Abstract

Capital Punishment has a vast history largely shaping around its efficacy and desirability as one of the penal options. In recent history, one can easily note that the formation of United Nations and the emergence of international Human Rights regime had a profound impact on the issue of capital punishment in almost all the legal systems of the world. It is worth noticing that by the beginning of 21st Century more than sixty states had ratified the international treaties prohibiting capital punishment and the concern of capital punishment has gradually occupied the central stage on international forums such as General Assembly and was one of the important agendas in the Rome Conference on the International Criminal Court. These developments are evidence of the fact the issue of that the death penalty has become a priority for nations of the world.

The statistics in respect of the status of capital punishment in different legal systems of the world are interesting and well substantiate the rapid changes taking place around the question of the death penalty. By the year 2016, 104 out of total countries of the world have abolished capital punishment for all crimes, thirty have not abrogated death penalty from their statute books but have practically abandoned it. Similarly, seven countries have abolished the death penalty for ordinary crimes while retaining it for exceptional circumstances and only fifty-seven countries have chosen to retain the death penalty. In 2016, total 3,117 deaths sentences were awarded and 1,032 number of people were executed the same year.

However, there are still several states who are in favor of retaining capital punishment on varied grounds. While countries like Singapore and Malaysia have relied upon the “Asian values” and the battle against narcotics drug trafficking for retaining death penalty, another retentionist country Rwanda which has had a tragic history of Genocide, has called for death penalty for people who have been involved in Genocide. The case with Muslim majority countries (though not necessarily governed by purely Islamic Law) stands unique as they have been consistently advocating to continue with practice of death penalty justifying the same on the grounds of Islamic teachings. What is most important to note is the varied understanding and stances that exists on capital punishment in different Muslim majority countries such as in one country there is a death penalty for a crime while the same issue is not even treated as a crime in another. Muslim countries have consistently argued in favor of retaining
death penalty as is evident from the stance of Pakistan made in response to 1982 session of General Assembly which sought submission from the member states on abolition of death penalty. This stand was followed by the Muslim Countries quite consistently in the following years, most notably in 1998 in the Rome diplomatic conference where the Muslim bloc in alliance with the Caribbean countries pushed for the exclusion of capital punishment from the International Criminal Court’s Rome Statute.

There is a common belief that Islamic Law invokes capital punishment and is in favor of administering it as it is very much in line with the argument that Islamic criminal law stands largely on the deterrent and retributive theories of punishment. But the facts say the contrary and this myth can be easily countered by looking at the example of homosexuality which is punishable with death penalty in Saudi Arabia, Iran, Sudan and Yemen whereas is not even considered a crime in Lebanon, Iraq, Syria, Jordan and Bahrain. Similarly, Western legal system has no different history in respect of capital punishment as it stuck to death penalty for many categories of crimes for the larger part of history and it is only less than a century ago since when an effort has been made to eliminate death penalty and replace it with other punishments which seek to prevent crimes without affording an easy go to the perpetrator of the crime.

The brief argument made above makes a point that the picture of capital punishment and how it works out in Muslim majority countries merits enquiry. It is not possible to capture the entire history of capital punishment, nor is it feasible to draw the status of capital punishment in all the contemporary legal systems of the globe. What seems worthwhile to the researcher is the comparative analysis of two legal systems i.e. Indian and Islamic. The researcher has invoked the comparative approach amidst various methods of legal research as it seems quite relevant in the backdrop of the increased interaction of experiences among the legal systems. Accordingly, an attempt has been made to comparatively analyse the rules of Islamic Sharia Law and the rules of the Indian criminal legal system relating to capital punishment. The research is primarily a doctrinal study involving a thorough examination of source materials and reviews of text relevant to the topic. The scope of this research is primarily of two-fold; firstly, it attempts to study the analytical and functional aspect of law relating to capital punishment and its application in Indian society, and secondly, dialectical method of reasoning is adopted to make an in-depth inquiry into the law of capital punishment as it exists in the primary sources of Islamic sharia i.e. Quran and Sunnah, its interpretation.
by classical as well as modern jurists and its application by the modern day leading Islamic countries.

