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The Doctrine of 'Rarest of Rare' in Capital Sentencing: A Critical Study of Its Suitability and Application in Indian Jurisprudence

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ABSTRACT

The doctrine of 'Rarest of Rare' in capital sentencing was evolved by the Indian Supreme Court in "Bachan Singh v. State of Punjab" to restrict the imposition of the death penalty and ensure it is awarded only in exceptional circumstances. Intended as a safeguard against arbitrary executions, the doctrine emphasizes a balance between aggravating and mitigating factors, focusing on whether life imprisonment is unquestionably foreclosed. However, its vague formulation and subjective interpretation by courts have led to inconsistent outcomes, undermining constitutional guarantees under Articles 14 and 21. The judiciary has often invoked public sentiment and "collective conscience" as grounds for capital punishment, blurring the lines between legal reasoning and populist justice. Case law analysis reveals disparities in sentencing even for similar offences, reflecting structural and procedural flaws. The absence of a uniform framework, insufficient consideration of reformative potential, and lack of codified sentencing guidelines continue to pose serious challenges. While judicial innovations such as life imprisonment without remission offer alternatives, they too lack legislative support. This research critically evaluates the doctrine's theoretical foundation, judicial application, and human rights implications, ultimately questioning its suitability and reliability in a constitutional democracy committed to fairness, dignity, and justice.

***Keywords**: Capital punishment, rarest of rare doctrine, constitutional rights, judicial discretion, criminal justice reform.*

I. INTRODUCTION

India's penal history with capital punishment reaches deep into pre-colonial jurisprudence where death was a state tool for maintaining dharma and royal order. In ancient texts like Manusmriti and Arthashastra, kings sanctioned executions as a means of retributive deterrence, often bypassing any due process. The concept of reform or rehabilitation had negligible

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presence then.[3]

During the colonial regime, the British institutionalized capital punishment through codified laws, particularly the Indian Penal Code, 1860. Section 302 IPC provided death as a punishment for murder, reflecting Victorian penological theories rooted in deterrence rather than reformation. The British administration enforced death penalty frequently but without laying down any sentencing policy or gradation of guilt. Public hangings were common. Mercy petitions were at the absolute discretion of the Governor-General.[4]

After independence, despite the transformative guarantees of the Constitution, India did not abolish capital punishment. The Constituent Assembly debated it but retained it with checks. The drafters inserted Article 21, guaranteeing the right to life and personal liberty, but also permitted its deprivation by "procedure established by law." This clause later served as a constitutional threshold for reviewing death penalty awards.[5]

In *"Jagmohan Singh v. State of U.P."*, the Supreme Court upheld the constitutional validity of the death penalty, stating that the judge's discretion under CrPC satisfied "procedure established by law." The court refused to intervene with the legislative wisdom behind capital punishment. It focused more on procedural fairness rather than substantive arbitrariness of the sentence itself.[6]

Post this, the 1978 CrPC reforms changed the default sentencing structure. Section 354(3) CrPC now mandated that for murder, life imprisonment shall be the rule and death penalty an exception, requiring "special reasons." This amendment marked a judicial shift towards minimal application of capital punishment. But it lacked clarity on what amounted to "special reasons".[7]

The turning point came in *"Bachan Singh v. State of Punjab"*, (1980) 2 SCC 684, where a constitutional bench laid down the "rarest of rare" doctrine. It held that death penalty could only be awarded when life imprisonment was unquestionably inadequate. The court tried to balance retributive goals with reformative ideals under Article 21. However, it left application to judicial discretion, laying the ground for future inconsistencies in interpretation.[8]

The apex court tried clarifying the standard in *"Machhi Singh v. State of Punjab"*, by listing aggravating and mitigating factors. It categorized the types of murders deserving capital

[3] P.V. Kane, History of Dharmaśāstra Vol. III, Bhandarkar Oriental Research Institute, 1946.
[4] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).
[5] INDIA CONST. art. 21.
[6] Jagmohan Singh v. State of U.P., (1973) 1 SCC 20.
[7] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[8] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

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punishment based on brutality, societal shock, and vulnerability of victims. Still, it could not avoid subjective application by trial courts and High Courts.[9]

Over the years, the death penalty retained its legal position, but its actual application sharply reduced. National Crime Records Bureau (NCRB) data reflects this change. While death sentences are awarded by lower courts, most get commuted or overturned by higher courts or through executive clemency. India has executed only a few people since 2000, notably in cases involving terrorism, rape, and crimes against women like the 2012 Nirbhaya case (*"Mukesh v. State (NCT of Delhi)"*.[10] Internationally, India remains among the minority retentionist countries. It has voted against UN General Assembly resolutions seeking moratorium on executions. India justifies it based on its sovereign criminal law framework, although it has ratified the ICCPR. However, it has not acceded to the Second Optional Protocol aiming at global abolition of the death penalty.[11]

(A) Research Objectives

1. To examine the evolution and judicial interpretation of the 'Rarest of Rare' doctrine through landmark Supreme Court decisions and evaluate its impact on capital sentencing trends in India.
2. To critically assess the compatibility of the doctrine with fundamental constitutional rights, including the right to life, equality before law, and protection against arbitrary state action.
3. To identify key procedural gaps, inconsistencies, and socio-economic biases in the implementation of the doctrine, and to propose legislative or institutional reforms that can enhance fairness and reliability in the imposition of the death penalty.

(B) Research Questions

1. How has the Indian judiciary interpreted and applied the 'Rarest of Rare' doctrine in capital sentencing since its inception in *"Bachan Singh v. State of Punjab"*, and to what extent has this interpretation ensured consistency and fairness?
2. Does the current application of the 'Rarest of Rare' standard align with the constitutional principles of equality, dignity, and due process as enshrined under Articles 14 and 21 of the Indian Constitution?

