The “Rarest of Rare” Doctrine:

Questioning the Administration of the Death Penalty in India

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I. INTRODUCTION

The recent hanging of the 1993 Bombay blasts convict Yakub Memon has fanned the already raging debate regarding capital punishment in India.[1] In this case, the doctrine of "rarest of rare" was applied yet again, in a quest to satisfy the collective conscience of Indian society. The phrase "rarest of rare" comes from a judgement of the Supreme Court of India in *Bachan Singh v. State of Punjab, 2 S.C.C. 684 (1980),*[2] where the constitutionality of the death penalty was called into question due to the obfuscation in its implementation. The constitutionality of the death penalty was upheld, but its application was restricted to the "rarest of rare" cases to curtail arbitrariness in application.[3]

The 35th Report of the Law Commission of India upheld capital punishment but did not recommend that the courts may award the death penalty only in special cases. However, contrary to this report, an amendment was made to Section 354(3) of the Code of Criminal Procedure requiring "special reasons" to be cited for awarding the death sentence in a particular case. The phrase "special reasons" was interpreted in the landmark judgement of *Bachan Singh*[4] to mean that the normal sentence for murder should be imprisonment for life, and only in the "rarest of rare" cases should the death penalty be imposed.[5] This case propounded that "aggravating and mitigating circumstances" be taken into account while awarding the death penalty, and also opined that Section 354(3) of the Code of Criminal Procedure lays down the due process framework for the death penalty, in light of expanding Article 21 jurisprudence in cases such as *Maneka Gandhi v.*

[1] Malini Parthasarathy, *A Case for Mercy*, THE HINDU (Jul. 23, 2015), http://www.thehindu.com/opinion/editorial/yakub-memon-death-sentence-a-case-for-mercy/article7452747.ece (last visited Apr. 12, 2016).
[2] Bachan Singh v. State of Punjab, 2 S.C.C. 684 (1980).
[3] Id.
[4] Id.
[5] Supra, note 1.

Union of India, 1 S.C.C. 248 (1978).[6] For surrounding circumstances, *Bachan Singh*[7] places reliance on pre-sentence hearings as under Section 235(2) of the Code of Criminal Procedure.

Even though cases such as *Machhi Singh v. State of Punjab, 3 S.C.R. 413 (1983)*[8] attempted to clarify its scope and application, the doctrine of 'rarest of rare' remains veiled in ambiguity. Owing to the lack of an authoritative definition, this doctrine is coloured by the values and beliefs of the judges in question. In 2008, Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) conducted a study titled "Lethal Lottery: The Death Penalty in India," analysing death penalty cases decided by the Supreme Court of India from 1950 to 2006. The report confirmed that the administration of the death penalty in India has long been an arbitrary exercise, and it was observed that under similar circumstances some convicts were awarded the death penalty and others were not. Over the years, those who make the case for abolition of the death penalty have relied heavily on the arbitrariness of the very doctrine behind its administration. The most recent 262nd Report of the Law Commission of India stated that "arbitrariness has remained a major concern in the adjudication of death penalty cases in the 35 years since the foremost precedent on the issue was laid down."[9]

The various issues stemming from this doctrine and its application have been evaluated in this paper. The main object is to present a critical analysis of the application of the "rarest of rare" doctrine in the administration of the death penalty in India. From this evaluation, the researcher shall determine whether the issues of subjectivity and arbitrariness mandate its abolition. The four

[6] Maneka Gandhi v. Union of India, 1 S.C.C. 248 (1978).
[7] Supra, note 2.
[8] Machhi Singh v. State of Punjab, 3 S.C.R. 413 (1983).
[9] *262nd Report: The Death Penalty*, LAW COMMISSION OF INDIA (2015), http://lawcommissionofindia.nic.in/reports/Report262.pdf (last visited Mar. 10, 2016).

inter-related issues afflicting the "rarest of rare" doctrine that will be presented through this paper are:

i. Lack of a standard definition of what "rarest of rare" is;

ii. Distortion in the interpretation of the doctrine over time;

iii. Judicial discretion in pronouncement of the death sentence; and

iv. Arbitrariness in application of the doctrine.

A. *Hypothesis*

"The subjectivity and arbitrariness that has crept into capital punishment in India due to the doctrine of 'rarest of rare' has mandated the abolition of the death penalty in India."

B. Research Questions

i. How do the procedural issues of the "rarest of rare" doctrine viz. lack of a standard definition, distortion in its interpretation, and judicial discretion influence the application of the death penalty in India?

ii. Do these issues provide sufficient justification for the abolition of the death penalty?

