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CRIME, FEAR AND PUNISHMENT: A CRIMINOLOGICAL AND JURISPRUDENTIAL ANALYSIS OF THE DEATH PENALTY UNDER THE 'RAREST OF RARE' DOCTRINE

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ABSTRACT

This research paper will discuss the Death Penalty in accordance with the principle of "Rarest of Rare" in India from constitutional, criminological, and jurisprudential standpoints. This research paper will examine the evolution of the "Rarest of Rare" principle from judicial precedents and its success as a balancing mechanism between societal interests and the right to life guaranteed under articles 14 and 21 of the Constitution. In addition to this, this research paper will explore different theories of punishment ranging from retribution to reformative, preventive, deterrent, and utilitarian theory of punishment, while highlighting various issues concerning judicial discretion, arbitrariness, socio-economic differences, and dignity of the individual.

Keywords: Death Penalty, Rarest of Rare Doctrine, Capital Punishment, Criminal Justice, Criminology, Jurisprudence, Human Rights, Judicial Discretion.

INTRODUCTION

The concept of punishment itself has always been one of the main tools used by the State to enforce discipline and address crimes. Of all punishments, however, the issue of the death penalty is the most contentious due to its irrevocability and its direct opposition to the current norms of human rights and constitutional morality. The death penalty is an example of the utmost exercise of State power when the law states that the individual should not be allowed the privilege of life anymore. It has therefore been subject to controversy in all parts of the world.

For India, the controversy regarding the death penalty has gained additional significance because of Article 21 of the Constitution[1], which guarantees life and liberty. Even though this article provides for life and liberty, it also allows the State to deprive an individual of life through a certain lawful process. The dilemma faced by the Indian judiciary was to strike a balance between the interests of society and those of the accused. The burden of deciding the constitutionality of the death penalty thus fell upon the judiciary.

However, the Supreme Court of India tried to balance the conflicting views by giving its judgment in *Bachan Singh v. State of Punjab*[2] and declaring that the constitutionality of the death penalty would be preserved only when it would be imposed in the "rarest of rare" cases. This doctrine has been used as a guiding principle for exceptional sentencing. In another case, namely, *Machhi Singh v. State of Punjab*[3], the Supreme Court gave some guidelines to define what would constitute "rarest of rare". However, this doctrine has been subject to criticism because of its vague nature, lack of certainty, and too much reliance on judicial discretion.

The issue of death penalty is not only related to the constitution but also to the field of criminology. There are different theories of punishment which justify their necessity through deterrence, retribution, prevention, and rehabilitation. While proponents of death penalty claim that deterrence is achieved through the fear of execution, opponents doubt the existence of any evidence in favour of deterrence and ask how reformation is possible with irrevocable punishment. From the standpoint of jurisprudence, the question centres around the morality of the State having the right to use its power over life in the pursuit of justice, and the constitutionality of punishments determined by "collective conscience."

The question has come into prominence again in India in light of the cases dealing with extremely brutal crimes, including the case of *Mukesh & Anr. v. State (NCT of Delhi)*[4], which is also referred to as the *Nirbhaya case*. This brought into the public domain a great need for stringent punishments to be meted out to those guilty of these crimes.

Additionally, issues such as socio-economic disparity, insufficient legal aid, wrongful convictions, and the psychological trauma caused by death row imprisonment have further

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[1] INDIA CONST. art. 21

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

[3] Machhi Singh v. State of Punjab, (1983) 3 SCC 470

[4] Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1

added to the critique of capital punishment. Globally, many of the democratic countries[5] have banned capital punishment or restricted its use considerably, stating that it is out of place with modern-day human rights values. In contrast, India has continued to maintain the death penalty despite its rarity.

This research paper aims to study the death penalty in India from criminological and jurisprudential viewpoints with special reference to the concept of "rarest of rare." The paper will focus on the constitutional aspects of capital punishment, evolution of the sentencing theory and jurisprudence of punishment. Also, it examines whether the doctrine has been able to maintain fairness and consistency or whether the doctrine has just served as a framework for subjective application by the judges through the constitutional language.

The primary thesis of this paper is that while the doctrine of the "rarest of rare" may have been instituted as a way of protecting constitutional values when it comes to the deprivation of life arbitrarily, in practice, there continue to be inconsistencies which go against the values of equality, fairness, and human dignity.

