cannot be reconciled with liberal values and a commitment to human rights. In the 21st century, we are finding new ways to create life and prolong life.

But we still can't make up our minds about whether it is right, ethical or good to take someone's life, even when it is dignified by a court of law. It is high time that India makes that same recognition and joins the international movement towards abolition of the death penalty.

God alone can take life because He alone gives it... "An eye for an eye makes the whole world blind"- Mahatma Gandhi - "Father of India", Political and Spiritual Leader.

**CONTROVERSIAL ISSUES IN INDIAN PENAL CODE,  
1860- EXTORTION:  
(WHETHER SURRENDER OF PROPERTY AN ESSENTIAL  
INGREDIENT OF SEC. 383?)**

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Extortion is an offence against property. It is placed in chapter XVII of Indian Penal Code, 1860. In the language of common man extortion is one of the most important type of black mailing. There are seven provisions regarding Extortion from Sec. 383-389. Sec. 383 defines it and provides 4 illustrations. Sec. 384 punishes it. 385-389 provides for various forms of Extortions and its punishment.

Aim of this paper is to inquire whether delivery of possession an essential element of extortion or not ? This issue is raised due to five reasons.

- i. the definition under Sec. 383 does not make it clear.
- ii. the illustrations appended to Sec. 383 seems to be inconsistent. Illustrations a and c indicate delivery of possession is not essential. Illustrations b and d indicate extortion is complete only after delivery or surrender of property.
- iii. The word dishonestly is used in Sec. 383. the definition of dishonestly in Sec. 24 shows wrongful loss or gain is essential.
- iv. Illustrations b, c, the of Sec. 390 Robbery makes it clear that surrender of property is essential for extortion.
- v. Sec. 410 -Stolen Property do indicate that for extortion the possession has to be transferred.

Benefit: It will bring clarity and confidence in class room teaching. It would also provide to the students of law an insight into inter relation between various provisions of the penal code.

Key words- Extortion, delivery of property, dishonestly,

## **LAW AND MORALITY DEBATE IN THE CONTEXT OF IPC WITH SPECIAL EMPHASIS ON HOMOSEXUALITY**

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In the modern Scenario, where country like India having democracy, whether Homosexuality Rights should be or should be not. Now the recent decision which was held by Delhi High Court regarding Naz Foundation case has created a new issue regarding Section 377 of IPC. Its decision has created conflict between Section 377 of IPC and Fundamental rights of Constitution. Whether the section of IPC violets fundamental rights or not. Article 13, 14, 15 and 21 has been questions on the basis of personal autonomy in this case. Here public morality and personal autonomy is conflicting with each other. Our aim of the paper is not only to show legalisation of Homosexuality rights but it would be also giving reason that it should be legalised. Our paper would not be concerning any particular aspects of any case. It would be giving only particular aspects of fundamental rights which are infringed by the section of IPC. We would also be trying to link my paper with Jurisprudence.

## **RELEVANCE OF THE INDIAN PENAL CODE IN CONTROLLING AND COMBATING CRIME IN MODERN AGE**

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Organized crime and corruption are shaped by the lack of strength of the control mechanisms of the law and order of a country. Crimes are increasing especially with changes in technology. Organised crime is not confined to the boundaries of any one country and has become a transnational problem. Organised criminal activity has existed in different forms since ancient times, but contemporary patterns of organised crime are infinitely more complex than they have been at any point of time in history. . The tendency of the legislature has been to provide severer punishments in special laws than the punishments provided for similar offences under the Indian penal code. This paper places the specific case of how India needs a thorough change to revamp the Indian Penal Code within the context of transnational trends in criminal activity.

## **AN ANALYSIS OF HOMOSEXUALITY AND SUICIDE LAW IN THE LIGHT OF LAW AND MORALITY**

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Law and morality is the battlefield of man's conscience. Question of morality arises with law in the cases relating to sex, cheating and with the questions of birth and death. In the context of 'law and morality debate' in cases of 'homosexuality and suicide', there are three prevalent theories. J.S. Mill, stood with prevention of "harm to others" principle, Lord Devlin relied on the principles of enforcement of morality whereas HLA Hart's approach was that of protection of only 'the universal values' along with "harm to others" theory. Lord Devlin, observed that moral principles are accepted as the basis of criminal law and the breach of them is an offence against society as a whole. If order and decency is eliminated from criminal law, fundamental principle would be overturned and will lead to end a number of specific crimes like euthanasia, suicide, abortion etc. , Professor Hart opines that it is absurd to believe that everything that society views profoundly immoral threatens social existence. In Gian Kaur case attempt to suicide has been held as a crime and in Naz Foundation case section 377 of IPC has been held as unconstitutional nevertheless the debate still persists. Many feel that there must be some amendment in punishments. This paper is an effort to delve into various cases related with the topic in the light of law and morality.

## **IDEOLOGY, HISTORY AND PHILOSOPHY OF INDIAN PENAL CODE**

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This paper deals with the law that was in operation just prior to and at the time of the enactment of the code and stages through which the drafting of the code went. If the judiciary and the bar had been more familiar with the report of the Law Commissioners and history of this piece of legislation, some of the errors in the interpretation of the code might have been avoided. We can see that draftsmen of IPC did independent thinking and were not only codifying English Law though English Law was largely in their minds. Through the subject matter of Part I, we can see that there are even certain parts of Code which owe their origin to Muslim Law; it is owing to a modification of a harsh rule of the old law that the maximum punishment for some offences has been fixed at seven years and for others at fourteen years. Otherwise it would have been difficult

to know why these odd numbers were chosen.

This paper contains the topic- origin and nature of Muslim law in India (Part I) and defines four broad principles of Penal justice in Muhammeden Jurisprudence i.e. [A] Kisas or retaliation [B] Diyut or blood-money [C] Hadd or fixed punishment [D] Tazeer and Siyasa or discretionary and exemplary punishments. It also highlights the period of transformation in India which took place from 1772 to 1834, and modified many of the laws prevailing in India by passing certain Regulations. Ex; Law of Dacoity and robbery, Burglary, Homicide, Mutiny and sedition in the army, abolition of Sati etc.

The second part of this paper, which is, 'Historical introduction to the Indian Penal Code', describes the various stages through which the draft of Indian Penal Code went. It embodies all the important stages and controversies which were confronted in the making and implementation of the IPC in India.

## **LAW & MORALITY DEBATE IN CONTEXT OF IPC WITH SPECIAL EMPHASIS ON SUICIDE**

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What does one do when confronted with the choice of succumbing to the dark interiors of deathly hallows instead of living a life that is laced with agony? This would be the moment when suicidal thoughts plague Ones mind.....But, the consequences of such an act would be fatal if the suicidal attempt would fail thereafter as a penalty would then ensue. The question that would then arise would be as to whether moral considerations should outweigh the practical ones? If yes, then who sets the benchmark for morality?

This paper attempts to deal with the varied shades of the subject of Suicide. A critical analysis of the same has been done in respect of the penal provisions which deal with suicide, assisted suicide, Medical Assistance of terminally ill patients and Euthanasia among others. The Present scenario has been comprehensively encapsulated in the essence of the Judicial saga which has so far ensued and the Global Stand on the subject. The various aspects have been dealt with against the backdrop of predominant moral and ethical considerations which also forms an underlying principle of the suggestions incorporated thereafter. Consequently, the subject of feasibility and existence of such a law has been critically analyzed.



## **REVISITING THE DOCTRINE OF 'RAREST OF RARE' CASES**

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Under Section 302, IPC the court has the discretion to either to punish the offender with death or imprisonment for life, which is qualified by requirement of 'special reasons' by Section 354(3) CrPC in cases of death penalty. The main thrust of the paper is with respect to the interpretation of 'special reasons' by Supreme Court in a number of cases and the confusion and arbitrariness which surrounds the application of the law relating to death penalty. The abolition of death penalty is argued not based on its merits, but the practice by Courts which has been pervaded with elements of arbitrariness. Even though the Court tried to clear the mist by invocation of doctrine of "rarest of rare" cases in Bachan Singh' case and elaborated in Macchi Singh's case but the benches in most of the later cases have shown no real understanding or even wrongly interpreted the doctrine. The cases demonstrate inconsistency in the approach of Supreme Court and the failure to evolve a sentencing policy in capital cases which was admitted by Supreme Court in Alok Nath Dutta v. State of W.B. case.

## **IPC AND MORALITY: WITH SPECIAL REFERENCE TO SUICIDE AND HOMOSEXUALITY**

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The morality or ethic is a code of values to guide man's choices and actions—the choices and actions that determine the purpose and the course of his life. Ethics, as a science, deals with discovering and defining such a code of IPC. The prudent engagement of morality and IPC is a dire need of present changing and developing Indian society. Recent suicides committed by homosexuals due to social pressure are of a great concern. On the other side suicide as an offence is criticized by social activists, legal personals and academicians. The morality is the ground of defence for criminalizing both homosexuality and Suicide. In various cases Courts have denied this justification. The atrocities on victims are still continuing under the vial of morality. The crux of penal laws is protection of individual and society from unlawful wrongs and injustice, to ensure comfort rather than ensuing discomfort. IPC cannot bind the people with certain entrenched sexual norms until it is scientifically injurious to society. The IPC needs to be revised with present needs. The amendments in it are unavoidable requirement. It cannot deprive an individual's individuality, his own being. Morality must be attained but not on the cost of Basic Human Rights. If the changes are not brought into it would me a huge miscarriage of justice.

