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Constitutionality of Death Penalty

RUDRAKSH JAIN¹

ABSTRACT

Death penalty is one of the most debated, ancient forms of punishment in almost every society. Inflicting capital punishment on Rarest of the Rare case is a controversy that follows every judicial verdict. India has always been conflicted with the idea of capital punishment, but also realizes death penalty to be a vital punishment in the abolition of crime in society. Many great leaders and scholars like Dr. APJ Abdul Kalam and Justice Krishnan Iyer have opposed the idea of awarding death sentence. Justice Krishnan Iyer believes that it is futile to award death penalty even to a terrorist as it is foolish to think of it as a cure for terrorism, whereas Dr. Abdul Kalam himself has approved death sentence in some brutal cases during his presidential tenure. In my opinion, yes, there have been grave, gruesome, and brutal cases for instance 26/11 attack and the Nirbhaya case where the convicts deserved to die, but the question lies, do we deserve to kill them? Our constitution echoes the importance of life, so is it fair for the law to take away someone's life? This research paper talks about the constitutional validity of capital punishment and landmark judgments on the said matter.

Keywords: *Capital punishment, Constitutionality of death penalty, Rarest of the rare, Bachan Singh v. State of Punjab*

I. INTRODUCTION

We are all the creation of God. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence. – Dr. APJ Abdul Kalam

There have been never-ending debates about the moral, ethical, and legal issues relating to death penalty. Many Great leaders deem death penalty to be an act of revenge rather than being justice for a crime, capital punishment occupies a very special and contentious place in the judiciary of India because of its retributive and irrevocable nature. Even The United Nations (UN) feels that death penalty has no place in the 21st century. Some 170 Members States of the United Nations with a variety of legal systems, traditions, cultures, and religious backgrounds, have either abolished the death penalty or do not practice it.

Justice V.R. Krishna Iyer in the case of *Rajendra Prasad V. State of Uttar Pradesh*, 1979²

¹ Author is a Student at Vivekenanda Institute of Professional studies, India.

² *Rajendra Prasad V. State of Uttar Pradesh*, 1979 SCC(3)646.

commented that- “The special reason must relate, not to the crime but the criminal. The crime may be shocking and yet the criminal may not deserve the Death Penalty”. On the other hand, the Indian judiciary as well as the legislature has refrained from abolition of death penalty.

In the words of famous French philosopher Montesquieu, “*The capital punishment represents a kind of retaliation, by which society withdraws protection from a citizen who has sought to destroy another citizen. A citizen deserves death, when he has violated the security of another and has gone too far as to kill him or attempted to kill him. The penalty thus employed may be described as the medicine for a social malady.*”³ Upholding this ideology, the Indian Penal Code provides provisions for awarding the death penalty for crimes committed under section 34, 109, 120B, 121, 132, 149, 194, 302, 305, 307, 364A, and 396 of the Code respectively. However, the Supreme Court of India has restricted death sentence to the ‘*rarest of the rare cases*’ as was held in *Bachan Singh v. State of Punjab, 1979*.⁴

II. CAPITAL PUNISHMENT IN INDIA

There are two motives behind condemning punishment to the guilty:

- The person who commits the crime must suffer for it.
- The other is, inflicting such punishment on the wrongdoer acts as an example for the society.

In India deciding the case for death penalty is based on doctrine of “rarest of the rare test” which was stated in the case of *Bachan Singh v. State of Punjab, 1979*⁵ which means that death penalty will only be awarded in rarest of rare cases only.

Another key thing to remember, in the case of *Macchi Singh v. State of Punjab, 1983*⁶– the three-judge bench interpreted the Doctrine Rarest of the Rare, notably mentioning the principles for imposing death sentence. The bench clarified that death penalty can be awarded if:

1. Manner of commission of murder

1. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner.
2. When the house of victim is set aflame with the motive of burning him alive.

³ Pawan Jain, *Supreme Court on Death Penalty (Universal Law Publishing, 2016)*.

⁴ *Bachan Singh v. State of Punjab, 1979 3 SCC 727*.

⁵ *Bachan Singh v. State of Punjab, 1979 3 SCC 727*.

⁶ *Macchi Singh v. State of Punjab, AIR 1983 SC 957*.

3. When the victim is tortured inhumanly causing death, and
4. When the body of victim is cut into pieces, or his body is dismembered fiendishly.

