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An Analysis of the Rarest of Rare Doctrine: A Retributive Perspective on Capital Punishment in India

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Abstract

This paper revisits the "rarest of rare" doctrine through a retributive lens, drawing on classical and contemporary principles of international and national law. This research centres its arguments on the judgments given in Manoj vs. State of Madhya Pradesh, where long-standing problems of arbitrariness and inadequate consideration of mitigating factors have been openly acknowledged. The 2025 decision of the Constitutional Court of Kyrgyz Republic rejected the reintroduction of the death penalty, which reflects a growing judicial commitment to the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The paper questions the nature of the "rarest of rare" doctrine, from a safeguard to a more crime-focused, emotionally charged standard that prioritises societal conscience over the offender's individual moral culpability. The core concern explored through the paper is the evolving approach behind the "rarest of rare" doctrine and its application through retributive justice, which rests on proportionality and desert, and whether it remains consistent with the right to equality and the right to life, which provides strict protection from arbitrariness while sentencing the death penalty. The findings reveal that the "rarest of rare" doctrine often operates as expressive retribution rather than a principled retributive threshold, resulting in inconsistent application and diminished attention to individualized culpability. The paper concludes that the doctrine, in its present form, fails to meet contemporary constitutional and international legal standards and argues that judicial abolition through doctrinal reform is a more coherent and principled response than continued reliance on a retributively unstable framework for capital punishment.

Keywords: Capital Punishment, Death penalty, Rarest of Rare, Retributive Justice.

1. Introduction

The "rarest of rare" doctrine was made to keep a check on unfair use of the death penalty in India. It was meant to be based on strong moral and legal reasons. However, over time, its inconsistent use and justifications have raised worries about its fairness and reliability. With growing public anger and media influence, the rule seems to juggle between punishment, fear of crime, and public opinion, which weakens its moral standing.

This research aims to revisit the rule through the lens of retributive justice. This idea says that punishment should fit the crime and be deserved by the person who committed it. The paper seeks to evaluate whether the current use of the doctrine aligns with its foundational idea or is swayed by personal views and social pressures. Further, this paper argues that the "rarest of rare" doctrine fails as a constitutional safeguard because its reliance on judicial moral intuition and notions such as "collective conscience" undermines the retributive principles of proportionality and individualised culpability that should govern capital sentencing.

The "Rarest of Rare" doctrine serves as the foundation for capital punishment in India, as cited by the Honourable Supreme Court of India in *Bachchan Singh v. State of Punjab* (1980)[1]. This doctrine restricts the imposition of the death penalty, one of the most severe forms of punishment under the law. Although the doctrine lacks a precise definition, its application depends upon various factors, such as the "facts and circumstances of the case," "the severity of the crime committed," "the conduct of the offender," "the offender's history," and "the potential for the offender to improve."[2]. When looked at through a retributive lens, the doctrine focuses on moral responsibility, deserved punishment, and the idea of "just deserts."

Under both old and new ideas about retribution, there are problems in India's capital punishment system. If the "rarest of rare" doctrine is viewed through a retributive lens, its application will be more ethically justified, more consistent with theories of justice, and strengthen the foundation of capital punishment in India.

1.1 Arbitrariness in the "Rarest of Rare" Doctrine

The "rarest of rare" rule was created to limit and make the use of the death penalty in India clearer. However, its uneven application and ambiguous rules have made court decisions unpredictable. This rule often mixes the goals of preventing crime and helping offenders, ignoring the moral responsibility of the person who committed the crime, which is a crucial aspect in justice theories. This raises an important question: Does this rule really bring justice, or does it harm it?

Recent well-known death penalty cases in India have sparked new discussions about whether this rule is used for true justice or just to please the public. The Nirbhaya case[3], for example, was seen as a response to a terrible crime, but it has been criticized for not following fair procedures and focusing too much on prevention. This leads to an important question: Is the "rarest of rare" rule a good fit for retributive theory, or is it applied randomly, leading to unfair outcomes?

The long history of the "rarest of rare" standard in Indian constitutional law suggests that there may be an underlying structural problem in the system of law that governs the death penalty. While the standard is typically offered as a limitation on the imposition of the death penalty, the continued reliance on indeterminate standards may suggest that the standard serves a more complex function in the system of law. While the standard may function as a guideline for the imposition of the death penalty, the standard

[1] Bachchan Singh v. State of Punjab, (1980) 2 S.C.C. 684 (India).
[2] Id
[3] *Mukesh v. State (NCT of Delhi)*, (2017) 6 S.C.C. 1 (India).

may also function as an institutional solution that the judiciary uses to address the tension between the imposition of the death penalty and the constitutional right to life under Article 21.

