



RAREST OF THE RARE DOCTRINE – AN ANALYSIS *

Abstract:

Every morning we all wake only to find cold blooded murders, honor killings, ambush, suicides, unrestrained abuses, unnatural offences and so on. Thanks to the “Rarest of Rare” doctrine propounded in Bachan Singh case in 1980. When the Constitution of India under Article 21 allows for depriving life and personal liberty by the procedure established by law, judicial precedents are antipode to this whole notion. Retributive theory that stipulates the ‘get even’ concept must be strictly adhered in the criminal justice system of any civilized government. Unless the heinous offenders are paid back in the same coin, justice to the victims would remain a distant dream. Right from the inception of laws, ‘An eye for an eye and tooth for a tooth’ was the grundnorm. Death penalty in rarest of rare of cases has become a safe haven for the offenders. The offenders of heinous crimes, whose guilt is proved beyond reasonable doubt cannot be permitted to live just to be ornaments of our jails and objects of sale for our news vendors. It’s the right time we reform this doctrine to make death penalty as the rule rather than the exception.

INTRODUCTION:

The omnipresent and omnipotent nature of crime is wreaking a havoc to the modern society. It’s really astonishing to find the ‘innovative’ types of crimes committed throughout the motherland and world as a whole. So, with this mammoth increase in crime rate the state has the sentencing system to curb the criminal behavior of the assailants. There is an urgent need to provide justice to those affected by crime and its aftermath. Section 53 of the Indian penal code, 1860 provides various kinds of punishment to the assailants depending on the gravity of the offence. It’s pertinent to note that the first punishment is death/capital punishment for offences under sections 121,132,194, 195-A, 302,305,307, 36-A and 396 of the code.¹ Among all the punishments, this sentence of death occupies a distinct place in criminal and penal jurisprudence. This is due to the fact that the capital punishment is retributive in nature. Since, death penalty is taking life, for life taken. Above all, this sentence is also distinct due to its irrevocable nature.

HISTORICAL BACKGROUND:

This capital punishment is not of recent origin, since it was common in the ancient civilizations. According to the Biblical accounts, the first ever victim of murder on the planet was Abel. The Holy Bible records the words of the Lord saying to Cain, the murderer that “*the*

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¹ T. Bhattacharya, “The Indian Penal Code”, 48 (7 ed., Central Law Publication, 2013)

voice of thy brother's blood crieth unto me from the ground"² Later the Lord promised that vengeance would be taken on Cain and it came to pass. With this said the modern day retributive theory was actually established in the Holy Bible several thousand years before Christ. The biblical verse says "*Breach for breach eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again*".³ The Hebrew law prescribed such severe death sentence for crimes like rape, adultery, bestiality, blasphemy, homosexuality and other grave offences. The offender was not sympathized but was made to pay for his wrong. Even according to Hindu teachings a criminal should be punished if he becomes a harm to the society and that will depend on the kings.⁴ Ultimately the aim of any punishment is to pay the offender in the same coin so that justice may be served. Not only in the Jewish, Hindu and Christian law, various civilizations employed different types of death penalties. The root of death penalty can also be traced to the Babylonian law. Hammurabi who was the first Metropolis, the King of Babylon issued a set of law to his people called Hammurabi Code. Babylonian civilization started in XIX century B.C., and Hammurabi was the first written code. It provided harsh standards by which Babylon could order their lives and treat one another. The establishment of death penalty can also be attributed to this magnificent laws. Capital punishment was normal in crimes like murder, wrong at work and trespass. The Babylonians used drowning as one of the penal sanction. The Hebrew law punished the offender by stoning. Roman usages included precipitation from the Tarpian rock, strangulation, exposure to wild bats, crucifixion⁵ etc., besides providing justice to the accused this strict punishment also served as a warning/deterrent to the future offenders. In fact, only this rigorous implementation of death penalty has performed to its fullest potential to curb the crime rate.

NEED FOR DEATH PENALTY:

The decision or the determination for the justification of capital punishment is being hotly debated across corridors over the decades, for it involves moral, ethical and legal questions. Some people even consider this barbaric, since it 'takes away' the precious human life. The need for any penal sanction is retribution at the first place, thereby providing justice to the victim. To put it in other words the concept of justice demands that the punishment inflicted should fit the offence committed. Example: if guilty person commits murder he must be punished with highest degree of penal sentence i.e., Capital punishment. This was also asserted by the Hon'ble Supreme Court of India in *Mahesh V. State of Madhya Pradesh*⁶ that "*giving lesser punishment to accused in such a brutal case will beaten citizen's faith in courts and justice, and law is liable to provide justice to society*". In *Dhananjay Chatterjee Alias Dhana V. State of West Bengal*,⁷ Justice A.S. Anand and N.P. Singh said "that the measure of punishment must depend on the gravity of crime, so that the victim must be provided with fair justice". But, once this intrinsic element is missed then the whole object of the criminal justice delivery system would be in vain. Ever since civilizations formed, punishments played a key role in curbing the crime.

