
REASSESSING DEATH PENALTY SENTENCING IN INDIA: THE CASE FOR STATUTORY GUIDELINES

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ABSTRACT

The death penalty occupies a unique and paradoxical position in Indian constitutional jurisprudence. While Article 21 guarantees the right to life as inviolable except through "procedure established by law," the Supreme Court in *Bachan Singh v. State of Punjab* (1980) upheld capital punishment's constitutionality by introducing the "rarest of rare" doctrine a framework premised on the assumption that judicial discretion, guided by broad principles, would prevent arbitrary sentencing. Forty-five years hence, this paper argues that the *Bachan Singh* framework has manifestly failed to deliver on its promise. Drawing upon empirical data, judicial inconsistencies, and comparative analysis with the United States' statutory guideline model, this research demonstrates that the current system produces arbitrary, crime-centric, and mitigation-blind sentencing outcomes. With over 95% of trial court death sentences reversed or commuted on appeal, and with trial courts imposing 139 death sentences in 2024 alone while awarding the punishment on the same day as conviction in over one-third of cases, the evidence of systemic failure is overwhelming. This paper contends that the solution lies not in further judicial refinement of the *Bachan Singh* framework, but in a fundamental shift toward statutory sentencing guidelines. Such guidelines, enacted by Parliament, would mandatorily require consideration of enumerated aggravating and mitigating factors, establish clear procedural safeguards, and create institutional mechanisms for pre-sentencing investigation reports. By channeling judicial discretion within defined parameters, statutory guidelines would enhance transparency, ensure consistency, and restore constitutional legitimacy to capital sentencing in India.

I. INTRODUCTION

The sword of Damocles, as Justice A.S. Oka recently observed, "cannot be kept hanging [over a convict's head] for an inordinately long time." This metaphor captures not merely the psychological torment of death row incarceration but the deeper malaise afflicting India's capital sentencing jurisprudence a system where the finality of execution is perpetually deferred, where trial courts pronounce death with theatrical flourish only to have appellate courts quietly commute those sentences to life imprisonment, and where the "rarest of rare" doctrine has become, in the words of Justice Ravindra Bhat, a "ritual invocation" devoid of substantive content.

India stands at a critical juncture in its engagement with capital punishment. It is one of the few democracies that retains the death penalty, and recent years have witnessed an alarming increase in its imposition. In 2023, the total number of inmates on death row reached 561, the highest in two decades. Yet this surge in sentencing at the trial level exists in stark tension with appellate practice: High Courts confirmed just one death sentence in 2023, and the Supreme Court confirmed none, marking two consecutive years without any affirmations. This dissonance between the eagerness of trial courts to condemn and the reluctance of appellate courts to execute exposes a fundamental crisis in the legitimacy of capital sentencing.

The constitutional framework governing death penalty sentencing was established in *Bachan Singh v. State of Punjab* (1980), where a five-judge bench upheld the constitutionality of capital punishment while simultaneously seeking to constrain its application through the "rarest of rare" doctrine. The Court mandated that sentencing judges must consider both aggravating and mitigating circumstances, weigh the probability of reformation, and impose death only when life imprisonment is "unquestionably foreclosed." This framework, the Court assumed, would provide sufficient guidance to prevent arbitrariness while preserving judicial discretion to respond to the unique facts of each case.

Four decades of experience have demolished this assumption. Empirical research, particularly by Project 39A at National Law University, Delhi, has documented systematic failures in capital sentencing: trial courts routinely impose death on the same day as conviction, depriving convicts of any meaningful opportunity to present mitigating evidence; mitigating circumstances are either ignored or dismissed perfunctorily; the probability of reformation is rarely assessed; and sentencing decisions are overwhelmingly driven by the brutality of the crime rather than any holistic evaluation of the offender. The result is a system where death

sentences function as symbolic gestures of societal condemnation rather than as constitutionally legitimate punishments.

In September 2022, the Supreme Court took the extraordinary step of referring a *suo motu* writ petition to a five-judge Constitution Bench to address the lack of uniform guidelines for assessing mitigating circumstances in death penalty cases. The reference acknowledged that while all judgments agree on the need for a "meaningful, real and effective" sentencing hearing, there is no clarity on what constitutes "sufficient time" or what procedures must be followed to ensure adequate consideration of mitigation. This constitutional reference represents the first comprehensive review of capital sentencing since *Bachan Singh* itself, and it presents a historic opportunity for reform.

This paper argues that the Constitution Bench should recommend, and Parliament should enact, statutory sentencing guidelines for death penalty cases. Such guidelines would represent a paradigm shift from the current model of unstructured judicial discretion to a structured discretion model that has proven effective in other jurisdictions, particularly the United States. Statutory guidelines would enumerate specific aggravating and mitigating factors, establish procedural requirements for pre-sentencing investigations, mandate a minimum time gap between conviction and sentencing, and require reasoned opinions demonstrating application of the statutory framework to the facts of each case.

The argument proceeds in five parts. Part II traces the historical evolution of death penalty jurisprudence in India, from the colonial era through *Bachan Singh* to contemporary developments. Part III presents empirical evidence of the framework's failure, drawing upon trial court data, appellate reversal rates, and documented patterns of arbitrary sentencing. Part IV undertakes a comparative analysis of the United States' experience with statutory sentencing guidelines following *Furman v. Georgia* (1972), drawing lessons for Indian reform. Part V examines recent reform efforts, including the pending Constitution Bench reference and the troubling counter-trend of legislative expansion of capital offences. Part VI makes the case for statutory guidelines, addressing potential objections and outlining specific recommendations for legislative action. The conclusion reflects on the broader implications for constitutional governance and the rule of law.

