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Death Penalty: Revenge Disguised as Justice or Social Necessity?

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ABSTRACT

This research project is aimed at finding answer to the question: whether death penalty is revenge disguised as justice or itself a social necessity of the day? At first, an introduction to the topic is discussed which focuses on death penalty as a mode of punishment and the relevance of the topic per se which is greatly inspired by PinkiAnand's book "Trials of Truth" where she asks this question out to the readers. Following this, the evolution of capital sentencing is traced through the history of mankind, how it has developed from one civilization to another, from one law system to another. Thereafter, an elaborate discourse is provided on the existence of death penalty in the Indian Law System particularly in the Indian Penal Code through a lot of offences in the IPC punishable with death. Following, there has been a discussion on the Constitutional validity of death penalty and whether at all death penalty violates the provisions of the constitution especially the right to life and liberty of individual or not. Thereafter there has been a detailed discussion on how the concept of 'rarest of the rare' evolved through the various decisions of the Hon'ble Supreme Court. The research paper finally ends with the answer to the question whether we should continue the practice of death penalty or abolish it in to.

I. INTRODUCTION

A burning question posed at the judicial system in the recent times is about the status of the most extreme form of penalty prescribed by the law- death penalty. The question is whether death penalty, is a means of revenge veiled in the cloak of justice in furtherance of the concept of "eye for an eye", or is it really a social need of the hour which is why the Indian legal system as still not done away with it. The greatest inspiration for this work is Pinky Anand's book *Trials of Truth*[2]where she raises the same question. Though the concept, of death as a punishment, is not a new one in the recent times with the Human Rights movements at the rise, it has come to face heavy criticism. Around the world, 106 countries

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[2]Pinky Anand, *Trials of Truth* (Penguin Random Books, India, 2017)

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have abolished death penalty for all crimes and 7 for ordinary crimes, whereas 56 only have retained it.[3] In such a global scenario, it is essential that we look into our own legal system and ask ourselves the same question. This research paper aims to find an answer to the same. The answer will however vary, when perceived from different theories of punishment. While the reformative theory would find no use of the same, the preventive theory is the strongest proponent of death penalty. To find an ultimate answer however, we need to look into the various facets of death penalty as discussed in the following parts of the paper.

II. HISTORICAL DEVELOPMENT ON THE CONCEPT OF DEATH PENALTY

The evolution of capital punishment or death penalty has evolved through human history. The first recorded evidence of prescription of death penalty was found in the **Code of Hammurabi** which dates back to the 18th Century B.C., of Babylon where 25 different crimes were made punishable with death. The death penalty was also part of the **Hittite Code** of the 14th century B.C., but marginally. The most serious offenses were punished through enslavement, although crimes of a sexual nature often were punishable by death. The **Draconian Code** of Athens, in 7th century B.C., made death the only punishment for all crimes. In the 5th century B.C., the **Roman Law of the Twelve Tables** also contained the death penalty. Death sentences were carried out by such means as beheading, boiling in oil, burying alive, burning, crucifixion, disembowelment, drowning, flaying alive, hanging, impalement, stoning, strangling, being thrown to wild animals, and quartering (being torn apart).[4]

In **Britain** death penalty was executed by hanging and it became the most common method of execution. In the 11th Century under **William the Conqueror** hanging was not allowed except for at times of war. However in the 16th Century under **Henry VIII** there was extensive use of capital punishment and it is estimated that nearly 72,000 people were executed for different offences which even included marrying a Jew. Some common methods of execution at that time were boiling, burning at the stake, hanging, beheading, and drawing and quartering.[5]By the 1700s, 222 crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren. Because of the severity of the death penalty, many juries would not convict defendants if the offense was not serious. This

[3]Abolitionist and Retentionist Countries, Death Penalty Information Centre, available at https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries last seen on 17.05.2020 at 6:57pm

[4]History of Death Penalty Laws, Find Law's Team, available at https://criminal.findlaw.com/criminal-procedure/history-of-death-penalty-laws.html last seen on 22.04.2020 at 6:27pm.