C. Research Methodology

In accordance with the objectives of this research paper, the method of doctrinal research has been applied, which entails collection and analysis of data from existing materials such as books, articles, *et cetera*. Primary sources such as legislation, case law, and empirical studies and secondary sources such as books, journal articles, law review articles, law commission reports,

and newspaper reports have been utilised extensively for this purpose. Examples of factually similar cases with disparate sentences have also been taken up to highlight arbitrariness in the application of the "rarest of rare" doctrine. The research method is descriptive.

D. Roadmap

The challenges identified above shall be addressed in a systematic fashion. Part II of this research paper shall address a three-fold concern: first, the challenges posed by lack of a definition of "rarest of rare"; second, the distortion and misapplication of the doctrine as it was originally envisaged (stemming from the lack of a clear definition); and third, the role of "collective conscience" in sentencing.

Part III shall first address the issue of judge-centrism and the resultant inconsistency and unpredictability in application of the "rarest of rare" doctrine. From there, it shall proceed to examine factually similar instances with disparate sentences. Lastly, it shall address the differential impact the death penalty tends to have on vulnerable sections of Indian society.

In the conclusion (Part IV), the impossibility of balancing uniform application of the death penalty with individualized sentencing has been discussed. The findings of the paper have been summarized, and it has been evaluated if the researcher's initial hypothesis has proven to be true.

This paper ends with a detailed bibliography of sources in Part V.

II. DEFINITIONAL CHALLENGES AND DISTORTION OF THE DOCTRINE

A. Lack of a definition of "rarest of rare"

The genesis of the "rarest of rare" doctrine lies in the interpretations accorded to the 35th Report of the Law Commission of India, which recommended the retention of the death penalty in

1967. The opinion expressed was that India's social, moral, and educational levels, coupled with its diversity, vast area, and need to maintain law and order, did not warrant the abolition of the death penalty at that time.[10] The report explicitly clarified that it does not make any recommendation to the effect that life imprisonment should be the normal sentence for murder, and that the death penalty may be awarded in the presence of aggravating circumstances.[11] However, Section 354(3) of the new the Code of Criminal Procedure (1973) went contrary to this recommendation, requiring "special reasons" to be given when the death sentence was imposed for an offence where the prescribed punishment was an option between life imprisonment and death.[12]

It was while determining the constitutionality of capital punishment and interpreting the phrase 'special reasons' that the Supreme Court of India formulated the "rarest of rare" doctrine in 1980 in the landmark judgement of *Bachan Singh.*[13] The Court expressed it in these words: "A real and abiding concern for the dignity of human life postulates resistance to taking a life…That ought not to be done save in the rarest of rare cases."[14] The Constitution Bench clarified the scope of *Jagmohan Singh v. State of Punjab, 1 S.C.C. 20 (1973),*[15] which had laid down that discretion in the matter of sentencing is to be exercised by the judge after balancing all the aggravating and mitigating circumstances of the crime. This case had been decided when the old Code of Criminal Procedure (1898) was in force, Section 367(5) of which provided for reasons to be cited by the Court for refraining from awarding the death penalty if in an offence punishable with death, the

[10] Pamela Philipose, *Is This Real Justice?*, THE HINDU (Sep. 10, 2011), http://www.thehindu.com/features/magazine/article2442039.ece (last visited Feb. 25, 2016).
[11] *35th Report*, LAW COMMISSION OF INDIA, http://lawcommissionofindia.nic.in/1- 50/Report35Vol1and3.pdf (last visited Feb. 20, 2016).
[12] Supra, note 9, at 7.
[13] Supra, note 2
[14] Id.
[15] Jagomohan Singh v. State of Punjab, 1 S.C.C. 20 (1973).

convict was sentenced to a punishment other than death. It was observed in *Bachan Singh*[16] that, under the Code of 1898, the sentence of death and the sentence of imprisonment for life provided for under Section 302 ("Punishment for Murder") of the Indian Penal Code 1860 could be imposed after weighing and comparing the aggravating and mitigating circumstances of the particular case. However, in view of Section 354(3) of the Code of Criminal Procedure,[17] the death sentence could be imposed only as an exception in "rarest of rare" cases, and the legislative policy had obviated the necessity of balancing the aggravating and mitigating circumstances, although they must be given due weight.[18]

The "rarest of rare" doctrine was intended to make the administration of death penalty coherent, by according due significance to aggravating and mitigating circumstances and ensuring that the death penalty is imposed only in extreme cases. In *Bachan Singh*,[19] the Court accorded a progressive interpretation to Section 302 of the Indian Penal Code 1860 that made life imprisonment the normal punishment of murder. The courts could deviate from this rule only if there were special reasons, which were to be recorded in writing, and only when the option of awarding the sentence of life imprisonment was unquestionably foreclosed.[20] This case sought to bring some clarity to instances in which the death penalty could be applied but provided ample room for judicial discretion. The significant contribution of this case was to shift focus from only the crime to both the crime and criminal.

