

## CAPITAL PUNISHMENTS IN INDIA:

### AN ANALYSIS IN THE LIGHT OF THE HANGING OF YAKUB MEMON

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#### **ABSTRACT**

*Capital Punishment is to be very sparingly applied with special reasons in cases of brutal murder and gravest offences against the state. About retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers and administrators. Criminologists and penologists are engaged in intensive study and research to know the answer to some perennially perplexing questions on Capital Punishment. (A) Whether capital punishment serves the objectives of Punishment? (B) Whether complete elimination of criminals through capital punishment will eliminate crime from the society? (C) Whether complete elimination of crime from society is at all possible or imaginable?*

*Human beings are neither an angel capable of doing only good nor are they demons determined to destroy each other even at the cost of self destruction. Taking human nature as it is, complete elimination of crime from society is not only impossible but also unimaginable. Criminologists and penologists are concerned about and working on reduction of crime rate in the society. Criminals are very much part of our society and we have to reform and correct them and make them sober citizens. Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions. But one also has to think from victims' point of view. If the victims realize that the state is reluctant to punish the offenders in the name of reform and correction, they may take the Law in their own hands and they themselves may try to punish their offenders and that will lead to anarchy.*

*Thus a balance must be struck between them. The researcher through this paper shall analyze the modern trend in Indian Judicial System regarding impartment of Death Penalty, specifically in the light of the recent hanging of Yakub Memon.*

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## **KEYWORDS**

Capital Punishment, Justice, Death Penalty, Theories of Punishment

## **CHAPTER 1**

### **THEORIES OF PUNISHMENT AND DEATH PENALTY**

Ideologies on punishment have frequently been provided as reasons for differing views of the death penalty. There are four general theories for punishment. These are rehabilitation, retribution, deterrence, and incapacitation (prevention). The three general reasons in support of capital punishment are retribution, deterrence, and incapacitation. The goal of rehabilitation is to return the offender as a productive member of society. Rehabilitation, sometimes called treatment, is inconsistent with support for the death penalty. So whilst, rehabilitation is a valid reason to oppose capital punishment, the other three punishment ideologies clearly provide reasons for supporting the death penalty.

#### **1.1 Deterrence Theory**

Deterrence is the belief that society can stop crime by making punishment more severe than the benefits gained from criminal acts. There are two types of deterrence, specific and general:

- Specific deterrence is aimed at individual offenders. By making the punishment so harsh, a particular offender should not recidivate in the future.
- General deterrence is aimed at the general public. By making “an example” of an offender, it is argued that others will learn their lesson and not commit a similar crime.

Proponents of the death penalty for deterrence reasons argue that a death sentence is a far more effective deterrent than life imprisonment.<sup>2</sup> Deterrence is a common reason providing for supporting the death. Many people, particularly politicians, indicate that the death penalty is an effective deterrent for the crime of murder.<sup>3</sup> When forced to choose between supporting the death penalty for deterrence or retribution reasons, Tyler and Weber (1982) found that 63% of the respondents surveyed selected deterrence. Rather than deter people from committing crimes, abolitionists argue that capital punishment actually causes more violence. The brutalization effect as a reason to oppose the death penalty is diametrically opposite to

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<sup>2</sup>ZEISEL AND GALLUP, ‘DEATH PENALTY SENTIMENT IN THE UNITED STATES’,(1989).

<sup>3</sup>ELLSWORTH AND ROSS, ‘PUBLIC OPINION AND CAPITAL PUNISHMENT: A CLOSE EXAMINATION OF THE VIEWS OF ABOLITIONISTS AND RETENTIONISTS’, (1983).

the deterrence reason to support the death penalty. The deterrence position argues that capital punishment reduces violence while the brutalization position argues that it actually causes more violence in society.

### 1.2 Retributive Theory:

Many people believe that retribution is an appropriate response to violent crimes.<sup>4</sup> There has been a hardening of the public's attitude toward crime during the past twenty years and an increase in social acceptance of retribution for criminal acts. While retribution, sometimes referred to as "just deserts," is a complex punishment ideology which states in essence that there must be punishment for wrong doers and that the punishment must be proportionate to the harm caused by the criminal act. This ideology is founded on in the principle of *lex talionis*, which holds that the punishment must fit the crime. For example, in the Christian Bible, in

Leviticus 24: 17-20, "And he that killeth any man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast. And if a man causes a blemish in his neighbor; as he hath done, so shall it be done to him; breach for breach, eye for eye, tooth for tooth ... ."

