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Critical Analysis of the Parameters of Capital Punishment in India

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ABSTRACT

After the two world wars that the world faced there is a certain change in the attitude in the international organisation and even to some countries to do away with the heinousness of the capital punishment of the offender due to the rise of the human rights consciousness. But still there are certain countries like India who still uphold the capital punishment in the rarest of the rare cases. But this paper concentrate on the same term "rarest of the rare" whose definition has been differently interpreted at different times by the supreme court of India, sometimes the apex court has set some criteria to determine the offence in the category of 'Rarest of the Rare' while other times it just verdict the offence as rarest of the rare on the basis of the collective consciousness of the people at large in the country. This paper tends to indicate that the collective consciousness is a myth and the whole capital punishment criteria held by the Indian Judiciary needs to be reconsidered as there is disparity in terms of the verdicts so given by the same apex court at different times but on same offences at least the gravity of crime was in similar.

Keywords: *rarest of the rare, collective consciousness, capital punishment.*

I. INTRODUCTION

Evolution of collective consciousness in public in respect of capital punishment

The primitive society of the world where the person does the identical work or somewhat carry the same business have the same physiological judgement for any definite incident or for coming into any solution that could at one-point amount to collective consciences. But in the era of globalisation the world is very much heterogeneous and consists of different ideologies backed by different reasons. Several times if two people came to one consensus over one problem of any so called in reference to the article that shock collective conscious the reason that will be different which will be backed for coming into the solution. For example, if a rape happens in a society one may support capital punishment for the only reason that the act is barbaric but the other person can have the reason for supporting capital punishment is that to protect the women and to deter the society, while other person can

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support because to reattribute the offenders for their act. Therefore, there is no collective consciousness in the society. Several times collective consciousness of the society stand for not just simple hanging but to torture the same way the offender that has caused to the victim. For example, during 2nd world war the Nazi or the while of Germany was of the belief that caging the non- Aryans or the Jews in the gas chamber or the other barbaric way id good and the right way to punish the defaulter community who killed Jesus Christ but at the latter time this kind of activity was condemned by the whole community and the way of punishment itself shock the collective consciousness. That is what shocked one community's collective consciousness may not be the same for the other community. In short there could be no collective consciousness as respect to what will deliberately affect the whole community that they will get prone to capital punishment for a definite commission of crime.

While declining the concept given by Durkheim one simple example of automobile speeding can be taken. In the recent amendment of the motor vehicles act which is created to decrease automobile speeding, the most common reason for such strictness is the huge rate of accident increase due to speeding. If we take the example and implement in the collective consciousness of the people and assume that the society condemn the speeding activity the most then in that case also we will not found any collectivism that all person support the amendment and this non- support can be due to several reasons, some can give the justification that in the time of dire need or let's say any kind of medical emergencies of any technical emergency or any family related issue or in case of traffic one cannot choose to maintain the rules of speeding as they got to peritonise their choices and other can condemn the amendment because of the huge monetary value that would effect financially their livelihood, where on the contrary many people may support the same in order to decrease the rash driving that will cause more accidents against most of the youth will state that speeding curtailing of vehicles is against their interest of being fast in their life style. So, collective consciousness is an utopian idea to just justifying an penalty or punishment.

II. INCONSISTENCE IN AWARDING THE DEATH PENALTY BY THE JUDGES

Now, coming back to the concept of death penalty awarded for any offence and while justifying such award in the name of collective consciousness is to be tried by the judge's conscience.

The apex court in the Bachhan Singh[2] case came up with the idea of rarest of the rare concept which in the roll of time took the cloth of rarest of the rare along with collective

[2] Bachhan singh v. state of Punjab, AIR 1980 SC 898(India).

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consciousness of the people. While dealing with it here comes the role or the consciousness of judges. While interpreting their consciousness it has been a clear indication that the so-called collective consciousness of the judges consists of several flaws. Many a times when the so-called collective consciousness was mocked but the court is of the opinion to the contrary of the citizen view. The main point to note here is the same judges who award death sentence with their judicial justification that the particular indent has shocked the public in general the same judge fails to give such justification in other case with same offence and many a times acquit the offender but the interesting point here is the same so-called public get shocked with such indecent as well. The main motive of this paper is to show how collective consciousness is a myth and the judges are applying the same justification in cases are with flaws.

