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Abolition of Death Penalty: A Study of the Rarest of Rare Cases

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ABSTRACT

Retention of death penalty has become a burning issue in this country since 1980. Although in theory death penalty continues to be a supreme punishment but has to be awarded in the rarest of rare cases. The question arises where the supremacy lies if the punishment can not be awarded in 99% cases. Even the doctrine of rarest of rare cases has been attacked on various grounds from time to time. The perception of the judges is also not uniform in this regard. This paper critically examines the developments towards the abolition of death penalty and the application of the doctrine of rarest of rare cases.

I. INTRODUCTION

There has been an unprecedented controversy about the status of death penalty in India. The endless debate on the question seems to have been accelerated by the developments having taken place in western liberal societies, particularly the developed countries, such as, the U.K. & the U.S.A. The question of death penalty brings at forefront many related issues and also the confusion existing about the penological purposes served by it. It also touches a larger issue as to which model of punishment- crime control model or due process model- better serves the needs of modern India. The question needs to be examined in this context is whether death penalty is a product of such weighing of interests.

The exercise of sentencing discretion for the award or refusal to award death penalty on the basis of formulation of aggravating and mitigating circumstances raises the question whether exercise of judicial discretion is really based on well known scale or just a reflection of adhocism in the exercise of the judicial power. Therefore it becomes necessary to examine whether the doctrine of rarest of rare cases, which appears a provisional compromise for the retention of death penalty in India has come to stay on the legal horizons of the country notwithstanding the uncertainty brought about by some recent judicial pronouncements[2] or a step towards the abolition of death penalty in this country.

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[2] Swami Shradhanand v State of Karnataka AIR 2008 SC 3040.

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II. ABOLITIONISTIC TRENDS

Following the abolition of capital punishment in a number of countries, repeated attempts direct as well as indirect have been made to get rid of it. India so far has not witnessed any significant movement in favour of abolition of death penalty. In 1931, a member from Berar gave a notice of motion for the adjournment of the house in the matter of infliction of death penalty on four persons of Sholapur in respect of whose guilt there was difference of opinion among the judges of the Bombay High Court. In 1933, a motion was adopted in the Legislative Assembly of India granting leave to move bill to abolish punishment of death for offences under the IPC. However the bill was never moved.[3] Sir John Thorne, then Home Minister in British India, in the debates of the legislative assembly in 1946 stated that the government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided. In 1949, the minister for Home Affairs declared in the Legislative Assembly and stated that "the present is considered an inopportune time for abolition of capital punishment."[4]

Resolutions for the abolition of death penalty were moved thrice in the Parliament- two times in Rajya Sabha and once in Lok Sabha. In 1958, in Rajya Sabha, out of fourteen members who participated in the debates only five advocated for the abolition and the rest nine favoured the retention of death penalty. In 1961, issue in the form of resolution was again moved in Rajya Sabha and out of nineteen members, six favoured the abolition and thirteen favoured retention of death penalty. In Lok Sabha, the issue was raised in form of resolution moved by a member of parliament. Fourteen members participated in the debate and only six members favoured the abolition of capital sentence.[5]

Several commissions and committees have been set up in several countries to probe the question of desirability or otherwise of death penalty. For example, the Royal Commission on Capital sentence 1949-53, the American President's Commission on Law Enforcement and Administration of Justice (1967), the Canadian Joint Committee of the Senate and House of Commons on Capital Punishment (1956), the Law Commission of India etc. Undoubtedly, the retention of death penalty was favoured. The thirty fifth report of the Law Commission of India which was relied on by the majority in Bachan Singh v. State of Punjab[6] strongly favoured the retention of death penalty. It stated[7] having regard however, to the consideration in India, to the variety of the social upbringing of its inhabitants to the disparity in the level of morality and

[3]. U.K. Jadhav, Is Capital Punishment Necessary 57 (1973, Ist. Published, Reprt. 1975).
[4] . *Id* at 57-58.
[5]. .*Id* at 58-59.
[6] . (1980) 2 SCC 684.
[7] . *Id* at 712.