Therefore, support for the death penalty under this ideology is based upon ancient punitive reasons, It is the idea that if a person takes a life, then he or she must sacrifice his or her own life. Thus, under this ideology murder is generally the only crime that should be punished by the death penalty. Retribution is probably the most emotional of the punishment ideologies and support for the death penalty is frequently based upon emotions.<sup>5</sup> For many people, the ideology of retribution is based upon the idea of revenge by the victim's family and society in general, that sentencing someone to death relieves the anger and hurt brought forth by the act of violence. According to the research, retribution, including emotional retribution, is a frequent reason provided by those who support capital punishment. In a study by Ellsworth and Gross (1983), it was observed that 79% of capital punishment proponents indicated that they are outraged when a murderer does not receive the death penalty. Incapacitation

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<sup>4</sup>ROBERT BOHM DEATHQUEST, 'AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT', (4<sup>th</sup> Edn.1980).

<sup>5</sup>TYLER AND WEBER, 'THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES', (1982).

### **1.3 Theory of Incapacitation (Prevention):**

Incapacitation is another reason given by some to justify support for the death penalty. Under the incapacitation ideology, offenders are kept under tight state control so as to minimize their ability to commit future criminal acts. Curtailment can be done in many ways, such as house arrest, intensive supervision probation, imprisonment, and death. A person who has been executed cannot victimize other inmates or escape and harm innocent citizens and, therefore, poses no future danger to those in prison or general society. Beyond doubt, executing a person is the ultimate form of incapacitation. Additionally, there is a belief by many that life imprisonment, even without a chance of parole, does not actually mean life. Some people believe someday that the vicious murderer sentenced to life will be released again to prey upon innocent citizens. Proponents of the death penalty under the incapacitation ideology argue that executing dangerous, violent offenders allows for society to ensure that they will not harm others in the future.

Based on these three guiding principles is the concept of Capital Punishment based. However, one cannot find any unanimity with respect to the acceptance of Capital Punishment as even a mode of punishment and opinions vary from person to person, even from country to country.

## **CHAPTER 2:**

### **DEATH PENALTY: THE GLOBAL SCENARIO**

#### **2.1 The United Nations (UN):**

Capital punishment is one of the most debated issues around the world. The UN General Assembly recognized that in case of capital punishment there is a need for high standard of fair trial to be followed by every country. Procedures to be followed must be just, fair and reasonable. For example, the UN Economic and Social Council (ECOSOC) in resolution No. 15 of 1996 encouraged member countries to abolish death sentence and recommended that those countries who retain it must ensure defendants a speedy and fair trial.

Universal Declaration of Human Rights provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment<sup>6</sup>. International Covenant on Civil and Political Rights provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>7</sup> By several resolutions the United Nations suggested protection of human rights of the persons facing capital punishment. These may be summarized as follows:

- Countries which have not yet abolished capital punishment may impose it only for the most serious crimes;
- Capital punishment may be imposed only in case of serious offences according to established law for the time being in force. There must not be any retrospective effect of the punishment;
- Young persons at the time of commission of crime, whose age was below 16 years, should not be awarded death penalty;
- Death penalty must not be imposed upon pregnant women or on new mothers or insane persons;
- Capital punishment must be imposed after following fair procedure according to Article 14 of the ICCPR and when guilt is clearly proved leaving no room for reasonable doubt or alternative explanation of the fact;
- Any person sentenced to capital punishment shall have right to appeal to the higher court and steps should be taken to ensure him right to appeal;
- Any one sentenced to capital punishment should be given the right to seek pardon or commutation of sentence;
- When appeal, pardon or commutation of sentence proceeding is pending, capital punishment shall not be executed;
- Execution of capital punishment must be by way of minimum possible suffering.<sup>8</sup>

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<sup>6</sup>See, Article 5, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 7 October 2015]

<sup>7</sup>See, Article 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 7 October 2015]

<sup>8</sup>Economic and Social Council in Resolution No. 50 of 1984.