LITERATURE REVIEW

Previous research on the death penalty is primarily concerned with its analysis from a constitutional perspective, criminology perspective, and human rights approach. Cesare Beccaria was a critic of capital punishment because of the issues of proportionality and human dignity whereas Immanuel Kant advocated capital punishment based on retribution theory. In India, legal research has mostly revolved around analyzing the development of the "rarest of rare cases doctrine" from important court rulings such as Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab. Furthermore, the Report No. 262 of the Law Commission of India (2015) raises questions about the arbitrary nature of the death penalty and recommends restraint in imposing it.

METHODOLOGY OF RESEARCH

In this study, a doctrinal research methodology has been adopted from secondary sources of law. This includes constitutions, acts, judgments of Supreme Court, books, journals, Law Commission reports, and international human rights treaties. For this research, a qualitative

[5] Law Commission of India, 262nd Report on the Death Penalty (2015)

method has been applied in order to analyze the constitutional legality, legal interpretation, and criminology of death penalty under the "rarest of rare" principle.

HISTORICAL EVOLUTION OF DEATH PENALTY IN INDIA

The death penalty has long formed part of India's criminal justice system. However, its constitutional and legal status has evolved significantly with the development of constitutional governance and human rights principles.

During the colonial rule in India, capital punishment was an important part of the criminal justice dispensation introduced by the colonial rulers. For instance, the Indian Penal Code, 1860, brought in as a result of the reforms initiated by Thomas Babington Macaulay, provided death penalty for various offences including murder and offences against the state. It is clear from this era that punishment was seen as a means of enforcing obedience and controlling any forms of rebellion among other factors.

The constitutional status of death penalty took a different turn post the enactment of the Constitution of India in 1950 wherein Article 21 read that no one would be deprived of his life or personal liberty save in accordance with the procedure established by law[6]. The article brought forth a new constitutionality challenge regarding the coexistence of the death penalty regime along with the right to life guaranteed by the Constitution.

A crucial change took place when the Code of Criminal Procedure, 1973 was passed. Section 354(3) of the Code overturned the old sentencing policy and stated that life imprisonment was to be the normal punishment while death was to be the exception[7]. The provision of the Code asked the courts to give "special reasons" before imposing the death sentence. This was a crucial step towards curbing arbitrariness in sentencing and also showed the unease of the courts with respect to unrestricted discretion concerning life and liberty.

The constitutional legality of the death penalty got its due recognition only after the Supreme Court considered this issue in the case of *Jagmohan Singh v. State of Uttar Pradesh*[8]. In this case, the Supreme Court held that the death penalty is constitutional because judicial discretion

[6] INDIA CONST. art. 21

[7] Code of Criminal Procedure, 1973, § 354(3)

[8] Jagmohan Singh v. State of Uttar Pradesh, (1973) 1 SCC 20

within due process does not violate Articles 14, 19 and 21 of the Constitution. But the decision was strongly criticized as too much dependence was put on judicial discretion.

The judicial attitude towards capital punishment took yet another turn in the case of *Rajendra Prasad v. State of Uttar Pradesh*, where Justice Krishna Iyer took a reformatory stance in relation to sentencing for the offence of murder[9]. While this view was not always adhered to strictly, it had significant repercussions on later interpretations of sentencing principles in constitutional law.

By far the most significant development in capital punishment jurisprudence came about in *Bachan Singh v. State of Punjab*. In this case, while upholding the constitutionality of the death penalty, the Supreme Court laid down stringent requirements for the imposition of this punishment, limiting it strictly to the "rarest of rare" cases[10]. The Court tried to achieve the delicate balance between justice and the Constitution by ruling that imprisonment for life would be the general practice, and death would be awarded only if there were no other form of punishment that could be considered sufficient.

Further, in *Machhi Singh v. State of Punjab*, an attempt was made by the Supreme Court to clarify matters further through classification of cases wherein the imposition of capital punishment was justifiable[11]. The criteria that were taken into consideration included the manner of commission, motive, magnitude of the offense, and collective conscience of the community. Nevertheless, notwithstanding these criteria, vagueness and inconsistencies remained a problem.

An important constitutional landmark came up in the case of Mithu v. State of Punjab, where the Supreme Court struck down Section 303 of the Indian Penal Code that imposed mandatory death sentences on some individuals[12]. It was held that this Section was violative of Articles 14 and 21 because it deprived the court of its discretion and ignored the individual's situation.

