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Examining the 'Rarest of Rare' Doctrine in Principle and in Practice

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Abstract

The punishment of capital sentence continues to be one of the most debated topics to date. This can be attributed to the very nature of the punishment, which, in addition to being irreversible, stands at the crossroads of justice, morality, and human rights. Many countries have opted to abolish this form of punishment, but India has retained it. The Supreme Court in India has held it to be an extraordinary sentence to be invoked only in the 'rarest of rare' cases, a doctrine which the Supreme Court evolved in the case of Bachan Singh v. State of Punjab (1982). This doctrine is to be applied only in those cases where the aggravating circumstances are more than the mitigating circumstances. However, what factors are considered to be aggravating or mitigating depends entirely on the facts and circumstances of each case and therefore rests solely at the discretion of the judge.

Keywords: *Aggravating, Bachan Singh, Capital Sentence, Mitigating*

1.0 Introduction

Capital punishment, also known as the death penalty, is the execution of an offender who has been sentenced to death by a court of law for committing a criminal offence. It is the highest possible punishment that can be given to a person and is generally awarded in severe and heinous crimes that shock the conscience of society.

Capital sentence as a form of punishment has been in existence for several hundred years. It was used as a tool to do away with all the anti-social elements that were responsible for disturbing the peace and security of society. Throughout the history of crime and punishment, we can find that capital punishment has been a standard practice, which was carried out by various countries using different methods such as hanging, drowning, crucifixion, stoning, use of sharp-edged weapons such as swords, etc.

Given the irreversible nature of capital punishment, it continues to be one of the most relevant and debated issues in the country. Many countries in the world have abolished the practice of capital punishment. India, however, has retained this form of punishment, upholding its constitutionality in Jagmohan Singh v. State of Uttar Pradesh (1972). This case was decided before the addition of Section 354 (3) of The Code of Criminal Procedure, 1973, via which it was made mandatory for the judge to cite 'special reasons' while awarding a capital sentence.

The Supreme Court in India has held capital sentence to be an extraordinary and exceptional sentence to be invoked only in the 'rarest of rare' cases where the alternative option is 'unquestionably foreclosed'. The 'rarest of rare' doctrine was evolved by the Supreme Court in the case of Bachan Singh v. State of Punjab (1980). This doctrine is to be applied only in those cases where the aggravating circumstances are more than the mitigating circumstances. However, what factors would be considered as aggravating or mitigating depends entirely on the facts and circumstances of each case and therefore rests solely at the discretion of the judge. This is a drawback of this doctrine in that it is a very subjective doctrine, which leaves it upon the judge to decide whether he considers the case to be fit for a capital sentence. In the case of Manoj and Others v. State of Madhya Pradesh (2022), the court deliberated on the discretion used in imposing

the death penalty and observed in paragraph 228 – "*An overall analysis of capital punishment cases decided by this Court will perhaps reflect that there is, in fact, no pattern. While there are real and valid concerns in the non-uniform application of the Bachan Singh framework, discretion in sentencing, in itself, is not worrisome, and the concern needs to be dispelled.*"

This article examines and assesses whether the 'rarest of rare' doctrine is applied in a standard and uniform manner across the country, or does it result in random sentencing practices which result in a subjective and biased judicial decision.

2.0 The Concept of 'Rarest of Rare' Doctrine

The doctrine of 'rarest of rare' was for the first time pronounced by the Supreme Court in the *Bachan Singh* case. According to this doctrine, a capital sentence can be awarded only in exceptional cases. In awarding a capital sentence, the court must look into the facts and circumstances of each case and assess whether the severity of that particular crime truly warrants the awarding of a capital sentence or whether the punishment of life imprisonment would be more apt and serve the purpose. Only if the judge believes that, in the particular case, any alternative option is 'unquestionably foreclosed' should a capital sentence be awarded, and to come to this conclusion, the judge has to look at the aggravating factors as well as the mitigating factors and weigh them together (Bhatia & Varshnay, 2021).

