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# **DISCRETIONARY POWER OF JUDICIARY IN RAREST OF THE RARE CASE DOCTRINE**

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## **I. ABSTRACT**

*The "rarest of rare" doctrine in India gives the judiciary significant discretionary power in determining whether to impose the death penalty for a crime. This discretionary power has been the subject of much debate and criticism, as it can lead to inconsistent and arbitrary application of the death penalty. However, the discretionary power of judges is an essential component of the doctrine, as it allows them to make nuanced judgments based on the unique circumstances of each case. To address concerns about the potential for inconsistency and abuse of power, judges must exercise their discretion carefully and with a deep understanding of the principles underlying the "rarest of rare" doctrine. Clear guidelines should be provided to judges on when the death penalty should be imposed, and judges should receive adequate training and support to help them make informed and impartial decisions. The discretionary power of judges in the "rarest of rare" doctrine is an important aspect of India's criminal justice system. While there are concerns about its potential for abuse, it is a necessary tool for ensuring that the death penalty is only imposed in the most exceptional cases. To prevent the arbitrary application of the death penalty, it is important for judges to exercise their discretion carefully and with a deep understanding of the principles underlying the "rarest of rare" doctrine.*

Key words: Doctrine, Arbitrary, Death Penalty, Discretion, Judiciary, Criminal Justice System

## II. INTRODUCTION

The Death Penalty in India which is also known as Capital Punishment is a legal penalty in India which is executed to punish criminals who have committed heinous crimes against society. Under the concept of the death penalty the application of the principle of the 'rarest of the rare case' has been implemented. This simply depends on the nature and gravity of the crime committed. Certain inhuman acts such as acts against the state, murder, rape, terrorism etc. such criminal acts that the perpetrator commits, he is often sentenced to death as a means to secure justice in the society.

The execution of the death penalty in India is done by hanging by neck until death.

Article 72 of the constitution of India deals with the pardoning power of the president of India which grants him the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. This paper does not deal with the perks of implementation of the death penalty in India and that it acts as a deterrence to crime, however, it condemns the implementation and the practice of death penalty in India as it is a gross violation of article 21 of the constitution of India. Thus, the author contends that the state does not and should not have the right to take away the life of an individual.

However, the author of the paper does not believe that criminals shall be free, they must pay for their sins not through an alternative approach, that is, the reformatory theory of punishment. There is no proof as to whether the existence of the death penalty is the reason for the decreased crime rate in the society; there also is no proof to state that the existence of the death penalty deters an individual from committing crimes. A prison is a correctional institution and with the implementation of reformatory and rehabilitative approaches, a criminal can have a second chance of living a life away from violence.

The very fact that crime occurs is that the aggressor is a social deviant and does not have mental ability in society as a law-abiding citizen. The author firmly believes that they must reform a criminal instead of punishing him. The existence of death penalty is an extremely mentally exhaustive procedure where a person suffers from various psychological distress such as anxiety, depression and also has a tendency to commit suicide.

To prevent this, they are put in solitary confinement and this worsens the existing situation and increases their rate of committing suicide in prison. Another issue with prisoners on death row is that they face extreme torture in prison from their fellow inmates and the prison guards. Furthermore, the Author firmly believes that the existence of mercy petition in India is yet again a traumatic procedure where the prisoner pleads to the president and awaits his fate; life or death. In this most of the mercy petition is rejected and this leads the prisoner to have ever more animosity against the

government. The main goal with the abolishment of death penalty is to be able to help the prisoner to reform himself with the guidance of the judiciary.

This would enable the prisoner to come to a realization of what deed he/she has committed and repent for their crimes. The 26204-law commission report on the death penalty in India has firmly advocated for the abolishment of the death penalty in India. The author firmly believes that the death penalty is barbaric in nature and that man should not have the right to take away the life of another man no matter how socially deviant he/she may be. The concept of life and death lay in the hand of God and it should continue to remain in the hand of God and that it should not be decided by man. Every man has free will and some may misuse this free will by committing various acts of terror. In certain cases, with respect to terrorism it mainly occurs due to religious indoctrination and due to economic, social and political reasons.