## 2.2 The European Union:

During 19<sup>th</sup> century due to work of Prof. Beccaria and other criminologists, political and economic changes as well as due to initiatives of Central and Eastern Europe, the European countries almost became capital punishment-free area and recognized death penalty as cruel and inhuman, which imposes psychological terror and gives scope for disproportional punishment. The 6<sup>th</sup> protocol to the European convention on Human Rights 1982 provides for the complete abolition of death sentence in peacetime by all members. The Assembly of the Council of Europe in the year 1994 with further protocol to the European convention on Human Rights recommended for the complete abolition of death penalty even in war time and under the Military Laws.

On 3<sup>rd</sup> May 2002 the 13<sup>th</sup> protocol to the European convention for the protection of Human Rights and Fundamental Freedoms was open for signature of member states which provides for the total abolition of death penalty in all circumstances. Most of the countries in the European Union have abolished death sentence. Capital Punishment has been recognized as cruel, degrading and inhuman punishment which infringes upon the basic human rights of the accused as expressed in article 3 of the European Convention on Human Rights.<sup>9</sup>

## 2.3 Rest of the World:

Following the resolutions of the European Union and the United Nations, several countries abolished death penalty completely. However, China imposed maximum death penalty. Saudi Arabia, Iran, Iraq, the United States of America (USA) are also in the first row so far the application of capital punishment is concerned.

In England it was abolished by the Murder (Abolition of Death Penalty) Act, 1965 though at the end of 18<sup>th</sup> century about 200 offences were punishable by death. In Warwickshire (England) a person was prosecuted on the charge of murder.<sup>10</sup> A little girl was under the care and custody of her uncle due to death of her multi-millionaire father. Accordingly she was about to inherit her father's property when she would become 16 years of age. The uncle was affectionate to her about her food, shelter, education and other reasonable necessities. When she was about nine years of age, one night the neighbors heard her cry which was quite

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<sup>9</sup>See, 13<sup>th</sup> Protocol to the European convention for the protection of Human Rights and Fundamental Freedoms.

<sup>10</sup>A. FELICITLA, 'HUMAN RIGHTS AND CAPITAL PUNISHMENT', IN HUMAN RIGHTS AND THE LAW: NATIONAL AND GLOBAL PERSPECTIVES', (Snow White, 1997).

unnatural saying “oh good uncle, please don’t kill me” and so forth. Just after this incident she disappeared and could not be traced. The police were informed about the matter. The uncle was suspected of committing murder of his niece and disposing of her body as in her absence he was her father’s heir apparent and would inherit his huge estate. He was arrested immediately though was released on bail on condition to produce the girl soon before the court. He could not produce the girl and he was sentenced to capital punishment. But after several years of the execution of death sentence, the girl returned to Warwickshire. She said that due to fear of punishment for her mischief, she had escaped to the neighboring town for those years. Death sentence once enforced is irreversible and irrevocable and the life which is lost cannot be brought back and the injustice done is irreparable.

#### **2.4 The Indian Perspective: The Rarest of Rare Case Doctrine**

The Indian Penal Code, 1860 (IPC) is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. Section 53 of the IPC provides for death sentence and imprisonment for life as alternative punishments.<sup>11</sup>

Article 21 of the constitution guarantees right to life and personal liberty to all which includes right to live with human dignity. *No person shall be deprived of his right except according to the procedure established by law*<sup>12</sup>. Therefore, the state may take away or abridge even right to life in the name of Law and public order following the procedure established by Law. But this procedure must be “due process” as held in *Maneka Gandhi v. Union of India*<sup>13</sup>. The procedure which takes away the sacrosanct life of a human being must be just, fair and reasonable. So, fair trial following principles of natural justice and procedural Laws are of utmost importance when capital punishment is on the statute book. Therefore, our constitutional principle is in tune with procedural requirements of Natural Law which constitute the inner morality of Law which may be stated as follows:

- Death sentence is to be used very sparingly only in special cases.

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<sup>11</sup>These are as follows: (1) death sentence or (2) imprisonment for life, (3) imprisonment with or without hard labour, (4) forfeiture of property and, (5) fine. Under Indian Penal Code, death sentence is alternative punishment for the following several offences such as; waging war against the government of India (sec.121); Abetting mutiny actually committed (sec.132); Giving or fabricating false evidence upon which an innocent person suffers death (sec.184); section 302 punishment for murder, abetment of suicide of child or insane person under section 305, section 307 punishment for attempt to murder by life convicts, section 396 dacoity with murder; but nowhere it is mandatory except under section 303 which deals with punishment for murder by a life convict.

