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INDIAN SOCIETY'S PARADIGM OF DEATH SENTENCE: A LOOK AT WHETHER INDIA WAS WRONG TO EXECUTE YAKUB MENON.

Abstract:

"Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that. Hate multiplies hate, violence multiplies violence, and toughness multiplies toughness in a descending spiral of destruction."

-□Martin Luther King, Jr.

Even after 160 countries have abolished the death penalty in law or in practice, India is still one of those 58 countries which hands out the death penalty. The hanging of Mumbai Terror attack convict Yakub Menon on July 20, 2015 who had killed 257 and injured many others in the 1993 blasts has reinitiated the age old debate on the validity of death penalty in a nation which is a firm believer of the Gandhian Principal, "An eye for an eye makes the whole world blind." This debate correctly impels a moral and philosophical issue of whether in this era of globalization where human rights, specially 'Right to Life' are given the utmost importance in the International arena should India lag behind and execute convicts disregarding the consistent uprising against such actions by human rights activists worldwide.

This paper delves into the subject in three parts. The first part introduces the debate on the viability of Death Penalty given to Yakub Menon throughout which the author critically analyses the execution of the terror convict Yakub Menon and puts forth her views in relation to the same. The Second Part relates to the interplay of 'death penalty' and the 'Fundamental Right to Life under Article 21 of the Constitution of India.' In this part the author studies various landmark judgments of the Supreme Court of India and the recently released Consultation Paper by the Government of India in May, 2014. The third part illustrates the journey of Death Penalty in India by describing the concept of 'hanging till death' just after India got its Independence in 1947 where it was compulsory for the courts to give death sentences in various cases to its now refined version where death penalty is given only in the 'rarest of rare cases.' Finally, the author after exploring the historical and societal reasons for retention of death penalty in India will suggest a way out of the given disorder and chaos and illustrate how India has not completely disregarded the 'international human rights issues' and will in-turn pose the question- 'whether India was really wrong to hang Yakub Menon?'

Keywords:

India, Society's Paradigm, Death Sentence, Yakub Menon, Right to life, Human Rights, Article 21 of the Constitution of India.

I: AN INTRODUCTION TO THE DEBATE ON THE 'VIABILITY OF DEATH PENALTY GIVEN TO YAKUB MENON.'

"The death penalty has no demonstrated utility in deterring crime or incapacitating offenders, any more than its alternative — imprisonment for life. The quest for retribution as a penal justification cannot descend into cries for vengeance."¹

- Law Commission of India's recommendation made in August, 2015

The interplay of '*Right to Life*' and the imposition of '*Death Penalty*' is undoubtedly the most heated topic of discussion currently on an international level between human rights activists and sovereign nation states. This debate has been affirmed by the adoption of *Resolution 69/186*² by UN General Assembly on fifth resolution on *Moratorium of Death Penalty* where 117 countries voted in favour of abolition of Death Penalty, 38 voted against abolition and 34 countries abstained from voting.³ These international standards are affected by the domestic laws and public policies of the various sovereign nations due to which only 160 countries have abolished the death penalty and 58 countries including the developed countries like the United States, Japan and Singapore and developing countries like China, Saudi Arabia and Malaysia have not yet abolished it.

Other than the Resolution by the UN General Assembly the provisions of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Convention on the Rights of Children, Convention against torture and other cruel, inhuman and degrading treatment also govern the Law on Capital Punishment internationally.

Sovereign nations that abolish death penalty argue that capital punishment does not necessarily act as a deterrent for future crimes,⁴ it imposes hardship and trauma for the convict's family who may have had no role in the crime and it also confuses the idea of retribution with justice. Further, it deprives people of the opportunity to reform and this deprivation is not free from risk as the application of capital punishment is too judge centric. They also emphasise that there are studies which show that economically and socially backward groups have greater chance of being subjected to execution than the rich.⁵ Such a killing is therefore called '*a form of state sponsored violence*.'⁶

¹ GOVERNMENT OF INDIA (August 2015) *Consultation Paper 262 on Death Penalty*. Law Commission Of India, New Delhi.