It is extremely evident while interacting with these individuals that they were taken advantage of at a young impressionable and vulnerable age and were used as a mere pawn to execute a plan. They simply lack the ability to differentiate between right and wrong and hence aren't at the right mental state of mind as they were exploited from a very young age. Hence, the implementation of the death penalty does not bring justice to society and in no way acts as a deterrent as there is no guarantee that by hanging one culprit there won't be a 100 other in the near future. This dissertation exposes the lacunae in the Indian judicial system and the fault in the criminal justice system in India with the existence of the death penalty which in turn leads to violation of the prisoners. It

proposes that Article 21 is flawed in nature by virtue of the right to life not being absolute, and the subsequent withdrawal of this right by due process of law.

### **III. HISTORY OF DEATH PENALTY IN INDIA**

The Indian Penal Code in 1861, which created the death penalty for murder was retained at independence in 1947. The proposal to ban capital punishment, which was articulated in the formulation of the Indian Constitution by many representatives of the Constituent Assembly between 1947 and 1949 but was not adopted into the Constitution. Private members laws were introduced in Lok Sabha and Rajya Sabha for the abolition of the death penalty in two decades, but none of them were passed. From 1950 to 1980, about 3000 to 4000 executions were recorded. The number of death sentences and executions from 1980 to the mid-1990s is more difficult to measure. Two or three people are believed to have been hanged every year. The Supreme Court decided in the 1980 Bachan Singh ruling that capital punishment should be enforced only in "rare instances," but what constitute the rare is not explicit.)<sup>1</sup>

Capital punishment is an antiquated punishment. Nearly every country in the recorded history of man has practiced the sentence at some point in time or the other, furthermore every period in history has contained the use of capital punishment. In antiquity under the law of the Draco during the Seventh Century BC, capital punishment was widely used for murder, treason, incendiarism and rape in ancient Greece. Plato argued that this punishment was to be used for the unrepentant. The Romans have used this for a variety of crimes, even though at one-point men were exiled during the empire for a short time as an alternative to capital punishment"<sup>2</sup>. This was noted by Sir Henry Maine said that "the Romans did not remove death penalty since their non-use was primarily driven by the exile or the custom of exile and questions prosecutions." This is also reflected in his findings".

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<sup>1</sup> Feberica Carugti, Gillian K. Hadfield, Barry R Weingast, "Building Legal Order in Ancient Athens" Journey of legal analysis, Volume 7, Issue 2 Pages 291-324 (2015)

<sup>2</sup> Raj Sethuraju, Jason Sole & Brian E. Oliver, Understanding Death Penalty Support and Opposition Among Criminal Justice and Law Enforcement Students, Volume 6 SAGE Open 215824401562495 (2016)

## **IV. POSITION IN INDIA**

India has rejected a UN resolution demanding that the death sentence should be placed on a moratorium because it is contrary to the Indian legislative law and to the sovereign right of each nation to develop its very own judicial system. In India, for the most serious crimes, death penalty is given. It is giving only very serious and atrocious crimes of a great magnitude. According Article 21, no one is to be stripped of the "right to life" granted to any d national. Numerous crimes such as criminal planning, assassination, w against the army, mutiny, murder dacoity and counterterrorism a death penalty under the Indian Penal Code. are subjec

In the case of death penalty, the president has the power to allow for m The Court held that the death sentence should only be awarded in very instances, as in the case of Bachan Singh vs. State of Punjab.<sup>3</sup> Furthermore, only the President has the authority to waive the death penal and offer mercy In cases of death penalties, the President alone has the authority to g mercy. The Court of appeal (which is the High Court of a state) must confine that a convict was convicted of death in acase by the Court of Sessions. the Supreme Court appeal fails by the convict, he may present the President of India with a mercy petition. State shall follow step by step instruction on the legal process for handling mercy calls from or on behalf of convicted of death penalty "<sup>4</sup>. The Ministry of Home Affairs shall recognize petitions to the Supreme Court and applications for special permission to refer these convicts to that Under the terms of Article 72 of the Constitution, Only the President has authority either to extend or suspend or remit the sentence of any pers convicted for an offence, reproach, parole or remission.