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education in the country the vastness of its area to diversity of its population and to the paramount need for maintaining law and order in the country at present juncture, India cannot risk the experiment of abolition of capital punishment.

Legislative thinking, although in favour of retention of death penalty, seems to have undergone to some change. Prior to 1955, it was obligatory on the part of the court to state reasons for not awarding death penalty in case of murder. However, the amendment introduced in 1955 in the Code of Criminal Procedure 1898(now repealed) dropped the requirement of stating reasons for not awarding the death penalty. The situation has been completely reversed by the Code of Criminal Procedure 1973 as sec. 354 (3) of the Code requires the court to state reasons for awarding death sentence. This statutory position has been further liberalized by Bachan Singh by propounding the doctrine of rarest of rare cases for selecting the cases fit for imposition of death penalty.

Judicial thinking on the question of death penalty has also undergone to some changes owing to legal and extra legal developments in India and elsewhere. In Jagmohan Singh v. State of UP[8] the Supreme Court unanimously held that sec. 302 IPC providing for death penalty was constitutional and not violative of arts 14, 19 and 21 of the Constitution. Justice Palekar speaking for the court held that it was neither unreasonable nor against public interest. It did not suffer from excessive delegation nor had it invested the judges with unguided discretion. It did not hit art 21 as it was administered according to the procedure established by law. Although the doctrine of fair just and reasonable procedure was laid down in Maneka Gandhi[9] and random views against the death penalty were expressed in certain cases[10] yet precedent value of Jagmohan Singh remained firm and intact and could not be eroded in Bachan Singh. However in Bachan Singh the court was not unanimous and by the majority of 4 over 1 upheld the constitutional validity of death penalty. But the impact of subsequent developments since Jagmohan Singh and updated scientific knowledge on the subject resulted in propounding the doctrine of rarest of rare cases by the majority led by justice Sarkaria. The court held that it did not offend arts 14, 19 and 21 nor was it in violation of international commitments. It served various penological purposes and it also relied upon the 35th report of the Law commission of India. Justice Bhagwati in his dissenting opinion held that it violated arts 14 and 21 of the Constitution and suffered from various defects; it also did not serve penological purposes.

Post Bachan Singh court faced many challenges and judicial invalidation of death penalty was

[8] AIR 1973 SC 947.
[9] AIR 1978 SC 597.
[10] Rajendra Prasad v. state of UP AIR 1979 SC 916, Bishnu Deo v. State of WB AIR 1979 SC 964.

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sought on grounds more than one. For example, in Machhi Singh v. State of Punjab[11] the court was addressed with the argument that the doctrine of rarest of rare cases was uncertain and vague as no guide lines had been laid down. Hence death sentence was unconstitutional. The court held the validity of the sentence and laid down a non exhaustive guide lines to pick up the cases fit for the award of death penalty. The question of constitutionality of death penalty was further raised in Kehar Singh v. Union of India, Alluaudin Main v. State of Bihar and Jumman Khan v. State of UP[12] but the court was not interested in reconsidering Bachan Singh. The question was seriously raised before a five judge's constitution bench headed by Justice K.N. Singh in Shashi Nayar v. Union of India[13] but the court once again upheld the constitutionality of death penalty.

However, all is not well with death penalty in India. There are cases which put question mark on the future of death penalty in India. In Mithu v. state of Punjab[14] the court unanimously held that S.303, IPC providing for mandatory death penalty was unconstitutional for violating arts 14 and 21 of the Constitution. In Deena v Union of India,[15] hanging the method of administering death penalty as prescribed in S. 354 (5) Cr. PC was challenged for offending art 21 of the constitution. The Court held it to be valid and most human and scientific method for the administration of death penalty. But in Attorney general of India v. Lachma Devi[16] the Supreme Court held that public hanging was a barbaric practice and violative of art 21 of the Constitution.

