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THE PRACTICE OF RAREST OF RARE DOCTRINE IN THE INDIAN LEGAL SYSTEM

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INTRODUCTION

Capital Punishment, the Death Penalty, or the execution is the sentence of death upon a person by the state as a punishment for an offence. Crimes that can result in Death Penalty are known as *capital crimes or capital offences*.

Death Penalty has been a mode of punishment since time immemorial. The Abolitionist and retentionist have debated over the years but no consensus have ever been arrived at with respect to the debate on the retention and abolition. There are 106 countries that have abolished death penalty for all crimes, 07 countries that have abolished death penalty for ordinary crimes, abolitionist in practice 29, 56 countries that have retained it, total abolitionist in law or practice 142. However, India chose to retain death penalty rather than abolishing it.

During British rule, the Privy Council and the Federal Courts were liberal in awarding death penalty, however, in the present day; the courts tend to resort to this punishment only in the 'rarest of rare cases'.[1]The present position regarding death penalty, as one might suppose of any system of law with pretensions of being considered civilized, to use it sparingly as possible in "*rarest of rare case*". India has best legal position of having death penalty in the statue book but to use it rarely. However, these guidelines are not strictly followed by the Judges causing arbitrariness in dealing with death penalty cases. In the end it's the discretion of Judges that decide, whether a case falls within the ambit of "rarest of rare". India has reached a stage where every arbitrary decision given by Hon'ble Judges is criticised and analysed by the International bodies.

[1] Bachan Singh v. State of Punjab, AIR 1980 (2) 684

METHODOLOGY OF THE RESEARCH

The methodology adopted by the researcher in this paper shall be Doctrinal researches. The researcher would be doing an in-depth research on arbitrariness in judiciary and procedural inadequacy relating to Death Penalty especially in the light of Rarest of Rare Doctrine.

HYPOTHESIS

In the light of the above-mentioned problem the researcher would put to test: -

1. Whether increased arbitrariness in exercising discretion by the Judges has led to dilution of the test of rarest of rare guidelines?
2. Whether there are enough procedural safeguards against arbitrary imposition of death penalty?

REVIEW OF LITERATURE

As times have changed, 70 % of the references used were available online and didn't need to refer too many books. The researcher in order to understand, examine and broaden the perspective on the title disciplines referred to some publications of national and international authors.

1. THE RAREST OF RARE DOCTRINE

Rarest of rare means comparison. Out of the rare cases which one is the rarest? Answer of this question will attract death penalty. Rarest of rare principle is not a uniform formula but it helps in filtering cases in which death penalty can be imposed and this principle also help equally or commuting cases. Supreme Court while going through the above-mentioned principle in Bachan Singh mentioned about balancing of the mitigating factors and aggravating factors. Mitigating factors are those which helps in commutation of death penalty and goes in favor of the accused. On the other hand, aggravating factors leads confirmation of death penalty and goes against accused.

In *Bachan Singh*, the Court recognized and emphasized that each case is unique and has to be decided on its own facts and circumstances. For this reason, the Court refused to provide any standardization or categorization of offences for which the death penalty would be applicable.

In *Machchi Singh and Others v. State of Punjab*[2], the Bench upheld three death sentences in a

[2] 1983 3 SCC 470

complex case that involved five different incidents over one night in which 17 persons in all were killed by the accused Machchi Singh and 11 of his accomplices. This Judgment was, in fact seen by many as supporting the death penalty, as it appeared to expand the "rarest of rare formulation" beyond the aggravating factors listed in Bachan Singh to a case where the collective conscience of a community may be shocked.

The Judgment further illustrated cases where such sentiment may arise: -

a) When the murder was committed in an extremely brutal, grotesque, diabolic, revolting or dastardly manner so as to arouse intense and extreme indignation of the community e.g. when the victim is sought to be put on fire by burning his house; where the victim is subject to cruelty to cause death and where the body of victim is dismembered in a fiendish manner.
b) When the murder is committed for a motive which evinces total depravity and meanness e.g. a hired assassin killing for profit; a cold-blooded murder for property or someone with whom the murderer is in a position of trust; murder is committed in the course of betrayal of mother land.
c) Anti-social or socially abhorrent murder- dowry death or killing due to infatuation with another women, of a member of schedule tribe or schedule caste on ground of his caste/tribe offences to terrorize people to give up property and other benefits in order to reverse past injustices and to restore social balance.
d) In case of multiple murders of a member of a particular family caste, community or locality.
e) Where the victim is innocent child, helpless women, aged or infirm person, a public figure whose murder is committed other than person reason.

