The Rarest of Rare Doctrine in Crisis

Abstract

Capital punishment in India has been a topic of debate for a very long time, identifying the real meaning of "rarest of rare cases". In 1980, a five-judge constitutional bench of the Supreme Court of India, in Bachan Singh vs the State of Punjab, attempted to constitutionalise capital punishment by giving the rationale of a rarest of rare cases. From that time hereof, the doctrine has helped to give a better judicial positioning in deciding the cases concerning the death penalty, but it has also increased the unpredictability of the same.

*Since the dawn of humanity, punishment has been an integral part of society. Indian history shows us that the death penalty was present in society along with exile; these were the two methods of eradicating society's antisocial elements under Hindu law, whereas under Sharia law, the Quran denies the authority to take the human life, i.e. capital punishment. The issue of the death penalty was not discussed in the legislative assembly of British India, but after 1931, the legislative assembly debated that "*The Government does not believe that it is prudent to repeal the death penalty for any crime for which it is currently authorised*." In adopting the colonial laws under the Indian Penal Act and the Code of Criminal Procedure post-independence, the Republic of India also adopted six punishments, including the death penalty.*

This article also concludes the legislative reforms and judicial precedents regarding capital punishment in India.

KEYWORDS

Capital punishment, Rarest of rare cases, death penalty, Article 21, judicial arbitrariness, Law Commission of India.

INTRODUCTION.

The term 'capital' is derived from the Latin word '*capitalis*', which means concerning the head. Thus, to be subjected to capital punishment means to lose one's head. In simple words,capital punishment is the execution of a criminal who has been sentenced to the death penalty by a court of law for a serious felony. Although the definition of such a felony depends on various factors like nation, state, age, the death penalty is given for grievous and heinous crimes against humanity.

According to the World Population Review of 2025, the overall crime rate in India is 44.3[1]. In such a situation, the legislation and penalties have to deter and prevent crime immediately. Punishment has been an important pillar to deter crimes from time immemorial. *Kautilya,* in his book '*Arthashastra'* have mentioned '*Danda*' (*the staff*) to show the coercive power of the state. Over time, the state was given the control to maintain law and order by modern theories of punishment.

In India, establishing the grounds for capital punishment was a major challenge for which Bachan Singh v. State of Punjab came as a landmark judgement well known for developing the jurisprudence on the death penalty, as it answers the major question of the death penalty and examines whether it was in consonance with the Articles of the Indian Constitution.

This case addressed the issues that "Is the death penalty under Section 302 of the IPC unconstitutional and in violation of Articles 14, 19, and 21 of the Constitution?" and "Does the sentencing procedure under Section 354(3) of the CrPC, which requires special reasons for imposing the death penalty, provide sufficient safeguards against arbitrary decisions?"

This landmark Judgement given by a constitutional bench consisting of five judges is well known for establishing the "Rarest of rare" doctrine useful to decide whether the death penalty should be imposed on the accused. The trial court and High Court convicted the accused, and later, in a special criminal appeal filed in the Supreme Court of India by Bachan Singh before the

[1] Crime Rate by Country 2025, World Population Review, https://worldpopulationreview.com/country-rankings/crime-rate-by-country (last visited [19/06/2026])

constitutional bench, challenging the constitutional validity of this conviction, which gave birth to this landmark judgement for this doctrine.

In discussing the matter related to, one of the major contrasts is the paradox arising in retaining capital punishment in a constitutional democracy. The deepest and most instinctive form of paradox is that the state, which on one hand frames killing as the most heinous and gravest of all crimes in its penal laws, reserves the sole exclusive right to kill.

Every country that holds a constitutional democracy penalises homicide, and so does India. The Indian Penal Code, 1860, under section 302(Now, Bhartiya Nyaya Sanhita,2023 in Section 101), castigates murder as the most serious offence attracting the highest award of punishment that a system can impose. The idea behind this offence lies under Article 21 of the Constitution of India, which states that "*No person shall be deprived of his life or personal liberty except according to procedure established by law,"*[2]*which* means that no person can take away one's life. The irony is that the state, which once convicts, penalizes, and prosecutes a killer, performs a similar act that it condemns. In application of the penal acts, the condemned is killed, the method is pre-mediated and calculated, the purpose is terminal, but the only variable is the fact that when the state performs such acts, it's termed as lawful.

HISTORICAL AND CONSTITUTIONAL BACKGROUND

Indian criminal law has been a combination of reformist and dissuasive forms of punishment; penalties must be applied to deter offenders, but they should also be given enough opportunity to reform. When the death penalty is imposed, the court must give enough justification for the decision.

The history of the death penalty is quite old. Hindu law has upheld the death penalty in India for ages; it was not viewed as barbaric under the Hindu legal system. *Kalidas* has well demonstrated the importance of the death penalty; the epics of *Mahabharata* and *Ramayana* have also asserted the need for the death penalty, and it was the responsibility of the king to maintain the society's

[2] INDIA CONST. art. 21.

law and order by giving *Dand,* even if he had to give the death penalty to the offender. The form of the death penalty has become quite barbaric in the medieval period of India; a very brutal form of punishment was awarded for the offences.

