
RETHINKING THE DEATH PENALTY: A BENTHAMITE CRITIQUE

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ABSTRACT

This project looks at the death penalty in India from the point of view of Jeremy Bentham's utilitarian theory. Bentham argued that punishment should only be used if it prevents greater harm and contributes to the overall happiness of society. He opposed the death penalty due to its irreversible nature, lack of proven deterrent effect, and failure to allow for reform. The project mainly focuses on the "rarest of rare" doctrine developed by the Supreme Court in important cases like Bachan Singh and Machhi Singh. By comparing how the courts have applied this rule in different cases, the project questions if there is consistency and justice in the way death sentences are given. It also checks if Bentham's ideas about usefulness, fairness, and public good are followed or not.

Keywords: Death penalty, capital punishment, Jeremy Bentham, rarest of rare.

INTRODUCTION

Death penalty is one of the most serious punishments any legal system can impose. It involves taking away a person's life as punishment for crimes considered extremely grave, like murder or terrorism. This research project aims to explore the death penalty through the ideas of Jeremy Bentham, one of the most important thinkers in legal philosophy. Bentham is well-known for his "theory of utilitarianism", which says that all laws and actions should be judged by how much happiness or benefit they bring to the greatest number of people. According to Bentham, "all punishment in itself is evil", and it should only be used if it prevents a greater harm from happening.¹ Bentham believed that punishment must be useful to society. It should prevent future crimes, protect victims, and reform the offender.² He opposed punishments that were too harsh or used simply to seek revenge or make a public example. Although Bentham did not completely reject the idea of the death penalty, he was very critical of it. In many of his writings, he argued that the death penalty might not be effective in deterring crime and could lead to mistakes that cannot be undone.³ For example, he questioned how taking a life can be justified if there is a chance of executing an innocent person.

This makes Bentham's philosophy very important for rethinking the "rarest of rare" doctrine used for sentencing death penalty in India. Whether it still supports old ideas like retribution (punishing because someone "deserves" it)⁴ and deterrence (scaring others from committing crimes)? Bentham would likely ask whether these justifications really benefit society today. He would want us to prove, using real data, that the death penalty actually reduces crime or improves safety, rather than simply assuming that it does. The "rarest of rare" doctrine has been used by Indian courts since *Bachan Singh v. State of Punjab*.⁴ This rule says that the death penalty should only be given in the most exceptional cases. But which case is to be taken as exceptional and which one isn't? Is this standard too vague? Bentham, who believed in measurable, rational law, would probably criticize this kind of subjectivity.

1 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 134 (Batoche Books Kitchener 2000).

2 Id. at 134-139.

3 JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 389-401 (Franklin Classics 2018). 4 Dhruv Sanjeev Purkar, Application of Utilitarianism Theory of Punishment in Rarest of Rare Crimes, 4(2) INDIAN JOURNAL OF INTEGRATED RESEARCH IN LAW (IJIRL) 636, 636-644 (2022).

4 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

AIM AND OBJECTIVE

The objective of the study is to examine capital punishment and critically evaluate the “rarest of rare” doctrine used by Indian courts through a Benthamite lens with special focus to *Bachan Singh v. State of Punjab* and *Macchi Singh v. State of Punjab*.

SCOPE AND LIMITATIONS

This study mainly focuses on how the “rarest of rare” in death penalty cases is used in India, and whether it matches with Jeremy Bentham’s utilitarian theory. It mainly focuses on *Bachan Singh* and *Machhi Singh*’s cases while making some brief comparisons with few other cases. However, the scope is limited to Indian law and a few landmark judgments. It does not go deep into international laws or other punishment theories. Also, the study is based on already decided cases, not new data or interviews. So, the conclusions may not fully cover all possible views on this topic.