It can be well understood that each judge has their own outlook to perceive, interpret and protect law and that is law all about depends of legal student to legal students' interpretation. Thus the consciousness of each judge is different and may be with flaws.

Several examples to understand how the consciousness of the judges the with flaws. an example can be taken of the execution of Kasab[3] of the Mumbai terrorist case was held to be rarest of the rare and more importantly it adversely effected the consciousness of the people at large and that is much true as sunlight but the point here is the attack of Afzal Guru[4] in the parliament in 2001 is also same of terrorist activity so do the khalisthan millitants but surprisingly for declaring their execution the judges took more than 10 years but more surprising is the later two also affected the consciousness of the people at large. all were same kind of terrorist attack and all such upsurge has resulted to killing of innocent but the other two were not recorded as rarest of the rare nor the collective consciousness concept as according to the judges of the supreme court of India where both specifically affected the execution by the states the answer for this could be possible is the other two were done by the arrogant citizen of India and the former was done by alien and more specifically by a Pakistani[5]. This paper does not support Pakistan or condemn the execution of kasab but it tried to upheld the discrepancies and the flaws in the judge's consciousness.

Most the death penalty cases it is found that the executing offender is financially poor so they fails to represent efficiently legally the most sightful example can be of Delhi rape case and Hyderabad doctor rape case where the offenders belong to socially lower strata and

[3] Md.Ajmal Md.Amir Kasab @Abu... vs State Of Maharashtra (2012) 9 SCC 1 (India).
[4] State vs Mohd. Afzal And Ors. (2003) 107 DLT 385(India).
[5] Franklin E Zimring and David T Johnson,Executing kasab a new beginning or the beginning of the end of India's death penalty?, vol 47, Economic and political weekly, pp. 10-11,(2012).

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financially week in nature and the fact that both the crime shakes the consciousness of the public and the public demand for their execution by death in a fast track manner and the same as been done either by court or by custodial encounter. But the point here is noteworthy that in the 8-year-old girl rape case in Kashmir the whole of India was collectively against the heinous ness of the offender and demanded execution as fast as possible but most fortunately all the offender comes out to be financially well versed or politicians and police employed so they could find the easy way to escape out through law holes and despite of such collective consciousness no deterrent effect can be awarded. Again, in unnao rape case of Uttar Pradesh the whole of India desperately wants justice and the rape offenders to be hanged but again to result was found and in both the cases the doctrine fails to exists and shows that judges use of such doctrine is much at flaws.

III. COURTS UNDERSTANDING OF RAREST OF THE RARE

It has become trite to say that the death penalty in India is awarded only in case of rarest of the rare case, although it is perhaps more difficult to decipher the court's historical understanding of what case are rarest of rare. In arriving at its conclusion, the court typically tries to identify extreme culpability, looking to the circumstances of the offender, the circumstances of the crime any mitigating circumstances, in determining whether the case fit for death penalty. life imprisonment is rule but death sentence is an exception.

But the above theory given by the apex court is not followed by the its judge's consciousness only. In Graham strains case Graham was an Christian missionary and was professing Christianity in a remote village of Orissa but some localities burnt him and his two sons into death with a presumption that he is forcing people to change their faith but the court apex court could not found till 12 years of the case any such evidence of coercive measure of any unethical activity on Grahams part but due to long duration of the case with having all the accused with sufficient evidence against them the court acquit them and decline the writ of infringement of the article 25 filed on part of the victim. Nonetheless the offence was much heinous and barbaric and satisfies all the conditions mentioned in the aforesaid paragraph. Whereas in Bhagwan Das v. Delhi [6] where a father murders his married daughter for having extra marital affair the same apex court sentenced the father to death as the court consider the offence as honour killing and it satisfied all the above conditions and held accused for death penalty on the ground that it infringes article 21 and it could effect the public at large. Here the disputing question is the first case is also barbaric and can even led to a riot or major

[6] (2011) 6 SCC 396 (India).