[5]Early History of the Death Penalty, EPIC, available at https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty last seen on 22.04.2020 at 6:38pm.

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lead to reforms of Britain's death penalty. From 1823 to 1837, the death penalty was eliminated for over 100 of the 222 crimes punishable by death.[6]

Similarly in the **United States**, death penalty remained in practice till 1950s when the public support for it started to decline. The U.S. Supreme Court banned the death penalty nationwide in 1972, ruling that it was arbitrary and discriminatory as applied at the time. But just four years later, the Court reversed this decision. This led to some reforms, including automatic appeals of death sentences and efforts to reduce sentencing disparities.[7]

But in the 21st century, a growing number of states began to implement moratoriums or statutory bans on the death penalty, including New York, Maryland, and Illinois. Furthermore, exoneration of death row inmates through DNA evidence has continued to shift public opinion away from support of the death penalty in USA.[8]

In **India**, previously, the Code of Criminal Procedure, 1898 had s. 376 (5) which required that if an accused is convicted with an offence punishable with death and the Court sentences him with any punishment other than death, then the Court in its judgement shall state the reasons as to why death penalty was not awarded. However, the Code of Criminal Procedure (Amendment) Act of 1955 deleted this section and now it is no longer necessary for the Courts to state reasons while imposing any other punishment than death, in case of offences punishable with death.

III. DEATH PENALTY AND THE INDIAN PENAL CODE (IPC)

In the Indian Penal Code, the substantive criminal law of the land for India, death penalty is provided for in certain exceptional occasions of offences which are considered "rarest of the rare"[9]. What is meant by "rarest of the rare" shall be dealt with in details subsequently. The following are the cases under IPC or offences under the Code which prescribe for death penalty as the maximum alternative punishment. There is no offence, punishment for which is *only* death.

Srl. No.	***Section***	***Offence***
1	121	Waging, or attempting to wage war, or abetting waging of war, against Government of India.

[6]Ibid
[7]Supra 1
[8]Supra 1
[9]See *Bachan Singh v. State of Punjab 1980 CrLJ 636*

2	132	Abetment of mutiny, if mutiny is committed in consequence thereof.
3	194 (Para II)	Giving or fabricating false evidence with intent to procure conviction of capital offence if innocent person be thereby convicted and executed.
4	195A (Part II)	Threatening or inducing any person to give false evidence- if innocent person is convicted and sentenced in consequence of such false evidence, with death.
5	302	Punishment for murder.
6	305	Abetment of suicide of child or insane person.
7	307 (Para III)	Attempt to murder by life convicts.
8	364A	Kidnapping for ransom etc.
9	376A	Punishment for causing death or resulting in persistent vegetative state of victim.
10	376AB	Punishment for rape on woman under twelve years of age.
11	376DB	Punishment for gang rape of woman under twelve years of age.
12	376E	Punishment for repeat offenders.
13	396	Dacoity with murder.
14	120B	Criminal conspiracy to commit offence punishable with death if committed.
15	34/149	Offence punishable with death committed in furtherance of common intention or common object.
16	109	Abetment of offence punishable with death.

A close reading of all the above offences which are punishable with death will reveal that under 2 broad categories of offences, the punishment of death is awarded. Firstly, in cases of offences which squarely fall within the category of a grave offence against the State. For example, waging war or mutiny are such offences. The second category of offences is more prevalent throughout the statute book, which symbolizes grave offences against the

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individual, whether directly on the body or indirectly causing death, like murder, gang rape of minor etc.