BENTHAM’S VIEWS ON PUNISHMENT AND CAPITAL PUNISHMENT

In “An Introduction to the Principle of Morals and Legislation” Jeremy Bentham states “all punishments are mischief: all punishment in itself is evil.”⁵ However, Bentham does not completely negate the idea either. He argues that the fundamental aim of laws should be to maximise happiness of society, and minimize harm or mischief. Since punishment itself is a form of harm, it should only be used when it prevents greater harm.⁶

Bentham identifies several scenarios where punishment is unjustified: when the act causes no harm, when the harm is outweighed by greater benefits (such as acts of consent or necessity), or when adequate compensation is certain. Punishment is also ineffective if the law was unknown to the offender, if the person lacked the mental or physical capacity to obey it due to infancy, insanity, intoxication, ignorance, compulsion, or fear.⁷ Additionally, punishment becomes unprofitable when its negative consequences exceed the harm caused by the offense, including pain to offenders, their families, or society, especially when social or political conditions magnify its cost. Further, punishment is unnecessary when harmful behaviours can

5 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 134 (Batoche Books Kitchener 2000).

6 Id.

7 Id. at 136.

be curbed more effectively and cheaply through education or rational persuasion, especially in cases of spreading harmful ideas, where public debate is a better remedy than coercion.⁸

Bentham explains how punishments should be balanced with the crimes they are meant to prevent. If punishment is necessary, then the lawmaker should aim for four smaller goals: First, to stop all crimes from happening if possible; Second, if someone has to commit a crime, then at least make them choose the one that causes the least harm; Third, if someone is determined to commit a crime, they should be made to do only as much harm as needed to achieve their goal—no more; and Fourth, whatever harm is being prevented, it should be done in the cheapest and “least painful” way possible.

To help reach these goals, there need to be clear rules to decide how serious the punishment should be for each crime. The first rule is that punishment must always be strong enough to “outweigh the benefit” someone thinks they will get from the crime. If not, people will keep committing the crime because they’ll think it’s worth the risk. Some people think this is harsh, but Bentham says it’s necessary. The second rule is about how much punishment is worth using. Third, when two crimes compete – say someone might steal or kill – the worse one should be punished more so that the person picks the less harmful one. Fourth, if a person has already decided to do a crime, the punishment should be designed so that they don’t do more harm than needed. For example, if a robber will get what they want by threatening someone, they shouldn’t feel encouraged to kill just to avoid being caught. The punishment must reflect that. Fifth, punishment shouldn’t go beyond what is necessary. Sixth, different people experience punishment differently. What feels like a small punishment to one might feel huge to another. So, judges should consider personal situations, like age or mental state, when deciding how much punishment someone should actually get.⁹

When we compare punishment to the benefit of a crime, we must look beyond just the amount (quantity) and also consider how certain and soon the punishment is. Crimes often bring benefits that are sure and immediate, while punishment is often uncertain or far off. To make up for this, punishments should sometimes be made bigger. Also, if someone likely committed similar crimes before without being caught – especially in cases like fraud – the punishment must be strong enough to make all the crimes together not worth it. Besides, if a crime shows

⁸ Id. at 134-139.

⁹ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 142 (Batoche Books Kitchener 2000).

someone has a habit of doing that thing, the punishment must be enough to cover all past and future crimes too.

He lists all the things we need to think about when deciding how punishment should match the crime. These include how much benefit and harm the crime brings, the size and type of the punishment, how sure and how soon it will happen, how sensitive the criminal is, whether the criminal has done it before, and what the public and international views are. Bentham says that everyone, even people acting out of emotion, still think and calculate to some extent when pain and pleasure are involved. People act based on what they believe is in their best interest – even if their calculations are rough. So, making punishments well-balanced and thoughtful is not a waste of effort; it actually helps the law work better.