II. The Evolution of Death Penalty Jurisprudence in India

A. The Colonial Legacy and Constitutional Framework

The death penalty has deep roots in Indian legal history. The Indian Penal Code of 1860, drafted by Lord Macaulay's Law Commission, provided for capital punishment for offences

including murder, waging war against the State, and abetment of suicide of a minor or insane person.⁸ The Code of Criminal Procedure, 1898, required confirmation of death sentences by the High Court but provided little guidance on the exercise of sentencing discretion. Under this framework, life imprisonment was the exceptional punishment. Section 367(5) of the 1898 Code required courts to state "special reasons" for awarding life imprisonment rather than death in murder cases.

India's constitutional transformation in 1950 fundamentally altered the legal landscape. Article 21 declared that "no person shall be deprived of his life or personal liberty except according to procedure established by law." This provision, inspired by but deliberately distinct from the American Due Process Clause, embedded life as a constitutional value while permitting its deprivation through lawful procedure. The Constituent Assembly debates revealed ambivalence about capital punishment: some members advocated for its complete abolition, while others accepted its retention subject to procedural safeguards.

The first major statutory reform came with the Code of Criminal Procedure, 1973, which reversed the presumption in capital sentencing. Section 354(3) mandated that when a court imposes a sentence of death, it must state "special reasons" for doing so. This provision, which remains in force under the newly enacted Bharatiya Nagarik Suraksha Sanhita, 2023, established life imprisonment as the norm and death as the exception a crucial shift that would shape subsequent constitutional adjudication.

B. The Pre-Bachan Singh Jurisprudence

The constitutionality of the death penalty was first challenged before the Supreme Court in *Jagmohan Singh v. State of Uttar Pradesh* (1972). A five-judge bench unanimously upheld capital punishment, holding that the procedure established by law including trial, appeal, and executive clemency provided sufficient safeguards against arbitrary deprivation of life. Chief Justice S.M. Sikri, writing for the Court, emphasized that sentencing discretion was guided by established judicial principles and that the subjective element in sentencing did not render the process unconstitutional.

Jagmohan reflected the prevailing judicial philosophy of its time an assumption that trained judges, applying their experience and judgment, could be trusted to exercise sentencing discretion wisely. The Court declined to lay down specific guidelines, stating that "it is not possible to make a catalogue of the circumstances which should be regarded as aggravating or mitigating circumstances in such a way that the death penalty should be imposed." This refusal to enumerate factors would prove consequential, as it left trial courts with virtually unbounded discretion in capital sentencing.

The 1973 CrPC's introduction of the "special reasons" requirement created new doctrinal possibilities. In *Rajendra Prasad v. State of Uttar Pradesh* (1979), a divided bench of the Supreme Court interpreted "special reasons" to require that the offender be found to be a "menace to society" who could not be reformed. Justice Krishna Iyer, writing for the majority, adopted a strongly reformatory approach, holding that death could only be imposed when the convict was "beyond reform." This judgment set the stage for the constitutional confrontation in *Bachan Singh*.

C. Bachan Singh and the "Rarest of Rare" Doctrine

Bachan Singh v. State of Punjab (1980) remains the lodestar of Indian death penalty jurisprudence. A five-judge bench, by a 4:1 majority, upheld the constitutionality of capital punishment while simultaneously seeking to constrain its application through the "rarest of rare" doctrine. The majority opinion, authored by Justice R.S. Sarkaria, rejected the extreme positions advanced by both sides neither accepting the petitioner's argument that death penalty was per se unconstitutional nor endorsing the state's claim that untrammelled judicial discretion was constitutionally permissible.

The *Bachan Singh* framework rests on several interconnected propositions. First, the Court affirmed that the death penalty is not inherently unconstitutional, as Article 21 permits deprivation of life through procedure established by law. Second, it held that the "special reasons" requirement in Section 354(3) of the CrPC provides a legislative mandate to confine capital punishment to exceptional cases. Third, and most importantly, the Court articulated a substantive framework to guide sentencing discretion:

"The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal."

The Court proceeded to enumerate, though not exhaustively, the factors that sentencing judges must consider. Aggravating circumstances include the manner of commission of the offence, the motive for the crime, the anti-social or abhorrent nature of the crime, and the magnitude of the crime. Mitigating circumstances include the age of the accused, the probability of reformation, the circumstances in which the offence was committed, and the mental condition of the accused. Crucially, the Court emphasized that mitigating circumstances must receive "a liberal and expansive construction" and that the burden is on the State to establish that the case falls within the rarest of rare category.

The ultimate test, according to *Bachan Singh*, is whether life imprisonment is "unquestionably foreclosed" as a sentencing option. The death penalty can be imposed only

when "the alternative option of life imprisonment is unquestionably foreclosed." This formulation establishes a high threshold: the sentencing judge must not merely prefer death over life but must conclude that life imprisonment is not a viable option in the circumstances of the case.

Justice P.N. Bhagwati's dissenting opinion in *Bachan Singh* proved remarkably prescient. He argued that the majority's framework provided insufficient guidance to prevent arbitrary sentencing, noting that "the death penalty is arbitrary and hence violative of Article 14 and Article 21 because it is not possible to evolve rational and meaningful criteria for imposing the death penalty." Justice Bhagwati predicted that the "rarest of rare" formulation would become a mantra invoked to justify death sentences without genuine engagement with mitigating circumstances a prediction that subsequent experience has validated.