² UNITED NATION GENERAL ASSEMBLY (December 18, 2014) *Moratorium on the use of Death Penalty*. Available from: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/186 . [Accessed: August 30, 2015].

³ AMNESTY INTERNATIONAL (April, 2015) *Death Sentences and Executions*. Amnesty International, United Kingdom 9 (50/001/2015).

⁴ Amnesty, 2015, p.3.

⁵ Rajendra Prasad v. State of U.P., (1979) 3 SCC 646.

⁶ GOVERNMENT OF INDIA (May 2014) *Consultation Paper on Capital Punishment*. Law Commission Of India, New Delhi.

Supporting the same view Martin Luther King wrote in his book *Stride Towards Freedom* after being inspired by the Gandhian principle of ‘An eye for an eye will make the world blind’ that “Violence as a way of achieving justice is both impractical and immoral... it seeks to annihilate rather than convert.” Jan Inslee, Governor of Washington State, USA on February 11, 2014 stated that “There are too many flaws in the system and when the ultimate decision is death there is too much at stake to accept an imperfect system”⁷

Supporters of death penalty however, believe that retribution through death penalty is the most effective means of achieving justice for the victim and for providing closure to the victim/victim's family and society.⁸ It ensures that the convicts are never released back into society as they may pose a threat in future and it also, reduces the chances of the convict of escaping from the prison. Further, Capital Punishment guarantees that jails are not overpopulated/ overcrowded and it impose less financial burden on the State.⁹

Barack Obama, President of United States of America while supporting death penalty once said “There is no parallel between death and even the most miserable life, so that there is no equality of crime and retribution unless the perpetrator is judicially put to death.”

With so many views on Capital Punishment the biggest issue is to decide which view truly leads to justice, brings an end to anarchy and establishes peace and security in the world. Through this academic research, the author tries to find an answer to this question keeping the specific settings of India and the recent execution of Yakub Menon into perspective.

Before going into details about Capital Punishment it is important to know more about Yakub Menon. Yakub Abdul Razak Memon was born on July 30, 1962 in Mumbai. He was the brother of Tiger Menon, the main accused in the Mumbai Blasts of 1993 which killed 257 and injured many others. After the bombings Tiger Menon with his counterpart Dawood Abraham went underground and the police failed to put them to justice. Yakub Memon was only responsible for financially assisting the executions of the bombings and for funding the training of 15 youths who were sent to Pakistan to learn the art of bomb blasts.¹⁰ The Indian Central Bureau of Investigation arrested Yakub at New Delhi Railway Station on August 5, 1994. However, he claims that he surrendered in Nepal on July 28, 1994.¹¹

⁷ Amnesty, 2015, p.3.

⁸ Amnesty, 2015, p.3.

⁹ Law Commission, 2014, p.34.

¹⁰ FIRST POST (2015) *No mercy for Mumbai blasts convict: Yakub Memon, once best CA awardee, will be hung on 30 July*. Available from <http://www.firstpost.com/india/no-mercy-sc-throws-out-last-minute-appeal-mumbai-blasts-convict-yakub-memon-will-be-hanged-on-30-july-2354838.html>. [Accessed: August 30, 2015].

¹¹ INDIAN EXPRESS (2015), *Yakub Memon: A chartered accountant and younger brother of Tiger Memon*. Available from <http://indianexpress.com/article/india/india-others/a-chartered-accountant-and-younger-brother-of-tiger-memon/>. [Accessed: August 30, 2015].

Memon filed an appeal before the Hon'ble Supreme Court of India which confirmed his conviction and death sentence for conspiracy through financing the attacks. The Court held that his role was not only limited to acting as a link between the masterminds and all other accused, but he was also entrusted with task of handling the explosive bags and for their safe keeping, which was also stated in the confessional statements of various co-accused persons. He was therefore tagged the "mastermind" and "driving force" behind the bombings by the Supreme Court.¹² After this judgment his lawyers filed a Review Petition, then a Writ Petition and exhausted all his avenues but no result was achieved. Finally, the mercy petition in front of the President was also rejected.