[16] Supra, note 2.
[17] Section 354 (3) of the Code of Criminal Procedure 1973 effectively reversed the position of the law under Section 367(5) of the Old Code, and reads: "(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."
[18] Sangeet & Anr. v. State of Haryana, 2 S.C.C. 452 (2013).
[19] Supra, note 2.
[20] Id.

In order to assist courts, *Bachan Singh*[21] laid down illustrations of aggravating and mitigating circumstances and interpreted the intent of the legislature to be that "for persons convicted of murder, life imprisonment is the rule and death sentence an exception."[22] However, the Court abstained from thorough standardization. To date, this lack of definition continues to be one of the most severe drawbacks of the death penalty in India, as it provides room for human life to be taken away based on a subjective doctrine.

In *Santosh Kumar Bariyar v. State of Maharashtra, 6 S.C.C. 498 (2009),*[23] the Supreme Court of India explained that the doctrine of "rarest of rare" is meant to serve as a guide for the application of Section 354(3) of the Code of Criminal Procedure, and reaffirmed that life imprisonment is the rule and death is an exception, to be conferred only in exceptional cases. The judgement went on to say that since the scope of exceptions is limited, there is a heavy burden on a court opting for capital punishment to conduct a thorough and objective assessment of the facts and circumstances. Another milestone that sought to clarify the scope of this doctrine was *Machhi Singh*.[24] The Supreme Court of India introduced the "balance sheet theory" under the regime of the new Code of 1973, in which the aggravating circumstances pertaining to the crime were sought to be balanced with and compared to the mitigating circumstances of the criminal. But this aspect of balancing aggravating and mitigating circumstances was not accorded much weight in the judgement, and the primary focus of the case was laying down five categories of cases in which it would be appropriate to award the death penalty.[25] In this way, *Machhi Singh*[26] considerably

[21] Supra, note 2.
[22] Id.
[23] Santosh Kumar Bariyar v. State of Maharashtra, 6 S.C.C. 498 (2009).
[24] Supra, note 8.
[25] Manner of Commission of Murder, Motive for Commission of Murder, Anti-Social or Socially Abhorrent Nature of the Crime, Magnitude of Crime, and Personality of Victim of Murder.
[26] Supra, note 8.

enlarged the scope of application of the death penalty, beyond what was envisaged in *Bachan Singh*[27]. Not only did *Machhi Singh*[28] deviate from the decisions of the constitution bench against the standardisation and classification of "rarest of rare" cases, but it also lay the foundation for a series of problematic judgements. In subsequent cases, it was considered to be referring only to the nature and heinousness of the crime, and this analysis sidelined consideration of mitigating circumstances.[29] This case provides a classic example of the disadvantage of too wide a scope for application of the death penalty, and has been discussed in detail in the following section.

B. Distortion and Misapplication of the Doctrine of "Rarest of Rare"

To understand how the "rarest of rare" doctrine was meant to be applied, the *Bachan Singh*[30] ruling must be studied in its entirety, based on which a court can confer the death penalty on a convict only when the alternative option of life sentence is "unquestionably foreclosed." The Indian criminal justice system is based on the concept of reformation, and the rationale behind studying aggravating and mitigating circumstances is to determine its possibility and scope. This case unequivocally holds that only when the convict is beyond reformation should the court resort to capital punishment.

The *Machhi Singh*[31] case referred to in section A hereinbefore laid the groundwork for the second objection to the "rarest of rare" doctrine, i.e. misinterpretation and misapplication of the doctrine. It has been misapplied by Indian judiciary starting with the *Machhi Singh*[32] judgement, which made the nature of the crime the central focus of capital punishment. The doctrine has been

[27] Supra, note 2.
[28] Supra, note 8.
[29] Madhumita Mitra, *'Rarest of Rare Case' Standard: Dealing with the Judge Centric Approach*, LEX WITNESS (2013), http://www.witnesslive.in/in-depth/78-death-penalty-rarest-of-rare-case-standard-dealing-with-the-judge-centric-approach#sthash.Yx8XrtEj.dpuf (last visited Feb 20. 2016).
[30] Supra, note 8.
[31] Id.
[32] Id.

misunderstood as referring to the heinousness of the crime alone, while its focus is meant to be on the mitigating circumstances of the convict, especially the scope of his/ her reformation.[33]