In the modern era, several legislative acts, judicial procurements and commission reports were compiled and codified for the decision of the *Death Penalty*, which include:

- Indian Penal Code,1860 & Code of Criminal Procedure,1973

1. Indian Penal Code

The Indian Penal Code contains several crimes that include the death penalty for the offenders; they are as follows:

1. Section 121 of the IPC states that waging war against a country is a crime, and anyone who attempts to wage war against a country can be sentenced to the death penalty by the court.
2. Section 132 of the IPC, abetment of mutiny by an officer or members of the Army, Navy or Air Force, is a crime, and anyone who does that can be sentenced to the death penalty.
3. Section 194 of the IPC, fabricating the capital evidence of the crime, is an offence, and anyone who does that can be sentenced to the death penalty.
4. Section 302 states that whoever causes murder can be punished with the death penalty.
5. Section 305, whoever abets the suicide of a minor, can be punished with the death penalty.
6. Section 364A, whoever intends to cause harm or death after kidnapping for ransom can be punished with the death penalty.
7. *Criminal Law (Amendment) Act,2013,* added several offences where the court can impose the death penalty;
    - Section 376A specifies the death penalty for rape that results in death or a permanent vegetative state of the victim.
    - Section 376E specifies the death penalty for a repeated rape offender.

8. Section 396, whoever causes dacoity with murder, can be punished with the death penalty.

- Code of criminal procedure,1973(hereinafter, CrPC)

Chapter 28 of the CrPC talks about the submission of a death sentence for confirmation.

1. Section 366, When the Session court passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless confirmed by the High Court.
2. Section 368 may confirm the sentence, or pass any other sentence warranted by law, or annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial, or may acquit the accused person.

- Bharatiya Nyay Sanhita,2023

    a. Section 103(1) and Section 103(2), whoever causes murder or when five or more people commit murder on the grounds of race, caste, community or personal belief can be punished with the death penalty.
    b. Section 65(2) and Section 70(2), whoever causes rape of a minor or gangrape of a minor, can be punished with the death penalty.
    c. Section 66, whoever causes rape resulting in death or a vegetative state can be punished with the death penalty.
    d. Section 71 states that whoever is a repeated rape offender can be punished with the death penalty.
    e. Section 111 and Section 113, whoever is involved in terrorism and organized crime and the act results in a death, can be punished with the death penalty.

- Judicial Decisions

Historically, the judicial system of India has served a very important role in maintaining the provision of capital punishment in India. Before the Bachan Singh case, the judiciary had intervened in matters related to upholding the constitutionality of the death penalty.

1. *Jagmohan Singh v. State of Uttar Pradesh*[3], wherein Jagmohan Singh was convicted for the murder of Chhotey Singh, the animosity grew from a family dispute. As in the past, Chhotey Singh was accused of murdering Jagmohan's cousin but was acquitted by the Allahabad High Court. Later, Jagmohan Singh and Jasbir Singh trapped Chhotey Singh, and Jagmohan shot him in the back, causing his death. Both the sessions court and the Allahabad High Court upheld the sentence of death under Section 302 of the IPC. Jagmohan moved to the Supreme Court, challenging the constitutional validity of the death penalty.

However, the court held that death sentence does not violate Article 14,19, & 21[4], the court held that as long as the procedures laid down in the CrPC are followed, death sentence was constitutionally valid, also the courts emphasized that constitution framers were very well versed with the provisions of capital punishment as the same is supported by the inculcation of Article 72(1)(c) which grants power to the president to pardon or commute sentences in cases where death penalty is imposed.

However, the accused argued that judges had their unguided discretion in choosing between life imprisonment and a death sentence, violating one's fundamental rights. The court, though, acknowledged the removal of Section 367(5) CrPC in 1955, which granted them discretion over imposing either penalty, but affirmed that the sentence is held on the basis of facts and circumstances and is not arbitrary and thus is performed by procedural safeguard and not a constitutional defect.

- ***Rajendra Prasad vs State of Uttar Pradesh*[5],wherein Krishna Iyer J. gave a radical reinterpretation of special reasons under section 354(3) of the CrPC 1973, under**

[3] Jagmohan Singh v. State of Uttar Pradesh, AIR 1973 SC 947**(**India).
[4] INDIA CONST. art. 14,19,21.
[5] Rajendra Prasad v. State of Uttar Pradesh AIR 1979 SC 916 (India).

which courts are required to record "special reasons" for imposing the death penalty. The majority was of the view that special reasons should be determined not by judging the crime but the criminal. This whole point of view was dramatic as it meant that, no matter how heinous, gruesome, or lethal a murder was, the act itself does not justify the death penalty; what mattered was whether the accused was so dangerous that they couldn't be reformed. His interpretation is termed destructive due to the following reasons:

1. Destruction of precedent- It held a constitutional bench judgement in Jagmohan's case as obiter.

2. Destruction of statutory text- it read that those special reasons under section 354(3) were offender-centric, but no proof was found in the provision.

3. Destruction of judicial consistency- by importing public order under Article 19, it almost created a test which would justify all the murders that took place in personal relations; it held the test to be too restrictive. Thus, virtually abolishes the death penalty for murder while it formally exists as a crime under section 302 of the IPC.

- 35TH LAW COMMISSION REPORT

There has been much discussion on retaining or abolishing the death penalty. In the light of this discussion, the Law Commission presented its report, which was called the 35th Law Commission Report. The 35th Law Commission report was a pro-retention; it favored keeping capital punishment based on the socio-political realities of the then Indian society.

The famous and most quoted reasoning of the report is:

"Having regard, however, to the conditions in India, to the variety of social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment."[6]

[6] Thirty Fifth Report on Capital Punishment 1967, Law Commission of India, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080828-1.pdf (last visited [19/06/2026])

Bachan Singh: The Doctrine Examined

Capital Punishment has been a topic of debate ever since the inception of society. Determining what crime can lead to the death of a person is highly challenging. The significance of Human life in society is deemed to be the highest, and ensuring no mistake is made while carrying out such judgements is the responsibility of society. ***Bachan Singh Vs. The State of Punjab***[7] is a landmark judgment in modern society in India. This case laid down the doctrine of "Rarest of Rare" cases.