The attitude of the Indian judiciary on capital punishment is marked by a growing conflict between retribution and constitutional humanism. On the one hand, while the law has remained unchanged and continues to authorize the use of capital punishment for particularly heinous

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[9] Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646

[10] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

[11] Machhi Singh v. State of Punjab, (1983) 3 SCC 470

[12] Mithu v. State of Punjab, (1983) 2 SCC 277

crimes, the danger of arbitrariness, erroneous convictions, unfair procedure, and socio-economic discrimination in imposing such penalties has come to be increasingly acknowledged. The Law Commission of India, in particular through its 262nd Report, has argued for abolition of capital punishment except in cases of terrorism and other offences related to national security[13].

This shows that the evolution of the death penalty in India is marked by the movement from the punitive approach characteristic of colonial rule to a more restrained constitutional approach. However, this leaves the question about the morality and effectiveness of capital punishment, along with issues relating to equality and justice, open-ended.

UNDERSTANDING THE "RAREST OF RARE" DOCTRINE

"Rarest of rare" doctrine is an important aspect of India's death penalty jurisprudence. This doctrine is an attempt made by the judiciary to regulate the process of death penalty by the means of the Constitution. Even though death penalty still remains a legally acceptable mode of punishment in India, this doctrine ensures that it is exercised extremely sparingly and in compliance with the constitutional rights enshrined under Articles 14 and 21.

The "rarest of rare" doctrine is an outcome of the realization of the judiciary that because of its irrevocable nature, any mechanism employed for imposing capital punishment must be designed such that there is no arbitrariness involved and the human dignity of the individual concerned is protected in the process. "Rarest of rare" doctrine was first introduced in the landmark judgment of Bachan Singh v. State of Punjab[14].

In a majority judgment, the Supreme Court validated the constitutionality of the death penalty but at the same time placed major restrictions on its imposition. According to the Supreme Court, "Death penalty cannot be awarded as an automatic punishment, it must be awarded in 'the rarest of rare cases' where the alternative option of awarding life imprisonment does not leave any scope for exercising discretion and where there remains no doubt about the extreme magnitude of criminality"[15]. In other words, life imprisonment becomes the norm while death penalty is the exception.

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[13] Law Commission of India, *262nd Report on the Death Penalty* (2015)

[14] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

[15] Id.

It is significant that through this judgment, the Supreme Court placed much emphasis on the principle of individualized sentencing. According to this principle, while dealing with the issue of punishment, not only the act done but also the manner in which the act is done and the person doing it are important. As a consequence, the court would need to consider the existence of aggravating and mitigating circumstances before imposing a death sentence. Aggravating circumstances include brutality of the crime, premeditation, recidivism, or acts that shock the collective conscience of society.

In the case of *Bachan Singh v. State of Punjab*, the Court's recognition of the relevance of reformative justice was evident from its observation that the death sentence may be awarded only when there is no possibility of the accused being rehabilitated, and the interests of society require that he be punished with the utmost severity[16].

Nevertheless, even though it had provided constitutional protection against such a penalty, the decision did not clearly define what the "rarest of rare" instances were. The lack of clarity in the definition resulted in considerable judicial latitude in interpreting whether a particular case fell within the specified category.

The Supreme Court has tried to make clear the criteria for imposing death penalty in *Machhi Singh v. State of Punjab*[17]. According to the decision in this case, several factors might justify the application of capital punishment including the modus operandi of committing murder, the motive of the criminal, enormity of the offence, ant-social nature of the crime, and the identity of the victim. Moreover, the court developed an ambiguous doctrine of collective conscience stating that death penalty can be imposed when the anger and outrage of society against the crime has become so strong that it cannot be satisfied by lesser sentences.

Despite all attempts to regulate the use of judicial discretion through setting guidelines in the case of *Machhi Singh v. State of Punjab*, they have contributed to its expansion as well. Terms like "collective conscience" and "outrage of society" do not have any objective constitutional criteria and can be interpreted according to emotional, social and political environment.

Inconsistencies in sentencing under the rule have been one of the biggest arguments against its implementation. Identical offenses have been punishable differently based on judicial perspective, popular opinion, or discrepancies in judgment by different benches. In *Santosh*

[16] Id.

[17] Machhi Singh v. State of Punjab, (1983) 3 SCC 470

Kumar Bariyar v. State of Maharashtra, the Supreme Court has itself pointed out inconsistencies in sentencing for capital punishment and condemned earlier rulings for inappropriate application of the "rarest of rare" doctrine[18]. The court noted that sentencing has often been "judge-centric" rather than principle-centric.