(A) Objective of Death Penalty

The prime objective of criminal law is to impose adequate, just and proportionate sentence commensurate with the nature and gravity of crime.[10]Inadequate sentence to show sympathy is unjustified and unlawful. The Courts while sentencing should also represent the collective conscience of the society[11]keeping aside, obviously the blood-thirsty mob mentality. It also should be designed to reform the accused and prevent him from committing any further offences in future. Thus, reformative, punitive and deterrent aspects of punishment play their due part in judicial thinking, though reformation dominates the current trend of sentencing policy.[12]

Broadly there are two approaches to punishment, one is punitive and the other is therapeutic. While punitive approach sees the criminal as a notorious menace to the society, the therapeutic approach sees him as patient who needs treatment. Even after taking into consideration all the objectives and approaches to punishment, there come such cases where the society's cry for justice shatters these concepts like a castle of cards. When a 23 year old girl is brutally raped in a moving bus, or two minor siblings are kidnapped and murdered, the soul of the society demands nothing less and nothing more than death of the perpetrators. Such are times, when elimination of the criminal from the society is the only possible way to maintain order and *supremacy of law* in the society. Such are times which call for death penalty.

IV. DEATH PENALTY: IS IT CONSTITUTIONALLY VALID?

With the wide writ jurisdiction that is vested by the Constitution on the Supreme Court and High Courts, there remains hardly anything under the Sun that has not been made to stand the test of Constitutional validity. The fate of death penalty was no different. The Constitutional validity of death sentence was challenged before the Supreme Court in 1973 in the case of ***Jagmohan Singh v. State of UP[13]*** and the Supreme Court upheld the validity of the death sentence. The detailed ruling of the Apex Court explains the reasons behind declaring the penalty to be valid. The proposition laid down by the Constitution Bench, in this case is as follows:

[10]*Alister Anthony v. State of Maharashtra*2012 CrLJ 1160
[11]*Union of India v. Kuldeep Singh* AIR 2004 SC 827
[12]Ratanlal&Dhirajlal, *The Indian Penal Code*, (Lexis Nexis, 35th Ed, 2018) p.90
[13]*Jagmohan Singh v. State of UP* (1973) 1 SCC 20

i. It was contented that there were no specific guidelines as to when award death sentence and when award the lesser penalty, hence it was arbitrary and excessive discretion of Judges. The Supreme Court rejected this argument by stating that the general legislative policy in penal jurisprudence is to stipulate a maximum and at times a minimum penalty so that the Judge can fix the degree of punishment according to the facts and circumstances of a particular case. An exhaustive list of aggravating and mitigating circumstances is not possible and this impossibility itself is the core of criminal law as administered in India.

ii. It was also contented that uncontrolled discretion of judges was arbitrary and unreasonable and it violated *due process of law.* The Supreme Court rejected this argument by stating that in our Constitution there was no provision like the Eighth Amendment of the U.S. Constitution prescribing a *due process* clause. However, here it must be noted that this is a **Pre-Maneka Gandhi judgement**[14]which is why the Apex Court has made a restrictive interpretation of the *due process* clause, as in Maneka Gandhi's case it became a well settled principle that *procedure established be law* under article 21 qualified to mean *due process of law* as in the U.S. Constitution.

iii. It was further contented that the absolute discretion of the Judge's while determining death sentence or otherwise violates the doctrine of equality as enshrined in **Article 14** as it is unreasonable. The Apex Court, rejecting the plea, held that the discretion doesn't violate article 14 as judicial decision is the safest possible safeguard for the accused and the same can also be corrected by Superior Courts.

iv. The final contention against death penalty was that it violated right to life as guaranteed under **Article 21** of our Constitution. However the Supreme Court took no time to reject this plea as well on the simple ground that before awarding death penalty the Court mandatorily undergoes all procedural necessities as required by the CrPC[15] and the Evidence Act[16]. This procedure qualifies to be the *procedure established by law* under Article 21. Thus, in such cases where procedure established by law is complied with, the right to life can rightfully be curtailed and such is the case of a Court awarding death penalty.