Bachan Singh was convicted of the murder of his wife and served 14 years of his life in prison after being punished under Section 302 of the IPC (Indian Penal Code). After his release, Bachan Singh started residing with his cousin Hukum Singh and his family. However, this living arrangement later became problematic due to objections made by the wife and children of Hukum Singh.

Bachan Singh was convicted for the murder of three out of four children of his cousin, Desa Singh, Durga Bai and Veran Bai. On July 4, 1977, Bachan Singh committed this crime by brutally killing them using an axe.

Therefore, Bachan Singh was convicted for the atrocities committed under Section 302 of the IPC. He was given the death penalty by the Sessions Court and upheld by the High Court while dismissing his appeal.

Bachan Singh filed an appeal in the Supreme Court of India challenging the constitutionality of his punishment. This appeal raised issues in front of the judiciary, concerning whether the procedure mentioned in Section 354(3) of the Code of Criminal Procedures, 1973, also whether the death penalty mentioned under Section 302, Indian Penal Code, 1860, is Unconstitutional.

In this case, the Supreme Court of India established the doctrine of "Rarest of rare" cases, helpful for determining when to and when not to give the death penalty. Through this Doctrine, the Supreme Court wanted to convey the message that *"imprisonment is the rule and death sentence an exception"*.

---

[7] Bachan Singh v. State of Punjab AIR 1980 SC 898 (India).

In *Bachan Singh vs. State of Punjab,* the Supreme Court of India stated that the death penalty is neither unreasonable nor against the public interest. The court also upheld the constitutional validity of the death penalty under Section 302 of the Indian Penal Code,1860. The court directed the judiciary that before imposing death punishment, the Court must examine whether life imprisonment can be an option and also punishment should not violate the ethos of Article 19 of the Constitution of India (Freedom of Speech and expression)[8].

The court stated that before imposing a death penalty, the court must examine the *mitigating* and *aggravating circumstances* of the crime and also determine whether the option of life imprisonment is '*unquestionably foreclosed'*.

Since the court did not elaborate on the identifying criteria for the "rarest of rare" cases, this issue created confusion in determining such cases. This doubt was cleared in the judgment of ***Machi Singh vs. State of Punjab[9].***

In the case of Machi Singh vs. State of Punjab, a massacre occurred where 17 people were brutally assassinated because of a feud between families. Machi Singh and his associates, on the night of 12th August 1977, carried out an act of revenge against a family, which led to the brutal murder of women and children, amounting to the taking of seventeen lives in total. The brutality and the manner in which this act was executed shocked the conscience of society.

Here, the issue was raised whether the death penalty could be given to the accused or not, using the "rarest of rare" doctrine. After which, the court held that the following factors must be considered for the "rarest of rare" doctrine as laid down in *Bachan Singh vs. State of Punjab:*

a. The manner in which the murder has been commissioned.
b. Antisocial or abhorrent nature of the crime.
c. Motivation behind the commission of the crime.
d. Magnitude of the crime.
e. Personality of the victim of a crime.

[8] INDIA CONST. art 19.
[9] Machi Singh v. State of Punjab*,* AIR 1983 SC 957 (India).

This judgement given by the Supreme Court of India became a landmark judgement for determining the capital punishment in India to date. In this judgement, the Supreme Court held that the punishment of death must be determined by the "*reaction of society to the crime and their cry for justice"*[10]. This decision was upheld in the case of *Dhananjay Chaterjee vs. State of West Bengal*[11]*, where* a security guard of a young school girl brutally raped and murdered the victim. The court in the case held that for the imposition of appropriate punishment, the court should respond to society's cry for justice against criminals.

THE DOCTRINE IN *CRISIS*

- Judicial Inconsistency Across Benches

The most damning indictment of the rarest of rare cases is not theoretical but practical. The identical or near identical fact has yielded different results in the Courts, it has always been dependent on the bench which is hearing the case, likewise, two accused convicted for the same type of offence — a single murder accompanied by robbery, or a sexual assault followed by homicide, may face the death sentence in one courtroom and a life sentence in another with no reason for this divergence.

The doctrine established in *Bachan Singh v. State of Punjab(1980)* was supposed to function as a filter for the cases regarding the death sentence. The concept of *Aggravating Factor* and *Mitigating Factors* given in the doctrine backfired for capital punishment; the bench started to apply its own implicit threshold while deciding the precedents. The case created a set of standards, but without a metric, and now, to fill that vacuum, judges started to apply their own individual moral intuitions.

- *Per Incuriam* Problem

It is a Latin phrase which means '*through lack of care'*. The judicial inconsistency has been observed in the courts where benches ignore the binding precedents while deciding a case. In the

[10] Aryan Malik & Sai Svarjit, Capital Punishment as a Paradox to the India Constitution and the Fundamental Rights,[Vol] JCLJ 1 (2023)
[11] Dhananjay Chaterjee v. State of West Bengal, AIR 1994 SC 954 (India).

appellate practice, a division bench is bound by earlier bench rulings, and departure from that ruling requires a larger bench, but in capital jurisprudence, this practice is frequently broken down. Benches have awarded or upheld death sentences without engaging with directly precedents, leading to the judgments that are, technically, *per incuriam* — decided in ignorance of binding authority.

