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# Fading Impact of the 'Rarest of Rare' Doctrine: has the Baton passed to the 'Public Opinion' Approach?

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## ABSTRACT

*This article deals with two main aspects: the first deals with how rarest of the rare test, devised vis-à-vis the death penalty cases, was broken down into various factors and analysed whimsically. The second deals with what was the reasoning of the Court behind this whimsical engagement. Here the Court advanced the principles of 'public opinion' and 'triple test'. The problem with these approaches is that it completely defeats the entire purpose of the rarest rare guideline. Bachan Singh restricted the death penalty to the rarest of rare cases. Bariyar further advised the judges to analyse a set of similar cases to be able to determine if the case being heard was rarest or rare. Gurvail Singh established certain crimes as particularly deserving of the death penalty. In Shankar Khade, the Court emphasised the need for evidence to guide death sentences. The addition or subtraction of various elements to the rarest of rare formulation ended up tempering with the very intent of Bachan Singh. The fact that in very few cases the original intent was preserved goes to show that the subjective interpretations of various judges go a long way in deciding the outcome of capital cases. At times the court added the triple test, society's call for justice, public opinion or collective conscience to the mix; at other times it gave one priority over the other. There is no way of knowing which way the judicial coin will land. Heads one could live and tails one could die. The court believed that the rarest of rare guidelines would provide the necessary guidance for the exercise of judicial discretion in crimes of murder, thereby installing a guarantee against the death penalty from being arbitrary. However, the phenomenon of judicial discretion led to several innovations of their own, failing to keep arbitrariness at bay. Undoubtedly, the courts engaged in cherry-picking of facts apropos of crime and criminal.*

## I. INTRODUCTION

The 'rarest of rare' stipulation placed value on the importance of life by restricting its absolute denunciation. It also placed value on the notions of dignity and human life by instituting some

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safeguards against an irrevocable punishment. This test was one of the most unique innovations of the Court in trying to minimise the unrestricted imposition of the death penalty in India. With its introduction, death sentences were to be meted out only if the "alternative option [was] unquestionably foreclosed.[2] Whether or not this formulation has been understood and followed in subsequent cases is the focus of this article.

In an effort to explain the intent of *Bachan Singh*, the Court in *Bariyar* stated that "[T]he conclusion that the case belongs to rarest of rare category must conform to highest standards of judicial rigour and thoroughness".[3] The whole point of a principle like rarest of rare is to make the award of the death penalty a thoroughly thought-out act. The idea behind introducing rigour in terms of looking at the facts and the circumstances of the case along with those of the criminal is to be absolutely sure that no one is awarded a death sentence, simply because it seems to be the most obvious punishment. Instead, the death penalty must be granted only when it is most fitting and fair.

In *Bachan Singh*, the court strongly suggested that:

> Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion.... When Judges take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large..The perception of 'community' standards or ethics may vary from Judge to Judge....Judges have no divining rod to divine accurately the will of the people.[4]

Here the court recognised the danger of the personal opinions of judges making their way into the law. It is also possible that the judges may wrongly presume their own views to be reflective of a larger public sentiment or ethic. Naturally different judges may presume different norms to be the defining feature of society. A better way then is to have one uniform legal principle so that such variations could be avoided. This is what the Court pointed towards in Bachan Singh. However, these guidelines have been variously interpreted and misinterpreted.

In the period following *Bachan Singh*, several variations of the judgement emerged. These variations served to follow or reject the intent and content of the 'rarest of rare' formulation. An analysis of the cases in this period, calls attention to the inconsistency that runs through the

[2] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, at para 209.
[3] *Santosh Bariyar v. State of Maharashtra,* (2009) 6 SCC 498, at para 61.
[4] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, at para 126.

Supreme Court decisions in death penalty cases over this period. Sometimes age was a mitigating factor and at other times it was not. Similarly, while at times gruesomeness of the crime led to the obfuscation of mitigating factors, at other times, it did not. In some cases, the pre-sentencing requirement from Bachan Singh was paid attention to, whereas at other times the court operated as if there was no mandatory pre-sentencing requirement at all. As 'rarest of rare' gradually receded into the background, so did the concerns of reform and rehabilitation. The court shifted to focus on newer conceptions like 'public opinion', 'social necessity' and 'cry for justice'. These new principles exemplified the fading impact of the Bachan Singh test. Hence, the concerns about the death penalty being "arbitrarily or freakishly imposed" were still present.[5]

The immediate impact of Bachan Singh had been a decline in the judicial award of death sentences. In the early 1980s, the Supreme Court upheld the death sentence in very few judgements. The *Bachan Singh* judgement placed emphasis on the reform of offenders in its 'rarest of rare' formulation. In the judgement, it was stated that the offender's ability to reform was to be necessarily presumed unless the state could prove the opposite with the help of evidence. This was to become a mitigating factor in ascertaining whether or not the case deserved the death penalty. Such a guideline led to commutation in a number of cases. In *Mukund alias Kundu Mishra and anr. v. State of Madhya Pradesh*,[6] the Supreme Court commuted the death sentence where the trial court had stressed the helplessness of the victims and the greed motive of the crime. While the Court agreed about the heinousness of the crime it still "[did] not think this case to be one of the 'rarest of rare cases' as exemplified in Bachan Singh v. the State of Punjab and Machhi Singh v. the State of Punjab." In *Muniappan v. State of Tamil Nadu*,[7] the Supreme Court overturned the lower court's argument that the murder was 'terrific' and thereby deserving of the death penalty. Instead, the Court argued that all murders were terrific and if all of them were punished with death, it would defeat the very intent of Section 354(3).