It actually serves as a deterrent to the would-be assailants. Philosopher Montesquieu had observed that "*the capital punishment represents a kind of retaliation, by which society withdraws protection from a citizen who has sought to destroy another citizen. This punishment is derived from the nature of the crime drawn from the fund of the reason and the springs of Good and Evil. A citizen deserves death, when he has violated the security of*

² The Holy bible, Genesis 4: 10 (King James Version)

³ The Holy Bible Leviticus 24: 20 (King James Version)

⁴ [https://en.m.wikipedia.org/wiki/Danda\(Hindu_punishment\)](https://en.m.wikipedia.org/wiki/Danda(Hindu_punishment)) (consulted on 12.11.2016)

⁵ H.O. Agarwal, "A book on Human Rights" 62-68 (12 ed., Central Law Publication, 2011)

⁶ (1987) 3 SCC 80

⁷ (2004) 9 SCC 751

*another and has gone too far as to kill him or attempted to kill him. The penalty thus employed may be described as the medicine for a social malady”.*⁸

Considering the ideological aspect to death penalty, capital punishment is considered to be a better deterrent than other forms of penal sanctions. Probably, this is the only instrument that permanently incapacitates the offender thereby securing respect for law. This punishment would also ease the economic burden of state, as the life convicts has to be fed and clothed during his prison term. But when death penalty is given, his crime is paid once and for all. If all the convicts are hanged immediately it ultimately leads to a safer society that would be free from criminals. The delay in the system would help the accused to find loopholes and it also provides them sufficient grounds for escape. Another need that stresses its importance is that, immediate death penalty would prevent the relatives of victims from taking law into their own hands which would make the matter more worse. With the increase in Jihadist terrorism it is the high time for the judiciary to feel the value of this age old punishment, thereby abolishing all ‘doctrines’ that hamper the effective delivery of justice especially to the vulnerable weaker sections of the society.

TRENDS IN THE MIDDLE EAST:

Middle Eastern countries are known for their strict public executions. That is the simple reason for the reduced crimes. The recent execution of the member of Saudi Royal family prince Turki bin Saud al- Kabeer for alleged murder,⁹ shows their vigor to make their land a tough place for the offenders. Thanks to the strict orthodox interpretation of Sharia law that has made this possible. Here death penalty is the rule unlike our nation where it is an exception. More than 100 people have been executed in Saudi Arabia in 2016 alone, while no one has been hanged in India in spite of the mammoth increase in the crime rate. The crime rate statistics between India and Saudi Arabia speaks volumes about the importance of death penalty.

DEATH PENALTY IN INDIA:

Before entering into this issue, it is significant to note what the Constitution of India has to say about taking one’s life. Article 21 of the Constitution says “*No person shall be deprived of his life and personal liberty except according to the procedure established by law*”¹⁰ in other words by procedure established by law, human life can be deprived. Even though the constitution of India and Indian Penal Code allows this sentence judicial decisions have interpreted it otherwise.

Our law makers must have had certain justifications while incorporating the provisions dealing with death penalty. Is killing the killer not an age old mode of punishment for those committing heinous crimes? If so, why is there so much complexity and debate whether the penalty of death sentence should be allowed in our statute books?¹¹

With the evolution of the “Rarest of Rare” doctrine propounded in Bachan Singh case¹², assailants have been provided a safe haven. Indeed this dictum entrenched the policy that life imprisonment is the rule and death penalty an exception.

⁸ Nadagoudar, V. Suresh “ Need for death penalty in India” published on Indian Bar Review Vol. XXIX(1),2002 pp.47

⁹ <http://edition.cnn.com/2016/10/19/middleeast/saudi-prince-executed/> (consulted on 11.11.2016)

¹⁰ Gopal Sankaranarayanan, “The Constitution of India”, 45 (Eastern Book Company, 12th edn, 2014)

¹¹ Gupta, Nina “ Capital Punishment to be retained as a deterrent “ published on Lawyers Update Vol. XX, Part 9, Sept 2014,p.24

¹² AIR 1980 SC 898

The result of this tragic doctrine has cost the victims dearly. For example, in the Priya Dharshini Mauto murder case (*Santhosh Kumar Singh vs. State through CBI*),¹³ the accused Santhosh Singh was free from the noose, despite raping and murdering her. Thanks to the ‘merciful application’ of the rarest of rare doctrine. Similarly a plethora of cases can be cited in which the convicts walked scot free.

