

WHY THE QUESTION OF LIFE OR DEATH REMAINS THE MOST DIFFICULT ONE

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The Courts have for some time now grappled with the imposition of death penalty. There are legal and moral considerations that they must take into account, before they pass judgment. In a sense, the Supreme Court now sits in final judgment on the life or death of death row convicts, as they invariably prefer appeals. The difficulty arises where the personal views of Judges take precedence over objective criterion. Though ordinarily subjectivity is an accepted part of judicial process, the need for some measure of objectivity does arise where another man's life is at stake. This paper looks at why the question of imposing capital punishment is so difficult to resolve, due to the 'fluidity' of the 'rarest of rare doctrine', which it argues is two-fold. On one hand, the doctrine, as formulated by the Supreme Court has an 'inherent fluidity'; on the other hand, it has 'acquired fluidity' in its application by the Court in subsequent cases. The author suggests procedural solutions to bring in objectivity, such as a full hearing on sentencing even at the appellate stage.

I. INTRODUCTION

The Courts, as part of their judicial function, are often called upon, to decide the fate of a man: life or death. India has refused to abolish capital punishment¹, though both the legislature and judiciary have made efforts to ensure it remains an exceptional form of punishment. The statutory regime did temper in 1973 by obligating the Court to provide 'special reasons', for awarding a death sentence.²

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¹ As of 2008, 135 nations had abolished death sentencing entirely. Despite acceding to the ICCPR in 1979, which as per Article 6 requires the abolition of such punishment [General Comment 6 on Article 6 of ICCPR, 27th July, 1982, ¶6]; India has steadfastly refused to alter its sentencing policy.

² CODE CRIM. PROC. §354(3).

The Supreme Court went further, to ‘complement’ the statute³, by ruling that the penalty should only be imposed for the ‘*rarest of the rare*’ crimes, where the alternative remedy is unquestionably foreclosed.⁴ In the process, the Court enhanced the obligation on Courts, to provide concrete justifications for choosing capital punishment.

Indeed, the judiciary has for some decades now, been under an obligation to justify the imposition of the death sentence. This stems from legal and moral considerations⁵, fortified by a global trend towards the abolition of such an extreme penalty⁶. Particularly, a strong justification is critical since unlike other punishments, a death sentence is inherently irreversible.

Several cases have shown that the Court decisions lack consistency, often turning on personal philosophies of the Bench. This militates against fairness and due process, and is difficult to excuse where the question is literally, one of life and death. Practically every death sentence case comes up in appeal, leaving the Apex Court as the final arbiter of the lives of hundreds of convicts.⁷ Some murmurs

³ Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 663 (1995).

⁴ Bachan Singh v. State of Punjab, AIR 1980 SC 898 (May 9, 1980).

⁵ The legal considerations are the “special reasons” required under §354(3) of the Criminal Procedure Code, 1973, and that the crime be the “rarest of the rare” cases to merit capital punishment. The moral considerations are humanitarian ideals of mercy, the right to life of the accused, his potential for reformation and rehabilitation, and the inherent barbarity of legally sanctioning the taking of another’s life; see also Dalbir Singh v. State of Punjab, (1979) 3 S.C.C. 745, ¶ 5 (citing Harijan, Mar. 19, 1937) (explaining how Gandhi writes that the punishment is contrary to *ahimsa*).

⁶ AMNESTY INTERNATIONAL INDIA & PUCL, *Legal Lottery: Death Penalty in India* 12-15, (2008) available at <http://www.amnesty.org/en/library/asset/ASA20/007/2008/en/16f59d0b-15fc-11dd-8586-f5a00c540031/asa200072008eng.pdf> (last visited Oct. 10, 2011).

⁷ See, e.g., State (NCT of Delhi) v. Navjot Sandhu, (2005)11 S.C.C. 600; see also State of T.N. through Superintendent of Police CBI/SIT v. Nalini, A.I.R. 1999 S.C. 2640; see also *Ajmal Kasab Moves SC Challenging Death Penalty*, INDIA TV NEWS, July 29, 2011, <http://www.indiatvnews.com/news/india/ajmal-kasab-moves-sc-challenging-death-penalty-9506.html> (stating that the latest convict to appeal to the Supreme Court is Ajmal Kasab, convicted for the 26/11 terrorist attacks).

of self-doubt have emerged from the Court itself, and an effort to correct and draw standards has been made in *Ramnaresh & Ors. v. State of Chhattisgarh*⁸ (hereinafter *Ramnaresh*).