In some other cases, the courts misinterpreted the 'rarest of rare' dictum and interpreted it literally. In the case of *Allauddin Mian and others., Sharif Mian and anr. v. the State of Bihar*,[8] that involved the killing of two infants, the Supreme Court noted that since motive could not be established, it could not be decided if this was a rarest of rare case. The Court said that the

[5] Phrase borrowed from the *Bachan Singh* judgement. For details see, *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, at para 15.
[6] AIR 1997 SC 2622.
[7] *Muniappan v. State of Tamil Nadu* (1981) 3 SCC 11.
[8] *Allauddin Mian and ors., Sharif Mian and anr. v. State of Bihar* [(1989) 3 SCC 5]

other elements of the case were not sufficiently uncommon so as to make it a rarest of a rare situation. *Ravindra Trimbak Chouthmal's* case provides an extreme example of this approach.[9] The case involved the brutal killing of an eight-month pregnant woman, for dowry. While noting that the crime was "most foul" the Court said that such cases had stopped being "rarest of rare." It was specifically noted in *Machhi Singh*[10] that dowry deaths were to be seen as extraordinary and worthy of the death penalty. However, as we will see later in this chapter, this dictum was not followed very sincerely. While commutation may be welcome in effect, the literal understanding of the Bachan Singh test took it far from its original intent. In *Suresh and anr. v. State of Uttar Pradesh,*[11] the accused had hacked the deceased and his entire family to pieces, over a piece of land. The Court observed that the case was not part of the rarest of rare category and that it did not agree with the argument inherent in it.

In some other cases, the Benches made mandatory references to the Bachan Singh doctrine. However, it lacked any real understanding of both rarest of rare dictum as well as the necessity of comparing the aggravating and mitigating circumstances. In *Mohan and ors. v. State of Tamil Nadu*,[12] the Court upheld the death sentence of two of the four convicts who were given the death sentence by the High Court. These two sentences were commuted as the Court did not find the two accused to have played any role in the killing of the ten-year-old victim. In its appeal to the Supreme Court, the defence stated that the lower courts had categorised the case as 'rarest of rare' but did not provide any explanation for it. The Court observed that "On the very face of it, the incident appears to be a gruesome one and indicates the brutality with which the accused persons committed the murder of a young boy and in furtherance of the said plan, they tried to cause the disappearance of the dead body itself." The Court found sufficient evidence to uphold the death penalty for two convicts but did not explain what these proofs were. In *Suresh Chandra Bahri v. The State of Bihar*,[13] the Court identified a list of aggravating factors following *Bachan Singh* and *Machhi Singh* but did not try to determine the mitigating circumstances.

Some argued that the decline in death penalty cases had caused a virtually abolitionist situation. In *Amrik Singh v. the State of Punjab*,[14] Justice A.P. Sen argued that this seemingly abolitionist situation heralded by Bachan Singh was retrieved slightly by Machhi Singh.[15] Those judges on

[9] *Ravindra Trimbak Chouthmal v. State of Maharashtra* [(1996) 4 SCC 14.
[10] *Machhi Singh and Others v. State of Punjab* [(1983) 3 SCC 470
[11] *Suresh and anr. v. State of Uttar Pradesh* AIR 2001 SC 1344.
[12] *Mohan and ors. v. State of Tamil Nadu* (1998) 5 SCC 336.
[13] *Suresh Chandra Bahri v. The State of Bihar* AIR 1994 SC 2420.
[14] *Amrik Singh v. State of Punjab* (1988) Supp SCC 685.
[15] Machhi Singh and ors. v. State of Punjab

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the bench who sought to retain the death penalty found a voice in Amrik Singh's case. In this case, the Court argued, "We had indicated in *Earabhadrappa alias Krishnappa v. the State of Karnataka*, the unfortunate result of the decision in Bachan Singh case is that capital punishment is seldom employed even though it may be a crime against society and the brutality of the crime shocks the judicial conscience. We wish to reiterate that a sentence or pattern of sentences which fails to take due account of the gravity of the offence can seriously undermine respect for law..." S.Muralidhar has argued that the *Bachan Singh* case was "neither a small nor insignificant achievement for the abolitionists" as "the rate of imposition of the death penalty would definitely have been higher" but for the judgment."[16] However, it is not possible to verify such a claim for a number of reasons. First, there is a lack of data from trial court judgements that could help assess the direct impact of the judgement. Second, there is no way to know exactly how many cases were confirmed or commuted, following from Bachan Singh.