This study seeks to establish the similarities and differences between the Islamic Legal system and the Secular legal system of India with respect to the concept of punishment, crime, function of law as well as the punishment system with special focus on trying to understand whether both the legal systems have something in common or are they diametrically opposed to each other as far as their outlook, ideology, purpose, is concerned. Presently, the popular perception is that both the legal systems cannot survive in the presence of the two so the proponents, as well as opponents of the Islamic legal system, have the all or nothing approach which makes it impossible for any sort of common ground being agreed between the two systems.

Also, the study seeks to scrutinize the various crimes which have been made punishable under Islamic criminal law but are not even considered a crime in the western legal system, an effort has been made to understand the underlying reason for such divergence of opinion on controversial issues.

Since the law is a dynamic discipline, it is closely associated with the socio-economic practices prevalent in particular society, therefore this research attempts to engage with the question whether there is a scope for improving or making Islamic Criminal Law much more effective with respect to the emerging changes in the society.

In the contemporary society a lot of emphasis has been placed upon the reformatory theory of punishment where the convict is not to be treated with hatred and contempt but he is seen as a sort of “sick mind” which should be treated with care in such a manner to reintegrate him in the society without his past affecting his behavior. In popular parlance, this sort of approach is considered as being alien to the concept of Islamic Law. The present study is an attempt to appreciate whether the Islamic Criminal Jurisprudence does not believe in reforming the criminals or if it does then what is the method/mode by which this is sought to be achieved and how far it is common with the present world concept of reformation.

Another area which merits enquiry is the fact that retribution and deterrence have always been considered as the bedrock on which the Criminal Law of Islam is based. For a Religion which emphasizes on the concept of forgiveness and compassion as the greatest of virtues it seems odd that there is strict adherence to retribution and
deterrence, whether this line of argument has any foundation in the Sharia or whether it is a case of individual opinion/ruling being passed off as a strict rule of Sharia without any solid backing has been central to this research.

The researcher has reached to a reasoning that a strict comparison cannot be made between Indian law and Islamic Sharia, as in former the system is well established where law is properly defined and interpreted by the judiciary, whereas, later is only an abstraction of legal principle. However, a relative comparison can be made in terms of the philosophical basis of capital punishment, its legality, and crimes punishable with death under both the laws, mode of execution, as well as the practice of Indian and leading Islamic countries in relation to capital punishment. Accordingly, a comparison between two legal systems has been made on four levels namely:

- philosophical and legal basis
- on the classification of crimes
- crimes which are punishable with death
- modes of execution

The point that calls for an appropriate pick to analyze Indian position on capital punishment is Article 21 of the Indian Constitution. The Article clearly lays down that ‘No person shall be denied life or personal liberty except according to the procedure established by law’. The Courts have later interpreted the term “procedure established by law” to mean “due process of law” which means that the procedure invoked must stand the test of natural justice. The notion of due process has become a useful tool for the activists to contest the law of death penalty in India although the courts have so far believed death penalty does not violate this ‘due process’ and is not inconsistent with the principle laid down in Article 21 of the Constitution. Also, India, being the signatory of Art. 6 of ICCPR can only award capital punishment for the most serious offences. The trajectory of the Jurisprudence on the capital punishment in India has been from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases; this shows the direction in which the practice of capital punishment is heading.
Similarly, under Islam, it is a basic principle that everyone has a right to life. In fact, so much is the emphasis on the person’s life that Quran mentions:

‘If anyone slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people’.

The above-mentioned verse of the Quran puts it in a unique position and the degree of sacredness it attaches to human life cannot be found in any other text be it religious or legal. It also becomes evident from the above verse of the Quran that taking away of human life is allowed only for cases i.e. murder and creating mischief on earth, even in that situation the “due process of law” has to be followed and cannot be executed at the whims and fancies of the individual/ state. In fact, the Islamic law relating to death penalty surely bears a resemblance to the Fifth Amendment to the U.S. Constitution and International instruments like European Convention on Human Rights. Therefore, quite contrary to conventional perception there is much similarity between the Islamic Law and the Indian legal system.