- Lottery Syndrome by the Supreme Court

- In the famous case of *Santosh Kumar Bariyar v. State of Maharashtra*[12]*,* observations made by Justice Krishna Iyer serve as an important basis for the judgment made on this case. His observations might serve as a groundwork to liquidate death penalty from the justice system in India. The discussions and debates over capital punishment were seen for a long time and have been refreshed after this case. The judgment was a progressive one under which the prosecution has to present leading evidence that the accused has no possibility of rehabilitation and life imprisonment would be an exercise in futility[13].
- Santosh Kumar Bariyar, the accused, with three other people, conspired to kidnap and take away Kartikraj to an unknown place, tortured him for nearly two hours and then, on a phone call to his family, demanded a ransom of Rs. 10 lakhs or else they would kill him. They ultimately killed him, chopped his body into pieces, and disposed of it at several places. All four accused were convicted under Section 302, 364b, 120b of the IPC and awarded death punishment to Bariyar and life imprisonment to the other co-accused on the fact that Bariyar was the real conspirator behind the act. Now that's where the Supreme Court intervened and denied the death sentence to Bariyar. The Supreme Court contended that the mitigating factors and circumstances do not place this case under the "rarest of rare" category.
- As the term "*rarest of rare*" has not been defined in the Indian criminal justice system, it gets difficult to determine what constitutes the "rarest of rare" category. Thus, bringing it under the ambit of judicial discretion, i.e. for the judges to decide on the basis of facts

[12] Santosh Kumar Bariyar v. State of Maharashtra (2009) 6 SCC 498
[13] Autri Saha & Pritika Rai Advani, The Death Penalty: A New Perspective in Light of Santosh Bariyar Case, [Vol] NUJS L. Rev. 669, 2 (2009).

and circumstances to award a death penalty or life imprisonment, because of its subjectivity. As in the present case, Bariyar was awarded the death penalty, and the other three co-accused were given life imprisonment. The Supreme Court also observed that the death penalty was not always awarded in cases of kidnapping and ransom, so though Bariyar, being the mastermind of the crime, should not be given such harsher punishment, his death penalty was commuted to life imprisonment.

- The Supreme Court emphasized that though judges have discretion over deciding what comes under "rarest of rare", they must apply it fairly and wisely and must not forget that life imprisonment is the rule and death sentence is an exception.
- Introduction to life imprisonment without remission – middle-path law-

  The middle-path law was introduced in the case of *Swami Shraddhananda v. State of Karnataka*[14] wherein, the accused Swami Shraddhananda drugged and killed his wife Shakereh Khaleeli (grand-daughter sir Ismail Mirza Dewan of Mysore) by burying her alive in his courtyard after securing power of attorney & will in his favor. After the investigation, authorities found her body in the courtyard in 1994. Shraddhananda was sentenced initially by a court of Karnataka in 2000, which was later upheld by the Karnataka High Court in 2005. The Supreme Court commuted the death sentence to life imprisonment without any possible chance of his release. The Supreme Court applied the middle-path law for the first time, which introduced life imprisonment without remission, reconciling differences between life imprisonment and the death penalty.

- <u>Empirical Data- From Project 39A, National Law University Delhi</u>

Since July 2020, India has continued to impose the death penalty at a daunting rate, with the end of 2021 seeing 488 prisoners on death row. In a unique trend, the Supreme Court has not awarded any death sentence since 2021. The court commuted five death sentences to life imprisonment and acquitted four death row prisoners of all charges. The frequent imposition of death sentences was awarded by the session court itself[15].

[14] Swami Shraddhananda v. State of Karnataka AIR 2008 SC 3040 (India).
[15] Project 39A, National Law University, Delhi, 'Death Penalty in India: Annual Statistics Report 2021' (Project 39A, National Law University, Delhi 2022).

In commuting death sentences, the Supreme Court showed an increasing repudiation of failures by courts to comply with the sentencing procedures and guidelines developed by the Court over the years.[16] One such procedure is that the onus is on the state to present evidence of the improbability of reform, and the court is to consider the mitigating circumstances that may favor the criminal.[17] One bench of the Supreme Court also passed orders calling for reports from Probation Officers, prison authorities and mental health experts to assess the psychological condition of the accused before the sentence is pronounced in the matter against them.

These progressive steps failed to give guidelines to the trial courts of India. In the year 2022, 57 people were given a death sentence. 38 persons were sentenced to death in a 39 single case, which indicates a failure to comply with recognized procedure and guidelines while giving a death sentence.

- The *Collective Conscience* Standard

When the Supreme Court decides to award a death penalty, it brings into practice the rarest of rare doctrine and raises the question: Does this crime shock the moral conscience (common moral feelings) of the society? If the answer is a simple yes, then the death penalty is justified, and if the criminal act is not as heinous to shock the moral conscience of society, then the court must award life imprisonment.

However, there are several fundamental problems with this doctrine:

- Conceptual disorder- the doctrine is stacked with layers of confusion: -
    a. What constitutes ‘collective’?

1. The entire nation?
2. The concerned state where the crime took place?
3. The established judicial system of the land?

[16] Lochan Shrivas v. State of Chhattisgarh, Criminal Appeal Nos. 499-500 of 2018 (Supreme Court of India, 14 December 2021); Bhagchandra v. State of Madhya Pradesh, Criminal Appeal Nos. 255-256 of 2018 (Supreme Court of India, 09 December 2021).
[17] Manoj & Ors. v. State of Madhya Pradesh, Criminal Appeal Nos. 248-250/2015 (Supreme Court of India, 29 September 2021); Mohd. Firoz v. State of Madhya Pradesh, Criminal Appeal No. 612/2019 (Supreme Court of India, 25 November 2021).