## **PUNISHMENT IN IPC WITH SPECIAL EMPHASIS ON DEATH PENALTY**

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Death Penalty is the pre-meditated and planned taking of a human life by judicial procedure in response to a crime committed by a legally convicted person. Death penalty is officially permitted, though it is to be used in the 'rarest of rare' case as per the judgment of the Apex Court of India. The issue of death penalty has generated endless debates around the world that failed to reach unanimous universal conclusions.

Among the various positive aspects of the death penalty, one of the most prominent one is that it serves as a deterrent. Moreover, it is necessary to ensure justice, or else people will lose faith in the judicial system. On the other hand, the reasons against capital punishment stress on the fact that it is inhumane and immoral to deny anybody the right to live.

The paper seeks to bring objectivity to the debate on the death penalty in India. Where on one hand, the abolitionists use the famous quote, "An eye for an eye would make the whole world blind" for abolishing the death penalty from the judicial process, on the other hand the retentionists cite, "It is justice, not charity that is wanting in the world" to retain the same.

## **CHALLENGING THE DEFINITION OF RAPE**

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Though more than half and a century has been passed, despite the prominent protection relating to the violence against the sex, i.e. "rape", defined under section 375 of Indian penal code remains same. It is pertinent to note here that the scenario when the Indian penal code was drafted by Thomas Macaulay has become different altogether today. The societal norms have been changed vastly. This change in the societal norms has brought change in commission of the offences. Now in the modern age new techniques are being used to commit offences. The offence of rape is not an exception. As per the confined definition of "rape", it can take place only by the way of penetration of penis in the vagina. Though this definition was sufficient at the time when the penal code of India was drafted, because at that time society was witnessing only this method. If there were some other methods for this offence, then either society was ignoring that less witnessing. It is, therefore, the offence of rape was confined only to the penetration of penis in the vagina. And the other method related to offences against sex had been criminalized under other heads, for example-under section 354 to outrage the modesty of a woman or girl, under section 377 unnatural last etc.

## **PUNISHMENTS UNDER INDIAN PENAL CODE WITH SPECIAL EMPHASIS ON DEATH PENALTY**

**Aiman Nasir and Shubham Agarwal**

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The majority of the nations of the world have redundant the death penalty and perceive it as barbarous. They have arrived to apprehend that capital punishment does not give out the best interests of society. It perpetuates the phase of brutality and precludes the prospect for emancipation. Society that aspires to be moral and just, there is no room for such a state-sanctioned uncivilized practice that the society seeks an escapist attitude by taking away the life of an individual. It works on the principle of an eye for an eye, a tooth for a tooth. CP is the infliction by due legal process of the penalty of death as a punishment for crime. It is laid down as a penalty in numerous legislative Acts; Under the IPC eleven offences are punishable by death. CP has a strong claim to being not merely morally permissible, but morally obligatory only limited to exceptional cases involving the "most heinous crimes.

CP ban and boons are put forward by both sides but the question remains that handing out a death penalty is brutal and not in favor of fundamental right to life. Life in prison without parole is the best alternative for the death penalty.

## **CONSENSUAL ADULT HOMOSEXUALITY IN PRIVATE – INTERPLAY OF LAW AND MORALITY: A CRITICAL STUDY OF NAZ FOUNDATION**

**Vinay Bhusan Upadhyay and Shudhakar Shukla**

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In the last half-century, legal, political, and social questions concerning homosexuality have become core and inquisitive questions in various contexts in many parts of the world. In particular, questions relating to the permissibility of sexual activities among people of the same sex, the desire to engage in such activities are most challenging questions facing judges, legislators, and executives. It is to be said that values are the life-blood of law. The legislators when they formulate their laws and the judges when they give their decisions are not working in vacuum. They are guided by the values recognized by the society.

Morality is value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life. This is the part of public morality and public morality must be preserved if society is to exist. There must be the maximum respect for individual liberty consistent with the integrity of the society.

## **IDEOLOGY, HISTORY AND PHILOSOPHY OF IPC**

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The Indian Penal Code has its roots in the times of the British rule in India. It is known to have originated from a British legislation account in its colonial conquests, dating back to the year 1860. The first and the introductory draft of the Indian Penal Code was formulated in 1860s and was done under the able supervision of the First Law Commission. The Indian security system has been one that has gone through a lot of tests and examinations throughout the time. This is due to the political as well as the social situation and standing of the country. On 1 January 1862, the British enacted the Indian Penal Code, and within two decades most of India's law was codified. Ironically, England still awaits a criminal code, and the vast majority of English law remains uncodified, in the form of statute or common law. In 2003, the Malimath Committee submitted its report recommending several far-reaching penal reforms including separation of investigation and prosecution (similar to the CPS in the UK) to streamline the clogged up Indian criminal justice system. Some other recent incidents have again pointed fingers at rewriting the Penal code. The essence of the report was a perceived need for shift from an adversarial to an inquisitorial criminal justice system, based on the Continental European systems.

## **INSATIABLE APPETITE FOR HUMANISM IN IPC**

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This paper shall corroborate that there is a drift from the legal values to human values as far as the deterrent effect of punishments under the Indian Penal Code is concerned and if the same gets established beyond reasonable doubt, the paper shall depict the essence of deterrence created by IPC in order to secure peace and justice. Thus a clear path is traced from jurisprudence of right to that of 'humane' and in so doing, an analysis of the veracity of the arguments put forward by human rights groups claiming death penalty to be cruel and irrational from the 'humanitarian' point of view is performed.

It is contended that the 'humanitarian' grounds be taken into consideration while dealing with the offender, is to be measured against the 'inhuman' act committed by him, so as to award a punishment by which "justice would not only be done, but seem to be done".

## **THE DEATH PENALTY: A NEW PERSPECTIVE IN LIGHT OF SANTOSH BARIYAR CASE**

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The recent decision of the Supreme Court in Santosh Bariyar is a welcome step in India's death penalty jurisprudence, in that it revisits the case of Bachan Singh as the defining law on the subject. The judgment calls for the prosecution to show by leading evidence that there is no possibility of rehabilitation of the accused and that life imprisonment will serve no purpose. This article essentially seeks to explore the ramifications of this judgment on India's death penalty jurisprudence. The article begins with an examination of the recent trend towards abolition of the death penalty, to mainly highlight that as the international community's consensus against the death penalty grows, India is becoming increasingly isolated in its commitment to it. Then it seeks to discuss the changing climate in the body of India's death penalty jurisprudence, by tracing the transition from 'the death penalty as the rule and life sentence as the exception', to the concept of 'rarest of rare' dictum. In the light of the above cases, the new standard laid down in the landmark Bariyar case will be examined and critically analyzed in light of the fact that it will have the fundamental effect of restricting the imposition of the death penalty drastically. Lastly, we will seek to answer the question whether the Bariyar judgment marks the end of death penalty in India.

## **A FATE WORSE THAN DEATH? THE PROBLEMS WITH LIFE IMPRISONMENT AS AN ALTERNATIVE TO THE DEATH PENALTY**

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The paper introduces the reader with the significant progress which has been made to abolish death penalty and which has on the other hand lead to a marked increase in life and long-term imprisonments. It further puts focus on the various aspects of life imprisonment which is given as an alternative to death penalty in penal statutes. It also discusses the social and psychological effect which such punishments leave on the prisoners. The prolonged deprivation of liberty and curtailment of basic rights can lead to numerous ill-effects, including increased social isolation, de-socialization, and the loss of personal responsibility. The paper further mentions the international standards relating to life imprisonment. It also mentions various measures which

the government must adopt in order to make life imprisonment as an alternative of death penalty. The imposition of longer prison term and an increase in indeterminate sentencing will not only contribute to the growth and ageing profile of prison populations, they will also, by consequence, lead to arise in the proportion of prisoners with ongoing health and personal care needs. Last but not the least, the paper concludes with some policies which every penal statutes must adopt in order to attain criminal justice.

## **LAW AND MORALITY: DEBATE IN THE CONTEXT OF IPC WITH SPECIAL EMPHASIS ON SUICIDE AND HOMOSEXUALITY**

**Chandrika Mehta**

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Law embodies in itself all the principles of justice, equity and good conscience. Rules of conduct are devised to govern the acts of individuals in society. The laws of each country may vary, depending on the traditional values, ideals, morals, and customs prevalent in the country. Criminal law is one among the many branches of law. It deals with a wide range of offences. The theme for the paper is a debated one, more so, in the light of recent judgements of the Supreme Court of India and the various High Courts. The Indian Penal Code dates back to 1860, when India was still reeling under the British Raj. Although, the Code is an excellent legislation of the colonial era, it presents many shortcomings in the light of changing notion of the very concept of crime. Section 309 of the code seems no more relevant and calls for a review. Likewise, social activists and Gay Rights activists have challenged section 377 of the Code on many grounds. However, it must be carefully analyzed in the context of the Indian society. The approach should be based on broader lines.

