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RESIDUAL DOUBT THEORY: A NASCENT ADDITION IN INDIAN CAPITAL PUNISHMENT JURISPRUDENCE

Sumiti Ahuja[*]

ABSTRACT

Reducing any residual doubt or uncertainty about guilt of an accused is one strategy to enhance trial outcomes, but achieving hundred percent clarity about accused's guilt in every case is unrealistic. Residual doubt is that thin line of gap between the 'beyond any reasonable doubt' and 'absolute certainty' which provides that even if there is a slightest of doubt lingering in the mind of judge or jury, as the case may be, at the time of sentence pronouncement they should commute the death sentence and thereafter replace it with life imprisonment, which may further be supplemented with a condition that the convict will stay behind the bars for the remaining period of his life. The punishment of death sentence has always had abolitionists and proponents representing arguments both against and in favor of capital punishment; with the advent of residual doubt theory the academic debate related to death penalty stands ignited again generating curiosity to understand the nuances of this concept whose origin can be traced to USA. The author in this paper has given an insight into this new addition in capital punishment jurisprudence in India alongwith reflecting on the judicial approach towards this theory.

I. INTRODUCTION

"[T]he execution of a person who can show he is innocent comes perilously close to simple murder."

- Justice Blackman[1]

The fear of pronouncing death sentence upon an innocent person differs fundamentally from the fear of wrongly imprisoning the accused. The death penalty jurisprudence that has emerged over the decades as a result of our judicial pronouncements has been both inconsistent and lacks coherence, and has therefore resulted in absence of symmetry in the imposition of such punishments[2]. The belief that such an ultimate and final penalty is inappropriate if there are doubts about guilt, even if they do not reach the level necessary for acquittal, stems from common sense and fundamentals of justness and fairness.[3]

[*]Assistant Professor (Sr. Scale), Law Centre-II, Faculty of Law, University of Delhi

[1] As quoted in Christina S. Pignatelli, "Residual Doubt: It's a Life Saver" 13(2) *Capital Defense Journal* 311 (2001).

[2] Project 39A, *Death Penalty Sentencing in Trial Courts: Delhi, Madhya Pradesh & Maharashtra (2000-2015)* (National Law University, Delhi, May 2020), *available at*: https://www.project39a.com/dpsitc (last visited on February 22, 2022).

[3] Dissenting opinion of Justice Marshall in *Heiney* v. *Florida*, 469 U.S. 920 (1984) at 921-22.

Although the evidence presented in a trial may be adequate to reach a guilty verdict using the beyond reasonable doubt metric, but the nascent addition in Indian capital punishment jurisprudence, i.e., residual doubt theory contends that there may be some 'lingering doubt' that renders a death sentence incompatible. It has been ruled that focusing on acquittal during trial and subsequently on residual doubt in sentencing stage might be acceptable, especially where the evidence of guilt is not found to be too overwhelming[4]. We are well aware that, the execution of an innocent person is the ultimate miscarriage of justice. Although the bar for conviction is 'beyond a reasonable doubt', the fact is that evidence is a sliding scale, possessed with varying degrees of certainty.

The residual doubt theory though has its origin in USA in the year 1986, it was only in 2014 that the Indian judiciary adopted it and incorporate it into our justice dispensation system. The residual doubt theory has sparked considerable scholarly debate, with both abolitionists and proponents of the death penalty seeking to navigate the actual impact of this concept.

Having this background in mind, the author has divided her paper into various parts. Starting with the introduction, Part-II of this paper describes the meaning and scope of residual doubt theory and also traces its origin in the American soil. Part-III elaborates the judicial recognition and acceptability of this theory in India. In Part-IV the contemporary situation pertaining to the Indian and US legal system has been touched upon followed by Conclusion under Part-V.

II. Residual Doubt Theory: Meaning, Origin and Scope

Meaning and Scope

It has been suggested that the best thing a death row inmate can do to increase his chances of earning a life sentence has nothing to do with mitigating evidence. Assuming everything else is equal, the greatest thing he can do is casting doubt on his culpability.[5] It can be said that even though the accused is more than ninety-five percent likely to have committed a capital

[4] 4. Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) at 1310, as cited in Welsh S. White, "A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants" 102(8) *Michigan Law Review* 2006 (2004).

[5] Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" 98(6) *Columbia Law Review* 1563 (1998).

offence, he may still make an effort to avoid the death penalty by pointing out the remaining five percent probability that he is innocent[6].