This is because the Indian system is based on a framework that recognizes the death penalty while at the same time recognizing the fundamental right to life and liberty. This has put the judiciary in a precarious position where it has to balance the constitutional validity of the death penalty with the need to ensure that it is applied in a manner that is fair, dignified, and proportional. The "rarest of rare" doctrine seems to have been formulated from this conundrum, where the death penalty is viewed as an extreme measure only applicable in extreme circumstances.[4]

However, the manner in which this limitation is achieved indicates a degree of conceptual instability in the doctrine. Rather than laying out clear criteria for the identification of cases in which the death penalty is truly justified, the doctrine relies heavily upon evaluative criteria such as the nature of the crime, the circumstances of the offender, and the needs of societal conscience. These evaluative criteria are often expressed in quite general and abstract terms. As such, the doctrine offers the judiciary a language in which the gravity of the death penalty can be acknowledged, as well as the discretion of the judiciary.

From this point of view, the 'rarest of rare' doctrine may also be understood as an expression of an anxiety of constitutionality with regard to the death penalty. On one hand, the judiciary acknowledges the significance and the moral debate that the death penalty embodies, but on the other hand, the judiciary does not explicitly hold the death penalty to be unconstitutional.[5] Rather, the 'rarest of rare' doctrine acts as an intermediary that enables the judiciary to hand down the death penalty, while at the same time highlighting its 'rarest of rare' nature.

The continued use of the concept of collective conscience and societal outrage as factors for capital sentencing is an example of how this concept works. The concepts are used by the judicial system to impose death penalties on extreme cases, which are treated as reactions to the moral damage that criminals have inflicted on society. The doctrine demands that judges impose death penalty sentences as special exceptions, and this gives the impression of constitutional restrictions being followed.

The implementation of this plan has some dangerous consequences. The doctrine is a rhetorical tool, and it helps individuals deal with their moral unease about capital punishment, although it does not provide the comprehensive sentencing system as it should. The judicial system still has not addressed its basic conflicts, as judges still use personal judgment to make decisions, and there are still issues with fairness in sentencing.[6]

The problems with the 'rarest of rare' doctrine cannot be explained solely in terms of the inconsistency of the courts, but rather in terms of a larger constitutional conundrum, namely, the attempt to square the death penalty with a constitutional legal system in which the right to life is at the heart of its normative vision.[7] Until this tension is resolved, either through a more detailed set of legal standards or a more fundamental

[4] *Bachan Singh v State of Punjab*, (1980) 2 S.C.C. 684.
[5] Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton Univ. Press 2001).
[6] Santosh Kumar Bariyar v State of Maharashtra, (2009) 6 S.C.C. 498.
[7] Shatrughan Chauhan v Union of India, (2014) 3 S.C.C. 1.

rethinking of the death penalty within the constitutional scheme, the problems with the 'rarest of rare' doctrine are likely to endure.

2. Evolution of the Doctrine

Before 1980, death penalty was given to offenders on the discretion of the judges without any defined framework, the courts usually had wide scope for punishing an offender with the death penalty. Although, under article 21 of the Indian constitution, right to life is protected but its relationship with it was never explored.[8]

In 1980, in a landmark judgement of Bachchan Singh vs. State of Punjab, court upheld the constitutional validity of death penalty and introduced "Rarest of rare" doctrine, aligning it more with article 21. Later, in Machhi Singh vs. State of Punjab (1983)[9], it laid down a framework to define what falls under "rarest of rare case". Post which the arbitrary and unethical use of the doctrine was widely debated and its vague nature was outshined in several cases like in Shankar Kisanrao Khade v. State of Maharashtra (2013)[10] the uniform application of "rarest of rare" test was questioned. In recent times, possibilities for reformations have been taken into consideration along with public opinion and morality, in case of Yakub Memon v. State of Maharashtra (2015)[11], tension between public values and constitutional validity rose, the court reiterated the doctrine but also took into consideration the procedure and rights of accused, especially in mercy petitions[12].

Over the course of several years, the subjectivity of the rarest of rare doctrine has been questioned repeatedly. "When is a punishment so severe justified?" "Can unreliable factors such as public sentiment and media attention be points of consideration?" Referring to the case of Dhananjoy Chatterjee vs State of West Bengal[13], the offender was convicted of sexually assaulting and murdering an 18-year-old girl and was thereby sentenced to execution. This case was deemed a rarest of rare situation that caused an "affront to the human dignity of the society."[14] Two statisticians, Professor Debasis Sengupta and Probal Chaudhuri have identified several inconsistencies in the evidence presented in the case.

Mukesh & Anr. v. State (NCT of Delhi)[15] was a case that invoked the rarest of rare doctrine. The offenders were executed for sexually assaulting a 21-year-old woman. Both the severity of the incident as well as the impact on society were weighed.

It is evident that public outrage played a significant role in both cases. This led to the imposition of capital punishment and has raised concerns about the reliability of a doctrine susceptible to such a subjective criterion.