This article seeks to examine whether this effort has proved successful at all, and indeed whether any standardization is possible. It looks at various decisions under the 'rarest of rare' regime, and points out to the fluidity of the doctrine, which is partly 'inherent' because of the terms in which it was conceived, and partly 'acquired', due to subsequent interpretation of precedents. The broad patterns that emerge from these cases turn a casual understanding of the doctrine on its head, and beg for reform and clarity. In this background, the article looking at recent cases attempts to determine whether the principles in *Ramnaresh* lead to different outcomes.

The research methodology centres on bringing out the conclusions and reasoning of the Court, having read the quoted judgments, often as they appear in the text. Part II of the article discusses the scope of the doctrine, while Part III looks at the principles elucidated by the Court in a decision earlier this year. Part IV provides the central argument on its fluidity. Part V discusses a specific category of cases to buttress the central argument. Finally, Part VI puts forth suggestions for uniformity while Part VII adds some concluding remarks.

II. THE 'RAREST OF RARE' DOCTRINE

Until 1973, Courts were required to state reasons for *not* awarding a death sentence, and preferring the alternate sentence of life imprisonment, in a capital offence,⁹ making death sentence the 'rule' and life imprisonment the 'exception'. In *Jagmohan Singh v. State of U.P.*¹⁰ (hereinafter *Jagmohan Singh*), the Supreme Court upheld the death penalty's constitutionality, finding that it was not merely a deterrent, but a token of emphatic disapproval of the crime by the

⁸ A.I.R. 2012 S.C. 1357.

⁹ CODE CRIM. PROC., §367(5).

¹⁰ AIR 1973 SC 947

society. The Court felt that India could not risk experimenting with the abolition of death penalty; and any errors in sentencing could be corrected by appeals to higher courts.¹¹ But, the Court articulated a standard that the death penalty was the narrow exception, and not the rule in sentencing. The circumstances of the case had to compel it, to protect state security, public order or public interest.¹²

Thereafter, the new Code of Criminal Procedure, 1973, gave the accused a right of pre-sentence hearing under Section 235(2)¹³; and obligated the Court, under Section 354(3)¹⁴, to state “special reasons” for awarding death sentence, rather than the alternate term of life imprisonment.

Once again though, the constitutionality of the death penalty was upheld in 1980, in *Bachan Singh v. State of Punjab*¹⁵ (hereinafter *Bachan Singh*). In this judgment, while interpreting the “special reasons” requirement under Section 354(3), the Court formulated the *rarest of rare* doctrine, in the background of a vociferous assault by the appellant on the legitimacy of the death penalty as a means of punishment itself. This is reflected in the Court’s conclusion,

*“[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”*¹⁶

¹¹ *Id.* at ¶ 22.

¹² *Id.* at ¶ 29.

¹³ CODE CRIM. PROC. §235, Judgment of acquittal or conviction – “(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of §360, hear the accused on the question of sentence, and then pass sentence on him according to law.”

¹⁴ CODE CRIM. PROC. §354, Language and contents of judgment – “(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”

¹⁵ *Bachan Singh*, *supra* note 4.

¹⁶ *Id.* at ¶ 207.

The Court elaborated on two questions, which must be considered: *first*, was there something uncommon about the crime rendering a life imprisonment sentence inadequate and; *second*, were the circumstances of the crime such that there was no alternative but to impose the death sentence, even after according maximum weightage to the mitigating circumstances that spoke in favour of the offender.¹⁷ In a sense, these conditions requiring an *uncommon crime & lack of alternative* suggest a standard equal to what the Court later coined the ‘*rarest of rare*’ situation.

In any event, the standard wore a mere cloak of certainty, but was vague in substance¹⁸; and so the Court set out to clarify the latitudes of the doctrine in *Machhi Singh & Ors. v. State of Punjab*, (hereinafter *Machhi Singh*).¹⁹ This involved a case of extraordinary brutality. Due to a family feud Machhi Singh, along with eleven others, raided a number of homes killing seventeen people during the course of a single night, for no reason other than they were related to two members of the other feuding family. In deciding on the death sentence, the Court put itself in the position of the “community”, whose “collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”²⁰ The Court went on to elaborately elucidate when the community could harbour such a sentiment, along with illustrations.²¹ It provided five categories of murder, within which the ‘*rarest of rare*’ doctrine was to be practically applied.²² These include the motive; the manner of commission; the magnitude; the anti-social or abhorrent nature of the crime; and the personality of the victim. Courts were thereafter expected to decide

¹⁷ *Bachan Singh*, *supra* note 4, at ¶ 162.

