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THE DOCTRINE OF 'RAREST OF RARE' IN INDIAN CAPITAL SENTENCING: CONSTITUTIONAL FOUNDATIONS, JUDICIAL INCONSISTENCIES, AND THE IMPERATIVE FOR REFORM

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ABSTRACT

The doctrine of 'rarest of rare cases,' as enunciated by the Supreme Court of India in Bachan Singh v. State of Punjab (1980), constitutes the sole constitutional filter through which the death penalty may be imposed in India. Conceived as a safeguard against arbitrary capital sentencing, it mandates that courts impose the ultimate sanction only when the alternative of life imprisonment is 'unquestionably foreclosed' and requires a principled balancing of aggravating and mitigating circumstances in every capital case. Yet, four and a half decades of judicial application have produced a body of case law that is, by the Supreme Court's own admission, characterized by inconsistency, unpredictability, and a structural susceptibility to the influence of public emotion through the doctrinally undefined concept of 'collective conscience.' The empirical literature, most comprehensively the Death Penalty India Report (Project 39A, 2016) and the Law Commission's 262nd Report (2015), demonstrates that capital punishment in India disproportionately falls upon the economically marginalized, those with inadequate legal representation, and members of minority communities. This paper undertakes a comprehensive doctrinal and critical analysis of the doctrine across its historical, philosophical, constitutional, and comparative dimensions. It examines the full trajectory of capital sentencing jurisprudence from the ancient textual traditions of Manusmriti and Arthashastra through the colonial codification in the Indian Penal Code, 1860, and the legislative reform of Section 354(3) of the Code of Criminal Procedure, 1973, to the landmark judgments from Jagmohan Singh (1973) through to Mukesh v. State (2017) and Chhannu Lal Verma (2018). It argues that the rarest of rare doctrine, notwithstanding its constitutional aspirations, has proven structurally inadequate to its task and that meaningful reform, including structured sentencing guidelines, mandatory pre-sentencing investigations, and a specialized capital defense program, is constitutionally overdue. The paper concludes by engaging the

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abolitionist case as articulated in the Law Commission's 262nd report and as exemplified in comparative jurisdictions including South Africa and the United Kingdom.

Keywords: *Rarest of Rare; Capital Punishment; Death Penalty; Bachan Singh; Article 21; Aggravating Circumstances; Mitigating Circumstances; Collective Conscience; Sentencing Reform; Constitutional Law*

I. INTRODUCTION

Of all the questions a constitutional democracy must confront, few are as fundamental or as resistant to easy resolution as this: under what circumstances, if any, may the state take the life of one of its own citizens? In most contemporary democracies, that question has been answered definitively in the negative; the global movement toward abolition of the death penalty has gathered pace steadily since the mid-twentieth century, and today, more than two-thirds of the world's nations have either abolished capital punishment in law or maintain a moratorium on its practice. India occupies a different position. It retains capital punishment, and the constitutional framework within which it is administered rests almost entirely upon a judicial doctrine the doctrine of 'rarest of rare cases' developed by the Supreme Court of India over four decades of evolving, and often contradictory, jurisprudence.

The doctrine's origins lie in the Supreme Court's 1980 Constitution Bench judgment in Bachan Singh v. State of Punjab. Before that decision, the Indian Penal Code, 1860 and the Code of Criminal Procedure provided for the death sentence without any principled framework governing when it should be imposed rather than life imprisonment. Judges exercised an unguided discretion, the outcomes of which were neither predictable nor consistent. Bachan Singh sought to change this by establishing that the death penalty could only be imposed in the 'rarest of rare cases' when, having balanced all aggravating against all mitigating circumstances, the sentencing court concludes that the alternative of life imprisonment is unquestionably insufficient. The judgment was animated by a genuine constitutional concern: to protect the irreversible character of capital punishment from being treated as an ordinary penal consequence and to ensure that every condemnation to death is the product of a rigorous, reasoned, and principled inquiry.

The disappointment and the central argument of this paper is that this aspiration has not been realised in practice. The application of the rarest of rare doctrine across four and a half decades has been marked by inconsistency, arbitrariness, and a structural bias against the poor and marginalized that strikes at the constitutional guarantees of Articles 14 and 21. The

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Supreme Court itself, in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009), acknowledged in unusually candid institutional terms that its own prior decisions had not applied the doctrine in a principled and consistent manner. The Law Commission of India, in its 262nd Report (2015), described the doctrine's practical functioning as 'arbitrary and freakish.' 'These are not the observations of outside critics; they are the self-assessments of the institutions responsible for administering the doctrine.

This paper proceeds in ten parts. Part II traces the historical evolution of capital punishment in India from ancient textual sources through the colonial codification and post-independence legislative reform. Part III examines the constitutional architecture Articles 14, 19, 21, 72, and 161 within which the doctrine operates. Part IV analyses the foundational judgment of Bachan Singh, including the majority's reasoning and Justice Bhagwati's prophetic dissent. Part V examines the doctrine's structure and operation as elaborated in Machhi Singh v. State of Punjab (1983) and subsequent decisions. Part VI addresses the philosophical tension between retributive and reformative theories of punishment that runs through all capital sentencing jurisprudence. Part VII surveys the major case law from 1983 to 2019. Part VIII analyses the aggravating and mitigating circumstances framework. Part IX critically examines the doctrine's practical failures. Part X offers comparative perspective and reform recommendations, and Part XI concludes.

