JUDICIAL TRENDS OF SENTENCING CAPITAL PUNISHMENT IN INDIA : A CROSS-SECTIONAL ANALYSIS

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1. INTRODUCTION

"The gallows is not a machine of death but a symbol, symbol of terror, cruelty and irreverence for life; a common denominator of primitive savagery, medieval fanaticism and modern totalitarianism. Its stands for everything that mankind must resist, if mankind is to survive its present crisis."[2]

Prolong palaver of the death penaltyand various issues attached to it have been a topic of heated debate across the world from time to time. With myriad intricacies and aspects such as very constitutionality of death penalty and its various methods, the viability, ethical basis, retention or abolition, various human rights issues, the crucial phenomenon of 'death row' etc. the death penalty has become a crucial enigma in various legal systems. However, the core aspect lyingbeneath whole debate is the very process of sentencing of capital punishment. The precedents by the Hon'ble Supreme Court of India have guided the judicial process and the case to case basis approach by the inception of 'rarest of rare' doctrine under Bachan Singh's[3] verdict. This doctrine can be said to be a benchmark of sentencing capital punishment. Therefore, in order to understand the judicial ethos of capital punishment a cross section into the very judicial process itself becomes highly warranted.

2. ETYMOLOGICAL ANTIQUITY OF CAPITAL PUNISHMENT:

The term 'capital punishment' is derived from the Latin word '*caput'* which means head. It originally referred to death by decapitation,but now applies generally to state sanctioned executions.[4] Having been found in almost all the civilizations of the world, death penalty makes its presence omnipresent. The antiquity of the death penalty can be traced back till Twenty-Fourth century with the Sumerian code framed by emperor Ur-Nammu.[5]It inflicted the punishment of death for capital offences such as rape, murder, adultery. Another celebrated ancient manuscripts of Eighteenth Century B.C. by the code of King Hammaurabi of Babylon, which codified the death penalty for 25 different crimes.[6] Thus, antiquity of death penalty is as old as human civilizations.

3. LEGAL FRAMEWORK OF DEATH PENALTY IN INDIA

Being one of the 58 retentionist nations of death penalty[7] India has several laws inflicting death penalty. The legislative trend of India from pre to post independence depicts the continuance of death penalty. The substantial and procedural laws are well-equipped with the capital punishment in India.

a) ***Substantial Laws*** **:**The core of which is Indian Penal Code, 1860 (hereinafter referred as IPC) being the backbone of the criminal laws of Indiasubstantially emanates the death penalty for certain offences.The showcase provision of various punishments[8] under IPC essentially includes the death penalty. At present, there are eleven offences which results into the death penalty as a punishment under IPC. Moreover it's pertinent to note that, the other laws inflicting death penalty are consists of both homicides as well as non-homicide offences. There are 22 laws in India which provides death penalty for the capital offences; whereas total 14 laws inflict capital punishment for the offences which are non-homicide. Recently the Criminal Law (Amendment) Act, 2013 provides the capital punishment for some additional offences under Section 376,[9] i.e. punishment for the rape. Additionally the Anti-Hijacking Act, 2016[10] inflicts the capital punishment.

b) ***Procedural Laws***: The Code of Criminal Procedure, 1898 enacted during British reign in India under its Section 367(5) depicted the capital punishment whilst directing the judges to record special reasons in case wherein the accused is not given death penalty while the offence is punishable with it. Such duty was casted on judges to record reasons as to why death sentences were not passed. No wonder, the omnipresent discontent against the brutal British reign and radical activities by revolutionary freedom fighters resulted into the words of this section. However, its pertinent to note that, after independence, the said harsh provision was gradually repealed by the Parliament.[11] Moreover, the introduction of new Criminal Procedure Code, 1978 reversed the earlier provision and laid down under Section 354 (3) that, special reasons are to be recorded while inflicting capital punishment for the offence which has an alternative of life imprisonment. In furtherance to this, Section 354(5) of Cr.P.C. provides the 'hanging' as the mode of execution in India.