¹⁸ The author refers to this as the *inherent fluidity* of the doctrine. See *infra* Part III for a detailed discussion.

¹⁹ (1983) 3 SCC 470

²⁰ *Id.* at ¶ 32.

²¹ See *infra* Annex.

²² *Machhi Singh*, *supra* note 20, at ¶¶ 33-36. See Annex.

the cases, aided by these illustrative guidelines. In that sense, they were to take a *loose view* of *Machhi Singh* as a precedent, since the illustrations went well beyond its factual matrix.²³

III. THE PRINCIPLES PUT FORTH IN RAMNARESH

The Apex Court in *Rammaresh*, decided earlier this year, was asked to consider death imposition of the death sentence on the accused in a brutal case of gang-rape and murder. The victim was strangled to death, during the gang-rape by her brother-in-law and four of his drunken friends. The Court set out to discuss and consolidate the principles on capital punishment.

The first and perhaps, most significant observation of the Court was that it was an “undisputable statement of law”, that it is neither possible nor prudent to state any universal formula which would be applicable to all cases where capital punishment has been prescribed. It would always depend upon the facts and circumstances of a given case. The Court noted that the “special reasons” required a consideration of matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality, the motive etc., which would never be identical in two given cases. It concluded, “it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles.”²⁴ Interestingly, it then observed that “the judicial principles” for imposition of death penalty were far from being uniform.

Ostensibly, reflecting on these “principles”, it reiterated that merely because a crime is heinous per se may not be a sufficient reason

²³ A ‘loose’ view of precedents is one where all points discussed by the Court, including those that go beyond the material facts required for the adjudication, are considered to be binding precedent. Such an approach blurs distinctions between *ratio decidendi* and *obiter dicta*. The contrary would be a ‘narrow’ view, where only the specific decision on the adjudicative facts before the Court is considered to have value as precedent. For a detailed discussion see KARL LLEWELLYN, *THE LEEWAYS OF PRECEDENT* 352 (1960).

²⁴ *Rammaresh*, *supra* note 9, at ¶ 26.

to award death sentence. The term “rarest of rare” itself emphasized that it would be restricted to exceptional cases, as did the obligation to provide “special reasons”. The principles had been dissected into two compartments, of aggravating circumstances and mitigating circumstances. The Court’s duty was to balance these two.²⁵

The Court went on to list out 13 aggravating and 7 mitigating circumstances.²⁶ The aggravating circumstances in general relate to the nature of the crime, while the mitigating circumstances generally concern the convict’s personality. Another noteworthy concern raised by the Court was the effect of the punishment on society as a whole, in terms of the retributive and deterrent aspect of imposing the death penalty.

Having set out these principles, the Court turned to the instant facts, and made some interesting conclusions. The death sentence was set aside and life imprisonment was awarded, on three grounds. First, the accused were all relatively young. Second, the death was caused by strangulation due to the gag tied around the victim’s mouth, and hence may have been coincidental to the rape being committed. Finally, and most interestingly, the Court considered that the victim was not a lawfully married wife, but rather a mistress of the accused’s brother. Ostensibly, this “may have been a matter of some concern for the family”²⁷.

In a later decision, *Brajendrasingh v. State of Madhya Pradesh*²⁸ the Court considered the principles set out in *Rammaresh* and added that it would not only have to examine whether the instant case falls under the category of ‘rarest of rare’ cases but also whether any other sentence, except death penalty, would be inadequate in the circumstances.

Despite a lucid enunciation of the principles by the Court, such unusual factors taken into account, in overturning the death

²⁵ *Id.* at ¶ 39.

²⁶ *Id.* at ¶ 39; *see also infra* Annex.

²⁷ *Id.* at ¶ 48.

²⁸ A.I.R. 2012 S.C. 1552.

sentence, are bound to raise eyebrows. At this juncture, it is pertinent to consider why decisions on capital punishment turn on such subjective considerations.