In the case of *Ravji (alias Ram Chandra) v. State of Rajasthan, 2 S.C.C. 175 (1996),*[34] the Supreme Court of India imposed the death penalty by holding that only characteristics relating to the crime, to the exclusion of the ones relating to the criminal, are relevant to sentencing in criminal trials: "...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial…" In 2009, *Bariyar*[35] became the first case to declare the *Ravji*[36] judgment *per incuriam* by virtue of being in contradiction to the ruling of a Constitution Bench in *Bachan Singh*[37] and not considering mitigating circumstances of the criminal at the sentencing stage.[38] *Machhi Singh*'s[39] categorization of the crime was, however, accepted as the broad guideline for imposition of the death penalty on convicts in several cases, including on one of the perpetrators of the 2008 Mumbai terror attacks.[40] This highlights the chief issue regarding distortion of the essence of "rarest of rare," that of consideration of the nature of the crime as opposed to the circumstances of the criminal.[41]

A recent judgement which gives due significance to the reformation theory of criminal justice is the decision of a three-judge bench of the Supreme Court of India in *Sushil Sharma v.*

[33] Anup Surendranath, *On the Verge of Unconscionable Hangings*, THE HINDU (Oct. 18, 2013), http://www.thehindu.com/opinion/op-ed/on-the-verge-of-unconscionable-hangings/article5244610.ece (last visited Feb. 23, 2016).
[34] Ravji alias Ram Chandra v. State of Rajasthan, 2 S.C.C. 175 (1996).
[35] Supra, note 23.
[36] Supra, note 35.
[37] Supra, note 2.
[38] Supra, note 29.
[39] Supra, note 8.
[40] Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra, 8 S.C.R. 295 (2012).
[41] Supra, note 29.

State of N.C.T. Delhi, 8 S.C.R. 295 (2012).[42] It was held that Sharma did not deserve the death penalty for murdering his wife and trying to dispose of her body by burning it in an oven. The Court emphasized that the state had not led any evidence to show that Sharma was beyond reformation. The fact that it is the state's burden to prove the impossibility of reformation was articulated in *Bachan Singh*[43] and has continually been overlooked. Judges must explain how the evidence presented warrants the conclusion that the convict is indeed beyond reformation, and if no such evidence is presented, there must be a presumption of reformation. Reformation is relevant to all prisoners irrespective of the nature of the crime, age, sex, and social background, and to argue that an individual cannot be reformed because of the nature of the crime he has committed is a popular but perverse articulation of what was intended in the *Bachan Singh*[44] judgement.[45]

C. Satisfaction of the "Collective Conscience": The Problem of Public Opinion

Machhi Singh[46] laid down the "collective conscience" doctrine as an extension of the "rarest of rare" doctrine. It was propounded that the court may award the death penalty when it is deemed that society's collective conscience would be so shocked that it would expect the judiciary to do so, irrespective of the personal opinion of judges regarding desirability or otherwise of such penalty. The judgement talks about the abhorrent nature of the crime, the manner of the commission of the murder, and gives an example of a murder committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner, or where the victim was subjected to inhuman acts of torture or cruelty in order to bring about his or her death as instances which would shock society's collective conscience.[47]

[42] Sushil Sharma v. State of N.C.T. Delhi 4 S.C.C. 317 (2014).
[43] Supra, note 2.
[44] Id.
[45] Supra, note 32.
[46] Supra, note 8.
[47] Id. Reaffirmed in Prajeet Kumar Singh v. State of Bihar, 4. S.C.C. 434 (2008).

An implication of this doctrine is that it takes public opinion and societal values as the yardstick for imposition of the death penalty, and runs contrary to the spirit of *Bachan Singh.*[48] An example of the application of the "collective conscience" doctrine can be located in the Nirbhaya case judgement. The incident took place in in New Delhi on 16 December 2012, when Jyoti Singh, a 23-year-old paramedic student, was assaulted, brutally gang-raped in a moving bus, and then thrown off it onto a main road.[49] This aroused massive public opinion in favor of the death penalty for the six perpetrators, and it was said that the savagery of the attack and depravity of the attackers had earned this crime a "rarest of rare" classification, warranting capital punishment.[50] Justice Yogesh Khanna of the Saket District Court, New Delhi, while pronouncing the death sentence for all perpetrators, held, "There should be exemplary punishment in view of the un-paralleled brutality with which the victim was gang-raped and murdered, as the case falls under the rarest of rare category. All be given death."[51] The verdict of death for the bestial gang rape in Delhi last December is based on the same lines as the *Machhi Singh*[52] reasoning, and exemplifies the distortion of the "rarest of rare" doctrine as envisaged by the judiciary in *Bachan Singh.*[53]

Trial of cases in print and television media is another menace building pressure on judges to satisfy the "collective conscience." While addressing a meeting held by the Bar Council of India in Chennai, Justice Kurian said, "Please stop trying (cases) in the media till a case is over. Never try a case in the media … it creates a lot of pressure on judges; they are also human beings."[54] He

