

## RETRIBUTIVE THEORY OF PUNISHMENT: A CRITICAL ANALYSIS.

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### ABSTRACT

*Since the commencement of history, social orders have rebuffed guilty parties while simultaneously attempting to legitimize the training on good and moral criteria and also to explain the connection between penalty and fairness. Punishment is often synonymous with crime and starts as personal revenge. Only the perpetrator carries out the punishment in order to fulfil his or her need for vengeance. Just distressed individual reserved the option to acquit the wrongdoer and no such power is conferred in general mass. punishment is granted to decrease wrongdoings and keep up harmony in the public eye. It is a regularly acknowledged idea that speculations of discipline address the premise of legitimating for the state's criminal discipline methodology. This paper is an unassuming undertaking to concentrate on the general situation of retributive theory of punishment in India, and also some judicial approach regarding the retributive punishment in India. In the last segment, critical analysis of retributive punishment and some recommendations to the system has been done by the author. At the very least, I hope that my criticism of retributivism will reignite a discussion that seems to have acknowledged the superiority of retributivist roles. The study is mostly based on sources from various research article, journals and books.*

**Keywords:** Punishment, Retributive, Critical analysis, Judicial approach, perpetrator.

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## **INTRODUCTION**

People of various faiths and classes can be seen in society. Since not every finger is the same, there are people who comply with the law and those who flung laws because of their evil intent. The State is responsible for protecting its interests. Any individual committing a crime that is prohibited by natural or statutory law, a punishment is the consequence of that crime. The wrong doers are punished for the purpose of preventing them from reoccurring the same wrong and turning them into lawful people. The type of penalty to be forced on the suspect depends on the type of society in which one lives. The efforts of various punishment theories are to transform violators into law enforcers. The legislation contains threats of imprisonment for future offenders and seeks to make the current offenders suffer to protect society from criminals and law-breakers. In its broader context, therefore, penal law comprises both substantive penal law and proceedings. Substantial criminal law describes and punishes offences and administers the substantive law in accordance with the Procedural Law.<sup>3</sup>

The most distinctive characteristic of penal law is undeniably punishment. Those who want to understand criminal law also need to comprehend the underlying goals of punishment and what society seeks to accomplish by punishment. Traditionally, crime has four punishment objectives. This includes restricting and eliminating society, imposing punishment for damages done to society, rehabilitating wrongdoers and dissuading the culprit and others generally from additional crime.

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<sup>3</sup> Administration of Criminal Justice System in India, available at: '<https://www.lawteacher.net/free-law-essays/administrativelaw/administration-of-criminal-justice-law-ssays.php?vref=1>' (last visited on March 25 2021)

Antony Flew,<sup>4</sup> HLA Hart<sup>5</sup> and Stanley Benn<sup>6</sup> have defined punishment “as something unpleasant in lieu of an offense against legal rules, imposed by a legal authority and administered by the society”. Unlike, Durkheim has stated, that “punishment is the reaction of the society against crime, punishment should be a proportionate response to the harm caused to the society.” The changing social framework has driven society to a scope of discipline thoughts and extremist changes, from ordinary to new, and serious issues regarding them.

“The end of criminal justice is four in number, and in regard to the purposes served by the penalty may be divided,” writes Sir John Salmond. Some of the theories of punishment are -

1. Deterrent theory
2. Retributive theory
3. Preventive theory
4. Reformatory theory
5. Expiatory theory.

## **RETRIBUTIVE THEORY**

The term "**Retribution**" has long been a philosophical theory based on the principle of desert, proportionality, justice and rational inquiry.<sup>7</sup> Punishment must be proportionate to the offence committed according to retributivists. Desert refers to any demerit that the accused committed a felony. The punishment must be equivalent with the depth of the desert. The greater the desert, the greater should be the penalty. According to Sutherland, “In the code of Hammurabi’s Lex talionis, the classic type of retributivism is the eye for the eye and the teeth for the tooth.”<sup>8</sup> Officials have advised and the general public agreed that criminal is worth the suffering. In its powers, the misery inflicted by the State is regarded as the political equivalent