D. Machhi Singh and the "Balance Sheet" Approach

Three years after *Bachan Singh*, the Supreme Court in *Machhi Singh v. State of Punjab* (1983) attempted to operationalize the "rarest of rare" standard through a more structured framework. Justice M.P. Thakkar, writing for the Court, identified five categories of cases that could potentially qualify as rarest of rare: (1) murder committed in an extremely brutal, grotesque, or revolting manner; (2) murder for a motive that evinces total depravity and meanness; (3) murder of socially valuable persons or public figures; (4) murder of large numbers of persons; and (5) murder in the course of anti-social activities such as drug trafficking.

Machhi Singh also introduced the metaphor of the "balance sheet" of aggravating and mitigating circumstances. Courts were directed to draw up a balance sheet, listing aggravating circumstances on one side and mitigating circumstances on the other, and to determine "which way the balance tilts." However, the judgment provided no guidance on how different factors should be weighted or how conflicts between aggravating and mitigating circumstances should be resolved. The balance sheet approach, while superficially appealing, merely restated the problem of unstructured discretion in different terms.

The *Machhi Singh* categories have been criticized for expanding rather than constraining the scope of capital punishment. By providing concrete examples of potentially qualifying cases, the judgment inadvertently encouraged trial courts to treat these categories as exhaustive rather than illustrative, and to impose death whenever a case fell within one of the enumerated categories contrary to *Bachan Singh's* mandate that all circumstances of the crime and the criminal must be considered.

E. Post-Bachan Singh Inconsistencies

The decades following *Bachan Singh* witnessed growing doctrinal confusion as benches of varying strength issued conflicting pronouncements on key aspects of capital sentencing. Two strands of case law emerged on the question of same-day sentencing. One line of decisions, following *Santa Singh v. State of Punjab* (1976), held that sentencing on the same day as conviction violates Section 235(2) of the CrPC and deprives the convict of a meaningful opportunity to present mitigating circumstances. Another line, exemplified by *Dagdu v. State of Maharashtra* (1977) and *Ramdeo Chauhan v. State of Assam* (2001), held that same-day sentencing does not necessarily vitiate the proceeding if the convict has had an adequate opportunity to be heard.

More fundamentally, courts diverged on the substantive content of the *Bachan Singh* framework. In *Allauddin Mian v. State of Bihar* (1989), the Supreme Court emphasized that the sentencing hearing must provide an "effective and real opportunity" to the convict and that same-day sentencing could not satisfy this requirement. Yet in *X v. State of Maharashtra* (2019), the Court held that a "meaningful opportunity" is "not conditional upon time or number of days granted" and placed the burden on the convict to approach appellate courts if mitigating circumstances were not considered at trial.

The most striking inconsistency emerged in two decisions rendered within weeks of each other in 2022. In *Manoj v. State of Madhya Pradesh* (May 2022), a three-judge bench held that imposing death without well-documented mitigating circumstances constitutes an incorrect application of the *Bachan Singh* framework. The Court mandated that trial courts must elicit information from both the convict and the State, including jail conduct reports and psychological evaluations. However, in *Manoj Pratap Singh v. State of Rajasthan* (June 2022), another bench of equal strength held that even if mitigation was not carried out at trial, this procedural lapse is not "so grave for death to be forsaken" and can be cured by appellate courts.

These inconsistencies are not merely academic; they have profound practical consequences for death row convicts. As one study observed, "the doctrinal confusion that pervades the capital sentencing framework" means that "the outcome of a capital case may depend less on the facts and more on which bench hears the matter and which precedent it chooses to follow."

III. The Empirical Failure of the Bachan Singh Framework

A. Trial Court Sentencing Practices

The gap between constitutional doctrine and courtroom reality is starkly revealed by empirical research on trial court sentencing practices. Project 39A's comprehensive study of death penalty sentencing in trial courts between 2018 and 2020 analyzed 306 death sentences imposed during this period, producing findings that systematically document the framework's failure.

Most alarming is the prevalence of same-day sentencing. The study found that in 36.1% of cases, convicts were sentenced to death on the very same day they were convicted of the offence.³⁶ In another 18.4% of cases, the gap between conviction and sentencing was only one day.³⁷ Same-day sentencing makes a mockery of Section 235(2)'s mandate for a separate sentencing hearing. It deprives the defence of any realistic opportunity to investigate and present mitigating evidence, which requires time to gather documents, interview family members, obtain psychological evaluations, and prepare submissions.

The consideration of reformation central to *Bachan Singh's* requirement that life imprisonment be "unquestionably foreclosed" is almost entirely absent from trial court judgments. The Project 39A study found that in approximately 40% of cases, trial courts did not even mention the convict's probability of reform. In the minority of cases where reform was discussed, courts typically dismissed it based on the nature of the crime rather than any assessment of the offender's character, background, or potential for rehabilitation. No trial court in the study sample obtained a psychological evaluation or jail conduct report to assess reformative potential, despite the Supreme Court's direction in *Manoj* that such materials are essential.

B. The Problem of Crime-Centric Sentencing

The dominant pattern emerging from trial court judgments is what scholars have termed "crime-centric sentencing" the imposition of death based almost exclusively on the nature and brutality of the offence, with minimal attention to the characteristics of the offender. This approach fundamentally misunderstands the *Bachan Singh* framework, which explicitly requires consideration of "the circumstances of the criminal" alongside "the circumstances of the crime."