A major flaw in the rule is that it is heavily based on judicial discretion. As there is no definition to be found under any statute regarding which cases would be considered "rarest of rare", judges have wide discretion while taking into account the aggravating and mitigating factors. This leaves room for arbitrariness under Article 14 of the Constitution and also poses a challenge to consistency in constitutional decisions. It is feared that the most irreversible punishment cannot be left to different judicial perspectives and morality.

In addition to that, the doctrine is subject to criticism due to an unclear connection with reformative justice. Although the courts always stress the potential for rehabilitation, the actual evaluation of the same varies significantly. Often, socioeconomic factors, improper legal assistance, and public opinion play a greater role in shaping sentencing than the objective evaluation of reformative prospects. The question of equality and justice thus raises its head when dealing with capital sentencing.

The problem comes to the fore where cases are met with great media coverage and public anger. In the case of *Mukesh & Anr. v. State (NCT of Delhi)*, the Supreme Court sustained the death penalty for the accused in the Nirbhaya case, placing great emphasis on societal conscience and the nature of the crime committed[19]. Though the judgment was welcomed by many as being a necessity for justice and deterrence, others have warned of the possibility of emotional justice in constitutional adjudication.

Moreover, researches and observations by courts in the past have found that the use of this doctrine adversely impacts weaker people and marginalized groups more than others. Lack of legal representation often limits the capacity of the accused to defend his case at the stage of imposing of the sentence. This poses many constitutional problems pertaining to equality and procedural justice.

Though the "rarest of rare" doctrine was introduced as a constitutional mechanism aimed at limiting capricious imposition of death sentence on accused, it remains plagued by many

[18] Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498

[19] Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1

inconsistencies and uncertainties. This is because the doctrine represents a difficult compromise between constitutional moral values and the need of society for retributive justice, which has become increasingly precarious due to lack of any objective criteria. Therefore, one of the key questions raised through this ongoing controversy is whether any legal doctrine can guarantee total fairness in an irreversible form of punishment like death.

CRIMINOLOGICAL PERSPECTIVES ON CAPITAL PUNISHMENT

Capital punishment can hardly be discussed only from the point of view of constitutionalism and jurisprudence. Capital punishment is also a question of criminology since it directly touches upon the problems of crime, fear, punishment, and social control. Different criminological schools have tried to either support or reject the death penalty on the grounds of punishment's deterrent role, ethical character, rehabilitation possibilities, safety reasons, and social usefulness. Thus, apart from being a question of legality, capital punishment also needs to be analysed regarding the accomplishment of the aims of punishment in society.

Retributive theory justifies punishment on the basis that offenders deserve consequences proportionate to their crimes. Thinkers such as Immanuel Kant[20] defended punishment as a moral necessity, and this reasoning continues to influence support for capital punishment.

Retributive reasoning continues to influence death penalty cases, particularly where courts refer to collective conscience and societal outrage.

A third important rationale for imposing the death penalty is that of deterrence theory of punishment. According to this theory, punishment works on the basis of fear of the punishment. Therefore, punishment, as envisaged under this theory, is not meant merely to punish the criminal, but to instil fear into people.

Modern criminological research has not conclusively established that the death penalty deters violent crime more effectively than life imprisonment. Many offences occur under circumstances where rational fear of punishment plays little role.

Cesare Beccaria argued that certainty of punishment is more effective than severity and opposed the death penalty on moral grounds.[21]

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[20] Immanuel Kant, The Metaphysics of Morals (1797)

[21] Cesare Beccaria, On Crimes and Punishments (1764)

Utilitarian theory evaluates punishment according to its social benefits. Supporters of capital punishment argue that it protects society from particularly dangerous offenders.[22]

However, problems arise in utilitarian thinking due to the irrevocable nature of capital punishment. The wrong execution of someone innocent or due to procedural problems can contribute to this irrevocable miscarriage of justice. In terms of utilitarian thinking, there is a lot at stake in executing someone, including the possibility of executing an innocent individual. In this sense, utilitarianism raises many ethical and constitutional questions in relation to this issue.

Contrary to both the ideas of retribution and deterrence, reformative theory of punishment considers rehabilitation of the offender more important than the destruction thereof. Reformative justice recognizes that most offenders are products of some social, economic, psychological or environmental background, but offenders always have potential for change. Constitutional states in the contemporary world have realized this potentiality in their justice systems.

