



Retributive Justice

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This article is based on **“Demonising the legal system won’t help”** which was published in The Hindu on 09/12/2019. It highlights the challenges associated with retributive justice.

The demand for speedy retributive justice in the recent heinous crime done against a veterinarian has brought into light the question of extra-constitutional killings. The public sentiments, political demand of public lynching of rapists inter-alia have raised the debate whether a democratic country should follow the constitutional norms and adhere to the due process of law or shall it adopt the measures of retributive justice to bring instant and speedy justice to the victim.

What do we mean by Retributive Justice?

Retributive justice is a system of criminal justice based on the **punishment of offenders rather than on rehabilitation**. It is a theory of punishment that when an offender breaks the law, justice requires that he or she must **suffer in return**. It also requires that the response to a crime must be proportional to the committed offence.

Current Issue

- While in India we have had a stringent, amended rape law in place and also fast track judicial processes, the **crime against women is still on the rise**.
- In the recent Hyderabad case, the police first turned away the victim’s family when they went to lodge a complaint and finally after the encounter of the four alleged convicts they claimed that the accused, who was under heavy police protection, tried to escape and had to be killed.

- From protests on the ground, to the commentary on social media, to MPs in Parliament, the demand for the instant killing of the accused from all corners created the public opinion for the **abandonment of the rule of law** that appears to have led to the incident.
 - The argument in this regard is that there is a perception that the legal institutions are ill-equipped to deal with such crimes and to bring the perpetrators to justice. The rule of law is not giving women the due justice, and that at the very least, laws need to be amended to create a stronger deterrent and provide quicker closure to victims of crimes of sexual violence.
 - But this argument needs to be challenged. As per the **National Crime Records Bureau data-2017**, **chargesheeting rates** in cases of rape as well as rape and murder are higher than that for all other violent crimes, and the **conviction rates are higher too**, while the **pendency rates** are roughly the same as the average for all violent crimes.

Cases and convictions

In 2017, while the chargesheeting and conviction rates in cases of 'rape' and 'murder with rape' were well above the overall rate on violent crimes, the pendency rates were similar. The pendency rates, in courts, in the case of crimes against Dalits were much higher



All figures in %	Rape	Murder with rape	All crimes against women	Crimes against Dalits	All violent crimes
Chargesheeting rate	86.6	95	78.3	82.6	82.6
Pendency rate (police station)*	29.3	32.9	32.9	27.8	28.2
Conviction rate	32.2	57.9	23.9	35.3	30.9
Pendency rate (court)**	87.5	90.1	89.6	91.7	87.8

*Number of cases in the police station pending investigation at the end of the year relative to the total number of cases for investigation

**Number of cases pending trial at the end of the year relative to the total number of cases for trial

- For several affected families, death is the only answer to rape. But public responses that equate judicial outcomes and justice to immediate and quick retribution are neither universal nor just.
- This raises a concern whether retributive justice is the way to go in a democratic country that has a historical legacy of resisting violence in fundamentally non-retributive ways?

Constitutional Conflict

- There is a procedure prescribed by the law for criminal investigation which is embedded in constitutional principles. **Article 21** of the Constitution (which is fundamental and non-derogable) states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Hence, **it is the responsibility of the police, being the officers of government, to follow the Constitutional principles and uphold the Right to Life** of every individual whether an innocent one or a criminal.
- Also in the **Salwa Judum case in 2011** a core constitutional precept was set out that in modern constitutionalism no wielder of power can be allowed to claim the right to perpetrate state's violence against anyone. This is also the touchstone of the constitutionally prescribed rule of law (**Article 14**).
- Also it was argued in the **Encounters case** before the Andhra Pradesh High Court, the discussion on the law was on 'whether a plea of self-defense where excessive force is used, should be tried for manslaughter or murder'.
- Till date, there is no law in force in India that authorises the police to kill. Hence, the plea of self-defence by police cannot be used to rationalise a targeted, premeditated killing of suspects in custody.

Challenges with the Present System

- **Stringent Laws:** Some of the existing legal provisions are too harsh in ways that harm both men and women, and other important legal provisions are not being implemented.
 - Even, the **Justice Verma Committee report** acknowledged the same and recommended at improving the status of women in **non-legal ways** alongwith its legal recommendations that included a much-needed broadening of the definition of rape and raising of the minimum sentence for rape to 10 years.
 - However, the **Criminal Law (Amendment) Act, 2013** went well beyond what was recommended by the Verma Committee Report. It **introduced the death penalty** for some circumstances around rape, including repeat offences, despite the Verma Committee expressly arguing against this. These stringent provisions have had a few worrisome results:
 - First, there has been further **criminalisation** (with longer sentences) of consenting underage couples (there are over 25% cases related to breach of promise to marry).
 - Second, laws have **removed any discretion** in minimum sentencing from the hands of judges. There is evidence that removing such discretion actually lowers the rate of conviction.
- **Inadequate Protection:** There is now a situation where there are not much loopholes in laws concerning sexual violence against women but on the other hand, there is **no legal protection for adult men** from rape; and under the new **Transgender Persons (Protection of Rights) Act**, the sexual abuse of a transgender person carries a maximum sentence of two years only.
- **Powerful Accused:** There have been instances when the accused is a powerful person, there is an attempt of exhausting the individual's pre-trial options, including attempts to quash charges or shift the trial to a friendlier city, making a mockery of a fast-track case.

Other challenges include, the police officials refrain from filing an FIR (already a punishable act for the police), victims facing cross-examination about their past sexual histories, and little is done for rehabilitation or therapy offered to victims.

- **Time-consuming Process:** Official statistics on the speed of trials by nature of crime are not maintained, however, there is anecdotal evidence that the **average rape trial** in a big city at the trial court stage is **completed within two years**, but the appellate process takes longer.
For instance, in the 2012 Delhi case, the trial was conducted within a year, the High Court appeal by March 2014, and the Supreme Court appeal by May 2017.

Way Forward

- Justice in any civilised society is not just about retribution, but also about deterrence, and in less serious crimes, **rehabilitation** of the offenders. Although existing laws on sexual crimes and punishment need a better application, a recourse to brutal retribution as suggested unwisely by many is no solution.
- The political sanction of “encounter killings” to deliver swift retribution would only be a disincentive for the police to follow due process and may even deter them from pursuing the course of justice. Far from ensuring justice to the victims, **bending the law in such cases would only undermine people’s faith in the criminal justice system.**
- There is no doubt that the anguish or outrage of people in the aftermath of such horrific crimes is justified. There is a need to keep in sight of the rule of law and constitutional tenets.
The ends of justice are not served by wanton killing and retributive blood lust. Justice lies in supporting them in their moment of grief and pain and insisting on due process that brings suspects and accused to trial through a robust, stringent and competent criminal investigation.

According to **Dr. B.R. Ambedkar**, the pathways of justice are not linear nor without obstacles. But we have, as a people, chosen the route of democracy and the Constitution, so we really have no option but to school ourselves in constitutional morality that with time must replace public morality.

Drishti Mains Question

‘The ends of justice are not served by wanton killing and retributive measures’. In the light of the given statement, briefly discuss the significance of the due process of law in the criminal investigation in India.