4. JUDICIAL PARADIGM :

The judicial trends regarding the death penalty have always remained trembling one. However, it's also pertinent to note that from time to time, the Hon'ble Supreme Court of India has guided the law and jurisprudence of capital punishment in India. The judicial scrutiny has handled various aspects and dimensions of the death penalty in India and encapsulated the ethos of death sentencing in more concretised manner. Following are the landmarks laid down by the judiciary in this regard :

- **Jagmohan :**

The first case challenging the constitutionality of the capital punishment in India came before the Supreme Court of India in 1973 is Jagmohan v. Union of India.[12] The Apex Court upholding the constitutionality of the death penalty observed that, death penalty doesn't violate the Art. 14, Art.19 and Art.21 of the Constitution of India. Similarly, the Supreme Court in Deena vs. Union of India[13]the Hon'ble Supreme Court has upheld the constitutionality of the 'Hanging' as a method of execution in India.

The sentencing of the death penalty has been a crucial challenge before judiciary. An overview on the judicial trends prior to the Bachan Singh[14] case shows that, the Apex Court has cautioned regarding sentencing policy and the reformative approach. The case of Ediga Anamma vs. State of Andhra Pradesh[15] the Apex Court observed that, due emphasise ought to be given to adduce clear evidence regarding the "facts of a social and personal nature" at the sentencing stage. This was to ensure that reformation was given as much importance as deterrence. It was also observed that, "a *legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life*." The case of Ediga Anamma was a clear shifting of judicial paradigm towards abolition of death penalty. Therefore, no wonder, in further judicial precedents the life imprisonment became the rule to which death penalty remained an exception. The ethos of death sentencing in India has seen the evolution of more defined and sparing character.

The Hon'ble Supreme Court of India has guided the judicial minds for sentencing stage. The inception of doctrine of "rarest of rare" case can be said to the landmark in sentencing stage of death penalty. However, the shifting of paradigm from the crime centric to criminal centric and ultimately judge-centric is massive legal phenomenon. Following are some of the prominent milestones set by the Hon'ble Apex Court whilst guiding the judicial process regarding death sentencing in India.

- **Bachan Singh:**

The case of Bachan Singh vs. State of Punjab[16] has brought a judicial certainty in the sentencing stage of capital offences by virtue of doctrine of "rarest of the rare case". The Apex Court whilst depicting the *modus-operandi* of sentencing capital punishment observed that, "real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." The Apex Court emphasised on the judicial nature of the sentencing as to A mechanical, formulaic approach, not calibrated to the

"variations in culpability" even within a single type or category of offence, would cease to be judicial in nature. Thus, although facts of the cases appear to be similar, its pertinent to note that, they can never be identical and there are "infinite, unpredictable and unforeseeable variations and countless permutations and combinations." The Bachan Singh's precedent formulated some significant principles such as,

- Life imprisonment is the rule and death sentence an expectation.
- The rare use of death sentence is to be done only in gravest cases of extreme culpability however, in the light of mitigating and aggravating circumstances.
- In order to shape the judicial reasoning the 'principled sentencing' was emphasised and it meant to be formulized through evolutionary process of judicial precedents.

It was expressed by the Apex Court that, judges have to *"discharge the onerous function (of deciding whether or not to impose the death penalty) with evermore scrupulous care and humane concern."* Although, precedent of Bachan Singh case guided the judicial process on sentencing policy for death penalty it left the basic questionuntouched as to what constitutes a case as rarest of rare one.

- **Machhi Singh :**

Three years after the Bachan Singh the question was solved by the Apex Court itself in the case of Machhi Singh vs. State of Punjab.[17]Machhi Singh's case made the doctrine of rarest of rare more simplified for the further judicial precedents, wherein the parameters were explained by the Apex Court viz., *Manner*; *Motive;Anti-Social or Socially abhorrent nature*; *Magnitude of Crime* and *Personality of Victim of murder*.[18] As observed in Swamy Shraddhananda's[19] verdict, Machhi Singh categories *"considerably enlarged the scope for imposing death penalty."*Emphasise was given to accord the full weightage towards mitigating circumstances. However, it can be seen that, further judicial trends have implicitly followed Machhi Singh's parameters without leaving any scope for the reformation of the convict. The parameters of Machhi Singh case become routine exercise for the judges and many precedents citing it made death penalty frequent judicial phenomenon. More prominently, in Devender Pal Singh v. National Capital Territory,[20] where the majority opinion cited the Machhi Singh categories and held that the circumstances of the crime (without any discussion regarding the circumstances of the criminal) were such as to require imposing the death penalty. Pertinently, the dissenting judge in this case had acquitted the accused, but this factor was not considered by the majority in deciding whether the case was one of "rarest of rare." The inception of rarest of rare doctrine paved the scope for thereformative aspects of sentencing death penalty however; it is seen to be closed by the verdict of Machhi Singh.