## **V. DOCTRINE OF THE “RAEST OF RARE”**

The "Rarest of Rare" Doctrine was propounded in the landmark case of Bachan Singh V State of Punjab, the apex Court of India ruled that the death penalty should only be issued in exceedingly rare circumstances.<sup>5</sup> This decision was strongly supported by the Supreme Court in trying to limit

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<sup>3</sup> Bachan Singh vs. State of Punjab, AIR 1980 SC 898. (Supreme Court of India 1980)

<sup>4</sup> Constitution of India, Article 72

<sup>5</sup> Bachan Singh vs. State of Punjab, AIR 1980 SC 898, (Supreme Court of India: 198 (Y Chandrachud, A Gupta, N Untwalia, P Bhagwati, R Sarkaria).

the use of criminal punishment. In Bachan Singh the Ratio Decidendi or Rule of Law enforced by the Apex Court is that the death penalty should be constitutional if it offers a way of replacing life imprisonment.<sup>6</sup> And in the most rare case the same is valid if the alternative is undoubtedly excluded. The Supreme Court has stated that in the case of Santosh Kumar Bariyari Vs. The State of Maharashtra, "the unusual rare maxims precedent in implementing the provisions of Section 354(3) of C maintaining a principle of the law of life and death penalty."<sup>7</sup>

According to Art 21 of the Constitution (of India), no person shall, except by proper process, be deprived of their "right to live." If the sentence of death is applied then it also restricts the degree to which new facts or laws are enforced in the case. It is irreversible if the sentence is executed. The argument for death Sentence in India is based on the theory or principle that has been stated in Bachan Singh V. State of Punjab, which is the rarest of rare test. Moreover, in the decision held in Machi Singh & Others Vs. The State of Punjab-The Three Judge Court upheld Bachan Singh's decision and declared that it could only be issued where, in very rare cases, the public and society at large feel that the judicial authorities are required to enforce death penalties. It can be done so in the following cases.<sup>8</sup>

- (a) where the murder is perpetrated in a particularly violent, revolting or indignant manner in order to stir up severe outrage from the public or
- (b) When a Scheduled caste person's murder is perpetrated that provokes community anger or in the event of bride or woman being burnt or killed for dowry,
- (c) When the victim of murder is- An Innocent child, A vulnerable Women or a person rendered unaided by mature age or illness".<sup>9</sup>

<sup>6</sup> Santosh Kumar Satish Bariyar Vs State of Maharashtra, 2009 6SCC 498 (Supreme Court Of India:2009)

<sup>7</sup> Santosh Kumar Satish Bhushan Bariyar vs State Of Maharashtra, 2009 6 SCC (Supreme Court of India: 2009).

<sup>8</sup> Machhi Singh And Others vs State Of Punjab, 1983 AIR 957, (Supreme Court of India 1983)

<sup>9</sup> id at 6

## **VI. UNDERSTANDING RAREST OF THE RARE**

The Question then becomes what exactly is an unusually rare case. As in the decision held in Macchi Singh<sup>10</sup>, the court set out certain condition for deciding when a case will fall within the rarest of rare. Analysis of the parameters as below:

1. Manner of murder commission-When the crime is perpetrated in an excessively violent, ludicrous, malevolent, repulsive, or manner to arouse the community's deep and severe wrath.
  
2. If the house or dwelling place of the victim was set on fire with the intention of causing him suffering through being burnt alive, alternatively if the party who is the victim underwent torture which resulted in his death, if the body of the victim was disfigured maimed
  1. If the killer's motives were depraved, or cold blooded, strategically planned to profit from the murder
  2. If the nature of the crime is against public and societal morality,
  3. If the weight of the crime is so great, where multiple human being loses their lives
  4. If the party who is the Victim is helpless, and frail and was at the mercy of a killer, such as the depraved murder of a child the murder of a frail person etc.

The Legality of death penalty was affirmed by the Apex Court in its decision in Jagmohan Singh vs. The State of Uttar Pradesh on grounds that it is not just a disincentive but a testament to society's disapproval. In the case of Bacchan Singh, the constitutionality was reaffirmed. The following suggestions have therefore arisen from the case of Bacchan Singh.

- 1) The ultimate phase of the death penalty cannot be enforced unless the culpability is severe.

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<sup>10</sup> Id at 8

2) The circumstances of the defendant must be taken into consideration prior to opting out of capital punishment. (Circumstances that aggravate and mitigate)

3) The death sentence and the constitution are exceptions to life imprisonment. In other terms, only if life imprisonment is inadequate, in view of particular circumstances of offense, should a death sentence be imposed.

4) An outline of all the aggravating and mitigating" conditions is required and mitigating circumstances must be completely weighted so that an equilibrium can be reached between them.