Yakub was charged for (a) Criminal conspiracy to carry out terrorist acts and disruptive activities and murder (b) Aiding, abetting and facilitating in a terrorist acts, (c) Illegal possession and transportation of arms and ammunitions and (d) possessing explosives with intent to endanger lives. The legally mandated punishments for the above activities are death sentence, life imprisonment, rigorous imprisonment for 14 years and 10 years respectively.¹³

On the day of the hanging he was permitted to take a warm bath and wear a fresh set of clothing. He also read the Quran, ate the last meal of his choice and spoke to his daughter.¹⁴ He underwent a final medical examination¹⁵ before he was executed by hanging in Nagpur Central Jail on July 30, 2015.

Yakub has been portrayed by actor/director Imtiaz Ali in Anurag Kashyap's film *Black Friday* in Bollywood which grabbed a lot of social attention. A part of the real footage of Yakub Memon's interview given to Madhu Trehan of *Newstrack*, where he states that the conspiracy was orchestrated by his brother Tiger Memon and his underworld associates, was also included in the film.¹⁶ Due to this media attention and the activism of human rights advocates a huge debate on Yakub Menon's execution commenced and they called for the abolition of Capital Punishment in India.

¹² TIMES OF INDIA (March 21, 2013) *1993 Mumbai serial blasts case: SC upholds death sentence of Yakub Memon, calls him mastermind of terror strike*. Available from: <http://timesofindia.indiatimes.com/india/1993-Mumbai-serial-blasts-case-SC-upholds-death-sentence-of-Yakub-Memon-calls-him-mastermind-of-terror-strike/articleshow/19103713.cms?> [Accessed: August 30, 2015].

¹³ Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay, (2013) 13 SCC 1.

¹⁴ THE NEW INDIAN EXPRESS (2015) *The Last Words and Wishes of Yakub Memon*. Available from: <http://www.newindianexpress.com/nation/The-Last-Words-and-Wishes-of-Yakub-Memon/2015/07/31/article2949346.ece>. [Accessed: August 30, 2015].

¹⁵ HINDUSTAN TIMES (2015) *Live: Yakub Memon executed at Nagpur jail for Mumbai blasts*. Available from: <http://www.indiaeveryday.in/news-live-yakub-memon-executed-at-nagpur-jail-for-mumbai-blasts-1001-831066.htm>. [Accessed: August 30, 2015].

¹⁶ THE QUINT (2015) *I Came Back to my Motherland: Yakub Memon's Only Interview*. Available from: <http://www.thequint.com/india/2015/07/16/i-came-back-to-my-motherland-yakub-memons-only-interview>. [Accessed: August 30, 2015].

II. THE IMPROVEMENT IN JUDICIAL STAND ON CAPITAL PUNISHMENT IN INDIA SINCE ITS INDEPENDENCE IN 1947:

We can understand the judicial attitude towards death penalty in India since its Independence in 1947 under 4 sub heads. They are:

Phase I: Death Penalty as a rule (1950-1955)

In India under the Code of Criminal Procedure, 1898 death sentence was a rule and life imprisonment an exception in capital offences and whenever the court preferred to award a lesser sentence than death in such offences it was required under section 367(5) of Cr. PC., 1898 to record its reasons in writing.

Phase II: Judicial Discretion in awarding Death Penalty or imprisonment for life (1955-1973)

By an amendment of the Criminal Procedure Code, 1898 Courts became free to award either death sentence or life imprisonment. The previous stand of the Court from 1950 to 1955 was also held unconstitutional in the case of *Mithu v. State of Punjab*.¹⁷

Phase III: Life Imprisonment was made the rule (1973-1980)

Code of Criminal Procedure was again amended and thereby imprisonment for life was made the rule and capital sentence was an exception. Special circumstances mandating death penalty were to be stated in case it is given.

