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## **Historical Overview of Torture and Inhuman Punishments in Indian Sub-continent**

### **Abstract**

This paper, comprising of three parts, evaluates torture and inhumane punishments prevalent during the three important phases of history of South Asia namely ancient India, medieval India and British India. In the Indian Sub-continent, the torture as a major technique of investigation had a long history. The first government-backed study of the practice of torture by the police in the history of modern India, the Madras Torture Commission Report of 1855, revealed that the use of torture and coercion in Indian society was not a novel introduction brought about by British Rule but it has a long history and predates colonization. In the light of the recommendations of the report, the confession under police custody was not admissible as an evidence under Code of Criminal Procedure, 1898, and the Indian Evidence Act 1872. Since the incorporation of this safeguard in these penal laws, during the last quarter of the twentieth century, unfortunately, it has proved less than a complete remedy and custodial violence or torture remained an integral part of police operation. In the name of enlightenment and civilizing India, the British concerned the mutilation and other inhumane punishments in vogue in India. This paper argues that the form of torture during British colonial period in India replaced it was different. It was carried out outside the public domain, in the context of policing operations, prison discipline, transport for life and arbitrary application of the death penalty.

### **(A) The Use of Torture in Ancient India**

The jurisprudence of Ancient India, which was essentially Hindu-ruled based upon the collections of ancient hymns and prayers, known by the names of Vedas. There are four Vedas which are the chief sacred books of Hindus: Rig Veda (the science of praise), *Atharva Veda* (the science of magic), *Yajur Veda* (the science of sacrifices), and Sama Veda (the science of melodies). The diversity of Vedas, both of style and contents, shows that they are production of different periods, between which a considerable interval must have elapsed.<sup>1</sup> The literary traditions of the Vedas are one of the major sources of compilation of *Dharmashastra*. Dharmashastra are ancient Sanskrit works prescribing the rules of *Dharma*. In short, they are the 'rules of conduct of man, a narration of do's and don'ts'.<sup>2</sup> Amongst the authors of the *Dharmashastra*, Manu is accepted as the eldest, and the authoritativeness of his code surpasses that of others.

Manu speaks of four forms of punishments: (a) *Vak-danda* (admonition), (b) *Dhikdanda* (censure), (c) *Dhanadanda* (pecuniary punishment such as a fine or forfeiture of property, and (4) *Badhadanda* (all sorts of physical punishments

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including the death penalty).<sup>3</sup> The different varieties of *Badhadanda* or physical punishments recommended by the authors are (1) tadanam (beating),<sup>4</sup> (2) severance of limbs,<sup>5</sup> (3) branding (imprinting marks on visible parts of the offender's body, indicating that he or she is convicted),<sup>6</sup> (4) capital punishment,<sup>7</sup> and (5) pouring heated oil into the offender's earhole.<sup>8</sup> According to Rama Parsad, 'the Jus talion which is so universally represented in archaic legislations becomes especially conspicuous in these punishments'.<sup>9</sup>

In ancient India, the system of punishment was dictated by three factors namely trial by ordeal, *danda* (rod of punishment) and the caste system.

#### **(A) Trial by Ordeal**

The knowledge regarding the procedure adopted in deciding cases in the courts is unfortunately very little.<sup>10</sup> However, many authors of ancient history confirm that 'trials by ordeal were frequently resorted to'.<sup>11</sup> Ordeals as a feature of Indian law extended as far back as the Atharva Veda and the Upanishads and contains through all of later ancient Indian legal texts.<sup>12</sup> The laws of Manu prescribe a number of trials by ordeal, particularly in cases where witnesses were not available or were considered unreliable.<sup>13</sup> The belief in ordeals does not seem contradictory in a society where religion was a great binding force.

Among other ordeals, ordeals by fire and water were frequently employed to prove the innocence of the accused because both water and fire occupy an important place in the Hindu religion. It was believed that *agni* (fire), as one of gods enjoyed purifying qualities. The accused was 'required to lick a red hot plough share with his tongue or pick a coin out of a pot of boiling liquid'.<sup>14</sup> In another ordeal 'an accused was required to hold in his hand a red hot iron wrapped in a leaf in order to establish his defense if his hands are not burnt he is innocent'.<sup>15</sup> Water also played an important role in ordeals. An accused person was often thrown into the water if he was innocent he would not drown.<sup>16</sup>

