
DEATH PENALTY IN INDIA: 'RAREST OF RARE' DOCTRINE - CONSISTENCY OR CONFUSION?

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ABSTRACT

The article researches and discusses various philosophical/theoretical as well as legal foundations that together form/develop the death penalty in India and specifically focuses on how the Supreme Court has incorporated the concept of 'rarest of rare' as a benchmark for finding cases appropriate for capital punishment. Intended to be used to limit use of the death penalty to an exceptional situation, the use of the term has received much criticism for many different reasons, including lack of consistency and clarity in application.

This document considers the four main philosophical theories of punishment (retributive, deterrent, reformative, and dignity) and analyses how each of these competing principles relate to how capital sentencing will take place in the context of India.

The conclusion of the study is that death penalty jurisprudence in India demonstrates/represents a pluralistic philosophy; an attempt to find a balance between proportionality, deterrence, reform, and human dignity, but the result of this balancing has created a degree of uncertainty in respect to the outcomes of sentences imposed for death penalty convictions. By examining the leading judicial decisions and reviewing the various theories that exist, the article contrasts the 'rarest of rare' principle and questions the existence of an adequate mechanism for ensuring certainty, fairness, and constitutional validity to the imposition of a sentence of death in India.

Keywords: Death penalty, rarest of rare, capital punishment, sentencing, proportionality, India.

I. INTRODUCTION

Sentencing isn't simply an application of legal guidelines to the facts it's fundamentally an evaluation of what the purposes of punishment should be, which factors are most significant in determining what level of punishment is suitable, and how the consideration(s) should be weighed against one another. Evaluations of this sort have value judgments at their core, and those value judgments are influenced either directly or indirectly by philosophical frameworks (theories) of punishment, i.e., justification for the State to punish individuals and what the goals of punishment should be.

Theoretical underpinnings are particularly relevant to capital punishment because the death penalty embodies the ultimate expression of state authority and creates questions regarding human dignity, state authority, proportionality, and the purpose of punishment. Theories of punishment provide a framework that supports various approaches to capital punishment and varying conclusions as to when, if ever, the death penalty is warranted.

This chapter will discuss four general theories of punishment retribution, deterrence, reform, and dignity based with respect to their applications to capital punishment. The chapter also will argue that the "rarest of the rare" doctrine is an attempt to reconcile a number of theoretical perspectives on punishment, however, there are inconsistencies among the theoretical perspectives that create uncertainty and inconsistencies in capital punishment sentencing. Understanding these theoretical perspectives is essential to assessing the cohesiveness of contemporary doctrine and creating prospective reform proposals.

II. RETRIBUTIVE THEORY: PUNISHMENT AS JUST DESERT

A. Fundamental Premises of Retributivism

Retributivism argues that punishment is justifiable because the guilty person merits suffering as a result of the injustice they have committed. The primary focus of retributivism is on the intrinsic justification of punishment as a reaction to an injustice not merely to achieve future social goals such as deterrence or rehabilitation. The three fundamental premises of retributivism include:

Principle of Deserts: Punishment is warranted only when the guilty person merits punishment due to their wrongful behavior. Merit, or deserts, is always backward looking and relies on the

prior actions of the guilty person and not on possible future consequences.

Principle of Proportionality: Punishment must be proportionate to the severity of the crime and the degree of culpability of the guilty person. Crimes that are more severe in terms of harm or culpability warrant greater punishment while less severe crimes warrant lesser punishment. Punishments that are disproportionately severe are unjust regardless of whether they could serve additional socially desirable purposes.

Principle of Equality: Cases that are identical in terms of their wrongdoing and culpability should be treated equally.

Principle of Limitation: Retributivism sets limits on the amount of punishment that can be imposed upon a guilty person. For example, punishment must never be less than what the guilty person merits (the floor) but must never be more than what the guilty person merits (the ceiling). These limits apply regardless of whether greater punishment could be used to promote other socially desirable objectives.