## **THE CRIME OF SUICIDE: A WINDOW TO THE HUMAN CULTURE**

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While nothing is more universal or ineluctable than death, nothing is more Particularistic or avoidable than suicide. The patterns of suicide and attitudes toward suicide exhibit wide gyrations from one society to another and from one era to another in the same society. The study of suicide provides a window into one of the most disconcerting but significant aspects of human culture, namely, the malleability of moral attitudes. Suicide consists of a self killing inspired by deliberate

intention of the deceased to put an end to his own existence. Implementation of section 309, I.P.C. to deal with those who attempt to commit suicide is not only unsatisfactory but also discriminatory but. This paper argues that the source of its divergence in our society is a conflict between moral systems and the law pertaining to it. It will further argue that because one of these conflicting systems is religiously based, any governmental action that favours this system over its rival violates the Establishment Clause. It also explores the relationship between systems of morality and view of suicide, tracing the changes in Indian culture and the constitutionality of the section 309 of I.P.C. The author uses the doctrinal method of research.

## **LAW AND MORALITY DEBATE IN THE CONTEXT OF IPC WITH SPECIAL EMPHASIS ON SUICIDE AND HOMOSEXUALITY.**

**Agni Som**

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The debate on law and morality in context of Suicide and Homosexuality holds very important significance now, when India is on the fast track to progress and the whole world is looking upon India, and Indians round the globe are doing exceptionally well. With the increased chance and opportunities to succeed, the chance to fail have also increased, and the people who are succumbing to failures are taking the easy recourse by quitting, by making attempts to end their lives, thus requiring the administration to take a fresh approach and work towards identifying effective steps to eliminate this growing trend. Also the same-sex couples coming forward and advocating their cause and concerns, this has created varied speculations in society, which needs to be effectively taken care of and also the role of authorities and custodians of justice should be revamped to help them take an impartial view when dealing with this distinguished class of people.

## **PUNISHMENT UNDER IPC VIS A VIS DEATH PENALTY IN INDIA: A LETHAL LOTTERY**

**Shwetabh Raj<sup>1</sup>, Shubham Tripathi<sup>2</sup> and Shweta Upadhyay<sup>3</sup>**

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It is universally accepted that wherever in any society in any country exist wealth, land and woman crimes are bound to occur and thrive in one form or the other. To check occurrence or

growth of crimes punishment is provided by that society in a country.

The Penal Law of a country will always tend to change according to the views of the sovereign power of that country. There are some 20 types of crime contained in the Indian Penal Code and one such kind of punishment is death penalty.

The Indian judiciary has ruled that the death penalty for murder must be restricted to the “rarest of rare” cases, but this instruction has been contradicted by the legislature increasing the number of offences punishable by death. The death penalty is mandatory under two of the relevant laws, including for drug-related offences. There are grave concerns about arbitrariness and discrimination in the processes that lead to people being sentenced to death.

Such factors would render India’s use of the death penalty to be in violation of international laws and standards. Therefore the paper aims to concentrate on punishments under IPC and deal with applicability of death sentence in India.

## **RELEVANCE OF CAPITAL PUNISHMENT IN COMBATING AND CONTROLLING CRIMES OF MODERN AGE**

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In the era of globalization the social system is changing rapidly. After the Social, economic, cultural, political development the society become more advance at every level. In the era of globalization, it influenced almost every country in the world. In last two decades Globalization not only affects the economy of the country but also it influenced every aspect belong to human life. The impact of globalization can easily see on social, cultural, economic, political structure of the society. At the time of framing, Indian Penal Code, the social structure was completely different from today. The Capital punishment has always been remaining part and parcel of Indian judicial system. The Indian Penal Code provides Capital Punishment for eight categories of offences. Criminal Procedure Code is the procedural law, which explains the procedure to be followed in Death Penalty cases. Provisions of Article 21, 72, and 161 of the Constitution are human rights friendly. These articles provide justice in case of Capital Punishment if any mistake or error commit in judgment. Various International Human Rights Instruments expressly or impliedly says that the practice of Capital Punishment is inhuman and human rights violation. India votes against UN resolution on moratorium on Capital Punishment. In many countries, governments justify the importance of the Capital Punishment, claiming it deters crime. But there is no evidence that it is any more effective in combating and controlling crimes. Statistical Evidence proves that there is no correlation between the threat of Capital Punishment and the occurrence of the crimes of modern age.



## **PUNISHMENTS OF CORPORATIONS: VIS-A-VIS PENAL POLICY UNDER IPC**

**Abhinandan Bassi**

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Unlike the American and British legal systems, Indian Legal framework has not outlined the punishment for the misdeeds of the Corporate. Even though section 11 of the IPC includes the Corporate within the ambit of the word Person and implies that the corporate is capable of committing a wrong but the penal policy has somehow failed to address the menace that can be created by the corporate by not defining the punishments as per the wrongful acts or omissions that can be committed by them. The paper discusses this issue along with the concept of corporate fault theory of punishment replacing the theory of vicarious liability and the ongoing debate of the corporate having a mind of its own or not and the dire need to amend and reform the penal policy so that it outlines the punishments according to the damage caused by the corporate houses to the individuals and the community at large.

## **LAW, MORALITY AND JUSTICE: A DEBATE ON ALTERNATIVE SEXUALITY**

**Prem Kumar Gautam**

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RMLNLU, Lucknow

There is so much good in the worst of us,  
And so much bad in the best of us,  
That it hardly becomes any of us,  
To talk about the rest of us.

Alternative sexuality is a matter of opinion. Alternative sexuality continues to be one of the more complex and in some ways paradoxical areas of public opinion. The issue is not only one of significant concern because of its traditional moral and religious overtones, but in recent years has been at the center of state and federal legislative battles, highly publicized court challenges and political debate. Most political and religious conservations probably have no difficulty that it is always morally wrong.

A substantial portion of the public probably believes that the morality of any sexual behavior depends upon the situation. Some subjects might consider any manipulative, coercive or on safe sex to be immoral. Consensual, safe sex by two adults in a monogamous committed relationship to be moral whether gay or straight.

Nowhere is this mode of rhetoric more prevalent, or more forceful, than in politically charged issues like same sex relationship, abortion, and birth control, each of which represents a playing field for debates over. Foundational social concerns and core constitutional values such as the family, the right to life, and to choose and the right to depends oneself. Recently gays, lesbians bisexual and transgender have become an important category in civil liberties movement. Previously this category of people was considered as people of no morality, it include their participation in prostitution, some of them were straight then tend to be homosexual by gaining the habit not because of biological reasons and others though would have it since birth.

## **LAW & MORALITY: A LIMITING APPROACH OF LEGAL SANCTIONS TO THE SEXUAL CONDUCT OF INDIVIDUAL**

**Prof. G S Bajpai<sup>1</sup> and Dr. Yogendra Srivastava<sup>2</sup>**

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This November 24th of 2010, in Ram Chandra Bhagat vs State Of Jharkhand bench consisting of Justice M. Katju and Gyan sudha Mishra got divided on the issue of illegality and immorality. The matter in this case has given a new dimension to the oft-seen debate on legality and morality. The SC in most of such cases prefers individual autonomy in these kinds of matter over the impositions of legal sanctions. However, the legislative intent of the Indian Penal Code (IPC) is not so as the express provisions in the IPC in such kinds of matter are overtly penal.

The Indian Penal Code (IPC) faces ever increasing social expectations to resolve the issues of a vast range. With the change in the society, the legal interpretations existing in the IPC specially in dealing with the matters of sexual offences and conduct relating to the marriage have undergone significant changes. In the recent past several cases in the higher judiciary have posed tough questions as to the interconnections of legality and morality.

## **DEATH PENALTY: BARBARIC OR ESSENTIAL**

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The issue of Capital punishment always draws fierce debate amongst the supporters and the protestors of the death penalty. The authors would be focussing on the aspect of 'Death Penalty' which has been a huge debate on it whether it is a barbaric exercise or necessity to maintain the criminal justice system in India. The point focussed is that concept prevalent in India after "Bachan Singh v. State of Punjab" is the rarest of rare principle or on the other side that

there can never be any justification for torture or for cruel treatment and used as a tool of political repression and imposed and inflicted arbitrary. It is also focussed that whether death penalty cannot be abolished as India cannot risk the experiment of abolition of capital punishment because the fact that the possibility of an error being committed in the matter of sentence can be corrected by appeals and revisions to higher courts was relied upon or the mere nature of death penalty which is that if once it is given, it cannot be taken back or is irrevocable. Also certain International Agreements have been focussed like that of UN and meetings of Amnesty International which advocate the total abolishment of death penalty and its repercussions on the prevalent conditions in India and in its penal statute i.e. Indian Penal Code.