II. HISTORICAL EVOLUTION OF CAPITAL PUNISHMENT IN INDIA

2.1 Ancient and Pre-Colonial Traditions

The death penalty is not a colonial imposition on India's legal consciousness. Its presence in the normative traditions of the subcontinent extends to the foundational texts of Hindu jurisprudence. The Manusmriti sanctioned capital punishment for grave crimes including murder, treason, and forms of grave theft, on the rationale that such punishment purged the offender's sin and restored the cosmic moral order the dharmic equilibrium disrupted by the crime.[1] In the Shanti Parva of the Mahabharata, the emperor Ghumtsen argued that releasing criminals unchecked would cause crime to proliferate, a deterrence argument that would surface repeatedly across the centuries.[2] Kautilya's Arthashastra was more politically pragmatic: it detailed modes of execution as instruments of state power and public deterrence, treating punishment as an extension of the king's sovereign duty to maintain order.[3]

What these ancient frameworks shared was an absence of anything resembling procedural safeguards in the modern constitutional sense. Punishment was the prerogative of the king, informed by dharmic obligation and the specific social status of offender and victim,

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but not constrained by rights-based principles or the requirement of reasoned justification. The medieval period, under Mughal governance, brought the Islamic concepts of Qisas (retributive punishment equal to the harm) and Diyya (blood money as a substitute for retribution) to parts of the subcontinent, introducing a different but equally status-conscious framework. Public executions were common and served explicitly exemplary functions.

2.2 The Colonial Codification: Indian Penal Code, 1860

The systematisation of capital punishment as a legal as opposed to merely a sovereign phenomenon in India came with the Indian Penal Code, 1860, drafted under the supervision of Lord Thomas Babington Macaulay. Section 302 of the IPC prescribed death or life imprisonment as the punishment for murder, granting courts an absolute and unguided discretion between the two without any criteria or procedure for exercising that choice.[4] The penological philosophy behind this provision was characteristically Victorian: retributive and deterrent, with no conception of the offender's rehabilitative potential.

The practical consequences were severe. Amnesty International's documentation of the colonial period records over 1,500 executions in 1931 alone.[5] Public hangings were routine. Mercy petitions were entirely at the discretion of the Governor-General. The Code of Criminal Procedure, 1898, compounded the structural bias in the opposite direction from what we would today recognise as just: Section 367(5) effectively made death the default punishment for murder, requiring a judge to record 'special reasons' not for imposing the death sentence but for not imposing it. The burden of justification thus fell on leniency, not on severity the inverse of what a constitutional framework committed to human dignity would demand.

2.3 Post-Independence Transition and the Reform of 1973

The Constitution of India, adopted in 1950, created a new normative framework. Article 21's guarantee that no person shall be deprived of life or personal liberty except according to 'procedure established by law' placed capital punishment under constitutional scrutiny for the first time. The Constituent Assembly debated abolition; the drafters retained capital punishment but embedded within the constitutional structure the tools that would eventually be used to constrain it principally through an expansive judicial interpretation of Article 21.

The Law Commission of India's 35th Report (1967) the first systematic post-independence review of capital punishment found that India was not yet ready for abolition, given the social and economic conditions of the time, but importantly flagged the absence of a sentencing policy as a structural problem requiring address.[6] The legislative

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response came six years later with the Code of Criminal Procedure, 1973, whose Section 354(3) reversed the colonial presumption: courts sentencing a person to death were now required to record 'special reasons' for imposing the death sentence, with life imprisonment the legislatively prescribed default. This was a foundational shift, though Parliament did not define what 'special reasons' meant leaving the elaboration of that standard to the courts.

1 P.V. Kane, History of Dharmashastra, Vol. III (Bhandarkar Oriental Research Institute, 1946).

2 Mahabharata, Shanti Parva, Chapter 267, verses 4–13.

3 Kautilya, Arthashastra (translated by R. Shamasastry, Government Press, 1915).

4 Indian Penal Code, 1860, § 302.

5 Amnesty International, Lethal Lottery: The Death Penalty in India, AI Index: ASA 20/007/2011.

6 Law Commission of India, 35th Report on Capital Punishment (1967).

III. THE CONSTITUTIONAL FRAMEWORK

3.1 Article 21 and the 'Procedure Established by Law'

Article 21 of the Constitution provides: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' This deceptively simple provision carries the constitutional weight of the entire debate about capital punishment. In its original interpretation in A.K. Gopalan v. State of Madras (1950), the Court read 'procedure established by law' narrowly as requiring only the existence of a validly enacted law, without any requirement that the law's substance or the procedure it prescribed be fair or just. On this reading, the colonial framework of the IPC and CrPC was constitutionally sufficient.

Maneka Gandhi v. Union of India (1978) transformed this analysis. A seven-judge bench held that the procedure contemplated by Article 21 must be 'right and just and fair,' not arbitrary, fanciful, or oppressive.[7] The Court drew upon the inter-relationship between Articles 14, 19, and 21, holding that a law affecting life or liberty must satisfy all three simultaneously. This triangulation fundamentally altered the constitutional stakes of capital sentencing: it was no longer sufficient that the IPC and CrPC provided a procedure that procedure had to be fair, just, and reasonable in its substance and operation. The implications for the doctrine of rarest of rare, which was articulated only two years later in Bachan Singh, were immediate and profound.