[9] Machhi Singh v. State of Punjab, (1983) 3 SCC 470.
[10] Mukesh & Anr. v. State (NCT of Delhi), (2017) 6 SCC 1.
[11] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

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3. What are the systemic limitations and procedural inconsistencies in the implementation of the doctrine, and how can the Indian criminal justice system reform capital sentencing to ensure greater transparency, objectivity, and justice?

(C) Research Methodology

This research adopts a doctrinal legal methodology, relying on a qualitative and analytical examination of primary and secondary legal sources. The study is based on a detailed review of constitutional provisions, statutory frameworks such as the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973, as well as landmark judicial pronouncements of the Supreme Court of India including *"Bachan Singh v. State of Punjab"*, *"Machhi Singh v. State of Punjab"*, and subsequent rulings that interpret and apply the 'Rarest of Rare' doctrine. Relevant Law Commission reports, international human rights instruments like the ICCPR, and comparative legal perspectives are also examined to understand the broader legal and philosophical context. Case law analysis forms a core part of this methodology, focusing on consistency, judicial reasoning, and the socio-legal implications of capital sentencing. Secondary materials such as legal commentaries, scholarly articles, and empirical data from credible legal databases and death penalty reports are utilised to support the critique and develop reform-oriented suggestions.

II. HISTORICAL AND JURISPRUDENTIAL ORIGIN OF THE 'RAREST OF RARE' DOCTRINE

(A) Historical Overview of Capital Punishment in Indian Penal Law

The notion of death as a legitimate state punishment existed in ancient Indian texts. Manusmriti justified capital punishment for grave crimes like murder, treason, and theft. It said such punishment purged sin and restored cosmic order. Kautilya's *Arthashastra* detailed methods of execution to deter future offenders. These texts saw punishment as moral retribution. Not legal process. Vengeance was often intertwined with deterrence.[12]

During medieval periods, rulers used execution for consolidating power. Islamic rulers followed *Sharia* where *Qisas* (retribution) and *Diyya* (blood money) determined outcomes. The punishment depended on social status and caste. Colonialism formalised this system under codified laws. British colonial rule introduced the Indian Penal Code, 1860. Section 302 prescribed death or life imprisonment for murder. No guidelines. No sentencing standards.

[12] P.V. Kane, History of Dharmaśāstra Vol. III, Bhandarkar Oriental Research Institute, 1946.

Courts had wide discretion to choose between the two without reasoning.[13]

Executions during British rule were frequent. Records show over 1500 hangings in 1931 alone. Death was the primary penalty for political rebellion. Public hangings acted as warnings. The CrPC, 1898, mechanically allowed judges to choose death or life imprisonment without stating any reasons. No distinction was made between ordinary and aggravated murders. The judicial system followed rigid interpretations, with little sympathy for individual circumstances.[14]

After independence, the penal code remained unchanged. India retained Section 302 IPC. Death was not abolished. Courts still had discretion. But the Constitution brought in a new perspective. Article 21 guaranteed right to life. Yet the state could still deprive it. But only by procedure established by law. Initially, the Supreme Court saw this phrase narrowly. In *"Jagmohan Singh v. State of U.P."*, the Court held that sentencing discretion satisfied Article 21. The court did not see death penalty as inherently arbitrary. It was seen as a legal consequence of a fair trial.[15]

This changed after the 42nd Law Commission Report and debates in the Parliament. CrPC was reformed in 1973. Section 354(3) required "special reasons" for awarding death. Life imprisonment became the rule. Death became the exception. Parliament did not define "special reasons." The decision was left to judges. This led to confusion and inconsistency. Some judges used social conscience. Others focused on brutality. This unstructured discretion needed judicial guidance.[16]

That clarity came with *"Bachan Singh v. State of Punjab"*. The Supreme Court upheld constitutionality of the death penalty but limited its use. The court evolved the "rarest of rare" doctrine. It said death should be used only when life imprisonment is "unquestionably foreclosed." The judgment emphasized balancing aggravating and mitigating circumstances. The doctrine was not codified. It was a judicial guideline. A principle of restraint. But ambiguity remained in application.[17]

"Machhi Singh v. State of Punjab" tried to operationalise this test. The court gave five categories of cases where death could be applied. It included manner of murder, motive, anti-social impact, victim's vulnerability, and societal abhorrence. But these categories were still subjective. They gave judges more structure but also more room for discretion. The phrase "collective conscience of society" emerged here. It lacked definitional clarity and led to moral

[13] Id at 2.
[14] Amnesty Int'l, Lethal Lottery: The Death Penalty in India, AI Index: ASA 20/007/2011, https://www.amnesty.org/en/documents/asa20/007/2011/en/ (last visited Apr. 15, 2025).
[15] Id at 4.
[16] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[17] Id at 6.

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interpretations by courts.[18]

Later rulings showed inconsistencies. In *"Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra"*,[19] the Supreme Court held that earlier cases misapplied Bachan Singh. It stressed on considering mitigating factors properly. In *"Shankar Kisanrao Khade v. State of Maharashtra"*,[20] the Court admitted arbitrariness in past death penalty awards. The doctrine seemed to depend more on the judge than the law.