That being said, there is no fixed formulae or an exhaustive list detailing what would constitute as aggravating and mitigating factors, therefore the court may examine factors such as the manner of commission of the crime, that is, whether the crime committed by the accused and the method employed by him was so brutal and inhumane that it shocked the conscience of the society (Bhatia, 2024). This is directly related to the circumstances surrounding the crime itself and would serve as an aggravating factor. Conversely, the court may also look into and examine the background of the accused, his age, whether he was a juvenile at the time of commission of the crime, his education, his family background, whether he is the sole earner, if he has any mental defect, etc. These constitute the mitigating factors that influence the decision of the judge at the time of pronouncing the judgment and may result in the judge taking a more lenient approach and thereby reducing the severity of the sentence.

2.1 Interpretation of *Machhi Singh* and its Problems

The guidelines laid down in *Bachan Singh* have been interpreted by different judges in different ways in many cases. One of the significant developments came in Machhi Singh and Others v. State of Punjab (1983), wherein a three-judge bench attempted to further clarify the guidelines laid down in the *Bachan Singh* case.

The court introduced the theory of 'collective conscience' and laid down five categories in which it would be expected by society that a capital sentence would be awarded. These categories were motive of crime, manner of its commission, anti-social or abhorrent nature of the crime, magnitude of the crime and personality of the victim of the murder. (Surendranath, Vishwanath, & Dash, 2020). However, laying down these categories completely diluted the framework established in *Bachan Singh*, which was to avoid the categorisation of offences qualifying for a capital sentence, and it was also in contrast with the system of deciding the culpability of the offender by taking into consideration both the circumstances of the offence as well as the offender. Adherence to this crime-centric approach in *Machhi Singh* results in the capital sentence being awarded while taking into consideration only the circumstances of the crime and not of the offender. The manner of sentencing laid down in *Bachan Singh* required careful weighing of aggravating and mitigating circumstances, whereas the framework of *Machhi Singh* replaced this individualised sentencing with a rigid, fact-based investigation focused on the existence of pre-identified crime-categories (Verma, 2021). It was held in the case of Ravji alias Ram Chandra v. State of Rajasthan (1995) that the criminal and the circumstances surrounding him would not be considered while deciding what would be the appropriate punishment; rather, the only central and deciding factor was the nature and gravity of the crime. This case was held *per incuriam Bachan Singh* in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) for its exclusive focus on crime.

The court in *Machhi Singh* had built further upon *Jagmohan Singh's* concept of 'balancing' aggravating and mitigating circumstances. It introduced the balance-

sheet concept wherein the judge would have to essentially prepare a balance sheet of the aggravating and mitigating circumstances and strike a just balance between the two, and in case the balance tilts in favour of the aggravating circumstances, the accused would be awarded a capital sentence and vice versa. This theory was criticised by the Supreme Court in Sangeet and Another v. State of Haryana (2013), and the court observed that the circumstances of the criminal and the factors which aggravate the crime are completely distinct and different from one another; therefore, the question of balancing the two does not arise at all. Also, another problematic issue with the *Machhi Singh* framework is that the courts have access to the aggravating circumstances of the case in the form of case records, whereas further investigation would be needed to find out the circumstances of the offender to get to the mitigating factors which would reduce the severity of the sentence of the accused thereby putting the accused at a disadvantaged position.

3.0 Discrepancy in Sentencing

It can be seen in several cases that the Supreme Court has not followed a uniform approach in awarding a capital sentence. It can be observed through many judgments of the Supreme Court that where the accused's young age has been considered to be a mitigating factor in one case, in the other, it has not. Where a capital sentence has been awarded because of the nature and brutality of the offence committed, life imprisonment has been awarded in another case with a similar set of facts (Yadav & Pandey, 2022).