Another indirect method of defeating death penalty is delay. In T.V. Vatheeswaran v State of T.N. [17] the court ruled that if there was a delay of more than two years in the execution of death penalty it would be reduced to life imprisonment. However Vatheeswaran was overruled by Sher Singh v. State of Punjab[18]. The court held that delay may be a relevant factor but could not be the sole factor for reducing death penalty to life imprisonment. It also pointed out that the delay of 4-5 years was very common thing. Vatheeswaran was decided by a bench of two judges and Sher Singh was decided by a bench of three judges. Justice O. Chinnappa Reddy who had delivered Vatheeswaran opinion was not prepared to go by Sher Singh in Javed Ahmad v. State of Maharashtra[19], where the opinion was written by Justice, O. Chinappa Reddy and the case was decided by two judge's bench. He said that overall circumstances justified the reduction of

[11] AIR 1983 SC 957.
[12] Respective citations are AIR 1989 SC 653; AIR 1989 SC 1456; AIR 1991 SC 345.
[13] AIR 1992 SC 395.
[14] AIR 1983 SC 473.
[15] AIR1983SC 1155.
[16] AIR 1986 SC 467.
[17] AIR 1983 SC 361.
[18] AIR 1983 SC 465.
[19] AIR 1985 SC 231.

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death penalty to life imprisonment and put the question should Sher Singh prevail over Vatheswaran simply because three is bigger than two. The controversy was finally settled by Triveni Ben v. State of Gujrat[20] where the court took the view that inordinate delay may be a relevant factor in reducing death penalty to life imprisonment but it could not be the sole factor. It again overruled Vatheeswaran on the point that delay of more than two years would justify the reduction of death penalty to life imprisonment. It emphasized that relevant delay meant the delay in the disposal of mercy petitions. In certain cases[21] the delay in the disposal of mercy petition has led the court to reduce death penalty to life imprisonment. Thus, the raising of major issues and trivial issues has made the retention of death penalty confusing which puts a question mark on the future of death penalty as well as in its present application.

III. DOCTRINE OF RAREST OF RARE CASES

In order to prolong the life of death sentence or dispel the objections of abolitionists, the court came forward with the formulation of rarest of rarest cases. In Bachan Singh the court observed that death penalty imposed in rarest of rare cases was constitutionally valid. Justice Sarkaria speaking for majority laid down the formulation in following words[22]:

A real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentally. That ought not to be done save in the rarest of the rare cases when the alternative option is unquestionably foreclosed.

However the evolution of the doctrine of rarest of rare cases has raised problem about the status of "special reasons" as required in S. 354 (3) for the award of death penalty. Is it obligatory on the part of the court to state special reasons to bring the case within the "domain of the rarest of rare cases"? Bachan Singh did not define what it meant by rarest of rare cases. It skipped the question by saying that it depended upon the facts and circumstances of the case. However, an attempt was made by the court to explain what it meant by "rarest of rare cases" in Machhi Singh v. State of Punjab. [23] The court reiterated that death penalty should be imposed in the rarest of rare cases and laid down the broad guidelines for the application of the "rarest of rare cases." It has listed them in following manner:

1. Manner of commission of offence when the murder is committed in extremely brutal, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation

[20] AIR 1989 SC 1335.
[21] Madhu Mehta v. UOI AIR 1989 SC 2299 ; Daya Singh v. UOI AIR 1991 SC 1548; see also S. N. Sharma, Inordinate Delay and Non Excecutablity of Capital Sentence, 27 (1991) C& M LJ 117-126.
[22] AIR 1980 SC 898 at 945.
[23] *Supra* note 10

of the community. For example, (a) When the house of the victim is set aflame with the object to roast him alive in the house. (b) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (c) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

2. Motive for commission of Murder when the murder is committed for a motive which shows total depravity and meanness. For example, (a) A hired assassin commits murder for the sake of money or reward. (b) A cold blooded murder with the object to inherit property or to gain control over property of a ward. (c) A murder is committed in the course for betrayal of the worst order.
3. Antisocial or socially abhorrent nature of crime - (a) where murder of a member of scheduled cast or minority community is committed not for personal reasons but to arouse social wrath or terrorize the people. (b) In cases of bride burning, dowry deaths or murder is committed for remarriage for extracting dowry once again or to many another women on account of infatuation.
4. Magnitude of Crime - The crime is enormous in proportion. Multiple murders such as many persons of a family or caste or community are committed.
5. Personality of the Victim of Murder - When the victim of the murder is innocent child, helpless women, a lovely public figure or killer is in position of dominance and trust.