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[48] Supra, note 2.
[49] Smriti Singh, *Delhi Gang Rape: Case Diary*, THE TIMES OF INDIA (Sep. 13, 2013), http://timesofindia.indiatimes.com/india/Delhi-gang-rape-Case-diary/articleshow/22455125.cms (last visited Mar. 18, 2016).
[50] Supra, note 29.
[51] Supra, note 2.
[52] Supra, note 49.
[53] Supra, note 8.
[54] '*Media Trials Strain Us,' Says SC Judge*, THE TIMES OF INDIA (Jul. 26, 2015), http://timesofindia.indiatimes.com/india/Media-trials-strain-us-says-SC-judge/articleshow/48221249.cms (last visited Mar. 18, 2016).

recalled how a judge who had adjudicated the Nirbhaya rape case had once told him: "If I had not given that punishment they would have hung me: the media had already given their verdict, (like) it is going to be this only."[55]

In *Dhananjoy Chatterjee v. State of West Bengal, 2 S.C.C. 220 (1994),*[56] the Supreme Court of India opined that the imposition of appropriate punishment reflects the court's response to society's cry for justice, and that the punishment inflicted should reflect public abhorrence of the crime. However, Arthur Chaskalson, who served as Chief Justice of South Africa from 2001 to 2005, has rightly pointed out that "society's cry" is an uncertain, unreliable, and arbitrary foundation for justice.[57] He was of the opinion that public opinion is of relevance to the enquiry, but is certainly not a substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions fearlessly.[58]

III. JUDICIAL DISCRETION LEADING TO ARBITRARINESS

A. A Judge-Centric Approach to the Death Penalty

The previous chapter averred to the massive public opinion in favor of the death penalty for the perpetrators of the Nirbhaya incident. Regardless of public opinion and emotions, application of the rule of law fairly and justly to criminal proceedings is the cornerstone of the Indian criminal justice system, and it is the judiciary's mandate to close its eyes to personal and public opinion and try cases on their own merit. However, justice is often subjective and invariably carries a "good deal of personal predilection of the judges."[59] In a study undertaken by *Caravan* magazine to highlight subjectivity, death penalty cases before two different judges were analyzed.

[55] Id.
[56] Dhananjoy Chatterjee v. State of West Bengal, 2 S.C.C. 220 (1994).
[57] Supra, note 10.
[58] Id.
[59] Swamy Shraddananda v. State of Karnataka, 13 S.C.C. 767 (2008).

It was found that out of the 33 death penalty cases Justice Arijit Pasayat of the Supreme Court of India adjudicated, he confirmed the award in 15, while Chief Justice of the Delhi High Court, Justice A.P. Shah did not confirm the death penalty in any of the 15 cases that came up before him.[60]

A recent introspective judgment in which the Supreme Court of India expressed its concern over this judge-centric approach to the death penalty is *Sangeet & Anr*.[61] The Court demonstrated through case law how the death penalty jurisprudence set out in the Constitutional Bench decision in *Bachan Singh* has been repeatedly ignored and that the "rarest of rare" principle has not been followed uniformly or consistently.[62] The judgment was delivered after an appeal to the president of India by 14 retired judges in August 2012 to commute the death sentence of nine convicts to life imprisonment. The judges pointed out that the Supreme Court of India had admitted that in three instances, death sentences had been awarded *per incuriam* and contrary to the rationale of the *Bachan Singh*[63] ruling.

This judgement gave examples of cases such as *Shivu v. Registrar General, High Court of Karnataka, 4 S.C.C. 713 (2007),*[64] *Rajendra Pralhadrao Wasnik v. State of Maharashtra, 4 S.C.C. 37 (2012),*[65] and *Mohd. Mannan v. State of Bihar, 5 S.C.C. 317 (2011)*[66] to illustrate how the

[60] Suhrith Parthasarthyn, *Final Word: How the judiciary misappropriated the phrase 'collective conscience,'* CARAVAN (Aug 1. 2015), http://www.caravanmagazine.in/perspectives/final-word-collective-conscience?page=0%2C1#sthash.BnTtPT0d.dpuf (last visited Apr. 10, 2016).
[61] Supra, note 18.
[62] Supra, note 29.
[63] Supra, note 2.
[64] Shivu v. Registrar General, High Court of Karnataka, 4 S.C.C. 713 (2007).
[65] Rajendra Pralhadrao Wasnik v. State of Maharashtra, 4 S.C.C. 37 (2012). This case involved the rape and murder of a three-year-old child in a vicious and brutal manner. This Court confirmed the sentence of death after taking into consideration the brutal nature of the crime but not the circumstances of the criminal.
[66] Mohd. Mannan v. State of Bihar, 5 S.C.C. 317 (2011). It was the case of a brutal rape and murder of a seven-year-old girl. While confirming the sentence of death, this Court referred to the nature of the crime and the extreme indignation of the community.