The Judges therefore argued that the Bachan Singh guidelines would have to be read in the above context and, "a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between aggravating and mitigating circumstances before the option is exercised. The Bench also suggested two questions to be considered before awarding the death sentence[3]:

a) Is there something uncommon about the crime which renders sentence or imprisonment of life inadequate and calls for a death sentence?

[3] See, Murlidharan, "Lethal lottery death penalty in India", Amnesty International India and people union for civil liberty, May 2008, p. 72

b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speaks in the favor of offender?

While the reference to the balancing of aggravating and mitigating circumstances and the questions to be asked by the Judges appear useful, the correctness of the expansion of the *Bachan Singh* Guidelines by the Judges in *Machhi Singh and others v. State of Punjab* is debatable given that former were listed by a five Judge constitutional bench and later by a regular three Judge bench. Despite this, as many of the cases discussed show that latter were used by many successive benches in upholding death sentences even though they would have failed otherwise.

2. ARBITRARINESS IN JUDICIAL PROCESS IN GRANTING CAPITAL PUNISHMENT

2.1 Introduction

In *Alok Nath Dutta and Ors. v. State of West Bengal*[4], in a very candid judgment the court admitted its failure to evolve proper sentencing policy in capital cases. The Bench admitted that different criteria have been adopted by the different benches of the court, although offences are of similar nature. "No clear sentencing policy in clear cut terms has been evolved by the courts of India. This shows that when a Judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence."

The judicial process become atrocious when after going through the moods of the Judges, there is no automatic right to appeal to the apex court where the death sentence is affirmed or awarded by the High Court. Thereafter the accused after going through the lacuna in the judicial process, the accused and his family have to go through the torture of delay in execution. A person knowing that soon his life will come to an end has nothing more to do except wait for his doom, each day representing the unique form of torture wherein suffering will occur, just in thinking about the fate being awaited.

[4] AIR 2006 SC 8774

2.2 Arbitrariness of the Judges and Judicial Process

Justice Bhagwati in *Bachchan Singh* Minority Judgment[5] pointed out that in practice the death penalty process created a context of arbitrariness and that it was unsafe to provide power to any set of Judges since a fool proof manner of administering criminal justice could never be developed. He also pointed out the danger of depending on Judges to administer law and follow procedure for providing for sentencing guidelines. He said that "when a Judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence".

To go into the deep detail of arbitrariness of our Judges, we first need to know, who suffers the most because of the arbitrariness in judiciary. A comparative study of the social political background of the person who have been awarded the death penalty or executed so far shows inequality in its awards. It is observed that convicts belonging to low socio-economic strata, the illiterate and the so- called the less powerful and ignorant people, fall prey to capital punishment.

2.2.1 The poor and under privileged[6]

The people who are sentenced to death each year of the thousand who commit murder, it is the poor and the illiterate who are singled out and eventually executed. For example, **Justice Bhagwati**, in his 1980 dissenting Judgment in the case of *Bachan Singh*[7] wrote:

"There *can be no doubt that death penalty in its actual operation is discriminatory fir it strikes mostly against the poor and deprived section of the community and the rich and the affluent escape from it clutches".*

One reason for this is that poor and illiterate prisoner does not have easy access to adequate legal assistance. Even when the legal aid is made available, the quality of defense rarely matches that obtained through private legal assistance. Legal aid fees are also very low – in fact much lower than the minimum usual fees charged by a private lawyer. The low level of legal

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[5] AIR 1982 SC 1325 Para.47, p.1362

[6] Arunjeev Singh Walia, "Treading the path towards abolition of the death penalty", Arunjeev Singh and Colin Gonsalves, Can society escape the noose? The Human Rights Law Network, India, June

[7] AIR 1980 (2) 684

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aid fees also means that legal aid lawyers, even if experienced can only spend a limited amount to prepare a defense. Thus, there is a serious risk that miscarriage of justice may occur.