This theory of punishment has had an impact on Indian constitutional jurisprudence in terms of judicial focus on human dignity and personalization of the sentence. For instance, in *Bachan Singh v. State of Punjab*, the Supreme Court held that the death sentence would be awarded only if there was no possibility for the offender's reformation[23]. Nevertheless, it has been claimed that often courts do not properly evaluate the chances for the defendant's rehabilitation before awarding him or her death.

Preventive theory of punishment plays an important role in supporting death penalties. Preventive justice focuses on the protection of the community by preventing criminals from repeating their actions. From the perspective of preventive justice, the death penalty is seen as a permanent way of defending society from criminals. Yet, it is argued that such a preventive purpose may be achieved without taking away people's lives.

The psychological aspect of capital punishment too has been widely criticized. Death row prisoners often suffer from prolonged periods of isolation, uncertainty, and anguish. The issue of “death row syndrome” brings forth significant ethical issues related to psychological cruelty

[22] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1789)

[23] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

and dignity. Even when execution has been lawfully allowed, there are further questions pertaining to humane punishment raised by delay and psychological anguish.

JURISPRUDENTIAL AND CONSTITUTIONAL ANALYSIS

The controversy surrounding capital punishment from the constitutional and judicial perspective is perhaps the most intricate one in modern day criminal law. At the heart of this controversy is a very basic question about whether the State in a constitutional framework of dignity, equality, and liberty has the legal legitimacy to deprive an individual of his/her life as a form of punishment. In essence, the question touches upon not only the domain of criminal law but also extends into the realms of constitutional ethics and morality.

The Indian Constitution ensures certain Fundamental Rights that govern the legality of capital punishment. Of all these provisions, Article 21 assumes a central importance since it secures the right to life and personal liberty of individuals except as per procedure established by law[24]. It is pertinent to mention that judicial interpretations have evolved the scope of this clause from merely procedural legality and extended it to encompass reasonability, arbitrariness, and dignity of individuals.

Constitutionality of the death penalty, however, was upheld in *Jagmohan Singh v. State of Uttar Pradesh*[25]. According to the Court's decision, death penalty does not infringe upon Article 14, Article 19, or Article 21 since imposition of the death sentence happens through due process of law, a judicial process. Nevertheless, the decision was criticized for placing too much trust on the judicial system without solving the issue of arbitrariness and discrimination within death penalty sentences.

More advanced arguments of constitutionality of death penalty were presented in *Bachan Singh v. State of Punjab*, in which the Supreme Court upheld death penalty yet set some restrictions in its implementation[26]. Namely, it should be used in the "rarest of rare" cases. Death penalty was brought into accordance with Article 21 via introducing principles of individual sentencing. According to the Supreme Court, while death sentence should be considered an exception, the principle of life imprisonment remains a standard one.

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[24] INDIA CONST. art. 21

[25] Jagmohan Singh v. State of Uttar Pradesh, (1973) 1 SCC 20

[26] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

However, despite these measures, some constitutional issues continue to remain outstanding. One of the foremost constitutional challenges faced by the application of capital punishment relates to Article 14, according to which all citizens enjoy equality before the law and freedom from arbitrariness[27]. The lack of an exact definition for the principle of "rarest of rare" leads to wide discretionary powers of judges, thereby causing inconsistency in the manner in which punishments are awarded in cases that fall into the category of murder.

The Supreme Court has itself pointed out such disparities in the process of sentencing in its judgement in *Santosh Kumar Bariyar v. State of Maharashtra*[28]. Inconsistencies of such nature lead to a challenge against capital punishment on constitutional grounds.

Yet another critical constitutional question pertains to the connection between the death penalty and human dignity. Constitutional interpretation has come to recognise dignity as an intrinsic part of Article 21 in modern times. Dignity entails something more than mere life and affects the means and manner of punishment and its execution. Death penalty has been described as an absolute affront to human dignity as it denies the possibility of reform and redemption in individuals who are made to feel like mere instruments of punishment.

Proportionality is another factor that assumes importance in constitutional adjudication. Punishments must be proportionate to both the crime committed and to the background of the perpetrator. Yet proportionality in death penalty cases has remained extremely subjective, considering that there are no standards for determining at what point life imprisonment ceases to be a proper measure and death penalty is considered necessary. Relying on such phrases as "collective conscience" and "outrage felt by society" makes proportionality more complex in constitutional adjudication.