Crime-centric sentencing is particularly pronounced in cases involving gender-based violence. The April 2025 judgment of a Gujarat trial court sentencing a 36-year-old man to death for the rape and murder of a 10-year-old girl exemplifies this tendency. The presiding judge remarked that "even a double death sentence awarded to the accused would not suffice"

language that reflects emotional catharsis rather than reasoned adjudication. The trial was concluded in 72 days, a pace that prioritized performative justice over careful consideration of the offender's background or mental state.

This pattern is not anomalous but structural. Research on 215 capital cases across Delhi, Madhya Pradesh, and Maharashtra between 2000 and 2015 revealed that 51% of trial judgments did not consider any mitigating factors. In cases involving sexual violence, courts frequently invoke the "collective conscience of society" as a basis for imposing death, treating societal outrage as an independent aggravating factor rather than as a background consideration. This transformation of the courtroom into "moral theatre" undermines the individualized sentencing that constitutional doctrine requires.

C. Appellate Reversal Rates and the Crisis of Legitimacy

The most telling indicator of systemic failure is the extraordinary rate at which trial court death sentences are reversed or commuted on appeal. According to Project 39A's analysis, only 4.9% of death sentences imposed by trial courts between 2000 and 2015 were eventually confirmed by the Supreme Court. In 2023 and 2024, this figure dropped to zero the Supreme Court confirmed no death sentences in either year. High Courts confirmed just one death sentence in 2023, a dramatic decline from previous years.

These statistics reveal a system operating in two parallel realities. Trial courts continue to impose death sentences with regularity 139 in 2024 alone apparently undeterred by the knowledge that the overwhelming majority will not survive appellate scrutiny. Appellate courts, meanwhile, function as a corrective mechanism, commuting sentences to life imprisonment or, in some cases, acquitting convicts entirely after years of death row incarceration.

The human cost of this dissonance is immense. Convicts spend years often decades on death row, enduring the psychological torment of uncertain execution, only to have their sentences commuted long after the fact. The Supreme Court recognized this harm in *Shatrughan Chauhan v. Union of India* (2014), holding that prolonged delays in execution violate Article 21 and justify commutation. Yet the Court's remedy addresses only the terminal stage of the process, not the systemic failures at sentencing that produce these delays.

The "death row phenomenon" the severe psychological distress caused by prolonged imprisonment under sentence of death has been recognized by courts worldwide as a form of cruel, inhuman, or degrading treatment. In India, the average time spent on death row before execution or commutation is measured in years, and in some cases decades. The 2025 case highlighted by the Supreme Court involved convicts arrested in 2007, sentenced to death in

2012, and still awaiting final determination in 2025 eighteen years of uncertainty and psychological suffering.

D. Social and Economic Dimensions of Arbitrariness

The failures of the *Bachan Singh* framework are not randomly distributed but systematically track social and economic disadvantage. Death row prisoners in India are overwhelmingly drawn from marginalized communities economically impoverished, educationally limited, and belonging to religious or caste minorities. This pattern reflects deeper structural inequalities in the criminal justice system: inadequate legal representation, inability to access mitigating evidence, and implicit biases that shape judicial perceptions of culpability and dangerousness.

The quality of legal representation in capital cases is a particularly acute concern. Most death row convicts are represented by lawyers appointed through legal aid mechanisms, who often lack the resources, training, or inclination to conduct the kind of intensive mitigation investigation that capital sentencing requires. Unlike retained counsel, who can devote substantial time to investigating a client's life history, legal aid lawyers typically meet their clients shortly before trial and have no capacity to gather evidence from family members, schools, employers, or mental health professionals.

The 262nd Law Commission Report (2015) highlighted this dimension of arbitrariness, noting that "the death penalty is applied in a manner that is arbitrary and capricious, and that it disproportionately affects the poor and marginalized." The Commission recommended abolition of the death penalty for all crimes except terrorism-related offences, a recommendation that Parliament has not acted upon.

IV. Comparative Perspectives: The United States and the Statutory Guidelines Model

A. Furman v. Georgia and the Constitutional Crisis

The United States experienced a constitutional crisis over capital sentencing a decade before *Bachan Singh*, with lessons that remain highly relevant to India's current predicament. In *Furman v. Georgia* (1972), a 5-4 Supreme Court effectively invalidated all existing death penalty statutes by holding that the unguided discretion afforded to juries resulted in arbitrary and discriminatory sentencing in violation of the Eighth and Fourteenth Amendments.

The nine justices filed nine separate opinions, but the central holding emerged clearly: a sentencing system that leaves the decision between life and death to standardless discretion cannot withstand constitutional scrutiny. Justice Potter Stewart's concurrence captured the essence of the problem with his famous analogy: "These death sentences are cruel and

unusual in the same way that being struck by lightning is cruel and unusual." Justice Byron White emphasized that the complete absence of standards meant there was "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."

Furman did not hold the death penalty unconstitutional per se, but rather the procedures by which it was imposed. The decision left states free to enact new statutes that would guide sentencing discretion and thereby cure the constitutional defect. The result was a wave of legislative reform that produced two distinct models: mandatory death penalty statutes and guided discretion statutes.