B. Retributivism and the Death Penalty

A retributive theory of punishment supports the use of the death penalty for the most serious types of crimes because the death penalty represents the proportionate punishment for the gravest of crimes. Retribution posits that certain types of crimes are sufficiently egregious that no lesser form of punishment is sufficient to reflect the degree of wrongdoing or culpability demonstrated by the offender. In addition to this, retributivism is used to justify the death penalty because it allows society to condemn, through the imposition of the ultimate punishment, the most egregious forms of wrongdoing and to express a demand for justice that is otherwise unfulfilled through the use of life sentences. That being said, retributive theory places substantial limitations on the use of the death penalty. In order for punishment to be proportionate to desert, the death penalty should only be imposed in those cases where the culpability of the offender is exceptional and the severity of the offense is exceptional. A retributive theory does not support the imposition of the death penalty solely for reasons of deterrence, public opinion or administrative expediency. Rather, a retributive theory of punishment requires a thoroughgoing analysis of the culpability of each individual offender, taking into account mitigating factors such as diminished capacity, age, history of abuse or coercion. In addition to the requirement that punishment be consistent with retributive theory,

there is also a need for consistency within sentencing. Sentencing that fails to treat similarly situated offenders equally undermines the assertion that punishment is merited on the basis of desert and not simply on the basis of whim or capriciousness.

C. Criticisms of Retributivism

Criticisms of retributivism include:

Problem of Measurement: How do you measure desert? What distinguishes one type of wrongdoing from another? How do you compare culpability among different offenders? While retributivist theory requires proportionality, it lacks well-defined standards for measuring what constitutes a proportionate punishment for what type of wrongdoing.

Looking Backward: Retributivist theory focuses on wrongdoing in the past, not on consequences in the future. Critics argue that punishment should be forward-looking in that it serves goals of deterrence, incapacitation and/or rehabilitation, not simply for the purpose of inflicting suffering for its own sake.

Concerns About Vengeance: Critics of retributivism believe that it amounts to nothing more than rationalized vengeance, motivated by a primitive desire for revenge rather than by rationally derived moral precepts. Advocates of retributivist theory assert that the infliction of punishment as a consequence of wrongdoing is a morally principled act and is limited in scope by the principles of proportionality, whereas vengeance knows no bounds.

Uncertainty of Empirical Data: Retributivist theory assumes that it is possible to accurately assess culpability and desert. However, culpability is affected by many factors including the mental state of the offender at the time of commission of the crime, the offender's background and circumstances surrounding the commission of the crime, etc., and may be very difficult to assess accurately. If we cannot accurately assess desert, retributive punishments will likely be unjust.

D. Retributivism in Indian Legal Theory

Indian legal theory concerning the death penalty utilizes a retributive model of punishment, especially in terms of proportionality to desert.¹ Courts have often stated that punishment must

¹ Bachan Singh v. State of Punjab, (1980) 2 SCC 684, 727–29; Machhi Singh v. State of Punjab, (1983) 3 SCC 470.

be commensurate to the seriousness of the offense and the level of culpability of the offender. The "rarest of the rare" doctrine, that is, the rule that death penalty should only be used in the rarest of cases, demonstrates a retributive interest in the idea that death penalty should only be used in the most extreme of cases where the level of culpability of the offender is extremely high. At the same time, Indian legal theory includes elements of non-retributive theory of punishment including deterrence, rehabilitative potential and societal impact. This conflict gives rise to indeterminacy within the law since if punishment is grounded in desert, then deterrent effect and rehabilitative potential should not play a role in the determination of appropriate punishment. Nevertheless, Indian courts evaluate these aspects, which indicates that the legal theory of India is based on a mixture of theories of punishment which may contribute to the indeterminacy of the law.²

III. DETERRENCE THEORY: PUNISHMENT AS CRIME PREVENTION

The idea behind the text is to describe the core beliefs of the "deterrence" theory explain how those ideas relate to the death penalty examine criticisms of the "deterrence" theory and illustrate how "deterrence" is used in Indian legal decisions.