"Collective Conscience," more explicitly articulated in *Machhi Singh v. State of Punjab* and subsequently invoked in cases like *Mukesh & Anr. v. State (NCT of Delhi)*, is a highly contested doctrine[29]. Its advocates assert that sentencing requires the recognition of society's expectations regarding justice in cases of extremely heinous acts. However, its opponents assert that rights can only be safeguarded by constitutional courts by exercising rational judgement and not being driven by public sentiments and outrage, media, or both.

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[27] INDIA CONST. art. 14

[28] Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498

[29] Machhi Singh v. State of Punjab, (1983) 3 SCC 470; Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1

The jurisprudential dilemma at stake here relates to natural law and legal positivism. The former stresses the importance of morality, human dignity, and human rights as opposed to the latter, which stresses legality and legitimacy. Under natural law theories, the State does not have any moral legitimacy to end a life, while under positivism, as long as the act is legal according to legislative competence and constitutionalism, punishment is still valid.

In addition, the retributive theory justifies the use of capital punishment as the most fitting type of punishment for some crimes. The likes of Immanuel Kant championed the need for punishment from the point of moral requirement rather than utility[30]. From this point of view, a crime deserving punishment ought to be punished according to justice regardless of the effects thereof. Nevertheless, there is a rising trend in modern constitutional democracies doubting the morality of punishing irreversibly, considering the possibility of human errors during judgments and human rights requirements.

On the other hand, reformative theory provides a different kind of jurisprudence since it centers on rehabilitation of offenders instead of destroying them. The Indian constitutional courts have been emphasizing reformative justice as an objective of punishment through time. For instance, in *Mithu v. State of Punjab*, the Supreme Court of India invalidated laws making death penalty compulsory because they denied individual consideration and reforms of the offenders[31].

The discourse on international human rights law has also made an impact on constitutional discussions in the context of the death penalty. A number of democratic countries have chosen to abolish capital punishment in the wake of the violation of human dignity and fundamental human rights. More international law instruments are being developed in favour of abolition or limitation of capital punishment. In spite of the existence of death penalty in India, constitutional discussion has evolved in the direction of limiting it.

An issue of considerable significance in terms of jurisprudence is that of irreparable miscarriage of justice. This form of punishment differs from all other forms of punishment in that it cannot be rectified. A wrongful judgment, lack of competent legal counsel, or even biased investigation can bring about irrevocable injustice under the constitution.

Moreover, unnecessary delays in execution give rise to further constitutional issues. In the case of *Shatrughan Chauhan v. Union of India*, the Supreme Court noted that undue delays in

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[30] Immanuel Kant, *The Metaphysics of Morals* (1797)

[31] Mithu v. State of Punjab, (1983) 2 SCC 277

execution of death sentences can constitute cruelty and punishment under Article 21[32]. It was emphasized that execution of a death sentence involves mental agony for condemned persons. Consequently, such an execution violates the constitutional requirement of humane treatment in spite of the capital punishment.

The constitutional and judicial debate on death penalty is a manifestation of the underlying conflict between the power of the State and personal rights. On one side, defenders of capital punishment claim that there is no substitute to death sentence when it comes to deterrence, retribution, and social safety, whereas opponents believe that capital punishment contradicts the evolving constitutional morality and respect for human dignity. The "rarest of rare" test is an effort to resolve the dispute, but doubts arise about the constitutionality of the death penalty because of its inconsistency and arbitrariness.

CRITICISM OF THE DEATH PENALTY

While the death penalty continues to persist in the legal system of India despite criticisms raised by various schools of thought such as the constitutional school of thought, the criminological school of thought and the human rights school of thought, there are certain concerns regarding the justness and consistency of the law. The problem is not only regarding the legality but also whether the death penalty is consistent with evolving standards of justice in a constitutional state.

Amongst the various criticisms raised regarding the death penalty, the issue of arbitrariness and inconsistency in the decision to impose death is one of the most significant criticisms. Although the "rarest of rare" rule enunciated in the case of *Bachan Singh v. State of Punjab* aimed at ensuring strict judicial scrutiny in sentencing, the lack of clear statutory provisions for the rule has led to inconsistent decisions by the courts[33].

There exists socio-economic discrimination with regards to the application of the death penalty. The experience has shown that people coming from less privileged backgrounds tend to be overrepresented among those sentenced to death. The reason for this is that such individuals lack access to proper legal representation or cannot afford to hire defence lawyers. Consequently, the death penalty may serve as an indicator of social, rather than legal, inequalities. Herein lies the problem of equality of citizens before the law.

