THE VALIDITY OF DEATH PENALTY AS A PUNISHMENT IN THE WAKE OF THE CRIMINAL LAW (AMENDENT) ACT, 2018

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The Criminal Law (Amendment) Act of 2018 inserted Section 376AB and Section 376BD in the Indian Penal Code (hereinafter referred to as the Penal Code)[1] which provides for death as a punishment for committing the act of rape on a minor girl below the age of 12.

THE IDEA OF PUISHMENT IS REFORMATION AND NOT RETRIBUTION

The punishment of death is not justified in the offence of rape, on minor girls below the age of 12, as such application of death penalty in India is contentious, the discretion of the judges is arbitrary in nature and further, criminal jurisprudence supports reforming the criminals.

APPLICATION OF DEATH PENALTY IN INDIA IS CONTENTIOUS

(i) Strait jacket formulae of categories for the application of death penalty.

The Apex Court in *Bachan Singh v State of Punjab*[2], held that it was "neither practicable nor desirable" to lay down a rigid or straight-jacket formula or categories for the application of the death penalty. Further, 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.[3]

[1] https://mha.gov.in/sites/default/files/CSdivTheCriminalLawAct_14082018_0.pdf (last visited at 13:47pm;20/02/2019)
[2] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[3] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

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This exceptional penalty can be imposed "*only in gravest cases of extreme culpability*" or "*exceptional circumstances*" 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*."[4] These factors shall be based upon "well recognised principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases."

Hence, applying a strait jacket formula for a single category of offence of rape of minor girls under the age of 12 would be arbitrary.

On average, NCRB records[5] that 129 persons are sentenced to death row every year, or roughly one person every third day. The Supreme Court took note of these figures and stated that "*the number of death sentences awarded … is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases*"[6] and the Court held 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*."[7]

Such concerns have been reiterated on multiple occasions, where the Court has pointed that the rarest of rare dictum propounded in *Bachan Singh*[8] has been inconsistently applied[9]. In these cases, the Court has acknowledged that the subjective and arbitrary application of the death penalty has led *"principled sentencing"* to become *"judge-centric sentencing"*,[10] based on the *"personal predilection of the judges constituting the Bench."*[11] Thus, there remain concerns that capital punishment is *"arbitrarily or freakishly imposed".*[12]

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[4] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[5] Crime in India, National Crime Records Bureau, available at http://ncrb.gov.in/CD-CII2013/Home.asp (last viewed on 31.01.2019).
[6] Shankar Kisanrao Khde v. State of Maharashtra, (2013) 5 SCC 546, ¶ 145.
[7] Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 104.
[8] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[9] Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230; Swamy Shraddhananda v. State of Karnataka (2008) 13 SCC 767; Farooq Abdul Gafur v. State of Maharashtra (2010) 14 SCC 641; Sangeet v. State of Haryana (2013) 2 SCC 452; Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
[10] Sangeet v. State of Haryana, (2013) 2 SCC 452
[11] Swamy Shraddhananda v. State of Karnataka, (2008) 13 SCC 767
[12] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

(ii) Inconsistency in the application of the rarest of the rare

For the application of a punishment of such magnitude, that is, taking the life of another person, what we must ensure is such punishment is, to say the least, not arbitrary as the punishment of death is irrevocable.

"*The Bachan Singh threshold of "the rarest of rare cases" has been most variedly and inconsistently applied*".[13] Supreme Court has recognized that "*the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system.*"[14] Further Supreme Court stated that "*the precedent on death penalty in itself is crumbling down under the weight of disparate interpretations."*[15]

The Supreme Court has called the "lack of consistency" and "want of uniformity" in capital sentencing, "*a poor reflection of the system of criminal administration of justice.*"[16] The Court has expressed concern that the "*extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle*.[17]

It is also important to note that, the categories brought under *Machhi Singh*[18] which "*considerably enlarged the scope for imposing death penalty*"[19] thus crystallized the applicability of the rarest of rare principle into five distinct categories which Bachan Singh had expressly refrained from doing. 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

[13] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, ¶109.
[14] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 109.
[15] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, ¶ 165.
[16] Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767, at para 52
[17] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 110.
[18] Machhi Singh v. State of Punjab, (1983) 3 SCC 470.
[19] Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767
[20] Devender Pal Singh v. National Capital Territory, (2002) 5 SCC 234

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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."