2.2.2 Person accused of terrorist offences

The recent trend of the courts in awarding extreme punishment as a general rule is in cases relating to terrorist offences. These have raised a suspicion of discrimination in the matter of sentencing, particularly in cases where the accused belong to a minor community or weaker section of the society. The death sentence has been made a rule for person belonging to these categories. For example, in the case of the assassination of former Prime Minister, Rajiv Gandhi[8]

Four people were sentenced to death even though the Supreme Court declined to hold the act of killing Mr. Gandhi as a "terrorist Act". All the accused were sympathizers of LTTE. It was a case under the Terrorist and Disruptive Activities Act (TADA), 1985.

In *Simon and others v. State of Karnataka*[9], the Supreme Court awarded capital punishment to four followers of Veerappan, a forest don and sandalwood smuggler. These persons were tried under TADA and were convicted for causing the death of twenty-two persons by blasting with a landmine. The trial court awarded life imprisonment to the accused. The Supreme Court, while enhancing the sentence, held that "the appellant are members of the gang lead by Veerappan, they do not deserve any sympathetic consideration."
However, the Judges have a huge pressure in dealing with the cases which include provisions related to terrorist attack. Under such pressure of the society the Judge must show his judicious ability. Even in case of terrorist a Judge should conduct a fair trial.

On 12-03-1993 Bombay witnessed a series of 12 bomb explosions took place one after the other at 12 different place which left the world in shock. Above mentioned facts are form Case of Yakub Menon who was executed in 2015 as a terrorist in 1993 bomb blast case[10].
Supreme Court in *Md. Ajmal Md. Amir Kasab @ Abu v. State Of Maharashtra* was focused on fair trial irrespective of the nature of crime committed and that is something a Judge should adopt as a practice throughout his career.

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[8] 1999 (5) SCC 253
[9] Cri. Appeal No. 149 -150 of 2002
[10] Yakub Abdul Razak Memon vs State of Maharashtra, 2013

2.3 Judicial Precedents[11]

After prolonged period of approximately 13 years under sentence of death, Dhananjoy Chatterjoy[12] was executed on 14th August 2004.Three days after his execution however; a similar case of rape and murder of a minor was heard on appeal by the Supreme Court in Rahul alias *Raosaheb v. State of Maharathra*[13]. While Dhananjoy Chatterjee was 27, Rahul was 24. The victim in the former case was thirteen-year-old; in the latter she was four and a half. Neither accused had a previous record nor in both cases there was no report of misconduct while in prison. Yet in the case of Dhananjoy Chatterjee he was deemed a menace to society and not only was the sentence upheld but he was subsequently hanged. In Rahul's case, he was not deemed a menace and his sentence was commuted to life imprisonment by the court.

This shows huge disparity in sentencing. This shows that the fate of an accused is dependent on the Bench listening to his plea. We can just say that Rahul's fate would have been different had his case been heard by another bench instead of Hon'ble Justice Balakrishnan and Lakshmanan.

It is ironic that while upholding Chatterjee's death sentence in 1994, Justice Anand accepted that there was a huge disparity in sentencing. He noted that:

"*Some criminals got very harsh sentence while many receive grossly different sentence for an essential equivalent crime and a shocking large number even go unpunished thereby weakening the systems credibility.*"

Two completely contradictory events over three days show that inconsistencies remain in death penalty.

In *Wazir Singh v. State of Punjab*[14], the Supreme Court commuted the sentence of accused on grounds of 'parity' (the evidence did not show whose gunshot killed the deceased and the co-accused already had his death sentence commuted) , whereas another bench took completely opposite view in *Brij Bhukhan and Ors. v. State of Uttar Pradesh*[15] refused to commute the death sentence awarded to the accused who instigated the assault even though those who had committed the murder had received the lesser sentence. The Court argued that, merely because leniency had been shown to the other appellant in the matter of sentence, it is not ground for

[11] See, Dr. Muralidhar, "India's Travails with the Death Penalty", Journal of Indian law institute, 40 JLI (1998)
[12] Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.
[13] (2005) 10 SCC 322
[14] AIR 1956 SC 754
[15] AIR 1957 SC 474

reducing sentence passed on Brij Bhukan.

Madan v. *State of Uttar Pradesh*[16], the Supreme Court in this case set aside the death sentence of a man accused, along with others, of firing on and killing multiple people over suspected political enmity in Uttar Pradesh's Muzaffarnagar, observing that although the crime fell in the 'rarest of rare' category, the death row convict was not beyond reformation. His recidivism had factored in with the confirming court since he had earlier been convicted in another murder case, but the top court held that past conduct does not necessarily have to be taken into consideration while imposing the death penalty, particularly when the commutation of the sentences of other accused persons, but not his, would lead to an anomalous situation.