<sup>12</sup> Article 21, Constitution Of India, 1950.

<sup>13</sup>AIR 1978 SC 597.

- Death sentence is treated as an exceptional punishment to be imposed with special reasons.
- The accused has a right of hearing.
- Death sentence must be confirmed by the High Court with proper application of mind.
- There is right to appeal to the Supreme Court under Article 136 of the Constitution and under section 379 of the Cr.P.C. The Supreme Court should examine the matter to its own satisfaction.
- The accused can pray for pardon, commutation etc. of sentence under sections 433 and 434 of the Cr.P.C. and under articles 72 and 161 to the President or the Governors. Articles 72 and 161 contain discretionary power of the President and the Governor beyond judicial power to interfere on merits of the matter; though judiciary has limited power to review the matter to ensure that all relevant documents and materials are placed before the President or the Governor. However, the essence of the power of the Governor should be based on rule of Law and rational considerations and not on race, religion, caste or political affiliations.
- The accused has a right to speedy and fair trial under articles 21 and 22 of the Constitution.

In *Jagmohan Singh v. State of U.P.*<sup>14</sup> it was argued that capital punishment for murder violates articles 21 and 14 of the Constitution. The counsel for the appellant contended that when there are discretionary power conferred on the judiciary to impose life imprisonment or death sentence, imposing death sentence is violative of Article 14 of the Constitution if in two similar cases one gets death sentence and the other life imprisonment. The Supreme Court held that there is no merit in the argument.

*If the Law has given to the judiciary wide discretionary power in the matter of sentence to be passed, it will be difficult to expect that there would be uniform application of Law and perfectly consistent decisions because facts and circumstances of one case cannot be the same as that of the other and thus these will remain sufficient ground for scale of values of judges and their attitude and perception to play a role.*

It was also contended that death penalty violates not only Article 14 but also Articles 19 and 21 of the Constitution. As the procedure is not clear here because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less

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<sup>14</sup>AIR 1973 SC 947, 1973 Cr. L.J. 330, 1973 SCC (Original) 162.

punishment is appropriate in that particular case. But this contention was rejected by the Supreme Court and the Court held:

*“in important cases like murder the court always gives a chance to the accused to address the court on the question of death penalty”. The Court also held “deprivation of life is constitutionally permissible provided it is done according to procedure established by Law. The death sentence per se is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the Judges has its origin in the impossibility of laying down standards. Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under section 302 I.P.C. No formula is possible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the criminal law as ‘administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment”*

Indian judiciary has pointed out their view regarding death penalty by ruling out in *Bacchan Singh v State of Punjab*,<sup>15</sup> that the death penalty must be restricted to the ‘rarest of rare’ cases, this view of Supreme Court was very much favoring to minimize the use of capital punishment to penalize the criminals, but this view of highest court was contradicted by the legislation by increasing the number of crimes for which capital punishment is awarded.

In the *Bacchan Singh* Case, Supreme Court expressed some outstanding reasons relating wrongdoing and criminal activities in which capital punishment must be awarded. In section 163, *Bacchan Singh* further noted:

*“....in settling the level of discipline or settling on the decision of sentence for different offenses, including one under Section 302 of [the] Penal Code, the court ought not bind its thought “chiefly” or just to the circumstances associated with the specific wrongdoing, additionally give due attention to the circumstances of the criminal.”*

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<sup>15</sup> (1980) 2 SCC 684

In *Santosh Kumar Bariyar v State of Maharashtra*<sup>16</sup>, the Supreme Court got an opportunity to explain this further:

*“The rarest of rare dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the court, in case it selects death penalty as the favored penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.”*

As the doctrine of *rarest of rare cases* evolved, the Supreme Court tried to formulate specific criteria to determine scope of ‘rarest of rare’ in *Macchi Singh v. State of Punjab*<sup>17</sup>. The court opined that while one is killed by another, the society may not feel bound by this doctrine. It has to realize that every person must live with safety. *Rarest of rare* doctrine has to be determined according to following factors:

1. *Manner of Commission of murder*: If the murder is committed in an extremely brutal, revolting, grotesque, diabolical or dastardly manner to intense indignation of the community.
2. If *Motive for the Commission of Murder* shows depravity and meanness.
3. *Anti-social or socially abhorrent nature of the Crime*.
4. *Magnitude of the Crime*.
5. *Personality of Victim of the murder that is, Child, helpless Woman, public figure and so forth*.