application of the death penalty depends on the discretion of individual judges. These cases based their ruling on the same principles as those used in *Chandra*,[67] discussed above, despite that case having been declared *per incuriam*. Often, extreme public indignation and pressure influence judges and affect their ability to remain unbiased harbingers of justice. In such cases, judges are unable to accord weight to the mitigating circumstances of the criminal and opt to satisfy the "collective conscience" instead.

B. Examples of Factually Similar Cases with Disparate Sentences

Even if aggravating and mitigating circumstances are duly considered, it remains unclear how different judges accord weight to such circumstances.[68] Under similar fact situations, some convicts are awarded the death penalty and others are not. Kavita Krishnan of the All India Progressive Women's Association offered the example of the sentencing in a series of murders in 2006 in the Khairlanji area of the western state of Maharashtra. The murders, in which a woman and her three children were killed by a mob, allegedly arose out of caste discrimination against Dalits. The mother of the family was dragged by her hair and dunked in a drain several times before being beaten to death with sticks and bicycle chains, and her three children, two sons aged 21 and 19 and a daughter aged 17, were also beaten to death.[69] After the killings, the bodies were thrown into a river and subsequently fished out. A fast-track trial court convicted eight farmers of murder and sentenced six of them to death. But in 2010, the Bombay High Court commuted the death sentences to 25-year prison terms on the ground that the convicted men had no prior records.[70] It also upheld the trial court's ruling that this was not a caste-based crime and that the

[67] Supra, note 34 at 175.
[68] Tripti Lahiri, *Death Penalty: What Is 'the Rarest of Rare?'* WALL STREET JOURNAL (Sep. 13, 2013), http://blogs.wsj.com/indiarealtime/2013/09/13/death-penalty-what-is-the-rarest-of-rare/ (last visited Mar. 25, 2016).
[69] Id.
[70] Id.

crime was a spontaneous act of revenge after the Dalit woman and her daughter had implicated the men in an assault on a family friend. The state of Maharashtra has asked the Supreme Court of India to set aside that decision, but the Apex court has not yet ruled. Kavita Krishnan has compared this case to the Nirbhaya gang rape in Delhi, and referring to the grotesque and brutal nature of both crimes she has correctly asserted that there is no uniform basis for what qualifies as "rarest of rare"; it varies from judge to judge.

Another instance that is comparable with the Delhi gang rape case is that of *Surendra Pal Shivbalakpal v. State of Gujarat, 3 S.C.C. 127 (2005),*[71] where a death sentence was commuted to life in prison in a case involving the brutal rape and murder of a girl. Due consideration was given to the background of the convict, the fact that there was no evidence that he had been involved in any other criminal case, and that he was susceptible to committing such a crime. In *State of Maharashtra v. Man Singh, 3 S.C.C. 131 (2005),*[72] too, the court refrained from awarding capital punishment, although the offence involved was rape with murder. Justice S.B. Sinha considered all these judgements in *Aloke Nath Dutta & Anr. v. State of West Bengal, 12 S.C.C. 230 (2007)*[73] to illustrate how, on similar facts, the court often takes contrary views on awarding death penalty to the convict.

A further example of personal predilection of judges guiding their judgements could be a comparison of the Justice Jyotsna Yagnik's invocation of human dignity while not awarding the death penalty for the Naroda-Patiya massacre,[74] and Justice M.L. Tahiliani's confirmation of the same for Ajmal Kasab[75] in the 2008 Mumbai terror attacks case. The crime committed in the

[71] Surendra Pal Shivbalakpal v. State of Gujarat, 3 S.C.C. 127 (2005).
[72] State of Maharashtra v. Man Singh, 3 S.C.C. 131 (2005).
[73] Aloke Nath Dutta & Anr. v. State of West Bengal, 12 S.C.C. 230 (2007).
[74] Mayaben Surendrabhai Kodnani v. State of Gujarat, S.C.C. OnLine Guj 6510 (2013).
[75] Supra, note 40 at 295.

former case was a grotesque manifestation of state-sponsored communal violence in India, while the latter an act of terrorism by the Lashkar-e-Taiba. The culpability of perpetrators of both crimes is the same, but the punishment they have received is qualitatively different.[76] Scholars have speculated about what Kasab's fate would have been if he had appeared before Justice Yagnik rather than Justice M.L. Tahiliani,[77] and this very unpredictability in administration lies at the heart of the objections to the death penalty in India.