## **PUNISHMENT IN IPC AND DEATH PENALTY**

**Parvez Alam Khan and Anoop Yadav**

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'Indian Penal Code' is the main criminal code of India. It is a comprehensive code, intended to cover all substantive aspects of criminal law. In the paper researcher tried to explain the term punishment under Indian Penal Code with reference to the theories given by several jurists. Further researcher tries to describe the term capital punishment under IPC with reference to the efforts made by India Legislative Assembly to abolish the death penalty with reference to case laws. Researcher also tried to explain recent capital punishment awards and conviction. We also tried to get into the abolitionist-retentionist debate and analyses the issues at hand, because of its limitations given the strong ideological stand of retentionists the researchers believe in and supports the provision of Death Penalty under Indian legal system. At last researcher concluded with recommendations and all we can say is that, "If the law is not enforced then cure is enforcement, not repeal. If death penalty is an evil it is a necessary evil and a criminal chooses this voluntarily".

## **IDEOLOGY, HISTORY AND PHILOSOPHY OF INDIAN PENAL CODE**

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To disentangle and trace all the aspects of modern criminal law in their congeries of law, morals, religion, and customs in successive past epochs, is a huge and a delicate task indeed, which might well make the boldest historian halt. The object of the paper is to etymologically analyze the different systems and epochs that have varied widely in defining the legal scope of the commandment.

The paper will cover three fields in a nut-shell: first, the history of criminal law in general- its moral and political ideas, its legislative movements, its general legal doctrines and its penal methods; secondly, the history of specific crimes as defined in the law and thirdly, history of crime itself- its practices, methods and causes.

## **MISUSE OF SECTION 498A: DANGER FOR SOCIETY**

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The reason behind the enactment of section 498-A of IPC was really to protect women from being harassed or subjected to cruelty by husband and/ or his relatives. However, at present, the provision of this section has been misused by the wife to tortured, harass her husband and his family. It is obvious that section 498A has been lost its importance and aim. Delhi High Court observed in the case of Savitri Devi vs. Ramesh Chand, 2003 CriLJ 2759 that the provisions of this section 498A of the IPC were made with good intention but the implementation has left a very bad taste and the move has been counter productive. The Supreme Court of India also signifies the misuse of section 498A in many instances. The Supreme Court of India itself has labelled the misuse of section 498a as “legal terrorism” and stated that “many instances have come to light where the complaints are not bona fide and have been filed with an oblique motive. It is the duty of our political leaders to enact the laws to protect the husband and his relatives from false harassment as our Constitution grants equal right for men and women. There is also need to change our assumption that women are innocent and cannot commit any crime as per police record defines that women are getting involved in all types of crimes.

## **WHY DO WE KILL PEOPLE, WHO KILL PEOPLE, TO SHOW PEOPLE KILLING IS WRONG.**

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Punishment is for transgression of rules and must be inflicted by legally authorized person. Term Capital punishment is included as a penalty in a number of legislative acts in India, such as the Indian Penal Code and penalty provisions of national security legislation. Under the Indian Penal code, eleven offences may be punished by death. In our paper the researcher has tried to define what punishment means with special emphasis on history of capital punishment and its further development. Then, we tried to get into the abolitionist-retentionist debate and analyses the issues at hand. It shall be worth acknowledging here that although due care has been taken

to maintain the objectivity of the paper; however it has its limitations given the strong ideological stand of abolition the researchers believe in. In last part of paper researcher tried to explore certain recommendations which can help in the appropriate functioning Indian judiciary with respect to death penalty.

## **PUNISHMENT IN IPC WITH SPECIAL EMPHASIS ON DEATH PENALTY**

**Amita and Amit Rathi Gujjar**

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With growing international consensus towards abolition of the death penalty, India's continuation of award of non-unanimous death sentences is equivalent to taking steps backward. Fair and reasonable procedure is a vital safeguard for the enjoyment of human rights - more so where people are charged with crimes punishable by death. Under international human rights standards, such accused are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards. The requirement of unanimity of judges in imposing death sentences could act as an additional safeguard.

The perspective shown in this paper about punishment in IPC and particularly death penalty, is that, punishments must be in a way reformatory rather just merely attached with sanctity. I have tried to bring out the real meaning of punishment and what must be the current status of taking human life with the seal of legal sanction. Is death penalty really helpful in declining rate of heinous crimes? This question is raised and answered through proper research of what are the punishments in IPC and particularly what crimes are attached with the highest form of sanction, that is, death penalty. Concentrating on the cases and history of capital punishments in India, I have tried to bring out constitutional validity of death penalty and its role in present society.

## **COMMUNITY SERVICE AS ALTERNATIVE PUNISHMENT**

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The Indian Penal Code was enacted in 1860 by virtue of the classic legal draftsmanship of Lord Macaulay. If there would have been a concept of community service prevalent at that time then the authors are sure that there would have been no need to urge the inclusion of the same in the Indian Penal Code. But since this exclusion by Macaulay is because of no fault of his it is our duty to incorporate such to meet the demands of the time and to make the IPC a living social document.

The research paper tries to incorporate the needs and the benefits of community service in

India. It would then delve upon the legal development of inclusion of community service as mode of punishment. It would be done by scrutinizing the reports of the law commissions, judicial pronouncements and the lapsed bills which urged such a reform.

Then authors would suggest concluding the problems in the inclusion and implementation of community service in India and how to overcome these difficulties so that IPC meets the social needs and critics find one issue sorted in criticizing the IPC and its efficacy.

## **REVISITING THE LAW ON INSANITY IN INDIA**

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In order to hold a person legally responsible for a crime. generally speaking, a criminal intent is necessary and therefore capacity of the wrong-doer to form a criminal intent is a relevant consideration in determining the criminal liability of that person. A person may lack sufficient mental capacity to form a criminal intent because of immaturity of age or because of some defect of the mental faculty. When such defect is caused by some disease of mind, a person is said to be insane. Therefore, those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion. idiots and lunatics, are not punishable by any criminal prosecution whatsoever. Stephen in his Digest of Criminal Law states- "No act is a crime if the person who does it, is at the same time when it is done prevented either by defective mental power or by any disease affecting his mind (a) from knowing the nature and quality of the act, or (b) from knowing that the act is wrong."

## **INTOXICATION AS A GENERAL DEFENSE: SCOPE OF SECTION 85 AND 86 OF THE IPC:**

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The link between alcohol use and crime has been explored extensively. Collins concluded that there was sufficient evidence to justify the inference that alcohol is sometimes casually implicated in the occurrence of serious crime, although this conclusion has been the source of considerable debate. Numerous attempts have been made to develop typologies for understanding the relationship between the drinking and offending behaviour, and whilst these vary, all agree that the link between alcohol and crime is multi-faceted. Three ways in which the relationship between alcohol and crime could be formed are as under:

- a. The relationship may be casual because the offender has committed an alcohol defined offence, an alcohol induced offence, or an alcohol inspired offence.
- b. The relationship between alcohol and crime may be contributory, alcohol provides “Dutch courage” to commit an offence, acts as a catalyst, or is offered later as an excuse for offending behaviour.
- c. There may be no relationship between alcohol and crime, with the two behaviour simply co-exists as separate activities.

## **PUNISHMENT IN INDIAN PENAL CODE: A NEED FOR OFFENDER ORIENTED PUNISHMENTS THAN OFFENCE ORIENTED**

**Atullya Narayan Srivastava**

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Object of penology today is to protect the society against the criminals by inflicting punishment under the existing criminal law. The paper talks about this object and the four classical principals of sentencing, mainly focusing on the reformatory principal citing Supreme Court cases emphasizing that reformatory approach to punishment should be the object of criminal law in order to promote rehabilitation without affecting community conscience and to secure social justice. The five punishments under the Indian Penal Code which are Death, Imprisonment for life, Imprisonment, Forfeiture of property and Fine are then described. The paper concludes stating the defects in the sentencing system. It is acknowledged that the provisions related to punishment in Indian Penal Code have become somewhat obsolete. But some attempts have however, been made recently to modernize our penal system through piecemeal legislation at best for the first offenders, the children and the juvenile delinquents.

India is a secular state. It has no religion of its own i.e., there is no state religion, unlike Islamic countries, such as Pakistan, Iran, Egypt, Saudi Arabia etc., which recognise Islam as the religion of - the state. The constitution of India in Article 25 has guaranteed freedom of conscience and free profession, practice, and propagation of religion, and in Article 26 the freedom to establish religious institutions and manage and administer their affairs and to hold, acquire and administer property.

The freedom of religion has been given a very wide connotation, so much so that even non citizen can enjoy religious freedom.

The five sections (295, 295A, 296, 297 and 298) of the Indian Penal Code 1860 contained elements to punish defilements (to make unclean or destroy the pureness) of place of worship, or objects of veneration (worship). outraging or wounding the religious feelings, and disturbing religious assemblies.

## **CRIME AND PUNISHMENT IN ANCIENT (SMRTI) INDIA**

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India's Culture is one of the oldest of the world. In ancient India "danda" was considered to be a crucial constituent of legal and social system. It was signified punishment meant for violating various laws of Society. These laws were framed and established by the ruling classes and on many points followed the principal of Varna or class legislation. The smritis prescribe various rules relating to punishments to be awarded for different. The nature of punishment as well as its degree prescribed in the smritis appear to have the objective of preventing acrimony based on caste and the other prejudices and to maintain the social position of castes as laid down in Vadas and smrtis. This system, although discriminatory according to modern legal philosophy, but was main training the law and order of the then society. This system might be obsolete today, but it has distinctive characteristic features of its own, this system was having description of every kind of crime and punishment thereof the then present in ancient society. We have to critically examine the old legal and judicial system for obtaining noble principles and giving up those principles which were either unwarranted to present day society or not meant for the welfare of society at all.