In some cases, the accused was made to take a caustic drink (Bish). It was believed that if he spoke the truth the drink would do no harm to him.<sup>17</sup> Ktesias, Greek historian of the fifth century BC, speaks of a more drastic form of ordeal. He mentions a fountain from which he says the water coagulates like cheese. If a person drinks he becomes delirious and confesses everything he has done.<sup>18</sup>

#### **(B) The Philosophy of *Danda* (Rod of Punishment)**

The philosophy of *Danda* (stick) was a key weapon to suppress crime and award severe punishments. The religious text advocates that the only way that a man might be kept pure and righteous was by the fear of *danda* and the whole race of men is kept in order by punishment.<sup>19</sup> In varying contexts, it may be translated as military force, coercion and severe punishment. This world is brought to righteousness through *danda*, the rod of punishment; hence 'the science of kingship is called *dandaniti* (the administration of force)'.<sup>20</sup> Manu says in order to reinforce the 'power of the king' and make it effective in protecting the people 'the creator simultaneously created *danda* from his own body'.<sup>21</sup> Law is nothing but *danda* itself.<sup>22</sup> The laws of Manu, the Arthashastra of Kautilya Chanakya, and the *Mahabharata*<sup>23</sup> all state that *danda* must be wielded with maximum discretion by the King to uphold justice. In Indian jurisprudence, dispensing justice and

awarding punishment was one of the primary attributes of sovereignty. The King was also the chief of judiciary of the State.<sup>24</sup>

### **Torture Associated with Methods of Executions**

There were different ways by which a death sentence could be executed with 'picturesque ingenuity'.<sup>25</sup> Jolly (Sanskrit scholar) expresses his opinion that 'capital punishment in various aggravated forms, such as impaling on a stake, trampling to death by an elephant, burning, roasting, cutting to pieces, devouring by dogs, and mutilations, were also frequently inflicted even for comparatively light offences'.<sup>26</sup> The other forms of executions are narrated in Manu: (a) by causing the offender to be burnt to death,<sup>27</sup> (b) by thrusting a red-hot iron into the offender's mouth,<sup>28</sup> and (c) by getting the offender devoured by hunting dogs.<sup>29</sup>

On the whole, as in other ancient civilizations around the world, in ancient India, use of severe punishment was based upon the Jus talionis which is so universally represented in archaic legislations.

### **(B) Inhuman Punishments during Medieval India (1206-1806 A.D)**

During the Medieval period various Muslim dynasties ruled the Indian-subcontinent. Generally, historians subdivide the period into Sultan of Delhi (1206-1545) and Mughal Rule (1526-1806). Muslim rule in India was firmly established in the thirteenth century and flourished until the beginning of the eighteenth century.<sup>30</sup> The Sultanate of Delhi ushered in a period of Indian cultural renaissance.<sup>31</sup>

Despite claims of Muslim rulers about their adherence to Islamic principles of equity and justice they inflicted penalties based upon their personal whims. In fact, intermittent outbreaks of crime such as robbery and murder and the consequent restlessness amongst the subjects tended to increase the uneasiness of medieval rulers and induced them in 'many cases to inflict penalties wholly opposed to the spirit, if not the letter, of the Sharia'.<sup>32</sup> The common method of execution was to get the criminals trampled under the feet of elephants. The various Kings used to keep elephants for the execution of 'malefactors'.<sup>33</sup> Jahangir (1605-26) took interest in seeing condemned prisoners torn to pieces by elephants. Terry depicts the horrible scene of torture of being trampled on by elephants as 'the elephant will break his bones by degrees, as men are broken upon the wheel, as first his leg, then his thighs, after that bones in his both arms'.<sup>34</sup>

The accounts of European travelers reflect that unspeakable methods of execution were in vogue during the reigns of some Muslims rulers. During the reign of Jahangir, a dacoit, with seven previous convictions, was torn limb after limb till he died. Terry asserts that, 'among other forms of punishment, malefactors were stung to death by snakes'.<sup>35</sup> Manucci reports that Shahjan used to punish 'any official who had failed to administer justice' by poisonous snakes.<sup>36</sup> Shahjahan ordered corrupt Kotwal (Muhammad Sa'id) to be bitten by a cobra capello in his presence in the open court, and then ordered that 'the body should lie two days in front of his court-house'.<sup>37</sup> Execution could take place by throwing a man down from the roof. To serve as deterrence, the executions used to be conducted in public. During the reign of Muhammad Bin Tughliq, the persons condemned were

executed outside the first gate of the court 'where their bodies lay exposed for three days and their relatives were not allowed to give a decent burial'.<sup>38</sup>