The primary issue is whether it is possible to develop a model of administering the death penalty that is consistent and non-arbitrary. Justice Yagnik chose not to impose the death penalty because of her commitment to the position that the human dignity of all convicts must be respected; Judge Tahiliani either does not subscribe to that view or believes that it is inappropriate for a trial judge to take such considerations into account.[78] Either way, the "rarest of rare" framework ultimately leaves significant scope for judicial discretion.

C. Disparate Impact of the Death Penalty on Marginalized Sections of Indian Society

The death penalty is more likely to be given to defendants deemed to be from a lower social class. "Do we ever see a privileged middle-class person with decent legal representation sentenced to death?" said Karuna Nundy, an acclaimed lawyer practising in the Supreme Court of India. The "collective conscience" reflects India's geographic and cultural divisions and is not equally sensitive or responsive to all brutal crimes. A study on the death penalty conducted by students of the National Law University, New Delhi showed that there were caste and religious biases in the imposition of death penalty in India. According to the data, 373 prisoners across India were

[76] Anup Surendranath, *Death is Entirely Discriminatory*, THE HINDU (Sep. 17, 2012), http://www.thehindu.com/opinion/lead/death-is-entirely-discriminatory/article3904606.ece (last visited Mar. 17, 2016).
[77] Id.
[78] Id.

awarded the death penalty between June 2013 and January 2015, 76 percent of whom belonged to economically weaker sections, backward castes, and religious minorities.[79] The study also indicated that 94 percent of the persons given death sentence for terror-related cases belonged to Dalit caste or religious minorities.[80] While this research does not make a case for direct discrimination, disparate impact of the death penalty on vulnerable socioeconomic groups must be acknowledged while studying its administration in India.[81]

In recent times, murmurs of self-doubt regarding subjectivity, arbitrariness, and disparate impact of the application of the death penalty have been emerging from the judiciary itself. In *Shankar Kisanrao Khade v. State of Maharashtra, 5 S.C.C. 546 (2013*),[82] the Supreme Court of India took note of statistics of the death penalty and stated that they suggest that the death penalty is being applied much more widely than was envisaged by *Bachan Singh.*[83] In *Bariyar*,[84] the Court held that there is no uniformity in precedents and that the death penalty has been affirmed or refused by the court without reference to any legal principle.[85] The bench went on to say that there is variation in how the ruling in the *Bachan Singh*[86] case has been implemented, as the case advocated for principled, and not judge-centric, sentencing. In *Shraddananda*,[87], the court again noted that "the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this court depends a good deal on the

[79] Utkarsh Anand, *Explained: In the Supreme Court, some questions of life and death*, THE INDIAN EXPRESS (May 27, 2015), http://indianexpress.com/article/explained/explained-in-the-supreme-court-some-questions-of-life-and-death/ (last visited Apr. 01, 2016).
[80] Id.
[81] Shankar Kisanrao Khade v. State of Maharashtra, 5 S.C.C. 546 (2013).
[82] Supra, note 2.
[83] Supra, note 23.
[84] Id.
[85] Supra, note 2.
[86] Supra, note 59.
[87] Id.

personal predilection of the judges constituting the bench."[88] The court emphasized the deficiency of the criminal justice system due to lack of consistency in the sentencing process given by the Supreme Court of India; neither the "rarest of rare" principle nor the "balance sheet theory" are followed universally.[89] Such concerns have been reiterated on multiple occasions, where the Court has pointed out that the "rarest of rare" dictum propounded in *Bachan Singh*[90] has been inconsistently applied.

IV. CONCLUSION

It is evident that the "rarest of rare" doctrine is a double-edged sword. *Jagmohan Singh*[91] and *Bachan Singh*[92] held against standardization of cases and circumstances, thereby paving the way for judicial discretion and for subjectivity and arbitrariness in application, which varies from case to case. The taking away of human life then depends on every judge's conception of what constitutes aggravating and mitigating circumstances as well as his personal predilection, bias, and preconceived notions. On the other hand, judgements like *Machhi Singh*,[93] which sought to standardize categories of cases to be considered "rarest of rare," were criticised for not leaving room for judicial discretion. Such standardization also works against defendants, as it focuses only on the nature of the crime to the exclusion of the defendant's background and the circumstances of the case. Either way, the "rarest of rare" seems to be fundamentally flawed.

Over the years, achieving a balance between judicial discretion and individualized sentencing has proved to be an impossible task.[94] Talk is rife in academic circles that is time for

[88] Id.
[89] Supra, note 2.
[90] Mithu v. State of Punjab, 2 S.C,R. 690 (1983).
[91] Supra, note 15.
[92] Supra, note 2.
[93] Supra, note 8.
[94] Supra, note 76.

the Supreme Court of India to recognize that it is attempting the impossible by trying to achieve a consistent application of the death penalty while maintaining the discretion of judges.