The scope of Article 21 was further expanded by subsequent decisions. Francis Coralie Mullin v. Union Territory of Delhi (1981) held that the right to life encompasses the right to

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live with human dignity. Sunil Batra v. Delhi Administration (1978) confirmed that even convicted prisoners, including those on death row, retain their fundamental rights and cannot be subjected to inhuman treatment.[8] These decisions established a constitutional environment in which capital punishment, as the ultimate deprivation of the right to life, required the most exacting substantive and procedural justification.

3.2 Article 14: Equal Protection and the Arbitrariness Concern

Article 14's guarantee of equality before the law and equal protection of the laws poses a direct structural challenge to any system of capital sentencing that relies on judicial discretion without governing standards. If similarly situated offenders receive different sentences depending on which judges hear their case, the quality of their legal representation, or the level of public attention attracted by their crime, the equal protection guarantee is compromised in fact even if not in formal legal theory.

The Supreme Court in Bachan Singh acknowledged this concern but rejected it, reasoning that the principled exercise of judicial discretion guided by the Bachan Singh framework itself was not the standardless arbitrariness that violates Article 14. This answer has proved empirically problematic: the Death Penalty India Report (2016) and the Law Commission's 262nd Report (2015) both demonstrate that capital sentencing in practice correlates with factors unrelated to the gravity of the offence, including socioeconomic status and bench composition. Justice Bhagwati's dissent in Bachan Singh, which directly raised the Article 14 concern, has been validated by the empirical record.

3.3 Articles 72 and 161: Executive Clemency

Articles 72 and 161 vest the power of pardon, reprieve, respite, remission, or commutation in the President and the Governors respectively. These provisions are constitutional safety valves recognition that judicial proceedings, however careful, can result in error, and that the irreversibility of execution demands a final opportunity for mercy. The Supreme Court in Shatrughan Chauhan v. Union of India (2014) held that inordinate delay in the disposal of mercy petitions constitutes a violation of Article 21, establishing that the constitutional protection of the right to life extends through the entire execution process, including the exercise of executive clemency.[9]

3.4 The Proportionality Principle

The principle of proportionality that punishment must be commensurate with the

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gravity of the offence and the culpability of the offender is derived from the combined operation of Articles 14 and 21 as interpreted through the Maneka Gandhi framework. In the capital sentencing context, it requires that the most severe punishment be reserved for the most severe circumstances, and that the sentencing court assess whether those circumstances are genuinely present in the case before it. The rarest of rare doctrine is, in this sense, the judicial operationalisation of the proportionality requirement.

3.5 International Obligations: The ICCPR

India ratified the International Covenant on Civil and Political Rights in 1979. Article 6 of the ICCPR recognises the right to life and provides that in retentionist states, death may only be imposed 'for the most serious crimes' a standard the UN Human Rights Committee has interpreted as limited to intentional killing.[10] Article 51(c) of the Constitution directs the State to foster respect for international law and treaty obligations, providing a constitutional basis for the use of international standards in the interpretation of domestic fundamental rights. India has, however, consistently abstained from or voted against UN General Assembly resolutions calling for a global moratorium on executions, a divergence that the Law Commission's 262nd Report expressly noted with concern.

7 Maneka Gandhi v. Union of India, (1978) 1 SCC 248, per Bhagwati J.

8 Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.

9 Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

10 UN Human Rights Committee, General Comment No. 36 on Article 6 of the ICCPR (2019).

IV.BACHAN SINGH V. STATE OF PUNJAB (1980): THE FOUNDATIONAL JUDGMENT

4.1 Background and Constitutional Questions

Bachan Singh was convicted of three murders arising from a family dispute in Punjab. The constitutional questions framed before the five-judge Constitution Bench were fundamental: whether Section 302 IPC, insofar as it provided for the death penalty, was unconstitutional as violating Articles 14, 19, and 21; and whether the discretion conferred on courts under Section 354(3) CrPC to impose the death sentence was itself unconstitutionally standardless.[11]

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The bench delivered a 4:1 verdict upholding constitutionality. The majority opinion, authored by Justice R.S. Sarkaria with the concurrence of Chief Justice Y.V. Chandrachud and Justices A.C. Gupta, N.L. Untwalia, and P.S. Kailasam, established the doctrine of rarest of rare cases. Justice P.N. Bhagwati dissented in a prescient opinion that would be vindicated by subsequent empirical evidence.

4.2 The Majority Opinion: Key Principles

On Article 21, the majority held that the multi-tiered procedural architecture of the criminal justice system trial, mandatory High Court confirmation under Section 366 CrPC, Supreme Court appeal, and executive clemency under Articles 72/161 constituted the fair, just, and reasonable procedure required by Maneka Gandhi. The death penalty was not per se unconstitutional; the procedure by which it was imposed satisfied constitutional standards.

The majority drew particular significance from Section 354(3) CrPC's reversal of the colonial presumption: by making life imprisonment the rule and death the exception requiring 'special reasons,' Parliament had itself expressed a preference for life. The Court gave this legislative intent constitutional force by holding that death should be imposed only in the 'rarest of rare cases' when life imprisonment was 'unquestionably foreclosed.' This formulation became the doctrinal cornerstone.