A brief look at the statistics proves, how a highly populated country like India is so slow in providing death sentence. The punishment rate is very low compared to other democracies. Asian Centre for Human Rights (AHCR) in its report “ the state of Death penalty In India 2013” stated that as per the records of the national Crime Records bureau (NCRB), Ministry of home affairs, Government of India 1,455 convicts or an average of 132.7 convicts per year were given death penalty during 2001-2011 have been awarded in India since 2001. But the actual execution is even more less. A report by Death Penalty Research project of the National Law University (NLU), Delhi shows that 1414 prisoners have been hanged to death since 1947.¹⁴ According to a report published in an English daily, this is not even 5 per cent of the total executions.

Above all the recent verdict that opened this topic anew is the Rape and Murder of 23 year old Soumya, while she was travelling in a passenger train from Ernakulam to Shornur on February 2001. In this case the Apex court commuted the death sentence of accused Govindasamy to life imprisonment.¹⁵ Former Supreme Court judge, Justice Markandey Katju has said the Supreme Court must review its judgement in the Soumya case in which the accused was found guilty of rape but not murder. Chief Minister of Kerala said “*This is not just a punishment at all and it is hard for the public in Kerala to digest*”.

Another prominent lawyer in Supreme Court and High Court of Kerala felt that the verdict was shockingly soft and highly dispiriting. “With great respect, I may say that the punishment is too meagre and has no deterrent effect. Also, it fails to satisfy the public consciousness. The court has rightly retained the maximum possible punishment of life imprisonment on the accused who is a potential threat to the society. But, the court could have done more than that”.¹⁶ The matter is *sub judice* and victim’s mother has filed for review petition in the Hon’ble Apex court, pleading to provide capital punishment to the accused. So these maladies must be seriously dealt with to decrease the crime rate in our country.

WHAT IS THE RAREST OF THE RARE?

The rarest of the rare doctrine evolved in the *Bachan Singh Vs. State of Punjab*¹⁷ in accordance with Section 354(3) of the Criminal procedure code, 1973 that reads like this.” *when the conviction for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence*”

In the *Prajeet Kumar Singh Vs. state of Bihar*¹⁸ Supreme Court Judges have ruled exactly on what would rarest of rare cases constitute. Court said that a death sentence would be awarded only,” *when a murder is committed in an extremely brutal, grotesque, revolting or dastardly manner as to arouse intense and extreme indignation of the community*”. But still the question

¹³ (2010) 9 SCC 747

¹⁴ <http://m.timesofindia.com/india/1455-death-penalties-awarded-in-India-since-2001-Report/articleshow/18511664.cms> (consulted on 11.11.2016)

¹⁵ https://en.m.wikipedia.org/wiki/Soumya_murder_case (consulted on 11.11.2016)

¹⁶ Ibid.

¹⁷ AIR 1980 SC 898

¹⁸ 2008 (4) SCC 434

as to what constitutes 'rarest of the rare' has not been satisfactorily answered, neither the application of the doctrine consistent enough to result in the crystallization of the principle's operative constituents. In the *Bachan Singh V. State of Punjab*¹⁹ case itself the court admitted that Section 354(3) of the Criminal Procedure Code prescribing 'special reason' is loose and hence needed an odd and random interpretation. But, on the other side of the coin establishing a standard is a policy matter to be done by the legislation. With this muddle, if this doctrine needs to be followed legitimate and specific elements must be present. This doctrine has literally belittled the value of the criminal justice delivery system. Isn't every murder barbaric, heinous that results in widespread uproar? If the judiciary tries to put every murder under its 'definition' truth will never prevail. The application of this doctrine has made the scenario worse with the rampant increase in heinous offences. Even when we take a look at the assassination of Mr. Rajiv Gandhi the convicted persons are still in prisons after the pronouncement of death sentence. The offenders of heinous crimes, whose guilt is proved beyond reasonable doubt cannot be permitted to live just to be ornaments of our jails and objects of sale for our news vendors.²⁰ This type of approach is not at all suitable to a country with high population rate. With utmost respect, the judicial pronouncements have favored and are favoring the accused thereby denying justice to the blood of the innocents killed. At the end of the day more than 'skilled' advocacy and expensive advocate's truth must prevail.