IV. INHERENT AND ACQUIRED FLUIDITY OF THE RAREST OF RARE DOCTRINE

The two Constitution Benches in *Jagmohan*²⁹ and *Bachan Singh*³⁰ resolutely refrained from standardization or classification of cases where capital punishment could be awarded, despite fervent pleas of the appearing counsels to do so, to protect the doctrine from the vice of arbitrariness. In *Jagmohan*³¹, the Court stressed that laying down standards would not serve any purpose; rather “the exercise of judicial discretion on well recognized principles is, the safest possible safeguard for the accused”. In *Bachan Singh*, it was contended that the term ‘special reasons’ in Section 354(3) of the Code was “*very loose*” and hence open to whimsical and arbitrary interpretation. But the Court said that standardization was a policy matter to be done by legislation, and it “would not by overleaping its bounds to rush to do what Parliament, in its wisdom, warily did not do.”³²

What is noteworthy is that the Court discussed the issue extensively over twenty-six paragraphs, giving over half a dozen reasons for non-standardization. It observed that such standardization was in any case, practically impossible, and the infinite variety of cases and their particular facets would make general standards either meaningless “*boiler plates*” or a statement of the obvious that no Judge would need.³³ Earlier in *Jagmohan*³⁴, it had been held that sentencing discretion was to be exercised judicially on “*well-recognised principles*”. It now clarified

²⁹ *Jagmohan Singh*, *supra* note 11, at ¶¶ 19-28.

³⁰ *Bachan Singh*, *supra* note 4, at ¶¶ 169-195.

³¹ *Jagmohan Singh*, *supra* note 11, at ¶ 26.

³² *Bachan Singh*, *supra* note 4, at ¶ 174.

³³ *Bachan Singh*, *supra* note 4, at ¶166 (quoting *McGautha v. California*, 402 U.S. 183 (1971)) (showing the American experience of the futility of such an exercise).

³⁴ *Jagmohan Singh*, *supra* note 11, at ¶ 27.

that this was a reference to judicial decisions illustrating different aggravating or mitigating circumstances. Consequently, though it propounded the standard of “*rarest of the rare*”, it is evident that it left the sentencing process as it came from the Legislature, flexible and responsive to the merits of each case. This, I submit, is the *inherent fluidity* of the doctrine. The Court’s decision takes the form of a general principle, rather than a narrow rule of law, which can be applied widely, to cases with materially different facts.³⁵

The strongest criticism of what the Court did is found in the dissenting opinion of Bhagwati, J.³⁶ A staunch abolitionist, he cautioned that the doctrine would give rise to a greater amount of subjectivity in decision making and render a person’s life dependent on the composition of the Bench, which was violative of Articles 14 and 21 of the Constitution. He raised a crucial point, arguing that the labels or epithets used for describing the crime, such as ‘brutal’, ‘cold blooded’, ‘gruesome’ etc., were not clear-cut categories, but only expressed the “*intensity of judicial reaction*” to the crime, which may not be uniform for all judges. Thus, the factors considered relevant by one judge may not be considered so by others.³⁷

Ostensibly, standardization of the doctrine came about with *Machhi Singh’s* categorization of crimes. But a look through these categories³⁸ shows that they fall into the very trap that Bhagwati, J., cautioned against, being *generalized* labels. Though the Court elaborated certain instances, these were only *illustrative*, as subsequent application of the judgment in later decisions has shown.³⁹

³⁵ Such an approach is at odds with the traditional common law rule of adjudication, which requires that the decision of the Court be confined to a strict interpretation of the material facts on record. For a further discussion see Ruggero J. Aldisert, *Precedent: What it is and What it isn’t, When do we Kiss it and When do we Kill it?*, 17 PEPPERDINE L. REV. 605 (1990).

³⁶ *Bachan Singh v. State of Punjab*, (1982) 3 S.C.C. 24.

³⁷ *Id.* at ¶ 301.

³⁸ *See infra* Annex.

³⁹ *See infra* Part V.

In the past decade, Sinha, J., in particular, repeatedly pointed this out. In *Aloke Nath Dutt v. State of West Bengal*⁴⁰ (hereinafter *Aloke Nath Dutt*), where the accused bludgeoned his sleeping brother to death over a property dispute, he cited a plethora of cases⁴¹ in which the Supreme Court awarded either death or life imprisonment to similarly situated convicts, without any justification for the difference in the outcome. He concluded by admitting the Court's failure to "evolve a uniform sentencing policy". After this extensive discussion, he finally spared the accused of the death penalty, holding that though the "manner of commission of the offence was gruesome", the "method applied could not be termed to be cruel." The murder was committed due to greed for money, arising out of his bad habits, whereby he was "pushed back to a situation where he thought he had no other option but to kill his brother."⁴² Though the decision does conform to precedents, where death penalty was not awarded as the conviction was based on circumstantial evidence⁴³, Sinha, J. clarifies that his conclusion is because the factual matrix does not warrant death penalty.⁴⁴

In *Swamy Shradananda v. State of Karnataka*⁴⁵ (hereinafter *Swamy Shradananda*), the accused murdered his wealthy wife, over finances and her apparent inability to give birth to a son. Sinha, J. felt death was unwarranted on the "specific facts and circumstances", but Katju, J. disagreed, holding that they fell within the first, second and fifth category enumerated in *Machhi Singh*. The matter was referred to a Full Bench, which acknowledged the changing social dynamics and incidences of crime since 1983, when *Machhi Singh* was pronounced. It concluded that the categories provided in that judgment were "very useful guidelines", but not inflexible, absolute or

⁴⁰ 2006 S.C.A.L.E. 467.