The condition of the prisoner was generally miserable.<sup>39</sup> It was binding upon the Qazis, under the Muslim law, to visit the prisons and inquire into their conditions and to release those who showed signs of repentance but usually they neglected their duty.<sup>40</sup> In this regard, Aurangzeb took special interest and issued instructions to the Kotwals to take the prisoners to the Qazi on the expiry of their term of imprisonment.<sup>41</sup>

In short, the period of medieval India (1206-1806 A D) was a continuity of the ancient India's system of monarchy with a new element of the Islamic system of crimes and punishment. In the absence of legislature and constitutional machinery, the domain of legislation, as was the case in medieval Europe, did not belong to the people. Consequently, the medieval Indian state remained autocratic in character throughout and represented in India the western ideal of L'etat c'est moi of the French monarchs. In this scenario, the different sets of people in India were thankful to the King, as a fountain of justice, if he took effective measures to dispense justice.

### **(C) Torture and Punishment during the British Colonial Period in India**

In 1765, the Mughal emperor recognized British jurisdiction over Bengal, which had been under de facto British control since 1757.<sup>42</sup> Under the charter, granted by the British Crown in 1726<sup>43</sup>, English courts had been working in the presidency towns of Bengal, Bihar and Orissa where the East India Company's factories had been established.

From 1750 onwards, the provisions for torture were being gradually removed from the criminal codes of Europe.<sup>44</sup> The British showed concern about the inhumane nature of the punishment of mutilation. Under the proceedings of Governor General in Council dated 10<sup>th</sup> October 1791, the punishment of mutilation was commuted by rigorous imprisonment and each limb counted for seven years.<sup>45</sup> Talal Asad argues that in their attempts to eradicate such 'cruel practices,' what really motivated the Europeans was 'the desire to impose what they considered civilized standards of justice and humanity on a subject population – i.e., the desire to create new human subjects'.<sup>46</sup> According to Thomas Metcalf (1994, p.17) the idea of 'improvement' and 'rule of law' were already central justification for British rule by the end of the nineteenth century.<sup>47</sup> In order to characterize British rule as a moral, 'civilized' and 'civilizing' regime, the idea of 'rule of law' was crucial. Alexander Dow wrote about the Mughal Emperors as quintessential oriental despots presiding over a lawless state.

In 1854, the House of Commons was rocked by allegations of torture leveled against East India Company. Mr. Danby Seymour, MP, accused the Company of using torture and coercion to get ten shillings from a man when he only had eight.<sup>48</sup> The revelations in Parliament and the press coverage that followed in 1854 made Madras Government to constitute<sup>49</sup> a three member Commission to 'conduct fullest and most complete investigation'.<sup>50</sup> Initially the mandate of the Commission was to enquire into the 'use of torture by the native servants of the state for the purpose of realizing the Government revenue'.<sup>51</sup> However, the scope

of inquiry was soon enlarged to include the alleged use of torture in extracting confessions in police cases'.<sup>52</sup> The Commission worked for seven months and heard several hundred allegations from people who travelled from every part of the presidency.<sup>53</sup> The Report found the term 'torture' as defined by Dr Johnson "pain by which guilt is punished or confession extorted" - to be applicable to the practices prevalent in the Presidency.<sup>54</sup>

The findings of the Commission endorse the fact that torture employed by the Police and the Revenue authorities was a historical fact. Relying on 'old authorities', it noted the 'historical fact' that 'torture was a recognized method of obtaining both revenue and confessions' since pre-colonial times.<sup>55</sup> Specifically with regard to the practice of torture for eliciting confessions, even the Government Order of the 19th of September 1854, extending the Commission's enquiry to police matters, said: 'So deep rooted, however, has the evil been found, and so powerful the force of habit, arising from the unrestrained license exercised in such acts of cruelty and oppression under the former rulers of this country'.<sup>56</sup>

**The Commission concludes:**

The police establishment has become the bane and pest of society, the terror of the community (...). Corruption and bribery reign paramount throughout the whole establishment; violence, torture and cruelty are their instruments for detecting crime, implicating innocence or extorting money.<sup>57</sup>