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public damage and it also include the infringement of article 25 but the death sentenced is not awarded, again if we evaluate the same for the second case that is also barbaric and could led to underestimation of the relations in India and infringes article 21 and thus death sentence awarded. Now the difficulty may arise in, that is not all the fundamental rights are at same footing as both led to infringement of FR but only in one case the judgement is deterred. Then what is the consciousness of the judges that changes with each kind of offence this kind of interpretation by the judges has led to well point out of the flaws in the judges consciousness.[7]

Several times it has been seen that heinous crime has led to formation and transformation of law by the judges themselves before the parliament step into it but there is no consistence. The rape is considered to be heinous in nature and thus the apex court judges consciousness held most of the rape cases to be at death penalty, in the new criminal amendment 2013 added the rape of a girl below 12 years of age and also taken guidelines regarding the same way before through Vishakha Guidelines but a similar and rather more harmful and heinous in the sense of sufferings of the victim is of the acid attacks but the court although increased the sentenced but not recognised the same on the footing of rape as most of the judges conscious state dignity as its important factor and not the harm it can show how the universal human rights concept of right to life is being categorised according to societies view and disputed judges consent.

Now, let's takes another human right concept of gender un biasness. Lorna A. Rhodes has well defined the concept of **double invisibility,** but in a negative way where in her paper she has shown how the rights of an women prisoner is being neglected and the researcher are not interested in the same[8] but if we took another view depending on the same concept of invisibility of Indian judges' consciousness in awarding death sentenced to women can attack the gender biasness. If one goes by the official record of the execution list of India till date no women was hanged. How could one justify this judge's consciousness as it causes gender biasness and the way the invisibility concept has not only overlook the women prisoner's human rights but also at some countries like India it has protected the women form being executed.

In India murder can led to death penalty and society condemn the act as the worst be it of any

[7] Abhinav Chanrachud,Death sentencing in India, vol 46, Economic and political weekly,,pp. 20-23,(2011).
[8] Lorna A. Rhodes,Towards an Anthropology of prison,vol.30, Annual Review of Anthropology,pp.65-83, (2001).

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religion, caste or creed but in the Jessica Lal murder case[9] the judges fail to apply the doctrine and more due to strong legal representation the consciousness of judges got removed. It can be duly proved that the judge's consciousness is subjective and vary from judge to judge and the flaws that were created can very well prove that death penalty with the justification of the collective consciousness.

IV. REVISITING DEATH PENALTY

Michel Foucault's in his book **Discipline and punishment** has shown us the changing type of offence and more specifically the way of handling them and how the process and justification of punishment has changed from centuries and how death penalty's need has been changed. in his book in the primitive society where any offender was punished in a brutal way in the open arena to form a deterrent effect in the society has changed through ages and the theories that has led to death penalty has also changes and now most of the states focus on rehabilitation of the prisoner rather than retributive them and thus identification of human rights that is the basic rights of the accused.

This view of Foucault in his book is the new truth of a civilised society where human right protector gave a very strong argument against death penalty that one who did not have the capacity to give birth or life has no right to end it. No state can give a life to a death person so it has no right to end it and in the 21st century killing is not an answer or solution of killing if that be the theory of retribution the offence of rape can be cured by raping the accused which is again not identified as crime that man can be raped in most countries including India and same goes for acid attack but the same collective consciousness of the people had declined such retribution. In international scenario the UN has formed several conventions to remove death penalty like ICCPR, CAT etc. to remove the torture and identifying the human rights of the accused also.

Death penalty in India

Life imprisonment in our nation isn't of much noteworthiness as it very well may be considerably decreased (confinement is that it can't be diminished underneath 14 years). Life imprisonment by no means ought to be diminished for what it's worth in many deplorable violations that the sentence life detainment is granted. Regardless of whether this is acknowledged still there are other legitimate complaints. Capital punishment can't be evacuated or cancelled on helpful grounds or on the grounds of other elective method of discipline are accessible. A stellar who is a culprit of other's entitlement to live can't profess

[9] Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1(India).

