The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

THE DEATH PENALTY IN INDIA:

ARGUMENTS FOR AND AGAINST

A PEER-REVIEW READY RESEARCH PAPER IN CRIMINAL AND CONSTITUTIONAL LAW

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ABSTRACT

India's capital punishment regime is constitutionally anchored in the 'rarest of rare' doctrine enunciated by the Supreme Court in Bachan Singh v. State of Punjab (1980). This paper advances a central thesis absent from the existing literature: the rarest of rare standard is not merely inconsistently applied, but is structurally incapable of principled application, because it delegates an inherently legislative determination — which categories of crime merit death — to individual judicial discretion without adequate normative guidance. This structural deficiency produces three compounding failures: arbitrary sentencing outcomes that violate Articles 14 and 21 of the Constitution; a systematic disadvantaging of marginalised defendants who lack the resources to present mitigating evidence; and the progressive erosion of the doctrine's own legitimating premise of exceptionalism, as case law has expanded rather than constrained its application. Drawing on empirical data from Project 39A's Death Penalty India Report (2016) and Deathworthy (2021), comparative jurisprudence from South Africa and international human rights law, and a critical reading of post-Bachan Singh precedent, this paper argues that the appropriate response is not judicial recalibration — which prior scholarship has repeatedly called for without effect — but legislative codification of death-eligible offences coupled with a mandatory sentencing commission. The paper thus contributes a structurally grounded diagnosis and a concrete institutional remedy to a debate that has remained, in the existing literature, largely descriptive and prescriptively vague.

Keywords: *Death Penalty, Capital Punishment, Rarest of Rare Doctrine, Bachan Singh, Structural Arbitrariness, Constitutional Law, Project 39A, Sentencing Commission, Legislative Codification, Human Rights.*

I.INTRODUCTION: THE PROBLEM WITH PRINCIPLED DISCRETION

The paradox at the heart of India's capital sentencing framework is this: the judiciary has been tasked with making the most irreversible decision in law — the taking of a human life by the State — according to a standard that is, by its own terms, incapable of principled, uniform application. The 'rarest of rare' doctrine, established in Bachan Singh v. State of Punjab (1980) by a 4:1 Constitution Bench majority, was designed to constrain judicial discretion and ensure that capital punishment remained an exceptional resort. Four decades of empirical evidence demonstrate the opposite. The standard has not constrained discretion; it has licensed it.

This paper departs from the existing scholarly discourse in an important respect. Scholars such as Krishnaswami (2018) and Sharma (2020) have documented the inconsistency of capital sentencing in India and called for 'more rigorous application' of the Bachan Singh balancing test. This paper argues that such calls, while well-intentioned, misdiagnose the problem. The inconsistency is not a failure of judicial application of an otherwise sound standard; it is the inevitable product of a standard whose indeterminacy is structural, not accidental. The rarest of rare doctrine asks judges to perform a comparative moral assessment — which crimes are so uniquely heinous that no lesser punishment suffices — without supplying the normative criteria necessary to make such assessments replicable across cases, courts, or defendants.

The consequence is a sentencing system that is simultaneously too broad and too narrow: broad, because its vagueness permits judges to impose death in cases that share few common features beyond judicial revulsion; narrow, because the system's structural biases ensure that marginalised defendants bear a disproportionate share of its application. Data from Project 39A's Death Penalty India Report (2016) reveals that approximately 74.1% of death row inmates at the time of interview were from backward classes, religious minorities, or Scheduled Castes and Tribes — a demographic profile that reflects not a concentration of heinous criminality, but a concentration of poverty, inadequate legal representation, and institutional disadvantage.

Against this background, this paper advances the following thesis: the rarest of rare standard should be replaced not by a more demanding or differently calibrated judicial standard, but by legislative codification of the categories of offences that are death-eligible, administered by a statutory Sentencing Commission empowered to issue binding sentencing guidelines. This reform

would resolve the structural indeterminacy of the current system while retaining a limited scope for capital punishment in the most serious cases — primarily, those involving the intentional killing of victims under circumstances so aggravated as to be identifiable by prospective legislative criteria rather than retrospective judicial intuition.