To begin, the first paragraph describes four core beliefs of the "deterrence" theory. These include:

- 1. Consequentialism:** The idea that punishment is justifiable when it leads to a reduction in criminal behavior. Therefore, the purpose of punishment is to prevent further crimes (both general deterrence and specific deterrence).
- 2. Rational Actor:** The belief that people act rationally and weigh the pros and cons of committing a crime. If the rational actor believes the risk of punishment outweighs the benefit of committing the crime, they will refrain.
- 3. Proportionality of Effect:** The belief that the punishment must be sufficient to deter, but not so severe that it becomes unnecessary.
- 4. Publicity:** For the rational actor to make a decision about committing a crime based upon

² Ravji v. State of Rajasthan, (1996) 2 SCC 175.

fear of punishment, there must be public knowledge that punishment follows the crime.

The second paragraph explains how "deterrence" relates to the use of the death penalty. While proponents of the death penalty argue that execution deters murder more than life imprisonment, opponents argue that this is based upon an empirically unproven assertion. In other words, while proponents argue that the possibility of being executed deters potential murderers, opponents argue that there is no reliable evidence to support this claim. Instead, proponents suggest that poverty, lack of social cohesion, lack of effective policing and inequality appear to have a much larger impact on murder rates than the severity of punishment.

While supporters of the death penalty assert that even if the death penalty did have a small deterrent effect, this would still justify the imposition of capital punishment, critics respond that this would be over-punishment. Specifically, if the death penalty is imposed simply to achieve a deterrent effect, and if a comparable deterrent effect can be achieved through a sentence of life imprisonment without parole, then imposing the death penalty is disproportionate and therefore unjustifiable.

The third paragraph examines three major criticisms of the "deterrence" theory:

1. Empirical uncertainty: Critics argue that the deterrent effects of punishment are impossible to quantify. As a result, while supporters of the death penalty rely heavily upon assertions regarding the deterrent effect of the death penalty, there is little empirical evidence to support these claims. Therefore, supporters of the death penalty cannot rely upon the deterrent effect of the death penalty to justify its use.

2. Instrumentalization: Critics argue that the "deterrence" model views individuals as instrumental means to societal goals rather than as ends in themselves. Thus, using punishment as a way to deter others from committing crimes, while at the same time punishing the individual responsible for the original crime, is a form of instrumentalizing the individual. Critics believe that this is contrary to the dignity and autonomy of the individual.

3. Risk of excessive punishment: Critics also argue that the "deterrence" model does not establish any limits on the amount of punishment that may be imposed upon a defendant. Specifically, if the goal of punishment is solely to deter future crimes, then the amount of punishment that may be imposed would only need to be sufficient to accomplish this goal.

Critics argue that this would create the risk that defendants could be punished excessively in order to maximize the deterrent effect of the punishment.

Finally, critics argue that the "deterrence" model can also create inequality among similarly situated defendants. Specifically, if the most effective deterrent is to punish certain defendants severely, then it would be reasonable for prosecutors to seek harsher punishments for some defendants in order to maximize the deterrent effect of their punishments. However, critics argue that this approach is contrary to basic principles of fairness and equality among similarly situated defendants.

The fourth paragraph discusses how "deterrence" is used in India's legal decisions. Death penalty jurisprudence in India relies upon deterrence as a primary rationale for imposing the death penalty, especially in cases relating to terrorism, organized crime and crimes that threaten social order. However, in Indian jurisprudence, there is limited consideration of empirical evidence related to the deterrent effect of the death penalty. In fact, the deterrent rationale is often asserted without empirical evidence.³ This raises a conflict between the reliance on the deterrent rationale and the absence of empirical evidence to support this rationale.

If deterrence is used to justify the death penalty, then it logically follows that courts should demand empirical evidence that demonstrates that the death penalty deters murder more effectively than life imprisonment. Since such evidence is absent, the deterrent rationale for the death penalty is speculative.⁴ Furthermore, the deterrent rationale may create inconsistent results. For example, if deterrence depends upon publicity and the degree to which society is concerned with a particular type of crime, then similarly situated defendants involved in similar crimes may receive disparate sentences based upon factors unrelated to their culpability or desert.

IV. REFORMATIVE THEORY: PUNISHMENT AS REHABILITATION

A. Principles of Reformatory Theory

A few key aspects of reformatory theory consist of:

Future Focus: Reformatory theory looks toward the future of the criminal instead of focusing

³ Law Commission of India, 262nd Report: The Death Penalty (2015).

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 6.

solely on their wrongdoings from the past.

