APPLICATION OF UTILITARIANISM THEORY OF PUNISHMENT IN RAREST OF RARE CRIMES

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ABSTRACT

The Theory of Utilitarianism was put forth by Jeremy Bentham and John Stuart Mill. According to this theory, any action or law was aimed to maximize happiness and minimize pain, along with that Bentham believed in the greatest happiness of the greatest number.[1] A similar theory also finds its application in theories of punishment in the criminal legal system of the country. The Utilitarianism Theory of Punishment puts forth that the fundamental objective of any penal action should be societal good.[2] Along with that, there are other theories based on various ideologies such as Retributive, Deterrence, Reformative etc. While deciding upon a criminal case, the Indian judiciary, applies an amalgamation of various theories. The rarest of rare crimes usually involve a combination of both Deterrence and Retributive Theories.[3] This paper seeks to dive into the aspect of Utilitarianism theory being imbibed while deciding upon rarest of rare crimes. It aims to analyse if application of the Utilitarianism Theory in rarest of rare cases can be arbitrary in nature or not. This paper looks at various sections of the Indian Penal Code, 1860 that have provisions of death penalty and also deal with the rarest of rare crimes.[4] The paper shall also look into various landmark judicial precedents and analyse if Utilitarian Theory of Punishment can be used or not, such as Bacchan Singh[5] case and the Macchi Singh[6] Case. The research methodology used is doctrinal study wherein an analysis of the theory and its usage in judicial precedents is attempted by the researcher.

Keywords: Utilitarianism, Death Penalty, IPC, Rarest of Rare Case

[1] Brink, David, "Mill's Moral and Political Philosophy", *The Stanford Encyclopaedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.)
[2] Crimmins, James E., "Jeremy Bentham", *The Stanford Encyclopaedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.)
[3] Balagopal, K. "Of Capital and Other Punishments." *Economic and Political Weekly*, vol. 33, no. 38, 1998, pp. 2438–47. *JSTOR*, http://www.jstor.org/stable/4407181.
[4] see Section 121, 132, 194, 302, 303 and 375, Indian Penal Code, 1860
[5] (1980) 2 SCC 684
[6] AIR 1983 SC 1957

Introduction

Reformation of criminals or corrective attempts to reduce crime in India are based on the notions of awarding punishments or sanctioning fines or both as the instances mandate or the gravity of the crime demands. For some crimes committed, the punishment might be restricted to a mere fine of some minimal amount which was valued to be a lot during the times such crimes were codified. Meanwhile, for others they might be termed as "rarest of rare" and therewith awarded with harsher punishments along with fines to set a deterrent example. This paper lays stress on the latter type of crimes, being grave and moreover rarest of rare in nature and how an attempt can be made to reduce such crime levels in the society at large using the Utilitarianism Theory of punishment while looking at such crimes. The paper focusses initially on the existing theories being used by criminal courts while deciding upon punishments and how moves forward to elaborate on how utilitarianism can be another suitable lens to look through and then decide on rarest of rare crimes. It goes on to substantiate that the current theories that are being used in order to decide on rarest of rare crimes are not resulting in the intended degree of impact on the levels of crime which the Courts and law makers exhort to create, and how an attempt to do so can be made by imbibing utilitarianism while deciding upon such grave criminal cases.

The rarest of rare case doctrine was propounded by the Hon'ble Supreme Court of India in the case of Bacchan Singh v. State of Punjab[7], where though an explicit definition of "rarest of rare crimes" wasn't given, however, certain generalized guidelines were formulated for the judiciary to decide on such grave crimes in the future. The punishment for rarest of rare crimes is not seen to vary much, with death penalty or the concept of capital punishment being a constant stance. The concept of capital punishment or death penalty in India is said to be used at instances highly rare in nature. In cases of crime being of grave nature, life imprisonment if often sough to be the first resort and then death penalty is used as an exception and awarded in the gravest of cases.[8] The Supreme Court in its judgment of Macchi Singh v. State of Punjab[9], laid down 5 factors to determine whether any instant case was the rarest of rare, and based on that accordingly the punishment was to be awarded. The factors to be taken into consideration were manner of commission, motive, social heinousness of the crime, degree or magnitude of crime and personality of the person committing such a crime. While deciding upon awarding

[7] AIR 1980 SC 898
[8] *Ibid.*
[9] AIR 1983 SC 957

capital punishment or rather punishments of any sort, the criminal court does take into account the law as well the theories surrounding the aspect of punishment and then subsequently pronounce a punishment. While deciding upon the rarest of rare cases as well, there are some theories that are followed by criminal courts in order to ensure the punishment sentenced to the convict is just on his/her part as well. In India, the deterrence theory and retributive theory is often used as a viewing lens in order to determine whether capital punishment can be awarded or not.[10] The paper proceeds to suggest utilitarianism as an alternate theory to also be kept in mind while deciding upon rarest of rare crimes.

