
A CRITICAL ANALYSIS OF THE APPLICATION OF RETRIBUTIVE JUSTICE THEORY IN INDIA

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ABSTRACT

“If we do an eye for an eye and a tooth for a tooth, we will be a blind and toothless nation.”

~ Martin Luther King, Jr.

The retributive theory is a form of punishment equivalent to the crime that a person has potentially committed. The approach seeks to believe that a person who committed a crime of such harm deserves the exact treatment in their case without any mercy. The theory contradicts the quote,

The theory of retributive justice was the basis of the entire codes of Hammurabi and The Old Testament under the principle of the *lex talionis*: “life for life, eye for an eye.”¹ H.L.A. Hart defined retributivism as ‘the application of the pains of punishment to a morally guilty offender’²

In India, the theory applies when people commit the most gruesome crimes under the doctrine of “rarest of the rare cases.” Only under extreme circumstances where someone kills another will they also be given capital punishment. The constitutional right to life can be taken away with the procedure that the law establishes. This paper will explain the Retributive Justice theory and analyze the application of retributive justice theory by the apex court in the country, setting aside one has constitutionally guaranteed right to life in the cases *Jagmohan Singh v State of Uttar Pradesh*³, *Mukesh & Anr vs. State For Nct Of Delhi & Ors*⁴ and *Vinay Sharma vs. Union Of India*⁵ as well as the case, *Bachan Singh vs. the State Of Punjab*⁶ after which the application of retributive punishment was included with the introduction’ rarest of rare case’ doctrine.

¹ J. Dyneley Prince, Review: The Code of Hammurabi [1904] Vol. 8, No. 3 , The American Journal of Theology, p. 601

² H. L. A. Hart, The Presidential Address: Prolegomenon to the Principles of Punishment [1959], Vol. 60, Oxford University Press on behalf of The Aristotelian Society, p.1.

³ *Jagmohan Singh v State of Uttar Pradesh* AIR 1973 SC 947)

⁴ *Mukesh & Anr vs. State of Nct of Delhi & Ors* [2017] CRIMINAL APPEAL NOS. 607-608 OF 2017

⁵ *Vinay Sharma vs. Union Of India* [2020] WRIT PETITION (CRL.) NO.65 OF 2020

⁶ *Bachan Singh vs. the State Of Punjab* AIR 1980 SC 898

Introduction

Laws were introduced to explain to people what the right thing to do is. It acted as a guideline that everyone had to look into to understand what can be considered the right thing to do and what is the wrong thing. Merely mentioning about it did not seem to bring about much change, which is the reason for the introduction of an impactful effect. Affirmative actions and sanctions were seen to modify and have complete control over human behavior. People did more when they were appreciated, and they certainly tried to avoid actions that brought about a negative effect on themselves. This was the reason why punishments were introduced. In economics, it was believed that if the benefit arising from an action is more than the possible punishment(cost) or harm it causes, people will be encouraged to do such an action.⁷ That way, the aim of introducing punishments by the penal systems fails as even with the introduction of punishments, the behavior would not be influenced. One solution to this was the retributive justice theory which believed that a punishment for a crime would be to make the criminal suffer the same harm that was caused to the victim

Retributive Justice Theory

Emphasizing the idea of punishments instead of reformation to bring about control in criminal behavior is the basis of the Reformatory Justice System. The theory is formed from the basic idea of ‘an eye for an eye which was given in the Hammurabi code introduced by the king of the Babylonian empire, Hammurabi. The Code was used in the ancient Mesopotamian civilization, and it was a proper set of rules engraved into a wall, and these rules had to be followed to achieve justice. This theory also included parts of Expiatory theory as the punishments that were given were expected to be proportionate to the crimes that were committed. Nevertheless, in reality, this was never really followed as the punishments were often entirely disproportionate to the crimes that were committed.

An example would be stealing a sack of punishment by cutting off the offender’s hands or even hanging him to death for the crime of theft was practiced. If theft also amounted to such a severe punishment, giving the same punishment for a murderer would not be justified, and nothing more than the death penalty can be given to an offender. This defect was also found in the Draconian law of Athens that followed the Retributive system of justice. Under that law,

⁷ Gary Becker, Crime and Punishment: An Economic Approach, *The Journal of Political Economy* 169, p. 176–177 (1968)

all offenses were punished with the death penalty. Therefore, the theory cannot be considered to deliver justice in any way. Philosophers like Sir Plato believed in this theory of punishment as it is clearly mentioned in his book, the republic that an offender must suffer because of what he has done. Other philosophers like Sir Immanuel Kant and Sir Hegel also believed that this is the best way to achieve social justice and prevent society from becoming completely chaotic. The retributive theory of justice is considered to have a retrospective effect in nature as a person is punished for something that has already happened, which is also the main focus of the theory. The theory does not precisely focus on preventing crimes from happening directly but acts as a form of revenge that a person which the authority gives to a person who has committed a crime. Technically speaking, the person authorized to do this also commits murder or the same crime that the offender has committed but can quickly get away with because of the power given to them. This cannot be seen as a means of achieving justice, as the entire purpose is forgiveness and reformation.