⁴¹ *Id.* at ¶¶ 154-182.

⁴² *Id.* at ¶ 183.

⁴³ *Sahdeo v. State of U.P.*, A.I.R. 2004 S.C. 3508; *Sheikh Ishaq v. State of Bihar*, 1995 (2) SCALE 271.

⁴⁴ *Aloke Nath Dutt*, *supra* note 41, at ¶¶ 90-92.

⁴⁵ A.I.R. 2008 S.C. 3040.

immutable. Further, this flexibility was envisaged in the rule in *Bachan Singh* itself; a reference to the *inherent fluidity* that I have already discussed. The Court went on to accept that the question of death penalty is not free from “*the subjective element*” and depends “*a good deal on the personal predilection of the judges*” constituting the Bench.⁴⁶ Death penalty was not confirmed, despite the Bench accepting that the murder was *gruesome and cold blooded*, on the ground that it did not cause any mental or physical pain to the victim and that the appellant had partially confessed his guilt before the High Court.

These cases evidence that the *rarest of rare* doctrine has *acquired* fluidity in its application, as the Court itself admits repeatedly. This occurs at two levels: *first*, the categorization in *Machhi Singh* itself being made in fairly general terms and; *second*, subsequent decisions, in any case, refusing to consider these as inflexible categories, instead deciding on the specific facts of the case. The latter introduces a host of external influences, including public opinion and the personal predilections of the judge. Sinha, J., admits to undue influence of public opinion in awarding death penalty too, with capital sentencing often becoming a media spectacle.⁴⁷

V. THE ILLUSION OF “APPLICATION OF SETTLED PRINCIPLES”

The Court in *Ramnaresh* spoke of examining each case in the light of “enunciated principles”. However, it is not clear as to what precisely these “principles” are, and when they are to be applied. In other words, what constitutes “the rarest of rare” circumstances is far from a settled position. What appears to be settled is a more fundamental principle – that life imprisonment is the rule, and death is the exception. But this is too broad to mitigate the discretion and subjectivity that may be applied to individual cases.

This discretion is reflected in numerous cases, decided by the Court over the years. By way of illustration, one may consider cases

⁴⁶ *Id.* at ¶ 33.

⁴⁷ Santosh Bariyar v. State of Maharashtra, (2009) 6 S.C.C. 498, ¶90

involving crimes against women. The Court has itself noted that the rising crime rate against women has made sentencing in such cases a matter of concern.⁴⁸ *Machhi Singh* had considered that the specific examples of bride burning, committed in order to remarry to collect dowry again; cold-blooded murders, where the murderer is in a dominating position or position of trust; and where death is brought about by inhuman acts of torture or cruelty, merited death sentence. Also, in the category of personality of the victim, “a helpless woman” and an “innocent child” were illustrative personalities that invited the death penalty.⁴⁹ Yet, the Court’s approach for crimes against women continues to fall prey to the fluidity of the ‘rarest of rare’ doctrine. Even in a single species of cases, say the rape and murder of a girl child, death sentence has not been uniformly imposed.⁵⁰

In *Dhananjay Chatterjee v. State of West Bengal*⁵¹ (hereinafter *Dhananjay*), the Court awarded death penalty to a security guard, who raped and killed a teenage girl as retaliation for his transfer on her complaint, as the savage crime “shocked the judicial conscience”. But in *State of Punjab v. Harchet Singh*⁵² (hereinafter *Harchet Singh*), decided in the same year, death was not awarded ostensibly because the offence was committed out of lust and not enmity. This distinction drawn between enmity and lust-based crimes seems frivolous, devoid of any legal or moral justification.⁵³

Two decisions of the Court in 2005, on the rape and murder of girl children, further expose the judicial dilemma. In *State of U.P. v. Satish*⁵⁴, the Court upheld death penalty where the victim was a six

⁴⁸ *Dhananjay Chatterjee v. State of West Bengal*, (1994) 2 S.C.C. 220, ¶14

⁴⁹ *Machhi Singh*, *supra* note 20, at ¶¶ 33-36.