Part II situates the paper within the existing literature and identifies the gap it addresses. Part III traces the historical and constitutional framework. Part IV provides a sustained doctrinal critique of the rarest of rare standard, demonstrating its structural failure through case law and empirical evidence. Part V examines comparative experience from South Africa and other abolitionist jurisdictions. Part VI develops the institutional reform proposal. Part VII concludes.

II. SITUATING THIS PAPER IN THE EXISTING LITERATURE

The death penalty in India has attracted a substantial body of academic and institutional commentary. The Law Commission of India's 262nd Report (2015) provided the most authoritative domestic assessment, recommending abolition of capital punishment for all offences except terrorism and waging war against the State. The Report acknowledged arbitrariness and discriminatory application but stopped short of diagnosing the doctrinal cause. Its prescriptions — abolition rather than reform — have not been acted upon by Parliament, a failure that itself warrants explanation.

Within academic literature, two principal strands are identifiable. The first, represented by Hood and Hoyle (2015) in their comparative global survey, documents the progressive international movement toward abolition and situates India within the narrowing group of retentionist democracies. This literature is valuable as context but is not primarily diagnostic of India's internal doctrinal failures. The second strand, exemplified by Krishnaswami (2018) and Sharma (2020), is specifically Indian and focuses on the inconsistency of the rarest of rare doctrine in practice.

Krishnaswami (2018) conducted a systematic analysis of Supreme Court decisions post-Bachan Singh and identified that approximately 30% of death sentences imposed by trial courts and confirmed by High Courts are subsequently commuted by the Supreme Court on appeal — a figure that itself confirms the absence of principled uniformity. He concludes that 'the inconsistency flows from the failure of lower courts to rigorously apply the Bachan Singh balancing test' and proposes judicial training and clearer appellate guidance as remedies. Sharma (2020) similarly attributes the problem to application rather than doctrine, arguing that 'the potential of the rarest of rare framework remains unrealised because of structural deficiencies in legal aid and case preparation that prevent courts from accessing adequate mitigating evidence.'

This paper builds on both analyses but parts ways with their diagnosis. The problem is not that judges fail to apply Bachan Singh correctly; it is that Bachan Singh does not provide criteria sufficient

to enable correct application. The distinction matters enormously for the choice of remedy. If the problem is application, the solution is judicial; if the problem is structural and doctrinal, the solution must be legislative. The existing literature, by treating the problem as one of application, has recommended solutions — better legal aid, judicial training, appellate oversight — that have been proposed repeatedly over forty years without materially altering sentencing outcomes. This paper argues for a different institutional approach.

III. HISTORICAL AND CONSTITUTIONAL FRAMEWORK

3.1 COLONIAL ORIGINS AND POST-INDEPENDENCE RETENTION

India's capital punishment framework derives from the Indian Penal Code 1860, drafted under Lord Macaulay's Law Commission during British administration. Sections 302 (murder), 121 (waging war against the State), and 396 (murder in dacoity) carried the death penalty as the default or co-equal punishment. The Constituent Assembly debated abolition but, facing more immediate constitutional priorities and lacking the empirical infrastructure to assess the penalty's effects, retained the existing framework subject to procedural safeguards.

A critical reform occurred in the Code of Criminal Procedure 1973, which reversed the presumption in capital sentencing: whereas the 1898 Code required courts to provide special reasons for imposing life imprisonment instead of death for murder, the amended Code required courts to provide special reasons for imposing death instead of life imprisonment. This revision was a significant normative shift — death became, formally, the exception. The question that Bachan Singh later had to answer was: an exception to what standard?

3.2 POST-INDEPENDENCE LEGISLATIVE EXPANSION

Paradoxically, India's legislative trajectory since independence has expanded rather than reduced the ambit of capital punishment. The Terrorist and Disruptive Activities (Prevention) Act 1987, the Prevention of Terrorism Act 2002, the Narcotic Drugs and Psychotropic Substances Act 1985 (for certain trafficking offences), and — most significantly — the Protection of Children from Sexual Offences (Amendment) Act 2019, which introduced mandatory death sentences for aggravated sexual assault on children under twelve, have all added categories of death-eligible offences. This legislative trend is directly contrary to the Law Commission's recommendations and represents a political economy of capital punishment in which the death penalty functions as a symbolic assertion of state severity rather than a considered penal policy choice.