Residual doubt is a cognitive gap that exists between the standard of proof of beyond a reasonable doubt and the point of absoluteness, i.e., perfect certainty[7]. The concept of residual doubt draws a link between the intensity of punishment and the certainty of guilt, blurring the boundary between the processes of decision making in the two stages of the criminal procedure[8]. As a precaution against regular capital punishment, residual doubt sets a higher level of proof than the beyond reasonable doubt threshold employed at the stage of conviction, keeping in mind the irreversible nature of death[9]. The notion of residual doubt, is said to respond to the concern about factual ambiguity or uncertainty in capital trials[10].

Residual doubt does not result in an acquittal from the offence or any negative outcome as to the aggravating factor, but there still remains in existence a sense of uncertainty that is felt, debated, and ultimately lingers[11]. It may not be a 'reasonable' doubt[12], but is still a legitimate concern.

The difference between 'residual doubt' and 'reasonable doubt' thus can be stated as, former refers to any remaining or lingering doubt in relation to the guilt of accused which may continue to persist at the stage of pronouncing sentence despite reaching satisfaction being reached as per the 'beyond a reasonable doubt' standard during conviction[13], whereas, reasonable doubts, have been defined as doubts that are actual and substantive in nature in contrast to being "merely imaginary, trivial, or merely possible". These residual doubts as stated earlier, may not be significant for purpose of conviction, but have at times been considered a mitigating condition when determining whether the case fits into the category of 'rarest of rare'. It would not be absolutely wrong to say that, conviction after discharging burden beyond all 'residual' doubt might result in maximum penalty (for example, capital punishment), whereas conviction proving guilt of the accused beyond all 'reasonable' doubt

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[6] Jacob Schuman, "Probability and Punishment: How to improve sentencing by taking account of probability" 18(2) *New Criminal Law Review: An International and Interdisciplinary Journal* 245 (2015).
[7] *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988).
[8] Talia Fisher, "Comparative Sentencing" *SSRN Electronic Journal* 7 (2009), *available at*: http://dx.doi.org/10.2139/ssrn.1488345 (last visited on February 20, 2022).
[9] *Ravishankar* v. *State of Madhya Pradesh* (2019) SCC OnLine SC 1290.
[10] Matthew Wansley, "Scaled Punishments" 16(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 311 (2013).
[11] Margery Malkin Koosed, "Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt" 21 *Northern Illinois University Law Review* 55 (2001).
[12] Reasonable doubt means a doubt backed by some reason.
[13] *Ashok Debbarma @ Achak Debbarma*v. *State of Tripura* (2014) 4 SCC 747**.**

would result in near maximum punishments (allowing for life imprisonment instead of capital punishment)[14].

Ron Siegel and Bruno Strulovici in their paper, point out that the weight of residual doubt varies from trial to trial and in order to explain the same they give an example. Consider a situation in which a person is found guilty on the basis of a confession and the testimony of an eyewitness. These kinds of evidence may prove his guilt 'beyond a reasonable doubt', but because confessions and eyewitness reports are known to be untrustworthy to some extent, some residual doubt continues to exist. Now take a similar trial in which credible evidence, such as clear video footage of the accused committing the crime, is available might result in less lingering doubt about his guilt. This variation in residual uncertainty among trials cannot be accounted for under a two-verdict established system, in which the accused is either guilty or not guilty.[15]

Origin of Residual Doubt Theory

The roots of the residual doubt theory with respect to capital punishment can be traced to the American legal system[16]. The residual doubt theory as understood in the American legal system can be stated as:

> "(1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offence, as opposed to other offences; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future."[17]

The theory of residual doubt has developed in America from *Lockett* to *Franklin*. It was observed by the US Supreme Court in *Lockett* v. *Ohio*[18], that a prisoner on death row has the constitutional right to present to the jury each and every evidence pertaining to himself as well as the offence that can persuade the jury to sentence him to life in prison rather than execution. After this decision and approximately a decade later came the decision of the US

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[14]*Supra* note 8 at 18.
[15] Ron Siegel and Bruno Strulovici, "Improving Criminal Trials by Reflecting Residual Doubt: Multiple Verdicts and Plea Bargains" 2 (2016), *available at*: https://faculty.wcas.northwestern.edu/~bhs675/Multiverdicts.pdf (last visited on February 22, 2022).
[16]*Lockhart* v. *McCree* 476 US 162, 181 (1986).
[17] Christina S. Pignatelli, *supra* note 1 at 307-08; See also, William S. Geimer and Jonathan Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases" 15 American Journal of Criminal Law 1, 27 (1987-88).
[18] 438 US 586 (1978).