[8] Granville Austin, *Working A Democratic Constitution: A History Of The Indian Experience* 270–75 (1999).
[9] *Machhi Singh v. State of Punjab***,** MANU/SC/0197/1983**.**
[10] *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 S.C.C. 546 (India).
[11] *Yakub Abdul Razak Memon v. State of Maharashtra*, (2015) 9 S.C.C. 552 (India)
[12] B.V. VISWANATHAN, *DEATH PENALTY IN INDIA* 118–25 (2016).
[13] *Dhananjoy Chatterjee v. State of West Bengal*, (1994) 2 S.C.C. 220 (India
[14] Debabis Sengupta & Probal Chaudhuri, *Anatomy Of A Judicial Error: The Dhananjoy Chatterjee Case* 1–5 (2014).
[15] *Mukesh v. State (NCT of Delhi)*, (2017) 6 S.C.C. 1 (India).

Manoj v. State of Madhya Pradesh[16] represents an important judicial awakening regarding the systemic flaws of the "rarest of rare" doctrine. The Supreme Court of India has openly confessed to the deep-rooted arbitrariness in the capital punishment sentencing, especially the prevalence of the disregard of the mitigating circumstances and the lack of individualized sentencing inquiries. At the same time, the Court's ruling reveals the vulnerability of the "rarest of rare" doctrine, which indicates the boundaries of corrective justice in the unstable sentencing system.

3. The rarest of rare doctrine and the Retributive Theory

The "rarest of rare" doctrine in India, has certain conceptual similarities with retributive justice theory. Retributive justice is based on the notion that punishment must have a moral proportion to the crime, since justice requires a moral appropriate response to the wrongdoing. Similarly, the "rarest of rare" doctrine holds that only crimes of utmost cruelty, which shock the collective conscience, and where the guilt of the offender is manifest, leads to the death penalty. Both approaches focus on the seriousness of the crime and the morality. The doctrine often integrates deterrence and societal reactions, which are different from retributive theories' strong emphasis on moral desert. While retributive justice aims for consistency through moral reasoning, the doctrine has sometimes displayed inconsistency due to subjective judicial interpretations and emotional or political influences.[17] Despite these distinctions, the doctrine's fundamental focus on moral severity and proportionality puts it, in alignment with retributive principles.

When dealing with the concept of retributivism, it can be distinguished into two types. Firstly, in cases of classical retributivism, it is contended that the only way for justice to be fulfilled is for the wrongdoer to suffer in proportion to the harm they have caused. According to Immanuel Kant, a proponent of classical retributivism, "The law of punishment is a categorical imperative."[18] However, this ideology was strongly criticized by utilitarians and advocates of modern retributivism. Their objective of justice is welfare maximization. In this case, the deontological punishment was deemed ineffective, and they aimed at offering education, therapy, and rehabilitation to the offenders.

Classical retributivism is concerned with the enforcement of punishments based on the gravity of the crime committed.[19] On the other hand, the rarest of rare doctrine corresponds to the concept of modern retributivism. It hinges on factors like societal shock and public outrage. This results in a volatile nature of the proceedings because it relies on the perceived demands of justice and media attention. The challenge of this doctrine is its ambiguity in practice. Since there is no structured mechanism, different courts and judges may interpret and apply the doctrine differently. This leads to unpredictable and arbitrary sentencing outcomes.

The issues with the "rarest of rare" doctrine cannot be explained by judicial inconsistencies alone, as they also stem from inherent ambiguities in the doctrine's conceptual structure. Although the doctrine was originally intended as a constitutional check on the death penalty, its emphasis on general and vague factors has led to a death penalty sentencing paradigm that is often devoid of normative guidance.[20]

[16] *Manoj v. State of Madhya Pradesh*, (2023) 2 S.C.C. 353 (India).
[17] Andrew Ashworth, *Sentencing And Criminal Justice* 92–99 (6th Ed. 2015).
[18] Immanuel Kant, *The Metaphysics Of Morals* 105–07 (Mary Gregor Trans., Cambridge Univ. Press 1991)
[19] Michael S. Moore, *Placing Blame: A Theory Of Criminal Law* 83–101 (1997).
[20] *Jagmohan Singh v State of Uttar Pradesh*, (1973) 1 S.C.C. 20.

Moreover, the emphasis on "collective conscience" has led to a shift in the death penalty sentencing paradigm, away from the moral culpability of the offender and toward the emotional response of society to the crime. This is particularly troubles when viewed in the context of a retributive justice paradigm, in which proportionality and individualized desert are essential components of punishment.[21]

The retributive theory also lays emphasis on the fact that punishment should be proportionate to the degree of moral culpability of the offender.[22] Therefore, the legitimacy of capital punishment is contingent upon a proper evaluation of the severity of the crime and the culpability of the offender. However, the current criteria of the 'rarest of rare' doctrine fail to offer proper parameters for such an evaluation, as no concrete parameters are available for balancing aggravating and mitigating circumstances, resulting in judicial discretion, and thereby giving rise to inconsistent judicial decisions in similar factual circumstances, which is against the principle of proportionate punishment as enshrined under the retributive theory.