B. The Post-Furman Statutory Frameworks

Several states initially responded to *Furman* by enacting mandatory death penalty statutes, which eliminated sentencing discretion entirely by requiring death upon conviction for specified offences. The Supreme Court struck down these statutes in *Woodson v. North Carolina* (1976), holding that mandatory capital punishment violates the Eighth Amendment by preventing individualized consideration of the offender and the offence. Justice Stewart, writing for the plurality, emphasized that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting the penalty of death."

The alternative model guided discretion statutes withstood constitutional scrutiny. In *Gregg v. Georgia* (1976) and companion cases, the Supreme Court upheld statutes that provided juries with lists of aggravating and mitigating circumstances, required at least one aggravating circumstance to be found before death could be imposed, and provided for automatic appellate review. The Court emphasized that such statutes "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death."

The Georgia statute upheld in *Gregg* became a template for capital sentencing reform. It enumerated ten aggravating circumstances, required the jury to find at least one beyond a reasonable doubt, and permitted consideration of any mitigating circumstances regardless of whether they were statutorily enumerated. The jury was required to balance aggravating and mitigating circumstances and to impose death only if the aggravating circumstances outweighed the mitigating circumstances. The statute also provided for automatic appeal to the state supreme court, which was required to review the proportionality of each death sentence compared to similar cases.

C. The Evolution of American Sentencing Guidelines

Subsequent decades witnessed further refinement of the guided discretion model. The Supreme Court required that sentencing juries be instructed on mitigating circumstances and that they be permitted to consider any aspect of the defendant's character or background as a basis for mercy. In *Lockett v. Ohio* (1978), the Court held that the sentencer must not be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offence that the defendant proffers as a basis for a sentence less than death." This requirement of individualized sentencing, paradoxically, coexists with the requirement that discretion be guided by statutory standards a tension that American courts have managed through elaborate jury instructions and appellate review.

The American experience offers several lessons for India. First, the *Furman* Court's rejection of standardless discretion mirrors the concerns that have emerged in India about arbitrary sentencing under *Bachan Singh*. Second, the post-*Furman* statutes demonstrate that it is possible to guide judicial (or jury) discretion through enumerated factors without sacrificing individualized consideration. Third, the mandatory death penalty experiment confirms that eliminating discretion entirely is not a constitutionally permissible solution sentencing must remain individualized. Fourth, the requirement of automatic appellate review provides a mechanism for ensuring consistency and correcting errors that India's current system of discretionary appeals lacks.

D. Lessons for India

The comparison between Indian and American capital sentencing jurisprudence reveals both parallels and divergences. Both countries confronted the problem of arbitrary sentencing and responded by articulating frameworks designed to guide discretion. Both recognized that individualized consideration is essential to constitutional legitimacy. Both have struggled with the tension between structured discretion and individualized sentencing.

The crucial difference lies in the institutional form these responses have taken. The United States addressed the problem through legislative action state legislatures enacted detailed statutes specifying aggravating and mitigating circumstances, establishing procedures, and mandating appellate review. India addressed the problem through judicial doctrine the Supreme Court in *Bachan Singh* articulated broad principles but left their implementation to trial judges without legislative guidance or institutional support.

This difference has profound consequences. American sentencing statutes create enforceable rights: defendants can challenge jury instructions that omit mitigating circumstances, argue on appeal that the evidence does not support findings of aggravating circumstances, and seek

proportionality review comparing their sentence to similar cases. Indian defendants have no comparable protections: the *Bachan Singh* framework provides standards so broad that virtually any outcome can be justified, and appellate review is discretionary rather than automatic.

The American experience also demonstrates the importance of institutional capacity. Guided discretion statutes presuppose that sentencing authorities have access to relevant information about aggravating and mitigating circumstances. This requires pre-sentencing investigation reports, mental health evaluations, and other mechanisms for gathering and presenting evidence. Indian trial courts lack this institutional infrastructure, which is why mitigating evidence is so rarely presented or considered.

V. Contemporary Developments: Reform and Retrenchment

A. The Constitution Bench Reference

The Supreme Court's September 2022 order referring capital sentencing issues to a five-judge Constitution Bench marks the most significant development in this area since *Bachan Singh* itself. The reference originated in *Manoj v. State of Madhya Pradesh* (2022), where the Court confronted the absence of uniform guidelines for considering mitigating circumstances. The three-judge bench, comprising Chief Justice U.U. Lalit and Justices S.R. Bhat and Sudhanshu Dhulia, observed that it was "necessary to have clarity in the matter to ensure a uniform approach on the question of granting real and meaningful opportunity as opposed to a formal hearing, to the accused/convict."

B. The Bharatiya Nyaya Sanhita, 2023: Expanding Capital Offences

While the Supreme Court moves toward greater procedural rigor in capital sentencing, Parliament has moved in the opposite direction. The Bharatiya Nyaya Sanhita (BNS), 2023, which replaced the Indian Penal Code, expanded the number of capital offences from twelve to eighteen. New offences punishable with death include mob lynching based on race, caste, or language (Section 103(2)); organised crime resulting in death (Section 111); and terrorist acts resulting in death (Section 113).

This expansion is difficult to reconcile with the global trend toward abolition and with India's own trajectory of increasingly rare executions. It also creates tension with the *Bachan Singh* framework, which was designed for a limited set of capital offences and assumes that death will be imposed only in the "rarest of rare" cases. When more offences carry the death penalty, the pressure to impose it in a wider range of cases inevitably increases.