Supreme Court in *Franklin* v.*Lynaugh*[19], which ended up diluting the theory as was explained in the *Lockett* decision. The factors that can be attributed to such dilution are: firstly, it determined that an accused had no constitutional right to educate members of the jury on doctrine of residual doubt, and that it is up to each state of US to determine whether residual doubt is a suitable argument during the sentencing hearing; secondly, the accused was not barred from submitting evidence pertaining to his character or the circumstances prevailing during commission of offence, but they could not as a matter of right raise the issue of guilt again; thirdly, it was strongly held by the majority that, residual doubt could not be the only reason for rejection of the death sentence. Justice Sandra Day O'Connor, in her concurring judgment in *Franklin*, objected to the identification of residual doubt as mitigating factor.

In *Oregon* v. *Guzek*[20], the United States Supreme Court debated the admission of new evidence during the sentence stage. The US Supreme Court defined, during sentencing, 'reasonable doubt' and 'residual doubt', noting that sentencing is concerned with "how" rather than "if" a person committed a crime.

Post *Franklin*, this concept has gained traction in certain American states, with both the *Franklin* and *Oregon* rulings noting that nothing prevents such evidence from being offered to the jury. However, other states do not examine the theory of residual doubt because they feel that it is incorrect to raise dispute about the guilty conviction at the sentence stage.

Jennifer R. Treadway, has advocated for the use of residual doubt in the American justice dispensation system on the basis of three arguments: first, residual doubt being both logical and relevant in capital sentencing; second, because juries currently apply residual doubt in capital sentencing decisions, so it is an operative mitigating factor; and third, residual doubt provides an additional safeguard necessary in capital cases, because the beyond a reasonable doubt standard is not infallible, and death is irreversible.[21]

In situations involving residual doubt or lingering doubt, there have been contentions from the side of accused that, during capital sentencing, they should be able to persuade juries for refraining from imposition of death sentence since they are not totally convinced that the

[19] 487 US 164 (1988).
[20] 546 US 517 (2006).
[21] Jennifer R. Treadway, "Residual Doubt in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor" 43(1) *Case Western Reserve Law Review* 217 (1992).

accused is guilty of crime[22]. This although has again and again found criticism in the American system.

The fact that there is still some uncertainty about someone's guilt impacts the basic foundations of sentence judgements. Residual doubt appeals to common sense and frequently serves as a *de facto* mitigating factor, with jurors preferring to impose a lighter sentence if they are convinced of the presence of residual doubt. Despite attempts to downplay the theory's significance and concerns about its application, the idea of residual doubt has proven to play a vital role in American death sentence law and has spared the lives of numerous accused.[23]

III. Judicial Applicability in India

While highlighting the challenges of the criminal justice system, such as a lack of resources, outdated investigative procedures, incompetent prosecution, and inadequate legal assistance, the Law Commission of India advocated the elimination of the death sentence in its 262nd Report[24]. Taking into account this Law Commission of India's assessment, the Hon'ble Division Bench in a Calcutta High Court case had stated that outdated investigative tactics and ineffective prosecution justify invoking the theory of residual doubt in our legal system[25]. When the instruments for unravelling truth are itself dull or ineffectual, one must get to a certitude regarding an offender's guilt, free of any remaining doubt originating from sublime or undiscovered elements, before the court may proceed to issue a death sentence[26].

The factual matrix of *Ravishankar* v. *State of Madhya Pradesh*[27], narrate a horrendous incident, wherein the appellant was accused of kidnapping a thirteen-year-old girl, raping her, strangling her to death, and thereafter destroying evidence as he had dumped her half naked body in a dry well. Consequently, he was sentenced to death under section 376-A of the Indian Penal Code, 1860, considering it to fall under the category of the 'rarest of the rare' cases. His death sentence was confirmed by the High Court. When the same was appealed against in the Apex court, the Supreme Court accepted the appeal in part and substituted the

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[22] Jeffrey L. Kirchmeier, "Beyond Compare? A Codefendant's Prison Sentence as A Mitigating Factor in Death Penalty Cases" 71 *Florida Law Review* 1061 (2019).
[23] Anushree Malaviya and Rhea Goyal, "Guilt Beyond Conviction: The Theory of Residual Doubt in Indian Capital Sentencing" 33 *National Law School of India Review* 46-47 (2021).
[24] Law Commission of India, "262nd Report on the Death Penalty" (August, 2015).
[25] *State of West Bengal* v.*Ustab Ali*; *Ustab Ali* v. *State of West Bengal*, judgment dated March 06, 2020, of the Calcutta High Court.
[26] *Ibid.*
[27] (2019) SCC OnLine SC 1290.

death sentence with life imprisonment, alongwith the stipulation that no remission be granted to the appellant and that he stays in jail for the remainder of his life. Before reaching to the conclusion of replacing death sentence with life imprisonment in this case, there were rigorous deliberations done on the part of the three-judge Bench, and the same are reflective in the judgment.