One of the major points of departure between Islamic Legal System and Indian Legal System has been the classification of crimes. Offences under Indian law is categorised on the basis of severity of punishment which entails every offence. Offences under Indian law are primarily classified into three categories i.e. cognizable and non-cognizable, bailable and non-bailable, compoundable and non-compoundable. By cognizable and non-cognizable offence it means that offences in which police officer is authorised to arrest the accused without a warrant are a cognizable offence and offences in which police officer is not empowered to arrest without warrant is a non-cognizable offence. Similarly, bailable offence implies that the accused is entitled to be released on suitable bail as a matter of right and non-bailable offence means that accused is not entitled to be released on bail as a matter of right but the court is at discretion to grant the bail or not. And compoundable offences are those offences which are considered to be less serious which largely affect the victim only and not the society at large nature of crimes for which death penalty may be imposed.

On the other hand, the Islamic Penal law consists of four categories or classes. The first category is Hudud which is derived from Hadd which literally means limits, these are the crimes for which punishment is prescribed in the Quran and Sunnah itself
e.g. adultery, rape, slander, theft, robbery, etc. Out of the Hudud crimes some are considered to be punishable with death like robbery, rape etc.

The second category *Qisas* concerns intentional crimes against the person and is based upon the Chapter 5 verse 32 as well as Chapter 17 verse 33 of Quran which has close resemblance with the “eye for an eye, tooth for tooth” doctrine. Contrary to popular belief this approach has been in existence for a long while and was present even in the Hammurabi code. The doctrine of Qisas is also neither barbaric nor excessive, rather, it was a progressive penal reform to prevent disproportionate revenge being taken by the victim against the perpetrator of the crime. The Islamic Law prohibits anyone apart from the victim or his/her legal heirs to take revenge from the criminal, even in that case it would be done under the supervision of the authorities and not in a vigilante-style incident. In addition to taking revenge on the victim or his/her legal also have the option of pardoning the offender, in that case, the penalty will not be imposed.

The third category of crimes is covered under *Diyat* which relies on restitution or compensation for the victim of the crime which has to be paid by the offender either to him/her or if he has died then to his/her legal representative.

The fourth category of crimes are covered under *Tazir* under which the statutory law may be passed by the law-making authority which may prescribe punishments for different crimes, the judge has got much wider discretion in case of Tazir which is not the case with the other three categories as the punishments are divinely specified in these crimes.

Another major bone of contention which has caused much disagreement between the Islamic law and the Secular legal system is the instances wherein the capital punishment may be meted out. Under the Indian legal system there are as many as eleven categories of offences for which a person may be punished with death penalty and most of these offences are against the authority of the state with a few relating to offences against the human body e.g. murder, waging war against the state, terrorism, abduction (in limited cases), Aggravated rape etc. On the other hand, under Islamic law most of the crimes for which death penalty can be awarded are common with the secular legal system of India like murder, waging war against the state but few controversial exceptions such as apostasy, blasphemy, homosexuality etc. which amounts to criminalizing things which are specifically protected under the international human
rights treaties and considered to be the violation of international law. For example death penalty for adultery which is universally accepted as lawful by Muslim countries runs contrary to the concept of free will which though morally reprehensible, is hardly ever made a criminal offence in most of the western countries, similarly the law relating to death penalty for apostates has also led to a lot of controversy with the Muslim countries insisting on retaining it while the western world denouncing it as being against one of the most basic rights of an individual of freedom of conscience.

Blasphemy law is another extremely controversial aspect of the penal system which has led to much controversy as the western world sees it as being the antithesis of the concept of free speech which is considered as the cornerstone of liberalism whereas the Muslim Countries are aghast at what they perceive to be a deliberate attempt on the part of the western world to offend their sensibilities in the garb of free speech. In recent years there have been many instances where both the Muslim countries and the western world has been at loggerheads on this issue with none of the sides ready to cede any ground to the opposite viewpoint which is particularly worrisome as it shows the scope for conflict between them.