Tailored to Each Individual: Reformative theory advocates for assessing each criminal individually based on their personal needs, the circumstances they were raised under, and their potential to be changed. Therefore, no two criminals are treated the same.

Humanity: Reformative theory views the criminal as a person with the capability of being changed, instead of viewing them as an unchangeable individual. Reformative theory advocates for punishment to be used to assist in changing the individual, not to punish them.

Limit on Punishment: Reformative theory advocates for the punishment of a criminal to end once the individual has been changed, or if the individual has proven to be incapable of being changed, then continuing to punish the individual would be unfair.

B. Reformative Theory and Capital Punishment

Capital punishment is directly at odds with reformative theory. Capital punishment eliminates any possibility of the individual being able to change. Therefore, capital punishment cannot be based on the idea that the purpose of punishment is to help change the individual (reformative).

On the other hand, reformative theory supports a life without parole sentence, as long as there is a possibility of the individual demonstrating change, and being released after a certain amount of time. Reformative theory advocates for rehabilitation, which includes programs such as educational classes, counselling sessions, job training, etc.

Therefore, capital punishment is not consistent with the goals of reformative theory.

C. Criticisms of Reformative Theory

Criticisms have been made to reformative theory in the form of: -

Limits Based on Empirical Evidence: Not all individuals can be changed. There are individuals that will not change, and there are individuals that lack the desire to change.

Justice Concerns: Reformative theory ignores the concept of justice. This may lead to an individual being punished too lightly.

Victims: Reformatory theory focuses entirely on the offender. Critics of reformatory theory believe that punishment should also take into consideration the victim(s) of the crime, as well as the harm caused to society by the offense.

Paternalism: Reformatory theory promotes a type of paternalism, where the government imposes its own conception of how an individual should behave on an individual who may disagree with that view.

D. Reformatory Theory in India Law

In the context of Indian death penalty jurisprudence, reformatory considerations are taken into account when determining whether the defendant has the ability to be reformed.⁵ When considering the issue of whether the defendant is capable of reform, courts consider the defendant's age, previous criminal history, mental health, socioeconomic status, and behavior while incarcerated.⁶ However, while reformatory considerations are utilized in death penalty assessments, they are often secondary to retribution⁷ and deterrent considerations.⁸ Therefore, even if the defendant demonstrates the potential for reform, a death sentence may still be imposed for crimes that are deemed to be extremely violent or to have had a significant impact on society. This represents the emphasis placed on retribution and deterrent theories of punishment.⁹

This creates an internal conflict within the legal system. If reformatory potential is a factor to be considered in the determination of a death sentence, then it should be evaluated in every case. However, in practice, reformatory potential is rarely fully examined in the assessment process, and consequently, some defendants are denied full consideration of their reformatory potential due to the variability in the application of mitigation practices. As a result, reformatory theory creates a procedural inequity that impacts the substantive outcome of a defendant's sentencing.

⁵ Bachan Singh v. State of Punjab, (1980) 2 SCC 684, 728; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

⁶ Sangeet v. State of Haryana, (2013) 2 SCC 452.

⁷ Mofil Khan v. State of Jharkhand, (2015) 1 SCC 67.

⁸ Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 220; Ravji v. State of Rajasthan, (1996) 2 SCC 175.

⁹ Machhi Singh v. State of Punjab, (1983) 3 SCC 470.

V. DIGNITY-BASED APPROACHES: PUNISHMENT AND HUMAN RIGHTS

A. The Main Features of Dignity-Driven Methods

Dignity-driven methods assert that punishments must respect the inherent dignity of the individuals undergoing them. Punishments can be limited on three bases: the principle of proportionality (i.e., the severity of the punishment), the principle of efficiency (i.e., whether or not the punishment will deter future criminal behavior) and the principles of human dignity and human rights. The main characteristics of dignity-driven methods are: -

Inherent Dignity: Each person is endowed with an inherent dignity that should always be respected regardless of his/her actions. Serious offenders possess this dignity too therefore, how seriously they may be penalized, is also subject to these limits.

Forbiddance of Degrading Treatment: Punishment cannot be degrading, humiliating, nor dehumanizing. There are certain types of punishments that, by their very nature, violate human dignity and this is true even if the seriousness of the offense justifies such a treatment.