Absolute removal of judicial discretion does not seem to make the administration of the death penalty any more just or fair, either. Before it was found to be unconstitutional, Section 303 of the Indian Penal Code (1860) provided that an individual who committed murder while serving a life sentence would automatically be sentenced to death. Emphasising the importance of individual sentencing, five judges of the Supreme Court of India in *Mithu*[95] found the automatic sentencing to be arbitrary and unjust. The inability of the sentencing judges to take into consideration individual circumstances while deciding the sentence, the judges felt, would cause grave injustice to the accused.

A similar deadlock between uniform and consistent application of the death penalty and individualized sentencing was witnessed by the U.S. Supreme Court in the 1970s. In *Furman v. Georgia*,[96] the Supreme Court raised constitutional concerns about the discriminatory and arbitrary use of the death penalty. After this judgement, many states responded with new guidelines for imposing the death penalty, including some mandatory death penalty schemes. While the attempt of the states to provide guidelines was upheld, the mandatory death penalty schemes were struck down in *Gregg v. Georgia*[97] in 1976. However, the American experience with "guided discretion" has been a futile exercise, as documented by the Steiker Report.[98] The American Law Institute's (ALI) model framework for the administration of the death penalty, developed in 1962, provided the basis for the death penalty statutes that the U.S. Supreme Court found acceptable in *Gregg*.[99]

[95] Supra, note 90.
[96] Furman v. Georgia, 408 US 238 (1972).
[97] Gregg v. Georgia, 428 US 153 (1976).
[98] Supra, note 80.
[99] Id.

However, after the Steiker Report came to the conclusion that the death penalty continued to be administered in an arbitrary manner, the ALI deleted the death penalty provisions from its Model Penal Code in December 2009 with no proposal to introduce another framework.[100] In the case of *Callins v. Collins*[101] in February 1994, Justice Harry Blackmun, who had been a staunch supporter of the death penalty, concluded that efforts of the U.S. Supreme Court to ensure fair and non-arbitrary application of the death penalty had proven to be futile, and found the death penalty to be "fraught with arbitrariness, discrimination, caprice, and mistake."[102]

The Supreme Court of India must follow suit and recognize the impossibility of balancing discretion with uniformly applicable legal principles. When the Supreme Court of India decreed in 1980 that the death penalty should be imposed only in the "rarest of rare" cases, it intended that this ruling would act as a safeguard against arbitrary applications of the death penalty. However, the doctrine seems to have had the opposite effect, and its application has proven to be fatally subjective.[103] Satyabrata Pal puts this predicament rather succinctly, stating, "The road to the gallows might be paved with its good intentions, but on matters of life and death, the law cannot be so cruelly flawed."[104] Justice A.P. Shah, the author of several progressive judgments, such as the one seeking to decriminalize homosexuality in India, believes that the "rarest of rare" doctrine has not yielded any satisfactory solution and that India must abolish the death penalty.[105] Justice

[100] Id.
[101] Callins v. Collins, 510 US 1141 (1994).
[102] Supra, note 80.
[103] Id.
[104] Satyabrata Pal, *Why Capital Punishment Must Go*, THE HINDU (Oct. 03, 2013), http://www.thehindu.com/opinion/lead/why-capital-punishment-must-go/article5193670.ece (last visited Apr 03, 2016).
[105] Manoj Mitta, *Justice A.P. Shah: India Should Join Nations Abolishing the Death Sentence,* THE TIMES OF INDIA (Aug. 29, 2012), http://timesofindia.indiatimes.com/interviews/Justice-A-P-Shah-India-should-join-nations-abolishing-the-death-sentence/articleshow/15906225.cms (last visited Nov 9, 2015).

A.K. Ganguly, too, has termed the death penalty "barbaric," "anti-life," "undemocratic," and "irresponsible," but "legal."[106]

Thus, the researcher's initial hypothesis viz. "The subjectivity and arbitrariness that has crept into capital punishment in India due to the doctrine of 'rarest of rare' used for its administration has mandated the abolition of the death penalty in India" has proven to be partly true. The death penalty must be abolished not only because of the subjectivity it admits, but also due to the seeming impossibility of balancing judicial discretion, individualized sentencing, and uniform principles of the law.

[106] J. Venkatesan, *'Death Penalty is Barbaric,' Says Judge,* THE HINDU (Nov. 16, 2011), http://www.thehindu.com/news/national/death-penalty-is-barbaric-says-judge/article2630923.ece (last visited Apr 8, 2016).

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