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, which replaced the Code of Criminal Procedure, introduces additional procedural changes with implications for capital sentencing. Section 472(1) establishes a 30-day deadline for filing mercy petitions after the dismissal of a curative petition. While ostensibly designed to address delays in the mercy petition process, this provision shifts the burden onto convicts and their families, who are often ill-equipped to navigate complex legal procedures within tight deadlines. The Law Commission's 262nd Report had highlighted the "death row phenomenon" caused by prolonged uncertainty as a reason to move away from capital punishment; the new deadline, by accelerating the process, may increase rather than decrease the psychological trauma of awaiting execution.

C. The Government's Victim-Centric Guidelines Plea

In October 2025, the central government filed an application before the Supreme Court seeking victim- and society-centric guidelines for sentencing in death penalty cases. The application argued that the existing framework, shaped by decisions like *Shatrughan Chauhan*, is overly accused-centric and fails to adequately consider the interests of victims and the collective conscience of society. The government sought directions for strict timelines for filing curative petitions and mercy petitions, and for execution to follow within seven days of mercy petition rejection.

The Supreme Court dismissed the application as "without merit," affirming the constitutional primacy of accused-centric safeguards in capital proceedings.⁸⁵ While no detailed reasoning was provided, the dismissal reflects the Court's recognition that the procedural protections developed over decades—the requirement of a separate sentencing hearing, consideration of mitigating circumstances, delays as grounds for commutation—are not mere technicalities but constitutional requirements flowing from Article 21.

The government's plea, however, reflects a broader political and social context in which capital punishment is increasingly demanded as a response to heinous crimes, particularly sexual violence. The West Bengal Aparajita Bill, 2024, which mandates death penalty for rape, exemplifies this punitive populism. Such legislation, enacted in response to public outrage following high-profile crimes, treats the death penalty as symbolic justice without engaging with the empirical evidence of its failure as a deterrent or its discriminatory application.

D. The Clash of Judicial and Legislative Trajectories

India thus finds itself at a crossroads, with its highest court and its Parliament moving in different directions. The Supreme Court, through the Constitution Bench reference and

decisions like *Manoj*, seeks to make capital sentencing more rigorous, more individualized, and more protective of convicts' rights. Parliament, through the BNS expansion of capital offences and the BNSS deadline provisions, moves toward expanding the reach of capital punishment and accelerating its implementation.

This clash reflects deeper tensions in Indian constitutional culture. The judiciary, as guardian of fundamental rights, emphasizes procedural fairness and individualized justice. The legislature, responsive to democratic pressures, emphasizes social security and punitive deterrence. Both institutions operate within their constitutional roles, yet their trajectories are increasingly divergent.

The resolution of this tension will shape the future of capital punishment in India. If the judicial trajectory prevails, India may move toward de facto abolition, with death sentences rarely confirmed and executions becoming historical artifacts. If the legislative trajectory prevails, India may witness a resurgence of capital punishment, with more offences carrying the death penalty and more executions actually carried out. A third path statutory guidelines that channel judicial discretion within constitutionally mandated parameters offers a way to reconcile these competing pressures by providing clear standards that both respect legislative prerogatives and satisfy constitutional requirements.

VI. The Case for Statutory Sentencing Guidelines

A. The Limits of Judicial Doctrinal Development

The preceding analysis demonstrates that four decades of judicial efforts to refine the *Bachan Singh* framework have failed to produce consistent, non-arbitrary capital sentencing. This failure is not attributable to judicial incompetence or bad faith but to inherent limitations of common law adjudication as a mechanism for structuring sentencing discretion.

First, the Supreme Court's docket constraints mean it can address only a tiny fraction of capital cases. With dozens of death sentences imposed annually and hundreds of appeals pending, the Court's capacity to provide guidance through case-by-case adjudication is necessarily limited. Most capital cases never reach the Supreme Court, and those that do are decided years after the trial court proceedings, too late to influence the practices of the trial judges who impose the overwhelming majority of death sentences.

Second, the incremental nature of common law development produces doctrinal inconsistency. As documented above, benches of equal strength have issued conflicting pronouncements on fundamental questions such as whether same-day sentencing vitiates the proceeding and whether appellate courts can cure trial-level errors. These inconsistencies

create uncertainty for trial judges and litigants alike, and they undermine the legitimacy of the entire sentencing process.

Third, judicial doctrine cannot create the institutional infrastructure that capital sentencing requires. The *Bachan Singh* framework presupposes that sentencing judges will have access to comprehensive information about the offender's background, mental health, and reformative potential. In practice, trial courts lack probation officers, sentencing commissions, or other mechanisms for gathering such information. Judicial pronouncements cannot remedy this institutional deficit; only legislative action, backed by appropriations and administrative design, can create the necessary infrastructure.

Fourth, judicial guidance inevitably operates at a level of generality that leaves ample room for discretion to operate arbitrarily. The *Bachan Singh* enumeration of mitigating factors age, probability of reformation, circumstances of the offence, mental condition provides so little specificity that virtually any outcome can be justified. What counts as "youth"? At what age does immaturity cease to be mitigating? How is "probability of reformation" to be assessed, and by whom, and based on what evidence? These questions cannot be answered through judicial pronouncement; they require the kind of detailed specification that legislation can provide.

B. The Constitutional Case for Statutory Guidelines

The constitutional case for statutory guidelines rests on the proposition that Article 21's requirement of "procedure established by law" demands more than the existence of judicial decisions purporting to guide discretion. Procedure established by law means procedure established by legislation enacted by Parliament, published in advance, and applicable equally to all.