Tracing the genesis of the 'rarest of the rare' doctrine in *Bachan Singh* v. *State of Punjab*[28], the court moved on to pointing out the elaborate 'rarest of the rare' test as laid down in *Machhi Singh* v. *State of Punjab*[29]. The Supreme Court also cited *Swamy Shraddananda @ Murali Manoharregono Mishra* v. *State of Karnataka*[30], in which the court had created a newer type of sentence and ruled that the court could substitute the death sentence with life imprisonment with a directive that the convict would never be granted release from the prison for the rest of his life. This category of sentence was later approved by the Constitutional Bench of the Supreme Court of India in *Union of India* v. *Sriharan @ Murugan*[31]. In *Ravishankar*, the Supreme Court also paid attention to cases whereby death sentences were confirmed in numerous horrifying, brutal, and exceptional crimes, including those involving kidnapping, rape, and murder of young children[32]. Then the court highlighted how the Apex court had been moved towards recognition and incorporation of the 'residual doubt' theory in the Indian judicial system. In *RameshbhaiChandubhaiRathod* v. *State of Gujarat*[33], on the basis of significant gaps in the prosecution evidence, as well as other mitigating factors found to be present, such as the likelihood that others were engaged in the commission of the offence, the court had refused to affirm the death sentence although upholding the conviction. Ratio of the *Rameshbhai* case can be equated to the residual doubt theory which was adopted and introduced by the Indian judiciary in the two-judge Bench decision of *Ashok Debbarma @ Achak Debbarma* v. *State of Tripura*[34]. The Supreme Court in the latter case observed that:

> "….in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts,

[28] (1980) 2 SCC 684.
[29] (1983) 3 SCC 470.
[30] (2008) 13 SCC 767.
[31] (2016) 7 SCC 1.
[32] *Mukesh* v. *State (NCT of Delhi)* (2017) 6 SCC 1; *Vasanta Sampat Duparev*. *State of Maharashtra* (2017) 6 SCC 631; *Khushwinder Singh* v. *State of Punjab* (2019) 4 SCC 415 and *Manoharan* v. *Inspector of Police* (2019) SCC OnLine SC 951.
[33] (2011) 2 SCC 764.
[34] (2014) 4 SCC 747.

> while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt."

Debbarma has been relied upon in certain three-judge Bench decisions of the Supreme Court of India. One as stated above is *Ravishankar*, then in *Sudam @ Rahul Kaniram Jadhav* v. *State of Maharashtra*[35], it was observed that death sentences, irrevocable in nature, should be imposed only when there are no other options left; in cases based on circumstantial evidence, the doctrine of prudence should be relied on when sentencing the accused, thereby taking into account both aggravating circumstances (like brutality, enormity, premeditated nature) if any, as well as mitigating circumstances (like socio-economic background of the accused, age factor of the accused, extreme emotional distractions at the time of occurrence of the offence) if any. In *Sudam*, accused was sentenced for committing murder of five persons, including a woman living with him as his wife, his two kids from his previous marriage and other two kids which he had with the deceased woman. He was given death sentence which was upheld by the Supreme Court at first instance, but at the time of hearing review petition in the same matter, the court commuted and replaced the death sentence with life imprisonment with a direction that the accused was to spend the remainder of his life behind the bars. The court did not consider it appropriate to give death sentence to the accused because of existing lingering doubts and at the same time found that the life imprisonment in its simple form would be inadequate looking at the brutal nature of the offence.

However, in *Ravi* v. *State of Maharashtra*[36], the Supreme Court gave their decision based on purely 'crime-centric' approach, and ignored the residual doubt theory. The victim therein was a two-year old child who was kidnapped, raped and murdered; the court did not look into the mitigating factors and straight away upheld the death sentence against the accused.