Yet another challenge is the problem of the concept of collective conscience. While the concept of collective conscience has been employed in the context of the death penalty by the courts, the employment of the concept of collective conscience in the context of the death penalty is problematic, owing to the inherent subjectivity that cannot be reconciled with the retributive justice approach. In fact, the retributive justice system is largely centered on the moral culpability of the individual and not on the emotional responses of society[23]. However, when the emotional responses of society are taken into account in the context of the sentencing of the individual, the death penalty is employed in a manner that is more responsive to the emotional responses of society and not the moral culpability of the individual.

In order for the 'rarest of rare' doctrine to have some real meaning as a protective mechanism, the same concept must be interpreted in the context of a more formalized system of retribution. Firstly, the method of sentencing must be based primarily on the concept of proportionality, which entails that the courts must evaluate the interplay between the severity of the crime committed and the guilt of the criminal.[24] This will involve the development of more precise rules in relation to the evaluation of aggravating or mitigating factors. Secondly, concepts that are perceived to touch upon the issue of excessive subjectivity, such as the concept of collective conscience, must be treated with extreme care or excluded altogether, as they have the potential to negate the objectivity that is a necessity in the concept of retribution.

The new framework will strengthen the constitutional protection of life through Article 21 because it establishes death penalty execution standards that require proof of maximum moral culpability. The doctrine establishes its basis through proportionality and individual desert principles which enable judges to apply the death penalty according to constitutional protections and retributive justice principles.[25]

In this way, a more structured and theoretically coherent interpretation of the "rarest of rare" doctrine would transform it from a largely discretionary standard into a framework with the potential to constrain the imposition of the death penalty.

[21] Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* (Oxford Univ. Press 2004).
[22] Jeffrie Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge Univ. Press 1988).
[23] Herbert Morris, Persons and Punishment, 52 *Monist* 475 (1968).
[24] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford Univ. Press 2008).
[25] Union of India v V Sriharan, (2016) 7 S.C.C. 1.

4. The Challenge of Balancing Offender Desert and Victim Suffering

In Bachan Singh v. State of Punjab (1980), the Supreme Court introduced the rarest of rare doctrine to guide when the death penalty should be used. The Court said that judges must consider both the seriousness of the crime and the background of the person who committed it. The death sentence should only be given when there is no other option.[26] Later, in Machhi Singh v. State of Punjab (1983)[27], the Court began to consider the suffering of the victim's family. It was said that if a crime causes deep shock and anger in society, it must be reflected in the punishment, especially to show that the justice system understands the pain caused.[28] In a relatively more recent case of Mofil Khan vs. State of Jharkhand (2021)[29], the Court has aptly recognized the emotional pain and suffering of the family of the victim. The Court stated that "punishment must measure not only the deserving punishment of the criminal but also provide some solace to the suffering."

This is due to the fact that retributive justice may be able to provide a sense of justice and closure to the victims and their families, given that it holds the criminal responsible for the crime he or she committed. The retributive punishment, whether it be a life sentence or even death, may be able to provide validation to the suffering experienced by the victim and thus be able to provide emotional closure to the situation. However, emotional closure may be subjective in that it depends on how one is able to cope with the situation. Some may be able to find closure in a process like restorative justice, in which they are given a voice and in which the criminal is held accountable in a more direct manner. Moreover, overemphasizing punishment may be able to hinder or even prolong the emotional healing process, especially in cases in which the process takes a very long time, like in the case of the death penalty.

4.1 Manoj v. State of Madhya Pradesh: A Structural Reckoning with Capital Sentencing

In Manoj v. State of Madhya Pradesh, the Indian Supreme Court reached a significant doctrinal moment in the evolution of Indian capital sentencing jurisprudence.[30] The Court, with unusual candor, addressed the longstanding structural flaws inherent in the "rarest of rare" doctrine's application. The Court's prior decisions, while recognising the need for proportionate evaluation of aggravating and mitigating circumstances, revealed how such a balance had often been an illusion.

One of the notable aspects of the Manoj judgment is the Court's emphasis on the importance of mitigation inquiry. The Court noted how often capital sentences had been imposed without sufficient inquiry into the socio-economic circumstances of the accused, his psychological condition, childhood deprivation, and his potential for reform.[31] This, of course, is tantamount to accepting that retributive proportionality cannot be determined independently of the circumstances of the offender. The notion of retributive proportionality, of course, depends on the offender's moral evaluation, which cannot be determined without a mitigation inquiry.

But critically, the Court also addressed the procedural asymmetry inherent in the capital trial process. The aggravating factors, such as the brutality of the crime, are immediately apparent, as are the emotional

[26] *Bachchan Singh v. State of Punjab*, (1980) 2 S.C.C. 684 (India).
[27] *Machhi Singh v. State of Punjab***,** MANU/SC/0197/1983**.**
[28] *Id.*
[29] *Mofil Khan v. State of Jharkhand*, (2021) 16 S.C.C. 385 (India).
[30] *Manoj v. State of Madhya Pradesh*, (2023) 2 S.C.C. 353 (India).
[31] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684 (India).

responses to such brutality. The mitigating factors, on the other hand, require time, expertise, and institutional support to be identified. Manoj has also accepted that the sentencing process in such cases is one in which the gravity of the crime dominates the offender's culpability.[32] The question of principled retribution is not answered; instead, there is expressive condemnation.