Bentham talks about the “key features” that any form of punishment should have to be effective and fair. He starts by saying that punishment should be strong enough to discourage people from committing crimes, but at the same time, it shouldn’t be more painful than necessary. So, the first important quality of punishment is “variability”¹⁰, meaning it should be adjustable depending on how serious the crime is or how much benefit the criminal gets from it. The second quality is “equability”¹¹, which means the punishment should affect everyone in a fairly similar way. For example, a fine might mean a lot to a poor person but nothing to a rich one, which makes it unfair. Bentham then talks about “commensurability”¹², or how punishments should be clearly worse for more serious crimes, so people will choose the lesser offense if they’re going to do wrong. Another key idea is “characteristicalness”¹³, where the punishment should be related to the crime in a symbolic or direct way, like “an eye for an eye” in some situations, which helps people easily connect the punishment to the wrongdoing and remember it better. This is especially useful for teaching others not to commit similar crimes. When punishment looks more dramatic or public, it can also seem worse and scare others more, which is helpful – this is called “exemplarity”¹⁴. But at the same time, punishment is a kind of harm, so it should also be “frugal”¹⁵, meaning not more painful than needed. In fact, some punishments, like fines, can even be beneficial if the money is given to others in need.¹⁶

10 JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 42 (Franklin Classics 2018).

11 Id. at 43.

12 Id. at 44.

13 Id. at 45.

14 Id. at 46.

15 Id. at 108

16 Bentham, *supra* note 10, at 157.

Further, Bentham mentions that punishment has four goals, (i) setting an example, (ii) reforming the criminal, (iii) stopping them from doing it again, and (iv) sometimes compensating the victim, and certain types of punishment may be better suited for one of these goals than others, depending on the situation.

Death is the most extreme way to do this because it completely removes the threat of further harm, which is why it's sometimes used for serious crimes like rebellion. However, death as punishment is costly and should only be used in rare, extreme cases. In most situations, imprisonment or removing the offender's rights (like job roles or marriage privileges) can stop repeat offenses more cheaply. Punishment can also serve to compensate victims – especially through fines, which are useful in money-related crimes. Another important idea is “popularity,” which means people should not strongly dislike the punishment. If people hate it, they might not support the law or help enforce it, making the law weak. The dislike might be based on misunderstandings, so lawmakers should try to educate the public.

Further, punishment should allow for “remissibility,”¹⁷ which means that in rare cases, it can be reduced or cancelled, especially if the person turns out to be innocent or has shown clear improvement. However, this only works for ongoing punishments like imprisonment, not for things like execution, which can't be undone. In general, no single punishment checks all the boxes, so lawmakers need to mix different types to suit the crime.¹⁹

Bentham in his work “The Rationale of Punishment” discusses the pros and cons of the death penalty.¹⁸ In the chapter “Capital punishment Examined,” first, he looks at the supposed benefits. One of the main advantages people claim is that it completely removes the threat posed by a criminal since the person can no longer harm anyone once they are dead. In cases like murder, the punishment seems to match the crime in a symbolic way, and many people support the death penalty for murder more than for other crimes. Executions, especially in countries where they happen rarely, tend to have a powerful effect on the public because they are dramatic and memorable.

Bentham argued that long-lasting punishments like prison are more effective than intense ones like death because people remember continuous pain more than quick pain.²¹ However, Bentham disagrees, saying most people fear death more than anything else and would do almost

¹⁷ Bentham, *supra* note 10, at 155. ¹⁹ *Id.* at 147-157.

¹⁸ Bentham, *supra* note 11, at 177. ²¹ *Id.* at 194.

anything to avoid it. Even if death itself is quick and maybe less painful than a lifetime of prison, the fear and anxiety leading up to it make it emotionally intense and frightening. So, for most people, especially those with families, dreams, or a sense of honour – capital punishment acts as a strong warning.

Still, Bentham admits that there are problems with the death penalty. First, it can't be used to make up for the crime financially or through labour. If someone dies, they can't repay society by working, so it's a total loss, both in terms of possible economic value and manpower. Also, most people who commit such crimes aren't productive anyway, but there's still a chance that prison labour could reform them or provide some benefit to society.¹⁹ Next, death as punishment isn't equal for everyone. Some fear it a lot, while others, especially experienced criminals or those who are miserable with life, may not care. For people who already see life as full of pain, the idea of dying doesn't scare them enough to stop them from committing crimes.²⁰ They might know that if caught, they could die, but that's a risk they're willing to take. Bentham explains that people don't do this math in a formal way, but deep down, they compare pain and pleasure before acting.²¹ Now, someone might argue that no punishment could deter such people, but Bentham thinks other punishments like prison can still help.