Proportionality: In addition to respecting the level of guilt, punishments must be compatible with the level of human dignity involved. Punishments that exceed the level of guilt, are excessively harsh, and therefore violate dignity.

Procedural Fairness: Dignity demands that each person receives due process before a court of law, e.g., the right to be heard, the right to present evidence, the right to legal counsel, and the right to appeal a conviction. Violations of procedural rights violate a person's dignity, regardless of the consequences of the action.

B. Dignity and the Death Penalty

Dignity-based methods have been used both to defend and to oppose the imposition of the death penalty. Some of them are: -

Opposition: Most human rights organizations believe that the death penalty is inherently at odds with human dignity. This is because the death penalty treats the individual who committed the offense as being disposable and not as having inherent value and worth. Human rights documents increasingly regard the death penalty as a violation of the right to life and as being

contrary to human dignity.

Defense: Some people believe that the death penalty is consistent with human dignity when the most egregious offenses are punished by death and when the death penalty is implemented fairly, in accordance with the severity of the crime, and when society determines that the most severe penalty is warranted. While dignity does not require the abolition of the death penalty, it requires that the death penalty be applied only in the most extraordinary of cases and under conditions that provide all of the procedural protections that are available. The Indian Supreme Court has taken the defense position, and has ruled that the death penalty is permitted in India by the constitution, as long as the death penalty is implemented in accordance with the same procedural and substantive requirements that govern all other criminal punishments.¹⁰ The Court has stressed that dignity requires that sentencing be individualized and based upon consideration of mitigating factors, and that there must be an opportunity for appellate review to prevent arbitrary application of the death penalty. The "rarest of rare" doctrine that the Court has articulated is a reflection of dignity-based concerns regarding the application of the death penalty and the need to apply the death penalty only in exceptional circumstances, as opposed to routinely.¹¹

C. Dignity in Indian Constitutional Jurisprudence

Article 21 of the Indian Constitution provides for the right to life and personal liberty. The Supreme Court has interpreted Article 21 as encompassing the right to live with dignity.¹² When depriving someone of their life, the Court has stated that the State must adhere to the following requirements of dignity:

- Adequate and fair trial processes with competent legal representation
- Individualized sentencing with consideration of mitigating circumstances
- Rational decision-making with sufficient explanations for why the death penalty was required
- Opportunities for appellate review to determine that the death penalty is consistently

¹⁰ Bachan Singh v. State of Punjab, (1980) 2 SCC 684; Jagmohan Singh v. State of U.P., (1973) 1 SCC 20.

¹¹ Bachan Singh v. State of Punjab, (1980) 2 SCC 684, 727–28; Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

¹² INDIA CONST. art. 21; Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

and correctly applied. These requirements are a reflection of the dignity-based concern that while the State has the authority to impose its will, i.e., to take life, it must do so in a way that respects the humanity of the individual and that meets the highest standards of fairness and rationality.

VI. THEORETICAL PLURALISM IN INDIAN DEATH PENALTY DOCTRINE

Indian capital punishment case law employs an amalgamation of various punitive theories, and thus a combination of those theories' principles, to implement its punitive approach. The pluralistic use of punitive theories by the Court represents an attempt to reconcile the competing values associated with each theory and create a sentencing model that will consider all of these competing factors.

Elements of Theories Applied in Capital Punishment Case Law

A. Elements of Theories Applied in Capital Punishment Case Law

Retributive Principles:

Retributive principles include the concepts of proportionality, desert, and the seriousness of the offense. The court has emphasized that a death sentence is warranted when a person commits an extremely serious crime and that no less severe of a punishment is justified by the seriousness of such a crime.

Deterrent Principles: Deterrent principles include the concept of societal impact and the need to prevent similar crimes.

Reformative Principles: Reformative principles include the concept of reform potential and mitigating circumstances.

Respect for Human Dignity: Respect for human dignity includes the concepts of due process, individualized sentencing, and respect for human dignity. A death sentence must be administered fairly and, death sentences should only be imposed in extraordinary cases.

B. Tensions Resulting from the Use of Multiple Theories in Capital Punishment

Case Law

Although using multiple theories allows for a nuanced evaluation of multiple factors in capital punishment case law, it also results in tension and ambiguity.