For instance, in the case of Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012), the facts were such that the accused, on the pretext of buying biscuits, had lured and committed rape upon a girl child of 3 years old, and further to hide his crime, committed murder of the victim. The body of the victim was found in the agricultural fields in a nude condition with multiple marks on her body as a result of the sexual act. The Supreme Court in this case upheld the death sentence on the ground that the crime committed was heinous, brutal and inhumane and that the accused held the child in a relationship of 'trust-belief' and 'confidence'. In contrast to this, in the case of Neel Kumar alias Anil Kumar v. State of Haryana (2012), a father had committed rape followed by the murder of his own daughter, of 4 years. The Supreme Court commuted the death sentence of the accused to life imprisonment, and no mitigating circumstance was highlighted in the judgment.

In the case of Sushil Murmu v. State of Jharkhand (2004), the severed head of the victim child was recovered from a pond. It was a case of human sacrifice wherein the accused had sacrificed the child and used the victim as an offering to fulfil his personal and religious goals. The Supreme Court in this case upheld the capital sentence awarded, holding it to be a case which fit the 'rarest of rare' category and did not treat the religious belief held by the accused as a mitigating factor. Very similar to the facts of this case were the facts of State of Maharashtra v. Damu S/o Gopinath Shinde and Others (2000), which was a case of triple infanticide wherein three innocent children were abducted and sacrificed by the accused persons as a part of a ritual because they believed that doing so would lead them to hidden treasures. The Supreme Court treated this belief of the accused persons as a mitigating factor and reduced the sentence from a capital sentence to life imprisonment, stating, *"47. Now, we have to make up our minds regarding the sentence to be imposed on the three accused. Learned counsel for the State pleaded for restoration of the same sentence which the trial court imposed, i.e., death penalty. The question is whether this case can be regarded as the rarest of rare cases in which the lesser alternative is unquestionably foreclosed. Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremonially performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance, or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Even so, we persuade ourselves to choose the normal punishment prescribed for murder as for these accused."*

Through an analysis of the judicial decisions pronounced thus far pertaining to capital sentence, it can be seen that the discretion of the judge has been influenced by the personal ideologies of the judge, the socio-cultural background of the judge and the societal perceptions regarding the particular case especially if it is a high profile matter which has received immense

media coverage which may lead the judicial decision to be less pragmatic and geared more towards populism (Majumder, 2025). This doctrine requires that the capital sentence is to be decided while factoring and weighing in the circumstances of the criminal and the gravity of the crime committed, and a by-product of such a requirement is that it results in immense subjectivity on the part of judges as it would depend from judge to judge what they consider to be the parameters that need to be fulfilled to deem a crime as grievous as well as the parameters that need to be fulfilled to consider them as mitigating factors in favour of the accused. Therefore, different court benches will perceive and decide cases differently, albeit the facts and circumstances of the two cases may be similar.

4.0 Current Developments

The Supreme Court has been making efforts to reform and standardise the sentencing practices across India in capital sentencing cases. Recognising the fact that capital sentences were being awarded without exploring the background and behaviour of the accused, the Supreme Court in Manoj and Others v. State of Madhya Pradesh (2022) ordered the trial courts to collect the details of the accused to effectively examine the mitigating circumstances of a case and the potential of the accused's rehabilitation. According to the Annual Statistic Report, 2024 of Project 39A, there were a total of 564 people living under a sentence of death in India. This figure denotes a steady growth in the death row population during the decade. The report states that the information on the accused, such as jail conduct, psychiatric evaluations and life circumstances, was not relied on by the trial court in at least 90.5% of the cases where capital punishment was awarded. This shows that the trial courts have failed to comply with the directions issued by the Supreme Court in Manoj and Others v. State of Madhya Pradesh (2022). However, notably, the Supreme Court did not confirm the death sentence of a single convict, continuing the trend since 2021 and also sought to rely on the reports pertaining to the life history, psychiatric evaluation and jail conduct of the accused (Project 39A, National Law University Delhi, 2024).

