OXYMORON OF LIFE-DEATH BY RAREST OF RARE DOCTRINE UNDER CAPITAL PUNISHMENT IN INDIA: A JUDICIAL ANTINOMY

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"[The] death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life forever…It is by reason of its cold and cruel finality that death penalty is qualitatively different from all other forms of punishment."[2] -P. N. Bhagwati, J.

INTRODUCTION

Death penalty has undeniably become a topic of heated debate across the globe in contemporary era. The sentence of killing a person by virtue of judicious and discerning judicial opinion has raised plethora of questions upon the very nature of death penalty under legal framework. The timeless antiquity of death penalty and its precise utility under modern times with the garb of deterrence or retribution can be a topic of independent research. However, the way in which a criminal justice system operates the very life and death of an offender necessarily requires a revisit in order to cross section the actual foundation of death penalty under the law books. The fate of death sentence has been predominantly shaped by the Hon'ble Supreme Court of India under the landmark precedent of Bachan Singh[3] while giving birth to the doctrine of rarest of rare. However, the application of the 'rarest of rare' doctrine suffered from an inherent divergence pertaining to its inconsistent usage. The judiciary has itself made it an eternal paradox

that, the underpinnings laid down under Bachan Singh's case left so behind and at present it has become an atlas task to summarise the fundamental foundations of this doctrines. Duering the passage of time, various sub factors and patterns got originated which have subsided and deviated the core ethos of rarest of rare doctrine, Thus, in order to understand the sentencing of death penalty in India, there warrants a deep dive into the underpinnings of rarest of rare doctrine. Present article attempts to address the paradox transpired within judicial precedents under cases of capital punishment and endeavours to encapsulate the ethos laid by Apex Court for the same in a nutshell.

INCEPTION OF RAREST OF RARE DOCTRINE

The fundamental question of very constitutionality of death penalty under the legal framework of India was resolved by the Hon'ble Supreme Court of India under the precedent of Jagmohan Singh v. State of U.P.[4] It was held that, death penalty is a permissible punishment and did not violate the Constitution by way of Art. 14,[5] 19[6] and 21[7] respectively. In furtherance to this, the Apex Court has decided the applicability of death penalty in a conclusive manner with the landmark judgement of the Bachan Singh vs. State of Punjab.[8] The case challenged the constitutionality of death penalty under the Indian Penal Code, 1860 under Section 302 as well as the Section 354(3) of Criminal Procedure Code, 1973. The contentions were, under Cr. P.C. the judges were given unguided discretion to choose the punishment from death penalty and life imprisonment and its arbitrary, untrammelled discretion which makes discrimination between convicts. The procedure in which the death penalty gets imposed is unguided for the want of concrete guidelines. However, the Apex Court came up with a dynamic approach and clarified that, death penalty meets with the reasonable requirement of the Constitutional mandate by way of "due procedure" enshrined under Art. 21. The Apex Court also held that, its, it was "neither practicable nor desirable" to lay down a rigid or straight-jacket formula or categories for the application of the death penalty. No two cases are exactly identical, and there are "infinite,

unpredictable and unforeseeable variations…(and) countless permutations and combinations" even with a single category of offences. 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. Rather, such standardization would "sacrifice justice at the altar of blind uniformity" and may end up "degenerating into a bed of procrustean cruelty."[9]

However, despite of bypassing any concrete guidelines on the imposition of death penalty the Apex Court clarified and guided some determining appropriate strategy to impose the punishment. As follows-

(1) For the offence of murder, life imprisonment in the rule and death sentence an exception.

(2) This exceptional penalty can be imposed only in a gravest case of extreme culpability. Taking into account the aggravating and mitigating circumstances in a case, paying due regard to the circumstances of the offence as well as the circumstances of the offender.

(3) The determination of aggravating and mitigating circumstances should be based on "well recognised principles…crystalized by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases."

(4) Only if the analysis of aggravating and mitigating circumstances provided for "exceptional reasons" for the death penalty, it can be imposed. The only exception to the above rule is, the"rarest of rare cases when the alternative option is *unquestionably foreclosed*."

Thus, it was the mandate drawn by the Apex Court to guide the future imposition of the death sentence in India and was rightfully expected that such a punishment of irreversible nature will have to be inflicted sparingly. That's the reason the Supreme Court had refrained itself from formulating any rigid framework, rather the wording "alternative is unquestionably foreclosed" itself connotes the wide discretion to the spectrum of wisdom of judges. The Apex Court has also observed that, individualised case to case basis approach along with the principled sentencing. It was also observed that, there are numerous permutations and combinations even in a single category of offences. That's the very reasons the Apex Court refused to categorise and standardise the norms to impose and apply death penalty.