Digambar v. The State of Maharashtra[17], in this case the Supreme Court commuted the death penalty imposed on a murder convict to the sentence of life imprisonment on the ground that manner in which the offence committed by him does not fall under 'rarest of rare' category and he does not have any criminal antecedents. The convict was a man, who killed his sister and her lover from another caste in 2017. After the murder, the convict himself surrendered before the police station and got the FIR lodged against himself.

Sundar @ Sundarrajan v. State by Inspector of Police[18], Supreme Court commutes death sentence for kidnapping and murder of a 7 year old child to life imprisonment for not less than twenty years without remission and held that we are of the view that even though the crime committed by the petitioner is unquestionably grave and unpardonable, it is not appropriate to affirm the death sentence that was awarded to him. As we have discussed, the 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation in a criminal.

The above-mentioned case illustrates that the Judges have been awarding death penalty or refusing to award it according to their own scale of social value and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decision. It is apparent from a study of the judicial decision that some Judges are readily and regularly inclined to sustain death sentences, other are similarly disinclined and the remaining waiver from case

[16] AIR 2023 SC 982
[17] AIR 2023 SC 361
[18] AIR 2023 SC 217

to case. Even in the Supreme Court there are divergent attitude and opinion regarding imposition of capital punishment. If a case comes before one bench consisting of Judges who believe in social efficacy of capital punishment, the death sentence would in all probabilities be confirmed but if the same case comes before another bench consisting of Judges who are morally and ethically against death penalty, the death sentence would be committed to life imprisonment.

3. PROCEDURAL SAFEGUARD AGAINST ARBITRARY DISCRETION

3.1 Introduction

Whether there are sufficient procedural safeguards to prevent arbitrary discretion of Judges?

Connotation of our fundamental rights recognized under article 14,19 and 21 completely changed when the doctrine of 'due process' was presented in *case Maneka Gandhi vs. Union of India and Ors.*[19] The 'substantive due process' and the 'procedural due process' principles introduced in Maneka Gandhi demanded that unless a law is just, reasonable and fair in procedure, it would fall foul of the above articles. In Bachan Singh, the majority held that after the interpretation of Article 21 in Maneka Gandhi, it acquired a new dimension. Article 21 of the Constitution is couched as follows: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. If this article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows: 'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law'[20].
In the converse positive form, the expanded article will read thus: 'A person can only be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law'.

Need for section 235(2) of the Code of Criminal procedure [S.258 (2) of the Sanhita] for pre-sentence hearing of the accused (Code), read with section 354(3) of the code [S.393(3) of the Sanhita] which mandate recording of special reasons for imposing the death sentence was explained by the court in *Bachan Singh v. State of Punjab*[21].

[19] (1978) 1 SCC 248
[20] Justice Ashok K. Ganguly "Landmark Judgments that changed India", p.97
[21] AIR 1980 (2) 684

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Section 235 (2) in the Code of Criminal Procedure, 1973 / Section 258 (2) of the Bharatiya Nagarik Suraksha Sanhita, 2023

(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 sentence on him according to law.

Section 354(3) in the Code of Criminal Procedure, 1973 / Section 393(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023

(3) When the conviction is 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.

Both the above-mentioned section is very important, and both should be followed while dealing with the cases of death penalty. Many judgments have observed that both the section should not be taken for granted and actual implication of the both the section should be visible.

3.1 What is Pre-Sentence hearing?

Once the court has pronounced the judgment of conviction it is the duty of the court to hear the accused on the issue of sentence. Court is bound to conduct such hearing because the word 'shall' have been used in section 235(2) of CrPC (S.258(2) of the Sanhita) which make it mandatory for court to hear accused at that particular stage.

In Pre-Sentence hearing the accused gets the opportunity to produce all material on record as is available, which may indicate toward mitigating factors in his favour. Such hearing usually for the accused so that he can argue for lesser sentence based on such mitigating circumstances. Supreme Court in *Accused 'X' v. State of Maharashtra*[22] observed that: Section 235 (2) of CrPC (S.258 (2) of the Sanhita) mandates Pre Sentence Hearing for the accused and imbibes a cardinal principle that the sentence should be based on 'reliable, comprehensive information relevant to what the court seeks to do'.