In the mid-1980s, the impact of *Bachan Singh* and the' rarest of rare' guideline had started declining. In quite a few cases, there was no reference to the 'rarest of rare' test or to the Bachan Singh directions. So in *Lok Pal Singh v. the State of M.P.*,[17] the Bench simply stated, "This was a cruel and heinous murder and once the offence is proved then there can be no other sentence except the death sentence that can be imposed." The judges argued that there were no extenuating circumstances and thus there was no need to show leniency. References to rarest of rare or other identifiable guidelines were also missing in cases such as *Mahesh s/o Ram Narain and ors. v. State of Madhya Pradesh*,[18] *Darshan Singh and anr. v. State of Punja*b[19] and *Ranjeet Singh and anr. v. State of Rajasthan*[20] among others.

## II. 'PUBLIC OPINION' APPROACH

Starting in the mid-1980s and covering the 90s, the Supreme Court turned its attention towards the notion of 'public outrage' over the nature of the offences committed. The 'threat to society' argument subsumed considerations of reform and rehabilitation of offenders. It went against the very narrative that a punishment like the death penalty should be meted out only in exceptional circumstances. The 'social necessity' argument was first propounded in *Earabhadrappa alias Krishnappa v. the State of Karnataka*.[21] In this case, Justice A.P. Sen argued, "It is the duty of the court to impose a proper punishment depending upon the degree

[16]S.Muralidhar, "Hang them now, Hang them Not: India's Travails with the Death Penalty", Vol. 40, Journal of the Indian Law Institute, 1998.
[17] AIR 1985 SC 891.
[18] (1987) 3 SCC 80.
[19] (1988) 1 SCC 618.
[20] AIR 1988 SC 672.
[21]*Krishnappa v. State of Karnataka* (1983) 2 SCC 330.

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of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders."[22] The Court suggested that the provision of death sentences in the IPC emerged from the need to protect the society at large. Those crimes which threatened societal interests definitely deserved the extreme penalty of death. Exceptional circumstances and social necessity had to be analysed side by side. Cases were not just 'rarest of rare' in terms of the particular facts and circumstances they exhibited. Instead, they became rarest of rare in terms of the peculiar threat they posed to the public at large. Similarly, the grant or otherwise of death sentence was not be based solely on the basis of circumstances of the criminal. It had to derive from an investigation of what those circumstances meant for the larger society.

With rarest of rare receding into the background, public opinion/outrage played a massive role in the Court's denial of commutation. The *Billa-Ranga* (*Kuljeet Singh alias Ranga v. Union of India and anr.*) [23] and *Munawar Harun Shah's* (*Munawar Harun Shah v. the State of Maharashtra*) cases[24] are good examples of this. In the former, two young children were kidnapped and murdered, leading to widespread protests and demands for severe punishment. The reason for dismissing the leave petition and other related details were not recorded by the Court. Later the accused Kuljeet Singh (Ranga) filed a separate writ petition.[25] The Court rejected the plea for commutation. It also did not provide any evidence and argued that the offenders did not deserve any sympathy "even in terms of the evolving standards of decency of a maturing society." The Court observed, "The survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security...."

The later judgements in this case also reflect the growing pressure on the Court. A second writ petition[26] was filed challenging the arbitrariness of the President's Clemency powers. The Court tried to find details from the government regarding what was the standard or basis applied by the executive in dealing with mercy petitions. It did not receive any response and hence decided to dismiss the petition.[27] The Court held that the analysis of the President's mercy power may have to be left for another occasion. It held: "This clearly is not that occasion insofar as this case is concerned, whatsoever be the guidelines observed for the exercise of the power conferred by Article 72, the only sentence which can possibly be imposed upon the petitioner

[22] Indian Kanoon. Org

[23] *Kuljeet Singh alias Ranga v. Union of India and anr.*, (1981) 3 SCC 324] (the '*Billa-Ranga* case').

[24] *Munawar Harun Shah v. State of Maharashtra* (AIR 1983 SC 585) (the '*Joshi-Abhyankar* case').

[25] *Kuljeet Singh alias Ranga v. Union of India and anr.* [(1981) 3 SCC 324].

[26] *Kuljeet Singh alias Ranga v. Lt. Governor, Delhi and anr.*, (1982) 1 SCC 11.