### **CHAPTER 3:**

#### **DEATH PENALTY: THE BOMBAY BLASTS AND YAQUB MEMON**

##### **3.1 Facts in Brief:**

On December 6, 1992 Babri Masjid at Ayodhya was demolished. After its demolition, violence broke out throughout the country. In aftermath of the demolition, Tiger Memon and Dawood Ibrahim, a resident of Dubai, formulated a conspiracy to commit a terrorist act in the

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<sup>16</sup> (2009) 6 SCC 498.

<sup>17</sup> AIR 1983 SC 957.

city of Bombay. In pursuance of the said object, Dawood Ibrahim agreed to send arms and ammunitions from abroad. Tiger Memon, in association with his men, particularly, the accused persons, received those arms and ammunitions through sea-coasts of Bombay. In continuation of the said conspiracy, Tiger Memon sent some of the accused persons to Dubai and from there to Pakistan for training and handling in arms and ammunitions.

On March 12,1993 the city of Bombay, witnessed an unprecedented terrorist act sending shock waves throughout the world. In a span of about two hours i.e., between 13:33 to 15:40 hours, a series of 12 bomb explosions took place one after the other at the following twelve places in Bombay, namely, Bombay Stock Exchange, Katha Bazaar, Sena Bhavan, Century Bazaar, Mahim Causeway, Air India Building, Zaveri Bazaar, Hotel Sea Rock, Plaza Theatre, Juhu Centaur Hotel, Air Port Bay-54 and Air Port Centaur Hotel. In the above said incident of serial bombings, 257 human lives were lost, 713 persons were seriously injured and properties worth about Rs. 27 Crores were destroyed. Many individuals were involved in the same in the following manner:

- Mohammed Farooq Mohammed Yusuf Pawale, Mohammed Tainur Phansopkar and Irfan Chougule planted bomb and caused explosion at Bombay Stock Exchange at 13:30 hrs. wherein 84 persons were killed and 218 persons were injured;
- Parvez Nazir Ahmed Shaikh planted bomb and caused explosion at Katha Bazaar at 14:15 hrs. wherein 4 persons were killed and 21 persons were injured;
- Mohammed Usman Jan Khan and Mohammed Farooq Mohammed Yusuf Pawale planted bomb and caused explosion at Lucky Petrol Pump near Shiv Sena Bhavan wherein 4 persons were killed and 50 persons were injured;
- Abdul Gani Ismail Turk planted bomb and caused explosion at Century Bazaar at 14:45 hrs wherein 88 persons were killed and 160 persons were injured;
- Bashir Ahmed Usman Gani Khairulla, Zakir Hussain Noor Mohammed Shaikh, Abdul Khan, Akram Amani Malik, Mohammed Faridulla Qureshi, Salim Rahim Shaikh and Ehsan Mohammed Tufel Mohammed Qureshi threw hand grenades and caused explosions at Fishermen's colony at Mahim at 14:45 hrs. wherein 3 persons were killed and 6 persons were injured;
- Mohammed Farooq Mohammed Yusuf Pawale, Mohammed Tainur and Irfan Chougule planted bomb and caused explosion at Air India Building at 15:00 hrs. wherein 20 persons were killed and 84 persons were injured;

- Md. Shoab Mohammed Kasam Ghansar planted bomb and caused explosion at Zaveri Bazaar at 15:05 hrs. wherein 17 persons were killed and 57 were injured;
- Parvez Nazir Ahmed Shaikh planted bomb and caused explosion at Hotel Sea Rock at 15:10 hrs.
- Asgar Yusuf Mukadam and Shahnawaz Abdul Kadar Qureshi planted explosives and caused explosion at 15:13 hrs. at Plaza Cinema wherein 10 persons were killed and 37 were injured;
- Mohammed Mustaq Moosa Tarani planted bomb and caused explosion at Hotel Centaur, Juhu at 15:20 hrs. which resulted in injury to three persons.
- Mohammed Iqbal Mohammed Yusuf Sheikh and Nasim Ashraf Shaikh Ali Barmare planted bomb and caused explosion at Sahar Airport at 15:30 hrs. and;
- Anwar Theba caused explosion at 15:40 hrs. at Centaur Hotel, Airport wherein 2 persons were killed and 8 persons were injured.