Phase IV: Birth of the Doctrine: "Rarest of Rare Case"

The Hon'ble Supreme Court in *Bachan Singh v. State of Punjab*¹⁸ laid down the doctrine of "*rarest of rare*." This doctrine mandates that capital punishment should only be awarded in the "rarest of rare cases" when the alternative option is unquestionably foreclosed. The Court held that *aggravating* and *mitigating* circumstances relating to the crime and criminal must weigh in the mind of the Court while sentencing in capital offences. Rarest of rare coexists when murder is committed in any extremely brutal manner and is committed for a motive which evidences total depravity and meanness. The crime should be antisocial, socially abhorrent or of enormous proportion, like multiple murders. Personality of victim of murder should also be seen to determine if the case falls under "rarest of rare."¹⁹

¹⁷ *Mithu v. State of Punjab*, (1983) 2 SCC 277.

¹⁸ *Bachchan Singh v. State of Punjab*, 1983 1 SCR 145.

¹⁹ *Macchi Singh v. State of Punjab*, (1980) 2 SCC 684.

After 1990's Capital Punishment became dependant on judicial discretion and therefore, very varied judgments were given where death penalty as totally based on the whims of the Judge.

The Supreme Court justified India's position in the International Arena when it came to Capital Punishments. It stated that in the field of Capital Punishments numerous conventions have been signed. However, India is just a Party to one of them. India became a party to the International Covenant on Civil and Political Rights on April 10, 1979 and is still to become a signatory. ICCPR does not abolish imposition of death penalty in all circumstances. All that it requires is, that (1) death penalty should not be arbitrarily inflicted, (2) it should be imposed only for most serious crimes. Indian Law provides the same as guarantee under Articles 20 and 21 of the Constitution of India. The Indian Penal Code also prescribes death penalty as an alternative punishment only for heinous crimes. Hence, Indian law is entirely in accord with international commitment.

III. THE LAW ON CAPITAL PUNISHMENT IN INDIA

The Indian Penal Code, 1860 prescribes Death Penalty for treason (Section 121), abetment of mutiny (Section 132), perjury resulting in the conviction and death of an innocent person (Section 194), threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (Section 195A), murder (Section 302), kidnapping for ransom (Section 364A) and dacoity with murder (Section 396).²⁰ Additionally, many other special legislations such as the Air Force Act, 1950, the Army Act, 1950, the Navy Act, 1950, Commission of Sati (Prevention) Act, 1987 [section 4(1)], Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [section 3(2)(i)], Explosive Substances Act, 1908 [section 3(b)], Unlawful Activities Prevention Act, 1967 [section 16(1)] also provide for the death penalty.²¹

If a person has been convicted and sentenced to death under the above mentioned laws he can approach the Court as a matter of right through subsequent appeals and petitions. He can also approach the President under Article 72 or the Governor under Article 161 of the Constitution of India to pardon, remit, or commute the sentence of death to life imprisonment. In case of unreasonable, unexplained, exorbitant and inordinate delay under Article 72/161 of the Constitution of India in deciding mercy petitions by the President or Governor the convicts can approach the Hon'ble Supreme Court to commute their Death Sentence on the grounds of violation of their Fundamental Right to have a Dignified Life under Article 21²² as such an unreasonable and unexplained delay amounts to torture.²³ Recently, the Supreme

²⁰ Law Commission, 2014, p.13.

²¹ Law Commission, 2014, p.13.

²² Sher Singh and Others v. State of Punjab, (1983) 2 SCC 344; Smt. Triveniben v. State of Gujarat, (1989) 1 SCC 678.

²³ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

Court commuted the death sentence of fifteen convicts to life imprisonment in a batch matter of thirteen petitions in exercise of mercy power in deciding their mercy petitions and laid down guidelines for exercise of mercy power.²⁴

Based on the official statistics of the National Crimes Records Bureau, between 2001 and 2011, an average of 132 death sentences were handed down each year.²⁵ Even after this high rate of conviction under Capital punishment rarely anyone was executed. Most convicts were pardoned and their sentence was turned to life imprisonment. This fact is evident from the table given below:

Table 1: Mercy Petitions Commuted and Rejected by the President

Period	Total petitions disposed	Commuted	Rejected	Executions per year
1948-1954	1,430	341	1,069	152.7
1955-1964	2,083	601	1,482	148.2
1965-1974	1,034	543	491	49.1
1975-1984	173	52	121	12.1
1985-1994	45	4	41	4.1
1995-2004	8	1	7	0.7
2005- 2014	5	2	3	0.3

Source: Information in row 7 is from author's research. Information in rows 3-6 is from Annexures in reply by S. Regupathy, Minister of State in the Ministry of Home Affairs on November 29, 2006, to Unstarred question no. 815, Rajya Sabha by S.S. Ahluwalia. Information in Row 1-2 is from http://shodhganga.inflibnet.ac.in/bitstream/10603/12841/10/10_chapter%204.pdf

The table clearly shows that the no. of executions have exponentially decreased from the time India got its Independence in 1947 to 2015. This shows a positive trend towards recognition of basic human rights. The number of executions in 2005-2014 groups is particularly motivating as it shows the understanding of the Judiciary to execute only worst of the criminals for the most heinous of crimes. In the group of 2005-14, other than Yakub Menon's execution in 2015 only Muhammad Afzal, convicted of plotting the 2001 attack on India's Parliament was hanged in 2013 and Mohammad Ajmal Amir Qasab, the 2008 Mumbai attack gunman was executed on November 21, 2012. Before 2012, India had an execution free run for a period of 8 years wherein, Dhananjay Chatterjee was executed in 2004 for the murder and rape of a 14-year old girl.²⁶ This de facto moratorium led many to believe and argue that

²⁴ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

²⁵ ASIAN CENTRE FOR HUMAN RIGHTS (February 14, 2013) *The State of the Death Penalty in India in 2013: Discriminatory treatment amongst death row convicts.* Available: <http://www.achrweb.org/reports/india/IndiaDeathPenaltyReport2013.pdf>. [Accessed: August 30, 2015].

²⁶ BBC NEWS (2012) *Mumbai Attack Gunman Ajmal Qasab Executed.* Available <http://www.bbc.co.uk/news/world-asia-india-20422265>. [Accessed: August 30, 2015]; TIMES OF INDIA, (2009) *Execution by Hanging to Continue, The Times of India.* Available: <http://timesofindia.indiatimes.com/Execution-by-hanging-to-continue-SC/articleshow/4746794.cms>. [Accessed: August 30, 2015].

India must consider the utility and desirability of retaining this most exceptional and absolute penalty.²⁷

This moratorium brings to the front a very important fact that Capital Punishments are not deterrent in nature as during this moratorium period National Crime Records Bureau did not see any particular spurts in crime rate. But we must also bear in mind that during this period, death sentences continued to be awarded or upheld by the Courts at the normal rate.²⁸

Another positive approach by India is that it executes only by hanging which is considered as one of the most dignified and humane method to carry out death penalty.²⁹ India under Section 354 of Indian Penal Code, 1973 mandates execution of Death Penalty by hanging as it causes instantaneous death through rapid fracture-dislocation of the neck.³⁰ Various countries provide for barbaric execution by beheading,³¹ electrocution,³² hanging³³ lethal injection,³⁴ shooting,³⁵ stoning³⁶ and stabbing³⁷ etc. The constitutionality of execution through hanging was also upheld by Justice P. Sathasivam when he wrote his judgment convicting Yakub Menon.³⁸ However, the occurrence of rapid fracture-dislocation of the neck and instantaneous death can be contested. Many suggest that it rarely takes place and in most cases the death results from slow asphyxiation. When this occurs the face becomes engorged, the tongue protrudes, the eyes pop, the body defecates, and violent movements of the limbs occur.³⁹

IV. CONCLUSION AND CRITICAL ANALYSIS:

The concept of public policy, morality and security differs from one country to another. This has been accepted internationally through various Conventions and Agreements. For example, exemption from following trade promises can be made if it is necessary for protection the of public policy under the General Agreement on Tariff and Trade, General Agreement on Trade in Services etc. Most of the bilateral Agreements also provide for Security exceptions based on a country's standards of 'threat to security'. Therefore, there can be no set rules for determining the standards for Death Penalty

²⁷ INDIAN EXPRESS (2014) *Justice more humane*. Available:

<http://indianexpress.com/article/opinion/editorials/justice-more-humane/>. [Accessed: August 30, 2015]; THE HINDU (2014) *The Injustice of Delay*. Available: <http://www.thehindu.com/opinion/editorial/the-injustice-of-delay/article5606434.ece>. [Accessed: August 30, 2015].