(B) Legal Landscape Before Bachan Singh (1980)

Before *Bachan Singh*, Indian courts awarded death penalty with unchecked discretion. The IPC, 1860 provided for capital punishment in over 20 sections. Section 302 allowed death or life imprisonment for murder. No criteria existed to guide this sentencing. Judges could choose either sentence. They were not required to provide any justification for awarding death over life imprisonment.[21]

The Code of Criminal Procedure, 1898 followed the same structure. Section 367(5) permitted the court to impose life sentence only by recording "special reasons." This clause essentially made death the default punishment. The burden lay on the judge to justify leniency, not severity. The approach mirrored colonial punitive philosophy. The accused was not given benefit of doubt in sentencing. Courts mechanically imposed death.[22]

In *"Jagmohan Singh v. State of U.P."*, the Supreme Court upheld this structure. The petitioner challenged the death sentence as unconstitutional under Articles 14, 19, and 21. The Court rejected the challenge. It held that sentencing after a full-fledged trial satisfied "procedure established by law" under Article 21. It concluded that judicial discretion was not arbitrary. It stated that judges could base sentencing on evidence, arguments, and precedents. No separate hearing for sentencing was required. The judgment did not require courts to weigh mitigating circumstances. The sentencing was assumed to be fair because the trial was fair.[23]

The Law Commission's 35th Report (1967) reviewed capital punishment. It received thousands of responses. It noted that society still supported retention of death penalty. The Commission did not recommend abolition. But it highlighted lack of sentencing policy. It suggested need for judicial discipline in capital sentencing. Still, no reform followed. The report remained a mere

[18] Id at 7.
[19] Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498
[20] Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546.
[21] Id at 2.
[22] The Code of Criminal Procedure, 1898, § 367(5), No. 5, Acts of Parliament, 1898 (India).
[23] Id at 4.

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academic document.[24]

The 42nd Amendment to the Constitution in 1976 added Article 31C which gave primacy to Directive Principles. However, it did not address procedural safeguards in sentencing. In 1973, the CrPC was revised. Section 354(3) was introduced. It reversed the earlier position. Now, death could only be awarded if "special reasons" were recorded. Life sentence became the default. The burden of justification shifted. But again, the law failed to define what those reasons were. Judges still relied on intuition and moral reasoning. Sentencing remained uncertain and judge-centric.[25]

In *"Rajendra Prasad v. State of U.P."*, Justice Krishna Iyer introduced a human rights lens. He held that capital punishment could only be justified if it was necessary to prevent crime. He warned that the death penalty must not be based on the crime alone but must consider the criminal's character and reformative possibility. He emphasized Article 21 and the need for "fair, just and reasonable" sentencing. His view, however, did not become binding. Other benches disagreed.[26]

(C) Landmark Case: *"Bachan Singh v. State of Punjab"*, (1980) 2 SCC 684

a) Judicial Reasoning and Majority View

The Supreme Court, in *Bachan Singh*, was faced with a constitutional question. Whether the death penalty under Section 302 of IPC read with Section 354(3) of CrPC violated Articles 14, 19, and 21. The petitioner argued that death penalty lacked procedural safeguards. That it was arbitrary and disproportionate. The state defended it as constitutionally valid. A five-judge bench delivered a 4:1 verdict upholding its constitutionality.[27]

Justice Bhagwati dissented. The majority included Justices Y.V. Chandrachud (CJ), A.C. Gupta, N.L. Untwalia, and P.N. Bhagwati. The majority opinion, written by Justice Sarkaria, held that capital punishment was constitutionally valid. It relied on the phrase "procedure established by law" under Article 21. The court said that if the law provides fair, just, and reasonable procedure, the deprivation of life is valid. The court did not find death penalty per se arbitrary.[28]

The majority drew strength from Section 354(3) of CrPC. It noted that this provision reversed

[24] Law Commission of India, 35th Report on Capital Punishment (1967), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080828-1.pdf (last visited Apr. 15, 2025).
[25] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[26] Rajendra Prasad v. State of U.P., (1979) 3 SCC 646.
[27] Id at 6.
[28] Id. at 688.

the earlier law. Life imprisonment became the rule. Death became the exception. Judges now had to record "special reasons." This safeguard was constitutional. It showed legislative intent to limit death sentences. The court stated that discretion, though wide, was not unstructured.[29]

The court introduced the "rarest of rare" doctrine. It stated that death sentence should be imposed only in gravest cases. Only when life imprisonment was "unquestionably foreclosed." This meant that reform and rehabilitation must be impossible. The court emphasized balancing aggravating and mitigating factors. It said mitigating circumstances like age, lack of motive, provocation, or socioeconomic condition must be considered. The court suggested weighing the crime and the criminal both.[30]

Justice Sarkaria refused to prescribe a rigid formula. He left application of the doctrine to judicial wisdom. He said that judges must act cautiously. Sentencing must reflect collective conscience, but not be swayed by public outrage. The decision marked a departure from colonial-era absolutism. It created a structured discretion. It did not remove death penalty. But it laid down a limiting principle. The judgment became the constitutional foundation for capital sentencing jurisprudence in India.[31]

b) Dissenting Opinions and Their Significance

Justice P.N. Bhagwati's dissent carried lasting moral force. He held that death penalty violated Article 14 and 21. He found the sentencing process arbitrary and unfair. He argued that judges had no clear standard. That courts imposed death based on subjective morality. He pointed out that different judges gave different sentences for similar crimes. He called this discriminatory.[32]

Justice Bhagwati stressed that sentencing must be free from personal bias. He said judicial discretion, without objective norms, becomes dangerous. He warned that the poor, illiterate, and socially backward were more likely to receive death. His view highlighted structural inequality. He said death penalty was not applied equally. It violated the right to equality before law.[33]

He declared that the state must not take life if there is a possibility of reform. He believed that the death penalty served no penological purpose. It neither reformed nor deterred. He called it irrevocable and barbaric. He said that a modern constitutional democracy must renounce retributive violence. His dissent foreshadowed later criticism by the Law Commission and