Thereafter, 27 criminal cases were registered in relation to the said incidents at various police stations in Bombay City, District Thane and District Raigarh. Upon completion of the investigation, a single charge sheet was filed against 189 accused persons including 44 absconding accused persons on November 4, 1993. Subsequently, further investigation of the case was transferred to the Respondent-CBI who filed 19 supplementary charge sheets under Section 173(8) of the Code of Criminal Procedure, 1973 and the trial of 123 accused persons was concluded on March 21, 2013.

One such individual who was involved in the case was Yukub Memon, brother of one of the masterminds behind the attacks Tiger Memon. Yakub fled to Pakistan after the incident and eventually arrested/surrendered as the same is still a fact in question. Nonetheless, from the aforementioned list of perpetrators of the attack, it is evident that Yakub played a secondary role in the orchestration of the attacks and thus was charged for only financing the same. Also, Yakub provided the Indian authorities with knowledge of the Pakistani officials who assisted the family in Dubai and Karachi, as well as details about the Pakistani passports and other identity documents issued to them by the Pakistanis, thus nailing Islamabad's lies. He also had a few micro-cassettes of conversations of Tiger and his associates that he had taped surreptitiously in Dubai and a few other items of proof. The information he provided played an important role in the trial but instead of being treated as an approver of sorts, he became a fall guy. Since the authorities did not have Tiger in their hands, they wanted another Memon to hang.

### 3.2 The Verdict:

The trial was concluded on March 21, 2013 around 20 individuals were awarded Capital Punishment. However, all of these were converted into Life Imprisonment except for one. The false note of shrillness in the public debate that surrounded the hanging of Yakub Memon, the **only accused to be sentenced to death** in the 1993 Bombay Blasts Case, can be seen either as a deep rift in the polity and society, or it could be interpreted to mean that the shrillness reflected the vibrancy of Indian democracy, where everyone spoke their views with candor; even though the discourse did turn acrimonious time and again. Yakub Memon's family had the opportunity to explore every legal remedy. In fact, the last hearing of the Supreme Court took place in the wee hours of Thursday morning — the day Yakub was hanged at Nagpur jail.

Critics may say that the doors of the court were open, but its mind was closed. It may be quite unfair to blame the court for having made up its mind because of its refusal to revisit its earlier decision. All that we can say is that the judges did what they could without claiming to be infallible. It is possible that the loud debate on what was right and what was wrong about the apex court refusing to revise its decision of upholding the death sentence of Yakub will not end, at least not in the legal circles. But that is as it should be because no legal decision holds for all times to come.

It was a mistake, the Supreme Court had once said. But by then it was too late. Ravji Rao, or Ram Chandra, had been hanged to death., Ravji, was from a tribal community of Rajasthan, and was executed on May 4, 1996, for killing five people, including his wife and three minor sons, and attempting to murder his mother and a neighbour's wife in Banswara in Rajasthan. In 2009, 13 years after his death, the Supreme Court, in the case of *Santosh Kumar Satish Bhusan Bariyar vs State of Maharashtra*<sup>18</sup>, declared the Ravji case 'er incuriam' because the case had failed to follow the Bachan Singh judgment, which stated that circumstances relating to "the crime as well as the criminal" be looked into before pronouncing a death penalty. Were the crime and the criminal kept in mind in the Bombings Trial or the Court would have to again accept an error some years later?

But is there any point in accepting the mistake when there is no way to give the hanged his life back. Is the question that remains to haunt us. The judiciary, after all, consists of human

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<sup>18</sup>AIR 2009 SC 56

beings. There are errors in passing judgment, there are some judges who are more prone to handing out death sentences than others, there is no uniformity in factors that lead to a sentence being commuted, and there is the real fear that innocent people may hang.

Take the case of Mohan Anna Chavan of Maharashtra's Kolhapur district. He was convicted of raping and murdering his neighbor's daughters by a trial court and sentenced to death. The high court and the Supreme Court confirmed his conviction and the sentence. He filed a mercy petition before the Maharashtra governor which is still pending. But the Supreme Court came to his rescue in 2009 by declaring the verdict an error, following the dictum of the Ravji case.