Retributive Justice, Indian Adaptation

The country's criminal justice system aims to make the breakers of the law understand their mistake by punishing them and making them abide by the law. The idea is reformatory by nature, and it also seeks to prevent others from doing the same with the help of deterrence theory. The reformatory theory is practiced by removing the criminal, isolating them behind bars for a specific period until they can live in a civilized society again. The criminal justice system in India aims to have crucial maintenance of harmony in society. In the country, the form of retribution is also used but only in the rarest of the rare case scenario. This theory is practiced by introducing capital punishment to certain specific types of crimes and in some instances only where the criminal is sentenced to death. The Indian Penal Code clearly mentions crimes to which this theory is applied, and even though it is given, punishments of lesser intensity will be given first by the court. Capital punishment will also be sent for various appeals, from the higher courts to the President.

Indian history is not very supportive of the idea of capital punishment. It was mythologically said in the Ramayana, an epic in India, that Lord Sri Ram asked his brother, Lakshman, to guard the gates as he was having a private conversation with a sage when he was a king and mentioned that if someone hears or interrupts the conversation, Lakshmana will have to give up his life. After this, a sage named Vishvamithra tries to visit Lord Ram and gets furious when Lakshman stops him and threatens that he will destroy the entire town of Ayodhya. Due to this,

Lakshman decides to sacrifice his life to save his city and takes the death penalty punishment. It was also seen to be practiced in King Ashoka's period before the Kalinga War. Hinduism believes in the theory of Karma where one will pay the price for one's deeds in this life or the next naturally and does not require any intervention. Rulers during the Mughal period decided to award this punishment to a deserving criminal only after they referred to the king through a special messenger. The punishment of the death penalty was executed only on receipt of the king's confirmation.⁸ During Akbar's rule, he permitted the governors of provincial regions to award death punishment without his permission in 1582.⁹ Apart from this, there is no other incident where the death penalty was glorified in ancient India as the rulers believed in the qualities of Dharma and forgiveness as well as Ahimsa(Non-Violence).

The practice gained its recognition again after the country became a British colony. British India's legislative assembly was the law-making body, and they did not receive any concern about capital punishment in the country for a long time. However, in 1931, Shri Gaya Prasad Singh was the first person who sought to remove this punishment from the Indian Penal Code with an introduction of an abolition bill. However, his efforts went on the vein as the plea was rejected. The then Home Minister, Sir John Thorne, mentioned that "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided"¹⁰ Even after independence, the various resolutions for the abolition of this punishment in 1956, 1958 and 1961 were rejected after debates. In 1962, Mr. Raghunath Singh moved a resolution in the Lok Sabha, which was also rejected but with an increased number of resolutions. The government called for a Law commission report and forwarded the transcript of the recent debate to the law commission. The Law Commission submitted its report on Capital punishment¹¹ to the government. Unfortunately, this report also did not recommend any material changes with the provisions of the capital penalty and retained this form of punishment.

Indian Laws Recognizing Retributive Justice

The Indian Penal Code suggests the execution of capital punishment by way of shooting or hanging. The standard model of execution used is hanging, and it is given under Section 354(5)

⁸ A Voyage to Surat, in the year 1689, John Ovington, Edited by H.G. Rawlinson, Oxford University Press, London, 1929, pp. 138-9; Monsterrate, p. 209; Indian Travels of Thevenot, p. 27.

⁹ Nicolao Manucci, Storia do Mogor, Edited by William Irvine, , IV, P. 264.