⁵⁰ S.N. Sharma, *Rape and Murder of Girl Child: Application of Rarest of Rare Cases* (2007) available at http://www.ebc-india.com/practicallawyer/index2.php?option=com_content&itemid=1&do_pdf=1&id=6647.

⁵¹ *Dhananjay Chatterjee*, *supra* note 49, (well-known case as the accused is as of date, the last person to be executed in India, in 2004).

⁵² (1994) 3 Crim.L.J. (S.C.) 1529 (Oct. 5, 1993).

⁵³ AHMAD SIDDIQUE, *CRIMINOLOGY: PROBLEMS & PERSPECTIVES* 342 (4th ed. 1997).

⁵⁴ (2005) 3 S.C.C. 114.

year old girl, considering its views in Bachan Singh's case and Machhi Singh's case.⁵⁵ The Court reasoned that rape, an "iniquitous, flagitious act" in itself, becomes abnormal when the victim is a child, and reaches the lowest level of humanity when it is followed by brutal murder.⁵⁶ But in *Surendra Pal Shivbalakal v. State of Gujarat*⁵⁷, another Bench refused to uphold the death penalty where the accused had kidnapped, raped and murdered a teenage girl, because her mother had refused his sexual advances. The evidence was practically identical to *Satisb's case*, with a confession by the accused, and available circumstantial evidence of the accused being the last person seen with the victim, blood-stained clothes etc. In a single paragraph, the Court opined this was not a 'rarest of rare' case as the accused was aged 36 years at the time of the crime, without any criminal record, and was "a migrant labourer from U.P. living in impecunious circumstances".⁵⁸ The standard applied appears to be that there was nothing to establish that he would be a menace to the society in future, though the Court did not refer to any precedent for relying solely on such standard.

The Court has also ruled differently where death results from rape, compared to where murder is committed as a sequel to rape, though both cases are classified as 'murder' under Section 302⁵⁹ of the Indian Penal Code, 1860 (hereinafter IPC).⁶⁰ In *Amrit Singh v. State of Punjab*⁶¹, a 2nd standard girl died of excessive bleeding following a brutal rape. The Court refused to uphold the death sentence solely because death was "not intentional". In *Kumudi Lal v. State of U.P.*⁶², the accused tied

⁵⁵ *Id.* at ¶ 31.

⁵⁶ *Id.* at ¶ 2.

⁵⁷ *Surendra Pal Shivbalakpal v. State of Gujarat*, (2005) 3 S.C.C. 127.

⁵⁸ *Id.* at ¶ 13.

⁵⁹ PEN. CODE, §302, Punishment for murder – "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

⁶⁰ Under §376 of the IPC, the offence of rape is not punishable with death penalty. But in these cases, the accused have been convicted under §302 of the IPC as well, removing any legal justification for the Court's decisions.

⁶¹ A.I.R. 2007 SC 132.

⁶² (1999) 4 S.C.C. 108.

a salwar around the neck of his fourteen year old victim to prevent her from shouting while resisting rape; however, she died due to strangulation during the act. Again, he was spared the death sentence.

One of the most arbitrary decisions however remains *Ravindra Trimback Chouthmal v. State of Maharashtra*.⁶³ Here, the husband killed his eighth-month pregnant wife, to get more dowry by remarrying thereafter. The Court accepted that the “*blood-boiling*” act was committed to satisfy raw greed, but refused to consider it as a *rarest of rare* case since “dowry death has ceased to belong to *that* species of killing”, ostensibly a reference to their growing incidence. Interestingly, such a case is an explicit illustration in *Machhi Singh*’s categorization, but the Court completely overlooks it. The decision was severely criticized as it suggested that the ‘*rarest of rare*’ doctrine was not to be interpreted considering the extreme brutality or depravity of the crime, but instead by an almost literal understanding, dependent on the frequency of incidents.⁶⁴

Despite all its introspection, recent cases do not evince any improvement of the Court’s predicament. In the much publicised *Santosh Singh v. State*⁶⁵, famously known as the *Priyadarshini Matoo* case, the Court spared Santosh Singh the noose solely due to the circumstances he faced subsequent to the murder.⁶⁶ Earlier this year, in *Md. Mannan (@ Abdul Mannan v. State of Bihar*⁶⁷, where a small child was raped and murdered by a mason working in the house, the Court imposed death penalty, reasoning that the collective conscience had been shocked by the cruelty to an innocent, defenceless child who

⁶³ (1996) 4 S.C.C. 148.

⁶⁴ B. B. Pande, *Murder Most Foul, though not Rarest of Rare*, 5 SUPREME CT. CASES J. 1, 3 (1996).