Hence, *Machhi Singh* and a subsequent line of cases have 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.[21]

The application of the rarest of the rare case is absolutely inconsistent and thus, the same cannot be relied upon. Further, a man's life cannot be legally ended based on inconsistencies.

DISCRETION OF JUDGES IS ARBITRARY IN NATURE

Arbitrariness is the anti-thesis of equality. 'Equality is a dynamic concept cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. Equality is antithetic to arbitrariness.[22]

Machhi Singh introduced into the vocabulary of India's death penalty jurisprudence, the notion of 'shock to the "collective conscience" of the community' as the touchstone for deciding whether to impose the death penalty or not. "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 that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge. Further, Judges have no divining rod to divine accurately the will of the people."[23]

[21] Prajeet Kumar Singh v. State of Bihar, (2008) 4 SCC 434.
[22] Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, 38.
[23] Bachan Singh v. State of Punjab, (1980) 2 SCC 684

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally and philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.[24] There has been a two-limb test laid down by the Apex Court[25] as with regard to permissible classification which is as follows:

a. Classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group;
b. The differentia must have a rational relation to the object sought to be achieved by the statute in question.

There is no intelligible differentia for imposing a lighter sentence upon persons who commit rape on minor boys, the reason behind this is twofold; this is contrary to the provisions of the Protection of Children from Sexual Offences Act and the last major study, in 2007, titled "Study on Child Abuse" performed by the Ministry of Women and Child Development threw light on the staggering figure that 52.94% of the victims of child sexual abuse were boys.[26]

This, therefore presents classification based on gender has no rational nexus with the object sought to be achieved by the ordinance and therefore, it is violative of Article 14 of Constitution of India and increases the vulnerability of the children of our country. Article 2 of the Convention on the Rights of Child which prohibits state parties from discriminating between children on the basis of sex. Further, under Article 51c, the State is obligated to foster respect for international law and treaty obligations. India is a party to Convention on Rights of Child and shall respect the aspect of non-differentiation between boy and girl minor.

THE CRIME TEST, THE CRIMINAL TEST AND THE RAREST OF RARE TEST

The Supreme Court has responded to the concern that capital sentencing is "judge centric," by articulating another formulation of the *Bachan Singh* doctrine has been articulated that three tests

[24] Maneka Gandhi v. Union of India
[25] Motor General Traders v. State of A.P., (1984) 1 SCC 222, 229.
[26] https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf (last visited at 18:18 pm on 20/02/2019)

have to be satisfied before awarding the death penalty: the crime test, meaning the aggravating circumstances of the case; the criminal test, meaning that there should be no mitigating circumstance favoring the accused; and if both tests are satisfied, then the rarest of rare cases 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. 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." [27]

However, this is of concern because, judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and wide shared preferences on these matters, judges have no means of determining these preferences. This triple test formulation seeks to reject the notion of categorizing crimes fit for death penalty in its "Rarest of Rare Test" which is predicated on "society's abhorrence, extreme indignation and antipathy to certain *types of crimes*."

Further, The Criminal Law (Amendment) Act, 2018 is a result of the public outcry for justice in cases of rape against minor girls under the age of 12 that followed the rape cases of minor girls in Kathua and Unnao, without adequately addressing the issues of implementation of the existing law in force and is merely a knee jerk reaction to the public outcry. The Supreme Court has questioned the relevance and desirability of factoring in such "public opinion" into the rarest of rare analysis, since *firstly;* it is difficult to precisely define what "public opinion" on a given matter actually is. *Secondly*, people's perception of crime is "*neither an objective circumstance relating to crime nor to the criminal*." *Thirdly*, the courts are governed by the constitutional safeguards which "*introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict*."[28]

[27] Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713.
[28] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498,

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The Court plays a counter majoritarian role in protecting individual rights against majoritarian impulses. Public opinion in a given case may go against the values of rule of law and institutionalism by which the Court is nonetheless bound.[29]

Thus, in departing from *Bachan Singh* both in terms of the framework of analysis, and the relevant factors to be considered especially the consideration of public opinion, this three pronged test appears to have further added to the conceptual confusion around the rarest of rare analysis and as the Court opined in *Sangeet v. State of Haryana*, the *Bachan Singh* dictum appears to have been "lost in translation."[30]The question that needs to be answered is that if our sentencing principle in giving death penalty in itself is flawed, then how can the Courts take upon itself the onus of giving such a punishment?