Though the court enumerated circumstances for imposing death penalty, yet it is difficult to identify the precise area of the rarest of rare cases. Nevertheless, the court made attempt to identify the area of the rarest of rare cases.

In Shushil Murmu v. State of Jharkhand[24] while dismissing the appeal of the accused who had sacrificed of child of 9 years before the deity of Kali for his property, the court laid down the test as to what cases may be covered under the rarest of rare rule. The court held that murder was diabolic in conception and cruel in execution. It said that following cases would attract the rarest of rare doctrine:-

1. When the murder is committed in am extremely brutal or dastardly manner so as to arouse extreme and intense indignation of the community.
2. The murder is committed for a motive which evinces total depravity and manners.
3. When the murder is that is a member of SC or minority community.
4. When murder is in enormous proportion - several persons are murdered.

[24]AIR 2004 SC 394.

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5. When the victim of murder is an innocent child or a helpless women or an old or infirm person.

The court said that in such circumstances only death penalty should be awarded. Clearly the court adheres to Machhi Singh guidelines.

IV. APPLICATION OF RAREST OF RARE CASES

During the evolutionary phase, in certain cases, the court did not make reference to the doctrine of rarest of rare cases and in other cases direct reference was made to the doctrine. However, later on the practice grew of making reference to the doctrine whenever death penalty was confirmed. Now this practice has become rule if death penalty is to be awarded or confirmed. In fact in awarding life imprisonment also the courts state that the case does not belong to the category of rarest to rare cases.

1. Manner of commission of offence

In Munawar Harun Shah v. State of Maharashtra[25] popularly known as Joshi Abhyanbar Massacre case, the accused had committed a series of murders and robberies and was sentenced to death. While confirming death penalty in appeal, the court observed[26]:

Having regard to the magnitude, the gruesome nature of the offence and the manner of perpetrating them this case in all facts and circumstances must be regarded as falling within the rarest of rare category and the extreme penalty of death is clearly called for.

In Asharfi Lal v. State of UP, [27] the accused, two brothers, had committed gruesome murders of two innocent girls to wreck their personal vengeance over the property dispute with their mother upholding the death penalty as the case falling with in the category of death penalty, Justice A.P. Sen observed: [28]

The punishment must fit the crime these were cold blooded brutal murders in which two innocent girls had lost their lives. The extreme penalty with which the appellants acted shocks the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against the society in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by S.302 of the Penal Code.

In Sevika Perumal v. State of TN[29] The accused who indulged in illegal business of ganja

[25]AIR 1983 SC 585.
[26]*Id* at 586.
[27]AIR 1987 SC 1721
[28]Id at 1722
[29](1991) 3 SCC 471

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enticed boys from affluent families to bring cash and jewellery and used to kill them at far flung places in order to avoid the identification of the body. For committing the offence they used to write to their parents that missing boys would come back alive own day. In this way they committed murder of four innocent people. The Supreme Court upheld death penalty having regard to the nature of crime and the manner in which the offence was committed.

2. **Motive for Commission of Murder**

In Henry West Muller v State of Assam[30], The accused had made a plan to kidnap children of rich people for extracting ransom. In pursuant to the plan the accused kidnapped a boy and murdered him. On appeal, the Supreme Court upheld death penalty on the ground that it is one of the rarest of rare cases in which the extreme penalty of death is called for. Pointing out that the accused was extracting money from child's father even after child's killing Justice Varadrajan emphasized that the offences committed by the accused were very heinous and preplanned and it was cold blooded murder.

3. **Personality of the Victim of Murder**

In Kehar Singh v State,[31] the accused had killed the then prime minister Mrs. Indira Gandhi. The Supreme Court upholding the death sentence pointed out that the case belonged to the rarest of race category. Justice Oza pointed out that the victim was a popular leader no less than a prime minister of the country. It involved the betrayal of worst order as the assassins were security guards on duty to protect her. They had undermined the accepted system of the country and the offence was committed in merciless manner.