[27] *Kuljeet Singh alias Ranga and anr v. Lt. Governor of Delhi and ors*. [(1982) 1 SCC 417].

is that of death and no circumstances exist for interfering with that sentence...not even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the petitioner." This was strange because earlier the Supreme Court accepted the petition because it had "far-reaching importance." Kannabiran has written that this owed more to public opposition regarding commutation than to the merits or demerits of the petition per se.[28]

In *Munawar Harun Shah's* case,[29] once again the effect of popular pressure on the matter of writ petition became visible. The special leave petitions dismissed in 1980 remain unreported in this case as well. *Bachan Singh's* judgement had stressed the importance of a pre-sentencing hearing. Although in *Munawar*, the Court did not conform to this hearing requirement. The review petitions were dismissed twice in 1981 and 1982. The Court did not offer any reason for the same. Further, none of these petitions or rejections was reported in the Court's regular journals. This case involved seven murders, and "having regard to the magnitude, the gruesome nature of offences and the manners perpetrating them"[30] the Supreme Court categorised it as 'rarest of rare'. The Court, anticipating a negative public opinion in case of a softer judgement argued, "any leniency shown in the matter of sentence would not only be misplaced but will certainly give rise to and foster a feeling of private revenge among the people leading to destabilisation of the society." Not only did the Court reject the petitions, but it also called for early execution of the accused. Before this, in *Sevaka Perumal* too, the Court spoke of 'private vengeance' in the event that the judgement failed to fulfil the victim's expectation of justice.[31]

In 1987, another Bench of the Supreme Court gave the social necessity and deterrence argument. This was the case of *Mahesh s/o Ram Narain and others v. State of Madhya Pradesh ('Mahesh')*[32] Here Justices Khalid and Oza upheld the death sentences of two accused in caste-based killings of five people. The judgement talks about 'the evil of Untouchability' but not about the role of the accused. The High Court stated that the act "was extremely brutal, revolting and gruesome which shocks the judicial conscience... in such shocking nature of the crime as the one before us which is so cruel, barbaric and revolting, it is necessary to impose

[28] For Details, see Lethal lottery Report (details)
[29] *Munawar Harun Shah v. State of Maharashtra*, AIR 1983 SC 585. (more famous as the 'Joshi-Abhyankar case' from Pune)
[30] *Munawar Harun Shah v. State of Maharashtra*, AIR 1983 SC 585.
[31] In *Munawar Harun Shah v. State of Maharashtra* (AIR 1983 SC 585), the Court observed that Shah was merely a minor participant and did not have a significant role in the actual crime. Hence he had the potential for reform. It was also mentioned during sentencing that since his conviction, he had been translating the Koran to Marathi. He was also devoting time to learn Arabic and homeopathy. Here the court was introduced to the case of Shantaram *Jagtap* as well. Another accused by the name of Jagtap had translated a book from English into Marathi and had even written another book in English. He had been spending time in learning about Buddhism.
[32] AIR 1987 SC 1346.

such maximum punishment under the law as a measure of social necessity which works as a deterrent to other potential offenders." In this case, 'social necessity', was placed alongside the conception of 'judicial conscience.' It is difficult to say if the Court imposed its own understanding of moral/immoral on the society or if it changed its own understanding in face of pressure from society. In either case, the lines between judicial understanding of a perpetual threat to society and societal understandings of the same, seemed to blur.

Further, in *Mahesh,* the Court observed, "We also feel that it will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justice system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon." The Court acknowledged the need to focus on the reformation in general. In this particular instance, however, the Court imposed the death sentence. Moreover, no mitigating circumstances were discussed in this judgement. It seemed as if concerns of 'rarest' easily gave way to societal expectations of the judiciary. In entire judgements, Court stressed mainly what the society expects of it, and how the commissioning of certain offences went against the society. There was no detailed discussion on what it was about the facts and circumstances of the case at hand, that made it 'rarest of rare'. As we saw above, in *Earbhadrappa*, the Court (taking cue from Bachan Singh) argued that 'exceptional circumstances and social necessity had to be analysed simultaneously. In *Mahesh*, the Court further added deterrence to the mix. The Court suggested that it is necessary for society to keep certain criminals locked up, to minimise the possibility of a repeat offence. With social necessity arguments gaining prominence, deterrence logically became another significant part of this package. Criminals who had already harmed social interests had to be incapacitated to an extent that they could not shock the moral fibre twice. In these early cases, instead of investigating whether or not a criminal showed any potential to reform, the Court set to investigate his propensity to violence, to an extent that he would engage in shocking the collective conscience again. In Bachan Singh, the Courts were advised to present evidence that the offender could not be reformed. Starting mid-1980s however, the Court simply presented evidence that the accused had a marked proclivity to violence. The rationale for awarding death was altered.