> *'A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.' Sarkaria J., Bachan Singh v. State of Punjab (1980)*[12]

The majority mandated a balancing test: sentencing courts must weigh aggravating against mitigating circumstances in every capital case, giving mitigating circumstances 'the greatest weight' given the irreversibility of the punishment. No single aggravating factor, however serious, could by itself justify the death sentence if countervailing mitigating factors were present. The majority identified age, absence of prior criminal antecedents, mental state, socioeconomic background, and the possibility of reformation as potentially relevant mitigating factors.

4.3 Justice Bhagwati's Dissent

Justice Bhagwati held Section 302 IPC unconstitutional to the extent that it provided for the death sentence, reasoning that the unguided discretion conferred on sentencing courts was arbitrary and therefore violative of Articles 14 and 21. His dissent was, at its core, an

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empirical argument: without legislative or judicial standards to guide the choice between death and life imprisonment, the outcome would inevitably depend more on which judge heard the case than on the facts of the case, and would disproportionately affect the poor, the uneducated, and those without effective legal representation.[13]

Bhagwati J.'s concerns were described by the majority as exaggerated. They have since been empirically confirmed. In Bariyar (2009), the Supreme Court acknowledged that its own prior decisions had been inconsistent in precisely the ways he warned against. The Law Commission's 262nd Report cited his dissent extensively. It is one of the most empirically vindicated dissenting opinions in Indian legal history.

11 Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

12 Id. at para 209.

13 Id. (Bhagwati J., dissenting) at para 777–781.

V.STRUCTURE AND OPERATION OF THE RAREST OF RARE DOCTRINE

5.1 The Machhi Singh Framework

Machhi Singh v. State of Punjab (1983) built upon Bachan Singh by providing the most detailed elaboration of the rarest of rare standard in any single judgment.[14] Arising from the massacre of seventeen persons in a family vendetta in Punjab, the case gave Justice M.P. Thakkar's bench the opportunity to identify five illustrative categories of cases that may qualify as rarest of rare:

- Manner of commission: murder executed with extreme brutality burning alive, dismemberment, prolonged torture that arouses intense community outrage.
- Motive: killing driven by total depravity, such as hired assassination or cold-blooded murder for economic gain.
- Anti-social or socially abhorrent nature: murder of a vulnerable class a woman, a person from a marginalised community, a bride in a dowry case.
- Magnitude: commission of multiple murders in a single episode.
- Personality of the victim: murder of an innocent child, a helpless person, or a public servant in the performance of duty.

These categories are expressly illustrative and non-exhaustive. They provide courts with an organising framework rather than a definitive checklist, and their application in any given case requires the holistic assessment Bachan Singh mandated. Machhi Singh also introduced or gave particular prominence to the concept of the 'collective conscience of

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society' as a relevant consideration in capital sentencing. As discussed in Part VI below, this concept has proven to be one of the most problematic elements of the entire doctrinal framework.

5.2 The Two-Question Test

Post-Bachan Singh jurisprudence has crystallised into what the Court and scholars have described as a two-question inquiry. The first question asks whether the crime itself falls within the rarest of rare category examining the nature, manner, motive, and societal impact of the offence. The second question asks whether the criminal is such that there is no genuine possibility of reformation or rehabilitation examining the person, not only the act.[15]

Both questions must be answered affirmatively for a death sentence to be constitutionally imposed. The second question reflects the reformative theory of punishment: even the gravest crime does not automatically justify execution if the person who committed it retains the capacity for change. This question has proven considerably more difficult to answer in practice because it requires evidence psychological assessments, social background reports, post-conviction conduct that is rarely gathered systematically in Indian capital cases. Its neglect has been a recurrent ground for commutation.

5.3 The Statutory Anchors: Sections 354(3) and 235(2) CrPC

Section 354(3) CrPC requires that where a court sentences a person to death, it must state the 'special reasons' for doing so. This provision is not merely procedural; it is substantive. It creates a record for appellate review, provides the basis for the exercise of executive clemency, and imposes a constitutional obligation on the sentencing court to engage in a structured, reasoned analysis of why the case qualifies as rarest of rare. A death sentence imposed without adequate special reasons is constitutionally defective.

Section 235(2) CrPC provides that after conviction, the court shall hear the parties on the question of sentence before passing it. The Supreme Court has consistently held that this hearing must be substantive and effective, not perfunctory the convicted person must be given a genuine opportunity to place before the court all material relevant to the sentencing decision. A cursory hearing that merely invites counsel to say a few words before immediate sentencing has been found to violate the constitutional requirements of Section 235(2) in several cases, including Rajesh Kumar v. State of Delhi (2011) and Chhannu Lal Verma v. State of Chhattisgarh (2018).

14 Machhi Singh v. State of Punjab, (1983) 3 SCC 470, per Thakkar J.

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15 Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546, per Lokur J.

VI. RETRIBUTIVE VS. REFORMATIVE JUSTICE: THE PHILOSOPHICAL FAULT LINE

6.1 Retribution and Its Constitutional Limits

The retributive theory of punishment that offenders deserve to suffer in proportion to the harm they have caused has deep roots in both ancient Indian tradition and the colonial penological framework. The Manusmriti's equation of punishment with moral retribution and Kautilya's equation of it with deterrent state power both reflect fundamentally retributive orientations.[16] The Indian Penal Code, 1860 inherited this tradition through the Victorian penological framework that animated Macaulay's drafting.