In *Machhi Singh V. State*²¹ in a feud between two families resulted in tragic loss of seventeen lives in the course of a series of five incidents on a night which occurred in quick succession in five different villages in the vicinity of each other. The dead included men and women. Four accused were awarded death sentence and nine imprisonments for life by the High court. On appeal the Supreme Court while acquitting one person and confirming the death sentence of three said the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. After all death sentence as a punishment was brought forth not to those who would qualify for the rarest of the rare, but for all who deserve death for the life taken. Seems this doctrine has missed the whole point of penal provision. When the provisions in constitution and the Indian Penal Code are so clear to provide death sentence, in reality convicts are spared from the noose.

In order for these guidelines to be applied, *inter alia* the following question needs to be answered: a) is there something uncommon about the crime which renders sentence of death inadequate and calls for imprisonment for life? If so, what is the thin line that distinguishes between death and imprisonment for life? The Hon'ble courts have used different yardsticks over the years to convict the criminal with this doctrine. They have an unexplained 'definition' that makes them to decide which murder qualifies for death penalty and which does not!

Generally aggravating factors and mitigating factors are considered by the court and it is open to the court to attach weightage to the relevant factors to determine the final outcome of the exercise. The mitigating factors enumerated by the Supreme Court are by and large extraneous or have been accorded undue weightage. While the Apex court's willingness to extinguish a life is quite understandable the broad shoulders of the law and the courts are sometimes summoned to carry unpleasant burdens.²²

¹⁹ AIR 1980 SC 898

²⁰ Gupta, Nina "Capital Punishment to be retained as a deterrent" published on Lawyers Update Vol. XX, Part 9, Sept 2014 pp. 24

²¹ AIR 1983 SC 957

²² Singh, Hemraj "Mattoo judgement: 'Rarest of Rare on trial' published on Lawyers Update Vol. XVI, Part 11, Sept 2010 p.34

In *Jagmohan Singh V. State of Uttar Pradesh*²³, Supreme Court by supporting constitutionality of death penalty held that “*it prevents the commission of crimes in the society*”. The court also held that Death penalty does not violate the fundamental right to life. Similarly, in *Deena V. Union of India*²⁴ the execution of death penalty was brought before court and it was held that hanging is not a cruel method of executing sentence and thus do not violate Article 21. Hon’ble court also said India could not take risk by experimenting with the abolition of death penalty.

The state is responsible for every human life under its control. If a life is taken it must use its full ability to bring the offender to the noose. It’s certainly the right time to see all these words in action to make our mother land a better place to live in.

REFORM IN THE TRIAL SYSTEM:

An ordinary member of the society expects peace and safe existence of his or her family. The commoner doesn’t care about all doctrines and legal jargons, all he needs is Justice. Despite there being a deterrent in the form of capital punishment there has been no reduction in the rate of heinous crimes being committed in the country. ‘Thanks’ to our criminal justice delivery system.

To end all this chaos that has weakened our justice delivery system it is the right time to have a paradigm shift from the current Adversarial system to the Inquisitorial model followed in Civil law countries like France, Italy etc. In spite of its disadvantages, the merits of this model simply outweighs all its demerits.

The Adversarial system favors the accused *in toto* and this is evident from its cardinal principles a) every accused is innocent until proved guilty, b) benefit of doubt is given to the accused c) the parties present their case to an ‘impartial’ judge. d) Charges must be proved beyond reasonable doubt.

The shocking statement of Additional Sessions Judge G.P.Thareja in Ms.Priyadharshini Mattoo case (*Santhosh Kumar Singh V. State through CBI*)²⁵ highlights the weakness of this system.

The Judge remarked “*though I know he is the man who committed the crime I acquit him, giving the benefit of doubt*”. This statement rightly says about the adversarial system. How will justice be provided with this type ‘presumptions’? It’s a sad reality that this model has denied justice to the helpless people without influence and money power.

The major defect with this system is that it has led to several unsolved crimes. Say for example in the Sunanda Pushkar ‘suicide’ case (2014)the truth is yet to come in spite of clear evidences and viscera samples from the premier All India Institute of Medical Sciences (AIIMS) . Moreover, the Latin maxim that plays an intrinsic part in the criminal law is “*Actio personalis moritur cum persona*” that literally means ‘a personal right of action dies with that person’. Going by this principle the case is deemed completed, the moment the accused dies. So the big question arises who has done the crime? What if the person remanded was innocent? What about justice to the victim? All these mysteries remain unsolved. All these aforesaid questions were evident in the sensational, broad day-light murder of IT professional Swathi on June 24, 2016 The late accused Ramkumar was taken to custody in a controversial manner and even his death inside the ‘high security’ prison complex has raised eyebrows. But the prison

²³ AIR 1983 SC 1155

²⁴ AIR 1983 SC 1155

²⁵ (2010) 9 SCC 747

officials said it as a case of 'suicide' by biting the high tension wires. Interestingly with the day to day increase in fake encounters, his alleged 'suicide' occurred a day before the filing of charge sheet to the Judicial Magistrate. As said above all the above said questions are left unanswered. Who will provide justice to Swathi???