In such light, the time has come for a rethink is being echoed by many who wielded the gavel. "I think we need to take a relook at the rarest of rare doctrine as laid down in the Bachan Singh judgement," says Justice K.T. Thomas, former Supreme Court judge. Judges, he points out, look at what they think is the rarest of rare cases.

## CONCLUSION

I would like to clear it at the first instance, I completely support the death penalty. Death penalty for rapist-murderers, child killers, terrorists and even acid-throwers, but only in accordance with the Supreme Court's doctrine of 'Rarest of Rare Case' as formulated in the Bachhan Singh Case. Yakub Memon, the latest entry to this list of people 'legally' killed, however did not fit that criterion.

Punishment in a civilized democracy must balance between retribution on behalf of the victim and the possibility of the rehabilitation of the criminal. As however is clear that the notion of rehabilitation is completely absolved in case of Capital punishment, there cannot be any balance left. In such a scenario of absence of a balance scale itself, the Rarest of Rare Case doctrine plays a very pivotal role in ensuring that justice must not only seem to be done but actually must be done.

And, of course, it must meet the requirement of proportionality, in other words, the punishment must fit the crime. In my view, Yakub Memon was a second-level actor in the conspiracy and didn't deserve the Gallows. The main conspirators were Dawood Ibrahim, his brother Anees, Yakub's elder brother Mushtaq "Tiger" Memon and the unknown ISI officers who helped them to stage the horrific Bombay blasts of 1993 that took the lives of 257

people. There were also others as evident from the final judgment of the case, such as the ten small-time hoods who actually planted the bombs, others who were involved in landing the RDX explosives and storing them at various locations in Mumbai.

However, in cases of terrorism, courts and officials usually respond to the blood lust of society. People accused of terrorism, even those peripheral to the crime, are sentenced to death and hanged. In this category comes Afzal Guru, who, as the evidence clearly showed, was a side-show in the Parliament House attack case. Yet, somebody needed to hang since the actual perpetrators had been shot dead and the main conspirators were out of our reach in Pakistan.

In the Rajiv Gandhi case, too, Indian investigators were unable to get to the main conspirators sitting comfortably in Sri Lanka and so Nalini, Murugan, G. Perarivalan and Chinna Shanthan were sentenced to death. Nalini's sentence was commuted to life imprisonment in 2000, and earlier this year, the sentences of the other three were also commuted by the Supreme Court. The commutation had more to do with the political pressure brought by various political players in Tamil Nadu, rather than some change of heart of the system.

To reiterate, Yakub was not innocent, but neither did he deserved THE sentence, given the background cited above. The charges against him are not of participating in the military training that was given to several of the conspirators by the Pakistanis, or of landing the RDX and placing the explosives. He was charged with financing the blasts, though his co-accused Mulchand Shah got just five years for the same charge.

Thus, it can be said that in Yakub's case the demand of the nation to have an execution shifted it too much towards retribution and it at the end became disproportionate to his crime. At this point of time, what is left to be analyzed is, What made Yaqub Memon, the rarest amongst so many accused that made him earn the Capital Punishment? Was it because of the faith he belonged to? Or he was the unlucky one amongst 123 individuals involved and thus became the sacrifice to feed the thirst of vengeance of a 'civilized' nation? Or were there any other factors involved?

The aspect of Rarest of Rare Doctrine, which needs serious consideration, is interpretation of latter part of the dictum – '*that ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*' suggesting selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and

serves no purpose. Would life imprisonment have been futile in Yakub's Case? If yes, then how and why?

Unfortunately, we won't get to know it ever. What was to happen, has happened amidst all the aforementioned questions. What is left is to prepare for the future which doesn't seem so bright as we have shifted to the reverse gear and heading towards the barbaric age, full of anarchy, uncertainty and arbitrariness with no reverence to Rule of Law. It is now for the Indian judicial system to reflect on whether the death sentence has become a whimsical lottery, tilted a bit against the Muslim community or not. On a parting note, Principle of Natural Justice says that, '*justice should not only be done but also should be seem to be done.*' However, the question of the hour remains that just because something seems just, does that actually make it just?