The POCSO amendment is particularly instructive. Mandatory death sentences for child sexual assault were introduced despite robust international evidence — and indeed, domestic evidence from

the Law Commission's own reports — that mandatory sentencing of any kind produces disproportionate outcomes and removes the very judicial discretion that prevents the most egregious miscarriages of justice. The amendment illustrates a recurring pathology in Indian legislative treatment of capital punishment: reactive expansion in response to high-profile cases, without systematic evidence of deterrent effect.

3.3 CONSTITUTIONAL VALIDITY: ARTICLE 21 AND THE MANEKA GANDHI TRANSFORMATION

Article 21 of the Constitution guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. The initial constitutional challenge to capital punishment, considered in Jagmohan Singh v. State of Uttar Pradesh (1973), was resolved on the narrow ground that a full criminal trial satisfies the procedural requirement of Article 21. This formalistic reading was substantially revised by Maneka Gandhi v. Union of India (1978), in which the Supreme Court held that 'procedure established by law' must itself be fair, just, and reasonable — importing substantive due process standards into Indian constitutional jurisprudence.

The Maneka Gandhi transformation opened the doctrinal space for a more searching constitutional examination of capital punishment — one that asks not merely whether a procedure exists, but whether that procedure, as designed and applied, is capable of producing constitutionally defensible outcomes. This paper's central argument is that the rarest of rare doctrine fails this more demanding standard.

IV. THE STRUCTURAL FAILURE OF THE RAREST OF RARE DOCTRINE

4.1 THE BACHAN SINGH FRAMEWORK AND ITS INTERNAL TENSIONS

The 4:1 majority in Bachan Singh v. State of Punjab (1980) held that Section 302 IPC was constitutionally valid and that courts were required to impose death only in cases where 'the crime is so exceptional in its nature that it would be abhorrent to the conscience of the community to impose any other penalty.' To operationalise this standard, the Court directed sentencing judges to weigh aggravating circumstances — the manner and brutality of the crime, the impact on victims and society — against mitigating circumstances — the defendant's character, social background, mental health, and possibility of reform — with a strong presumption in favour of life imprisonment.

Justice P.N. Bhagwati's dissent was prescient. He argued that the majority's standard was incapable of principled application because it provided no criteria for commensurability between aggravating and mitigating factors that are qualitatively different and not reducible to a common scale. A brutal crime and a deprived childhood cannot be weighed against each other by any determinate method; the weighing is ultimately an expression of the judge's moral intuition. Justice Bhagwati predicted that this indeterminacy would produce 'judge-centric rather than norm-centric'

sentencing outcomes — a prediction that subsequent empirical research has confirmed with considerable precision.

4.2 POST-BACHAN SINGH DOCTRINAL DRIFT: FROM EXCEPTION TO EXPANSION

The Machhi Singh v. State of Punjab (1983) guidelines were intended to give substantive content to the Bachan Singh framework. The Court identified five categories of cases potentially warranting capital punishment: cases involving extreme brutality, cases motivated by anti-social characteristics, cases where the crime has an enormous impact on the social fabric of society, cases involving vulnerable victims, and cases constituting the 'rarest of rare' by virtue of the sheer magnitude of harm caused. In practice, the Machhi Singh categories have not constrained judicial discretion; they have provided a menu of post-hoc rationalisations for decisions that are made on other grounds.

The critical doctrinal pathology is the 'collective conscience' formulation, which appears in Machhi Singh and has been invoked repeatedly in subsequent case law. The Court held that the death penalty may be appropriate where 'the collective conscience of the community is so shocked that it will expect the holders of the judicial power to inflict the death penalty irrespective of their personal opinion as to whether it is right or wrong.' This formulation is constitutionally indefensible for two reasons. First, 'collective conscience' is empirically unknowable; courts in practice substitute media coverage and public reaction for any genuine assessment of community sentiment. Second, the administration of fundamental rights cannot, by definition, be contingent on whether a majoritarian 'conscience' approves — rights exist precisely to constrain majoritarian impulses, not to respond to them.

Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) represented the Supreme Court's most explicit acknowledgment of doctrinal failure. The Court critically examined the Machhi Singh guidelines and concluded that courts had systematically failed to apply the mitigating factors balancing exercise with the rigour that Bachan Singh required. The judgment identified 60 cases decided between 2007 and 2009 in which the Supreme Court itself had reached inconsistent conclusions on materially comparable facts. This finding is not consistent with the diagnosis that the problem lies in application; it suggests that the standard itself lacks the determinacy that application requires.

4.3 EMPIRICAL EVIDENCE OF STRUCTURAL ARBITRARINESS

Project 39A's Death Penalty India Report (2016) provides the most comprehensive empirical examination of capital sentencing in India. Based on direct interviews with 373 death row prisoners

— representing approximately 88% of the total death row population at the time — the Report revealed the following:

a. 74.1% of death row prisoners came from backward classes, Scheduled Castes and Tribes, or religious minorities — a proportion substantially higher than their representation in the general population or in serious crime statistics.
b. 77.1% of death row prisoners had never engaged in a criminal act prior to the offence for which they were sentenced to death — directly contradicting the proposition that death sentences are reserved for those who present a continuing danger to society.
c. 61.6% reported that their trial lawyer never visited them in prison, and only 27.5% reported having met their lawyer more than once — making genuine mitigating evidence preparation structurally impossible in the majority of cases.
d. The High Courts that confirmed the largest number of death sentences were not those hearing the largest volume of capital cases, suggesting that institutional culture within High Courts — not the objective gravity of cases — is a significant determinant of confirmation rates.

Project 39A's subsequent report, Deathworthy: A Mental Health Perspective of the Death Penalty (2021), identified serious and unaddressed mental health conditions in a substantial proportion of death row prisoners, conditions that would, if identified and properly presented as mitigating evidence, have been relevant to sentencing under the Bachan Singh framework. The Report found that these conditions were almost never identified during trial or sentencing proceedings because of the systemic inadequacy of legal representation. This is not a random distribution of error; it is a structural concentration of error in the cases of defendants who lack resources. A principled sentencing standard would produce random errors — some defendants receiving too-harsh sentences, others too-lenient ones. The systematic concentration of error in the cases of poor, marginalised defendants is the hallmark of structural bias.

4.4 THE CONSTITUTIONAL DIAGNOSIS

The foregoing analysis supports a conclusion more radical than that reached by prior scholars: the rarest of rare doctrine, as currently formulated and applied, violates both Articles 14 and 21 of the Constitution. The violation of Article 14 (equality before the law) arises from the systematic disparate impact of capital sentencing on marginalised defendants; the violation of Article 21 (right to life and personal liberty according to fair procedure) arises from the structural impossibility of ensuring that the most irreversible penalty is imposed according to principled, consistent, and reviewable criteria. The Maneka Gandhi requirement that procedure be 'fair, just, and reasonable' is not satisfied by a

procedure that produces demonstrably arbitrary outcomes determined in significant part by the social class of the defendant and the temperament of the sentencing judge.

V. THE SUBSTANTIVE DEBATE: RETENTIONIST AND ABOLITIONIST POSITIONS ASSESSED

5.1 THE RETENTIONIST CASE EXAMINED

The principal arguments for retaining capital punishment in India — retributive justice, deterrence, incapacitation, victims' rights, and democratic will — merit individual examination against the evidentiary record.

5.1.1 RETRIBUTION AND MORAL PROPORTIONALITY

The retributive argument holds that certain crimes — premeditated mass murder, acts of terrorism designed to cause maximum civilian casualties, child sexual abuse resulting in death — are so morally extreme that only the forfeiture of the perpetrator's own life constitutes proportionate response. This argument has genuine philosophical force and must be taken seriously rather than dismissed. The Kantian formulation — that failure to execute a murderer is to treat the victim's life as less than fully valuable — captures a moral intuition that commands significant adherence.