Retributive thinking in Indian capital jurisprudence most visibly manifests in the concept of 'collective conscience of society.' When courts justify a death sentence on the ground that the crime was so shocking as to outrage the moral sense of the community as in Dhananjoy Chatterjee (2004) and Mukesh v. State (2017) they are, in essence, giving legal force to a retributive social demand. The constitutional problem with this is that 'collective conscience' is undefined, unmeasurable, and susceptible to the influence of media coverage and political pressure. It has no defined content as a legal standard and provides no check against populism in judicial reasoning.

6.2 The Reformative Commitment in Constitutional Jurisprudence

The reformative theory holds that punishment should aim at the rehabilitation and reintegration of the offender. This theory finds considerable constitutional support in India. The Directive Principles of State Policy, Article 21's evolving interpretation as encompassing human dignity, and the Supreme Court's decisions in Sunil Batra (1978) and Francis Coralie Mullin (1981) collectively establish a constitutional commitment to the humane treatment of prisoners and the recognition of their continuing personhood.

Justice Krishna Iyer, writing in Rajendra Prasad v. State of U.P. (1979), pushed this commitment furthest in the capital sentencing context, arguing that the death sentence could be constitutionally justified only if it was genuinely necessary for the security of the state and society, because only in such extreme circumstances could the complete denial of any reformative possibility be accepted.[17] While his specific reasoning was disapproved by the majority in Bachan Singh as unsupported by the text, the spirit of his concern that the

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reformative potential of the accused must be a central element of the sentencing inquiry survived and was incorporated into the Bachan Singh framework.

Bachan Singh attempted to hold both philosophical traditions in balance. Its insistence that the possibility of reformation be considered as a key element of the rarest of rare analysis is a concession to reformative values. Its retention of the death penalty for exceptional cases is a concession to retributive and deterrent concerns. The doctrine is, at its philosophical core, a compromise and a compromise that the evidence suggests has not been stable in practice.

16 Kane, op. cit. (note 1).

17 Rajendra Prasad v. State of U.P., (1979) 3 SCC 646, per Krishna Iyer J.

VII. MAJOR CASE LAWS: DOCTRINAL DEVELOPMENT AND APPLICATION

7.1 Summary Table of Landmark Decisions

Case	Doctrinal Contribution
Jagmohan Singh v. State of U.P. (1973)	Upheld constitutionality of death penalty; judicial discretion satisfies Article 21 procedure.
Rajendra Prasad v. State of U.P. (1979)	Introduced human-rights reading; stressed reformative potential and socio-economic background.
Bachan Singh v. State of Punjab (1980)	Established rarest of rare doctrine; mandatory balancing of aggravating/mitigating circumstances; life is rule, death is exception.
Machhi Singh v. State of Punjab (1983)	Five illustrative categories; introduced 'collective conscience'; elaborated aggravating factors.
Kehar Singh v. Union of India (1989)	Reaffirmed doctrine in political assassination case; limits of mercy petition review.
Dhananjoy Chatterjee (2004)	Retributive 'betrayal of trust' rationale; minimal mitigating analysis subsequently criticised.
Swamy Shraddananda (2008)	Introduced 'life without remission' as an intermediate category.
Santosh Kumar Bariyar (2009)	Court acknowledged own arbitrariness; mitigating circumstance failure is constitutional infirmity.

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Rajesh Kumar v. Delhi (2011)	Perfunctory sentencing hearing violates Section 235(2) CrPC; commutation ordered.
Shankar Kisanrao Khade (2013)	3-R test (Rarest, Reformation, Retribution); documented inconsistencies in sentencing.
Shatrughan Chauhan (2014)	Delay in mercy petition = Article 21 violation; mental illness post-conviction = commutation ground.
Mukesh v. State [Nirbhaya] (2017)	Confirmed death sentences; heavy reliance on collective conscience; limited mitigating analysis.
Chhannu Lal Verma (2018)	Absence of psychiatric evaluation = constitutional defect; commutation ordered.
Rajendra Wasnik (Review, 2019)	Rare self-reversal; intellectual disability and mental capacity not adequately assessed.

7.2 Doctrinal Analysis of Key Decisions

Bariyar (2009): The Watershed of Judicial Self-Criticism

Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra represents the most significant institutional moment of self-criticism in Indian capital jurisprudence.[18] The accused was convicted of kidnapping and murdering a child for ransom. The trial court and the High Court imposed the death sentence. The Supreme Court commuted it not merely on the facts, but on the basis of a comprehensive review that revealed the inconsistent and unprincipled application of the rarest of rare standard in the Court's own prior decisions.

The Court found that earlier decisions had mechanically cited Machhi Singh's categories without engaging with Bachan Singh's balancing test. Mitigating circumstances had been routinely underweighted or ignored. The quality of legal representation had influenced outcomes in ways that had nothing to do with the content of the doctrine. The Court acknowledged in terms that echoed Bhagwati J.'s 1980 dissent that the sentencing process in capital cases had been 'judge-centric' rather than 'law-centric.' This acknowledgment was important but did not itself generate the structural reforms necessary to address the problem.