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[32] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

[33] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

The inevitability of a possible execution of an innocent person is probably the most serious and irrevocable criticism of the death penalty. It is worth noting that no other form of punishment carries as high stakes as the death penalty because once a person is sentenced to death and executed, the mistake cannot be undone anymore. In other words, the probability of errors committed during the investigation or trial process cannot be neglected in the discussion on whether or not the death penalty is morally acceptable.

The inconsistency was even admitted by the Supreme Court in various instances, such as the case of *Santosh Kumar Bariyar v. State of Maharashtra*. The Supreme Court in that case held that while deciding cases relating to the death penalty, the court's consideration should not be confined to the subjective views of judges[34]. Nevertheless, there is still a problem of inconsistency even in such an observation.

One such criticism pertains to the mental torture experienced by convicts awaiting execution on death row. Convicts facing death sentences suffer through long periods of anxiety, isolation, and emotional trauma because of the delays in executions due to various appeals filed on their behalf. Also known as the "Death Row Phenomenon," this issue becomes relevant with regard to Article 21, where the right to life with dignity has been guaranteed to all individuals. The mental torture suffered by the convict even before his/her execution can qualify as a case of cruel and unusual punishment.

Criticism of the death penalty comes as a result of several aspects: legal, empirical, and ethical. Although it seeks justice in the most heinous crimes, there remain concerns of discrimination and injustice in terms of equality and accuracy in carrying out such executions. Thus, in the context of this essay, the use of capital punishment seems controversial and unnecessary.

JUDICIAL TRENDS AND LANDMARK CASES

In India, jurisprudence in relation to capital punishment has been largely a result of judicial decisions rather than legislative enactments. In the course of time, attempts have been made by the judiciary to reconcile the question of constitutional morality with the demands of justice in society, leading to an extensive yet highly inconsistent jurisprudence of capital punishment. The "rarest of rare" principle has provided the basis but its interpretation in different cases indicates inconsistency and subjectivity.

[34] Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498

A more systematic approach was adopted in *Bachan Singh vs. State of Punjab*, where the 'rarest of rare' principle was evolved[35]. This ruling was a major turning point, in that it clearly stipulated that in case life imprisonment is clearly inadequate, death penalty can be applied. Individualization of sentences and the inclusion of mitigating circumstances brought about a constitutional restriction on the exercise of judicial discretion. However, this landmark decision did not elaborate on the meaning of the principle.

In the case of *Machhi Singh vs. State of Punjab*, the Supreme Court tried to apply this concept by categorizing those situations under which capital punishment may be awarded[36]. Some of the situations mentioned are instances of extreme cruelty, shockingly brutal nature of the offense, and cases that shock society's collective conscience. This introduction of the concept of "collective conscience" brought about an emotional element in sentencing.

One of the key developments in the evolution of sentencing principles was seen in *Mithu v. State of Punjab*, where the Supreme Court declared that provisions of mandatory death penalty under Section 303 of the Indian Penal Code were unconstitutional since they denied judicial discretion, thus violating Articles 14 and 21[37]. In other words, this decision reinforced the notion that the sentencing process should take into account the peculiarities of each case.

At the same time, there still seemed to be some discrepancies in sentencing even when there were theoretical principles and rules that should have been applied. For instance, in *Santosh Kumar Bariyar v. State of Maharashtra*, the Supreme Court noted that earlier interpretations of the "rarest of rare" approach had been flawed, with death penalty sentencing becoming more concerned with the preferences of judges[38].

Likewise, in the case of *Sangeet v. State of Haryana*, the apex court realized that the guidelines for imposing the death penalty as set out by Bachan Singh's judgment were not consistently followed[39]. It was noted that aggravating factors and mitigating factors were not considered in an organized manner, which made imposition of the death penalty unpredictable. Once again, it pointed towards the failure to have an effective process of sentencing.

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[35] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

[36] Machhi Singh v. State of Punjab, (1983) 3 SCC 470

[37] Mithu v. State of Punjab, (1983) 2 SCC 277

[38] Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498

[39] Sangeet v. State of Haryana, (2012) 11 SCC 172

Cases such as *Mukesh & Anr. v. State (NCT of Delhi)*, where the death penalty was awarded but the judgment took into account the nature of the crime, reflected societal conscience[40]. Even though such judgments have been seen as a way of responding to extreme public agitation, they bring back the issue of public opinion having an effect on the judicial process.