4. The informed citizen?
5. The general public?
    a. What comes under ‘conscience’?
6. Moral judgement?
7. Emotional reaction?
8. Public opinion?
9. Constitutional values?
    a. Who is the deciding factor?
10. A single bench
11. A division bench
12. Constitutional bench
13. Higher courts

It has been made a notion that justice could be served only by hanging the criminal. Justice has been equated with the mere satisfaction of society.

- Cultural bias- Often the court’s decision depends on who the victim is –(rich or poor/educated or uneducated/ upper caste or Dalit caste/ urban or rural).

Who is the accused (respectable or criminal /upper caste or lower caste)? As a result, the accused gets punished depending on these factors too.

The unfair discrimination due to cultural bias can be very neatly observed by comparing the two very infamous cases: *Satyama Dubey V. Union of India*[18] (Hathras rape case,2020) and *Mukesh & anr. V. State (NCT of Delhi) & ors* [19](Nirbhaya rape case,2012), wherein, in the former case, a 19-year-old woman belonging to a Dalit caste, with a poor and uneducated background, was gang raped, brutally assaulted by four upper caste men belonging to the Thakur community with political connections. The victim later succumbed to her injuries and died at a hospital in Delhi. The court held that it was not a crime so brutal to have shocked the moral conscience of society, and dropped the charges of gang-rape from all four accused.

[18] Satyama Dubey v. Union Of India (2020) 10 SCC 694
[19] Mukesh & anr. v. State (NCT of Delhi) & ors (2017) 6 SCC 1.

It acquitted three of them of all the charges and held one with charges of culpable homicide with minimal charges. Also, the media did not give great coverage to this case; there was minimal reporting on this incident.

However, in the latter case, the gang-rape of a 23-year-old woman took place inside a private bus in Delhi, the victim was a paramedic intern and belonged to a middle-class family. The accused were four people from a lower economic background, strangers to the victim and had no political connections gang raped her, assaulted her with iron rods and threw her body out of a moving bus; she later died due to these injuries. The court's response in this case was that the case shocks the moral conscience of the society and held that "viciousness is demonic and shows human lust at its worst" and all the four accused were given death sentence, there was huge public outrage and marches and it was also due to great coverage on this case by the media, it became a national headline for months and also attracted international media coverage, there were huge protests across the nation due to media's prime coverage on this issue.

So, after observing the courts' response to both the cases mentioned above, we can clearly make an overview that "moral conscience" is actually affected by the media; it became a national headline for months and also attracted international media coverage. There were huge protests across the nation due to the media's prime coverage of this issue.

Structural and Procedural failure

Each structural and procedural failure compounds the other- together they negate the doctrine's promise. The failures of capital sentencing in India are not confined to the appellate chambers of the Supreme Court. They run deeper, through every institutional layer through which an aggrieved person passes: from the trial courts that impose the death sentence to the appellate authorities that review it and finally to the executive that holds final power over life and death. Bachan *Singh v. State of Punjab* (1980) contemplated a system of procedural safeguards that ensure individualized, humane, and constitutionally sound sentencing, but these safeguards exist in aspiration and are systematically and procedurally denied on the ground level.

- Absence of Pre-Sentencing Hearing and Socio-Legal Investigation

Before imposing the death sentence, a court must consider not merely the crime. The background of the accused, their socio-economic circumstances, their mental health history, their reformative potential, and the mitigating factors personal to them must be placed before the court hearing the matter, and it should weigh them against the aggravating circumstances of the offence. It was the constitutional foundation of the doctrine's claim to fairness and not just the recommendation.

Indian trial courts operating under the Code of Criminal Procedure,1973, conduct no separate sentencing hearing. A provision of the Supreme Court in *Allauddin Mian v. State of Bihar* (1989)[20] held that Section 235(2)of the CrPC, *"the accused shall be given an opportunity of being heard in regard to the sentence",* must be meaningfully complied with and not treated as a formality. The Death Penalty India Research Project (NLU Delhi, 2016) found that in the majority of capital cases studied, sentencing hearings lasted minutes. No pre-sentencing report was prepared, no social investigation of the accused's background was commissioned and no psychological assessment was conducted; the court focused on the basis of the trial record alone before giving the death sentence.

- <u>The Constitutional Guarantee vs. Ground Reality- Inadequate Legal Representation</u>

Article 21 with Article 39A[21]guarantees the right to free legal aid to those who cannot afford actual representation in the courts. The Supreme Court in the case of *Hussainara Khatoon v. State of Bihar* (1979)[22] has upheld the constitutionality that a trial conducted without adequate legal representation will be held unconstitutional under Article 21. In capital cases, where the stakes are literally life and death, this guarantee is of greatest moral and constitutional weight. But the empirical reality contradicts the constitutional reality. The Death Penalty India Research Project found that only 73.5% of death row accused were represented by legal aid counsel at the trial stage.[23]

Legal aid lawyers appointed in the cases routinely lacked experience in criminal law, had inadequate time to prepare for the case, had less chance to commission forensic analysis or expert witnesses, and also in the worst but practical case scenario, met their clients for the first

[20] Allauddin Mian v. State of Bihar AIR 1989 SC 1456 (India).
[21] INDIA CONSTI. art 21,39A.
[22] Hussainara Khatoon v. State of Bihar AIR 1979 SC 1369 (India).
[23] Death penalty India report, *supra* note 15.

time on the day of the hearing. The cross-examination of a prosecution witness is a very important step to check the reliability of evidence, but it is often done in a superficial manner by the legal aid council because of the reasons stated above. Although the Supreme Court in *R.M. Malkani v. State of Maharashtra* (1973)[24] and *Suk Das v. Union Territory of Arunachal Pradesh* (1986)[25] held that the right to legal aid is not merely the appointment of counsel but the counsel must be effective.