Recently, another three-judge Bench of the Supreme Court, in *ShatrughnaBabanMeshram* v. *State of Maharashtra*[37], observed that already in cases wherein conviction is based on circumstantial evidence, the burden of proof to be discharged is already of such great magnitude, and once the same is discharged by the prosecution then there is no room left for any other hypothesis or innocence of accused to be taken up again at the stage of sentencing. That therefore the idea of residual doubt was conceptually flawed and cannot be used as a

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[35] (2019) 9 SCC 388.
[36] (2019) 9 SCC 622.
[37](2021) 1 SCC 596.

mitigating element at the sentence stage. The Supreme Court highlighted that in the case of circumstantial evidence, a higher standard must be set for imposing death sentence. The situations wherein death sentence can be the appropriate remedy are those wherein the two questions are answered in affirmative; the questions are: that the aggravating factors outweigh the mitigating factors and secondly, there is no doubt lingering in the minds of the court that death is the only suitable remedy in accordance with the facts, evidence and circumstances of the case.

IV. CONTEMPORARY SITUATION: INDIA AND USA

India

The Supreme Court of India has made attempts to replace existing criteria with ones that can assure better impartiality and less discretion in the death penalty procedure. The residual doubt has the potential to be that standard; nevertheless, the multitude of tests and standards has resulted in a scenario in which Courts select a standard that best matches their sensibilities in a given instance.[38] Residual doubt theory still being in nascent stage has a long journey to take, it is left to be seen how far and deep this theory will be rooted in our criminal justice system.

United States

In the United States, residual doubt is not a universally acknowledged mitigating factor. The Supreme Court has refused to regard lingering doubt as a constitutionally necessary mitigating element, deferring the decision to the states. Some US states explicitly reject residual doubt as a mitigating factor. Other states, although not explicitly rejecting the idea, exhibit a reluctance to recognize residual doubt as a mitigating factor by judicial unwillingness to venture on it. This resistance appears to be motivated by the fact that lingering doubt does not meet the standard definition of a mitigating circumstance.[39]

The most overt use of residual doubt in the criminal justice system in the United States is in the decision of death sentences. In capital trials, jurors must decide whether the accused should be sentenced to death after reaching a guilty conviction. In this sentencing phase, residual doubt may be utilized as a mitigating reason to prevent the death penalty from being

[38] *Supra* note 23 at52.
[39] *Supra* note 21 at251.

imposed. The Capital Jury Project[40], a survey for academic purposes involving former jurors in death penalty cases, discovered that lingering uncertainty was the most important mitigating factor recognized by such jurors.[41]

Christina Pignatelli in her paper has reflected upon the perception of public, judiciary and legislature in relation to the residual doubt about innocence in relation to death penalty. Public was found to be most sensitive to residual doubt in the study conducted by Christina. It is because when the public imbibes the belief that the death penalty is being used unfairly or that innocent people are being sentenced to death, it calls for curbs on the usage of the death sentence, even going to the extent of asking for abolition of death sentence. The reaction of judiciary is completely different; the United States Supreme Court has granted states the authority to restrict arguments regarding residual doubt at various stages of a trial. The legislature has made efforts to provide for avenues like *habeas corpus*, executive clemency, etc., but these avenues have been considered to be restrictive in nature.[42]

The US Congress, passed the Innocence Protection Act in 2004 thereby permitting accused, in light of the issues about erroneous convictions in death sentence cases, to plead fresh DNA evidence post-conviction.

V. CONCLUSION

In India, the residual doubt theory is still at nascent stage; though promising in nature but still has a long way to go. It proceeds on the premise that even though guilt of the accused has been proven beyond reasonable doubt but there might be a residue of that doubt lingering when it comes to deciding upon the sentence of death in a case. Since it has been pointed out time and again that death is irreversible in nature, so the court should not be left with any doubt when pronouncing death sentence. The Indian courts had developed 'rarest of the rare' doctrine laying down parameters under which the death sentence of accused can be upheld. Now, the 'residual doubt' theory has been called by many as a life saver from capital punishment in case of even an iota of doubt. Ultimately it has to be understood that there lies a difference between 'reasonable' doubt and 'residual' doubt. One needs to be free from any doubt while pronouncing death sentence and it should always be kept in mind that leaving a

[40] William J. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings" 70(4) *Indiana Law Journal* 1043-1102 (1995).
[41] *Supra* note 15 at 29.
[42] *Supra* note 1 at322.

guilty person free is not that much of a horror than the horror of punishing an innocent person with death is.