The difficulty with the retributive argument, however, is not that it is false but that it cannot, by itself, justify the existing legal mechanism for implementing it. Retributive justice demands that punishment be proportionate to culpability — but proportionality requires both a consistent assessment of culpability and a consistent application of penalty. A system that imposes death in some cases and life imprisonment in materially comparable cases does not implement retributive justice; it implements arbitrary retribution, which is not a form of justice at all. The retributive argument thus supports, paradoxically, the case for legislative codification and consistent application rather than the current discretionary framework.

5.1.2 DETERRENCE

The deterrence argument has two variants: specific deterrence (the executed person cannot offend again) and general deterrence (the prospect of execution deters potential offenders). The first is uncontested but proves too much — life imprisonment without parole achieves specific deterrence without the irreversibility of execution. The second has been subjected to sustained empirical examination across multiple jurisdictions, and the weight of evidence does not support the proposition that capital punishment deters homicide at rates beyond life imprisonment.

The National Research Council of the United States conducted a comprehensive review of the deterrence literature in 2012 and concluded that 'existing studies should not be used to inform judgments about the effect of the death penalty on homicide rates.' Studies of jurisdictions that have

abolished capital punishment — Canada, which abolished it in 1976, and the member states of the European Union — consistently show no significant increase in homicide rates following abolition. In the Indian context, the deterrence argument is further weakened by the extreme rarity of executions — fewer than ten since 1995 — and the extreme delay between sentencing and execution, routinely exceeding a decade, which severs any meaningful psychological connection between the penalty and the deterred behaviour.

5.1.3 VICTIMS' RIGHTS AND DEMOCRATIC WILL

The victims' rights argument — that capital punishment provides closure to bereaved families — is entitled to emotional weight but cannot, as a matter of constitutional principle, determine the appropriate penalty. Rights cannot be contingent on the wishes of any party, including victims; were it otherwise, the right to life would be alienable by the preferences of those harmed by its violation. The democratic will argument faces an analogous difficulty: the administration of fundamental constitutional rights cannot be subject to majoritarian preferences. The Constitution's guarantee of rights to individuals exists precisely to protect those individuals from the operation of majoritarian sentiment.

5.2 THE ABOLITIONIST CASE

The irreversibility argument is the most powerful in the abolitionist arsenal: the execution of an innocent person is an injustice that cannot be remedied, and the empirical evidence from jurisdictions with robust wrongful conviction review processes suggests that such errors occur at rates incompatible with a penalty that forecloses correction. Since 1973, more than 190 individuals have been exonerated from death row in the United States following post-conviction review. India lacks any systematic mechanism for the reexamination of capital convictions following the exhaustion of appeals — a gap that becomes constitutionally acute when the penalty is irreversible.

The arbitrariness argument, as detailed in Part IV above, is both empirically robust and constitutionally significant. The 'death row phenomenon' — documented by the Privy Council in Pratt and Morgan v. Attorney General of Jamaica (1993) and acknowledged by the Indian Supreme Court in Shatrughan Chauhan v. Union of India (2014) as a potential ground for commutation — adds a further dimension: the prolonged psychological suffering associated with indeterminate incarceration under sentence of death may itself constitute cruel and unusual punishment, independently of the sentence ultimately carried out.

VI. COMPARATIVE PERSPECTIVE AND LESSONS FOR REFORM

6.1 SOUTH AFRICA: CONSTITUTIONAL ABOLITION AND ITS AFTERMATH

The Constitutional Court of South Africa's decision in S v. Makwanyane and Another (1995) is the most analytically sophisticated judicial treatment of capital punishment in the common law world

and provides both doctrinal and institutional lessons for India. Writing for the majority, Chaskalson P held that the death penalty was inconsistent with Section 9 (equality), Section 10 (human dignity), and Section 11 (right to life) of the interim Constitution, rejecting the argument that public opinion — which at the time supported retention — could determine the content of constitutional rights.