This interpretation finds support in the structure of Article 21 itself, which distinguishes between "procedure established by law" and the American concept of "due process of law." The Constituent Assembly deliberately chose the former formulation, indicating that deprivation of life must be according to procedures laid down by legislative enactment rather than according to judicially developed standards. While subsequent interpretation has infused Article 21 with substantive content, the procedural dimension remains: the law that establishes procedure must be law in the formal sense legislation enacted by the competent legislature.

The current framework, in which capital sentencing is governed by broad judicial pronouncements supplemented by conflicting case law, falls short of this requirement. Trial judges are not applying legislatively established procedures; they are applying their

understanding of judicial decisions, which may vary based on which precedents they consider binding and how they interpret them. This is not "procedure established by law" but procedure established by judicial opinion, which lacks the clarity, accessibility, and democratic legitimacy of legislation.

The Supreme Court has recognized this principle in other contexts. In *Mithu v. State of Punjab* (1983), the Court struck down Section 303 of the Indian Penal Code, which mandated the death penalty for life convicts who commit murder, holding that the provision violated Article 21 because it allowed no consideration of mitigating circumstances. The Court emphasized that "a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, is harsh, unjust and unfair."⁹⁴ This reasoning supports the proposition that legislation must provide for individualized consideration in capital sentencing but it does not require that the standards for such consideration be supplied by the judiciary. To the contrary, *Mithu* contemplates that Parliament will enact laws that respect constitutional requirements while providing the necessary guidance.

C. Essential Elements of Statutory Guidelines

Statutory sentencing guidelines for death penalty cases should address four dimensions: the enumeration of aggravating and mitigating circumstances, procedural requirements for sentencing hearings, institutional mechanisms for gathering and presenting evidence, and appellate review.

1. Enumeration of Aggravating and Mitigating Circumstances

The guidelines should contain an exhaustive list of aggravating circumstances that can support a death sentence, modelled on the post-*Furman* American statutes but adapted to Indian conditions. These should include:

- The offence was committed in an especially heinous, cruel, or depraved manner
- The offence was committed for pecuniary gain
- The offence was committed to conceal the commission of another offence
- The victim was particularly vulnerable due to age, disability, or status
- The offender has a prior conviction for a serious violent offence
- The offence was committed in the course of committing an act of terrorism

The guidelines should require that at least one aggravating circumstance be proved beyond reasonable doubt before death can be considered.

The guidelines should also contain an illustrative list of mitigating circumstances that courts must consider, including:

- The age of the offender (youth or advanced age)
- The offender's mental condition at the time of the offence
- The offender's role in the offence (if not the principal offender)
- The absence of prior criminal record
- The offender's background of deprivation, abuse, or trauma
- The offender's potential for rehabilitation, as evidenced by conduct, psychological evaluation, and other factors
- Any other circumstance that may reasonably justify a sentence less than death

The guidelines should provide that mitigating circumstances need not be proved beyond reasonable doubt but may be established by a preponderance of evidence, and that the sentencing court must consider any mitigating circumstance proffered by the defence regardless of whether it appears on the statutory list.

2. Procedural Requirements

The guidelines should establish minimum procedural standards for capital sentencing hearings:

- A mandatory minimum interval between conviction and sentencing, sufficient to permit investigation and presentation of mitigating evidence. Project 39A's research suggests that same-day sentencing is incompatible with meaningful mitigation; the guidelines should prescribe a minimum of 30 days, with provision for extension upon showing of good cause.
- A requirement that the sentencing hearing be conducted before the same judge who presided over the trial, to ensure continuity and familiarity with the case.
- A requirement that the court appoint and fund qualified mental health experts to conduct psychological and psychiatric evaluations when the defence requests such evaluations or when the court deems them necessary.
- A requirement that the prosecution disclose to the defence all evidence relevant to sentencing, including any evidence that may be mitigating in nature.
- A requirement that the court issue a written judgment specifying the aggravating circumstances found, the mitigating circumstances considered, the reasons for rejecting any

proffered mitigating circumstances, and the basis for concluding that life imprisonment is "unquestionably foreclosed."

3. Institutional Mechanisms

The guidelines should establish institutional infrastructure to support capital sentencing:

- Creation of a cadre of trained sentencing advocates, within legal aid authorities, responsible for conducting mitigation investigations in capital cases. These advocates should have access to investigators, social workers, and mental health professionals.
- Establishment of probation officer or social worker positions dedicated to preparing pre-sentencing reports in capital cases, including investigation of the offender's background, family circumstances, education, employment, and any history of trauma or deprivation.
- Development of standardized protocols for psychological and psychiatric evaluation in capital cases, ensuring that evaluations are conducted by qualified professionals using validated instruments and that reports are provided to both parties and the court.
- Creation of a sentencing commission or similar body to collect data on capital sentencing, monitor compliance with guidelines, and recommend revisions based on experience.

4. Appellate Review

The guidelines should provide for mandatory appellate review of all death sentences, regardless of whether the convict files an appeal. This review should encompass:

- Whether the evidence supports the finding of at least one aggravating circumstance
- Whether the sentencing court considered all relevant mitigating evidence
- Whether the sentence is proportionate to sentences imposed in similar cases
- Whether any legal error occurred that may have affected the sentencing decision

The appellate court should be authorized to affirm the death sentence, commute it to life imprisonment, or remand for resentencing. The court should be required to issue a written opinion explaining its decision, contributing to the development of a coherent body of sentencing jurisprudence.