The judgment, however, does not address the deeper question of the inherent instability of the "rarest of rare" doctrine itself. It has strengthened the procedures, but it has not fully engaged with the question of whether the "rarest of rare" test is sufficiently conceptually clear to eliminate arbitrariness in the decision-making process. The reference to "collective conscience" in the earlier judgments has not been abandoned.

Constitutionally speaking, the judgment is a reminder of the tenuous nature of Articles 14 and 21 safeguards in capital sentencing. Individualisation of sentencing is predicated on judges' sensitivity rather than on any institutional mechanism. Hence, equality before the law is qualified and imperfect. While Manoj advances the doctrine closer to a culpability-based model of retribution, its reformative dimension is contained within existing parameters. It does not engage with issues of its consistency with the right to life. This is a judgment that is both corrective in its proceduralism and philosophical depth, but also points to the limits of a death penalty system within a constitutionally framed world of dignity, equality, and non-arbitrariness.

5. Comparative and International Approaches to Arbitrariness in Capital Punishment

The analysis of the decisions of constitutional courts on capital punishment helps in achieving a deeper understanding of the basic issues involved with the concept of the "rarest of rare." The Indian capital punishment process is plagued with many issues, as it relies on its process for judges to decide on the sentence and how they decide on proportionate punishment and their discretion to make decisions. The United States also had issues with the capital punishment process in the 1950s to 1970s, and this led the Supreme Court of the United States to review the constitutional validity of capital punishment under the rule of the Eighth Amendment, which prohibits cruel and unusual punishment.

The issue of arbitrariness in capital sentencing was most prominently addressed in Furman v. Georgia (1972). In this decision, the Supreme Court held that the existing death penalty framework was unconstitutional because it allowed juries and judges to impose capital punishment without clear guiding standards. The Court observed that such unfettered discretion resulted in inconsistent and unpredictable sentencing outcomes, thereby violating constitutional principles of fairness and equality. Although the decision did not permanently abolish the death penalty, it emphasized that the absence of structured sentencing standards rendered the punishment constitutionally suspect.

In reaction to the Furman decision, several states enacted new death penalty statutes that attempted to limit arbitrariness by providing more procedural safeguards. The constitutionality of these new statutes was reviewed in the case of Gregg v. Georgia (1976), in which the Supreme Court approved a system that provided "guided discretion" in the imposition of the death penalty. This system involved the consideration of particular aggravating factors in the sentencing process, while allowing mitigating factors such as the character of the offender to be presented.

[32] *State of Punjab v. Prem Sagar*, (2008) 7 S.C.C. 550 (India).

At the same time, the Court did not uphold statutory schemes in which discretion was completely eliminated. This was illustrated in the decision in Woodson v. North Carolina (1976), in which the Court struck down mandatory death penalty statutes that prescribed the death penalty for certain types of murders. The Court held that individualized sentencing was constitutionally necessary in death penalty cases because of the unique severity of the death penalty and the need to consider the individual circumstances of the offender and their moral culpability for the crime.

These decisions reflect the constitutional dilemma in the death penalty context, in which the legal system must balance the need to avoid unstructured discretion with the need to avoid the rigidity of mandatory punishment. The American jurisprudence attempted to balance these competing concerns by developing the model of guided discretion.

While the Indian judiciary, similar to the American post-Furman model, has attempted to curb the death penalty by stressing the exceptional circumstances in which it is to be used, it is different from the American "guided discretion" model in the Gregg case in the sense that there is no clear list of aggravating circumstances or sentencing guidelines, and the Indian judiciary is guided by general evaluative criteria, including the nature of the offense, the circumstances of the offender, and in some instances, the dictates of collective conscience.

This lack of clear guidance contributes to the concern over inconsistency and subjectivity in the Indian system of capital sentencing. Although the doctrine calls for the weighing of aggravating and mitigating factors, it does not offer a clear methodology for such an evaluation. This has led to the possibility that different courts may reach different conclusions in cases with similar factual patterns. The experience in the United States is instructive in that it points to the difficulty in the Indian system, i.e, in the absence of clear standards in sentencing, the effort to restrict the death penalty in broad doctrinal terms may not succeed in preventing arbitrary results.