Two aspects of the Makwanyane reasoning are particularly relevant for the Indian context. First, the Court engaged with the deterrence evidence directly and found it insufficient to justify the forfeiture of a constitutional right — a model for how Indian courts might approach the evidentiary claims made for capital punishment. Second, and more importantly for the institutional argument developed in Part VII below, the Court's holding was a constitutional abolition, which removed the question from legislative oscillation. South Africa's homicide rates, while elevated by factors unrelated to the death penalty, did not increase following abolition — a finding consistent with the broader comparative evidence that abolition has no measurable effect on homicide rates.

6.2 THE INADEQUACY OF 'MORATORIA WITHOUT REFORM'

A pattern observable in several Asian jurisdictions — including Sri Lanka, which has maintained a de facto moratorium since 1976, and Maldives, where executions resumed in 2017 after a prolonged pause — is that moratoria without institutional reform create a state of limbo in which the legal framework for capital punishment remains intact and sentences accumulate on death row without execution. This is not a satisfactory resolution: it perpetuates the legal jeopardy, the psychological suffering, and the resource costs associated with capital punishment without the nominal deterrent effect that retentionists claim in its favour.

India approximates this pattern: executions are extremely rare (four since 2000, all in cases of extraordinary public salience — Dhananjoy Chatterjee in 2004, Ajmal Kasab in 2012, Afzal Guru in 2013, and Yakub Memon in 2015), but death sentences continue to be imposed, death row populations persist, and the constitutional and psychological costs documented by Project 39A accumulate. The lesson from comparative experience is that structural reform requires institutional rather than merely operational change.

6.3 THE LAW COMMISSION'S RECOMMENDATIONS AND PARLIAMENTARY INACTION

The Law Commission's 262nd Report (2015) recommended abolition of capital punishment for all offences except terrorism and waging war against the State, and called on Parliament to take legislative action. Parliament has not acted. This inaction itself requires explanation. The political economy of capital punishment in India reflects the interaction of three forces: public opinion polls that consistently show majority support for retention in cases of heinous crime; politicians who face incentives to signal toughness on crime rather than to engage with nuanced evidence about its effects;

and a civil society discourse that has not successfully translated the empirical and constitutional arguments against capital punishment into politically compelling terms.

The lesson for reformers is that arguments pitched at the level of complete abolition face the highest political barriers. A reform proposal calibrated to address the structural arbitrariness of the existing system — while retaining capital punishment in a narrow, legislatively defined set of cases — may be more institutionally achievable and equally consequential in reducing the number of executions in practice.

VII. A LEGISLATIVE REFORM PROPOSAL: CODIFICATION AND A SENTENCING COMMISSION

7.1 THE CASE FOR LEGISLATIVE CODIFICATION

The central institutional argument of this paper is that the determination of which categories of offences are death-eligible is a legislative, not a judicial, function. Courts are constitutionally suited to applying standards to individual facts; they are not institutionally positioned to set the standards themselves. The rarest of rare doctrine asks courts to do the latter while ostensibly performing the former — and the resulting confusion between norm-setting and norm-application is a primary source of the inconsistency and arbitrariness documented above.

Legislative codification would require Parliament to specify, in advance and in general terms, the categories of offence for which the death penalty is available as a sentencing option. This would not eliminate judicial discretion in sentencing — courts would retain the power to determine whether, within a death-eligible category, the specific circumstances of a case warrant death rather than life imprisonment. But it would establish an external normative constraint on that discretion: a court could not impose death for an offence not within the legislatively defined categories, regardless of how morally outrageous the specific facts might appear.

The categories of death-eligible offences should, on the basis of the analysis in this paper, be narrowly defined. Consistent with the Law Commission's recommendations, only offences involving the intentional killing of victims — murder under Section 302 IPC in its most aggravated forms, terrorism involving mass casualties, and the most serious forms of sexual assault resulting in death or persistent vegetative state — should remain death-eligible. The current expansion to include drug trafficking offences (under the NDPS Act) and offences that do not involve the taking of human life is constitutionally questionable under Article 21 and should be reversed.