In the words of the colonialist historian who worked in Indian Police Service, Sir Percival Griffith, the report 'galvanized the Madras Government into much needed action'.<sup>58</sup> One of the major outcomes of the report was the recommendation by the Second Law Commission in 1855 that police should not have any authority to record the confession of an accused person. This recommendation culminated in the elaborate distrust of the police which was embodied in the Criminal Procedure Code and the Indian Evidence Act 1872.<sup>59</sup> The Indian Evidence Act, 1872, ruled all confessions made to the police or by a person in police custody to be out of the stream of evidence.<sup>60</sup> The Code of Criminal Procedure 1898 excluded from evidence all statements recorded by the police including those of witnesses.<sup>61</sup>

The report of the Police Commission in 1905, appointed by Lord Curzon<sup>62</sup>, reveals the same sorry state of affairs: 'There is no point at which (according to the evidence before the Commission violence is not done to the spirit or letter of the law; and these abuses are practically universal'.<sup>63</sup> The commission further identifies: 'Suspects and innocent persons are bullied and threatened into giving information they are supposed to possess. The police officer, owing to want of detective ability or to indolence, directs his efforts to procure confessions by improper inducement'.<sup>64</sup>

The language of the Curzon Commission Report was a good deal more restrained than that of the Madras report, but it would be simplistic to infer that the practice of torture had diminished proportionately. It condemned the unnecessary severity and unnecessary annoyance with which the police discharged their duties, but exonerated them of 'actual physical torture' which it stated to 'now rarely happen'.<sup>65</sup> In the words of Ruthvan: 'Its aura, if not exactly white wash, has the flavor of bureaucratic obfuscation. The reality was that little could be done to

improve things'.<sup>66</sup> Despite the Curzon Commission's professed belief in their comparative rarity, the disturbing allegations of actual physical torture continued to appear in the nationalist and in some cases the English press.

There are some other evidences that endorse that torture was a common practice during the British rule in India. For instance Principal Phillaur Police Training School, in India writes that 'it is common for a complaint to be made that *Thanidar* (incharge of Police Station) is not severe enough with the suspects in his cases'.<sup>67</sup> M Joseph Chailley, a French Scholar, visited India twice between 1900-1 and again in 1904 to study the British administrative system in India.<sup>68</sup> The French scholar writes in detail in his book *L' Inde Britannique* on the working of the police in British India: 'they torture the accused and put pressure on the witnesses'.<sup>69</sup> Despite the limited evidentiary value of confession under police custody, 'the misdeeds of the police are frequent'.<sup>70</sup> He further writes: 'I have myself seen, on more than one occasion, constables who have been imprisoned for attempts to extort confessions'.<sup>71</sup>

The answer to the question what changed the practice of police torture to extract confession during British colonial rules in India lies in: Torture unofficially yet tacitly incorporated into judicial system. Peer argues that 'as long as torture did not directly undermine their position, the British could afford to overlook it'.<sup>72</sup> He further elaborates that the police were crucial to the British Raj, and to some observers, at least, helped establish the foundations of a police state.

The new form of torture that replaced it was different. It was carried out outside the public domain, in the context of policing operations and prison discipline, the inseparable components of modern disciplinary society. The public rituals of torture were replaced by a new secretiveness. As Talal Asad explains, 'modern torture as part of policing is typically secret, partly because inflicting physical pain on a prisoner to extract information, or for any purpose whatsoever, is 'uncivilized' and therefore illegal'.<sup>73</sup> This new sensibility about physical pain necessitated that the modern state could do practice torture only alongside a simultaneous 'rhetoric of denial'. The Torture Commission Report is indeed a classic case of the practice of this rhetoric of denial.

### **Torture Associated with Punishments**

The British implemented the Indian Penal Code, 'in the liberal spirit of reducing archaic forms of discretionary authority and differences in status in order to make the rule of law more effective in a culturally diverse society'.<sup>74</sup> It introduced a comprehensive criminal justice system- a hierarchical network of courts spread throughout the country, a system of appeals, codified and uniform laws, and a sole power of state to prosecute and pardon. It is appreciable that the code did away with inhuman indigenous punishments like the public display of a criminal on the back of an ass, mutilation and leaving the condemned to be trampled by elephants.