- **Santosh Bariyar :**

Machhi Singh and subsequent cases intrinsically focused on the crime and various aspects

resulting into crime however, the case of Santosh Bariyar paved a way for new jurisprudence within sentencing of death penalty. The term "individualised sentencing" was coined by the Honb'le Supreme Court of India based on the judicial verdict US Supreme Court in Furman v. Georgia.[21] The case of Bariyar seeks attention for extending the scope of rarest of the rare case by the Supreme Court itself. The judgment divides the doctrine into two parts. Firstly, it is the duty of the prosecution to prove as to how the case falls into the 'rarest of rare' category. Secondly, the prosecution must establish the pellucid evidence as to why the accused is not fit for any kind of reformatory and rehabilitation scheme. In other words, the connotation laid down under Bachan Singh's case 'any other alternative is unquestionably foreclosed" must be established by the prosecution. The possibility of rehabilitation and reformation is impossible is to be proved by the prosecution.

The verdict of Santosh Bariyar case can be said to be a step towards the abolition of death penalty in India. Moreover, the conversion of death sentence into rigorous life imprisonment by the Honb'le Supreme Court laid down few more parameters into death sentence ethos viz., case to case basic approach, due consideration towards the family background of the accused, circumstances under which the crime has been committed, the balance-sheet of aggravating and mitigating circumstances whilst sentencing etc.

To encapsulate the myriad thresholds of the sentencing ethos of the death penalty in nutshell is an atlas task. The abovementioned judicial precedents have made the abundant flow of death sentences as more controlled and well-defined in nature. However, these precedents have also seen to be fading out before enormous cases of capital offences. Even the Law Commission of India in its 262nd report on Death Penalty observed that, in the last decade itself, in cases like Aloke Nath Dutta v. State of West Bengal,[22]Swamy Shraddhananda v. State of Karnataka,[23]Santosh Bariyar v. State of Maharashtra,[24]Mohd. Farooq Abdul Gafur v. State of Maharashtra,[25]Sangeet v. State of Haryana,[26] Shankar Khade v. State of Maharashtra[27] and Ashok Debbarma v. State of Tripura,[28] the Supreme Court has acknowledged that the application of the death penalty is subjective and arbitrary and that "even though Bachan Singh intended "principled sentencing", sentencing has now really become judge-centric."[29] The Apex Court has also admitted that the Bachan Singh threshold of "the rarest of rare cases" has been most variedly and inconsistently applied,"[30] Hence, the implicit reliance of judges on the precedents without exploring the gist of factual and circumstantial aspects of the case has made the sentencing of death penalty a stereotype task for judges. As a result of which, the cases on similar facts have been concluded with opposite results. Such lack of consistency was highlighted by the Hon'ble Supreme Court of India as "a poor reflection of the system of criminal administration of justice."[31]

- **JUDICIOUS DENOUEMENT :**

Several doctrines evolved by judiciary whilst articulating death sentencing somewhere made the judicial process concrete but diversified. With plethora of cases Apex Court has endeavoured the sentencing to be more concrete and certain one. One of such attempts to encapsulate the doctrinal ethos of death sentence, Honb'le Supreme Court in Gurvail Singh alias Gala vs. State of Punjab[32] held that, three tests are to be satisfied before awarding the death penalty, viz.,

(i) *The Crime Test:*the aggravating circumstances involved in the case which gave rise to the crime. This test has to be fully satisfied.

(ii) *The Criminal Test:* the mitigating circumstances involved in the case which makes accused eligible for lesser punishment.

The Apex Court further observed that, even if the above two tests are satisfied against the accused, the Court ought to finally apply the third test, i.e. Rarest of rare case.

(iii) *The Rarest of Rare Case (R-R Test)* : which depends on the perception of the society and not "judge-centric", that is whether the society will approve the awarding of death sentence to certain types of crime or not.