Shatrughan Chauhan (2014): Extending Constitutional Protection Through the Execution Process

Shatrughan Chauhan v. Union of India extended Article 21's protective reach to the post-sentencing executive process.[19] The Court held that inordinate and unexplained delay in

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the disposal of mercy petitions by the President of India constitutes a form of torture the sustained psychological suffering of living under sentence of death with no resolution that violates the constitutional right to live with dignity. Fifteen death sentences were commuted on this ground. The Court also held that the development of mental illness after sentencing is an independent constitutional ground for commutation, and examined the conditions of death row confinement, finding that solitary confinement beyond security requirements violates Article 21.

Mukesh v. State (2017): Collective Conscience at the Apex

The Nirbhaya case Mukesh v. State (NCT of Delhi) confirmed the death sentences of four men convicted for the gang rape and murder of a young woman in December 2012.[20] The Court's invocation of the 'collective conscience of society' as a central justification, in a case that had generated unprecedented public pressure for execution, raised questions that scholars including Singh Umendra Pratap and Dr. Srijan Mishra have examined in detail.[21] Their 2025 study finds that in high-profile cases, the Court's reliance on collective conscience tends to be inversely proportional to the rigour of its mitigating circumstance analysis a pattern that, if accurate, represents a fundamental failure of the doctrine's constitutional function. The executions, carried out in March 2020, were the first in India in several years and intensified the public debate about the role of emotion in judicial capital sentencing.

18 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

19 Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

20 Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1.

21 Singh Umendra Pratap & Dr. Srijan Mishra, 'The Doctrine of Rarest of Rare in Capital Sentencing: A Critical Study of Its Suitability and Application in Indian Jurisprudence' (2025) Vol. 8 Issue 2 International Journal of Law Management & Humanities 3745.

VIII. AGGRAVATING AND MITIGATING CIRCUMSTANCES: A STRUCTURED ANALYSIS

8.1 Aggravating Circumstances

Drawing from the corpus of decisions from Bachan Singh through to the present, the following categories of aggravating circumstances have been consistently recognised as potentially relevant to the rarest of rare determination. None is determinative in isolation; each must be weighed against the full picture of mitigating circumstances:[22]

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- Extreme brutality, cruelty, or depravity in the commission of the offence prolonged torture, burning, dismemberment, or gratuitous violence beyond the act itself.
- Premeditation and deliberation the planned, cold-blooded nature of the killing, as distinct from impulsive or heat-of-moment violence.
- Multiple victims killing more than one person in a single episode or as part of a pattern of conduct (Machhi Singh itself being the paradigm case).
- Vulnerability of the victim murder of a child, elderly or disabled person, or pregnant woman, where the offender exploited a significant power imbalance.
- Murder of a public servant in the performance of duty carrying both direct and societal harm dimensions.
- Killing for economic gain hired killing, murder for insurance or property, reflecting a particularly cold acquisitive motive.
- Prior record of violence suggesting a pattern of dangerous conduct rather than an isolated aberration.
- Betrayal of trust the Dhananjoy Chatterjee rationale: where the offender occupied a position of care or confidence in relation to the victim.
- Absence of remorse and attempts to conceal the crime relevant to both culpability and the assessment of reformative potential.

8.2 Mitigating Circumstances

The Bachan Singh framework requires mitigating circumstances to be given 'the greatest weight.' The following categories have been recognised in the case law:[23]

- Young age at the time of the offence consistently treated as significant, on the ground that youth correlates with amenability to rehabilitation.
- Mental illness or intellectual disability acknowledged as grounds for commutation in Navneet Kaur (2014), Rajendra Wasnik (review, 2019), and Chhannu Lal Verma (2018); absence of psychiatric evaluation held to render sentencing constitutionally defective.
- History of severe deprivation, abuse, or trauma Project 39A's research found that a significant proportion of death row prisoners had experienced severe childhood deprivation and abuse.
- Absence of prior criminal record first-time offenders present a weaker case for the ultimate sanction than recidivists.
- Acting under duress, extreme provocation, or compulsion reduces moral culpability

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even where it does not provide a complete defence.

- Genuine remorse credible evidence of remorse and willingness to engage with rehabilitation is relevant to the reformative potential assessment.
- Inadequate legal representation acknowledged in Bariyar as a constitutionally relevant factor in the sentencing process.

8.3 The 'Collective Conscience' Distortion

The concept of collective conscience, introduced in Machhi Singh, creates a structural distortion in the aggravating-mitigating balance. When courts treat the level of public outrage generated by a crime as an aggravating factor, they add to one side of the balance a weight that is not anchored in legal standards and has no counterpart on the mitigating side. An offender's youth, mental illness, or history of abuse cannot reduce the weight of collective outrage but collective outrage, unlike criminal culpability, is not a constitutionally cognisable measure of anything.

Rajkumari and Dr. Ripu Daman Pratap Singh, writing in the Indian Journal of Integrated Research in Law, observe that the absence of a precise legal definition of the rarest of rare standard means that 'what makes a case the rarest of the rarest is a controversial subject,' and that the invocation of collective conscience effectively substitutes public moral response for legal analysis.[24] This substitution has been most visible and most troubling in cases of high media salience.

22 Bachan Singh (n 11); Machhi Singh (n 14); Dhananjoy Chatterjee v. State of West Bengal, (2004) 9 SCC 751.

23 Bachan Singh (n 11) per Sarkaria J.; Bariyar (n 18); Chhannu Lal Verma v. State of Chhattisgarh, (2018) 15 SCC 670.

24 Rajkumari & Dr. Ripu Daman Pratap Singh, 'The Doctrine of Rarest of Rare: A Critical Analysis' (2022) Vol. II Issue IV Indian Journal of Integrated Research in Law, ISSN 2583-0538.