In ***Rajendra Prasad v. State of U.P.***[17] the Supreme Court held that the special reasons for imposing death penalty must relate not to the crime but to the criminal. It could be awarded

[14] See *Maneka Gandhi v. Union of India* AIR 1978 SC 597
[15]The Code of Criminal Procedure, 1973
[16] The Indian Evidence Act, 1872
[17]*Rajendra Prasad v. State of U.P.*(1979) 3 SCR 646

only if the security of the state and society, public order in the interest of general public ordered that course.[18]

V. Evolution of Capital Punishment in India

Once, it is settled in affirmative whether death penalty is valid, the next pertinent question is when to award death penalty and when not to. As stated earlier, the legislative policy in penal jurisprudence is to stipulate a maximum punishment, and Judges, making use of their judicial mind have to determine the appropriate punishment in that case keeping in mind the particular facts and circumstances of the case. The sentencing policy in India has also undergone substantial changes over the years as the yardstick of determination of sentence has gradually shifted from the 'crime' to the 'criminal'. The evolution of the sentencing policy can be traced through the following phases:

1. Crime Test

Right after the Jagmohan Singh's case[19], the established law became that the Judge while deciding whether or not to award death penalty, would make a balance sheet between the aggravating and mitigating circumstances of the particular crime in question. This balance was known as the 'crime test'. It was laid down in that case, that the Court is principally concerned with the aggravating and mitigating circumstances of the "crime under inquiry".

Aggravating circumstances are those circumstances or situations which make the case more serious and push the bar of determination towards death penalty, while *mitigating circumstances* are those situations which reduce the seriousness of the offence and push the sentencing away from death penalty, to a lesser penalty.

2. Post-Conviction Hearing

The above case was shortly followed by the introduction of the new Code of Criminal Procedure, 1973. In the new code, the recommendation made by the 41st Law Commission Report was accepted, in the form of s. 235. The section states thus:

"235. Judgment of acquittal or conviction.

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass

[18]Supra 9
[19]Supra 10

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sentence on him according to law."[20]

This provision gave an opportunity of hearing to the accused after conviction on the question of sentence. This post-conviction hearing opportunity gives the accused a chance to raise fundamental issues in adjudication and determination of sentence by the Court. It also ensures that the sentencing is just, fair and reasonable. This new provision is aptly justified and in tandem with the modern trends of penal jurisprudence and sentencing policy.[21]

3. Criminal Test ("Rarest of the Rare" Doctrine)

Once again the validity of death penalty was challenged before the Supreme Court and the Court similarly upheld the constitutionality of death penalty in 1980 in the landmark judgement of ***BachanSingh v. State of Punjab***[22]. In this case it was held that for persons convicted of murder, life imprisonment is the rule and death sentence is an exception. This judgement is in furtherance of the reformative theory of punishment. The Supreme Court clarified that the aggravating circumstances (brutal nature, exceptional depravity, by a public servant etc.) relate to the crime; the mitigating circumstances (young age of offender, probability of reformation, under stress or domination etc.) relate to the criminal. Both these circumstances have to be given due weightage and a balance-sheet has to be drawn up between them. Only if the gravest culpability is concluded, death penalty should be given, which means only in the "rarest of rare" cases.

The most pertinent question now was, which cases come within the ambit of "rarest of the rare" case. Specifically dealing with punishment for murder, the Supreme Court gave detailed guidelines on determining a rarest of rare case depending on the facts and circumstances of the case, in the case of ***Machhi Singh v. State of Rajasthan***[23]. The guidelines are as follows:

Factors to be Considered in determination of RR (Rarest of the Rare Case):-

1. *Manner of Commission of Murder:* If the murder is committed in an extreme brutal, diabolical, grotesque or dastardly manner so as to arouse indignation of the entire community.
2. *Motive:* If the motive reveals extreme meanness like a murder by hired assassins, cold-blooded murder to inherit property etc.
3. *Anti-social nature of crime:* This includes caste killings like selective murder of members from the SC community, dowry deaths etc.