Another problem with the death penalty is that it doesn't offer any flexibility. It's the same outcome every time – death – so you can't increase or decrease the punishment based on the seriousness of the crime.²⁵ Most importantly, death is final. You can't undo it if a mistake is discovered later. Trials are sometimes based on weak evidence, and people can be saved only by lucky coincidences that prove their innocence. Also, executing someone destroys any chance of getting testimony from them. Criminals often know things that could help solve other cases, and when they die, that knowledge dies too. This can protect other criminals who remain hidden. While death as punishment is said to have some benefits, it mirrors the crime in murder cases, preventing future crimes, and sending a strong message. But even for murder, punishments like life imprisonment can also send a strong message. As for preventing future harm, some argue death is the only way to stop dangerous murderers. But that's exaggerated, even hired assassins act based on gain and safety, unlike mentally ill people who are often more dangerous and unpredictable, yet they aren't killed; they're confined.²⁶ So, confinement can work just as well, and is less extreme. Lastly, using the death penalty too often can backfire,

¹⁹ Id. at 180.

²⁰ JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 181 (Franklin Classics 2018).

²¹ Id. at 182. ²⁵ Id. at 185. ²⁶ Id. at 193.

especially when the public disagrees with it. Instead of stopping crime, it may encourage it by making the legal system look unfair and inhumane.

CRITIQUING “RAREST OF RARE” DOCTRINE THROUGH A BENTHAMITE LENS

Having explored Jeremy Bentham’s views on punishment and his critical stance toward capital punishment in the previous chapter, this one examines how the Indian judiciary has justified the death penalty in landmark cases and evaluates whether such justifications meet Bentham’s principle of utility. It analyses key decisions of *Bachan Singh v. State of Punjab*²², and *Machhi Singh v. State of Punjab*²⁸ and examines the judicial reasoning from a Benthamite perspective.

In the case of *Bachan Singh v. State of Punjab*, the Supreme Court examined the constitutional validity of the death penalty under Section 302 of the Indian Penal Code. The petitioner was already serving a life sentence for a previous murder. But while he was out on parole, he killed some people again, and was then sentenced to death. He challenged that death penalty violates Articles 14, 19, and 21 of the Constitution²⁹. However, this research is not about whether the death penalty is constitutional or not. It focuses on how the Court explained and justified giving someone the death sentence, even when such big challenges were raised.

The Court said that to give someone death penalty, there should be some “special reasons” related to the crime as well as criminal(s). This would depend on the specific circumstances of the case itself. Like, the manner of committing the crime, whether it is well framed “coldblooded”, “pre-planned” murder indicating the degree of aggravation; how cruelly the act is executed, manner of use of sharp weapon(s), and the “helpless state of the victim” etc. At the same time, “judges ought not to be bloodthirsty,” hence, age of the murderer, whether he was too young, “post-murder remorse,” or repentance by him is also relevant.²³ This is something Bentham too would value perhaps, because of the simple fact that these kinds of emotions help bring a sense of change and reformation within the criminal. The counsel on behalf of the appellant argued that all the murders including those which were committed before sentencing life imprisonment, and even after the parole, along with the circumstances

22 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 28 *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470
29 INDIAN CONSTI. art. 14, 19, 21.

23 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

“do not constitute any special reason.” So, was the Court being retributive in its approach? Given the past conduct (murdering his own wife and two children) and killing three children of his cousin, the court said it took a “deterrent approach.” Owing to the facts of the case the Court formulated the “rarest of rare” doctrine, which theoretically does align with Bentham’s idea of promoting death penalty in extremely rare cases.