Both whipping and transport for life were frequently used during the British raj. Whipping was inflicted not under the Indian Penal Code 1860, but under the provisions of an act passed in 1864.<sup>75</sup> In this regard, Alipore Bomb Case (1908), Kakori Conspiracy (1925) and Lahore Conspiracy Case (1928), provoked considerable outcry among the general Indian populace. In *Emperor vs Aurobindo*

*Ghosh and others* known as Alipore Bomb Case (1909) Barindra Ghosh and Ullashkar Dutt, were sentenced to death by the District and Session Court in Calcutta charged with conspiracy and waging war against the King under Sections 121 and 122 of the Indian Penal Code.<sup>76</sup> Their sentences were commuted to transport for life by Bengal High Court in its appeal judgment.<sup>77</sup> Subsequently both were released in 1920 under general amnesty.

In short, the British introduced Indian Penal Code with the modern spirit of humanism But it was eclipsed by the punishment of whipping, transport for life, cellular confinement, rigorous imprisonment and the implementation of arbitrary death penalty to suppress the national movement for independence. Jörg Fisch has rightly wondered ‘why the loss of a limb is more cruel or inhuman than the loss of liberty or even the loss of life’.<sup>78</sup>

### **Conclusion**

South Asia has a long history of using torture to extract confession and inflict severe punishments from Ancient India to the colonial India. The retributive justice, deterrence and calculus of terror were associated with the system of crime and punishment during various periods of history in the Indian subcontinent. The use of torture and coercion in Indian society was not a novel introduction by British Rule in India. It had a long history with individuals such as English authors depicted the prevalent practice of torture against political opponents and the accused. The proverbial cruelty of some of the Moghul rulers exercised a powerful hold on the European imagination.

The colonial regime used imprisonment with hard labor, punishment of flogging and transportation for life as a calculus of terror. It is a bitter fact that imprisonment, the chief form of punishment, was employed as a terror to malefactors by employing the techniques of segregation in cells and hard labor. At the same time, the punishments of whipping and transporting offenders overseas for life was enforced to tame and discipline the natives of colonial India.

Ironically, this emphasis meshed with the rhetoric that sought a moral high ground by espousing the replacement of harsh Islamic punishments with the civilized and civilizing regime of colonial discipline and punishment. There is no sound argument why the loss of a limb was more cruel or inhuman than the loss of liberty or even the loss of life itself. Again the brutal and brutalizing punishment of whipping finds no justification in a civilized and humane criminal justice system.

## Notes & References

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<sup>6</sup> Vishnu, Ch. II, r.3-7,20

<sup>7</sup> Manu, Ch. IX, SI.232; Vishnu, Ch. VIII, r.43-V

<sup>8</sup> Manu, Ch. VIII, SI.272

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<sup>10</sup> Arthur Llewellyn Basham, *The Wonder That was India: A Survey of the History and Culture of the Indian Sub-continent before the Coming of the Muslims* (New York: Taplinger Publishing Company, 1968), p. 122.

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<sup>21</sup> Manu, Ch. VII, SI. 13.

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<sup>36</sup> Niccolao Manucci, *Storia du Mog or Mogul India, 1653-1708, vol.1, Translated by William Irvine* (London: John Murray, 1907), p.197.

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<sup>44</sup> Douglas M. PEERS, *Torture, the Police and the Colonial State in Madras Presidency, 1816-1855*, (1991)12 Criminal Justice History, pp. 29-56p.74.

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<sup>48</sup> Speech of Danby Semour, 11 July 1854, Hansard, 3<sup>rd</sup> ser.,135(1854): 61.

<sup>49</sup> Extract from the Minutes of Consultation in the Public Department, No. 922, dated 9th September 1854.

<sup>50</sup> A Letter issued from the Chief Secretary, H. C. Montgomery, Public Department, Fort St. George, 9<sup>th</sup> September 1854, No.925, para.4.

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<sup>54</sup> *Ibid.*, para.54.

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<sup>74</sup> Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' in Chan, Wing Cheong, Barry Wright, and Stanley Meng Heong Yeo( eds.), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Farnham: Ashgate , 2011), p. 55.

<sup>75</sup> ACT VI of 1864 passed by Governor General of India in Council, Sec II –VI

<sup>76</sup> Bejai Krishna Bose, *The Alipore Bomb Case Mr. Beachcroft's Judgment* (Calcutta: New Town Press, 1910), pp. (236-238)

<sup>77</sup> Noorul Hoda, *The Alipore Bomb Case: A Historic Pre-Independence Trial* (New Delhi: Niyogi Books, 2008), pp.138-139

<sup>78</sup> Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1817*(Wiesbaden: Steiner, 1983), p.131.