## **DECRIMINALIZATION OF HOMOSEXUALITY: HUMAN DIGNITY OUGHT NOT TO BE SACRIFICED ON THE ALTARS OF PUBLIC MORALITY**

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"Interference with individual liberty may be thought an evil requiring justification ... for it is itself the infliction of a special form of suffering... This is of particular importance in the case of laws enforcing a sexual morality."

Homosexuality has always been a controversial issue since antiquity. Conflicting views have hounded this sensitive issue, goaded by the preconceived standards of public morality. This has lead to a very narrow societal outlook, treating people having same sex relations as aliens, as criminals. With time, perspectives change; and 126 odd nations have decriminalized homosexuality. Of late, India has joined the aforesaid bandwagon. The prohibition under Section 377 of the IPC has been overshadowed to accommodate the clarion call of the hour by social activism and judicial interpretation in the Naz Foundation case. Public animus and disgust towards the vulnerable minority of the homosexuals must not formulate a ground for deprival of their



inalienable rights. Basic human autonomy must not be made sub-servient to the ambiguous and manipulative notions of public morality. India has a long way to go. Presently we have to wait and watch whether Supreme Court delivers the final nail in coffin for homosexuality detractors or pulls up cudgels of morality and social milieu to overrule the decision of the Delhi High Court.

## **PRINCIPLES OF NATURAL JUSTICE VIS-A-VIS CRIMINAL JUSTICE ADMINISTRATION**

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The laws of nature are intended to promote endurance rather than justice. Nature is ruled by principles such as the survival of the fittest and prevalence of might over right. When a flock leaves its feeble members behind there is no question of the feeble being supported or sheltered. Therefore, 'natural' justice is not justice found in nature; it is a compendium of concepts which must be naturally connected with justice, whether these concepts are integrated in law or not. Justice is a great humanizing strength. Justice ensures that the rule of law rather than the rules of nature prevail in controlling human conduct. The principles of natural justice have evolved under common law as a check on the arbitrary exercise of power by the State. As the State powers have increased, in name of maintaining law and order it has become increasingly necessary to ensure that these powers are exercised in a just and fair manner. Minimum fair trial is right of every accused person irrespective of his or her status. Cardinal principle of criminal law is let hundred guilty person set free but not a single innocent person be punished.

This paper proposes to critically examine various principles of natural justice and their application in a fair criminal trial in the light of Indian criminal justice system. To analyze certain cases where exception to the rule of natural justice principles applied in criminal cases are justified. To achieve this end, the author will discuss few offences under Indian Penal Code, certain provisions of criminal procedure as well as various case laws.

## **ECOLOGICAL NUISANCE AND COMMON LAW ENVIRONMENTALISM: RELEVENCE OF INDIAN PENAL CODE IN COMBATING ENVIRONMENTAL CRIME**

**Md. Zafar Mahfooz Nomani**

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AMU, Aligarh

The alarming increase in environmental degradation with fatal consequences has created the continuous need for expanding the scope of environmental offences. The criminal law requires

supporting institutions and structures for the effective implementation and enforcement of environmental norms. The proliferation of environmental law to combat environmental crime has increased manifold. The flagrant violations and widespread dissatisfaction with environmental law triggered jurist and legislators to reexamine common law remedies to supplement existing regulatory regime. The common law's environmental potential under so-called free market environmentalists is based on private property rights and market-based approaches. This revival of interest in the environmental law scholarship continues to assume that a return to the common law is unlikely. The article begins by surveying variations on the traditional remedy of money damages. It then discusses the appropriateness of alternatives such as restitution, injunction and declaratory remedies. This discussion is followed by an overview of the penalty options available to policy makers for environmental harms for non-compliance with environmental laws and regulations. The article provides a background analysis of the critical formulation of common law remedies to enforce environmental compliance for good environmental governance and respect for sustainable development. This analysis is followed by a discussion of the differences between criminal and civil penalties and the appropriateness and underlying bases of each form of penalty. Finally, the article offers a brief discussion of alternative penalties available to policy makers, in addition to the traditional criminal and civil penalties available, by surveying environmental enforcement alternatives in use by environmental administrators.

## **INDIAN PENAL CODE OR INDIAN POPULAR CODE: FROM A CRIMINOLOGICAL PERSPECTIVE**

**Dr Mridul Srivastava<sup>1</sup> and Dr Akanksha Nigam<sup>2</sup>**

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Indian Penal Code can be referred as the most popular code in India. What things make this document which is only concerned about the crime and punishment system so remarkable in the history that after 150 years of its existence, it still serves the purpose of punishing the criminals. From a common petal shop owner to the top most officials, politicians, literate or illiterate persons almost everyone is aware about some sections of IPC which common persons use in their day to day gossips or discussions. The most popular sections of IPC are 302 for murder, 307 attempt to murder, 376 for rape, 377 for homosexuality, 120 B etc. What makes it so different? As a criminologist, when authors tried to find out the reasons of its popularity then one thing is very clear that this document defines each and every crime very clearly and punishment prescribed in this substantial law is crystal clear. The criminal justice system consists of police, prosecution, Judiciary and Correctional Institutions uses it frequently and implementation of the provisions are enforceable and practical. IPC has a deterrent effect also which can be easily seen in the common man's life.

## **DECOLONIZATION AND LAW IN INDIA : EVALUATION OF PUNISHMENT IN IPC WITH SPECIAL EMPHASIS ON DEATH PENALTY**

**Dr. A. K. Sonakar<sup>1</sup> and Sujeet Kumar<sup>2</sup>**

<sup>1</sup>Associate Professor of Law, University of Lucknow, Lucknow

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The paper tries to study the colonial legacy of IPC in independent India vis a vis the process of decolonization of the past. The emphasis in the present paper is on the death penalty as an important variable of punishment in modern Indian society. The important thing to note is that the process of decolonization with respect to death penalty seems to be another process of imitation of the Europe. The paper shall examine, what is indigenous jurisprudence behind the change in orientation regarding death penalty. Despite continuing international efforts for initiating and implementing policies aiming at complete abolition or at least at extended moratoriums the death penalty is still imposed and enforced in various world regions. Today, Europe represents the only world region where the death penalty has been eliminated completely. With political and economic transition having been accompanied during the nineties by the process of abolition of the death penalty in Central and Eastern Europe at large has become a death penalty-free zone. From a European perspective, it is essentially two major world regions where the death penalty still plays a significant role. In particular, Asia, and here China as well as the United States of America, seem firmly committed to retaining the death penalty as a response to serious crimes. However, Asia, and here China as well as the United States of America, seem firmly committed to retaining the death penalty as a response to serious crimes. However, Asia at large as well as the African continent continues to be places where the death penalty not only is available in criminal law statutes but is also imposed and enforced. Some 84 countries, according to the latest Amnesty International survey – retained and enforced the death penalty at the end of 2001. The paper shall examine the Indian jurisprudence of this shift in orientation.

## **RELEVANCE OF INDIAN PENAL CODE IN CONTROLLING AND COMBATING MODERN AGE CONSPIRACY**

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The provisions of Section 120-A and 120-B. IPC have brought the law of conspiracy in India in line with English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The sections make conspiracy a substantive offence in itself, apart from

the acts which may be pursued in furtherance of the conspiracy. Sections 120A and 120B were introduced in the penal code by an amendment in 1913. Before this amendment steps had been taken earlier and specific conspiracies had been made substantive offences in themselves. E.g. S. 121A which was introduced by amendment in 1870, s. 107 clause 'secondly'. However, apart from s. 121A, conspiracy *per se* was not an offence in India i.e. conspiracy without act in pursuance of that conspiracy was not an offence except as provided under s. 121A. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means. It is necessary that they should agree for design or object of the conspiracy.

## **IDEOLOGY, HISTORY OF IPC WITH SPECIAL REFERENCE TO SECTION 377**

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<sup>2</sup>Student, UPES, Dehradun

Indian Penal Code is a document that covers almost all the crime happening in the society. It is a piece of British colonial legislation dating from 1860. Now it provides a penal code for all of India. The code applies to any offence committed by an Indian Citizen anywhere and on any Indian registered ship or aircraft. The Indian Penal Code came into force in 1862 and is regularly amended, such as to inc aspects of the Criminal Law. The nature of these have led to allegations of abuse of those laws.

After independence, Indian Penal Code was inherited by Pakistan(now called Pakistan Penal Code) and Bangladesh, formerly part of British India. It was also adopted wholesale by the British colonial authorities in Burma, Sri Lanka, Malaysia, Singapore and Brunei, and remains the basis of the criminal codes in those countries

## **THE TRAGIC ILLUSION: DEFENDING LIFE BY TAKING LIFE**

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The question of whether the death penalty is a more effective deterrent than long-term imprisonment has been debated for long. A society consumed by outrage easily confuses punishment and revenge, justice and vendetta. All systems of law, however wise, are administered

through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism. The paper seeks to emphasize that the death penalty offers the *tragic illusion that we can defend life by taking life*. We cannot teach that killing is wrong by killing. The researcher inquires into various theories of punishment and proposes to the reformatory system of justice which professes the view that the *offender needs to be treated, not punished*. Vengeance is a strong and natural emotion. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. But it has no place in our justice system. It is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes.