D. Addressing Potential Objections

Several objections might be raised against statutory sentencing guidelines, each requiring careful consideration.

Objection 1: Guidelines would unduly constrain judicial discretion and prevent individualized sentencing.

This objection misunderstands the function of guidelines. Properly designed guidelines do not eliminate discretion but channel it, ensuring that sentencing decisions are based on relevant considerations rather than on idiosyncratic judicial preferences. The American experience demonstrates that guidelines can coexist with individualized sentencing; indeed, the requirement that courts consider any mitigating circumstance proffered by the defence ensures that no potentially relevant factor is excluded from consideration.

Objection 2: Parliament lacks the expertise to legislate on sentencing matters.

While Parliament may lack the detailed knowledge of courtroom practice that judges possess, this objection proves too much. Legislatures routinely enact criminal laws, including provisions defining offences and prescribing punishments. Sentencing guidelines fall within this traditional legislative competence. Moreover, the guidelines would be developed through a process that includes consultation with judges, lawyers, academics, and civil society organizations, ensuring that judicial expertise informs legislative outcomes.

Objection 3: Guidelines would lead to mechanical application and increased death sentences.

This objection raises empirical questions that cannot be answered a priori. The experience of jurisdictions that have adopted guidelines is mixed: some have seen increases in death sentences, others decreases. The critical variable is the content of the guidelines, not the fact of guidelines themselves. Guidelines that narrowly define aggravating circumstances, require proof beyond reasonable doubt, mandate consideration of extensive mitigating evidence, and provide for rigorous appellate review are likely to constrain rather than expand the use of capital punishment.

Objection 4: Guidelines would be unconstitutional as an encroachment on judicial power.

This objection raises fundamental questions about the separation of powers. Under the Indian Constitution, Parliament has the power to enact laws prescribing procedures for courts to follow. The guidelines proposed here would not dictate outcomes in individual cases they would establish factors to be considered, procedures to be followed, and standards for review. These are quintessentially legislative functions. As the Supreme Court has repeatedly affirmed, the power to prescribe procedure for courts is legislative, not judicial, and Parliament's exercise of that power is subject only to constitutional limitations.

Objection 5: Guidelines would be ineffective without institutional infrastructure that India lacks.

This objection has force but points toward the need for institutional development rather than abandonment of the guidelines project. Creating the infrastructure for mitigation

investigation, mental health evaluation, and pre-sentencing reports requires resources and administrative capacity. However, these investments are necessary regardless of whether guidelines are adopted the current system's failures are due in part to the absence of precisely this infrastructure. Guidelines would provide the legal framework that makes such investments meaningful.

VII. CONCLUSION

The Indian Constitution's commitment to the sanctity of life, embodied in Article 21, demands that when the State takes upon itself the power to end a human life through judicial process, it must do so with the utmost care, through procedures that minimize the risk of arbitrariness and ensure individualized consideration of each offender's circumstances. The *Bachan Singh* framework, for all its doctrinal sophistication, has failed to deliver on this constitutional promise. Four decades of experience have demonstrated that broad judicial standards, without legislative specification or institutional support, cannot prevent arbitrary sentencing.

The evidence of failure is overwhelming. Trial courts impose death sentences without meaningful consideration of mitigating circumstances, often on the same day as conviction. The overwhelming majority of these sentences are reversed or commuted on appeal, years after convicts have endured the psychological torment of death row. The burden of this arbitrary system falls disproportionately on the poor and marginalized, who lack the resources to present the mitigating evidence that might save their lives. The "rarest of rare" doctrine has become, as Justice Bhagwati predicted, a mantra invoked to justify death rather than a genuine constraint on its imposition.

The Constitution Bench reference presents a historic opportunity for reform. The Court could, as this paper recommends, use this opportunity to articulate the constitutional minimum requirements for capital sentencing while calling upon Parliament to enact comprehensive statutory guidelines. Such guidelines would enumerate aggravating and mitigating circumstances, establish procedural safeguards, create institutional mechanisms for gathering evidence, and provide for mandatory appellate review. They would channel judicial discretion within constitutional parameters while preserving the individualized consideration that capital sentencing requires.

Statutory guidelines would also reconcile the competing trajectories of judicial and legislative action on capital punishment. By establishing clear standards, they would provide trial courts with the guidance they currently lack, while respecting Parliament's prerogative to define

crimes and prescribe procedures. They would create a framework within which the expansion of capital offences could be evaluated and, if necessary, challenged on constitutional grounds. Most importantly, they would restore legitimacy to a sentencing process that has lost the confidence of the appellate courts that must review its outcomes.

The sword of Damocles cannot remain suspended indefinitely over the heads of those condemned to death. But neither can the constitutional commitment to the sanctity of life be vindicated by a system that imposes death arbitrarily, without genuine consideration of the offender's circumstances, without procedural fairness, and without the institutional infrastructure that capital sentencing requires. Statutory sentencing guidelines offer a path toward reconciling these imperatives a path that respects both the legislative power to define crimes and punishments and the constitutional requirement that the power over life and death be exercised with scrupulous fairness and individualized justice.

The time has come to move beyond the *Bachan Singh* framework not to abandon its core insights but to fulfill its promise through the legislative action that its implementation has always required. The Constitution Bench should lead the way by articulating the constitutional requirements that any capital sentencing system must satisfy, and by calling upon Parliament to enact the guidelines that will make those requirements a reality in courtrooms across India. Only then can we truly say that the procedure established by law provides meaningful protection against arbitrary deprivation of life.

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