Like *Mahesh*, in *Asharfi Lal and ors. v. State of Uttar Pradesh*[33] too, arguments based on 'social necessity' came to the fore. Yet again, mitigating circumstances received no mention. There

[33] AIR 1989 SC 1721.

was no analysis of the specific positioning of the criminal vis-a-vis the crime he had committed. Factors of age, poverty, illiteracy did not receive any mention as the majority of the attention was focussed on how the particular crime had ongoing implications for the public at large. To begin with, at any given time, it is not possible to accurately assess societal opinion towards any crime/criminal. In making something as abstract and fleeting as public opinion, the basis of granting life or death, the Court was giving in to emotions at best. Deterrence and protection of society from criminals was given priority over the reformative approach. The Court argued, "undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine public confidence in the efficacy of law and society could not long ensure under serious threats.... if the court did not protect the injured, the injured would then resort to private vengeance." Several judgements came to rest on assumed fears of how society would react and not on the facts of the case or the circumstances of the criminal. The potential of victims avenging the wrongs done to them was placed against the potential of an offender to reform. In the Court's presumption of what the society expected of it, there was an innate assumption that an offender was going to re-offend. This was coupled with the fact that the Court, in many cases, chose to skip over a detailed discussion of those facts that may/may not have made a case 'rarest of rare'.

In 1996 again the court again noted the possibility of public revenge. In *Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh*, [34] a bus was set to fire with a large number of people in it, following a failed robbery attempt. The Court rejected the mitigating circumstances like the young age of the accused, the primary motive being robbery, lack of prior planning in the killings as well as the fact that those who could, were allowed to escape. The Court stated that these were "eclipsed by many aggravating circumstances...(and) planned pogrom... executed with extreme depravity and...the inhuman manner in which they plotted the scheme and executed it."[35] The Court also stated that "if this type of person is allowed to escape the death penalty, it would result in a miscarriage of justice and the common man would lose faith in the justice system." Earlier, in this case, the High Court had argued that the death penalty was required to diminish any possibility of retaliation by the public against the offenders. Once again there was no analysis of the circumstances of the criminal, in the judgement. In Sevaka Perumal too the Court had expressed fear of public outrage if the decision did not meet societal expectations.

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[34] *Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh* AIR 1996 SC 2791.

[35] A subsequent campaign for commutation led by the Andhra Pradesh Civil Liberties Committee argued that the killings were unintentional and unplanned and was ultimately successful in obtaining a commutation of the sentences by the executive.

In *Ram Deo Chauhan and anr. v. State of Assam* ('Ram Deo Chauhan'),[36] Justices Thomas and Sethi, while advancing the argument of society's well-being and protection argued that, "when a man becomes a beast and menace to the society, he can be deprived of his life." The Court's reasoning revolved around the fact that anybody who performs a pre-planned quadruple murder does not deserve to be shown any sympathy. Such criminals, the Court argued, must be given the death sentence in order to protect society while simultaneously deterring others. The same Bench in *Narayan Chetanram Chaudhary and anr. v. the State of Maharashtra*,[37] upheld the death sentence of the convicts, who were found guilty of robbery and five murders. The Court concluded that these convicts were "so self-centred on the idea of self-preservation that doing away with all inmates of the house was settled upon them as an important part of the plan from the beginning." In this case, pre-meditation was translated as a deep intent to cause harm at large. Those persons who had already exhibited extreme selfishness by engaging in a pre-planned crime that harmed societal interests did not deserve a second chance.

In *Gurdev Singh and anr. v. the State of Punjab*,[38] Justices Srikrishna and Balakrishna upheld the death sentence of two offenders who had assisted in killing thirteen people. The Court argued that the case "shocked the collective conscience of the community." While there were no previous offences in their name, the Court believed the convicts to be permanent threats to society. It argued: "the acts of murder committed by the appellants are so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances."

## III. THE TRIPLE TEST

The Court, in *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (Mohd. Farooq)[39] noted that the "disparity in sentencing by [the] court flowing out of varied interpretations to the rarest of rare expression."[40]A word of caution was also inserted by the Court where it said that an inconsistent and random understanding of the rarest of the rare test might end up violating Article 14.[41] A look at the cases above makes it clear that different judges interpreted the content and intent of the rarest of rare principle differently. Too many important decisions in death penalty cases came to rely upon the individual judges. This seemed to install a heterogeneous as well as a "judge-centric" system of determining cases while simultaneously dealing with the rarest of rare criteria. In effect, the arbitrary and subjective application of the

[36] *Ram Deo Chauhan and anr. v. State of Assam*, AIR 2000 SC 2679.
[37] *Narayan Chetanram Chaudhary and anr. v. State of Maharashtra* (2000) 8 SCC 457.
[38] *Gurdev Singh and anr. v. State of Punjab,* AIR 2003 SC 4187.
[39]*Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641
[40] *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.
[41] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641.

rarest of rare formulation converted "principled sentencing" into "judge-centric sentencing".[42] Sentencing appeared to have become a factor of the subjective understanding of the various judges.