IX. CRITICAL ANALYSIS: ARBITRARINESS, BIAS, AND INSTITUTIONAL FAILURE

9.1 The Empirical Indictment

The most damaging critique of the rarest of rare doctrine is empirical. The Death Penalty India Report (2016) published by Project 39A at National Law University Delhi the

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most comprehensive empirical study of India's death row population found that capital sentencing cannot be explained by the gravity of the offence alone. Cases with essentially identical factual profiles resulted in different sentences depending on bench composition, quality of legal representation, geographic jurisdiction, and public attention. The study found that the overwhelming majority of death row prisoners were economically impoverished, had received inadequate legal representation at trial, and belonged to socially marginalised communities including scheduled castes, scheduled tribes, and religious minorities.[25]

The Law Commission's 262nd Report (2015) reached a damning conclusion: capital punishment in India is 'applied in an arbitrary manner, making it possible for a person guilty of the same offence to be sentenced to death while another may not be.'[26] The Commission further observed that 'many trial courts do not follow the Bachan Singh framework' and that the absence of structured sentencing guidelines creates conditions in which sentencing inevitably reflects factors unrelated to the constitutional requirements of the doctrine.

9.2 Bench-Dependence and Inconsistency

Studies of the Supreme Court's capital decisions including that of Singh Umendra Pratap and Dr. Srijan Mishra have found statistically significant variation in outcomes attributable to bench composition.[27] The probability of a death sentence being confirmed or commuted in any given case depends not only on the facts of the case but on the personal judicial philosophy of the judges hearing the appeal their orientation toward retributive versus reformative penology, their tolerance for collective conscience arguments, and their assessment of what the Machhi Singh categories require.

This bench-dependence was explicitly acknowledged by the Supreme Court in Bariyar: the Court found, upon reviewing its own prior decisions, that there was no consistent principle distinguishing cases where death was confirmed from cases where it was commuted, and attributed this to the absence of a principled, consistently applied framework. The Article 14 guarantee of equal protection cannot be satisfied by the mere formal existence of a doctrine that produces inconsistent outcomes in its application.

9.3 Socioeconomic Bias and Legal Aid Failures

The causal mechanism connecting poverty to capital punishment is straightforward and structurally entrenched. Persons who cannot afford private counsel depend on the legal aid system, which in India is chronically underfunded and frequently incapable of providing the standard of representation necessary for effective capital defence. An accused without

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competent counsel cannot present a comprehensive mitigation case; cannot commission psychological assessments or social background investigations; cannot effectively challenge the prosecution's evidence; and cannot make the legal arguments necessary to contest the rarest of rare determination.

The result is a systematic bias in the application of the death penalty that tracks socioeconomic status rather than criminal culpability precisely the structural inequality that Justice Bhagwati identified in his 1980 dissent. Project 39A's Deathworthy report (2021) further found extremely high rates of severe mental illness among death row prisoners, much of it attributable to the conditions of long-term death row confinement conditions that the Supreme Court itself in Shatrughan Chauhan found potentially violative of Article 21.[28]

9.4 The Absence of Structural Safeguards

At the root of these failures is a structural gap: the absence of formal, binding sentencing guidelines for capital cases. Unlike post-Furman American capital statutes, which require the jury to find at least one statutory aggravating circumstance before the death sentence is available, India's rarest of rare doctrine imposes no equivalent concrete requirement. The Bachan Singh and Machhi Singh frameworks guide judicial reasoning but do not govern it; they are standards to be applied with discretion, not rules whose satisfaction can be objectively verified. In the absence of such rules mandatory psychological assessment, required social background reports, structured documentation of the mitigating circumstance analysis the quality of the sentencing decision remains entirely dependent on the diligence and sensitivity of individual judges and the adequacy of individual advocates.

25 National Law University Delhi (Project 39A), Death Penalty India Report (2016).

26 Law Commission of India, 262nd Report on The Death Penalty (2015), para 7.1.

27 Singh Umendra Pratap & Dr. Srijan Mishra, op. cit. (note 21) at 3762.

28 National Law University Delhi (Project 39A), Deathworthy: A Mental Health Perspective of the Death Penalty (2021).

X. COMPARATIVE PERSPECTIVE AND REFORM RECOMMENDATIONS

10.1 Comparative Perspectives

United States: Furman, Gregg, and the Guided Discretion Response

In Furman v. Georgia (1972), the United States Supreme Court invalidated existing capital punishment statutes as unconstitutional under the Eighth Amendment, with Justice

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Brennan's characterisation of the death penalty as 'freakishly imposed' resonating directly with the Indian experience.[29] The legislative response was the development of 'guided discretion' statutes requiring juries to find specific statutory aggravating factors upheld in Gregg v. Georgia (1976). The American approach represents a statutory response to the arbitrariness problem that India has not adopted.