¹⁰ Capital Punishment in India by Dr. Subhash C. Gupta, 2000, P.104-105

¹¹ The Law Commission of India : Thirty-Fifth Report on Capital Punishment (1967).

of the Criminal Code of Procedure. Section 354(3) of the CrPC mentions that the court should clearly mention why it is granting such a punishment in its judgment. The Indian Penal Code defines specific crimes for which this punishment can be given under various sections of the Code. Section 120B of IPC is the initial provision that allows the courts to grant capital punishment for a person who is a part of a criminal conspiracy that is planned to commit a capital offense. Under Section 121 of IPC, the punishment can be granted for waging war against the country's government. Section 302 also provides for capital punishment for a person committing murder, and Section 396 provides for Dacoity with murder as an offense by a group of 5 or more persons. Apart from this, various other offenses like committing abetment of mutiny, giving or fabricating, or even threatening any person to give false evidence, further resulting in the conviction and death of an innocent person. After the Nirbhaya case, the Ministry of Home Affairs, India, called for a law commission and, based on its report, introduced the Criminal Law (Amendment) Act, 2018, which included parts to Section 376 of the penal Code where rape with an injury that results in death or a persistent vegetative state of the victim, rape or gang rape of a child below 12 years as well as repeat offenses in the context of rape all for which capital punishment could be awarded.

Apart from this, specific other statutes like the Indian Army act 1950, the Border Security Force Act 1968, and Indian coast guard Act 1978, and The Narcotics Drugs and Psychotropic Substances Act, 1985 give provisions for capital punishment for specific offenses or organized crimes against the security of the country.

Conflict with the Constitution

Death Penalty is an irreversible mode of punishment which does not give any chance of reformation to the accused. It infringes various rights like the right to life and equality. *Jagmohan Singh V. State of U.P.*¹² was the first case where the question of constitutional validity of death penalty came before the apex court. Section 302 of IPC, 1960 (Death penalty for murder) was put under the test of constitutional validity. The main contention put forward before the Supreme Court was that it was violative of many fundamental rights granted to citizens and especially violative of Article 14 stating the reason that in two similar cases the punishment given for murder is life imprisonment and in some cases death penalty is given.

¹² *Jagmohan Singh V. State of U.P.*, AIR 1973 SC 947

Justice Krishna Iyer in the Judgment of *n Rajindra Prasad V. State of U.P* pointed out that “Section 302 of Penal simply gave discretion to the judges to impose either death sentence of life imprisonment on the persons convicted for the offence for murder, without giving any guidelines as to the exercise of that discretion.”¹³ He stated that “unguided discretion in this matter even in the hands of the judges was grave risk as the question is of life and death. The matter should be reviewed because of the irrevocable nature of the death penalty. The error committed by the Judges in sentencing a person to death was beyond correction.

Article 245, the fundamental allocation of lawmaking power to Parliament. The argument on this last head was that by failing to specify precise standards to be applied by judges in determining the sentence, Parliament had "abdicated" or impermissibly "delegated" its legislation.

Evolution of Mandatory Death to Doctrine of rarest of rare cases

This means that if a person commits a certain kind of offense then he will be punished only with a death sentence. In India, a mandatory death sentence existed in the Indian Penal Code, 1860. Section 303 of the Indian Penal Code, 1860 provided for a mandatory death sentence but the main ingredient for the attraction of this penal provision was that person who was already serving a life sentence commits murder would be punished for death. The basic condition to get charged under this section and to get a mandatory death sentence a person must commit murder who is already serving a life sentence. The question of the constitutional validity of mandatory death sentence (Section 303 of the Indian Penal Code, 1860) came up before the Apex court in the case of *Mithu V. State of Punjab*¹⁴. The main and basic contention for challenging the constitutional validity of the mandatory death penalty was that Section 303 of the Indian Penal Code, 1860 is violative of Article 14 (Right to Equality) and Article 21 (Right to Life) of the Indian Constitution, 1950. It was further contended that the intention of the legislature was wrong in classifying different kinds of murders as it was violative of Article 14 of the Indian Constitution, 1950. From this case onwards, the issue of mandatory death was diluted and the country introduced the doctrine of the rarest of rare cases as a recent trend. In the year 2018 on delivering the judgment in the case of *ChhannuLal v. the State of Chattisgarh*, the Supreme court judge, Justice K. Joseph said that "The constitutional regulation of capital punishment attempted in *Bachan Singh versus the State of Punjab* in 1980 has failed to prevent

¹³ *Rajindra Prasad V. State of U.P*, AIR 1979 SC 916

¹⁴ *Mithu V. State of Punjab*, AIR 1983 SC 473

death sentences from being 'arbitrarily and freakishly imposed' and that capital punishment has failed to achieve any constitutionally valid penological goals, we are of the view that a time has come where we view the need for the death penalty as a punishment, especially its purpose and practice."¹⁵

International Sandings

Article 5 of the Universal Declaration of Human Rights mentions that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The aim of introducing this article was to include the most degrading punishment in the country, capital punishment.¹⁶

The International Covenant On Civil And Political Rights in its Article 7 also mentions that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁷

The Second Optional Protocol to the International Covenant on Civil and Political Rights aims at the abolition of the death penalty. There is also growing concerned at the irreconcilable conflict between the death penalty and the infliction of torture or cruel, inhuman, or degrading treatment or punishment that it tries to address.