5.1 International Law Perspective: Article 6 of the ICCPR

The right to life has been recognized under Article 6 of the ICCPR, it has recognized the right to life as an inalienable right that cannot be derogated from in any circumstances. Though it has not been specific in the regard that it allows for the abolition of the death penalty, it has been extremely rigorous in its requirements regarding the death penalty.. The article allows the imposition of the death penalty for the "most serious crimes" after a final judgment by a competent court.[33] The words "most serious crimes" have been construed as a limiting provision as opposed to an enabling provision. The death penalty has been retained as an exception under Article 6 of the ICCPR, rigorously construed. The United Nations Human Rights Committee, in its General Comment No. 36, has clarified that the term "most serious crimes" should be interpreted restrictively and normally only refer to crimes that entail intentional killing.[34] The Committee has also clarified that the imposition of the death sentence should not be arbitrary, and the concept of arbitrariness should not merely connote the absence of legality but also include aspects of inappropriateness, injustice, unpredictability, and procedural unfairness.[35] This broad concept of

[33] International Covenant on Civil and Political Rights art. 6(2), Dec. 16, 1966, 999 U.N.T.S. 171.
[34] Human Rights Comm., General Comment No. 36, Article 6: Right to Life, ¶ 35, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).
[35] *Id.* ¶ 12.

"arbitrariness" is particularly pertinent for countries that permit judicial discretion in sentencing, such as India.

Further, Individualized sentencing is also required under Article 6. The Human Rights Committee has consistently emphasized that "the personal circumstances of the offender, including mitigating factors, must be taken into account" in arriving at a death sentence.[36] "Mechanistic" or "automatic" death sentences are, in any case, in violation of the Covenant. The rationale behind this requirement is closely connected to the idea of moral blameworthiness that the retributive model relies on when it comes to the proportionality of punishment. The punishment has to be proportionate not only to the gravity of the crime, but also to the blameworthiness of the criminal If the systems are geared towards public outrage, or symbolism, or collective conscience, rather than individual assessment, then there is a violation of the Covenant's prohibition on arbitrary deprivation of life.

In addition, there is a general normative shift in international human rights case law that supports the move towards abolition. Although Article 6 does not call for the immediate abolition, it has been interpreted to reflect a clear abolitionist trend.[37] There is a call for states to move progressively in limiting and, in the end, abolishing the death penalty. The Second Optional Protocol to the ICCPR further supports this move by binding ratifying states to the call for abolition.[38] In spite of the fact that a state may not be a party to the Second Optional Protocol, the interpretive trend in the case law on Article 6 is that the death penalty should be seen as an extreme measure, permissible only in the least circumstances and under the strictest procedures.

However, in analyzing the Indian concept of "rarest of rare" in relation to Article 6, it must be noted that what would be important would be to determine whether or not the concept was one of narrowing or one of discretion and emotion. If it was one of discretion and emotion, then arbitrariness would be at play, and it would be constitutionally and internationally important to determine whether or not retribution was being used in a manner that was symbolic or in relation to society at large rather than in relation to the individual offender. In this case, although retribution is not in and of itself impermissible, it would be required to be principled, proportionate, and individualized in its application. If it is symbolic or in relation to society in general, then it is in violation of the right to life that it is attempting to uphold and is in excess of what is permissible under Article 6.

5.2 Comparative Insight: Constitutional Court of the Kyrgyz Republic (2025)

The Constitutional Court of the Kyrgyz Republic reached its decision in 2025 when it declined to restore the death penalty because it maintained that the right to life holds constitutional priority over all human rights commitments of the state.[39] The decision is of particular importance in the comparative constitutional dialogue because it demonstrates the court's resistance to the trend of penal populism, as

[36] *Id.* ¶¶ 41–45.
[37] Human Rights Comm., General Comment No. 36, Article 6: Right to Life, ¶ 50, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).
[38] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414.
[39] Decision of the Constitutional Court of the Kyrgyz Republic (2025).

well as the explicit acknowledgment of the incompatibility of the death penalty with modern human rights principles.

The rationale for its decision was grounded in constitutional provisions regarding the right to life and dignity, with due consideration given to the State's obligations under Article 6 of the ICCPR. Although Article 6 does not absolutely prohibit capital punishment, it has created a restrictive framework that progressively limits its application. The rationale of the Kyrgyz court was based upon its interpretation of this framework in relation to the global trend towards abolition and found that reintroduction would be equivalent to regression in human rights protection.[40]

More importantly, however, is that the judgment did not merely consider the death penalty in terms of legislative power but also in terms of constitutional identity. In doing so, the judgment implicitly negated retributive theories of punishment that advocate for expressive or symbolic punishment. In doing so, the judgment equated proportionality with dignity and not outrage.

The judgment is important for retentionist countries such as India in that it provides a comparative model. India's Constitution protects life and personal liberty under Article 21 and equality under Article 14.[41] However, if arbitrariness and inconsistency in the application of the "rarest of rare" doctrine continue to characterize Indian jurisprudence on capital punishment, then the Kyrgyz model shows how a constitutional court can go beyond doctrinal niceties and advocate for a principled abolition of capital punishment.