⁶⁵ *Santosh Singh v. State through CBI*, (2010) 9 S.C.C. 747.

⁶⁶ *Id.* at ¶ 99 (“Undoubtedly, also the appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family.”)

⁶⁷ (2011) 5 S.C.C. 317.

did not provide even an excuse, much less a provocation for murder.⁶⁸ But in *Hareesh Mohandas Rajput v. State of Maharashtra*⁶⁹, involving similar facts and evidence, the Court refused to award death, despite finding conclusive evidence against the accused, based on the “considered opinion” that the case does not fall within the *rarest of rare* cases.⁷⁰

Some cases decided this year further illustrate the illusion of “application of settled principles”. In *Brajendrasingh*, a man, suspecting his wife’s fidelity, killed her and his three children; failing in his own attempt to commit suicide. His death sentence was set aside as the Court considered the fact that he had lost his own wife and children, and that the crime was committed out of “suspicion and frustration” as mitigating circumstances. In *Absar Alam v. State of Bihar*⁷¹, the accused killed his mother by chopping off her head and thereafter fled from the house with the head leaving behind her body. The High Court considered the dastardly and diabolical nature of the crime in awarding the death penalty, but the Apex Court set it aside considering that the accused was “an illiterate rustic and was a cultivator residing in a village with virtually no control over his emotions and has over-reacted impulsively to the situation.”

It is accordingly evident that the doctrine continues to be riddled with subjectivity and arbitrariness; moreover, its application over time, even specifically for the category of crimes against women, has been sheer chaos. Though the Court stresses its decision is based on “application of settled principles”, it ultimately turns on subjective considerations.

VI. SUGGESTIONS FOR UNIFORMITY IN SENTENCING

Martha Nussbaum argues that a legal system must protect against abuse due to moral arbitrariness in sentencing; for which there must be time to learn the whole complex history of the person whose

⁶⁸ *Id.* at ¶ 26.

⁶⁹ (2011) 12 S.C.C. 56.

⁷⁰ *Id.* at ¶ 30.

⁷¹ A.I.R. 2012 S.C. 968.

life is in question.⁷² She concludes that as law becomes more sophisticated, the influence of the judge's state of mind is reduced.⁷³ Bearing in mind such an objective, the following options may be considered:

- a) Death penalty as a punishment itself cannot be applied for all crimes and in fact, has not been accepted as an effective means of punishment in *all* situations.⁷⁴ Clearly, uniformity in application of the “rarest of rare” doctrine remains elusive. However, bearing in mind the trend towards gradual abolition of the death sentence, the Court would do well to restrict the “rarest of rare” scenarios to a certain category of crimes alone. For instance, the death penalty would be an appropriate punishment for a barbaric act of terrorism.⁷⁵ This includes both the active terrorist, such as a gunman or bomber, as well as the conspirators, since they are equally culpable for the offence. The basis for considering terrorism as the “rarest of rare” crime in contrast to the cases of murder that have been discussed earlier is four-fold. *First*, the taking of innocent lives to secure a political or religious end is indeed a special species of crime. The barbarity of the crime may be comparable to several of the murder cases discussed earlier; however, it is the motive that drives the perpetrators that makes it distinct and “rare”. *Second* such terrorists pose a security hazard if kept alive, as they may become bargaining chips for other terrorists in future attacks. This has happened before during the

⁷² Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 116-117 (1993) (explaining that reducing the scope of capital punishment would reduce the risk of arbitrariness in sentencing, and instead allow for broad, individuated decision making (citing *Walton v. Arizona*, 110 S. Ct. 3047 (1990) (Stevens, J., dissenting))).

⁷³ *Id.* at 111.

⁷⁴ *Bachan Singh*, *supra* note 4 at ¶ 207.

⁷⁵ Indeed, there may be some difficulty in defining a “terrorist” and there has been no international consensus on the issue; however, it is submitted that presently, the definition adopted by the Supreme Court in *Madan Singh v. State of Bihar*, 2004 (4) S.C.C. 622, may be considered, which is that a terrorism is a “peacetime equivalent of a war crime”.

