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Does our "Collective Conscience" Lead us to Hanging?

Sanjay Hegde and Pranjal Kishore Jun 5, 2017

Students and social activists holding a protest in the memory of the victim of 16th December Delhi Gang Rape case on the occasion of second anniversary, at Jantar Mantar in New Delhi on December 16, 2014. File photo: Shiv Kumar Pushpakar The Hindu

Since 1983, the Supreme Court has been using the "shock to the conscience of the society" as a ground for imposition of the death penalty. It remains unclear as to how judges gauge society's reaction to a crime. Are they influenced by reports in the media? Do their personal opinions influence their judgment regarding what the conscience of the society really is? It is impossible to answer with certainty. In this article, ***Sanjay Hegde*** *and* ***Pranjal Kishore*** *trace the history of the doctrine of social consciousness and all that is wrong with its application to the death penalty in India.*

> In *Tiller V/s. Atlantic Coast Line Rail Road Company* [1], Justice Frankfurter of the United States Supreme Court had prophetically stated: “A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula indiscriminatingly used to express different and sometimes contradictory ideas.”

The phrase ‘collective conscience of the society’ was introduced to India’s death penalty jurisdprudence in *Machhi Singh & Ors. v State of Punjab*, (“Machhi Singh”) [2] . Over the past 34 years, the doctrine has been used by our Supreme Court as a ground to impose the death penalty.

The authors of this piece were among those who assisted the Supreme Court as Amicus Curiae, in the Delhi gang rape and murder case of 2012. We were aware of the difficulties we would face in attempting to save the lives of even one of the convicts, given the fact that the “collective conscience of the society”, had seemingly been inflamed by an endless media barrage which followed the investigation, trials and appellate processes of the case.

We did argue in court that if it came to sentencing, individual attention to the roles played by each accused and their separate circumstances in life needed examination. A resort to the collective conscience by the court might be seen as succumbing to majoritarian groupthink. We failed.

Large portions of the judgments in *Mukesh and Anr v NCT of Delhi and Ors* [3] apply the doctrine of collective conscience. This article is an examination of this pernicious, persistent doctrine in death sentence jurisprudence, its origins and the problems in its application.

Origins of the Doctrine

The phrase “collective conscience” has its origins in Sociology. It has been used by French thinkers such as Alfred Espinas since the early 19th century. However, it is through its usage in the “The Division of Labour” (1893) by French Sociologist Emile Durkheim that the phrase received prominence. Durkheim defined collective conscience as: "the totality of beliefs and sentiments common to average citizens of the same society which forms a determinate system which has its own life."

According to Durkheim, an action is criminal "when it offends the strong, well-defined states of the collective consciousness". The result of a crime is a passionate reaction that occurs in the form of punishment. This is done in order to safeguard the collective consciousness. Durkheim thus saw the very purpose of penal law, as one designed to safeguard the collective consciousness of society.

The Doctrine in India

The most widely acknowledged/authoritative translation of ‘The Division of Labour’ was published in 1984. A year earlier – in July, 1983 to be precise, the Supreme Court (in Machhi Singh) had given judicial recognition to the notion of “shock of collective conscience” as a ground for imposition of the death penalty.

Machhi Singh was a case that involved seventeen murders by twelve accused. Ultimately, a bench of three Judges of the Supreme Court sentenced three of the accused - Machhi Singh, Kashmir Singh and Jagir Singh to death. While doing so, the Court observed:

“Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case.

It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”

The Court went on to list the categories of cases where the death penalty was a suitable option. It noted that the “community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.”

Three points of note emerge from the Judgment:

a. It crystallized the application of the rarest of rare doctrine into definite categories
b. The categories related only to the circumstances of the crime
c. Outrage of the community was made a ground for imposition of the death penalty.

With respect, all three appear to be in conflict with the Judgment of a Constitution bench of the Court in *Bachan Singh v. State of Punjab* [4] (“Bachan Singh”). Bachan Singh was decided by a Constitution Bench (five judges). It was therefore binding on the bench of three judges in Macchi Singh.

The Court in Bachan Singh had explicitly refrained from categorizing crimes. It had also pointed out the need to “give due consideration to the circumstances of the criminal.” Perhaps most significantly, it had warned against the dangers of judges taking “upon themselves the responsibility of becoming oracles or spokesmen of public opinion” It is relevant to reproduce the portions of the Judgment which are in conflict with the principles laid down in Machhi Singh.

i. Categorization of cases

“169. If by "laying down standards", it is meant that 'murder' should be categorised before hand according to the degrees of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free-play of discretion, the argument merits rejection.
170. As pointed out in Jagmohan [5] such "standardisation" is well-nigh impossible.”

ii. Circumstances of the criminal

“208. The present legislative policy discernible from Section 235(2) read with Section 354(3) [6] is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.”

iii. Conscience of society

"126. Incidentally, the rejection by the people of the approach adopted by the two learned Judges in Furman, furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the same time, it is a reminder that Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned."