It was held that “death penalty” should be imposed only in case where “life imprisonment is wholly inadequate” and the crime is of extreme brutality, shocking the “collective conscience” of the society.²⁴ Hence, in Bachan Singh case, the Court upheld the constitutionality of capital punishment. But then, perhaps Bentham would be skeptical of the term “collective conscience”. How do you measure collective outrage? Whose conscience does the judiciary represent? Is it the emotional outrage of the media, political sentiment, or actual harm to public welfare? The recent R.G. Kar rape-murder²⁵ case caused a huge shock for the whole nation, people protesting everywhere, and complete media outrage across the country. It was still not considered as the “rarest of rare.” It raises the question what does “collective conscience” exactly mean?

Now taking the case of M. Jaishankar²⁶, a serial rapist and murderer. He escaped prison twice, committed over 30 rapes, 15 murders and numerous robberies, and was a terror for people across three states (Tamil Nadu, Karnataka & Andhra Pradesh). He even said that he enjoyed torturing his victims. Strangely, he was never given the death penalty. Bentham would see this as a failure of consistency. If deterrence and public safety were the real goals, why wasn’t this case treated as “rarest of rare”? Bentham said the law must work with certainty and equality. If one horrible crime gets death but another worse one doesn’t, people would lose faith in justice. This inconsistency defeats the utility purpose of punishment. Life imprisonment might be a utilitarian and ethical choice, but Bentham also mentions that “if a crime shows someone has a habit of doing that thing, the punishment must be enough to cover all past and future crimes too.” If Bachan Singh could be hanged for murdering relatively less number of people and escaping prison just for once, then why was M. Jaishankar allowed to live?

Under Machhi Singh v. State of Punjab²⁷, the Supreme Court upheld the death penalty for the

24 Bachan Singh v. State of Punjab, (1980) 2 SCC 684

25 In Re: Alleged Rape and Murder Incident of a Trainee Doctor in R.G. Kar Medical College and Hospital, 2024 SCC OnLine SC 2245

26 THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/city/salem/30-rapes-15-murders-2-escapespsycho-shankar-terror-reign-ends/articleshow/63104820.cms> (last visited May 17, 2025).

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

accused, who had brutally murdered seventeen people, including infant, children and women in a planned attack driven by family rivalry. The Court extended the “rarest of rare” doctrine established in *Bachan Singh*, identifying specific criteria such as the manner of execution, motive, magnitude, and impact on society to determine when capital punishment is justified. It held that the nature of the crime, calculated, cold-blooded, and causing widespread fear – was so extreme that life imprisonment would be inadequate. The judges took into account all the mitigating circumstances and only two, who were more culpable out of original seven accused, have been sentenced death and the rest were sentenced life imprisonment. But perhaps Bentham would first ask: Can life imprisonment achieve the same deterrent and protective effect as the death penalty? Wouldn’t life imprisonment had sufficed for the other two as well? If yes, then death would be excessive and therefore unjustified under frugality. Even for the sake of exemplarity, Bentham wouldn’t have probably arrived at the Court’s conclusion easily. He would demand strong evidence that death penalty works better than life imprisonment to deter such crimes, that there are no alternative methods (like solitary confinement) that can protect society and deter crime, and the benefit to society (in terms of reduced fear or crime) clearly outweighs the irreversible harm of execution. In Bentham’s words “punishment should be exemplary but not excessive, and only justified if it brings more good than harm.”

Here, “cruelty” and “multiple killings” became triggers for the judgement. But the question is: Why does the manner of killing matter more than the actual social consequence? For example, a gruesome multiple murder case in a remote village might provoke media outrage, but a white-collar crime causing thousands of deaths, like toxic gas leak as in the *Union Carbide Corporation vs Union of India*²⁸ (Bhopal Gas Tragedy) case, doesn’t attract the death penalty which caused immediate death of 20,000 and affected 5,00,000 people. If we use Bentham’s felicific calculus, this disaster caused massive, long-lasting pain. The physical, emotional, and social suffering was huge and continues even today. The intensity and duration of suffering, along with the certain corporate negligence and the wide extent of harm, weigh heavily in favour of a proportionate and exemplary punishment. But the sufferers were not even adequately compensated. Court gave death sentence for repeat murders, but not for industrial negligence that kills thousands. However, Bentham was also very concerned to not punish without absolute certainty of the wrongdoers. He might remain hesitant to tilt in favour of death penalty. But the point of mentioning this case was that the “rarest of rare” might seem like