## **CURBING THE LEGAL MARGINS OF JUDICIAL SENTENCING**

**Dr. Subhash Chandra Singh**

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Mahatma Gandhi Kashi Vidyapeeth, Varanasi

Since the adoption of the Penal Code in 1860, the culture of sentencing in India has always significantly reflected a great deal of faith in the judiciary, given wide margins of discretion in order to be able to do justice to the seriousness of the crime and the conditions in which it was committed, as well as to the perpetrator as a person and the personal background against which he/she came to commit a crime. In addition to the classical foundation of punishment—retribution, and its classical goal—general deterrence, growing importance was attached to special deterrence and resocialisation. In post-independence era, faith in the judiciary meant that Indian criminal justice had a specifically paternalistic flavour. After the end of colonial regimes a new dimension has been added through the Constitution and the fair and impartial judicial system in which the principles of civilised society and the elements of human rights that have come to dominate criminal procedure.

The Indian sentencing system has traditionally permitted judges a wide discretion in passing sentences. It is rare that the sentence for an offence is fixed by law (murder and some other serious offences being the notable exceptions) and so there is no such thing as a 'correct' sentence. Apart from statutory provisions such as those stating the maximum penalty for an offence, or providing separate rules for dealing with specific types of offenders (like the young or mentally disordered), the sentencer traditionally enjoyed considerable freedom in his choice of sentence. The task of providing guidance or controlling this wide discretion was a matter for the higher courts.

## **OFFENCES RELATING TO THE RELIGION AND TRANQUILITY**

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Students, RMLNLU, Lucknow

India is a secular state. It has no religion of its own i.e., there is no state religion, unlike Islamic countries, such as Pakistan, Iran, Egypt, Saudi Arabia etc., which recognise Islam as the religion of - the state. The constitution of India in Article 25 has guaranteed freedom of conscience and free profession, practice, and propagation of religion, and in Article 26 the freedom to establish religious institutions and manage and administer their affairs and to hold, acquire and administer property.

The freedom of religion has been given a very wide connotation, so much so that even non citizen can enjoy religious freedom.

The five sections (295, 295A, 296, 297 and 298) of the Indian Penal Code 1860 contained elements to punish defilements (to make unclean or destroy the pureness) of place of worship, or objects of veneration (worship). outraging or wounding the religious feelings, and disturbing religious assemblies.

## **CORPORATE LIABILITY: GENESIS AND EVOLUTION WITH REFERENCE TO INDIAN PENAL CODE**

**Dr. C.P. Singh**

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The day man learnt to live in groups need of law to regulate the relationship of the individuals of that very group arose. As soon as the man discovered wheels he also started exchange of commodities and business as well. To recognize the identity of individuals doing business in a group the concept of Corporation emerged. The word "corporation" derives from *corpus*, the Latin word for body, or a "body of people" entities which carried on business and were the subjects of legal rights and duties. In the late 18th century, Stewart Kyd, the author of the first treatise on corporate law in English, defined a corporation as, a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.

Corporate liability means the extent and manner in which the liability of a corporation can be fixed for offences being done by it. The concept of corporate liability is nothing but a way to regulate the corporation so as to prevent them from creating a economic chaos resulting in imbalance to social infrastructure.

The concept of corporate liability has a long history so as the legal development is concerned. The principle of corporate traveled a long journey from *Alter ego* theory propounded in *Asheatic Petroleum* case till today.

The question of corporate liability has always been a matter of discussion among the jurists. As the corporations are persons without any physical existence and therefore fixation and imposition of the liabilities on the corporation has always been a issue for the courts also. The term corporate liability is a term of multifarious meanings it includes corporate social responsibility along with civil and criminal liability of the corporations.

## **SOCIO-LEGAL DIMENSIONS OF HONOUR KILLINGS IN INDIA**

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An honour killing or also called a customary killing is the murder of a family or clan member by one or more fellow family members, in which the perpetrators (and potentially the wider community) believe the victim to have brought dishonour upon the family, clan, or community. The perceived dishonor is normally the result of the following behaviors, or the suspicion of such behaviors: (a) utilizing dress codes unacceptable to the family/community, (b) wanting to terminate or prevent an arranged marriage or desiring to marry by own choice, or (c) engaging in certain sexual acts, including those with the opposite or same sex. Such killings or attempted killings occur due to the belief that the honour of a family, clan, or community justifies killing a person whose behavior is perceived to have dishonored the clan, family, or community. In most of the cases of honour killings usually the victim is woman. Over the last couple of months, news has been pouring in about 'honour killings' from the northern States in India mostly from Haryana, Punjab, Uttar Pradesh and Bihar. Numerous couples have been killed mostly by family members on the orders of the 'Khap panchyats' as they eloped, married outside their caste or within the same 'gotra'. This social menace is not only limited to the north, but can be seen in Southern States as well. The Central Government is planning to include this menace as a special provision of the Indian Penal Code (Does it mean they are currently not murderers?) But instead of acting upon it with urgency, the government has convened a Group of Ministers to deliberate upon the matter. While it is a very sensitive matter, the sensitivity is largely limited to the victims and not the murderers, the *khap panchayats*. This problem becomes more complicated when vote bank politics take over the issue, as khap panchyats wield almost total control over a large section of

the rural community in these states. Pronouncing them as murderers would minimize the chances of any party at the time of elections.

In June 2010, scrutinizing the increasing number of honour killings, the Supreme Court of India issued notices to the Central Government and six States including UttarPradesh, Punjab, Haryana and Rajasthan, to take preventive measures against this social evil. Today we are living in 21<sup>st</sup> century in which women have made a distinct place in society, and are attaining new heights in all walks of life along with their men counterpart. The practice of honour killings in twenty first century is a blot on Indian society and culture. It is nothing but violation of their life and personal liberty, and in a civilized society such inhuman and barbaric practices must be awarded exemplary punishment and eliminated. The present paper is an attempt to critically analyse the socio-legal dimensions of honour killings prevalent in different parts of India, and to suggest suitable ways to curb this menace.

## **AN ASSESSMENT OF INDIAN PENAL CODE REGARDING CHANGING CRIME PATTERN IN INDIA**

**Dr. (Mrs.) Anupam Sharma**

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Crime in the society deprives the people of their lives, property and dignity which are the basic rights of the citizens. It also disturbs the smooth life of the citizens and create law and order problem in the country. The primary duty of the state is to maintain peace and prevention of crime in the society through its preventive machinery as police. Although police is well equipped with the various crime prevention laws mentioned in the Indian Penal Code but with the changing social, political, economic and cultural conditions police has been facing the problem of changing pattern of crime in different areas as shown the 'Crime In India'. In this context the objective of the study is to analyze the implications and effects of the provisions of Indian Penal Code in the light of changing scenario and new types of offences entering into. The hypothesis of the study is to verify that whether Indian Penal Code is relevant for combating new pattern of crime in present situations. The study will be conducted empirically on police personnel from lower to high ranking officers in the police department.

## **REFORMS IN IPC**

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Law and morality influences almost all the statutes in some or the other way. Indian Penal Code is also not untouched from it. There is an ongoing law and morality debate on controversial issues such as divorce, death penalty, dowry prohibition, adultery, obscenity, premarital sex, prostitution, pornography, suicide, homosexuality under IPC. In this paper, we are focusing on



this debate under IPC in context of suicide and homosexuality.

IPC makes abetment of suicide (Section 306) and attempt to suicide (Section 309) punishable. It is the instincts of majority segment of society that give rise to ethics and morality which lead to uniform norms. So, attempt to commit suicide is against the generally accepted norm. Therefore by declaring attempted suicide a penal offence, the IPC upholds the dignity of human life, because human life is as precious to the state, as it is to the holder and state cannot turn a blind eye to a person in attempting to kill himself.

Homosexuality is an offence under Section 377 IPC. This debate over homosexuality involves legal as well as ethical, social and religious aspects. Article 21 of Constitution provides for the right to life and liberty but at the same time it also says that the right can be taken away by procedure established by law and section 377 is just such a procedure which is established by law.

Thus, both these issues are long debated and have yet not arrived to any settled position.

## **NEED OF JUDICIAL ACTIVISM IN IPC: MEETING THE ENDS OF JUSTICE.**

**Jyotsna Nagvanshi and Nilufer Bhateja**

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Dicey writes :

*“As all lawyers are aware, a large part and as many would add, the best part of the law of England is judge-made law—that is to say, consists of rules to be collected from the judgments of the courts. This portion of the law has not been created by Act of Parliament and is not recorded in the statute book. It is the work of the courts; it is recorded in the reports; it is, in short, the fruit of legislation.”*

Speaking on the role of the judges, President Roosevelt in his message of 8 December, 1908 to the Congress of the United States, said:

*“The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process or law, liberty, they necessarily enact into law parts of the system of social philosophy; and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century, we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions.”*

A judge can both make laws as well as declare laws. In common law countries, the role of the judges has been greatly creative. In countries where the law has been codified, the role of the

judges has been comparatively less creative. However, the difference between the two is not very great. The two views regarding the role of the judges are rather complementary and not opposed to each other. A true picture of the judicial function lies in the synthesis of the two views. The creative role of the judges in England has been so dominant that English law is sometimes referred to as judge-made law, but this does not mean that judges in England have made the law in the same sense in which legislatures make it. Moreover, this view does not apply to other countries. A judge may be said to be laying down law in cases of first impression, but while doing so he is guided by certain principles, conventions and ideals. Even in countries where law is codified, a judge gives creative touches while applying the codified law. The result is that judges not only declare law but also make law. Likewise, making does not mean that judge make law in the sense in which legislators make law.