This challenge was recognised by the court itself in *Sangeet v. State of Haryana* ('Sangeet')[43] *Swami Shradhhananda*[44] and *Khade*. In Sangeet v. State of Haryana ('Sangeet') the Court observed that the Bachan Singh dictum was somewhere "lost in translation."[45] In *Bariyar* the court suggested that "there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle."[46] In a lot of other instances as well, the Supreme Court mentioned that the rarest of rare doctrine developed in the Bachan Singh case has been arbitrarily used. The observations of the Supreme Court in *Khade*,[47] *Swamy Shraddhananda v. the State of Karnataka* ('Swamy Shraddhananda'),[48] *Farooq Abdul Gafur v. State of Maharashtra* ('Gafur'),[49] *Aloke Nath Dutta v. State of West Bengal*[50] are relevant here. The court responded to this by improvising on the Bachan Singh framework and the 'public opinion' approach. In the case of *Gurvail Singh @ Gala v. the State of Punjab*,[51] the Supreme Court put forward three more conditions that had to be fulfilled before awarding the death penalty. These tests were:

1) The crime test (dealt with the aggravating circumstances of any case)
2) The criminal test (it means that there should not be any mitigating circumstances that favour of accused)
3) If both these tests are fulfilled, then the 'rarest of rare cases test'. Instead of being 'judge-centric', this test would derive from society's attitude towards a particular crime. The Supreme Court observed, "While applying this test, the Court has to look into a variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes."[52] Once again, the Court stressed the need to consider public opinion.

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[42]The Court itself echoed a similar concern in Sangeet v. State of Haryana, (2013) 2 SCC 452.
[43]*Sangeet v. State of Haryana* (2013) 2 SCC 452.
[44]Swamy Shraddhananda v. State of Karnataka, (2008) 13 SCC 767.
[45] *Sangeet v. State of Haryana*, (2013) 2 SCC 452, at para 33.
[46] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 104.
[47] (2013) 5 SCC 546.
[48] *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767.
[49] (2010) 14 SCC 641.
[50] (2007) 12 SCC 230.
[51] Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713.
See also Birju v. State Birju v. State Of M.P., (2014) 3 SCC 421; Ashok Debbarma @ Achak Debbarma v. State Of Tripura, (2014) 4 SCC 747; Santosh Kumar Singh v. State Of M.P, (2014) 12 SCC 650; Dharam Deo Yadav v. State Of U.P, (2014) 5 SCC 509; Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra, (2014) 4 SCC 69. One of the opinions in Shankar Khade also used **the triple test.**
[52] *Gurvail Singh @ Gala v. State of Punjab*, (2013) 2 SCC 713, at para 19.

It seemed as if the Court kept alternating between public opinion to reformation, back to public opinion, so on and so forth.

The Court had to analyse what type of crimes produced the strongest reactions from the public at large. This was to help determine what cases were so rare in their core, that they absolutely shook the society's moral fibre. Such an analysis was to guide the courts in assessing whether or not to award the death sentence in the case before it. This test was further elaborated upon in *Mofil Khan v. the State of Jharkhand*,[53]. Here the court said that the real purpose behind this test is to "basically examine whether the society abhors such crimes and whether such crimes shook the conscience of the society and attract intense and extreme indignation of the community."[54]

In the triple test system, the so-called 'judge-centrism' can be dealt with by bringing in the society's response to any particular crime. This is important because, as acknowledged in *Bachan Singh* and later reiterated in *Bariyar*, judges end up considering their own presumptions and predilections as against those of society. This is so because even if we were to assume the existence of a clearly quantifiable public opinion, the judges do not have any means of accessing that particular opinion.

While Bachan Singh did not name the exact crimes that warranted the death penalty, the triple test analysis aimed to do exactly that by advancing the "Rarest of Rare Cases test". Under this test, the courts had to engage in an in-depth study of those cases where the death sentence had been imposed, by virtue of the rarest of rare principles. If the circumstances of the case at hand matched the circumstances of those that had to be studied, the death penalty was to be the obvious choice of punishment. This clearly went against the spirit of Bachan Singh's judgement that hoped to set up a case-by-case system of analysis. Instead of rigorously analysing the attributes of the case before it, the court had to see if it aligned with the attributes of some other cases that had already received the death penalty. This led to another problem. In their enthusiasm to use the 'rarest of rare' lens to understand the case before them or just use the phrase the Court many times ignored those facts that made a case singular. This is problematic because while cases were similar, they were certainly not the same. Further, the similarity index applied only to the gruesomeness of the crimes and sometimes the motive for which these crimes were committed. For logical reasons, it could not hold true for differential positioning of different criminals that committed different crimes.

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[53] *Mofil Khan v. Jharkhand*, (2015) 1 SCC 67.
[54] *Mofil Khan v. Jharkhand*, (2015) 1 SCC 67, at para 46.

The departure from Bachan Singh was made both in terms of the analytical framework and the pertinent factors to be thought about (particularly public opinion). The three-tier test thereby contributed to the conceptual confusion surrounding the rarest of rare criteria. The benefit of this triple test is that it minimises the chances of death penalty imposition to those cases that fully lack any mitigating circumstances. In a way then this three-fold criteria is also in line with the intent of the Bachan Singh guidelines, wherein only the most exceptional cases deserved the death penalty. It further nuanced the notion of 'rarity' that had to be looked at by the courts in dealing with capital cases.