Is the Ratio of Machhi Singh per Incuriam?

The categories and illustrations that were laid down in Machhi Singh went well beyond the facts of the case. The Court stated that full weight had to be accorded to mitigating circumstances. However, the sentence imposed by the High Court was confirmed without going into the question of mitigating circumstances at all. The ratio of Machhi Singh thus appears to be somewhat ambiguous [7] .

Machhi Singh was bound by the dictum of the larger bench in Bachan Singh. Going by the passages from both judgments reproduced above, it would appear that the Court in Machhi Singh lays down the incorrect law. Indeed, subsequent judgments have been critical of the judgment in Machhi Singh. However, they have all stopped short of terming it per incuriam [8] .

A bench of three Judges in *Swamy Shraddananda (2) v. State of Karnataka* [9] noted that "the standardisation and classification of cases that the two earlier Constitution Benches had resolutely refrained from doing finally came to be done in Machhi Singh." The Bench went on to observe that: "Machhi Singh, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty."

Similar observations were made by a division bench in *Haresh Mohandas Rajput v. State of Maharashtra* [10] , where the Court noted that Machhi Singh had "expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh."

Another division bench in *Sangeet v. State of Haryana* [11] , ("Sangeet") was also critical of the law laid down in Machhi Singh. The Court therein observed:

"Despite the legislative change and Bachan Singh discarding Proposition (iv)(a) of Jagmohan Singh , this Court in Machhi Singh revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different constituents of an incident. Nevertheless, the balance sheet theory held the field post Machhi Singh"

In *Rameshbhai Chandubhai Rathod v. State of Gujarat* [12] , Ganguly J., in his separate opinion warned, that the Court could not "afford to prioritise the sentiments of outrage" of the society. He went to hold that "the expression `rarest of rare cases' is not to be read as a mere play on words or a tautologous expression……This is a very loaded expression and is not to trifled with. It is pregnant with respect for the inviolability of human life. That is why

the word `rare' has been used twice and once in a superlative sense. Therefore, the significance of this expression cannot be watered down on a perceived notion of a `cry for justice'."

In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [13] , ("Bariyar"), the Court, without expressly referring to Machhi Singh, was especially critical of factoring in "public opinion" into the rarest of rare analysis. The Court noted that "perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of Bachan Singh."

Application of the collective conscience doctrine in India

Jurist Karl Llewellyn in his celebrated book '*The Bramble Bush: On our Law and its Study*' had referred to precedents being either 'strict' or 'loose'. The loose view takes the previous ruling as established law. This is done without considering the context and the specific facts of a precedent. Such an approach is often criticized for blurring the distinctions between ratio decidendi and obiter dicta [14] .

As has already been noted, the categories and illustrations that were laid down in Machhi Singh went beyond the facts of the case. The Court did state that the sentencing judge should accord full weightage to mitigating circumstances as well. However, the Law Commission in its 262nd Report has noted that "in subsequent cases, many judges have invoked the categories in Machhi Singh in a manner that suggest that once a case falls within any of the 5 categories it becomes a rarest of rare case deserving the death penalty. [15] "

It appears that subsequent decisions have taken, what Llewellyn would describe as a 'loose view' of the ratio of Machhi Singh. Over the years, similarly vague notions like "society's cry for justice" and "public abhorrence of the crime" have emerged as grounds for imposition of the death penalty. In some instances (the Law Commission records at least six), Courts have focused only on the crime without considering the circumstances of the criminal or the possibility of reform. These were clear requirements under the Bachan Singh doctrine.

For instance, in *Sudam @ Rahul Kaniram Jadhav v. State Of Maharashtra* [16] , the accused was convicted for killing a woman and four children. The Court noted that the crime was pre-meditated and held that the facts showed that "the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It has resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant."

The Court did not discuss any mitigating circumstances at all.

Again, in *Ajitsingh Harnamsingh Gujral v. State of Maharashtra* [17] , the Court while imposing the death penalty observed: "In our opinion a distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former, the latter belongs to the category of rarest of rare cases, and hence death sentence should be given."

No mitigating circumstances were referred to.