In September 2022, the Supreme Court, in In Re: Framing Guidelines Regarding Potential Mitigating Circumstances To Be Considered While Imposing Death Sentence, discussed this existing conflict between judges in awarding a capital sentence at length and, to have clarity and ensure a uniform approach, recommended the matter to a five-judge bench (Constitutional Bench). The bench to deliberate on this issue has yet to be assembled.

Bharatiya Nyaya Sanhita, 2023 (BNS) introduced new offences punishable with death, which include 'organised crime' under section 111 of the BNS and 'terrorist act' under section 113 of the BNS. Mob lynching has also been added as an offence with the BNS specifying that murder by 'five or more persons' is punishable with death. Also, gang rape of a woman under 18 years of age has been made punishable with death by the BNS, which sees a change from the Indian Penal Code, 1860, wherein this age was 16 years.

Section 472 of the Bharatiya Nagarik Suraksha Sanhita, 2023, lays out the procedure to be followed in filing and hearing of mercy petitions. The section states that the convict under the sentence of death, his 'legal heir' or 'any other relative' may file a mercy petition before the Governor within 30 days from the date of the final judgment which confirmed the death sentence. On either rejection or disposal by the Governor, 60 days from the date of such rejection or refusal has been given to file the said mercy petition before the President of India. The 30-day period may be limiting because the accused may not be able to gather enough relevant materials to file a mercy petition before the Governor. Also, a significant departure from the current norm can be seen with the legislature restricting the ability to file a mercy petition only to the convict, his legal heirs and his family members, effectively ruling out the possibility of mercy petitions being filed by third parties such as NGOs and civil societies on behalf of the convict even though such practices have been prevalent in India.

After the horrific R G Kar Hospital incident, the West Bengal Government passed The Aparijita Woman and Child (West Bengal Criminal Laws Amendment Bill), 2024. This bill enhances the punishments for many sexual offences. Section 6 of the bill is the most significant aspect as it introduces a mandatory sentence of death for the offence of rape resulting in a vegetative state, punishable under section 66 of BNS. This Bill has not yet received the assent of the President.

The Supreme Court in the case of State of Maharashtra and Others v. Pradeep Yashwant Kokade and Another (2024) issued directions to tackle the problem of delay in execution of the death sentence. The essence of these

guidelines is that undue, unexplained and inordinate delay in execution of the death sentence would entitle the accused to approach the Supreme Court under Article 32 of the Constitution, albeit the court will only examine the reasons for delay and will not go into the merits of the case. The Court stated that Article 21 is restricted not only to the pronouncing of the sentence, rather it also extends to the execution of that sentence, and such inordinate and unexplained delay has a dehumanising effect upon the convict and therefore would qualify as one of the factors used for the commutation of the death sentence into life imprisonment.

5.0 Conclusion

Capital punishment is undoubtedly one of India's most debated legal issues because of its moral and societal implications. The discretion exercisable by the judge in awarding such a sentence has always been at the forefront of such debates. Although the judiciary has made attempts to explain the 'rarest of rare' doctrine, there are inconsistencies in the sentencing process due to the unavoidable inherent factors that affect the reasoning capacity of the judge, such as his religious background, family background and media coverage of the particular case. There also seems to be many contradictions between different benches of the Supreme Court on deciding whether the punishment should be oriented more towards retributive or reformative theory. This inconsistency between judges can be attributed to the inherent shortcomings of the 'rarest of rare' doctrine, wherein the alternate option is 'unquestionably foreclosed', which leads to subjective and judge-centric decisions. The solution to such inconsistent sentencing is a complete re-evaluation of the sentencing framework in India to ensure fair and consistent sentencing, wherein the amount of discretion exercisable by a judge would be reduced. Completely removing the judicial discretion would be detrimental to society. The spirit of the 'rarest of rare' doctrine has to be understood, that is, capital sentence should be awarded only in exceptional cases, and a proper and robust sentencing framework would help in assisting the judges to implement this doctrine methodically, thereby achieving its actual goals.

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