Like the 'public opinion' approach, the triple test also involves an examination of society's perspective towards a particular issue/crime. Unsurprisingly then it also suffers from the problems of the former approach. It falsely assumes that society is one identifiable grouping with a clearly discernible set of opinions. It does not give due regard to the fact that society's opinion does not emerge from a full knowledge of the facts of the case or what would be the most justified way of dealing with a crime. Rather it is a mere feeling. Law, on the other hand, cannot be based on feelings. How people understand crime or identify guilt is not something that is based on objective facts. It is very much a factor in their subjective understanding of the world. Generally speaking, the courts lack the means to acquire and thoroughly examine public opinion in all cases that come to it for consideration of the death sentence. Moreover, there is no one clearly discernible box of public opinion that can present all the relevant information on any particular case. Society, in itself, maybe divided between those who favour reformation and those who presume the end of justice to be revenge or retribution. In such situations, how will the Court be able to choose the relevant public opinion? Once again, which side is chosen comes to depend on the subjective predilection of judges. And once again, the outcome of death penalty cases comes to depend not on objective criteria but subjective interpretations of that criterion.

In *Bariyar*, the Court itself acknowledged this limitation when it stated that "how people understand any crime is neither an objective circumstance relating to crime nor to the criminal."[55] Here the Court emphasised the difficulty of quantifying public opinion. Further in Bariyar, it was recommended that courts must give due attention to constitutional safeguards. These safeguards "introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to the procedure to be invoked by the state in its dealings with people in various capacities, including as a convict."[56] In Bariyar

[55] *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 80.
[56] *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 82.

the Court acknowledged that involving public opinion as against invoking constitutional proviso would subsume the model enshrined by the Bachan Singh judgement. This implies that the court has to play a counter-majoritarian role. It must save individual interest against majoritarian tendencies. There may also be versions of public opinion that go against constitutionalism or rule of law. The courts, however, must function within the bounds of constitutionalism as well as rule of law.

Giving too much importance to public opinion or giving in to public pressure can be problematic. A court has to be an institution of law and not merely public opinion. Courts do not always have to exactly represent or work as per the public opinion. Judges certainly form part of society. Undoubtedly, they may express views that sometimes coincide with the larger public opinion. There may also be cases when it goes completely against the said opinion. In either scenario, the law must be given primacy over any opinion. There should not be any pressure on the judges, Benches or courts to infuse public opinion into the formal framework of law, especially when it comes to an irrevocable punishment like the death penalty. If one simply has to worry about satisfying public expectations of a trial, then there is not much point in bringing any case to the courts. As Aparna Chandra has written, "If the opinion of the public matters to questions of sentencing, then courts are the wrong institutions to be determining a sentence. Parliament or lynch mobs are more apposite."[57]

Concentrating excessively on public opinion also entails the danger of the death penalty "becoming a spectacle in media. If media trial is a possibility, sentencing by media cannot be ruled out."[58] The point made by K.G.Kannabiran is relevant here. He has noted that modern states retain the death penalty on their statutes in order to turn the sentence into a spectacle. He writes,

> On the morning of 30th December 2006, those of us living in countries of the eastern hemisphere was startled to witness the unforgettably morbid and macabre sight of a very composed Saddam Hussein being prepared for his execution. Rarely, in recent memory, has the world been witness to execution within minutes of the event. ....it equally strongly stoked the voyeuristic in some, fed the morbid curiosity of others, and gave a diabolic twenty-first-century expressive form to the practice of revenge through 'blood letting', in a manner no fictional creation could as evocatively or forcefully ever have.[59]

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[57] For more details of the same, see Aparna Chandra

[58] *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 87.

[59] The Lethal Lottery: An examination of the Death penalty in India, Amnesty International. AI Index: ASA

This is also what justice as revenge can lead to. To feel vindicated at someone's death should not be the objective of any justice system. This is the limit of retribution as a revenge model of punishment. We shall deal with it in detail in the next chapter, under retribution as a penological objective.

## IV. Did the Court always give in to public pressure?

It is important to note that the Court did not give in to public pressure for all kinds of cases, particularly cases dealing with 'Gender-based violence'. During the 1980s, the women's movement in India succeeded in highlighting instances of gender centric violence, particularly dowry related violence or dowry murders.[60] In Machhi Singh's judgement (1983), the Court expanded the notion of 'rarest of rare' to include dowry murders in that framework.

One of the first dowry-related cases to reach the Supreme Court was *State (Delhi Administration) v. Laxman Kumar and ors.*[61] In this case, three people had been sentenced to death by the trial court on account of an 'atrocious dowry death'. Subsequently, the accused were acquitted by the High Court. This decision was challenged by the State and the IFWL (i.e. the Indian Federation of Women Lawyers) Justices Sen and Misra reinstated the original conviction but did not award the death penalty. They argued that two years had elapsed since the High Court's acquittal and 'other facts and circumstances' of the case had also changed. However, it did not go into what exactly those changed facts and circumstances were. The High Court judgement, in the 'conclusion' part, noted that the verdict would likely "cause a flutter in the public mind more particularly amongst women's social bodies and organisations". It further emphasised that the judges needed to take into account the evidence placed before them. This reflected the court's worry about the impact of its judgement on the public. However, in spite of this, the death penalty was not awarded in this case.