[22] Accused X v. State of Maharashtra SC, 2019, para.16

For the first time this issue was addressed by Supreme Court in *Santa Singh v. State of Punjab*[23]. The Court held that section 235(2) (S.258 (2) of the Sanhita) is in accordance with the modern trends in penology and the same is an effective stage in the process of administration of justice. The court held that in most countries of the world, intensive study of sociology of crime, thus widening the objectives of sentencing. It was pointed out that a proper sentencing discretion calls for consideration of both extenuating ang aggravating circumstance, prior criminal record of criminal, his age, social adjustment, emotional and mental condition, his background, his education, his personal life and prospects for his rehabilitation. The court also held that the non-compliance with proper hearing under section 235 (2) is not curable under section 465[24] of the code (S.511 of the Sanhita).[25]

3.1.1 Importance of Pre-Sentence hearing

Judiciary is one of those pillars on which Indian democracy rest with the growing future. For independent working of judiciary fair trial is one of the paramount concerns. Few principles of the fair trails are presumption of innocence, prohibition of double jeopardy, speedy trail, trial in presence of accused and so is the pre- sentence hearing. Although such hearing takes place after completion of trial but, it is that stage at which one reaches when all the essential principles have been followed. If the pre-sentence hearing is not taken place in its actual manner than it will fail the purpose of its inclusion in the code.

Supreme Court in *Rajender Prasad v. State of Uttar Pradesh*[26] mentioned the issue that the mandatory pre-sentence hearing has become nothing more than that the repetition of the facts of the case. The bench further mentioned that the “bar will assist the bench in fully using the resources of new provision to ensure socio personal justice, instead of ritualising the

[23] (1976) 4 SCC 190

[24] Section 465 of the Code of Criminal Procedure, 1973. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

[25] Justice Ashok K. Ganguly “Landmark Judgments that changed India” page 99.

[26] AIR 1979 SC 916

submissions on sentencing[27] by reference only to materials brought on record for proof or disproof of justice".

Supreme Court in *Santa Singh v. State of Punjab*[28] session court convicted appellant for the changes of murder and sentence to death on the day when Judgment was pronounced by the court appellants advocate was not present. Opportunity was not given to the accused to be heard on the question of sentence as required by Section 235(2) Crpc (S.258 (2) of the Sanhita). Appellant did not complain about the breach that trail court had committed. Justice P. N Bhagwati observed that under section 235(1) the court must in first instance, deliver a Judgment convicting or acquitting the accused. If the accused is acquitted no further question arises. If the accused is convicted at that stage, he must be given an opportunity to be heard in regard to sentence and it is only after hearing him that court may pass sentence.

3.1.2 Nature of pre-sentence hearing

Chief Justice *Chandrachud in Muniappa v. State of Tamil Nadu*[29] held that the obligation to hear the accused under section 235 (2) cannot be discharged by just putting few questions to accused. There must be a genuine effort to gain a clue to the genesis of the court by casting aside the formalities of the court scene and approaching the question from a broad sociological point of view.

In *Allauddin Main and Ors. Sharif Mian and Anr v. State of Bihar*[30], the Supreme Court expressed the same view and held that Section 235 (2) conforms to the principles of natural justice and has a significant bearing on the sentencing procedure. It is a salutary provision and not a matter of mere formality[31].

When on one side courts were making efforts to develop a procedure on sentencing by following natural principle of law on the other hand various Judgements of Supreme court followed the other fashion while dealing with pre-sentence hearing few of these are as follow:

In *Sevaka Perumal v. State of Tamil Nadu*[32], Court upheld the death sentence even though it

[27] (1976) 4 SCC 190
[28] SCR (3) 270
[29] AIR 2003 SC 886
[30] 1982 (3) SCC 24
[31] Justice Ashok K. Ganguly "Landmark Judgments that changed India", p.100
[32] AIR 1991 SC 1463

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was argued that no time had been given to raise grounds on sentencing by the trial court. Court observed that, during the appeal, the defence counsel had been unable to provide any additional grounds on sentence and therefore no prejudice had been caused to the accused.

So irrespective of the nature of case this provision should be followed in such a manner that it may be able to meet the purpose for which it was added in the code. One of the classy examples is the judgment in which brutality of the crime war out of the imagination of any human being. The animal lust of the accused for the victim shocked the nation in such manner that its impact remained in the mind of people forever.