The mode of giving punishment holds a very important place as far as the Islamic criminal Law is concerned where the execution of the penalty to the criminal must be done in public so as to enhance its deterrent effect. This point has proved to be contentious as some people believe it stands in contravention to Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights which prohibits the ‘cruel, inhuman or degrading treatment or punishment.’ In fact, the whole movement for the abolition started initially by putting an end to public executions as they were perceived to be inhumane and against the dignity of human beings, on the other hand, the Muslim Countries insist on the executions being public in nature to retain its deterrent effect. This is one instance where the Secular legal system and the Islamic Criminal law seem to have an irreconcilable difference with no apparent compromise in sight.

This work applies the above-discussed methodological tools and apparatuses to examine broadly the evolution and status of the concept of capital punishment in Indian and Islamic Sharia law. The critical analysis of the two systems in respect of capital punishment leads to some interesting conclusion. The source of Islamic punishments is
of divine origin whereas the punishments provided under the Indian law are based upon the common legal system, which is of secular origin. There is a popular perception that the Philosophy and purpose of Islamic punishments is subject to its context and is altogether different from the philosophy and purpose of punishment laid down under Indian law. However, what comes out of the research is quite contrary to it and it is a fact that Islamic Punishments have been in practice in various parts of the world since its inception and are still being implemented in several leading Islamic countries. What is more important to note is that the Islamic penal architecture and Indian criminal legal system stands on the same philosophical foundations and share common ends of providing justice and preventing crimes. Likewise, the idea of capital punishment enshrined in the Indian as well as the Islamic legal system is founded on the two common principal theories of punishment i.e. Deterrent and Retributive. The capital punishment under Quran and Indian legal system are prescribed only for those crimes which fall into the category of ‘most serious offences’. However, the range of crimes which invokes capital punishment is far wider and inconsistent among Islamic countries as compared to the Indian legal system. Accordingly, the practice of Islamic countries in connection with the death penalty is in violation of the law of capital punishment mentioned in the Quran.

Further, the research engages with the laws and practice in respect of capital punishment in three leading Muslim countries. Saudi Arabia, Iran and Pakistan have been picked for the examination of the status of capital punishment in these systems as they are the leading countries having considerable execution of death penalty. After analysing the laws and practices of capital punishment in India and three leading Muslim countries, astonishing picture has come out. In respect of India it has been observed that though in recent years the Indian Judicial system has rarely invoked death penalty but it has been highlighted by various critics that the situation is in fact worse than what it was when there was universal application of death penalty in serious cases. The critics and scholars have highlighted very disturbing aspect of death penalty that rather than having any deterrent effect death penalty has become a case of deadly lottery where the convict’s chances of execution or survival does not depend upon the gravity of the crime but rather upon the subjective opinion of the judges of the court who have no standard parameters for the application of the death penalty. Thus, it has been an extremely sad aspect of the criminal justice system in India that the people who are
executed are exclusively belonging to vulnerable groups like Muslims, Tribals, Dalits and other poorer sections of the society.

Similarly, in respect of Saudi Arabia, the most serious drawback is the absence of codified penal laws leaving definitions of crimes and punishments vague and wide open to arbitrary interpretation. It also gives judges the power to use their discretion in sentencing, leading to vast discrepancies and in some cases arbitrary rulings. There are serious objections regarding the conduct of trial which are sometimes unfair and violates the principles of natural justice. For instance, Law of Criminal Procedure of Saudi Arabia allows the court as well as a prosecutor to alter the charge. In addition to this, it has been discovered that often capital punishments are also carried out after unfair and summary proceedings which are sometimes held secretly with no legal assistance or representation through the various stages of detention and trial. Also, it is alleged that defendants may be convicted solely based on “confessions” which is procured under coercion, duress, torture or other ill-treatment. Moreover, it is also alleged that Saudi Arabia including other Islamic countries practices capital punishment for the offences which are not internationally considered to be the crime under international human rights law. These crimes include apostasy, witchcraft or sorcery. There are several such drawbacks which have been discussed in detail in the thesis but what has been of primary interest is how the practice of capital punishment in Saudi Arabia is in contravention to the directives categorically made by the Quran in respect of death penalty. This is one point which has been central to this research and has been extensively dealt with.