The ECOSOC Report on Capital punishment is a very crucial report that was given on 21 July 2020 as it asses the fair methods of execution and introduces guidelines for the same. The report goes on to outline international developments relevant to capital punishment, including resolutions of the General Assembly, work of the Human Rights Council, of the Office of the UN High Commissioner for Human Rights, and work of regional organizations. It also provides information on international treaty obligations to which States have committed during the survey period, in particular under the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. considers the implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, which was adopted by the ECOSOC in 1984 and updated in 1989. It contains a detailed elaboration on Safeguard 1 relating to the imposition of capital punishment “only for the most serious crimes” namely intentional crimes with lethal or other extremely grave consequences.

¹⁵ Chhannu Lal v. State of Chhattisgarh, SCC OnLine SC 2570

¹⁶ Universal Declaration of Human Rights(1947), Article 5

¹⁷ International Covenant On Civil And Political Rights (1976), Article 7

A number of recommendations are presented for consideration by the ECOSOC. One is that States that continue to apply the death penalty be urged to report on the number of persons sentenced to death or executed and the crimes for which capital punishment is applied, taking into account that transparency is a requirement for fair and effective criminal justice. It has been noticed in India that the record of the number of people executed from the central jails have gone missing or it is unclear whether it was maintained in the first place. This has seriously hampered the process of finding if the number was just, fair as prescribed by the United Nations' ECOSOC report.

Judicial Precedents

*Bachan Singh vs. the State Of Punjab*¹⁸

The appellant, in this case, is a murderer who murdered his wife and two other people Desa Singh, Durga Bai, and Veeran Bai and caused harm to others with an axe. In this case, the issue concerned the fundamental right to life and other rights guaranteed in part 3 of the constitution. The apex court, in this case, introduced the doctrine of rarest of rare cases for the death penalty being used as a punishment and mentioned that in such cases, the fundamental rights are not said to be infringed. The court also mentioned the case of *Jagmohan Singh v State of Uttar Pradesh*¹⁹ was the first case to consider the constitutionality of capital punishment. The five-judge bench of the Supreme court mentioned that freedoms under Article 19 are subject to restrictions, and the punishment was seen as an exception more than the rule of law. Therefore, it upheld the constitutional validity of *Rajendra Prasad v. State of UP*.

*Mukesh & Anr vs. State For Nct Of Delhi & Ors*²⁰

The case *Mukesh and Anr v. the state for NCT Delhi* is one where a group of 6 men in a moving bus in Delhi raped and caused serious bodily injuries to a girl who was named 'Nirbhaya' by the press, which led to the death of that girl. The rape committed was of a very gruesome method. It was the most heinous crime ever seen, which led to the formation of the Verma committee, and some recommendations were considered, and The Criminal Law Amendment 2013 was made. The accused were sentenced to death, and even the Supreme court upheld this decision.

¹⁸ AIR 1980 SC 898

¹⁹ AIR 1973 SC 947

²⁰ [2017] CRIMINAL APPEAL NOS. 607-608 OF 2017

*Vinay Sharma vs. Union Of India*²¹ was a review petition submitted to the Supreme court by the death-row convicts of the Mukesh case petition to review the capital punishment that was awarded to them. The Supreme court rejected this petition and upheld the punishment. The President of India has powers under Article 72 of the Constitution has the power to reduce the punishment; however, even the President rejected this plea.

Conclusion

The retributive theory of justice is one of the most ancient and most infamous theories which is not expected to be legalized in a civilized society. The intention behind the theory is to punish a person so that the country believes fit by making him go through everything that he did to another person. The idea of reformation is not given as much importance in theory, and therefore, it is largely criticized. In India, the idea of Capital punishment finds its roots in this theory. Even though it is used in the rares of rare cases, the lawmakers found it necessary to include such punishment as a justification for the number of heinous crimes that take place. The criticism that this method of punishment holds is that the lawmakers implicate that the fundamental right to life guaranteed to a person can be taken away if that person commits an offense by taking a person's life or causing a national threat. As seen in the above precedents, a doctrine of the rarest case is mentioned. However, it is vast and gives absolute power to the Judiciary to interpret differently in different cases. It is also seen that the list of death penalty convicts who were hanged or executed to death since independence is not available in the prison records. This also leads to more suspicion. In this era where the Rights of convicts are gaining more importance, it is necessary to revisit this mode of punishment and the severe threat it poses to justice.

²¹ [2020] WRIT PETITION (CRL.) NO.65 OF 2020