- Appellate review under CrPC

Section 366 of the Code of Criminal Procedure, 197, necessitates that every death sentence by a Sessions Court must go to the High Court for confirmation before it can be executed; this is a structural safeguard regarding capital sentencing. The principle establishes that no person is executed just on the order of the session court but the review is first done by the High Court so that it applies its mind regarding the conviction and sentencing of the accused before the death penalty is carried out.

Empirically, it has generated an anomaly of its own. The foremost is the inconsistency in the standard of procedural and review systems of different high courts of the country. Some treat the reference as a *full de novo* review of both law and facts, examining whether the rarest of rare standards is met. While others interfere only where the trial court's conclusion is manifestly erroneous, this makes the protection afforded by Section 366 geographically contingent.

A further anomaly is related to the speed of confirmation. Data indicates significant variation in the time taken by the Courts to confirm or overturn death sentences, ranging from months to years. And during this time, the condemned person remains in anticipatory confinement.[26] This reference procedure was designed as a safeguard. Its operation, as actually experienced by condemned persons with arbitrary timelines, inconsistent standards, and no meaningful right of participation beyond what counsel provides, makes it a formal rather than a substantive protection.

- Mercy jurisdiction under Article 72&161

[24] R.M. Malkani v. State of Maharashtra (1973) 1 SCC 471.

[25] Suk Das v. Union Territory of Arunachal Pradesh AIR 1986 SC 991(India).

[26] Project 39A, *Supra* note 15

Article 72 and Article 161 of the Constitution of India vest in the President of India and the Governor of a State, respectively, the power to grant pardon, reprieve, remission of punishment and commutation of a death sentence; however, the power to commute a death sentence is limited exclusively to the President and not the Governor under Article 161. The mercy jurisdiction is the final regulatory safeguard in capital sentencing, which is the executive check on judicial sentencing. The pardoning in India is not an effect of personal mercy but an executive act guided by democratic principles.

The paradox here is that though the president and governors are executive heads, they cannot exercise their discretion under these provisions; they have to act on the advice of the appropriate government.

In *Maru Ram v. Union of India (1981)*[27], the supreme court held that power to grant pardons under Article72 is to be exercised on the advice of council of ministers, this case established that president is simply a figurehead executing ministerial advice and, power under Article 72 and 161 are to be exercised by central and state government and not the President and keeping the identity of the council of ministers as to who decided what on the subject of the mercy petition.

Similarly, in *Kehar Singh v. Union of India*[28], the accused petitioned the president under Article 72 of the Constitution after the Supreme Court upheld his death sentence. He requested reconsideration of the merits and an oral hearing. However, his plea was rejected by the President, asserting that he could not reopen the merits of the case as already decided by the Supreme Court. The court clarified that the president may look into the merits, but he is not bound to do so, and an oral hearing before deciding on the mercy petition is also not allowed.

Judicial review of the president's decision on a mercy petition cannot be put under the ambit of judicial review unless it seems to have been obtained through arbitrariness, malevolence, or in an unconstitutional manner or procedural irregularities in the case and not on merits.

So, in both the above cases we can see that powers under article 72 threatens both fairness and accountability considering the executive non-transparency as president in real does not decide anything on the mercy petition and those who decide are never questioned, also, the limits on the

[27] Maru Ram v. Union of India AIR 1980 SC 2147 (India).
[28] Kehar Singh v. Union of India AIR 1989 SC 653 (India).

judicial review operates on a narrow level reducing the actual power which should have been granted to the president and enjoyed by the one seeking a mercy petition.

Each of these are the procedural failures while deciding the cases for mercy jurisdiction are the procedural failures individually. They become worse when they are considered together as a wholesome structural and procedural failure. Bachan Singh justified the capital punishment and gave the structure and procedure for giving the capital punishment, but in reality, it is found out that there are several shortcomings instead, like no pre-sentencing investigation, inadequate representation, inconsistent appellate review, opaque executive mercy, and unaddressed psychological suffering. A doctrine whose constitutional legitimacy largely depends on the structures and procedures is deemed to be vague if the same is compromised.

Comparative Perspective

Capital Punishment has been a debatable topic all around the world. Many jurists and scholars view the death penalty as a morally weak form of punishment, and it should be abolished, while the other wing of scholars and jurists support the death penalty; according to them, the death penalty sets an example and instils fear of punishment in criminals more than any other form of punishment.

All over the world, around 106 countries have abolished the concept of death punishment, but all nations don't share the same opinion about this topic. Some nations serve a more severe form of death than others, in South Korean electrocution is the form of execution; in the United States and Vietnam, the offender is given lethal injection; in the United Arab Emirates, the criminal is beheaded; in India, Bangladesh, Egypt and some other countries, the accused.

- South Africa

The newly formed constitution of South Africa issued a landmark judgement, where they abolished capital punishment completely by declaring it unconstitutional while prioritising the right to life and dignity above everything else. This opinion of the court, published on June 6, 1995, in *S v Makwanyane & Another*,[29] drew international attention and became prominent in

[29] S v. Makwanyane 1995 (3) SA 391 (S. Afr.).

discussions on the international framework and became part of the death penalty debates in other countries such as the United States. And following the end of apartheid, the constitution of South Africa framed an interim constitution, including a Bill of Rights in 1993[30].

- United States of America

The United States, on the other hand, functions differently; it has a mixed opinion on the death penalty, where almost 27 states out of the total 50 in the United States of America legally recognize the death penalty as a valid and constitutional punishment, while the remaining 23 have abolished it. The primary form of Capital punishment is carried out by giving a lethal injection to the offender. However, many other alternative forms exist where the accused is electrocuted, hanged, gassed, use of firing squad.