[29] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[30] Id at 6.
[31] Id.
[32] Id at 6 (Bhagwati, J., dissenting), 777.
[33] Id. at 779.

human rights bodies.[34]

Though not binding, his dissent became a reference point in future debates. It was cited in *"Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra"*, where the Court admitted to arbitrary application of the rarest of rare test. His views also shaped the Law Commission's 262nd Report, which called for abolition except for terrorism.[35]

His opinion reminded the judiciary that procedural fairness alone cannot justify death. That substantive equality matters. His dissent created space for a rights-based critique of the death penalty. It remains one of the most powerful judicial arguments against state-sanctioned execution in Indian constitutional history.[36]

III. PHILOSOPHICAL UNDERPINNINGS: RETRIBUTIVE VS REFORMATIVE JUSTICE

Retributive justice holds that the offender deserves punishment. It sees crime as a personal choice made with awareness of the consequences. Punishment, therefore, must reflect the severity of the crime. In ancient India, punishment had a moral foundation. The king, as upholder of *dharma*, had the duty to ensure that evil was punished in equal measure. The Indian Penal Code, 1860 inherited the colonial preference for retributive sanction, especially for crimes like murder or treason.[37]

Reformative justice, however, believes punishment should serve to transform the wrongdoer. It does not ignore the seriousness of the crime but focuses on the potential for rehabilitation. This model gained traction in Indian jurisprudence after independence. Article 21 of the Constitution gave the right to life a broader meaning. It demanded humane treatment of prisoners and a dignified process even for the condemned. The Supreme Court acknowledged this in *"Sunil Batra v. Delhi Administration"*, observing that even prisoners are not stripped of their basic human dignity.[38]

"Bachan Singh v. State of Punjab", was a turning point. The majority opinion rejected pure retributivism. It held that capital punishment must be based on a careful evaluation of aggravating and mitigating circumstances. The Court insisted on individualised sentencing. The presence of possibility for reform should weigh heavily against imposing death. But it did not rule out retribution altogether. It preserved it for exceptional cases where rehabilitation seemed

[34] Id. at 781.
[35] Id at 17.
[36] Law Commission of India, 262nd Report on the Death Penalty (2015), https://docs.manupatra.in/newsline/articles/Upload/A23C371C-CD67-44A9-B2BC-B62BF71CDE5A.pdf (last visited Apr. 15, 2025).
[37] Id at 2.
[38] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.

beyond possibility.[39]

Justice Krishna Iyer earlier in *"Rajendra Prasad v. State of U.P."*, (1979) 3 SCC 646 had strongly supported reformative justice. He argued that capital punishment should serve constitutional goals. He questioned whether the state could ethically end a life when the criminal might be reformed. But this reasoning did not find favour in *Bachan Singh*. The Court found that the Constitution did not prohibit death penalty as long as proper process existed.[40]

Indian courts continue to juggle these two philosophies. In "*Dhananjoy Chatterjee v. State of West Bengal"*, the Court stressed societal need for retribution. It upheld death sentence stating it satisfied the collective conscience. In contrast, *"Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra"*, stressed on mitigating circumstances and the reformative possibility. The doctrine remained philosophical ground for both sides, but lacked precision in application.[41]

(A) The 'Rarest of Rare' Standard: Judicial Innovation or Ambiguity?

The "rarest of rare" test was introduced in *Bachan Singh* as a judicial innovation. It was not sourced from any statute. The Court created it to balance between the retention of death penalty and the need to reduce its misuse. It stated that death sentence should be awarded only when life imprisonment is "unquestionably foreclosed." It was an attempt to guide discretion with constitutional morality.[42]

But the Court deliberately avoided defining "rarest of rare." It offered no precise checklist. It stated that every case must be judged on its own facts. It laid down that aggravating and mitigating factors must be considered. Yet, it left interpretation of those factors to individual judges. This open-endedness allowed wide discretion. In *"Machhi Singh v. State of Punjab"*, the Court gave five illustrative categories—manner of crime, motive, vulnerability of victim, magnitude, and public abhorrence. But these too were not exhaustive. They were moral guides, not legal standards.[43]

This ambiguity led to inconsistent application. In *"Swamy Shraddananda v. State of Karnataka"*, the Court avoided death and introduced the "special category" of life imprisonment without remission. In contrast, in "*Afsan Guru v. State (NCT of Delhi)"* the Court awarded death citing collective conscience, even though the convict had no direct role in the

[39] Id at 6.
[40] Id at 24.
[41] Id at 17.
[42] Id at 6.
[43] Id at 7.

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crime. These cases reflected divergence in how judges applied the doctrine.[44]

Critics argue that the standard lacks objectivity. It allows personal biases. A judge's social values often decide whether a crime shocks the conscience. No uniform threshold exists. The Law Commission's 262nd Report (2015) acknowledged this ambiguity. It observed that capital punishment in India is "arbitrary and freakish." It stated that the "rarest of rare" formula has failed to limit the death penalty effectively.[45]

Supporters argue that flexibility is necessary. No two murders are alike. Fixing rigid formulas can lead to injustice. The doctrine, in their view, allows human judgment. It ensures that the Court can respond to both societal and individual factors. But even they agree that the lack of appellate consistency is a serious problem.[46] The "rarest of rare" standard was born from constitutional compromise. It sought to restrict, not remove, the death penalty. But in doing so, it opened the door to interpretative chaos. What was meant to protect life often ended up depending on the composition of the bench.