6. India's Constitutional Position on Judicial Abolition

The continued practice and application of the death penalty under the "rarest of rare" doctrine creates grave constitutional issues under Articles 14 and 21 of the Indian Constitution. Article 21 of the Indian Constitution states that "no person shall be deprived of life or personal liberty except according to the procedure established by law."[42] The guarantee under Article 21 has been judicially elevated into a standard of substantive due process, incorporating elements of fairness, absence of arbitrariness, and reasonableness.[43] The determination of sentencing decisions in capital cases based on judicial perceptions of "collective conscience" and "moral outrage" creates a grave issue regarding the deprivation of life that is suspect under the Constitution.

Moreover, Article 14 takes this examination to an even greater intensity. The principle of equality before the law requires a degree of consistency and non-arbitrariness in the State's actions. Empirical and theoretical studies of death penalty trials in India have consistently shown how sentencing practices vary in terms of judicial discretion and the examination of mitigating circumstances. Even after procedural reforms such as those emphasised in the judgment in Manoj v. State of Madhya Pradesh,[44] certain

[40] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414.
[41] INDIAN CONSTITUTION arts. 14, 21.
[42] INDIAN CONSTITUTION art. 14.
[43] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).
[44] Manoj v. State of Madhya Pradesh, (2023) 2 S.C.C. 353 (India).

inconsistencies in the system will persist. If unequal sentences for similar crimes of different offenders are meted out depending on the judicial interpretation of the term "rarest," then the promise of equal protection under the Constitution will be undermined.

Indeed, international law supports this tension inherent within the constitution. Article 6 of the International Covenant on Civil and Political Rights only allows for the imposition of the death penalty within very limited circumstances, prohibiting arbitrary deprivation of life.[45] The Human Rights Committee has clarified that "arbitrariness includes unpredictability and absence of individualisation."[46] Where the structure of sentencing allows emotive considerations to dominate over rational considerations of proportionality, there is a systemic, rather than random, threat of arbitrariness.

Collectively, the constraints of the constitution and international law may indicate that doctrinal incremental reform is not sufficient. Enhancing mitigation procedures or refining sentencing guidelines does not address the underlying indeterminacy of the "rarest of rare" test, which is conceptually inherent to such approaches. Judicial abolition, grounded on the twin provisions of Articles 14 and 21 of the Constitution and interpreted holistically alongside international developments, may provide a more rational response. This is not to suggest that retributive justice is abandoned; rather, it is to recognise that the imposition of the death penalty is inconsistent with the dignity, equality, and progressive realisation of human rights inherent within the constitution.

7. Suggestions and Reforms

Based on the findings of this study, it clearly shows that the "rarest of rare" doctrine uses vague terms like "exceptional" or "heinous," and that judges interpret cases differently according to their personal moralities and media narratives, resulting in inconsistent application of the doctrine. This kind of unpredictability undermines its alignment with retributive justice and fairness and results in unequal treatment under the law; thus, this section proposes targeted suggestions and reforms to address these challenges.

1. Proposals for Clearer, Retributivist Criteria for Capital Punishment

Retributivism emphasises that punishment should be proportionate to the offender's moral culpability, focusing on the moral severity of the crime rather than deterrence or rehabilitation. To restructure the "rarest of rare" doctrine around retributive standards, some of the suggestions are as follows.

- Moral Culpability Assessment/Standard: Which explicitly mention the factors to assess the offender's moral responsibility, such as extreme cruelty, or targeting vulnerable victims (e.g., children or the elderly), crimes involving prolonged torture or massacre could qualify as "rarest of rare" due to the gravity of the offence, ensuring punishment reflects the offender's desert rather than societal outrage or deterrence goals.

[45] International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.
[46] Human Rights Comm., General Comment No. 36, Article 6: Right to Life, ¶ 12, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

- Proportionality Framework: The framework would prioritise objective indicators of retribution over subjective judicial discretion, which could be inspired by global models like Germany's or South Africa's, to assess the degree of harm, societal impact, offender's culpability, and weigh mitigating factors (e.g., mental health)
- Exclusion of Non-Retributive Goals: Minimise reliance on deterrence, public sentiment, or media pressure, as Retributivism demands that punishment be based solely on the offender's action, not on external pressures.
- Crime-Specific Thresholds: Codify specific categories of crimes (e.g., genocide, serial killings) that presumptively qualify and inherently demand the death penalty, provided mitigating factors are absent.

2. Recharacterizing the "Rarest of Rare" Doctrine as a Rights-Based Threshold

The "rarest of rare" doctrine needs to be judicially reinterpreted as a rights-protective threshold and not a crime-focused or sentimentally based measure. The judiciary needs to specifically hold that the societal conscience, public indignation, or the abstract significance of the crime cannot be a substitute for a nuanced determination of the offender's moral culpability.[47] The retribution, if relied upon, needs to be confined to the parameters of proportionality and desert, which need to be based on the offender's agency and circumstances and not merely on the atrocity of the crime.