2. Motive for commission of murder

1. A hired assassin commits murder for sake of reward.
2. A cold-blooded murder with intention to inherit property or to gain control over property of a ward or person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, and
3. A murder is committed in the course for betrayal of the motherland.

3. Anti- social or socially abhorrent nature of the crime.

1. When murder of a member of a *scheduled caste or minority* community etc., is committed not for personal reasons but in circumstances which arouse social wrath.
2. In cases of *bride burning* and what are known as *dowry deaths* or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

4. Magnitude of crime

1. When the crime is enormous in proportion.

5. Personality of victim of murder

1. When the victim is an innocent who could not have or has not provided even an excuse.
2. A helpless woman or an old age or an infant is murdered.
3. When the murderer is in a position of domination or trust.
4. When the victim is a public figure generally loved and respected by the community for the services rendered by him and the murderer is committed for political or similar reasons other than personal reasons.⁷

Having said that these factors were deemed *unnecessary* in case law *Swamy Shraddananda V. State of Karnataka, 2007*.⁸

⁷ Pawan Jain, *Supreme Court on Death Penalty (Universal Law Publishing, 2016)*.

⁸ *Swamy Shraddananda V. State of Karnataka, AIR 2007 SC 2531*.

III. DOCTRINE OF ‘RAREST OF THE RARE’

The constitutional validity of the death penalty was challenged in *Jagmohan Singh v. State of U.P., 1980*⁹ on various grounds including that unbridled power is given to the court to impose death sentence. Appellant raised the question that Section 302 of IPC violated Article 14, 19 and 21 of the Indian Constitution. The constitutional bench, by unanimous verdict, rejected all the contentions of the appellant and declared death penalty to be constitutionally valid. Firstly, the bench stated that no law violates Article 19 unless it is not in public interest or unreasonable. Since death penalty has not been declared unconstitutional by the legislature, therefore judiciary on its own, without any object evidence, cannot assert death penalty as unconstitutional. Secondly, the bench stated that each case differs from another in terms of facts and circumstances of the crime. A judge exercises his discretionary power after considering all the mitigating and aggravating factors related to the crime, so it is unacceptable that the death sentence violates article 14 of the Constitution. Thirdly, the trial takes place according to the provisions of law stated in the *Indian Evidence Act, 1872, and the Criminal Procedure Code, 1973*. The judge takes his decision according to the provisions of the law. All things considered, capital punishment does not violate Article 14, 19, 21 of the Indian Constitution and stands fair.

In *Rajendra Prasad v. State of Uttar Pradesh, 1979*¹⁰ it was held, “*If the murderous operation of a diehard criminal jeopardizes social security in a persistent, planned and perilous fashion then his employment of fundamental rights may be rightly annihilated.*”¹¹ The same principle was re-iterated in *Bachan Singh v. State of Punjab, 1980*¹² with a majority of four to one. However, some advancements were made in the said concept of capital punishment. The court held that death penalty must be awarded only in “*gravest cases of extreme culpability*”. Thus, *Supreme Court restricted death penalty only in Rarest of the Rare cases, where the crime is so brutal, gruesome, unusual that life imprisonment seems inadequate to punish the guilty.*

IV. SCOPE AND RESTRICTIONS OF RAREST OF THE RARE

The Rarest of the Rare doctrine, originated in the case *Bachan Singh v. State of Punjab, 1980*¹³ is based on Section 354(3) of the Criminal Procedure Code, 1973. It stated that “*when the conviction for an offence punishable with death or, in the alternative, with imprisonment for*

⁹ *Jagmohan Singh v. State of U.P., AIR 1980 SC 898.*

¹⁰ *Rajendra Prasad V. State of Uttar Pradesh, 1979 SCC(3)646.*

¹¹ *Pawan Jain, Supreme Court on Death Penalty (Universal Law Publishing, 2016).*