IV. JUDICIAL APPLICATION AND INCONSISTENCIES IN INTERPRETATION

(A) Guiding Principles from *"Machhi Singh v. State of Punjab"*, (1983) 3 SCC 470

The Supreme Court in *"Machhi Singh v. State of Punjab"*, sought to bring clarity to the "rarest of rare" doctrine laid down in *Bachan Singh*. The Court attempted to build a structured framework. It listed specific categories to guide judges in deciding when the death sentence was appropriate. The bench, led by Justice Thakkar, reiterated that capital punishment should be an exception, not the rule. But it tried to give form to the exception.[47]

The Court divided murder cases into five categories. First, the manner of commission. If the act of murder was executed with extreme brutality—burning alive, dismembering, or prolonged torture it could qualify as "rarest of rare." Second, the motive. If the murder was committed for abnormally depraved reasons greed, betrayal of trust, or sheer brutality it crossed the threshold. Third, the anti-social or socially abhorrent nature. Murders involving vulnerable victims children, women, or persons from minority communities—could warrant capital punishment. Fourth, the magnitude. If the crime caused multiple deaths or widespread terror, as in mass murders or terror attacks. Fifth, the personality of the victim. If the victim was innocent or respected in society—a public servant, teacher, or someone with no provocation—then the

[44] Swamy Shraddananda v. State of Karnataka, (2008) 13 SCC 767; Afsan Guru v. State (NCT of Delhi), (2005) 11 SCC 600.
[45] Id at 34.
[46] Id at 18.
[47] Id at 7.

death sentence might be justified.[48]

The Court held that the sentencing judge must balance aggravating and mitigating factors. Aggravating factors include the manner of killing, premeditation, and the danger to society. Mitigating factors include the age, mental condition, lack of criminal history, and possibility of reform. The judgment emphasized individualized sentencing. It warned against generalizations. The punishment must fit not just the crime but also the criminal.[49]

The judgment shifted the discourse from judicial philosophy to judicial reasoning. It created a checklist, though not exhaustive. It sought to reduce arbitrariness. It placed emphasis on objectivity, but without mechanical application. The Court warned that public outcry or collective conscience must not override legal standards. Still, it allowed courts to consider the societal impact of the crime. This opened the door to moral judgment.[50]

In *Machhi Singh*, the Court upheld the death penalty for the accused. They were involved in a family feud that escalated into mass killings across villages. The brutality and calculated nature of the murders, the helplessness of the victims, and the cold planning led the Court to affirm the executions. It was seen as a textbook example of the "rarest of rare." But it also showed that the doctrine was still open to interpretation.[51]

Despite its guidance, *Machhi Singh* did not create a binding formula. It left discretion intact. The judgment did not resolve the ambiguity of what shocks the collective conscience. It provided labels, but not limits. Later cases often cited its categories selectively. In *"Kehar Singh v. Union of India"*,[52] the Court invoked the public sentiment factor to affirm death in a political assassination. In "*Shivaji Jaising Babar v. State of Maharashtra"*,[53] the Court avoided death despite brutal rape and murder, citing reformative possibility. This inconsistency stemmed from how judges interpreted the *Machhi Singh* principles. The doctrine remains discretionary. While *Machhi Singh* tried to streamline capital sentencing, it added another subjective layer. It reduced legal uncertainty only in theory. In practice, the categories provided room for narrative manipulation. What is brutal to one judge may be forgivable to another. The test of "rarest of rare" shifted from legal criteria to personal morality.

(B) Criteria Laid Down by the Judiciary for Death Penalty

The Supreme Court in *"Bachan Singh v. State of Punjab"*, laid down the foundational test. The

[48] Id. at 478–479.
[49] Id. at 479–480.
[50] Id. at 481.
[51] Id. at 482–483.
[52] Kehar Singh v. Union of India, (1989) 1 SCC 204.
[53] Shivaji Jaising Babar v. State of Maharashtra, (1991) 4 SCC 375.

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Court held that the death penalty may only be imposed in the "rarest of rare" cases. This standard was not rigidly defined. But it introduced the obligation to weigh aggravating and mitigating factors. Judges were to consider not just the nature of the crime but also the criminal's background, intent, and potential for reform.[54]

The Court refused to adopt a uniform checklist. Instead, it left discretion to the judiciary. The sentencing judge must first determine whether life imprisonment is unquestionably foreclosed. This phrase formed the fulcrum of the test. It required a conclusion that the convict is beyond reformation. This conclusion must be drawn from the case facts. Not from social panic or public anger. The emphasis was on individualized sentencing.[55]

In *"Machhi Singh v. State of Punjab"*, the Court tried to crystallize the *Bachan Singh* principles. It outlined five broad categories—manner of commission, motive, anti-social nature, magnitude, and victim's status. These were meant to guide judicial reasoning. The court advised that brutality, mass killings, or targeting defenceless victims could justify death. But these criteria were not exhaustive. They allowed considerable subjectivity.[56]

Aggravating factors that courts have consistently recognised include premeditation, extreme cruelty, betrayal of trust, or impact on society at large. For instance, in "*Dhananjoy Chatterjee v. State of West Bengal"*, the Court justified death citing that the crime a rape and murder by a security guard—was against the faith placed by society. The betrayal of trust aggravated the act beyond tolerance.[57]

Mitigating circumstances, on the other hand, could include the convict's age, socio-economic background, lack of criminal antecedents, remorse, or mental condition. In *"Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra"*, the Court overturned the death sentence on the ground that the trial court failed to consider mitigating factors. It stressed that non-consideration of such factors is not a curable defect.[58]

Another important criterion emerged in *"Swamy Shraddananda v. State of Karnataka"*. The Court created a special category—life imprisonment without remission. This judicial innovation allowed the court to avoid both extremes—execution or standard life term. It was based on the principle that not all murders deserve the gallows, yet some convicts should not reenter society. It became an implicit recognition that the "rarest of rare" test often left courts with a dilemma.[59]

[54] Id at 6.
[55] Id. at 739.
[56] Id at 7.
[57] Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.
[58] Id at 17.
[59] Swamy Shraddananda v. State of Karnataka, (2008) 13 SCC 767.