3. Mandatory and Independent Mitigation Investigation Mechanism

A structural reform is needed to address the issue of arbitrariness that was acknowledged in the case of Manoj vs. State of Madhya Pradesh.[48] The courts that give sentences should be compelled by the constitution to take into account independent mitigation reports that are prepared by professionals such as psychologists, social workers, and criminologists.[49] The reports should include information on socio-economic background, mental health, violence/abuse, and prospects of reform.

4. Exclusion of Expressive and Collective Conscience Reasoning

The use of the "collective conscience" and "societal outrage" in capital sentencing should be specifically renounced by the judiciary.[50] These terms bring moral panic and emotional reasoning into a process that must be constitutional and rights-based. Their continued use will convert the death penalty into an expressive tool of state power, and this will affect equality before the law and the principled application of retributive justice. The exclusion of these terms would improve the consistency of the sentencing process.

5. Judicial Abolition as a Doctrinally Coherent Alternative

Due to "rarest of rare" doctrine's continued arbitrariness and retributive instability, the most sensible course of reform would be judicial abolition through constitutional interpretation.

[47] Anup Surendranath, *Judicial Arbitrariness in Death Penalty Sentencing in India*, 10 NUJS L. REV. 1, 9–12 (2017).
[48] *Manoj v. State of Madhya Pradesh*, (2023) 2 S.C.C. 353, (India).
[49] Mitigation Information in Capital Cases, AM. BAR ASS'N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.11 (2003).
[50] *Dhananjoy Chatterjee v. State of W.B.*, (1994) 2 S.C.C. 220 (India).

Instead of continuing a practice of a doctrine that does not live up to modern constitutional and international norms, judicial abolition would be a morally sound expression of commitment to the right to life and the boundaries of retributive justice.

6. Interim Safeguard: Presumption Against Death Sentencing

Until the objective of abolition is achieved, the courts must set a strong presumption against the death penalty, placing the evidentiary burden squarely on the prosecution to prove why life imprisonment is inadequate.[51]

7. Role of Sentencing Councils or Constitutional Oversight

Sentencing Councils: In need to comply with the reforms a National Sentencing Council comprising judges, legal scholars, criminologists and psychologists must be established to develop and revise guidelines for the death penalty, the council main work could be to analyze the data to ensure the doctrine is applied uniformly across states, issue advisory guidelines, recommend reforms.

Constitutional Oversight: This will empower the Court to conduct mandatory reviews of death penalty cases, ensuring compliance with Article 14 and 21, and can also allow PILs to challenge inconsistencies in the doctrine's application

8. Conclusion

the "rarest of rare" doctrine, despite being intended as a constitutional protection, has developed into an irregular and retributively unstable measure for the application of the death penalty. On closer scrutiny, when viewed through the prism of a retributive approach based on proportionality and offender moral culpability, the doctrine tends to operate more as expressive retribution, giving primacy to the severity of the crime rather than the individual circumstances. The frank admission by the Supreme Court in the case of Manoj v. State of Madhya Pradesh[52] of the existence of systemic flaws in the assessment of mitigation supports the view that arbitrariness in capital punishment is structural rather than exceptional.

The "rarest of rare" doctrine is an important attempt at curbing the death penalty through judicial intervention, but the conceptual and structural vagueness of the doctrine makes it ineffective in the role of a constitutional check. The lessons that can be drawn from other constitutional systems, constraints on the death penalty must extend beyond rhetoric to the structuring of the standards that inform judicial discretion in the imposition of the death penalty.

Philosophical consistency is essential in the sentencing of criminals for the maintenance of a fair and legitimate practice. This is even more critical in cases of death penalty, as the same is applied through the 'rarest of rare' principle in India. It is the doctrine, which is intended for extreme cases, and abandons independence to arbitrary construction, displaying the want of a uniform philosophical basis, and the indefinite sense in which they apply it. Sentencing should be based on clear objectives – deterrence, retribution, or rehabilitation – and in line with constitutional values and human rights. To reform that

[51] *Santosh Kumar Bariyar v. State of Maharashtra*, (2009) 6 S.C.C. (India).
[52] *Manoj v. State of Madhya Pradesh*, (2023) 2 S.C.C. 353, (India).

doctrine, the moral foundation should be articulated, the objective criteria set, and the application periodically monitored. A failure of coherence here would mean that the ship of the death penalty would flounder on miscarriage of justice. As a principles-based, open-ended and humane alternative, an elimination of it in favor of a restorative justice model, life as the longest end sentence, seems to hold appeal in the long run. Thus, the continued resort to the "rarest of rare" doctrine is a manifestation of doctrinal inertia rather than constitutional restraint. The appropriate judicial approach, therefore, is not to further refine a defective doctrine but to soundly abandon it in principle, reaffirming the right to life as a substantive constitutional value rather than a qualified exception.[53]

[53] Anup Surendranath, *The Death Penalty in India: A Study of the Supreme Court's Ruling in Capital Sentencing*, 42 ECON. & POL. WKLY. 35, 37–38 (2007).