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The 'Rarest of the Rare' Doctrine' in Awarding Death Penalty

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ABSTRACT

The highest punishment that can be inflicted upon a person is death. Though historically, capital punishment has been used in almost every part of the world, more than 70% of the world's countries have abolished capital punishment in law or practice in current times. Nonetheless, capital punishment presently exist in many parts of the world. The Indian Penal Code lists certain offences which prescribe death penalty as a punishment and the constitutionality of death penalty has been upheld by the Supreme Court. To pass a death sentence as a punishment to the perpetrator of a crime, a trial court relies on the doctrine of and circumstances of each case individually. Death penalty is a not a mandatory punishment and should be resorted to only if the Court is burdened with a case involving the "rarest of the rare" circumstances where death penalty is necessary to restore the collective conscience of the society. The principle of "Rarest of Rare" has its inception in the case of Bachan Singh v. State of Punjab and has further evolved through other landmark judgements such as Macchi Singh & Ors. v. State of Punjab where the Apex Court established several guidelines for invoking the Rarest of Rare principle. However, the relevance of this principle has been put to question as most of the developed world has abolished death penalty as a form of punishment. In a modern democracy it's of utmost importance that the mode of punishment in the criminal justice system shifts from retributive to reformative and calls for abolition of death penalty have been rising rendering the rarest of rare doctrine untenable in the 21st century's democratic society.

I. INTRODUCTION

The highest punishment that can be inflicted upon a person is death. Human life is precious and valuable and there is no humane way to kill a person, even if that death comes in form of punishment. Imposition of death penalty is often arbitrary, and always irrevocable thus, forever depriving an individual of the opportunity to benefit from new evidence or new laws that may lead to the reversal of a conviction, or discontinuation of death penalty. Though historically, capital punishment has been used in almost every part of the world, more than

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70% of the world's countries have abolished capital punishment in law or practice in current times. Nonetheless, capital punishment presently exist in many parts of the world, especially in many third world countries and countries with dictatorial leadership.

II. STATUS OF CAPITAL PUNISHMENT: THE GLOBAL AND THE INDIAN SCENARIO

Amnesty International recorded at least 2,307 death sentences in 56 countries in 2019, a slight decrease from the total of 2,531 reported in 2018. At least 26,604 people were sentenced to death globally in 2019.³ Death penalty is still valid in India but only in exceptional cases. According to Amnesty International, in India, about 100 people in 2007, 40 in 2006, 77 in 2005, 23 in 2002, and 33 in 2001 were sentenced, but not executed, to death. In India, death penalty by hanging is legal under Section 354(5) of The Code of Criminal Procedure, 1973.⁴

The Indian Penal Code lists certain offences which prescribe death penalty as a punishment. A few of such offences include Section 121 (waging war against the State), Section 302 (murder), Section 364A (kidnapping with ransom) among others. Other statutes awarding death penalty include The Commission of Sati (Prevention) Act, 1987 and The Narcotic Drugs and Psychotropic Substances Act, 1985, etc. The question of constitutionality of awarding death penalty arose in the landmark case of *Jagmohan Singh v. State of Uttar Pradesh*⁵ where the Supreme Court upheld the constitutionality of capital punishment giving reasons that it's not merely a deterrent but a token of disapproval of crime on part of the society. It was observed by the Hon'ble Supreme Court that no law can be enacted which abridges the right to life of a person unless it is reasonable and in public interest. If the entire procedure for a criminal trial under the Code of Criminal Procedure, 1973 for arriving at a death sentence is valid then the imposition of the death sentence in accordance with the procedure established by law cannot be called unconstitutional. However over the years, to restrict the number of death sentences awarded to convicts, courts in India have relied on a theory of 'rarest of rare cases' in adjudging offences that award death penalty as a form of punishment.

III. RAREST OF THE RARE DOCTRINE

To pass a death sentence as a punishment to the perpetrator of a crime, a trial court relies on the doctrine of "Rarest of the Rare". The scope of the Rarest of Rare doctrine remains

³ *Death Penalty*, available at <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited 2/07/20).

⁴ When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

⁵ *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947.

undefined, rather the doctrine has evolved through years of judicial interpretation. A sentence of death is passed upon the discretion of the judges. To warrant a death penalty, the grounds of the case should be such that the Bench is left with no other option other than to resort to a death penalty for maintaining law and public order in the society. While deciding a case which warrants death penalty for the offence committed, the Bench is required to emphasise on the atrocity and brutality of the crime perpetrated, the enormity of the crime warranting public abhorrence and it should answer to the society's call for justice against the convict.

A death sentence is passed after examining the facts and circumstances of each case individually. During a trial for an offence punishable with death sentence, a judge cannot pass a sentence of death under the "rarest of rare" principle if the circumstances surrounding the offence are mitigating in nature. A judge upon his discretion may pass a death sentence only if the facts indicate aggravating circumstances based on which the perpetrator has committed the crime. . Therefore in deciding the punishment of death, it more so should be intricately and closely examined whether that death penalty is proportional to the severity of the crime and has a deterrent effect on the society.⁶

IV. EVOLUTION OF THE DOCTRINE

The principle of "Rarest of Rare" has its inception in the case of *Bachan Singh v. State of Punjab*.⁷ In this case, the Supreme Court by 4:1 majority laid down the 'Rarest of the Rare doctrine' by imposing the limitations on death penalty. The judges relied on the judgments of *Jagmohan Singh v State of Uttar Pradesh*⁸ and *Rajendra Prasad v State of Uttar Pradesh*⁹ where it was observed that a person loses his right to life when he is given a death sentence, abridging his fundamental right. However, if the murderous operation of a die-hard criminal jeopardises social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated. The following principles were laid down in the case:

- The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

⁶ Ravji alias Ram Chandra v. the State of Rajasthan, (1996) 2 SCC 175.