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<sup>4</sup> Antony Flew, ‘The Justification of Punishment’ 29 *Philosophy* 293-294 (1954)

<sup>5</sup> HLA Hart, “*Punishment and Responsibility*” 5 1st, Clarendon Press, Oxford (1968)

<sup>6</sup> S I Benn, ‘An Approach to the Problems of Punishment’ *Philosophy* 127, 325 (1958)

<sup>7</sup> Gerome Hall, *Perennial Problems of Criminal Law* 16(1973)

<sup>8</sup> Edwin Sutherland and Donald Cressey, *Principles of Criminology Bombay Times of India Press* 287 (1965).

of human vengeance. Retributivism according to Herbert Hart is “the application of the pains of punishment to an offender who is morally guilty.”<sup>9</sup>

Punishment is however considered to be a kind of 'retour' for crimes committed under the retributivist penal theory. Supporters of the retributive theory claim that “if the perpetrator does not get the punishment he deserves, either or both of the following consequences may occur: the victim may pursue vengeance, which could mean lynch-law if his friends cooperate with him; or the victim may fail to make accusation or give evidence, handicapping the state in relations with criminals.”

Judicious conduct is concluded from the standards of ethical quality, and punishment can satisfy the soundness of good and equity. Guilt is a reasonable prerequisite for punishment to be justified. Thus, according to Kant, a human being is a free man who has legal rights based on mankind's dignity. At the point when an individual effects with another's right, he relinquishes and surrenders his own and accepts the intercession of others in his life as legal. It is referred to by Kant as "moral authorization"—Befugnis to Intervention.<sup>10</sup> Kant defined right to execute sentences on the offenders as “the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him”<sup>11</sup>

Since most citizens have obeyed Criminal Law, the criminal has benefited; as a result, he owes society an obligation to pay debt in the form of punishment, which is a prerequisite for his reemergence into society.<sup>12</sup> Hegel agrees with Kant's thesis that retribution involves punishment. He does, however, have a theological rationale for vengeance, unlike Kant. A

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<sup>9</sup> R.A.Duff and Stuart P.Green, “Introduction: The Special Part and Its Problems’ in *Defining Crimes: Essays on the Special Part of the Criminal Law*” *Oxford L Oxford University Press* 1-20 (2005)

<sup>10</sup> Amit Bindal, “Rethinking Theoretical Foundation of Retributive Theory of Punishment” *51 JILI*. 323 (2009)

<sup>11</sup> Immanuel Kant, “Retributivist Theory’ in Edward Allen Kent, *Law and Philosophy*” *New York, Meredith Corporation* 288 (1970)

<sup>12</sup> Murphy, J.G., “Retribution, Justice and Therapy; Essays in Philosophy of Law” *Holland: D Reidel Pub, Co.* 83-84 (1979)

crime, according to Hegel, “is an infringement of rights; this infringement is erased by the infringement of the criminal's rights, especially his right to freedom, induced by the imposition of punishment.”<sup>13</sup>

Hampton supported this viewpoint, claiming that the suspect fails to accept the victim's dignity as a human being simply by committing the crime. Retributive punishment restores “Retributive punishment re-establishes the estimation of the casualty denied by the miscreant's activity by developing an event that not just disavows the activity's message of incomparability over the person in question, yet does as such in a way that builds up their fairness.” As a consequence, punishment will “cancel the message sent by the crime that they are not equal in worth.”

Punishment shall be inflicted only to the guilty, but not to anyone else, according to the Roman doctrine of **Poena sous tenere debet actors et non alios**. Retributive theory of punishment is based on the above doctrine. It punishes voluntary actions while excluding involuntary acts that are less blameworthy, such as acts committed by insane person or immature people.