## **DEATH SENTENCE: THE JUDICIAL RESPONSE AND ITS CHANGING PERSPECTIVE**

**Dr. Kshemendra Mani Tripathi<sup>1</sup> and Dr. Prashant Mishra<sup>2</sup>**

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The legal fraternity and the criminologists have been committed, focussed and contributed a great deal of research attention to the deterrence and death penalty question. This dimension is and has been of academic interest, primarily focussing the theories of punishment associated with. The varied aspects in its perspective, of death sentence, have manifold reasons and, hence, should not come as a surprise for the intelligentsia, in particular, for the masses. Firstly, the death sentence is an emotionally charged issue for laypersons and policy makers. For many the deterrence issue is at the heart of the debate. Secondly, India is one of the countries retains death sentence. This fact underscores questions about the utility of this form of punishment within India. Thirdly, despite the relatively uniform pattern of negative findings on capital punishment and deterrence, recent studies have raised questions that have been addressed by the investigators. Improvements in data availability and analysis techniques have also permitted scholars to respond to many previously unanswered deterrence and punishment issues.

There are few fundamental questions that raise to review and assess the empirical evidence regarding the deterrent effect of capital punishment/death sentence. Primarily, do executions actually promote, rather than discourage murder or such other offences? Due to volume of research, our analysis has not included a detailed review of all the various studies.

## **RELEVANCY OF THE CAPITAL PUNISHMENT IN CONTROLLING AND COMBATING THE CRIME IN MODREN AGE WITH SPECIAL REFERENCE TO THE DISPARITY IN SENTENCING**

**Dr. Urusa Mohsin & Shashank Shekhar**

Asstt. Professors, Unity Law College, Lucknow

At the present era of digital revolution new challenges and new forms of crime emerge, to combat these challenges the sentencing system should be redefined. The etiology of the crime be tried to find out, to bring about legislation which introduces a whole change of innovative and appropriate dosage of punishments that change the psychology of the accused. Re-examination of the splitting offences be done to compact the IPC. Every endeavor should be made to tackle and punish perpetrators of the crimes adequately. Death needs not be inflicted except in gravest cases.

Revision of the amount of the fine in the age of galloping inflation is necessary. Justice to the victim is one of the inseparable imperatives of the criminal justice system. The deterrent and reformative potentialities of restitution be examined.

## **COMPOUNDING OF OFFENCES**

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Compounding or compromise in Webster Dictionary is “*to avoid prosecuting a criminal for private motive*”. All the three Cr. P.C.’s made, so far, in India were having provision for compounding of offences. Section 320 of Cr. P.C. has provided on celebrate list of offences which are compoundable directly or by the permission of the court. However, the trend shows the sympathetic attitude of the court that the Court may grant permission in non-compoundable offences, also, if thinks fit and Court has not to wait for procedural formalities as required under law. This new practice is a step in advancement of social justice and human rights. But sub-section (9) of 320 Cr. P.C. in still a hurdle in this field. It has compelled the court not to pass suitable orders suiting the parties. The court either reduced the conviction to the period already under gone by him in Jail or altered the charge of non-compoundable offence to one compoundable and then only the accused was released on the basic of compromise. I do not think that this practice is not good one but the court is bound to accept this practice. Thus steps need to be taken for liberalization of Cr.P.C. in light of will of the parties and permission by the court.

## **REFORMS IN RAPE LAW IN INDIA**

**Triyugi Narain Mishra<sup>1</sup> and Om Prakash Singh<sup>2</sup>**

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The laws relating to rape and sexual assault are set to undergo a radical overhaul with the Union Home Ministry readying a draft Bill on the subject. Home Minister P. Chidambaram's remarks suggest that the proposed legislation is likely to be based on the Law Commission of India's 172nd report, which called for a thoroughgoing review of our rape laws. The 2000 report was prepared following a direction from the Supreme Court that loopholes in the law relating to rape and sexual assault should be identified with a view to plugging them. At least two major changes seem to be on the anvil. First, the meaning of rape, which Section 375 of the Indian Penal Code construes as non-consensual sexual intercourse, will be broadened to cover other forms of penetrative acts that fall outside the purview of the existing definition. The Law Commission, the National Commission for Women, and various feminist organisations have supported such a widening of the definition of rape on the ground that the existing legal provisions neither reflect nor deal adequately with the various kinds of sexual assault women are subjected to in India. The restrictive interpretation of the term 'penetration' in the Explanation to Section 375 fails to address the myriad ways victims of sexual crime can be humiliated — physically, emotionally, and psychologically. Rape, as feminists have argued, must be understood as an experience of brutal violation and degradation and not just the act of penetration. This paper seeks to analyze the existing framework relating to the rape laws in India and argues that the proposed reforms in rape laws may not be adequate to bring the Indian laws on par with its counterparts in some other parts of the world.

## **COMMUNITY SERVICE AS ALTERNATIVE PUNISHMENT IN INDIA**

**Prof. A.N. Singh**

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The modern concept of community service as a punishment began in Great Britain in the late 1960s and has become increasingly popular with judges who find they can be more flexible and humane in punishing offenders unlikely to commit another crime. Those guilty of offenses like shoplifting, writing bad checks, possessing small amounts of illegal drugs, or hurling cell phones, are required to work a certain number of hours for the good of the community, usually in a local nonprofit or government facility. (The judges' rule of thumb: Six hours of work equals one day in jail.)...

Whether the work itself is useful or not, this kind of sentencing is certainly helpful to the criminal justice system in a time of budget deficits and overcrowded prisons. (We have more people locked up than any other nation and lead the world in incarceration rates at 751 people in prison or jail for every 100,000 in the population. California may have to release prisoners.)

Community service is practical as well as humane. It saves court time because few of these cases go to trial. The charges are generally dismissed once community service is done and the fine paid. The state saves the high cost of a prisoner's daily care.

Is community service helpful to the community by making offenders less likely to commit crimes in the future? Sentencing experts point to the good outcomes for young offenders, where time in jail would very likely have made them more dangerous.

We'd like to believe older offenders can be transformed by serving their communities, but the few studies on the subject are inconclusive. There's not much evidence that such sentencing significantly reduces recidivism....

## **COMPENSATION AND PUNISHMENT**

**Prof. Kumkum Kishore**

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A fifth theory of punishment, restitution, gained significant ground in the twentieth century, and is becoming more and more important in criminal procedure as technology advances and the criminal law becomes more moderate. The theory of restitution, compensation, recompense - however one refers to it - interprets the debt to society the criminal incurs through his offense in a more mercantile sense (perhaps in a more humane sense). In addition to suffering society's retribution, couldn't the criminal's debt to society also be paid through valuable service to the community and the individuals he harmed? The answer is often yes and, as better and more accurate ways of tracking convicted criminals are integrated into the criminal justice system, courts are increasingly turning to this method.

While criminals who serve active prison sentences do not really have opportunity to recompense the communities and individuals they harmed, the methods of modern criminal justice are rendering active incarceration less necessary, which allows convicted criminals more opportunity to perform compensatory services. More intensive probation, jail time served on weekends, and house arrest (which can be enforced by using an electronic ankle bracelet that alerts police when the arrestee tampers with the bracelet or goes somewhere other than home or work) are some of the methods that allow convicted criminals to perform services or render payments while serving their sentences. Examples of compensatory punishment might be a thief who serves jail time on the weekends but who is allowed to work and live at home during the week on the condition that he pay back the business he stole from, plus damages; or a sexual offender who is placed under house arrest for a year and allowed to go to work on the condition that he pay for psychiatric treatment for his victim.

## **VIOLENCE AGAINST WOMEN: CIVIL AND CRIMINAL LAW PERSPECTIVES**

**Vineeta Singh**

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Violence against women has been acknowledged both nationally as well as internationally as a violation of human rights of women, something that impairs the overall development of women. The first part of the paper gives a brief history of various IPC (Indian Penal Code), CrPC (Criminal Procedure Code) and Civil Law protections available to women against violence in India. The second part critically offers a comparative perspective of IPC provisions and the PWDVA (Protection of Women from Domestic Violence Act) 2005, with special emphasis on its ability to protect the human rights of women.