There are the cases where the death penalty was upheld without making any reference to the doctrine of rarest of race cases. In Kuljeet Singh alias v Union Of India [32] popularly known as the "Chopra children murder case", the court confirmed death sentence as the murders of the two children after kidnapping them for ransom were committed after prior planning and inhumanity shown by the accused denying all beliefs and description. Chief Justice Chandrachud observed[33]:

The *survival of an orderly society demands* the extinction of persons like Billa and Ranga who are a *menace to social order and security*. They are professional murders and *deserve no sympathy*.

[30]AIR 1985 SC 823
[31]AIR 1988 SC 1883
[32]AIR 1981 SC 1572; see also Gyasi V State of UP AIR 1981 SC 1160.
[33]*Id* at 1574 (Emphasis Supplied).

In Mahesh v Sate of MP[34] The court confirmed death sentence imposed on the accused, father and son who axed to death a person, his wife mother, daughter a neighbour who intervened merely because the daughter of the person in question (the deceased) married a Harijan. Justice Khalid said that any lesser sentence would render the justicing system of the country a suspect. The common man would lose faith in courts. In such cases he understands the language of deference more than the reformative Jargons. In Ranjeet Singh v State of Rajasthan[35] the court upheld death penalty on the ground that the entire family had been eliminated in a cruel manner. The court said that the manner in which the offence was committed shows that the offence was deliberate and diabolical, determined and cold blooded. It was absolutely devilish and dastardly. In Darshan Singh V State of Punjab[36] the accused had brutally killed the entire family of his uncle in order to eliminate the claimant to the property. The court upheld the death penalty. All these cases may be fitted into the rarest of race category as laid down by the court in Machhi Singh but the court did not do so.

Generally, the rape and murder of girl child is regarded as "rarest race cases" and the offender is sentenced to death[37]. In Kamta Tiwari V State of MP[38] the accused committed rape on a seven years old girl and strangulated her to death and threw her body in a well. The trial court sentenced him to death and the sentence was maintained by the High Court. The Supreme Court also upheld the sentence of death as the case belonged to the rarest of race category. But Amrit Singh V State of Punjab[39] involved the murder and rape of girl child who was a class II student. The accused was sentenced to death by the courts below but on appeal, the Supreme Court changed it to life imprisonment. The cause of death was not strangulation but excessive bleeding from private parts. Justice S.B. Singh said that though the offence was heinous but it did not belong to the rarest of race category.

4. **Magnitude of Crime**

In Ceneta Vijayavardhan Rao V State of AP[40] the two appellants were accused of setting up a super express bus on fire by sprinkling petrol with the motive of plundering the passengers. This resulted into roasting 23 passengers to death and a number of passengers received serious injuries. The Supreme Court held it to be a case of rarest of rarest category not merely because

[34] AIR 1987 SC 1346.
[35] AIR 1988 SC 672.
[36] AIR 1988 SC 747; see also Lokpal Singh V State of MP AIR 1985 SC 891
[37] S. N. Sharma, Rape And Murder of Girl Child: Application Of Rarest Of Rare Cases, (2007) I SCC (Cri)(Jour) 5-11.
[38] AIR 1996 SC 2800.
[39] AIR 2007 SC 132.
[40] AIR 1996 SC 2791; see also Ravji v. State of Rajasthan AIR 1996 SC 787.