28 *Union Carbide Corporation vs Union of India*, (1989) 2 SCC 540

punishing what “looks evil” rather than what “causes the greatest harm.” In Machi Singh the Court upheld Bachan Singh’s “rarest of rare” judgement due to factors like cruelty, motive, number of victims, and the shock to society. But these are still vague. Is killing one child more “rare” than killing three adults? Is killing in revenge worse than killing for money? What decides whether killing one person in a gruesome way is more severe than killing five people in a less cruel way? There seems no consistent logic here. Bentham believed such inconsistencies make the law unfair and unreliable, which reduces public trust in justice.

Capital punishment, though gives a deterrent view, but it can equally serve a “retributive” purpose, something which Bentham wouldn’t quite support. In *Furman v. Georgia*²⁹ it has been pointed out that at times the criminal conduct is so egregious and barbaric that “society’s interest in deterrence and retribution completely outweighs any consideration of reform.” For example, in *Kehar Singh v. Union of India*³⁰, there was no direct evidence, but based on circumstantial evidence, for his alleged involvement in the conspiracy to assassinate Prime Minister Indira Gandhi he was sentenced to death. Bentham would be deeply concerned here. He warned that if punishment is too harsh and the guilt is uncertain, then it increases suffering without justification. He valued certainty and fairness more than political or emotional pressure. Punishing someone based on suspicion to protect “national security” would perhaps fails Bentham’s utilitarian test. So, should this be seen as setting an example, or rather revenge in the name of public safety and national security?

The “rarest of rare” idea was meant to stop the death penalty from being used too much. But when we look at it using Bentham’s way of thinking, it has many problems. The idea is not applied in the same way in every case. It depends too much on feelings like “collective conscience,” and different judges may think differently. What is rare for one, might not be rare for the other. Bentham might not totally reject the idea of keeping death penalty for extreme cases, but he would say it must be used carefully, based on clear facts, and in a fair way. For him, punishment is not to show anger or satisfy emotions. It should be a tool to reduce harm and increase good for everyone.

CONCLUSION

In this study, it has been tried to understand the use of the death penalty in India by looking at

²⁹ *Furman v. Georgia*, 408 U.S. 238 (1972)

³⁰ *Kehar Singh v. Union of India*, (1989) 1 SCC 204

it through the ideas of Jeremy Bentham. According to Bentham, laws should be made in such a way that they bring the most happiness and the least amount of pain to the largest number of people. He believed that punishment should only be given if it brings more good than harm, and it must always be used carefully, with clear logic and not just emotions or anger.

The Indian courts have tried to limit the use of death penalty by creating the “rarest of rare” doctrine, starting from the Bachan Singh³¹ case. The idea was to make sure that only in very extreme and brutal cases, where life imprisonment is not enough, the death penalty is given. But after reading different cases like Machhi Singh³², M. Jaishankar, Kehar Singh³³, and even comparing with cases like the Bhopal Gas Tragedy³⁴, it seems that there is no clear rule to decide what counts as “rarest of rare.” Some cases with many murders or shocking cruelty got the death sentence, while others with similar or worse facts did not. This shows inconsistency, which Bentham would strongly oppose.

In conclusion, Bentham would probably not fully reject the death penalty, but he would say that its use should be very rare, logical, and based on clear public benefit, not anger, revenge, or feelings. The “rarest of rare” rule was meant to be a careful tool, but it often becomes vague and unpredictable in practice. The justice system must be consistent, fair, and always based on reason, as Bentham said. Otherwise, even a good doctrine like “rarest of rare” can become unjust in real life.

31 Bachan Singh v. State of Punjab, (1980) 2 SCC 684

32 Machhi Singh And Ors. v. State of Punjab (1983) 3 SCC 470

33 Kehar Singh v. Union of India, (1989) 1 SCC 204

34 Union Carbide Corporation vs Union of India, (1989) 2 SCC 540