# किसान भाइयों के लिए खुशखबरी

## मण्डी आवक-किसान उपहार योजना पर एक दृष्टि...

इस योजना का उद्देश्य यह है कि किसान भाई अपनी उपज सीधे मण्डी स्थल में लायें और बिक्री उपरान्त व्यापारियों से 6-आर पर्चा अवश्य प्राप्त करें जिससे



बिचौलियों के शोषण से उनकी मुक्ति हो सके। योजना के अर्हतर्ग रू0 5,000/- तक के मूल्य के 6-आर पर्चे पर एक इनामी कूपन समिति कार्यालय से मिलेगा। इस कूपन को मासिक, त्रैमासिक और छमाही बम्पर ड्रा में लाटरी द्वारा निकाले जाने वाले इनाम में सम्मिलित किया जायेगा।

### मासिक ड्रा :

हर महीने हर जिले में 10 किसानों को मोबाइल फोन देने की व्यवस्था।

### त्रैमासिक ड्रा :

उपहार	उपहार की वस्तु	प्रत्येक सम्भाग में उपहारों की संख्या
प्रथम	सीड ड्रिल	एक
द्वितीय	स्प्रेयर (कंधे पर टांगने वाला)	दो
तृतीय	धातु निर्मित बखारी (पांच कुन्तल)	तीन

### छमाही ड्रा :

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- दिल्ली-सहारनपुर बार्डिंग योजना, गाजियाबाद (1058.081 हेक्टेयर)
- लोदी रोड योजना, गाजियाबाद (136.559 हेक्टेयर)
- दिल्ली-बुलन्दशहर बार्डिंग्स (हृतात्म विहार योजना), गाजियाबाद (294.792 हेक्टेयर)
- इन्दिरागंधा विस्तार योजना-2, लखनऊ (221.274 हेक्टेयर)
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- जगुति विहार योजना, मेरठ (206.510 हेक्टेयर)
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- मुल्तानपुर रोड योजना, लखनऊ (617.139 हेक्टेयर)
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- नबोला भूमि विकास एवं गृह स्थान योजना संख्या-4, मंगल (विस्तार), मुसताबाद (104.04 हेक्टेयर)
- शाहबी नगर फ्लैट, इलाहाबाद ( 27.167 हेक्टेयर)
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- सख्तपुर रोड भूविधि एवं गृहस्थान योजना, इन्वोई (82.323 हेक्टेयर)
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## योजनाओं के चयनित स्थल

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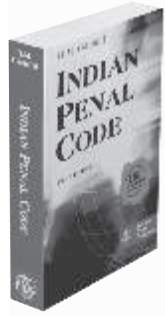
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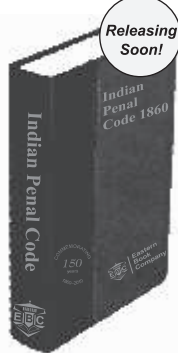
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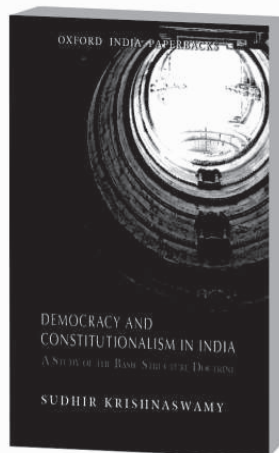
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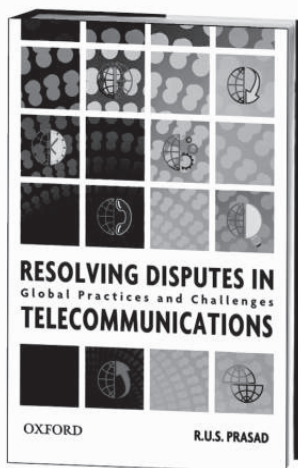
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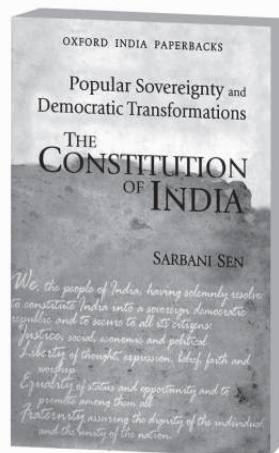


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प्रदेश के गरीबों, असहायों एवं ज़रूरतमंदों को सीधे लाभ पहुँचाने के लिए प्रासन्न की गयी  
इस क्रांतिकारी ‘उत्तर प्रदेश मुख्यमंत्री महामाया गरीब आर्थिक मदद योजना’ के मुख्य उद्देश्य :-

‘उत्तर प्रदेश मुख्यमंत्री महामाया गरीब आर्थिक मदद योजना’ द्वारा प्रदेश में रहने वाले प्रत्येक गरीब आदमी, जिसे अभी तक किसी भी पेंशन योजना  
अथवा सस्ते दर पर खाद्यान्न योजना का लाभ नहीं मिला है, को प्रतिमाह रुपये 300 की धनराशि देकर उनकी रोजमर्रा की जरूरतों को पूरा करना।  
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जो लाभार्थी परिवार वित्तीय वर्ष 2010-11 में आच्छादित नहीं हो पायेंगे, उन्हें अगले चरण में लाभान्वित करने का प्रदेश सरकार का संकल्प।

### योजना हेतु पात्रता एवं चयन प्रक्रिया:-

- प्रदेश में गरीबी की रेखा के नीचे रहने वाले ऐसे लोग जिन्हें अभी तक अंत्योदय एवं बी.पी.एल. कार्ड धारकों को दी जाने वाली खाद्यान्न योजना, नूट्रिशन पेंशन, विधवा पेंशन अथवा विकलांग पेंशन योजनाओं का लाभ मुहैया नहीं हो पा रहा है।
- यह योजना वित्तीय वर्ष 2010-11 से लागू की गयी है। जो लाभार्थी परिवार वित्तीय वर्ष 2010-11 में आच्छादित नहीं हो पायेंगे, उन्हें अगले चरण में आच्छादित किया जाएगा।
- लाभार्थी के रूप में परिवार की महिला मुखिया को चयनित किया गया है।
- लाभार्थी के चयन के लिए सबसे पहले प्रत्येक ग्रामसभा/राजस्व ग्राम में विन्हीकरण किया गया है। विन्हीकरण में यह देखा गया कि गरीबी की रेखा के नीचे कितने ऐसे परिवार हैं, जिन्हें अन्त्योदय/बी.पी.एल. कार्ड अथवा नूट्रिशन/विधवा/विकलांग पेंशन योजना का लाभ नहीं मिल रहा है।
- इस प्रकार विन्हीकृत परिवारों की सूची ग्रामसभा में प्रकाशित की गयी और एक माह के अन्तर लोगों को उसके सम्बन्ध में आपत्ति दर्ज कराने का मौका दिया गया।
- विन्हीकृत परिवारों का स्थापन एवं उनमें से योजना के अर्धीन पात्र परिवारों का चयन उप जिलाधिकारी/जिला स्तरीय अधिकारी की उपस्थिति में ग्रामीण क्षेत्र में ग्रामसभा की खुली बैठक में तथा शहरी क्षेत्र में भी निर्दिष्ट खुली बैठक में किया गया है। तदीयस्ततः लाभार्थियों की सूची को अन्तिम रूप जिलाधिकारी के स्तर से दिया गया है।
- इस चयन प्रक्रिया में पूरी पारदर्शिता बताने एवं ईमानदारी से शाकी बचे हुए गरीब लोगों का चयन सुनिश्चित करने के लिए प्रत्येक ग्रामसभा में खुली बैठकों में उपजिलाधिकारी/जिला स्तरीय अधिकारी की उपस्थिति अनिवार्य की गयी।

### योजना की प्रमुख विशेषताएं :-

- यह योजना खासतौर पर प्रदेश के गरीब लोगों को ध्यान में रखकर बनाई गयी है।
- प्रत्येक लाभार्थी को प्रतिमाह 300 रुपये की धनराशि दी जायेगी।
- 50 फीसदी से अधिक लाभार्थी अनुसूचित जाति/अनुसूचित जनजाति के आच्छादित किये गये हैं।
- इस योजना के तहत प्रदेश के गरीब परिवारों को दी जाने वाली धनराशि उनके नाम से बैंक खातों को खुलवाकर साल भर में दो बार छमाही किश्तों के रूप में सीधे उनके बैंक खाते में भेजी जायेगी।
- ग्रामसभा एवं नगरीय क्षेत्र में खुली बैठक के माध्यम से लाभार्थियों का चयन एवं बरिचसाक्रम निर्धारित किया गया है।
- जनपद स्तर पर योजना का क्रियान्वयन जिलाधिकारी के निर्देशन में उनकी सीबी देखरेख में किया जाता है।
- प्रदेश के ग्रामीण क्षेत्रों में ₹20 19884 प्रति परिवार प्रतिवर्ष तथा शहरी क्षेत्र में ₹20 25546 प्रति परिवार प्रति वर्ष की अधिकतम आव सीमा के अनुसार निर्धारित गरीबी रेखा से नीचे जीवन यापन करने वाले परिवारों का विन्हीकरण किया गया है।
- योजना का संचालन भारतीय स्टेट बैंक, किसी अन्य राष्ट्रीयस्त बैंक अथवा क्षेत्रीय ग्रामीण बैंक में लाभार्थी के नाम बचत खाता खोलकर किया जा रहा है।

गरीबों के उत्थान हेतु कटिबद्ध उत्तर प्रदेश सरकार की हर नीति ‘सर्वजन हिताय व सर्वजन सुखाय’ पर आधारित