In this paper the researcher attempts to examine whether the current theories of punishments which are the basis of deciding rarest of rare crimes are apt for the contemporary times or not. It also aims to obtain an answer on whether utilitarianism can be incorporated with other theories while deciding punishments for rarest of rare crimes. The paper revolves around the question as to how can the Theory of Utilitarianism be incorporated or clubbed with other theories of punishment for criminal courts to decide upon "rarest of rare" crimes. 6The theory of utilitarianism should be clubbed along with other theories while deciding upon rarest of rare crimes and the same will be helpful in setting a deterrent example and also supplement existing theories that are being used.

Literature Review and Research Methodology

Various research papers talking about the doctrine of rarest of rare crimes were reviewed and a conclusion was drawn as to what theory is used to determine punishments for convicts of such crimes. Secondly, research papers focussing on basic aspects of utilitarianism as defined by various philosophers and its subsequent application in criminal law. Doctrinal mode of research has been carried out and a ground analysis of the chosen literature has been carried out. The research articles and judicial precedents that were reviewed are enlisted below:

1. "The Doctrine of Rarest of Rare Crimes": A Critical Study[11]- This paper analyses the doctrine of rarest of rare crimes and further talks about the history and background of the concept of death penalty. It also states that the concept of death penalty is "constitutionally valid and it is mark of rejection by the society." This paper helped the researcher to understand a societal perspective when such crimes are carried out by

[10] Ranjana Tiwari & Dr. Rakesh Kumar, Theories of Punishment with Special Reference to Capital Punishment, Volume 7 (Issue 10), JETIR, 2334, 2334-2336, 2020
[11] Rajkumari, "The Doctrine of Rarest of Rare": A Critical Analysis, Volume 2 (Issue 4), IJIRL, 1, 1-5, 2022

perpetrators on citizens. It is critically important to understand the response of the society who also judge such grave and heinous events through their common lens. The paper also critiques on various Supreme Court judgments and the approaches taken by judges while deciding on rarest of rare cases. It elaborates on the factors that are usually taken into consideration by criminal courts while punishing the convict and appellate courts while upholding or dismissing such orders.

2. Capital Punishment in India: An Ethical Analysis[12] - This paper has elaborated on the morality and ethical aspect of awarding capital punishment in form of death penalty. It also talks about the theories that are being used while determining such punishments, being deterrent theory and having an eye-to-eye approach. The paper mentions that the main purpose of death penalty is to deter identical or similar ones. In fact, this paper is one of the very few literatures in place to talk about utility aspect while awarding death penalty. The same shall be analysed in detail in subsequent chapters.

3. Utilitarianism and Punishment[13] - The author places significant reliance on this paper as it conceptualizes and provides an in-depth analysis of what utility in crime would imply. It is being defined and elaborated as one of the theories of punishment. It analyses various types of utilities and gives the readers with an idea as to what differences utility methods have from legal concepts of rights and fairness, it is propounded that notions of utility will indirectly point to legal soundness and welfare in the society. The paper mentions elaborately on the feasibility of utilitarianism while deciding whether death penalty should be awarded or not. The great purposes for the idea of the death penalty are the viability of the equivalent to prevent the indistinguishable or comparable violations. It is additionally emphasized that specific class or classes of violations take away the right of an individual to live. Utilitarian theory propounded by Jeremy Bentham focuses on government assistance expanding activities. This hypothesis conveys that the significant government assistance of the society offsets the hardship of life of the lawbreaker.

[12]Reema Jain, Capital Punishment in India: An Ethical Analysis, Volume 1 (Issue 1), SLS Nagpur Multidisciplinary Law Review, 26, 26-37, 2021
[13] J. J. C. Smart, Utilitarianism and Punishment, 25 Isr. L. REV. 360 (1991)

4. Bachan Singh v. State of Punjab, AIR 1980 SC 898 – This case is considered as the landmark case for rarest of rare crimes which laid down the rarest of rare doctrine and conclusively said that capital punishment or death penalty can be awarded only where the circumstances are so grave and the act committed is so serious in nature that the rarest of rare crime doctrine is satisfied.

5. Jagmohan Singh v. State of Uttar Pradesh[14] - The Supreme Court maintained the validity of capital punishment, holding that it isn't just a hindrance however denotes the dismissal of the wrongdoing with respect to the general public. The Court additionally felt that Indians couldn't bear to explore different avenues regarding abrogating capital punishment.