In Mukesh v. State (NCT of Delhi)[33], Court held that in the event the procedural requirements under Section 235 (2) of the CrPC are not met, the appellate court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence. On the other hand, the court also noted that any deficiency in noncompliance of Section 235 (2) of CrPC can be cured by providing the opportunity at the appellate stage itself so as to curtail the delay in the proceedings. In that case, this court had allowed the accused to file an affidavit listing the mitigating circumstance, noticing that no pre-hearing on sentence was ever carried out.

3.2 Special Reasoning

The Law Commission of India, in its 48th Report, pointed out the deficiency of the sentencing procedure which led to the enactment of Section 354 (3). In para 45 of the report, the Law Commission insisted on having sufficient information on, and background of, the offenders in the following words: it is now being increasingly that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background of the offender.

Section 354 (3) of the CrPC talks about the special reasoning, which also ensure the prevention of arbitrary discretion of Judges while dealing with the cases of capital punishment. Rarest of rare doctrine cannot be applied in its judicial sense if the court do not follow the said provision. Sec.353 (3) reads as “When the conviction is for an offence punishable with death penalty or, in the alternative, with imprisonment for life sentence awarded, and in the case of sentence of death, the special reasons for such sentence”.

[33] (2017) 6 SCC 1

Supreme Court in *State of Maharashtra v. Goraksha Ambaji Adsul*[34] observed that the legislative intent behind enacting section 354 (3) CrPC clearly demonstrates the concern of the legislature for taking away a human life and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the court would also take into consideration the mitigating circumstances and their resultant effects.

So, it is quite clear that court must comply with the requirement of the above-mentioned provision. In case of sentence for 10 year or more reason must be given but in case of death penalty special reason should be there for such sentencing. This is the provision which changed the concept of death penalty in India. Prior to this section 367(5) of the code of 1898 which required reasons to be recovered as to why the death penalty is not given in a case where the offence is punishable by death. Section 367(5) of the old Code was deleted by the Amendment Act 26 of 1955. Now the rule is life imprisonment and the death penalty is exception and for such exception special reason need to be furnished by the Court

CONCLUSION

It is beyond doubt that, whether an accused is sentenced to death or not is an arbitrary matter, the decision relies on number of extremely variable and often subjective matter, such as the competence of legal representation and characteristic of the Judges who sit on various benches hearing the case.

Rarest of Rare Doctrine is a principle to give capital punishment without violating the right of anyone. Bachan Singh Judgment has stated that death penalty should be granted only in Rarest of Rare case. Now the challenge before the Indian Judiciary is to discover that which case falls under Rarest or rare case. Above mentioned judgments have discussed various points which will maintain the balance between the Rights of Victim and the accused. For this purpose, Supreme Court in Bachan Singh case gave points, and which were stated as the guidelines for all the courts to follow while dealing in cases where Death Penalty can be imposed. Court while mentioning aggravating and mitigating factors asked to stick as much as possible to these points and also mentioned that these are not only the factors. It may change with case to case. Just after

[34] 2011 (7) SCC 437

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three years of Bachan Singh Judgment Machhi Singh was pronounced by the three-Judge bench of Supreme Court and which resulted in change of scoop for applying rarest of rare doctrine.

The Arbitrariness of the Judges can be expounded by showing that Judges never adhered to guidelines laid down in *Bachan Singh*[35], making it clear that it is Judge's subjective discretion that eventually decide the fate of the accused.

The arbitrariness is fatal, but it is also very selective and discriminatory. It goes without saying that person with less influence is more likely to be given death penalty. In Bachan Singh, **Justice Bhagwati** commented on this:

"*Death penalty has a certain class complexion or class bias as inasmuch it is largely poor and down- trodden who are victim of death penalty. We hardly found any rich or affluent person going to the gallows". The Judge concluded: There can be no doubt that the death penalty in its actual operation is discriminatory, for it is most strikes mostly against the poor and deprived section of the community… this circumstances also adds to the arbitrary and capricious nature of death penalty and renders it unconstitutional*".

Furthermore, the problem of judicial discretion aggravates, when there is a difference of opinion amongst the Judge's on common ground and still the accused is given death sentence. It had been held in Bachan Singh that death sentence shall be given only in "rarest of rare case", therefore, when one Judge differs from an opinion given by other Judges, the case goes beyond the scope of "rarest of rare". It does not fall within the ambit of "rarest of rare guidelines" anymore; hence the death sentence shall be commuted to life imprisonment.

[35] AIR 1980 (2) 684