[20] S. 235, *The Code of Criminal Procedure, 1973*
[21] *Santa Singh v. State of Punjab* (1976) 4 SCC 190
[22] *Bachan Singh v. State of Punjab* AIR 1980 SC 898
[23] *Machhi Singh v. State of Rajasthan* (1983) 3 SCC 470

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4. *Magnitude of crime:* When the crime is huge by its sheer magnitude, like killing of all members of a family, several members of a village etc.
5. *Personality of victim:* If the victim is an innocent child, old or infirmed, in a position of trust by the accused, political figure etc.

The above circumstances would generally push a case towards inclusion in the category of rarest of the rare cases.

4. Criticisms of the RR Guidelines

Since the above decisions, a period of almost 25 years went by. It was in 2008 that it struck the conscience of the Supreme Court that the condition of life and society has undergone a great deal of change in all respects. The recent trends of crime included rioting, Parliamentary attacks, terrorist attacks on innocent people, custodial rape and death, killings of 'whistle-blowers' etc. and that all these could not be included in the straight-jacket formula laid down in *Bachan Singh* or *Machhi Singh's* case.[24] In ***Shraddananda v. State of Karnataka***[25]the Supreme Court taking cognizance of the changed social milieu accepted the need for flexibility in sentencing structure, depending on case to case, qualitative to quantitative factors etc. In ***Santosh Bariyar v. State of Maharashtra***[26] the Supreme Court made a remark that *Bachan Singh* guidelines increased the inconsistency in sentencing policy than reducing them.

5. Recent Principles

In 2013 the Supreme Court gave out some recent principles in the ***Sangeet's case***[27] and ***Mohinder Singh's case***[28]. A cumulative study of the principles states that there cannot be a balance between aggravating and mitigating circumstances because while the former relates to the crime, the latter relates to the criminal and both of them cannot be balanced on the same scale. That is why, sentencing has become more of a judge-centric decision rather than a principled sentencing as envisaged in the *Bachan Singh's case.* Remissions should be given on case-to-case basis and not in a wholesome manner. While awarding the extreme penalty of death, the 'special reasons' have to be specified and these mean the exceptional reasons which call for the extreme penalty and not anything short of it. The case will be considered "rarest of the rare" when the offender if not eliminated permanently will pose a continuous

[24]Supra 9 p. 626
[25]*Swami Shraddananda v. State of Karnataka* AIR 2008 SC 3040
[26]*Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498
[27]*Sangeet v. State of Haryana* AIR 2013 SC 447
[28]*Mohinder Singh v. State of Punjab* (2013) 3 SCC 294

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threat to the peaceful coexistence of the society. The circumstances of such a crime should be such that it pricks the judicial conscience of the Court.

VI. EXAMPLES OF RAREST OF THE RARE CASES:

Some of the cases which have been by far accepted as squarely falling within the category of rarest of the rare cases and have gathered wide abhorrence from the society at large are:

1. Assassination of Mahatma Gandhi[29]
2. Assassination of Indira Gandhi[30]
3. Nirbhaya Gang rape and murder case[31]
4. Sanjay-Geeta Chopra murder case[32]
5. 1993 Bombay blasts[33]
6. Hetal Parekh murder case (Dhananjoy Chatterjee)[34]
7. The 26/11 attacks in Bombay[35]

These are cases of offences committed with extreme brutality, or by repeated offenders, or an attack against the Government of India, or against innocent children or even against the Father of the Nation or the most beloved Prime Minister of India by her own bodyguards.

Nirbhaya, the Unafraid One: The soul of the Nation was petrified and the collective conscience of the society was shook to its core when the news of the 2012 Delhi gang rape case came out. A 23 year old medical student was gang raped on a moving bus, an iron rod pierced in her private parts casing sepsis, subject to violent sexual assault, rape, robbing of all their belongings, attempted to be killed by being thrown out of the moving bus and trying to be run over by the bus. The Supreme Court opined that the brutal, diabolic and barbaric nature of the crime created a “tsunami" of shock in the collective minds and destroyed the civilised marrows of the milieu in entirety. The voice of the Nation cried for justice and the case came to be known as the Nirbhaya case (the ‘unafraid'). This case brought about a landmark change in the criminal justice system as the Nation realized that the time had come when a renewal in the laws of crimes against women was required. This legal lacuna was filled by the Criminal Law Amendment Act of 2013 amending substantial provisions of the