Retribution vs. Deterrence: Retributive theory evaluates what an offender should receive based upon their prior behavior, while deterrence evaluates the likelihood of preventing future crimes. These two evaluations can result in conflicting results. For example, although an offender may be deserving of a lenient punishment based upon retributive theory, they may be deserving of a harsher punishment based upon deterrence theory if the crime is highly prevalent.

Retribution vs. Reform: Retributive theory evaluates an offender's deservingness of punishment based upon their past behavior, while reformative theory evaluates an offender's potential for reform. Although an offender may deserve a harsh punishment based upon retributive theory, they may demonstrate a high level of reform potential, resulting in conflict between desert and reform.

Deterrence vs. Dignity: While deterrence may justify harsh punishment to maximize the deterrent effect, dignity places limitations on the severity of punishment based upon the deterrent value of such punishment.

Collective Conscience: The doctrine of collective conscience is invoked in capital punishment case law as a justification for determining the appropriate level of punishment, however the theoretical basis for invoking collective conscience is ambiguous. Collective conscience may reflect retributive intuitions regarding an offender's desert, deterrence-based concerns regarding the social order, or dignity-based concerns regarding an offender's relationship to the community's values.

C. Implications of Consistency

Pluralistic use of punitive theories creates the opportunity for inconsistent capital punishment determinations because judges may employ differing levels of emphasis toward various punitive theories or may employ different balances among punitive theories. Thus, for example, while one judge may emphasize retribution as a basis for punishing an offender, another judge may emphasize the offender's reformative potential. As a consequence, both judges may reach different conclusions in comparable cases. Further, if there is no specification within the

doctrine of how to achieve a balance between competing punitive theories, the decision-making authority of the judge may be based on his/her theoretical commitments rather than on the application of consistent, principled standards. Pluralistic use of punitive theories in capital punishment case law does not necessarily imply that such use should be discontinued. Multiple factors are relevant to the determination of an appropriate sentence, and strict adherence to a single theory may lead to unjust outcomes. To the extent that pluralistic use of punitive theories is compatible with consistency, the doctrine must establish guidelines regarding how competing punitive theories should be evaluated and weighted.

VII. PROPORTIONALITY AND THE “RAREST OF RARE” DOCTRINE

Despite the fact that there can be many (theoretical) approaches to justice, proportionality is a common thread among them all of the primary approaches (retribution, deterrence, rehabilitation, dignity) have proportionality requirements (although they each have their own definitions).

Retributive Proportionality:

Proportionality under the retributive theory means that punishment must be proportionate to the criminal’s deservedness. Criminals who commit crimes that are more severe, and those who are guiltier (i.e., more culpable), deserve harsher punishment.

Deterrent Proportionality

In order to achieve the greatest deterrent effect, proportionality under the deterrent theory means that punishment should be sufficiently harsh to be an effective deterrent, but no greater than the amount needed to achieve that effect.

Reformative Proportionality

Under the rehabilitative theory, proportionality means that punishment should not be longer than is necessary to bring about the desired rehabilitative effects. When the offender has been rehabilitated, or when rehabilitation is impossible, further punishment is unjustifiable.

Dignity-Based Proportionality

Under the dignity theory, proportionality means that punishment should not be excessively

harsh relative to human dignity. Some punishments are excessively harsh regardless of what the criminal did, because they are inherently incompatible with basic human worth.

Proportionality Under the "Rarest of Rare" Doctrine

Although the "rarest of rare" doctrine provides some clarity to the issue of proportionality, it still leaves much to be determined by the courts. The "rarest of rare" doctrine states that death penalty should only be used in instances where the crime committed was of an unusually high degree of severity, and/or the level of guilt (culpability) of the defendant was also unusually high. Therefore, the doctrine seeks to limit the use of death penalty to only the most heinous of cases. However, this doctrine does not establish any specific criteria to determine when a death sentence is proportional to the crime. The terms "rarest of rare", and "unquestionably foreclosed" are vague and subject to varying interpretations. As such, there exists a real possibility that the court may make disparate proportionality determinations based upon similar crimes and circumstances.