The case with Iran is no different rather it is more deplorable as it has been in the limelight for blatant violations of principles of natural justice and arbitrariness. Iran alone accounts for more than half of the capital punishments of the world excluding China. The most important aspect to note in respect of Iran is the ‘Revolutionary courts’ which in 2016 alone awarded and directed the execution of more than 60% of the total death penalty executed the same year in Iran. These courts have been a major object of criticism on grounds of employing arbitrary rules and violating the principle of due process. Another apparent violation of International Human Rights is the considerable number of capital punishments awarded to juveniles. These and much more criticism have been thoroughly examined in the paper such as lack of transparency, proceedings
and trials being discriminatory and most important of all is that Iranian penal law stands in violation of the directives of Quran.

Pakistan ranks fifth in the world in terms of execution of death penalty. The penal law of Pakistan has been the subject of severe criticism as it lacks the contents of fairness in trial, there are blatant violations of principles of natural justice and grave arbitrariness in the functioning of courts, Apart from all such common drawbacks, it has been thoroughly criticised because from arrest to trial to execution, the safeguards mechanism against the misuse of capital punishment is either too fragile or absent which ultimately paves the way for high possibility of wrong execution on an innocent person. It is also contended that crimes punishable with death in Pakistan does not meet the international criteria of ‘most serious crimes’ for which only death penalty could be invoked under international law as the crimes like, blasphemy, adultery, stripping a woman clothes in public, kidnapping and drug trafficking do not fit in the definition of most serious crimes. These drawbacks have been thoroughly explored in the thesis.

After engaging with these legal systems of the world and exploring their penal legal architecture especially in respect of capital punishment certain suggestions have been made to ensure that the sacredness of life is restored and to avoid arbitrary execution of capital punishments.

The scheme of the present research study is divided into six chapters. Apart from the Introduction part, the chapters are namely, Capital Punishment - An Overview; Capital Punishment under Indian law; Capital Punishment under Islamic law; Saudi Arabia, Iran and Pakistan: Analysis of Capital Punishment amongst the Leading Executioners in the Muslim World, Capital Punishment under Islamic and Indian Law: A Comparative Analysis and, Conclusion and Suggestions.

Introduction provides outlines about the topic. It discusses the statement of the problem, aims and objectives of the study, scope and limitations of the study, research hypothesis, research methodologies, and literature review.

Chapter one deals with the general aspect of capital punishment. It covers the historical aspect of capital punishment which traces out the practice of capital punishment has existed throughout the history and the modes of execution adopted by different societies and nations in the history. This chapter also presents the global status of capital punishment which is in existence in present. In short, this chapter is a
complete overview of capital punishment in terms of practice, modes of execution and the position of capital punishment in the modern world.

Chapter two discusses the status of capital punishment as exists under Indian law. It highlights the philosophical basis of punishment upon which Indian criminal legal system is based. It discusses the theories of punishment which justifies the law of capital punishment. It also mentions how the classification of offences is done under Indian law. It further discusses crimes which are punishable by death under Indian law and approach of the judiciary on it. Last but not the least, the mode of execution exists under Indian law.

Chapter three is a detailed study of capital punishment of Islamic sharia. The first part of the chapter traces out the philosophy of Islamic punishments upon which Islamic criminal justice system is based. The second part of the chapter deals with the classification of offences as exists under Islamic law. The third part is the detailed and important one which discusses the crimes which are punishable by death under Islamic sharia. The fourth and last part of the chapter discusses the modes of execution prescribed under Islamic sharia for carrying out capital punishment.

Chapter four is a study of the practice of leading Islamic countries in connection with capital punishment. In this chapter first, Muslim countries have been divided on the basis of the legal system. After that, it discusses the law and practices concerning capital punishment of the three leading executioner countries of the sharia compliance nations namely, Saudi Arabia, Iran, and Pakistan.

Chapter five, discusses the similarities and dissimilarities of Indian and Islamic law in relation to capital punishment. An evaluation is drawn by comparing both the laws concerning capital punishment in the light of the detailed study conducted under preceding chapters.

And finally, in Chapter six, the conclusion has been drawn in the light of the above discussion and thus, appropriate suggestions have also been made accordingly.