‘Retributive justice has been portrayed differently, yet it is better perceived as such an justice that sticks to the accompanying three standards:

- that the individuals who carry out certain classes of illegitimate demonstrations, like inalienably genuine wrongdoings, ethically merit an impartial discipline;
- that it is characteristically and ethically great regardless of whatever other advantages that may emerge if a veritable position gives them the discipline they merit; and

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<sup>13</sup> Hegel, “Philosophy of Right” 1st, Dyde, 100 (1952)

- that it is totally unsuitable to rebuff the blameless or incur difficult punishment on them.

### **JUDICIAL APPROACH REGARDING THIS THEORY**

1. Justice Chinnappa Reddy in the celebrated case **Bishnu Deo Shaw v. State of W.B.**<sup>14</sup> observed “The retributive theory is incongruous in an era of enlightenment. It is inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the persons punished.”
2. Justice Krishna Iyer also expressed his disapproval of the retributive theory in **Rajendra Prasad v. State of U.P.**,<sup>15</sup> He said: “Punishment .... is not lextalionis of retributive genre. To be strictly ... retributive, the same type of cruel killing must be imposed on the killer. Secondly, can the hanging of the murderer bring the murdered back to life?The dull cold ear of death cannot hear the cries or see the tears of the dying convict.”
3. In **Ram Narain vs. State of Uttar Pradesh**,<sup>16</sup> it was held that “the broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient...”
4. In **Bablu v. State of Rajasthan**,<sup>17</sup> reiterated that “As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the

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<sup>14</sup> (1979) 3 SCC 714

<sup>15</sup> (1979) 3 SCC 646.

<sup>16</sup> (1973) 2 SCC 86, para. 8

<sup>17</sup> (2006) 13 SCC 116

innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.”

5. In **Lehna v. State of Haryana**,<sup>18</sup> it was observed that, “The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice, it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that the punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without [fault].”
6. The Supreme court in **Union of India v. Kuldeep Singh**,<sup>19</sup> repeated the focal position involved by Retributive theory of punishment: "criminal law adheres to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences.”
7. Justice K.T. Thomas in the case of **State of Gujarat Vs. Hon'ble High Court of Gujarat**,<sup>20</sup>“observed that the retributive theory of punishment has waned into a relic of primitively because civilised society has realised the retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis made by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been

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<sup>18</sup> (2002) 3 SCC 76

<sup>19</sup> (2004) 2 SCC 590.

<sup>20</sup> (1998) 7 SCC 392

transposed from retribution to cure and reforms so that the original man, who was mentally, healthy can be recreated from the ailing criminal.”

8. In the case of **Sri Ashim Dutta Alias Nilu vs State of West Bengal**,<sup>21</sup>“In this case, it was observed that both deterrent and retributive punishment aim at prevention of the recurrences of the offences by others passing exemplary punishment for a particular offence. But the civilization and the societies are progressing rapidly. There is advancement of science and technology. The literate people and the experts in different branches of knowledge started thinking in a different way. Eye for an eye, and tooth for a tooth are no more considered as the correct approach towards the criminals. Such principle may perpetuate the rule of the Jungle but cannot ensure the rule of law.”
9. The **Mukesh & Anr vs State for Nct Of Delhi & Ors (Nirbhaya Judgement)**,<sup>22</sup>is “indeed the first and foremost case to be mentioned, while talking about retributive justice in India. In this Judgement, the Supreme Court sentenced four out of six felons involved in the extremely heinous Delhi gang rape case to death, much to the delight of the society, as they had committed an extremely gruesome, as well as morally unimaginable crime.”
10. **Anwar Ahmad v/s. State of Uttar Pradesh and Anr.**<sup>23</sup> “In this case, the convicted had already undergone a six-month imprisonment term, before being officially convicted by the Court. The Court held that since the convict had been convicted and also, the required ‘blemish’ had also been imposed upon him, it was not necessary to sentence him again in the name of ‘retributive punishment’, as it would inflict a very big loss upon the family as well.”