Theory of Utilitarianism

Utilitarianism is a type of consequentialism. For consequentialism, the ethical rightness or unsoundness of a demonstration relies upon the outcomes it produces. On consequentialist grounds, activities and inactions whose unfortunate results offset the positive outcomes will be considered ethically off-base while activities and inactions whose positive outcomes offset the unfortunate results will be considered ethically right. On utilitarian grounds, activities and inactions which benefit not many individuals and mischief more individuals will be considered ethically off-base while activities and inactions which hurt less individuals and advantage more individuals will be considered ethically right.[15] Pain and pleasure can be described in more than one manner; for classical utilitarians like Jeremy Bentham (1748-1832) and John Stuart Mills (1806-1873), they are characterized regarding joy and torment. On this view, activities and inactions that cause less torment or misery and more delight or joy than accessible elective activities and inactions will be considered ethically right[16], while activities and inactions that cause more agony or despondency and less joy or joy than accessible elective activities and inactions will be considered ethically off-base. In spite of the fact that delight and satisfaction can have various implications, with regards to this part they will be treated as equivalent.

It is observable that utilitarianism is against deontology, which is an ethical hypothesis that expresses that as moral specialists we have specific obligations or commitments, and these

[14] 1973 AIR 947
[15] Supra note 13
[16] *Ibid.*

obligations or commitments are formalized regarding rules.[17] There is a variation of utilitarianism, specifically rule utilitarianism, that gives rules to assessing the utility of activities and inactions. The distinction between a utilitarian rule and a deontological decide is that as indicated by rule utilitarians, acting as per the standard is right in light of the fact that the standard is one that, if broadly acknowledged and followed, will deliver the greatest. As indicated by deontologists, whether the results of our activities are positive or negative doesn't decide their ethical rightness or moral unsoundness. What decides their ethical rightness or moral misleading quality is whether we act or neglect to act as per our obligation or obligations.

Under the utilitarian philosophy, the purpose of criminal law is to maximize the happiness of society.[18] Since crime and punishment are terms inconsistent with happiness, these should be kept to a minimum.[19] Utilitarians do identify with the fact that society free from crime is an impossibility, yet, Utilitarians endeavour to inflict only as much quantum of punishment as is requisite to prevent crimes in the future. In this sense of the commensuration of crime and its consequentialist punishment the Utilitarians play on a mathematical formula of sorts. They are aware that punishment has consequences for the offender as well as the society. Thus, embrace the formula that the total good produced by the punishment should exceed the total evil caused by the offence committed.[20] Only then would punishment truly turn to be of utility. Under the utilitarian hypothesis, criminal regulations which determine discipline for criminal lead ought to be planned in a manner which discourages comparable future crook direct. Hence, it tends to be seen that prevention as an idea likewise works on two levels, explicit and general.[21] In like manner speech, general discouragement suggests discipline ought to keep others from carrying out future criminal acts. In this manner, discipline fills in to act as an illustration until the end of the social set-up, while likewise capitalizing on the ace in the hole of putting others on the admonition that criminal way of behaving of such and additionally comparative sort will be rebuffed as needs be.[22]

Theories of Punishment

The Retributive theory of punishments basically implies that a person should be punished

[17] Supra note 13
[18] Utilitarianism Theory of Punishment- Volume 1, MHRD, (2020)
[19] Ibid.
[20] Jeremy Bentham, An Introduction to the Principles of Morals and Legislations, Wilfred Harrison (Ed.) Basil Blackwell, Oxford, as seen at http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf
[21] R.N. Bohn & K.N. Haley, Introduction to Criminal Justice (2002)
[22] Supra note 21

according to the nature or heinousness of the crime he commits. This theory takes into account a test of proportionality, according to which, a person should be punished with such severity as the gravity off the crime was. In cases of rarest of rare crimes, the gravity of the crime committed would result in determining whether capital punishment is to be awarded or not. The same has been seen to be followed by criminal courts in various cases as well. Another theory that has been extensively used while deciding upon such cases is the Deterrence Theory of punishments. According to this theory, the main aim of the judiciary to award a particular punishment is to deter its commission in the society using the current convict as an example. Let's assume, X has committed murder of an entire family of 10, which becomes a grave and heinous offence to commit. The trial court while deciding upon it shall consider the fact that such a crime has to be deterred from being committed in the society in the future by any other person. If the court grants life imprisonment or death penalty to the convict, one of the objectives kept in mind by the Courts is to make sure that such crimes are prevented from being committed in the future. The convict in the case, X, shall be considered to be a deterrent example for others in the society.