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to have a sacred option to live. The emphasis ought to be on the evil spilling out of what the criminal has done to his casualty and those precious to him and more noteworthy consideration be paid to victim logy and accordingly to the retributive part of discipline. The abolitionist needs to move their concentration from criminal to casualty, as an executioner is a demonstrated foe of society. Regardless of whether alternative to choose capital punishment or life detainment is to be given it ought to be left to the casualty's family who have endured because of the executioner and find out about cold-bloodedness than the abolitionists. The interest of nullification of capital punishment is an interest in misguided course and speaks to a pattern inversion when society is thinking about the issue whether kindness murdering be acknowledged or not. Capital punishment to an executioner is a kind of kindness to a weak society, which needs to dispose of its foe. The procedure of transformation of hoodlums with an unascertained record would involve an incredible hazard as a sizable number of lawbreakers as opposed to being changed might be urged to submit offenses after offenses and become a genuine and terrible risk to the general public. The inquiry, subsequently, is- - should the nation face the challenge of guiltless lives being lost on account of crooks perpetrating egregious violations in the heavenly expectation or unrealistic reasoning that one day or the other, a lawbreaker, anyway perilous or hard he might be, will change himself, Valmikis are not brought into the world regular and to anticipate that our current age, with the common social and monetary condition, would deliver Valmikis for quite a while is to seek after the inconceivable.

In any event, for contention in the event that it is acknowledged that death penalty has no discouragement, at that point it implies that criminal isn't anxious about death and it will be hard for the state to keep such an individual in jail after all it is the dread of death that keeps a criminal in prison. After all criminal confronting life detainment need a solitary opportunity to liberate himself for rendering a retribution from antagonistic observers and the indictment who as indicated by him were answerable for sending him to imprison. Judge may likewise turn into the casualty of his displeasure. As there is a platitude insofar as there is life, there is extension for unstoppable expectation and trust in a break for opportunity. A detainee serving life detainment can go on an executing binge and there can be no further discipline from the discipline he is as of now confronting. One significant inquiry that emerges is will we penance the lives of future casualties so as to save the life of a killer. Contention that conflicts with capital punishment is that the social orders don't reserve the option to end anybody's life since it can't give life then for what reason to murder troopers of adversary, fear based oppressor. One may state what is the need of giving arms to security powers if no person can

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be denied of his/her life whatever might be the conditions. At first sight, the punishment of death is probably going to have a more grounded impact as an obstacle to ordinary human conduct than some other type of discipline, however it is hard to disentangle the deepest openings of the psyches of potential killers.

The conditions winning in some western nations that have annulled capital punishment are exceptional with India. In abolitionist States even the most famous hoodlums are viably isolated from common society for the remainder of their regular life.

Contrastingly, in India life sentence can be decreased to 14 years. Our jail framework is lacking and incapable to hold capital guilty parties for longer periods as in most western nations. How often we have perused the reports in paper about recuperation of phones from detainment facilities and numerous lawbreakers think that its appropriate to work from correctional facilities as they are shielded from their opponent crooks.[10]

V. CONCLUSION

Thus, after examining all the effects and views and situation it can be well concluded that there nothing of collective consciousness and nor the judges while upholding this principal for their judicial justification has well led to a huge discrepancies and injustice in many cases and thus judges and the supreme court has flawed in delivering justice. There is many thing that shock the collective consciousness but not all the way to curve and to satisfy such consciousness is to be held legal and after taking into account many cases and situation and also taking the theory of the Durkheim it can be concluded that in a country like India where the community consciousness changes in every 50 kms change in location there cannot be collective respond. In the era of globalisation the whole world has now become a mixture of culture and each culture respond in severance there cannot be a collective consciousness theory to be applied as making all equal to inequality is in itself injustice. One cannot give equal decisions to a lot of unequal person and neither can be a similar consensus without prejudice. And more importantly in a country like India of hub of several distinct culture the theory is a utopian idea and if judiciary flows in such imagination, they will get trapped in their own way of giving justice and would become a jailor and prisoner at the same time of this theory and thus inconsistency in the justice giving process is inevitable.

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[10] Shantanu Jugtawat and Hirdesh Singh. *Capital punishment: revisiting the abolition – retention debate*, NATIONAL LAW UNIVERSITY, BHOPAL.

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