## **CRITICAL ANALYSIS OF THE THEORY**

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<sup>21</sup> Cr. Appeals 126-129/1997

<sup>22</sup> (2017) 3 SCC 719

<sup>23</sup> 1991 CriLJ 717



Since it treats a criminal with dignity, retribution is neither inhuman nor barbaric. It helps him to make reparations for his misconduct by suffering. The doctrines of desert, justice, and proportionality abolish harsh, inhuman punishments and condemn the uncivilised vengeance theory. Punishment is relatively limited under retributive principle. Retributive theory cannot be termed as representation of vengeance theory as the state and criminal justice system cause fair punishment on the wrongdoer. The retributive theory cannot be criticised for this because it never asserted it. Law dismisses the demonstration of the criminal by forcing punishment; if this is to fulfil the retaliation of the survivor of wrongdoing or the sensations of general mass, at that point the retributive punishment can't be reprimanded for it since it never guaranteed it because if proportional amount of punishment is not imposed on the wrongdoer then the victim will not trust on the justice system and will take the law in his/her hand to punish the wrongdoer by their own and that will create a chaos in the society and an imbalance will be created in the system. Not only the revenge feeling of victim, but also the feelings of general mass have to be also satisfied so that they do not become outrageous and started mass movement because of want of justice.

We get the example of this attitude of people in our present days as because the justice system could not satisfy the feeling of revenge of general mass as well as the victim, many candle marches, billboard with posters were done in many cities and parts of our country. Not only physical movement but also the movement in the social media through viral videos, revengeful posts and posts in want of justice for the victim and infliction of punishment on the criminal were put up in the online platform in order to pressurise the state and the justice system to adjudge the matter in a very quick and competent manner. So, it is necessary to inflict proportionate punishment in consonance with the severity of the delinquency on the criminal not only to satisfy the revengeful feeling of victim and the general mass but also to

make way for the criminal to expiate from the criminal mind of himself. By punishing wrongdoers, people are taught about the magnitude of the evil that encompasses the crimes, as well as the severity and consequences of committing a crime. Though Retributive theorists believe that wrongdoers shall be punished with what they deserve but the essence of mercy is a defining characteristic of retributive philosophy. A convict's guilt is forgiven and he is allowed to reintegrate into society once he pays his debt to society in the form of retribution. In deterrent punishment, this kind of theory is lacking.

In **Dhananjay Chatterjee v State of West Bengal**,<sup>24</sup> it was held that “appropriate punishment is the manner in which the courts respond to society’s cry for justice and that justice demands imposition of punishment befitting the crime to reflect public abhorrence.”

Retributive theory of punishment has some criticism also. It is said that it has failed to propose any guideline regarding what would be the proportional punishment upon the wrongdoer and this cause difficulty on the Judges to measure the proportionate amount of punishment on the wrongdoer. The key drawback of this argument is that punishment in and of itself is not reducing the crime. It only serves to exacerbate the problem. Punishment is inherently bad and can only be justified if it produces a better outcome. Revenge is a kind of unbridled justice. After punishing the wrongdoer with appropriate punishment, the crime rate in the country is not reduced. Rather in answer, the criminals are getting much more furious and after commission of crime, they are not leaving the victim alive, so that there is no sign of witness whatsoever and they get much lesser amount of punishment than they should have received if victims should have been alive. For example, after the Nirbhaya rape case, though the rapists were sentenced with death penalty and it was a kind of retributive punishment, but

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<sup>24</sup> 1994 SCR (1) 37

after that also many rape cases, murders and other such crimes are being committed till now. The functioning of social institutions and social processes is now scientifically proven through numerous empirical studies to be more responsible for crime than the criminal himself. As a result, a question arises that will it be fair to impose retributive punishment on those who commit crimes as a result of circumstances rather than personal characteristics?