The fundamental disadvantage of this philosophy of deterrence is that in all situations where the justice delivery framework is slow and justice is postponed, the entire way of thinking tumbles down similar as an extension gone submerged, ending up vain and every day. Consequently, postponed justice frequently obstructs prevention thusly. Deterrence per say isn't impediment "except if it shows up as a genuinely unavoidable outcome of criminal way of behaving." The fundamental prerequisite of any general public is a level of adjustment to its principles and regulations. Each general public requires the altruistic nature of individuals coming to the guide others. In such manner, social set-ups must boost consistence to the regulations and co-employable way of behaving of its people by doling out some "positive task of economic wellbeing to the people who adjust or are useful. This positive endorsement suggests negative dissatisfaction. Danger of such dissatisfaction is the base 'corrective assent.' This kind of objection fittingly appears as discipline in the socio-legal order. Each discipline which "communicates the disdain or outrage of the disciplinarian might have an obstacle impact at," a flashing level, yet, it barely at any point prompts the sensation of responsibility, regret, expiatory or a general difference in demeanour. In stray cases, obviously, exemptions frequently demonstrate the standard, where the rebuffed have been over-accompanied a sensation of culpability and felt regret for their activities and subsequently perceive the need of discipline, even to the degree of tolerating the disciplinary idea of discipline. Among the

lesser acknowledged drawbacks of punishment is the fact that it loses its credence with the credibility of the punisher. That is to suggest that punishment is rendered ineffective if its administrators are not suitably respected by the wrong-doers. In a highly corrupt prison administration and penal system, where bailiff and jailors, even superintendents and judges are perceived as dishonest, respect for the ideology of punishment would be a rarity in itself.[23] There has also been a tussle between the applications of retributive theory and utility theory.

The Retributive approach seeks to reason out the punishment awarded on a wrongdoer on basis of just actions and the crimes which have been committed by the wrongdoer. The idea is to do wrong or treat accordingly the wrongdoer, who did similarly proportionate acts to any of the people. Retribution is a backward phenomenon which basically implies that it means to look back at the instances and circumstances of the wrongful act so performed and then deciding upon an accurate punishment.[24] In common understanding, it is like taking revenge on the wrongful act doer, or in some way an act of vengeance not against just the doer, but also to set an example to other people who might have had or are thinking to perform the act so punished. Popular philosopher Robert Nozick and Immanuel Kant have different ways of looking at retribution. One of the main criticisms of this theory is that the theory lacks utility aspects.[25] Gainful and desirable consequences which affect the society at large should also be considered in order to give the utilitarianism touch to it. An example of this could be criminal reformation which would benefit the society and also be used to set as a deterrent example. Another significant criticism of the retributive theory is the main foundational principle from which this theory stems that the punishment given should be proportionate to the crime that has been committed.[26] Problems might arise as we try to ascertain how much or what retribution a criminal deserves.[27] Especially in the cases involving rarest of rare crimes, it would be difficult to consider whether capital punishment should be proportionate to the grave crimes that have already been committed.[28] Applying the retributive theory of punishment in isolation, the only way a wrongdoer is awarded death penalty is when the doer commits murder. However,

[23] Supra note 18
[24] Andrew F, A Critical Assessment of the Retributive Theory of Punishment, Volume 3, Global Journal of Humanities, 9, 9-10, 2003
[25] *Ibid.*
[26] Koritansky, Peter. "Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas." *History of Philosophy Quarterly* 22, no. 4 (2005): 319–38.
[27] Bindal, Amit. "Rethinking Theoretical Foundations Of Retributive Theory Of Punishment." *Journal of the Indian Law Institute* 51, no. 3 (2009): 307–39.
[28] Vibhute, K I. "Choice Between 'Death' And 'Life' For Convicts: Supreme Court Of India's Vacillation *Sans* Norms." *Journal of the Indian Law Institute* 59, no. 3 (2017): 221–64.

offenses like gang rapes, armed robbery and other capital offences, after a significant scrutiny of the facts by the courts, may also come under the ambit of grave and should be given death penalty[29] as well even tough on the periphery it may seem against the retributive theory.

Conclusion

Usage of theories like deterrence and retribution aid in safeguarding however, it is only for the time being. If utilitarianism is used to determine capital punishments, the fact that it supports or denotes societal action is itself enough to deter the criminal enough with the existing theories. The author is not contending to use the utility aspect in valence, but this aspect should club and consider itself along with other theories and it shall aid the most then if, say, retributive theory is used along with consideration of utility. For any crime that has been categorized as rarest of rare, is often met with a lot of societal despise and that can play a role as well, only once it is proven beyond reasonable doubt that the accused is/are guilty of the crime. This societal despise can be incorporated within the deciding factor of awarding capital punishment which would further amplify the deterrence factor as another deciding stakeholder, the general public consensus, is added in the process for deciding punishments for such rarest of rare crimes. The perpetrators of such rare crimes have an additional factor to consider as to what the society would want that would be the ambit of utility, and how the society would demand the treatment of such criminals, once proven guilty.

[29] *Manoj & Ors v. State of Madhya Pradesh*, 2020 LiveLaw (SC) 510