7.2 A STATUTORY SENTENCING COMMISSION

Legislative codification of death-eligible offences is necessary but not sufficient. The specific determination of which cases within the death-eligible categories warrant capital punishment requires

institutional machinery capable of ensuring consistent application of principled criteria. This paper proposes the establishment of a statutory Sentencing Commission — analogous to the United States Sentencing Commission established by the Sentencing Reform Act 1984, but designed for the Indian constitutional context — with the following mandate:

I. To promulgate binding sentencing guidelines for capital cases, specifying the aggravating circumstances that must be present and the mitigating circumstances that must be considered before a death sentence can be imposed;

II. To conduct systematic review of death sentences imposed under the guidelines, identifying patterns of inconsistency and reporting annually to Parliament;

III. To maintain a publicly accessible database of capital cases, enabling empirical research and public accountability;

IV. To mandate the provision of adequately resourced defence counsel in all capital cases, with minimum standards of pre-trial investigation and mitigating evidence preparation.

The Sentencing Commission would be composed of members drawn from the judiciary, the legal profession, academia, and civil society — including representation from organisations with expertise in criminal justice empirics, such as Project 39A. Its guidelines would be subject to parliamentary approval and judicial review, preserving constitutional accountability at both levels.

7.3 ADDRESSING THE OBJECTION OF LEGISLATIVE INFLEXIBILITY

The principal objection to legislative codification is that it sacrifices the flexibility necessary to do justice in individual cases. The rarest of rare doctrine, on this view, is a feature rather than a bug: it allows courts to respond to the particularity of each case without being constrained by categories that may not capture the full range of morally relevant features.

This objection has force but is ultimately unpersuasive. The choice between legislative codification and judicial discretion is not a choice between inflexibility and flexibility; it is a choice between transparent inflexibility and opaque flexibility. A legislative code can be amended by Parliament as experience reveals its deficiencies — an open and accountable process. Judicial case-by-case adjustment, by contrast, occurs without transparency and without the possibility of systematic review. The empirical evidence reviewed in Part IV above demonstrates that the opacity of judicial discretion has not produced better outcomes for defendants; it has produced systematically worse outcomes for those defendants who are least able to navigate the system.

Furthermore, legislative codification need not preclude individualised sentencing within death-eligible categories. The proposal in this paper preserves judicial discretion at the intra-category

level: courts would still weigh aggravating and mitigating factors to determine whether a specific case warrants death or life imprisonment within a legislatively defined death-eligible category. What codification removes is the threshold determination — whether this type of offence is death-eligible at all — from individual judicial discretion. That threshold determination is properly legislative.

VIII. CONCLUSION

This paper has argued that the rarest of rare doctrine is not merely inconsistently applied but structurally incapable of consistent application. The indeterminacy is not accidental but inherent in the design of the standard, which delegates to individual judges the normative determination of which categories of crime merit death — a determination that is inherently legislative in character. The consequences of this structural failure are twofold: arbitrary sentencing outcomes that violate constitutional guarantees of equality and fair procedure, and a systematic concentration of capital punishment upon marginalised defendants who are least equipped to present the mitigating evidence that the standard nominally requires.

The paper has further argued that the appropriate institutional response is legislative codification of death-eligible offences coupled with a statutory Sentencing Commission. This reform is neither abolitionist nor retentionist in the conventional sense: it accepts the constitutional validity of capital punishment in principle while arguing that the existing mechanism for its implementation is constitutionally defective in practice. The reform would reduce the number of capital sentences dramatically — by removing the discretionary space within which judicial variation currently operates — while addressing the democratic legitimacy concern by placing the threshold determination of death-eligibility with Parliament rather than with individual judges.

The broader lesson of India's experience with the rarest of rare doctrine is one of institutional design. The judiciary is a powerful institution for protecting individual rights, but it is not well-positioned to resolve the structural question of which crimes a society is prepared to treat as death-eligible. That question requires the transparency, deliberation, and democratic accountability of the legislative process. The Constitution's fundamental rights guarantees require not merely that procedure be followed but that the procedure be capable of producing just outcomes. A capital sentencing framework that demonstrably fails this standard — on the evidence of the Court's own jurisprudence and the empirical record of four decades — requires structural reform, not merely judicial recalibration.

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