Numerous judgments of the Supreme Court have been critical of this approach. In *Shankar Kisanrao Khade v. State of Maharashtra* [18] , ("Khade") the Court doubted the correctness of the imposition of the death penalty

in *Dhananjoy Chatterjee v. State of West Bengal* [19] . It was of the view that "*there was not much discussion on the mitigating circumstances to satisfy the 'criminal test*." It is well known that Chatterjee was executed in 2004, almost a decade before the Judgment in Khade.

Similarly, the Court in Sangeet, also noted three instances where the death penalty was imposed without any regard to the circumstances of the criminal.

The most glaring instance of the arbitrariness of the death penalty jurisprudence in India is the judgment of the Court in *Ravji*. In *Ravji alias Ram Chandra v. State of Rajasthan* [20] , the Supreme Court held:

> "It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial."

The ratio in Ravji was followed in *Surja Ram v. State of Rajasthan* [21] . The men were hanged in 1996 and 1997 respectively. Twenty-two years later, the judgment in Bariyar, ,noted that the Court had not considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in Ravji or any of the 6 decisions wherein it was followed. All of these decisions were declared to be incorrect, but not before two men had been executed.

Conclusion - The dangers of the Doctrine

The doctrine of collective conscience has been controversial since the time it first gained prominence. In *Goldberg v Kelly* [22] , Justice Douglas Black of the United States Supreme Court described the doctrine as an euphemism for an individual's judgment. He noted that "judges are as human as anyone, and as likely as others to see the world through their own eyes and find the collective conscience, remarkably similar to their own."

The Supreme Court has expressed concern about arbitrary application of the doctrine in numerous decisions. However, it has failed thus far, to address its own concerns. The Law Commission has been particularly severe in its criticism and described the doctrine and its offshoots as "amorphous."

There are numerous difficulties with the invocation of the doctrine for the imposition of the death penalty. Firstly, as the Court noted in Bachan Singh, judges are not equipped to assess the will of the people. Secondly, in times such as these, there is a real danger of capital sentencing becoming a media spectacle. In fact, the Court in Bariyar has noted that "a possibility of sentencing by media cannot be ruled out"

It is important to note that public opinion in cases where the death penalty is demanded may run "counter to the rule of law and constitutionalism." The Court in Bariyar has noted that "the constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations."

The danger of the death penalty lies in its irreversibility. Thus, any legal system that continues with the practice has to ensure that there is no margin for error in its application. Over 140 countries have now abolished the death penalty either in law or in practice. Indeed, there is no evidence to show that the death penalty is anymore deterrent than life imprisonment. The scope of this article is limited to the application of the death penalty in India and not with its existence per se. However, given the circumstances, and the admitted fallibility of the Court, death penalty law in India stands on a slender thread.

Before we end, we wish to record, that we have desisted from specific explication of the facts and law applied in the Delhi Gangrape case, where we had assisted as Amicii. This is because the legal process there has not yet concluded. It is not our desire to reargue the case in any outside forum. This essay is only designed to inform the collective conscience of society, about the dangers of collective groupthink. For as Atticus Finch put it, "The one thing that doesn't abide by majority rule is a person's conscience."

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5.^ ***indiankanoon.org. 1972.*** "Jagmohan Singh v State of Uttar Pradesh", *Supreme Court of India*, October 3. (1 SCC 20).

6.^ Section 235(2) in The Code Of Criminal Procedure, 1973

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

Section 354(3) in The Code Of Criminal Procedure, 1973

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

7.^ *Ratio/ratio decidendi* refers to the rationale for a decision that forms a binding precedent.

8.^ *Per incuriam* literally translated means a Judgment delivered through 'lack of care', i.e. a judgment that is incorrect.

9.^ ***indiankanoon.org.* 2008.** "Swamy Shraddananda@Murali ... vs State Of Karnataka", *Supreme Court of India*, July 22. (13 SCC 767).

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13.^ ***indiankanoon.org.* 2009.** "Santosh Kumar Satishbhushan ... vs State Of Maharashtra", *Supreme Court of India*, May 13. (6 SCC 498).

14.^ A remark made in a judgment made in passing, and therefore not binding.

15.^ 262nd Report of the Law Commission, The Death Penalty, August, 2015.

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(***Sanjay Hegde*** is a Senior Advocate of the Supreme Court. **Email**: sanjayrhegde@gmail.com

Pranjal Kishore is a graduate from the 2015 batch of Hidayatullah National Law University, Raipur. After graduating, Pranjal spent a year litigating on the original side in Trial Courts across Delhi. In July, 2016 Pranjal started working with an Advocate on Record in the Supreme Court and has been representing clients in a variety of civil, commercial and criminal matters at the appellate stage. **Email**: pranjalkishore.hnlu@gmail.com)