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a number of innocent persons had been roasted alive but also because of the inhuman manner in which the scheme of crime was plotted and executed. There are numbers cases in which death penalty has been imposed on the ground that the case belonged to the "rarest a race category". For example, in Bablu Alias Mubarik Hussain v. State of Rajasthan[41], the accused killed his wife, three daughters (aged about 9 years, 6 years and 4 years) and son Babu (aged 2 ½ years). Upholding the death penalty, Dr. Arijit Pasayat, J. said that the brutal acts done by the accused-appellant were diabolic in conception and cruel in execution. The acts were not only brutal but also inhuman with no remorse for the same. The case squarely fell under the rarest of race category to warrant death sentence. [42]

While hearing appeal on the quantum of sentence, the question of death penalty with reference to the rarest of race cases has been reopened in Swami Shraddananda v. State of Karnataka[43]. The appellant was convicted and sentenced to death for committing murder of his wife at the residential flat. The venue was the bedroom shared by the deceased and her husband. The appellant was convicted and sentenced to death by the courts below and appeal on the quantum of sentence came up before the division bench of Justices S.B Sinha and Markendey Katju. As the bench was evenly divided on reducing death penalty to life imprisonment, the matter was referred to larger bench[44] but it reduced death penalty to life imprisonment for rest of the life without any remission. Surendra Koli V State of UP[45] is another example of application of earest of rare cases by Justice Katju. The accused a serial killer used to use small girls and strangulate them. Thereafter, he tried to have sex with the body and then would off their body in parts and eat them. The court applying the doctrine confirmed death sentence.

V. Concluding Observations

The issue of abolition of death penalty has more been addressed with emotive appeals rather than legal reasonings and social acceptance. The retention as well as abolition of death penalty has been advocated on many attractive arguments, making it difficult and confusing to adjudge the desirability or otherwise of the death penalty.

Historical speaking, death penalty is increasingly becoming unpopular and abolitionistic trends are dominating with the passage of time. Human rights objections have put a big question mark on the validity of death penalty. The second optional protocol to the Covenant on Civil &

[41] AIR 2007 SC 697.
[42] *Id* at 704.
[43] AIR 2007 SC 2531.
[44] Swami Shradhanand V State of Karnataka AIR 2008 SC 3040. The bench consisted of Justices B.N.Aggrawal, G.S. Singh and Aftab Ahmad and the judjement was delivered by Aftab Ahmad J.
[45] AIR 2011 SC 970.

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Political Rights (1990) aims at abolishing death penalty. India, so far, has not signed it presumably due to immaturity in the society. Many odds exist against the retention of death penalty. On many grounds, death penalty has been reduced to life imprisonment. If there is inordinate delay in the disposal of mercy petition, death penalty is reduced to life imprisonment. There is difference among the judge about the purposes served by death penalty. Thus, India is fastly moving towards abolition of death penalty.

The doctrine of rarest of rare cases has not been uniformly applied by the courts and strong words, such as,' diabolical planning', 'brutal execution', 'shocking to judicial conscience', 'savage nature of crime' etc. have been used for its application and for abolition of death penalty also strong words have been used. The relation between "special reasons" under Section 354(3) and 'rarest of rare cases' reasons has not been made clear by the court.

All these are not healthy developments so for the life of death penalty is concerned. The present developments are also leading towards the abolition of distinction between murder and culpable homicide from penological point of view. Practically, death penalty has virtually become non nest as awarding death penalty in rarest t of rare cases may not have significant impact. If in 99% cases life imprisonment is to be awarded, it means Section 302 is practically providing only one punishment, viz. life imprisonment which is not permissible under Mithu's ruling. Being aware of this fetal abnormality, the courts have evolved a new variant of life imprisonment, viz., life imprisonment till life without any remission.[46]A little hope in favour of death penalty has been raised by Justice Katju or by the bench of Justices Katju and Mrs. Gyan Sudha Mishra. In Rajbir V State of Haryana[47] the petitioner was found guilty of murdering of his pregnant wife barely six months after marriage. The punishment of life imprisonment awarded by the trial court u/S 304 B was reduced to 10 years by the high court. Expressing anguish at this, the bench of above two justices failed to see why it was done when the deceased was repeatedly struck and throttled. The court directed all the trial courts to add s.302 to the charge of S. 304 B, so that death penalty may be imposed in such cases. Further, if a girl child is raped and murdered, the probability of death sentence is highest. Thus, notwithstanding anything, the court is not moving away from crime control model.

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[46] *Ibid.*
[47] AIR 2011 SC 568.

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