The trend of judicial decisions in India has revealed a conflict between the need for the imposition of the maximum punishment in relation to the worst crimes and the need for justice and equity in sentencing. Though in all cases the Supreme Court has done well in developing the doctrine, yet the fact remains that in essence it still continues to be highly subjective in nature.

COMPARATIVE AND INTERNATIONAL PERSPECTIVE

There has been an immense evolution in the attitude of countries across the globe towards capital punishment in recent decades. Several democracies have chosen to completely abolish capital punishment, or at least to limit its imposition to extraordinary cases such as war crime or terrorist offenses. This is indicative of the increasing influence of human rights jurisprudence and constitutional morality, as well as the irreconcilability of death penalty and dignity.

There is no universal ban on capital punishment under international laws, but several international documents do support the idea of complete abolition of capital punishment. The UN Universal Declaration of Human Rights Article 3 supports the right to life and personal safety, while Article 5 rejects any form of punishment that may be classified as being cruel or degrading[41].

India is uniquely placed in the international picture. Although the death penalty is still retained by the nation, the law of India tries to confine the application of the death penalty via the "rarest of rare" rule in *Bachan Singh v. State of Punjab*[42].

The Law Commission of India, in its 262nd Report, noted the trend of abolition internationally and suggested that India confine itself to executing only those criminals who commit terror-related offenses or those related to national security issues.[43]

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[40] Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1

[41] Universal Declaration of Human Rights arts. 3, 5, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)

[42] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

[43] Law Commission of India, *262nd Report on the Death Penalty* (2015)

However, in spite of all these trends across the world, defenders of capital punishment in India maintain that Indian peculiarities in terms of social setting, criminality levels, and safety needs make capital punishment necessary. Outrage among public groups regarding terrorism, rape, and mass murders sometimes leads to increased calls for stricter penalties. As a result, India remains torn between development on the one hand and international human rights on the other.

A comparative study shows that modern legislation in general is moving from capital punishment to a more constructive approach to justice. In such a way, the existence of the death penalty in India according to the “rarest of rare cases” rule puts the country in an interesting situation in which constitutional requirements compete with societal pressures and international norms.

SUGGESTIONS AND REFORMS

The ongoing debates about capital punishment in India are an indication that the concept of ‘rarest of rare’ despite being constitutionally significant has not solved the problems regarding arbitrariness, equity, and consistency in the sentencing process. While the judiciary has made repeated attempts to narrow down the application of capital punishment, implementation of such practices seems to be fraught with structural and procedural flaws. As such, reforming the existing provisions is needed so as to guarantee that constitutionally enshrined rights are respected within capital punishment law.

Clearer sentencing guidelines are required to reduce subjectivity and improve consistency in determining whether a case falls within the “rarest of rare” category.

Courts should place greater emphasis on mitigating circumstances such as socio-economic background, mental health, and prospects of rehabilitation before imposing capital punishment.

There have been growing calls for considering alternatives to capital punishment in very serious cases of conviction, such as lifetime imprisonment without the possibility of parole. Alternative punishments can resolve the issue of security as well as satisfy concerns regarding punishment without having to resort to capital punishment. It is indicative of an evolving system toward reformative justice and rights protection while keeping in view violent crimes.

The future of death penalty case law in India, will be determined by the Indian Constitution's commitment to an equal, fair, dignified, and non-arbitrary manner. Whether on question of future use of the death penalty as an instrument of punishment, or on the question of continuing

to use the death penalty for a limited number of crimes, the justice system must continue to use principled, humane, and constitutionally consistent methods of sentencing.

CONCLUSION

The continued controversy surrounding the application of the death penalty in Indian criminal justice system is due to the fact that death penalty is a combination of legal, moral, penal, and constitutional issues. It can be noted that the concept of the "rarest of rare" was developed by the court in order to balance societal requirement of justice with the constitutional guarantees of Article 14 and 21. By means of various landmark cases like *Bachan Singh vs State of Punjab*[44] and *Machhi Singh vs State of Punjab*[45], the Supreme Court has attempted to make death penalty an extraordinary form of punishment.

In essence, the debate on the death penalty is one that is about more than the punishment of criminals; it is about the nature of the State. A justice system founded on the principles of law must constantly ask if fear and the finality of the death sentence make any contribution to justice at all.

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