JUDICIAL DIVERGENCE IN APPLYING THE DOCTRINE OF RAREST OF RARE

The precedent set forth by the Bachan Singh's case made a wide room for the judicial minds to adjudge the case within the bounds of rarest of rare framework. The very purpose of non-formulation of any specific norms was perhaps a beneficial factor for the criminal justice system. However, this very ethos has changed and seriously deviated by the Apex Court itself with the landmark precedent of Machhi Singh v. State of Punjab[10]. Under this case, the Apex Court has laid down the five categories to concretise the norms pertaining to the allocation of the rarest of rare doctrine. These five categorises are as follow as summarised under the report of the Law Commission of India in tis 262nd report on Death Penalty[11]-

❖ CATEGORIZATION

i. Manner of Commission of Murder:

This category mandates the court to scrutinise that, whether, the murder iscommitted in an extremely brutal, grotesque, diabolical revolting or dastardly mannerso as to arouse intense and extreme indignation of the community.

e.g. (i)When the house of the victim is set aflame with the end in view to roast him alive in thehouse. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order tobring about his or her death. (iii)When the body of the victim is cut into pieces or hisbody is dismembered in a fiendish manner.

ii. Motive for Commission of murder:

It makes the Court to ensure that, whether the murder is committed for a motive whichevinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with adeliberate design in order to inherit property or to gain control over property of a wardor a person under the control of the murderer or vis-a-vis whom the murderer is in adominating position or in a position of trust. (c) a murder is committed in the course forbetrayal of the motherland.

iii. Anti Social or Socially abhorrent nature of the crime:

It asks the Court to ensure that,

(a) Whethermurder of a ScheduledCaste or minority community etc., is committed not for personal reasons but incircumstances which arouse social wrath. For instance when such a crime is committedin order to terrorize such persons and frighten them into fleeing from a place or in orderto deprive them of, or make them with a view to reverse past injustices and in order torestore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

iv. Magnitude of Crime:

It mandates the court to scrutinise that, whether the crime is enormous in proportion. For instance whenmultiple murders say of all or almost all the members of a family or a large number ofpersons of a particular caste, community, or locality, are committed.

v. Personality of Victim of murder:

It mandates the court to scrutinise that, whether the victim of murder is (a) an innocent childwho could not have or has not provided even an excuse, much less a provocation, formurder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c)when the victim is a person vis-a vis whom the murderer is in a position of dominationor trust (d) when the victim is a public figure generally loved and respected by thecommunity for the services rendered by him and the murder is committed for politicalor similar reasons other than personal reasons.

Thus, the basic trend of keeping the doctrine of rarest of rare cases away from any standardisation and categorization was severely deviated under Machhi Singh's case. This crystallization of rarest of rare doctrine under five distinct categories paved way to the broader application of the rarest of rare doctrine. As a result of which, the doctrine no more remained to be a narrow channel through which a case has to pass its scrutiny and became a large canal of much wider ambit. This development later was observed by the Apex Court in the judgement of SwamyShraddhananda v. State of Karnataka[12] that, Machhi Singh categories "considerable enlarged the scope for imposing death penalty beyond what was envisaged in Bachan Singh."

❖ **TRIPLE TEST**

The tradition of standardization as well as crystallization of the norms pertaining to the rarestof rare doctrine remained incessant with the case of Gurvail Singh Gala v. State of Punjab[13] wherein the Apex Court held that, capital sentencing has changed its route and has become more and more "Judge Centric". Thus, Court formulised a triple test to be satisfied in order to arrive at the conclusion that, whether cases fulfils the requirements of the Rarest of rare doctrine. The triple tests are as follows-

i. Crime test

It implies to scrutinise that, whether the crime under a particular case has any aggravating or mitigating circumstances. It has to be mandatorily taken into consideration that whether such circumstances are present against the accused.

ii. Criminal Case

In order to fulfil this test, the court must ensure that, there are no mitigating circumstances present in the case which are favouring the accused. Thus, hereby it is the duty of the Court to ensure and confirm that, there are no mitigating circumstances found which might be favourable to the accused. Unless and until this test is passed the court cant proceed for the next case.

iii. Rarest of Rare case

If at all abovementioned two tests are satisfied, the court can apply this third test. It implies that, perception of the society is to be taken into consideration rather than individual opinion of the judge. In simple worlds, the Court has to ensure that, whether the society will accept the imposition of the death penalty under this particular case. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes…"[14]

The analysis enshrined under the triple test mentioned above has been further simplified by the Apex Court itself, in the case of Mofil Khan v. State of Jharkhand[15] wherein the Court held that, "basically examine whether the society abhors such crimes and whether such crimes shock theconscience of the society and attract intense and extreme indignation of the community." Thus, on the one hand the triple test has shifted the paradigm of 'judge centric' sentencing and has succeeded partly to narrow down the scrutiny for rarest of rare doctrine. However, the distinction framed by the triple test to analyse the circumstances of crime and criminal in separate manner has made the situation more confusing. Moreover, this deviation of triple test has been rightly observed by the Apex Court in, Mahesh DhanajiShinde v. State of Maharashtra[16] that, triple test "may create situations which may well go beyond what was laid down in Bachan Singh."