In the case of *Kailash Kaur v. the State of Punjab*,[62] Justices Sen and Eradi expressed disappointment over the fact that the death penalty had been awarded in a situation of dowry murder. The Supreme Court stated: "This is yet another unfortunate instance of the gruesome murder of a young wife by the barbaric process of pouring kerosene oil over the body and setting her on fire as the culmination of a long process of physical and mental harassment for extraction of more dowry. Whenever such cases come before the court and the offence is

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[60] "Dowry murders" refer to crimes that are tried under Section 302 of the Indian Penal Code. This is different from "dowry deaths" that are covered by Section 304 B of the IPC. It should be noted that the Supreme Court has used these terms interchangeably on some occasions.

[61] AIR 1986 SC 250.

[62] (1987) 2 SCC 631.

brought home to the accused beyond a reasonable doubt, it is the duty of the court to deal with it in the most severe and strict manner and it may award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such anti-social crimes." In this particular case, however, the trial court had convicted two accused but sentenced them to life imprisonment and acquitted another. The High Court had further acquitted another, leaving only one accused sentenced to imprisonment for life. The Supreme Court entertained grave doubts about the legality, propriety and correctness of the decision of the High Court to acquit one of the accused. However, the Court took no action to reverse the decision, using the excuse that the state had not filed an appeal on this issue. While upholding the life sentence of the appellant, the Supreme Court commented, "we only express our regret that the Sessions Judge did not treat this as a fit case for awarding the maximum penalty under the law and that no steps were taken by the State Government before the High Court for enhancement of the sentence."

When it came to 'dowry murders', the Supreme Court tried to establish that it was not influenced by the rising public pressure. There were of course variations to it: some high courts installed their own approaches; the Rajasthan High Court in *Lachma Devi and ors*.[63] stated that the offenders in dowry cases could be hung publicly once the public had been duly informed. This was struck down as unconstitutional by the Supreme Court in an appeal to the Attorney General of India.[64] The Court also reprimanded the High Court for giving in to emotions. In *Lichhamadevi v. State of Rajasthan* (AIR 1988 SC 1785), [65] another appeal was filed in the same case. It was heard by another Bench of the Supreme Court. While Justices Oza and Shetty agreed that the murder was "dastardly and diabolic", the sentence was commuted. The court argued that "it is apparent that the decision to award death sentence is more out of anger than on reasons. The judicial discretion should not be allowed to be swayed by emotions and indignation." The court further expressed an issue with the procedural part of the trial as well as the way in which evidence had been collected against him. In practice, the supreme court did not uphold the death sentence in many dowry cases brought before it. That said the court did spend a considerable time in expounding rhetoric about the evils of the dowry system and how dowry murders must attract the ultimate penalties.

## V. CONCLUSION

This article deals with two main aspects: the first deals with how the rarest of the rare test was

[63] *Lachma Devi and ors.* (AIR 1986 SC 467).
[64] Attorney General of India v. Lachma Devi and others, (AIR 1986 SC 467)]
[65] Licchamadevi v. State of Rajasthan (AIR 1988 SC 1785)

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broken down into various factors and analysed whimsically. The second deals with what was the reasoning of the Court behind this whimsical engagement. Here the Court advanced the principles of 'public opinion' and triple test. The problem with these approaches is that it completely defeats the entire purpose of the rarest rare guideline. Without sufficient discussion about the facts and circumstances of the case and the criminal, the idea of arriving at the most suitable punishment received a short thrift. Looking only at the crime or the criminal would not present a full picture. Any punishment that was meted out by looking only at either would leave some lacunae in the sentencing process. *Bachan Singh* restricted the death penalty to the rarest of rare cases. *Bariyar* further advised the judges to analyse a set of similar cases to be able to determine if the case being heard was rarest or rare. *Gurvail Singh* established certain crimes as particularly deserving of the death penalty. In *Shankar Khade*, the Court emphasised the need for evidence to guide death sentences. Unless the courts received evidence, they could not decide if a case at any given point, was "rarer" than a comparative block of other similar/rare cases. The addition or subtraction of various elements to the rarest of rare formulation ended up tempering with the very intent of Bachan Singh. The fact that in very few cases the original intent was preserved goes to show that the subjective interpretations of various judges go a long way in deciding the outcome of capital cases. At times the court added the triple test, society's call for justice, public opinion or collective conscience to the mix; at other times it gave one priority over the other. There is no way of knowing which way the judicial coin will land. Heads one could live and tails one could die. Undoubtedly, the courts engaged in cherry-picking of facts apropos of crime and criminal.

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