The cases involving an abnormal offense which is odd to a sensible citizen or anyone in a reasonable mind in society, as well as the lack of appropriate punishment for the crime, were similar to what the Court eventually described as the rare situation<sup>6</sup>

As any other subject, the evolution of the doctrine of the rarest of rare is not free of academic criticism. Most commentators indicated that a view is highly ambiguous and subject to different interpretations of this teaching

A strong critique arose from Justice Bhagwati himself, who, in his disagreeable view, warned of saying that "this test would lend credence to a larger amount of arbitrariness in decision-making and determine whether individual will live or die depending on the makeup of the bench."

The decisions made on this doctrine were also argued that they are wrongly taken. For example, the Supreme Court described it as a very unusual a deadly situation if an individual, accused of the fidelity of his wife secede her head and murdered her. Here the Amruta v. Maharashtra case is relevant in the context where, even when there were identical facts as stated above the court refrained from giving the death sentence.<sup>11</sup>

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<sup>11</sup> Ex rel. Bhaeru Singh v. State of Rajasthan, 1994 2 SCC 407, (Supreme Court of India 1994). Drew from the case of Macchi Singh v. State of Punjab (Id., at 33.)

The court ruled that a deliberate, cold-blooded and barbaric murder of a very delicate child after committing rape on her certainly falls into the rarest category of rare. But in the Kumudi Lal case,"is a case which involved the 38 rape and the murder of a 14-year-old girl, the court declined to uphold the death sentence. A child of 2nd grade was brutally raped in the case of Am Singh v. State of Punjab. She later died from excessive bleeding. Both jury and the High Court convicted the murderer and sentenced him to death under section 302. But the Supreme Court ruled that although the attack was violent the murder was not deliberate.<sup>12</sup>

It was held in Jagmohan and Bacchan Singh, both Constitutional Benches refused to create a standard categorization where, despite the strong pleas from appearing counsel, the rarest of rarest doctrines could be appealed. The Court stated in Jagmohan that, in order to ensure the best security possible of the parties involved, the development of specifications does not serve any purpose.

The dissenting opinions of Bhagwati have been the most critical of all. J. He made a key argument, and that it is a matter of fact to characterize the crimes as "gruesome," "cold-blooded," "brutal," etc. Factors which a judge finds relevant may therefore not be relevant for others

The National Law University has a Death Penalty Centre which conducted research into criminal justice mechanisms and systems in India and its correlation to the death penalty in India, this was conducted by nearly 60 43 former judges of the Supreme Court. "For a significant number of judges, the unusual one was based on the definition or clarification of crimes alone and had little to do with a judicial review involving' unqualified forbidding the right of life imprisonment," the study said. After consultation with the 60 previous judges who had awarded 208 cases of death penalty at various points over the period 1975-2016, this detailed report was released.

These reports show that there was no consistent interpretation of the criteria of uncommon rare doctrine,' Senior Counsel Rebecca John said during seminar, after the publication of the report. "Despite unusual death penalty of rarest of the rare doctrine as provided by Bacchan Singh's Supreme Court.

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<sup>12</sup> <https://www.project39a.com/nlu/>

## **VII. ABOLITION OF THE DOCTRINE OF RAREST OF RARE**

Since the concept of Unusually Rare is not per se is not defined by statute, confusion arises every time the Court provides death penalty. In some cases, the perpetrator has attempted rape and murder and was given the death penalty, but the accused has not earned the sentence of death for other situations with specific evidence and circumstances.<sup>13</sup>

The variation that contributed to a discrepancy in these sentences is extremely difficult to find- "isthis the crime? Or the delinquent? Or the magistrate? The court was of the opinion that it will putthe country at increased risk by removing altogether the principle of death penalty.

To encounter these extreme conditions, India has not yet become a nation appropriate. The procedure should be based on morality but rather it has become focused on the judge. To maintain this principle, the judiciary hast consider certain elements that clean up the fog"

In its 262nd report (August 2015), the Law Commission Report for 2015 proposed abolishing the definition of the death penalty for all crimes related to non-terrorist activities, which were not meant to protect national security its previous review during 1967, the Commission found that the "experiment during abolishing capital punishment" could not be put at risk by India. Nonetheless, of 2015"<sup>15</sup>, "the Commission thinks it is time for India to continue with abolishing the death penalty".

Although death sentences are seldom enforced in India, the commission has proposed the elimination of the penalty. There were the following reasons given by the commission:

- 1.) The circumstances changed.
- 2) It does not Deter.
- 3.) The justice system in India is flawed.