⁷ Bachan Singh v. State of Punjab (1980) 2 SCC 684.

⁸ Jagmohan Singh v State of Uttar Pradesh AIR 1973 SC 947.

⁹ Rajendra Prasad v State of Uttar Pradesh (1979) 3 SCR 646.

- Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.¹⁰

The Supreme Court observed that death penalty is constitutional and can be imposed only in rarest of rare situations where an alternative punishment is excluded. However, the scope of the phrase “Rarest of Rare” was left undefined and the doctrine has evolved throughout the years by means of judicial interpretation.

In *Mithu Singh v. State of Punjab*¹¹, the Supreme Court reiterated that death penalty is not a mandatory punishment and should be resorted to only if the Bench is burdened with a case involving the “rarest of the rare” circumstances where death penalty is necessary to restore the collective conscience of the society. The court laid emphasis on the rule that life imprisonment is the norm whereas death penalty is an exception,

The principle of “Rarest of Rare” further came into question in the case of *Macchi Singh & Ors. v. State of Punjab*.¹² This case was crucial where the Supreme Court has framed guidelines under which a death sentence shall be passed under the doctrine of “Rarest of Rare”. The court held that a death sentence may be passed in *rarest of rare* cases when the collective conscience of the society is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The Court observed for passing a death sentence the following factors are required to be considered –

- Manner of commission of murder
- Motive for commission of murder
- Anti-social or socially abhorrent nature of the crime

¹⁰ Rachi Singh, *Analysis of Bachan Singh and Macchi Singh and its implications*, 5 (4) INTERNATIONAL JOURNAL OF RESEARCH AND ANALYTICAL REVIEWS, 135-143, (2018).

¹¹ *Mithu Singh v. State of Punjab*, AIR 1983 SC 473.

¹² *Macchi Singh & Ors. v. State of Punjab*, 1983 SCR (3) 413.

- Magnitude of crime
- Personality of Victim of murder

The Court held that the guidelines indicated in Bachan Singh's case¹³ will have to be culled out alongside these guidelines and applied to the facts of each individual case where the question of imposing of death sentences arises.

In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*¹⁴ the Supreme Court reaffirmed the “Rarest of Rare” principle and held that appropriate punishment is to be determined on a case-by-case basis. The death sentence is not to be awarded save in the ‘rarest of rare’ case where reform is not possible. The Court also observed that there is no uniformity of precedents in the “rarest of rare cases” and in most cases, the death penalty has been affirmed or refused to be affirmed by the Court, without laying down any legal principle.

V. CRITICISM TO THE RAREST OF RARE PRINCIPLE

The basis of criticism of the “Rarest of Rare” doctrine lies in the ambiguity in the application of the doctrine. The doctrine of Rarest of Rare was formulated to give punishments proportionate to the gravity of the crime but, in various cases this doctrine has been misinterpreted and misunderstood by the judiciary in giving judgements as well as the public in understanding its true meaning and essence. This can be clearly noticed in *Dhananjoy Chatterjee v. State of West Bengal*¹⁵ and *Kumudi Lal v. State of Uttar Pradesh*¹⁶ Both cases involved teenage girl’s rape and murder yet the Apex Court pronounced different verdicts. Dhananjoy Chatterjee was sentenced to death. The Court in Kumudi Lal case didn’t confer the death penalty on the accused for the rape and murder of 14-year-old girl.

VI. AUTHORS’ TAKE

Calls for abolishing death penalty in its totality have been rising rendering the doctrine untenable in the 21st century’s democratic society. In its 262nd The Death Penalty Report, the Law Commission of India had highlighted that –

“...The capital punishment enterprise as it operates in India, therefore perpetrates otherwise outlawed punitive practices that inflict pain, agony and torture which is often far beyond the maximum suffering permitted by Article 21. The debilitating effects of this complex

¹³ Supra 4.

¹⁴ Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

¹⁵ Dhanajoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.

¹⁶ Kumudi Lal v. State of Uttar Pradesh, (1999) 4 SCC 50.

phenomenon imposed on prisoners what can only be called a living death.

...The death penalty does not serve the penological goal of deterrence any more than life imprisonment....

...In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of....

...The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war....”¹⁷

In a modern democracy it's of utmost importance that the mode of punishment in the criminal justice system shifts from retributive to reformative. Punishment should be given in such a way that the criminal has to proportionately pay for the crime and in a way such that the life of that criminal and the society is kept peaceful and harmonious. The purpose of punishment should be to “reform the offender as a person, so that he may become a normal law-abiding member of the community once again. As Martin Luther King said – “*returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars*”.

¹⁷ Law Commission of India, *The Death Penalty*, 262 REPORT OF THE LAW COMMISSION OF INDIA, 212-214, (2015).