Similarly, in the alleged hit and run case against actor Salman Khan (2002) the Hon'ble High Court of Bombay has acquitted the accused Salman Khan, thereby concluding 'no one was at the wheels' while the killing of three innocents took place. If person 'A' has not caused the harm who else? Is the haunting question that is left unanswered!

In this adversarial system the role of Judiciary is limited to a mere passive listener who decides the case based on 'skilled' advocacy rather than finding the truth. Those with the ability to influence and manipulate will escape the sanctions, but all the helpless people suffer the brunt of law. Another vital element that makes this system weak is the binding precedents (Article 141- Law declared by Supreme Court to be binding on all courts)²⁶ that sometimes lead to continuous error in the forthcoming judgements. At the first place, if the system is defective sentencing cannot be proper.

Whereas in the Inquisitorial model the judgement totally rests in the hands of an expert in the area of crime. There is no chance of fooling the public by fancy arguments. The court of justice is not a passive listener but the officers play a substantive role to secure justice. All the components of criminal justice system i.e., the police, the prosecutor, the defense lawyer, the court and the accused help to secure justice to the innocent victims. This fool proof system easily detects all distortions in evidence and the dubious practice followed by the accused. This is evident in the Paris Bataclan theatre shooting case where all perpetrators were shot down within a short time frame. Unlike the adversarial model, precedents are not given much importance in the inquisitorial system. It's the right time we switch over to this system that works for the cause of justice.

ETHICAL AND MORAL COUNT:

Each and every human life is valuable in the sight of the Creator and the sanctity of each one must be valued. The maximum evil that can be done to a person is taking away his precious God given life and all homicide is barbaric and heinous. No amount of justification and doctrines can revoke the irrevocable act. So on ethical and moral counts the offender must be strictly repaid by following the retributive theory. The late Archbishop of Canterbury, William Temple has explained in length the justification for punishment in his remarkable lecture "the ethics of Penal Action". *"It is the first moral duty of the community or the state on its behalf to reassert the broken moral duty against the offender who has broken it. It has the first point in the retributive theory of the punishment that the penalty must be visited to the guilty party"*²⁷ Justice demands that courts should impose punishments proportional to the crime. At the end of the day it's the truth that must prevail. 'Skilled' advocacy and influence can never deliver justice to the victim. The state plays a key factor in providing justice to the helpless victims.

Included in this moral factor is the time count. The penal sanction must be given within the stipulated time frame. In the Rajiv Gandhi assassination case, the convicts Perarivalan, Santhan, Murugan and Nalini are still languishing in prisons despite their conviction. On the

²⁶ Gopal Sankaranarayanan, "The Constitution of India", 139 (Eastern Book Company, 12th edn., 2014)

²⁷ Nadagoudar, V. Suresh "Need for death penalty in India" published on Indian Bar Review Vol. XXIX (1), 2002 pp.47

side of convicts 25 years is really a long wait. They cannot die daily thinking about their sentence. Above all the state exchequer is being drained, by protecting all death row convicts in high security prison cells. So, once if the death sentence is pronounced it must be executed as soon as possible. This ultimately helps to uphold justice.

CONCLUSION:

Today the Indian democracy is blessed with excellent laws that provide capital punishment for criminals who have indulged in brutal crimes such as murder etc., with an intent of *men's rea* to kill that person. If the commission of crime is proved beyond doubt, he must be sentenced immediately. Why should a convict be allowed to adorn the prisons? To make this feasible first of all a shift from adversarial to the inquisitorial model is needed immediately. Above all the 'rarest of the rare' doctrine must be done away with and death penalty must be the rule rather than the exception. Until this rigorous application of capital punishment is given, reduction in crimes will be a distant dream. While the need for death penalty is constantly felt one must feel that this is not a place for any vendetta. It is not a thing to be boasted off, but rather this is a part of the state's utmost responsibility towards its citizens to ensure their dignity, safety, security and obviously the cherished human rights. It's better late than never. Let's strive to make our nation free from all evils by strictly implementing death penalty thereby making our land a better place to live in.