The United States Supreme Court delivered a landmark judgement in 1972 in the case of *Furman v. State of Georgia*[31] here it was stated that the capricious and arbitrary manner of imposing death penalty in unconstitutional under eight and fourteen amendments and amount to cruel and unusual punishment, but the Supreme court agreed to hear the appeal only on one issue, weather whether imposing and executing death penalty in these particular instances amounted to cruel and unusual punishment under Eighth Amendment. The court later found that the death penalty would be unconstitutional in an arbitrary and discriminatory application. The death penalty was halted so that there can be no disproportionate harm by bringing amendments to criminal laws. This case brought similar concerns to the set of *Bachan Singh v. State of Punjab.*

In *Gregg v. Georgia 1976*[32]*,* the US Supreme Court ruled that the death penalty was constitutional because it did not amount to cruel and unusual punishment as per the provisions of the Eighth Amendment in regard to the sentencing procedure that involves guided discretion and review. To interpret the Eighth Amendment, the Supreme Court of the US employed the principle of evolving standards of decency that required the death sentence to be proportionate

[30] Nina Motazedii, 30 Years ago, South Africa Abolished the Death Penalty to Prioritize Life and Dignity, Death Penalty Information Centre, https://deathpenaltyinfo.org/30-years-ago-south-africa-abolished-the-death-penalty-to-prioritize-life-and-dignity (last visited [19/06/2026])

[31] Furman v. Georgia, 408 U.S. 238 (1972).

[32] Gregg v. Georgia, 428 U.S. 153 (1976).

and for the individual traits of the person to be taken into account prior to sentencing him/her to death.

- ICCPR

The foremost international legal instrument dealing with capital punishment is Article 6 of the International Covenant on Civil and Political Rights (ICCPR). This article recognizes the right to life of every human being, but for those countries that have not abolished the death penalty, this article sets criteria stating that the death penalty should not be granted to a person below the age of 18 years or to a pregnant woman. Article 6 of ICCPR does not directly demand for abolishment of capital punishment. However, Article 2 of the Second Optional Protocol of ICCPR requires the complete abolition of capital punishment. 130 countries supported the idea by December 2024. Even then, the US and India remain opposed to it. Therefore, expressing that both nations share the pattern of retentionist states selectively engaging with international human rights norms while firmly resisting binding abolitionist obligations.

Reforms

- Pre-sentencing report and codification of guidelines

The Supreme Court drew a clear line while establishing the doctrine of “Rarest of rare” in *Bachan Singh vs. State of Punjab,* where the court clearly wanted to reserve the capital punishment for the most gruesome and cruel crime case that shakes the moral consciousness of society. But things did not turn out as expected amidst courtroom principles and everyday practice. Sentences became inconsistent. Similar cases led to wildly different outcomes. Mitigating factors got glossed over. The system, in short, started producing results that were hard to defend.

Two reforms can fix this, and neither requires rewriting the law from scratch.

The first is mandatory pre-sentencing reports. Currently, the judges are passing death sentences without determining the clear identity of the accused. Their background, mental health, family situation, education, and chances of genuine rehabilitation are not systematically gathered or presented. Bachan Singh itself said courts must consider these things. In *Manoj v. State of Madhya Pradesh*, the Supreme Court went further and stressed that a detailed assessment of the accused's behavior and mental state is essential before any mitigating factors can even be properly evaluated. The fix is straightforward: require that probation officers, psychologists, psychiatrists, and social workers prepare thorough reports in every capital case, without exception.

The second reform is structured sentencing guidelines. This isn't about taking discretion away from judges; it's about giving them a more consistent framework for using it. At the moment, how much weight any judge gives to a particular aggravating or mitigating factor depends largely on that judge. The Supreme Court acknowledged this openly in Santosh Kumar *Satishbhushan Bariyar v. State of Maharashtra* and *Sangeet v. State of Haryana*, where it admitted that the application of the death penalty had become uneven. Clear guidelines would require courts to evaluate a defined set of factors, explain exactly how they've weighted each one, and explicitly address the accused's potential for reform before passing sentence. The outcome would be more consistent, more transparent, and critically more defensible.

Together, these two changes would make the system better and more honest. Judges would have the information they need. Their reasoning would be visible and comparable across cases. And the foundation laid down years ago in *Bachan Singh v. State of Punjab* would finally have the procedural backbone they need to work in practice.

- Abolition for specific categories

Juveniles- The international consensus is clear about the decision over capital sentences in the case of juveniles. The UN Convention on the Rights of the Child prohibits the execution of anyone who is below the age of eighteen years. The U.S. in Roper v. Simmon (2005)[33] held that adolescent minds are more impulsive, have less appreciation of consequences and are highly driven by peer pressure. India's *Juvenile Justice (Care and Protection of Children) Act*, 2015, also relies on this same principle. However, in India, if a juvenile aged between 16 and 18 years of age commits a heinous crime like murder or rape, etc., they would be treated with the same punishment as that of an adult. So, we see that on one hand the Indian laws follow the UN conventions, but on the other hand opens gate for the possibility of treating them as mature adults in extreme cases. This whole procedure and mindset sit uneasily with the abolitionist framework.

Mental illness- it is another important ground where Indian laws lack in the protection of mentally ill people. They are categorized into two forms-

- At the time of the offence, if the act is committed due to a psychotic episode and the offender lacks mens rea, which is an essential requirement.
- At execution, if a person later develops a mental illness, they cannot comprehend why they are being executed.

  The Healthcare Act, 201, recognizes mental illness as a social and legal reality, but death penalty jurisprudence has not created any categorical protection for mentally ill offenders.