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Judicial reasoning has also allowed the idea of "collective conscience" to influence capital sentencing. This concept, introduced in *Machhi Singh*, has been used inconsistently. In *"Mukesh v. State (NCT of Delhi)"*, the Nirbhaya case, the Court upheld the death penalty by invoking the collective conscience. But it gave minimal weight to mitigating factors. This raised concerns that emotional response was replacing legal reasoning.[60]

Courts have also held that failure to consider post-conviction conduct is an error. In *"Shankar Kisanrao Khade v. State of Maharashtra"*, the Court observed that reformative evidence must be gathered even after conviction. A death sentence cannot be based on the trial evidence alone. The judiciary must evaluate the potential for reform during incarceration.[61] The criteria laid down by courts reflect evolving standards. But they lack uniformity. No fixed framework binds judges. What qualifies as shocking or inhuman varies. The discretion continues to rest on the judge's interpretation of facts and morality. As a result, similar crimes often receive different punishments. The standard remains as unpredictable as it is serious.

(C) Case Law Analysis of Selected Supreme Court Judgments

In *"Machhi Singh v. State of Punjab"*, (1983) 3 SCC 470, the Supreme Court attempted to concretise the "rarest of rare" formula laid down in *Bachan Singh*. The Court upheld the death penalty for the accused who brutally murdered seventeen persons in a family vendetta. The judgment categorized crimes based on motive, manner, victim status, and social abhorrence. It formed the basis for future capital sentencing. However, this effort at clarification failed to create a consistent standard in subsequent jurisprudence.[62]

In "*Dhananjoy Chatterjee v. State of West Bengal"*, the Court awarded the death sentence to a security guard who raped and murdered a schoolgirl. The Court held that such crimes erode public trust and shock the collective conscience of society. It ruled that retribution in such cases was necessary for societal balance. No detailed examination of mitigating circumstances was undertaken. The decision leaned heavily on the gravity of the crime alone, setting a precedent that was later criticised.[63]

In *"Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra"*, the Court adopted a reformative lens. It commuted the death sentence awarded to the convict, who had lured and killed a friend for monetary gain. The Court observed that mitigating factors were ignored by the trial court and that the prosecution had not established that the accused was beyond

[60] Id at 8.
[61] Id at 18.
[62] Id at 7.
[63] Id at 55.

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reformation. It further criticised prior death sentence rulings that mechanically applied *Machhi Singh* without engaging with *Bachan Singh*'s balancing test. This judgment raised the bar for judicial reasoning in capital sentencing.[64]

In *"Shankar Kisanrao Khade v. State of Maharashtra"*, the Court reviewed several capital punishment cases and found that inconsistencies persisted. It stressed that judges must not impose death based on crime alone. The background, mental health, and potential for reform of the convict must be considered. Justice Lokur in his opinion flagged the alarming arbitrariness in awarding death and called for a systemic framework. Despite this observation, the death sentence was upheld in the instant case, again showing a disconnect between the doctrine and application.[65]

In *Mukesh & Anr. v. State (NCT of Delhi)*, popularly known as the Nirbhaya case, the Court confirmed death penalties for the convicts of a brutal gang rape and murder. The judgment stressed the depravity, cruelty, and social outrage caused by the act. The Court invoked the "collective conscience" principle. It did not delve deeply into individual mitigating factors of each accused. Public sentiment appeared to play a role in sentencing. The judgment reflected a shift toward reaffirming public morality over personalised justice.[66]

In *"Swamy Shraddananda v. State of Karnataka"*, the Court introduced an intermediate category of punishment—life imprisonment without remission. The convict, a well-educated man, murdered his wife and buried her in the house. The trial court gave life. The High Court awarded death. The Supreme Court, recognising the gravity but also reform potential, avoided both extremes. It signalled dissatisfaction with the binary options of death or life with potential remission. This judgment was a creative deviation from standard sentencing practice.[67]

In "*Ramnaresh v. State of M.P."*, the Court revisited the need for aggravating and mitigating balance. The case involved gang rape and murder. The Court found that the brutality of the act outweighed the potential for reform. The Court upheld death. But the analysis of mitigating circumstances was perfunctory. It focused more on the gruesomeness of the crime than the convict's individual history. The tension between individualized justice and retributive symbolism remained unresolved.[68]

In "*Rajendra Pralhadrao Wasnik v. State of Maharashtra"*, the Court initially imposed death

[64] Id at 17.
[65] Id at 18.
[66] Id at 8.
[67] Id at 57.
[68] Ramnaresh v. State of M.P., (2012) 4 SCC 257.

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penalty in a child rape and murder case. But upon review in "*Rajendra Pralhadrao Wasnik v. State of Maharashtra (Review Petition)"*, it commuted the sentence. It held that critical factors intellectual disability and lack of mental capacity had not been properly evaluated. The Court acknowledged its earlier mistake. It accepted that flawed sentencing process could lead to miscarriage of justice. The rare reversal highlighted judicial vulnerability and fallibility.[69]

In "*Birju v. State of M.P.*," the Court commuted the death sentence of a man who killed two children. The Court observed that the act was heinous, but the convict had no criminal background. He was young and had displayed remorse. Reformative possibility was not ruled out. The Court criticised the High Court for ignoring mitigating circumstances. It reiterated that mere brutality does not automatically warrant capital punishment.[70]

V. CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVES

Article 21 of the Constitution guarantees the right to life and personal liberty. This right is not absolute. It can be restricted by a procedure established by law. But the procedure must be just, fair and reasonable. In *"Maneka Gandhi v. Union of India"*, the Court expanded the meaning of Article 21. It held that any law affecting life or liberty must not be arbitrary. The standard applied to criminal laws too. Capital punishment, being irreversible, demands the strictest adherence to fairness.[71]

Article 14 ensures equality before law. Arbitrary imposition of death penalty violates this. In *"Bachan Singh v. State of Punjab"*, the Court accepted that discretion in sentencing is valid. But it warned against arbitrary use. Yet, absence of uniform sentencing guidelines has led to inequality. Similar crimes attract different punishments depending on the judge, region, or timing. This violates the equal protection of laws under Article 14. Justice Bhagwati in his dissent said that death penalty is constitutionally unsound due to its discriminatory application.[72]

Article 19(1)(a) confers the right to freedom of speech. Though not directly linked, it becomes relevant when courts invoke "collective conscience." In *"Mukesh v. State (NCT of Delhi)"*, the Court upheld death sentences based on societal outrage. It framed public opinion as a legal standard. This creates a constitutional conflict. Courts are not mandated to reflect the will of the people. They are bound by law. Using social outrage as a measure risks majoritarian justice. It

[69] "Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37; Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2019) 12 SCC 460."
[70] Birju v. State of M.P., (2014) 3 SCC 421.
[71] "Maneka Gandhi v. Union of India, (1978) 1 SCC 248."
[72] Id at 6.

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weakens procedural safeguards.[73]

The Code of Criminal Procedure, 1973 through Section 354(3), tries to strike a constitutional balance. It says judges must record special reasons before imposing death. This provision was a response to concerns of arbitrariness. But it fails to define "special reasons." Courts often interpret this differently. Some rely on nature of the crime. Others examine the criminal's background. The lack of structure allows judges to bypass reformative considerations. This weakens Article 21 protections.[74]

The death penalty also invites scrutiny under Article 32 and 226. These articles allow constitutional remedies. Many death convicts approach courts seeking clemency, commutation, or retrial. Delays in mercy petitions have been recognised as a ground to commute death to life. In "*Shatrughan Chauhan v. Union of India*," the Court held that delay in execution amounts to torture. It violates Article 21. The Court commuted 15 death sentences on this ground. This judgment expanded the scope of constitutional review in death penalty cases.[75]

International human rights law supports abolition. India is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR recognises the right to life and urges abolition of death penalty. The UN General Assembly has repeatedly passed resolutions calling for a global moratorium. India has abstained or voted against them. It justifies this on the basis of domestic sovereignty. Yet, global human rights bodies continue to express concern over India's use of capital punishment.[76]

The Law Commission of India in its 262nd Report (2015) recommended abolition of death penalty for all crimes except terrorism. It noted that the penalty is not deterrent. It affects the marginalised more than the powerful. The Commission concluded that the "rarest of rare" doctrine has failed to prevent arbitrary sentencing. It acknowledged that constitutional principles are often diluted by emotional judgments. The report cited empirical studies showing caste, poverty, and geography as factors in sentencing outcomes. These violate the spirit of Article 14 and 21.[77]

Right to dignity survives even after conviction. In "*Navtej Singh Johar v. Union of India*," the Court reaffirmed that dignity is a constitutional value. Execution, by its nature, is violent. It

[73] Id at 8.
[74] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[75] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.
[76] International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.
[77] Law Commission of India, 262nd Report on the Death Penalty (2015), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081670.pdf (last visited Apr. 15, 2025).

ends not just life but all potential. This creates a contradiction with the constitutional promise of dignity. Courts have struggled to resolve this tension. Some judgments defend death as necessary. Others call for reform. The inconsistency reflects the judiciary's discomfort with the punishment itself.[78]

Capital punishment in India stands at odds with constitutional values. The judiciary tries to narrow its scope. But the lack of clear standards, pressure of public outrage, and systemic bias weaken that effort. The "rarest of rare" doctrine, though constitutionally intended to safeguard life, often fails to live up to that promise.

VI. CRITICAL ANALYSIS OF THE 'RAREST OF RARE' DOCTRINE

The doctrine of "rarest of rare" was intended to restrict the arbitrary imposition of death penalty. It was framed in *"Bachan Singh v. State of Punjab"*, as a constitutional compromise. It gave courts a guiding framework to ensure that capital punishment remains an exception. But in practice, the standard has evolved into a judicial slogan. Its application lacks uniformity and clarity. The phrase itself is vague. What is rare for one judge may not be rare for another.[79]

Judicial interpretation of this doctrine has varied across benches. Some focus on the manner of the crime. Some look at public sentiment. Others consider the reformative potential of the convict. There is no fixed benchmark. In *"Machhi Singh v. State of Punjab"*, the Court tried to give structure. It created five categories to help identify such cases. But these categories were not exhaustive. They became loose indicators rather than strict tests. This led to further interpretative confusion.[80]

The subjective nature of the doctrine opens it to judicial bias. Judges bring their personal morality, social conditioning and emotion into sentencing. In *Dhananjoy Chatterjee v. State of West Bengal*, the Court upheld death to "restore faith in justice." In *Santosh Bariyar*, the Court said this faith must come from fairness, not vengeance. Both cited *Bachan Singh*. Yet reached opposite conclusions. The same doctrine produced inconsistent outcomes.[81]

The term "collective conscience" has deepened the ambiguity. Courts often invoke it to justify executions. But there is no objective measure for it. It shifts focus from legal reasoning to public perception. In *"Mukesh v. State (NCT of Delhi)"*, the Court justified death based on public outrage. This undermines the requirement of a reasoned judgment. Courts become vulnerable

[78] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[79] Id at 6.
[80] Id at 7.
[81] Id at 55.