ENIGMATIC INTERPRETATION OF THE RAREST OF RARE DOCTRINE

The inception of the rarest of rare doctrine in its purest form under Bachan Singh's case thus, shifted to the individualistic and inconsistent interpretations by the benches of the Apex Court. Its pertinent to note that, from time to time the Apex Court itself has noticed these deviations. More distinctly in, Sangeet v. State of Haryana[17] the Supreme Court observed that, achan Singh dictum appears to have been "lost in translation." In another case, it was inferred that, "disparity in sentencing by [the] court flowing out of varied interpretations to the rarest of rare expression," and was concerned that "the precedent on death penalty … is crumbling down under the weight of disparate interpretations."[18]

The path laid down under Bachan Singh case has considerably deviated under Machhi Singh's case in such a way that, when in earlier case the Apex Court expected that the sentencing judge should

accord full weightage to mitigating circumstances as well. However, its seen that, many decisions in this line appeared in such a manner that, judges have provoked the categories laid down under Machhi Singh and proceeded as if once the case falls within any of such 5 categories it is fit for rarest of rare doctrine. A subtle cross section under the cases after Machhi Singh's decision reveals that, focused only on the circumstances, nature, manner and motive of the crime, without taking into account the circumstances of criminal or the possibility of reform as required under the Bachan Singh doctrine.

This enigmatic interpretation has been introspected and accepted by the Apex Court in a very significant precedent of SantoshBariyar vs. State of Maharashtra[19] that, judges engage in "very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index." In consonance with this, the Supreme Court has also held that, ""[d]espiteBachanSingh, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in Bachan Singh appear to have taken a bit of a back seat in the sentencing process."[20]

V. CONCLUSION

The legacy left by the Bachan Singh's case whilst formulating the doctrine of 'rarest of rare case' has changed its nature entirely and conclusively. The Law Commission of India in its 262nd the Court has given varyinginterpretations to the *Bachan Singh* requirements and different judges have understood the mandate of*Bachan Singh* differently.[21] In this scenario it becomes highly warranted that, a clear pellucid consistency has to be maintained by the higher judiciary as well as by the trial courts while sentencing the death penalty. Its not gainsaying to quote that, the contemporary deviations under the interpretation of the rarest of rare doctrine may result into the complete revamp of the original ethos and may give rise to a serious anomaly under the criminal justice system. To that effect, a most plausible leeway would to frame entirely new guidelines by the Apex Court itself which would be less rigid and clear enough to be followed by the judges. Which will also enable them to be flexible with the case to case approach but yet it will limit the scope of the frequent application of the death penalty. It has to accept that, However, with the accretion of precedent the Bachan Singh guidelines have become more a legitimation for imposing the death sentence, than any meaningful restriction.[22] In this regard, the introspection has to be done pertaining to the inconsistencies, absurdities and enigmatic interpretations of the rarest of rare doctrine. A very insightful observation has been done by the Bhagwati J. within his dissenting judgement in bachan Singh's case wherein he says-

"This is a classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the Bench. … The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?"

In the light of Bachan Singh's case and further deviations under numerous cases whilst inconsistent interpretations of rarest of rare doctrine it is the need of time that, a speedy step has to be taken by the higher judiciary to save the procedure of sentencing death penalty from becoming a judicial oxymoron.

(Endnotes)

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2 Bachan Singh v. State of Punjab, (1982) 3 SCC 24, 751, at para 23, Dissenting Judgement by P.N. Bhagwati, J.
3 ibid
4 (1973) 1 SCC 20.
5 Art. 14, the Constitution of India, Equality before law.
6 Art. 19, the Constitution of India, Protection of certain rights regarding freedom of speech, etc.
7 Art. 21, the Constitution of India, Right to life and personal liberty.
8 (1980) 2 SCC 684
9 ibid
10 (1983) 3 SCC 470
11 262 nd Law Commission of India Report, Death Penalty, (2015) available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiBjcHvl7PVAhVLNI8KHdsnDtUQFggnMAA&url=http%3A%2F%2Flawcommissionofindia.nic.in%2Freports%2Freport262.pdf&usg=AFQjCNGcFchNwa0ImTpnipt4urVphyoZMg, last seen on 25/07/2017
12 (2008) 13 SCC 767
13 Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, at para 19.
14 Ibid
15 (2015) 1 SCC 67.
16 (2014) 4 SCC 292
17 , (2013) 2 SCC 452
18 Mohd.Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641
19 (2009) 6 SCC 498
20 Sangeet v. State of Haryana, (2013) 2 SCC 452
21 262nd Law Commission of India Report, Death Penalty, (2015) available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiBjcHvl7PVAhVLNI8KHdsnDtUQFggnMAA&url=http%3A%2F%2Flawcommissionofindia.nic.in%2Freports%2Freport262.pdf&usg=AFQjCNGcFchNwa0ImTpnipt4urVphyoZMg, last seen on 25/07/2017
22 Ibid