[33] Roper v. Simmons, 543 U.S. 551 (2005).

Intellectually disabled- India lacks even in considering the intellectually disabled people. Basically, they are people with low reasoning and understanding skills, which makes them deliver false confessions, fail to help their lawyer in explaining their case and struggle to understand the court proceedings. In the U.S., executing a person of such a category is considered cruel and inhumane. However, in India, there are no such bars; courts treat it as a mitigating factor but not as an exemption.

- Role of the judiciary and the law commission on

The Supreme Court has carried this problem for too long on its own. Judges have stretched, reinterpreted, and tried to patch a doctrine that was always going to need more than judicial ingenuity to survive. Bariyar, *Shraddananda*, and *Shatrughan Chauhan each* did something useful, and none of it was enough. Courts can correct individual outcomes. They cannot build institutions. They cannot write sentencing guidelines into statute. They cannot mandate pre-sentencing reports, fund effective legal aid, or compel the executive to process mercy petitions transparently. Only Parliament can do those things.

The Law Commission has done its part twice over — in 1967 and again in 2015. Both times, Parliament looked away. That is not judicial failure. That is legislative abdication. The death penalty in India will remain constitutionally precarious until the institution with actual power to fix it decides the problem is worth its attention.

- Reconsideration of the 262nd Law Commission Report (2015) — The Recommendation on Abolition

The 262nd Law Commission Report arrived in August 2015. After years of study of reviewing comparative jurisprudence, examining data, consulting stakeholders, and confronting the documented failures in India, the Commission concluded : the death penalty, as administered, cannot be justified. *It recommended abolition for all offences except terrorism-related crimes and waging war against the state.*[34]

[34] Law Commission Report on Death Penalty, SCC Online https://www.scconline.com/blog/post/2015/09/01/262-law-commission-report-on-death-penalty (last visited [19/06/2026])

That recommendation has sat on a shelf for a decade with no legislative debate and no government response. For a report that took years to produce and carried the weight of the Commission's collective authority, the silence has been remarkable and revealing.

The Commission's reasoning deserves to be taken seriously. It acknowledged that the rarest of rare doctrine had failed to prevent arbitrariness in sentencing. It recognized that the burden of the death penalty falls overwhelmingly on the poor and the inadequately represented groups that the Constitution was specifically designed to protect. They are the findings grounded in evidence, and they have only grown stronger in the decade since the Report was published.

The carve-out for terrorism offences was itself a compromise. If the penological case against capital punishment holds, it holds regardless of the label attached to the crime. Retaining death for terrorism while abolishing it elsewhere does not resolve the doctrine's contradiction but only relocates it.

Conclusion

The rarest of rare doctrines was never meant to be a permanent solution. It was moreover a compromise a constitutional lifeline thrown to capital punishment at a moment when the Supreme Court could neither abolish it nor leave it entirely ungoverned. *Bachan Singh v. State of Punjab* (1980) did something important: it told courts that death is different, that discretion must be guided, and that the person standing before the bench matters as much as the crime they committed. For a brief moment, it looked like Indian capital sentencing might actually become principled, humane, and consistent.

What four decades of post-*Bachan Singh* jurisprudence reveal is not a doctrine being faithfully applied and occasionally misread. It is a doctrine that was structurally incapable of delivering what it promised. The rarest of rare standards never defined what "rarest" means. It never told courts how to weigh a traumatic childhood against a brutal murder, or how many mitigating factors cancel one aggravating factor. It imported *"collective conscience"* as a determinant of life and death — a standard so malleable that it bends effortlessly to public outrage, media pressure, and the cultural biases of whoever sits on the bench that day.

The Supreme Court itself said as much in *Santosh Kumar Bariyar* (2009), when it acknowledged that the application of the doctrine had become a matter of chance. That is not a minor judicial admission. That is the court conceding that the standard it enforces cannot guarantee equal justice, that whether a person lives or dies may depend less on what they did than on which judges happened to hear their case.

And the failures do not stop at doctrine. They run through every institution a condemned person touches. Trial courts sentence without pre-sentencing reports. Legal aid lawyers meet their clients hours before hearings. High Courts apply inconsistent standards of appellate review. Mercy petitions sit undecided for years while condemned prisoners deteriorate on death row psychologically, sometimes irreparably. The procedural architecture that *Bachan Singh* assumed would surround capital sentencing was never built. What exists instead is a formal framework that gestures toward due process while systematically denying it.

The empirical record confirms the same. The Death Penalty India Research Project found that those most likely to be executed in India are not necessarily those who committed the worst crimes. They are the poorest, the least educated, the most inadequate. This is not an accident of implementation but a predictable consequence of a doctrine that offers no structural protection against the biases.

None of this leads inevitably to abolition. But it does lead somewhere specific. It leads to the conclusion that the current arrangement, retaining capital punishment while pretending the rarest of rare doctrine tames it, is constitutionally dishonest. The *262nd Law Commission Report (2015)* said, carefully and on the basis of extensive study, that the death penalty should be abolished for all offences except terrorism. This recommendation deserves a serious legislative response.

If India is to retain the death penalty at all, it must build the system that *Bachan Singh* imagined but never created, mainly, mandatory pre-sentencing hearings, independent social investigation reports, structured sentencing guidelines, guaranteed effective representation, and a transparent mercy process governed by published criteria.

The rarest of rare doctrine promised that capital punishment in India would be an exception so carefully governed that it almost ceased to exist. What it produced was something far more troubling: *"a system that executes rarely enough to avoid scrutiny, but arbitrarily enough to deny justice."*