IC-814 hijack, where three dreaded terrorists had to be exchanged in order to secure the release of the hostages on the hijacked plane. *Third*, the State incurs huge expenditure in keeping them alive, as there are needs for a high security prison, medical facilities, and deployment of additional security forces. Put in context, the cost of keeping Ajmal Kasab, the 26/11 attacker, alive has exceeded the amounts paid in compensation to the security forces martyred during the attacks, which begs the question whether the value of the terrorist's life exceeds that of the ordinary innocent civilian in India.⁷⁶ *Finally*, it is pertinent to note that the Ministry of Home Affairs, under Mr. P. Chidambaram has employed a formula for advising the President on clemency pleas: 'death for terrorists and clemency for others'. While clemency was granted to all persons convicted of murder, it been denied for Murugan, Santhan and Arivu, convicted for the assassination of Rajiv Gandhi, and Khalistan Commando Force terrorist Devinder Pal Singh Bhullar.⁷⁷ Such an approach may well be employed by the judiciary, at the sentencing stage itself. Such a formula would remove arbitrariness in sentencing entirely and simplify India's approach to the death penalty as a punishment. It is pertinent to note that the judiciary has not uniformly awarded the death penalty in all cases of terrorism thus far.⁷⁸

- b) In the meantime, it may be wiser to adopt procedural tests; for instance, a pre-sentence hearing, even at the appellate stage, where it is specifically proved that the accused is beyond all possible reform. This would account for any change in circumstances that

⁷⁶ Prafulla Marpakwar, *Cost of keeping Kasab alive: Rs 45 cr & counting*, TIMES OF INDIA, Feb. 22, 2011, http://articles.timesofindia.indiatimes.com/2011-02-22/india/28624789_1_ajmal-amir-kasab-arthur-road-jail-special-cell.

⁷⁷ Aman Sharma, *Chidambaram's Hang Terrorists Formula an Instant Hit*, INDIA TODAY (Aug. 13, 2011), <http://indiatoday.intoday.in/story/chidambaram-hang-terrorists-formula-an-instant-hit/1/147964.html>.

⁷⁸ Devender Pal Singh v. National Capital Territory of Delhi, AIR 2002 SC 1661; State through Superintendent of Police, CBI/SIT v. Nalini, AIR 1999 SC 2640; Krishna Mochi v. State of Bihar, *contra* Jayawant Dattatray Suryarao etc. etc. v. State of Maharashtra, AIR 2002 SC 143; Nazir Khan v. State of Delhi, AIR 2003 SC 4427.

have occurred since the sentence was first passed in the Trial Court, considering the lengthy litigation time-frames in the country. It would also ensure that the Court, which is the final arbiter on the question of a man's life or death, is forced to make a contemporary reasoned decision. This conforms to Nussbaum's characterization of a "mentalistic" attitude of an "ideal judge", which requires him to investigate the depths of every case. The Court itself has considered this procedural safeguard, particularly Sinha, J, who has made a case for it on several occasions.⁷⁹ Adopting a pre-sentence hearing even at the stage of confirmation by the Supreme Court, would ensure that the accused gets a full opportunity to have his case considered, as it stands on that day, considering that many years may have elapsed since he was first convicted by the trial Court.

VII. CONCLUSION

Bachan Singh, undoubtedly attempted a difficult task of balancing just judgment for the offender, and social consequences⁸⁰; in fact, it has been argued that the number of death sentences would have been far higher but for the judgement.⁸¹ *Ramnaresh* has attempted to set out the agreed standards to decide death sentences, but it remains to be seen if any uniformity will be achieved. As argued, the "rarest of rare" doctrine contains an *inherent fluidity*, exacerbated by subsequent interpretations and application, where it *acquired* even more instability. This piece has shown that even with regard to cases involving serious crimes against women and children, the Court has been unable to come up with uniform standards.

Admittedly though, a standard set in stone to decide on the death penalty is undesirable and perhaps impossible. This does not mean that objectivity is to be shunned all together. Even the most

⁷⁹ See, e.g., Santosh Bariyar, *supra* note 48.

⁸⁰ Nussbaum, *supra* note 73, at 109.

⁸¹ S. Muralidhar, *Hang Them Non, Hang Them Not: India's Travails with Death Penalty*, 40 J. INDIAN L. INST. 143 (1998).

vocal supporter of a dynamic judicial process would agree that though law need not stand still, it must certainly be stable.⁸²

⁸² Roscoe Pound, *Remarks on Status of the Role of Judicial Precedent*, 14 U. CIN. L. REV. 324, 326 (1940).

ANNEX

THE FACTORS SET OUT IN RAMNARESH V. STATE OF CHHATTISGARH

Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, etc. by the accused with a prior record of conviction for capital felony.
2. The offence was committed while the offender was committing another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
7. The offence was committed by a person while in lawful custody.
8. The offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty u/s. 43 Cr.P.C.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
2. The age of the accused is a relevant consideration but not a determinative factor by itself.
3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
5. The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.