Beccaria was an outspoken opponent of the retributive doctrine and the lex talionis concept. In Beccaria's day, the primary purpose of punishment was vengeance or revenge. He expressed his rejection thus: "The purpose of punishment is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned."<sup>25</sup>

So, we can say though retribution talks about infliction of punishment what the criminal deserves and it is not cruel and barbaric in true sense but it is now outdated, it is now backward in nature which only talk about infliction of deserve punishment on the criminals and satisfying the feelings of victims and general masses. Retributive discipline just makes hoodlums affirmed foe of society.

## **SUGGESTIONS**

Retributive punishment is somewhat capable of efficiently detecting crimes and apprehending offenders, namely the threat of negative repercussions to motivate compliance among those

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<sup>25</sup> Mike C. Materni. "Criminal Punishment and the Pursuit of Justice". 2 Br. J. Am. Leg. Studies. 264-265 (2013)

tempted to commit crimes. In addition, retributive punishment provides a second form of deterrence, which ensures law-abiding people that those who willingly follow the rules will not be sacrificed to those who do not. But retributive system needs to be cope up with the upgradation of society and its development. Now a days the concept of “eye for an eye and tooth for a tooth” does not really acceptable by the experts. Because this system is somehow failing to reduce the crime rather it is causing loss of life of the victim. But It is not at all feasible to take away the retributive type of punishment completely as because there is a mentality of the people that we feel good on seeing the criminal to suffer. Justice is a feeling. It is an abstract feeling and the one criterion of it is retributive punishment. So, it would be feasible if some reform in the sentencing policy and also in prisons shall be taken. Execution should be reasonable, speedy trial should be taken into account and it shall be just for everyone without any discrimination. One thing our criminal justice system can introduce is the leniency in imposing sentence to the offender by balancing both side of the offender and the victim. Because punishment should be there. If there is not surveillance of punishment then every people will act according to their will and fancies. Man will turn into animals. So, in present scenario after analysing the mind of the offenders we have to change their prospective criminal mind and have to take care of them. So, in the retributive punishment, judges have to be lenient and some opportunity of reformations in the prisons shall be introduced through which the offenders will pay their debt in form of serving the punishment as well as they will reform themselves so that after coming from prison, they can lead a better life where their goodness comes to play which was shadowed down inside in the past.

## CONCLUSION

To conclude the discussion on retributive theory, it can be said, quoting Jeffrie Murphy that “The retributivist seeks, not primarily for the socially useful punishment, but for the just punishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand.”<sup>26</sup> Retributivism justifies “punishment in terms not of its contingently beneficial effects but of its intrinsic justice as a response to crime; the justificatory relationship holds between present punishment and past crime, not between present punishment and future effects.”<sup>27</sup> In terms of effectiveness and significance, retributive theory is a form of punishment that continues to dominate public and intellectual space. The retributive principle is based on the concept that a convicted person should get the penalty he or she deserves; otherwise, the victim can seek vengeance or fail to seek access to the criminal justice system set up by the state. As a result, the state's ability to deal with offenders would be hampered. Punishment alone is not a cure for the offender's disobedience, according to retributive principle. It only serves to worsen the problem. Punishment is bad in and of itself, and can only be justified if it produces a better outcome. Revenge is a kind of unbridled justice. Punishment has a secondary function of revenge. The concept of retribution in the form of "an eye for an eye and a tooth for a tooth" is, however, controversial, and the philosophy of *lex talionis* has sparked abundant disparagements.

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<sup>26</sup> Jeffrie G. Murphy. “Retributivism and the State’s Interest in Punishment” in *Nomos XXVII: Criminal Justice 156*, J. Pennock & J. Chapman eds., 158-59 (1985)

<sup>27</sup> R. A. Duff. “Punishment, Communication, and Community,” *Oxford: Oxford University Press*.19-20 (2001)

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