²⁸ GOVERNMENT OF INDIA (September 1967) *Capital Punishment*. Law Commission of India, New Delhi. Available: <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf>. [Accessed: August 30, 2015].

²⁹ Deena v. Union of India, (1983) 4 SCC 645.

³⁰ State v. Weisberg, 473 N.W.2d 381 (1991).

³¹ In Saudi Arabia and Iraq.

³² In USA.

³³ In Egypt, Iran, Japan, Jordan, India, Bangladesh, Malaysia, Pakistan, Singapore and other countries.

³⁴ In China, Guatemala, Philippines, Thailand and USA.

³⁵ In Belarus, China, Somalia, Taiwan, Uzbekistan, Vietnam and other countries.

³⁶ In Afghanistan and Iran.

³⁷ In Somalia.

³⁸ Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay (2013) 13 SCC 1.

³⁹ Weisberg (1991).

in different countries and it varies for all the 198 countries on the Globe. Countries cannot be forced to look at any issue with a certain perspective. The correct way to approach this question of Moratorium is to accept the differences and not to force countries to take up an extreme stance as living and believing in extremes provides no result. There should be a cautious balance as all questions on abolition of death penalty cannot be answered with a 'Yes' or 'No.'

India has come a long way in defining the concept of "Capital Punishment" and its conception in my view has improved for the better. Earlier, death penalty was mandatory for crimes like murder. However, today it is an exception. India still believes that "*hundreds of convicts can go free, but not one innocent person should be punished.*" Understanding this, India does not compartmentalize its opinion into a 'Yes' or 'No' for abolition of Death Penalty but it creates such situations which can be called as a de-facto Moratorium on death Penalty, where less than one person is executed every year. India's stand today is very practical as death penalty is given only in the "rarest of rare cases" and even after that most people are pardoned or their sentence is commuted to Life imprisonment.

The terrorist attacks of 1993 which killed 257 people are one of the worst terrorist attacks in the Indian history. Therefore, it mandates strict action not only for the people organizing it but also for the people who helped in financing the attack. Yakub Menon was given the benefit of doubt and was judged according to the 'procedure established by law.' His contribution to the attacks was never questioned only the degree of contribution was doubted. But even after this he got a fair representation and a trial, not once but various times through Appeals and Petitions. He also applied to the President for commutation of the sentence but his act was so nerve wrecking that any lesser punishment would have been an attack on the sovereignty of the Country and the liberty of the individuals.

I believe that even though a few exceptions where Capital Punishment is executed can be made for public benefit but this cannot be made a Practice. A very valid human rights issue is raised when it comes to execution as 'Right to life' is an inherent Right of an individual which he has from his birth and any state cannot be given the means to take away this Right. The right course of action therefore, is not to abolish Death Penalty but to grant it in very less no. of cases where the Act has been so heinous that it shakes the soul.

One deficit of this Indian Judicial system seems to be that a lot of death sentences are handed down by the Judges but only very few actually take place. This uncertainty even after capital punishment is given is no less than torture and leads to a violation of the "Right to have a dignified life" and should therefore be avoided. Courts should grant death sentences in very limited number of cases. But when a death sentence is given it should be followed through.

Recently in August, the Law Commission of India set up for dealing with the issue of Moratorium of Death Penalty under the Chairmanship of Justice Ajit Prakash Shah, former Chief Justice of Delhi High Court and Chairman, Law Commission of India brought out a Report on Death penalty. The Commission recommended that the death penalty should be abolished for all crimes other than terrorism related offences and waging war. According to me this is a formal expression of the de-facto situation already existing in India and such an expression is itself evidentiary of the growth made by the Indian Society in the context of Death Sentence.