5. CONCLUSION

The sentencing ethos of death penalty has evolved from various judicial precedents of the Apex Court of India. However, to lay down fixed parameters to arrive at the conclusion of death penalty is simply impossible for even the most trained judicial minds. Thus, 'case to case basis' has been followed by the judges as a most common and easiest protocol whilst sentencing death penalty. The judicial creativity has paved room for further evolution of sentencing process. The said can be seen through precedent of Gala's case wherein the Apex Court whilst denying imposing death sentence has laid down that, convict was not warranted to be inflicted with death penalty. However, the life imprisonment with minimum of thirty years in jail without remission was awarded to the accused. Its quite evident that, the radically changing nature of capital offences has made the task of sentencing even more crucial like never before. However, a clear shift of judicial paradigm from abundant death sentences to a well-defined sentencing policy coupled with judicious modifications has made the sentencing more concretised and principled one. The very rationale of death penalty has been revealed by the Apex Court as, *"Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric."*[33] Being the most severe sentence, the death penalty always warrants the due diligence and utmost caution from the judges, as observed by the Apex Court, *"the passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because, that is one sentence which cannot be recalled."*[34]The role of society in sentencing death penalty may not be directly visible, however, the repercussions of such sentence certainly forms a nexus with society. Apex Court in Mohammad Giasuddin v. State of Andhra Pradesh[35] whilst observing such nexus held that, "modern community has a primary stake in reformation of the offender, and the focus should be therapeutic rather than an "in terrorem" outlook. In contemporary era, the judicial sentencing has become a mechanism of facilitating the justice subject of numerous impediments. In the light of such hurdles, the role of judges while writing the sentence of death penalty is being guided by Apex Court as*"The whole man is a healthy man and every man is born good. Criminality is a curable deviance...we make these persistent observations only to drive home the imperative of Freedom that its deprivation, by the State, is validated only by a plan to make the sentences more worthy of that birth right."*The shrewd judicial ethos of sentencing death penalty in India thus falls within the equilibrium of judicially evolved individualistic and principled sentencing ideologies.

(Endnotes)

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2 Arther Koestler, *Arthur Koestle>Quotes,* Goodreads, available at https://www.goodreads.com/author/quotes/17219.Arthur_Koestler, last seen on 28/11/2016

3 Bachan Singh v. State of Punjab, AIR 1980 SC 898

4 Bedau, Hugo Adam, The Death Penalty in America', available at http://aic.gov.au/media_library/publications/tandi_pdf/tandi003.pdf, last seen on 27/11/2016

5 Julian B. Knowles QC*, The Abolition of the Death Penalty in the United Kingdom,* 6, (1st ed., 2015)

6 Introduction to the Death Penalty: Early Death Penalty Laws, Death Penalty Information Center, http://www.deathpenaltyinfo.org/part-i-history-death-penalty, last seen on 28/11/2016

7 *Abolitionist and Retentionist Countries,* Death Penalty Information Centre, available at http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140#retentionist, last seen on 30/11/2016
8 Section 53, Indian penal Code, Punishments.—The punishments to which offenders are liable under the provisions of this Code are (First) Death; 1[Secondly. Imprisonment for life;] 2[***]
(Fourthly) Imprisonment, which is of two descriptions, namely:(1) Rigorous, that is, with hard labour;
(2) Simple; (Fifthly) Forfeiture of property; (Sixthly) Fine.
9 Punishment for Rape
10 The Anti-Hijacking (Amendment) Act, 2016, Section 4 (a)
11 The Cr.P.C. Amendment , 1955 repealed the Section 367(5) from the Cr.P.C. 1898
12 (1973) 1 SCC 20
13 (1983) 4 SCC 645
14 (1980) 2 SCC 684
15 AIR 1974 SC 799
16 (1980) 2 SCC 684
17 (1983) 3 SCC 470
18 262nd Law Commission of India Report, *The Death Penalty,* 111, (2015) available at http://lawcommissionofindia.nic.in/reports/report262.pdf , last seen on 1/12/2016
19 (2008) 13 SCC 767
20 (2002) 5 SCC 234
21 Furman v. Georgia, 408 U.S 238, (1972, Supreme Court of the United States)
22 (2007) 12 SCC 230
23 (2008) 13 SCC 767
24 (2009) 6 SCC 498
25 (2010) 14 SCC 641
26 (2013) 2 SCC 452
27 2013) 5 SCC 546
28 (2014) 4 SCC 747
29 (2013) 2 SCC 452
30 Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498
31 Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767, at para 52.
32 (2013) 2 SCC 713
33 (2013) 2 SCC 713
34 Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCC 35.
35 (1978) 4 SCC 494