REFORMATION: OBJECTIVE OF CRIMINAL LAW

The criminal jurisprudence functions on the aspect of reformation of the criminal. The focus of the punishment should be balanced between the society and the individual, i.e., the deterrent element of punishment must be balanced with the possibility of reformation of the individual.[31] In *Sunil Batra v. Delhi Administration*[32] the Court observed that "a rehabilitation purpose is or ought to be implicit in every sentence of an offender unless ordered otherwise by the sentencing court."

The capital punishment acts as a retributive aspect. The conception of retribution as revenge is based on the understanding that the "undeserved evil" inflicted by the criminal on the victim should be matched by a similar amount of punishment to him/her.[33] In *Deena v. Union of India*,[34] the Court ruled that *"the retribution involved in the theory 'tooth for tooth' and 'an eye for an eye'*

[29] Rameshbhai Rathod v. State of Gujarat, (2009) 5 SCC 740
[30] Sangeet v. State of Haryana, (2013) 2 SCC 452, at para 33
[31] Ediga Anamma v. State of Andhra Pradesh, 1974 (4) SCC 443.
[32] Sunil Batra v. Delhi Admn. (1978) 4 SCC 494
[33] Immanuel Kant, The Metaphysics of Morals 141-42 (M.J. Gregor trans., 1996); Jeffri E G. Murphy, Kant: The Philosophy of Right 124 (1994)
[34] Deena v. Union of India, (1983) 4 SCC 645

has no place in the scheme of civilized jurisprudence."[35] More recently, in *Shatrughan Chauhan v. Union of India*, [36] the Supreme Court ruled that "retribution has no Constitutional value" in India. It held that "*an accused has a de- facto protection under the Constitution and it is the Court's duty to shield and protect the same*."

In *Bachan Singh v. State of Punjab*, the Supreme Court held that rehabilitation is an express sentencing goal, and must never be ignored especially in the death penalty context. It held that the death penalty should not be imposed "save in the rarest of rare cases when the alternative option is unquestionably foreclosed." Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.[37]

Thus, the main objective of the criminal law should be to reform the criminal. Apex Court in *Mohammad Giasuddin v. State of A.P*[38], stated that the modern community has a primary stake in reformation of the offender, and the focus should be therapeutic rather than an "in terrorem" outlook and the Court opined "*the whole man is a healthy man and every man is born good. Criminality is a curable deviance."*

CONDEMNATION OF DEATH PENALTY UNDER INTERNATIONAL REGIME.

Various judgements have condemned the death penalty across the World. Article 6(2) of the ICCPR, to which India is a party prohibits imposition of death penalty. Further. The U.S. Supreme Court held in *Coker v. Georgia*[39]that capital punishment cannot be awarded for a rapist, as the same is an excessive penalty. The Supreme Court of USA in *Patrick Kennedy* v. *Louisiana*[40]stated that death penalty would be an inappropriate and out of proportion penalty for the crime of rape.

[35] Deena v. Union of India, (1983) 4 SCC 645, at para 10.
[36] Shatrughan Chauhan v. Union of India (2014) 3 SCC 1, ¶ 245.
[37] Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 209
[38] Mohammad Giasuddin v. State of A.P (1977) 3 SCC 287
[39] Coker v. Georgia 43 USS 584.
[40] Patrick Kennedy v. Louisiana, 554 U.S. 407 (2008).

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Further, the Constitutional Court of South Africa in the case of *The State v. Makwanyane and Machunu*[41] observed that a punishment as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be.

The practice of punishing all serious crimes with equal severity is now unknown in civilized societies.[42] It is the certainty of punishment and not the severity of punishment that acts as a deterrent and this is what needs to be worked upon.

[41] The State v. Makwanyane and Machunu [1995] ZAAC 3.
[42] Shaliesh Jasvanthbhai v. State of Gujarat, (2006) 2 SCC 359.

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