¹² *Bachan Singh v. State of Punjab, 1979 3 SCC 727.*

¹³ *Bachan Singh v. State of Punjab, 1979 3 SCC 727.*

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.”¹⁴

Having said that, the said judgement didn't lay down any specific guidelines to decide whether imposing death penalty in a specific case is necessary or not, *in other words* there is no specific definition of the rarest of the rare doctrine and no clear rules to understand which case falls under this category. Despite this, in *Machhi Singh v. State of Panjab, 1983*¹⁵ three judge bench gave some guidelines to decide whether a case is exceptional enough to shock the collective conscience of the community. The Court must look upon five factors before awarding the death penalty — the manner of commission of murder, the motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime, and personality of the murder victim. On the contrary, in *Bachan Singh v. State of Panjab, 1980*¹⁶ the constitutional bench stressed on the fact that there is no reasonable and probable way to identify guidelines to categorise cases which may be placed in the Rarest of the Rare doctrine. The constitutional bench advised to identify aggravating factors which deals with the nature and commission of crime and mitigating factors which deals with the personality of the criminal. The court must decide on its own and rightly balance these two factors in order to distinguish whether the punishment should be exceptional or not. But Recently, in *Shankar Kisanrao Khade case*, the Court stated that instead of balancing the mitigating and aggravating factors, the focus should be on crime test, criminal test, and rarest of the rare case test. Regarding the rarest of the rare case test, the Court held that it must be “*society centric*” rather than “*judge centric*”. The Court must study various factors related to societal values and perceptions while conducting this particular test. The death penalty should be awarded only when the Court is satisfied with all the three tests.

‘INCEPTION OF ‘RAREST OF THE RARE’

Section 367 (5) of the Criminal Procedure Code, 1898 stated, “*If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.*”¹⁷ The CrPC (Amendment) Act, 1955 has removed this provision and now, *life imprisonment has become the rule, and the death penalty is an exception.* This amendment has made it essential for the judges to deliver special reasons for granting capital punishment in

¹⁴ *The Code of Criminal Procedure, 1973, Section 354(3), Acts of parliament, 1973(India).*

¹⁵ *Macchi Singh v. State of Punjab, AIR 1983 SC 957.*

¹⁶ *Bachan Singh v. State of Punjab, 1979 3 SCC 727.*

¹⁷ *Pawan Jain, Supreme Court on Death Penalty (Universal Law Publishing, 2016).*

exceptional circumstances.

Nathuram V. Godse v. Crown was the first case which satisfied the Rarest of the Rare nature that happened in independent India. Nathuram Godse and his associates were accused of assassinating Mahatma Gandhi, the conspiracy to murder took place for six months before the killing took place. The Special Court of Delhi passed death sentence to two main accused, which was confirmed by the Panjab High Court. In *Nawab Singh v. State of U.P.*, the Supreme Court for the first time referred to aggravating and mitigating factors while awarding death sentence. Similarly, in *Vadivelu Thevar case*, the Supreme Court stated that more emphasis must be on aggravating and mitigating factors rather the character of evidence produced by the prosecution in sentencing death penalty.

The court in *Jagmohan Singh Case* held that the focus must be on balancing all the aggravating and mitigating factors related to the crime only. Despite this, in *Rajendra Prasad case*, it was held that the court must contemplate the factors related to the criminal and not the crime. Finally, in *Bachan Singh case*, the court used the term *Rarest of the Rare* and held that the death penalty must be conferred only after considering all the aggravating and mitigating factors related to the crime as well as the criminal.

V. CONCLUSION

The rarest of the rare doctrine has been the subject of endless debates over the years because of no guidelines mentioned to determine whether an accused can be sentenced with special judgment or not. As mentioned in *Bachan Singh case*, the bench believed no guidelines can be arranged due to the dynamic nature of every case. But In *Machhi Singh case* the need for guidelines were felt thus, constructing 5 factors. Shortly, in *Swamy shraddananda case*, the guidelines laid by the 3-judge bench were deemed unnecessary and in violation of *Bachan Singh case and Rarest of the Rare doctrine*.

Death Penalty is a severe subject due to its irreversible nature. Over the years, some courts felt the need to abolish capital punishment, whereas some believed death penalty as a remedy for heinous crime. In my opinion Rarest of the Rare doctrine and *Bachan Singh case* is fundamental, and power to award death penalty should unquestionably be “judge centric”. A crime may seem heinous and brutal in nature, yet the criminal may not deserve death penalty, thus as held in *Bachan Singh v. State Of Punjab*, 1980¹⁸ every judge must consider the mitigating and aggravating factors on its own and rightly balance these two factors in order to

¹⁸ *Bachan Singh v. State of Punjab*, 1979 3 SCC 727.

differentiate whether the punishment should be exceptional or not.

Many great leaders, judges and even the Law Commission of India felt the need to abolish capital punishment. But capital punishment will continuously remain a crucial part of justice for those who do not deserve to live and enjoy the benefits of the society.