[29] *NathuramGodse v. Crown* AIR 1949 E.P. 321
[30] *Kehar Singh v. Delhi Administration* (1988) 3 SCC 609
[31] *Mukesh & Ors. v. State of NCT of Delhi* 2017 (5) SCALE 506
[32] *State vs Jasbir Singh @ Billa And Kuljeet* 17 (1980) DLT 404
[33] *Yakub Abdul Razak Memon v. State of Maharashtra*(2013) 13 SCC 1
[34] *Dhananjay Chatterjee Alias Dhana vs State Of W.B.* 1994 (1) ALT Cri 388
[35] *Ajmal Amir Kasab v. State of Maharashtra* Criminal Appeal no. 1961 of 2011

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IPC, CrPC and the Evidence Act. The perpetrators however escaped their duly deserved death penalty for 7 long years by exhausting their statutory and Constitutional remedies one by one. However hope of the country was renewed in its Judiciary when the dawn of 20th March 2020 brought with it the news of the execution of the surviving convicts of the Nirbhaya Case.

Some other cases-

In the first case the accused, with intention to rob the passengers sprinkled petrol in the bus and set it ablaze not allowing the passengers to escape, thus resulting in the death of 23 passengers. This cave fell within the category of "rarest of the rare" cases and therefore death penalty was awarded to the accused and the same was confirmed.[36]

In another case the victim was a 16 year old girl who was alone in her house and was preparing for the examination. The 2 accused were working in her house. Taking advantage of her being alone, they raped and strangulated her to death and later on disposed of her dead body in a septic tank. No mitigating circumstances were there. The Court held that it squarely fell within the category of rarest of the rare cases and capital punishment was rightly awarded.[37]

Capital punishment is also provided for under the ***Unlawful Activities (Prevention) Act*** when a terrorist act results in the death of a person. In the case of the 1993 Bombay Attack[38], the Supreme Court discussed all aggravating and mitigating circumstances and awarded death penalty to the accused.

VII. CONCLUSION: A FINAL ANSWER

What can be inferred from the discussion and the barbaric nature of certain crimes, is that death penalty is a social necessity. The necessity however, isn't felt all the time. It is felt when one such nefarious offence takes place which raises the society's cry for justice to such an extent that any other form of punishment would seem clearly inadequate and elimination of the perpetrator from the society becomes necessary for the peaceful continuance of order.

Death penalty supersedes all its major oppositions because of the very system of sentencing in India. Now it is a settled law in penology that life imprisonment is the rule and death is the exception in case of extreme penalties. Even after death penalty is awarded to an accused, the same cannot be executed unless it is confirmed by the High Court having jurisdiction over the

[36] *III Addl. Sessions Judge, Guntur v. G. V. Rao* 1996 CrLJ 703 (AP)
[37] *Malai v. State of M.P.* AIR 2000 SC 177
[38] *Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay* (2013) 13 SCC 1

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same. When the High Court confirms the same, the accused doesn't run out of his legal remedies, rather a wide arena of criminal and constitutional remedies are opened to him. While he has statutory rights like appeal, review, revision etc. on one hand, he has constitutional rights to seek for mercy from the President or the Governor of the state who can commute the sentence if they so deem fit. Even after exhausting all the remedies, if the accused is sentenced to death then it inevitably upholds the fact that the case is definitely "*rarest of the rare*" and death penalty is a necessity in the case.

Like almost every concept of law there is no 'one size fits all' policy for awarding death penalty either. The punishment is decided from case to case basic depending upon the particular facts and circumstances. Thus for the rarest of the rare cases, death penalty cannot be reduced in value by calling it a revenge disguised as justice, rather it is most rightfully a social necessity, a need of the hour.

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