## **VIII. RATE OF EXECUTION AND COMMUTATION OF CAPITAL PUNISHMENT IN INDIA**

The principle of the death penalty is prevalent over India, but from 1998-2018 there were only seven executions. A total to 1303 capital punishment judgements were issued between 2004 and 2013, but between this time only 3 convictions were executed. Only one individual was executed between 2004 and 2012. In the last 20 years, there have been a total of 3751 death sentences.

Yakub and eleven others were sentenced to death in July 2007. The 1993 bombing in Mumbai, which slaughtered up to 260 people and injured several others, was organized or executed by special court. During the commutation of the death penalty of 10 people, the SC upheld Memnon's death sentence in March 2013, while one died later. In the last 19 years there were just 4 people hanged to death and in Nirbhaya in February 2020 the Four convicts face execution.

## **IX. COMMUTATION OF DEATH PENALTIES**

The Constitution of India u/A161 & 72 empowers the governor or President of any State and India to grant or revoke, refer or mitigate the imprisonment of any person convicted of any crime, for any parole, reprieves, release or revocation of sentence 12.

- (a) in all situations where the punishment or sentencing is convicted ordered to be enforced by the Court Martial;
- (b) furthermore, all cases in which the application of punishment or a sentence is levied for a breach of any statute in respect of an issue to which the Union / Status executive powers extend; Legi proceedings. The verdict must only be made by a high court when death penalty is issued by a majority (trial) of a court over finalize it.

The inmate has the privilege of appealing to the Supreme Court once he is confirmed by the High Court. If that is not possible, the person convicted of this case can give a petition "mercy" an application can be made to the Sovereign head of state who is the president of India, additionally

an appeal can be made to the state Governor this is in case the Supreme Court refuses or fails to hear the appeal. The prisoner has the right of appealing to the Supreme Court once the High Court has admitted it. If this cannot happen or if the Supreme Court declines or fails to accept the appeal the person convicted can give the President of India and the Governor of the State a 'mercy petition. The legislative powers of the President and Governors today derive from the old Government of India Act which was passed in 1935, but in relation to the Governor General there are no prerogative clemency rights of the President and Governors of independent Indians. Procedure for deployment Hanging and Shooting are the prescribed methods of execution under the CrPC.

## **X. CONCLUSION**

At the heart of the "rarest of rare" doctrine is the idea that the death penalty should be imposed only in the most exceptional circumstances. This means that judges must use their discretion to carefully consider the specific facts and circumstances of each case. They must weigh factors such as the nature and gravity of the offense, the character of the offender, and the impact of the crime on society. The discretionary power of judges is an essential component of the doctrine, as it allows them to make nuanced judgments based on the unique circumstances of each case.

However, the discretionary power of judges in the "rarest of rare" doctrine has been the subject of much criticism. One concern is that the discretionary power of judges can lead to inconsistent and arbitrary application of the death penalty. There is a risk that judges may impose the death penalty in some cases but not in others, even where the facts and circumstances are similar. This can undermine the fairness and credibility of the criminal justice system.

Another concern is that the discretionary power of judges can be abused by those in power. There is a risk that judges may be influenced by political or social factors when making decisions about the death penalty. For example, judges may be more likely to impose the death penalty in cases where the crime has received significant media attention, or where there is public pressure to do so. This can lead to the death penalty being imposed in cases where it is not justified, or where there are doubts about the guilt of the accused.

To address these concerns, it is important to ensure that judges exercise their discretion carefully and with a deep understanding of the principles underlying the "rarest of rare" doctrine. Judges must be aware of the risk of inconsistency and arbitrariness and strive to make consistent and fair decisions in each case. They must also be aware of the risk of abuse of power and strive to ensure that their decisions are based solely on the facts and circumstances of each case, rather than political or social considerations.

One way to ensure that judges exercise their discretion carefully is to provide them with clear guidelines on when the death penalty should be imposed. The Indian Supreme Court has provided some guidance in this regard, stating that the death penalty should be imposed only in cases where the alternative sentence of life imprisonment would be inadequate. The Court has also held that the death penalty should be imposed only in cases where the offense is of such exceptional gravity that it shocks the conscience of society.

Another way to ensure that judges exercise their discretion carefully is to provide them with adequate training and support. Judges must be trained to understand the legal principles underlying the "rarest of rare" doctrine and to apply them consistently and fairly. They must also be provided with support and guidance from senior judges and legal experts to help them make informed and impartial decisions.

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