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to media influence. The sentencing process becomes emotive rather than constitutional.[82]

Socio-economic bias persists despite the doctrine. Poor, uneducated, and marginalised convicts receive death more often. They lack quality defence. Cannot present mitigating evidence effectively. Courts rarely wait for psychological evaluations. In *Chhannu Lal Verma v. State of Chhattisgarh*, the Court admitted that lack of psychiatric report made the sentence constitutionally defective. Still, such procedural lapses continue across lower courts.[83]

The Law Commission in its 262nd Report (2015) criticised the doctrine's failure. It said the rarest of rare test has not fulfilled its constitutional promise. The report showed data of how the test is often skipped or misapplied. It recommended abolition of death penalty for all crimes except terrorism. It also noted that many trial courts do not follow the *Bachan Singh* framework. Sentencing becomes arbitrary. Some are sentenced to death where others with similar facts are spared.[84]

The Supreme Court has acknowledged these inconsistencies. In *Shankar Khade v. State of Maharashtra*, Justice Lokur highlighted several wrongful convictions. He pointed to flawed investigations, poor legal aid, and rushed sentencing. He said the doctrine has not prevented miscarriage of justice. But despite these warnings, there is no statutory reform. The judiciary continues to rely on judicial discretion without institutional safeguards.[85]

The doctrine fails to provide measurable standards. Courts do not specify what qualifies as "unquestionably foreclosed." There is no procedural rule to examine reformation potential. No obligation to hear psychologists or social workers. Sentencing is done based on facts presented during the trial, not on post-conviction behaviour. This deprives the convict of a full chance to argue against death.[86] Comparative legal systems have moved towards abolition. UK, South Africa, and Canada abolished death citing similar arbitrariness. The US still uses it but has seen rising concerns about racial and class bias. Indian jurisprudence has acknowledged global concerns. But the retention of death penalty continues, justified only through an inconsistent doctrine. Reformative justice, although constitutionally preferred, is rarely enforced in death sentencing.[87]

[82] Id at 8.
[83] Chhannu Lal Verma v. State of Chhattisgarh, (2018) 15 SCC 670.
[84] Id at 34.
[85] Id at 18.
[86] Id.
[87] Amnesty Int'l, Abolitionist and Retentionist Countries, https://www.amnesty.org/en/documents/act50/007/2022/en/ (last visited Apr. 15, 2025).

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VII. CONCLUSION

The "rarest of rare" doctrine was introduced to confine the scope of capital punishment. Its objective was to eliminate arbitrariness and ensure consistency in death sentencing. Judicial intention was to make death an exception, not a rule. But over time, this doctrine has been inconsistently applied. Courts have developed rich jurisprudence. Yet sentencing outcomes remain unpredictable. The doctrine lacks objective metrics. No statutory framework supports its application. Sentencing remains dependent on subjective judicial opinion.[88]

Judicial analysis reveals that while the test is meant to protect constitutional rights, it often fails to do so in practice. Similar crimes have led to different punishments. Some convicts are hanged. Others are spared. This shows structural imbalance. It contradicts Article 14. The judiciary has acknowledged these problems in multiple cases. Still, no concrete reform has followed. Courts continue to rely on vague parameters like "collective conscience." This term is undefined. It often reflects public emotion more than legal reasoning.[89]

Article 21 of the Constitution guarantees the right to life. It allows deprivation only through a fair and just procedure. The standard must be more stringent when the punishment is irreversible. Death penalty extinguishes all rights. There can be no remedy once executed. Procedural safeguards in CrPC under Section 354(3) are inadequate. There is no mandatory psychological evaluation. No requirement for a separate sentencing hearing post-conviction. Trial courts rarely assess reformation potential. This undermines both fairness and dignity.[90]

The Law Commission in its 262nd Report has made it clear. The doctrine has failed to prevent arbitrary application. It found that marginalised communities are disproportionately affected. The report called for abolition except in terrorism-related offences. It cited absence of deterrent value. It highlighted international trends. Most countries have abolished death penalty. India remains a retentionist state despite global pressure. This divergence from international norms affects its human rights image.[91]

Judicial innovation like life imprisonment without remission has emerged. This was introduced in *Swamy Shraddananda*. It is an attempt to balance justice and reform. But this is also not codified. It is dependent on individual judge's preference. Without legislative backing, it lacks permanence. Sentencing continues to oscillate between retributive and reformative ideals. This

[88] Id at 6.
[89] Id at 55.
[90] The Code of Criminal Procedure, 1973, § 354(3), No. 2, Acts of Parliament, 1974 (India).
[91] Id at 34.

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duality is constitutionally unsettling.[92]

The doctrine also fails to integrate rehabilitation assessments. No structured evaluation of post-conviction conduct is undertaken. Supreme Court in *Shankar Khade* raised this concern. But no uniform guidelines have been issued. This gap weakens Article 21. It also compromises the reformative theory of punishment. Criminal justice must be restorative. But death sentence forecloses all possibility of reintegration.[93]

The judiciary has repeatedly cautioned against the hasty application of death penalty. Yet public sentiment influences decisions. High-profile cases see quicker and harsher punishments. Media trials and political narratives interfere with judicial independence. This reduces sentencing to a populist exercise. Justice must be objective, not performative. But the current sentencing structure allows external pressures to influence outcomes.[94] India must reconsider the future of capital punishment. If retained, it must be guided by strict statutory conditions. If abolished, the state must strengthen life imprisonment mechanisms. Either way, the doctrine of rarest of rare needs redefinition. Not through judicial rhetoric. But through legislative clarity and constitutional commitment.

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[92] Id at 57.
[93] Id at 18.
[94] Id at 8.

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