South Africa: Constitutional Abolition

South Africa's Constitutional Court abolished the death penalty in State v. Makwanyane (1995), explicitly engaging with the Indian precedents of Jagmohan Singh and Bachan Singh.[30] Justice Chaskalson's opinion held that capital punishment violated both the right to life and the constitutional commitment to human dignity, and that no procedural framework could constitutionally justify the permanent elimination of a human being by the state. The judgment represents the logical extension of the constitutional trajectory that Maneka Gandhi and Bachan Singh established.

United Kingdom and the European Experience

The United Kingdom abolished the death penalty for murder in 1965, completing abolition in 1998. Protocol 13 to the European Convention on Human Rights prohibits the death penalty in all circumstances among Council of Europe member states. The European empirical experience demonstrates consistently that abolition is not associated with increased homicide rates undermining the deterrence rationale that has supported India's retention of the punishment.

10.2 Reform Recommendations

The following reforms are both constitutionally necessary and practically achievable within the existing constitutional framework. They do not require a constitutional amendment, only legislative and judicial will.

(i) Structured Sentencing Guidelines

The most urgent reform is the development of binding structured sentencing guidelines for capital cases, introduced either through parliamentary amendment to Section 354(3) CrPC or through a Supreme Court constitution bench judgment with the force of constitutional precedent. These guidelines should specify the aggravating circumstances that must be present (not merely those that may be relevant), the mitigating circumstances that must be assessed and

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documented, and the procedure for demonstrating that the balance between them justifies the death sentence.

(ii) Mandatory Pre-Sentencing Investigations

Every capital case should require, as a precondition to the sentencing hearing, a mandatory social background report prepared by qualified social workers and a psychological or psychiatric assessment prepared by a qualified mental health professional. These reports should be state-funded, prepared as a matter of course rather than dependent on the accused's ability to commission them, and provided to the court as part of the official sentencing record. The absence of such reports should be a ground for remand for fresh sentencing.

(iii) Specialised Capital Defence Programme

A specialised capital defence programme analogous to public defender systems in some American jurisdictions should be established within the National Legal Services Authority framework, staffed by lawyers with training and resources specific to the demands of capital litigation. Capital defence requires not only legal expertise but the ability to conduct sentencing investigations, commission expert assessments, and present coherent mitigation cases. The general legal aid system, as presently constituted, cannot meet this standard.

(iv) Reform of the Mercy Petition Process

Following Shatrughan Chauhan, Parliament should enact a mandatory time limit for the disposal of mercy petitions three months from receipt, with provision for extension in genuinely exceptional circumstances giving concrete legislative force to the constitutional requirement of timely decision-making. The procedure for gathering material relevant to the mercy petition should also be systematised.

(v) Long-Term: Reconsideration of Abolition

The Law Commission's 262nd Report (2015) recommended abolition of the death penalty for all offences except terrorism and waging war against the state, on the grounds that the punishment lacks demonstrable deterrent effect, falls disproportionately on the marginalised, and that the rarest of rare doctrine has proven constitutionally inadequate to its intended function.[31] This recommendation deserves serious legislative attention. The constitutional case for abolition that no procedure can constitutionally justify the irreversible elimination of the right to life when the evidence demonstrates that the process by which that

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elimination is authorised is arbitrary and discriminatory is strong and growing stronger with each year of documented failure.

29 Furman v. Georgia, 408 U.S. 238 (1972), per Brennan J.

30 State v. Makwanyane and Another, 1995 (3) SA 391 (CC).

31 Law Commission of India, 262nd Report (2015), op. cit. (note 26), para 9.1–9.4.

XI. CONCLUSION

The rarest of rare doctrine occupies a paradoxical position in Indian constitutional law: it is simultaneously a genuine achievement and a documented failure. It is an achievement because it replaced a colonial framework of standardless, unguided judicial discretion with a principled constitutional architecture that, at least in theory, requires reasoned, individualised, and rights-conscious decision-making before the state takes a human life. The constitutional principles articulated in Bachan Singh life as the rule, death as the exception; mitigating circumstances given the greatest weight; the irrevocability of execution demanding the utmost caution are constitutionally sound and reflect a sincere engagement with human dignity.

It is a failure because the evidence empirical, doctrinal, and institutional demonstrates that these principles have not been consistently or equitably applied. Capital sentencing in India is arbitrary. It is discriminatory in its impact on the poor and marginalised. It is susceptible to collective emotion through a doctrinally undefined concept that has no legitimate role in constitutional adjudication. It is procedurally deficient because pre-sentencing inquiries are routinely inadequate. And it is structurally incapable of the consistency that constitutional equal protection demands, in the absence of binding guidelines and mandatory safeguards.

The reforms proposed in this paper structured guidelines, mandatory pre-sentencing investigations, specialised legal aid, a reformed mercy petition process, and ultimately the reconsideration of abolition address these failures at their structural roots. They are constitutionally required, not merely desirable. The forty-five years since Bachan Singh have provided evidence enough that the doctrine, as applied, cannot satisfy the constitutional demands placed upon it. The question of whether any doctrine can satisfy those demands or whether, as the Law Commission suggested in 2015, the honest answer is abolition deserves a definitive response from India's courts and legislature.

As Justice Bhagwati wrote in his prescient 1980 dissent in words that have only grown more resonant with the passage of time and the accumulation of evidence a constitutional democracy cannot accept a system of punishment that falls arbitrarily and discriminatorily

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upon those who are least able to defend themselves. India's capital sentencing system, however sophisticated its doctrinal framework, has not escaped that criticism. It is time it did.

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