

POVERTY AS A DEFENCE AGAINST CRIME

*Peri Ushajee Rao**

Introduction

The aim of this paper is to make a case for poverty as a defence against crime with specific reference to the situation of a poor starving person who commits a crime to gain access to food or money to buy food. One of the claims of legitimacy made on behalf of criminal law is that it respects and does justice to individuals by punishing them only for their “voluntary acts”¹. The concept of voluntary acts has however changed over a period of time, as is borne out by the change in the criminological theories, which guide policies on crime and punishment. The attitude of the judges towards the question of what acts are really “voluntary”, has been influenced by the criminological theories in vogue at that time. The classical school headed by Bentham and Beccaria conceives of the criminal as a calculator². The most important feature of this school of thought is its emphasis on the individual criminal as a person who is guided by the principle of hedonism, whereby there is a calculation of the risks and rewards involved in the actions. Accordingly, they argued that punishment should be suited to the offence and not to the social and physical characteristics of the criminal. At the other end of the spectrum of criminological theories is the Marxist theory of criminology³, which squarely puts the blame for the commission of crimes on the shoulders of capitalism and the resultant exploitation and class-divide, thereby negating the individual free will and absolving the individual of guilt.

Fortunately for us the Common Law system, from which we draw our laws was guided exclusively by neither of these theories, but by a healthy amalgamation of these two extreme theories and pragmatism. The individual offender was considered to be neither completely at the mercy of the socio-economic milieu he was living in, nor to be completely unaffected by it. This is evident from the fact that the guiding Latin Maxim for the determination of crime is “*Actus non facit reum nisi mens sit rea*”. The required mental element is either,

* IV year, B.A.,B.L(Hons), NALSAR University of Law, Hyderabad.

¹ Alan Norrie, *Crime, Reason And History*, p.171, Butterworths, 2nd edn., (2001).

² J. Robert Lilly, Francis T. Cullen, Richard A. Ball, *Criminological Theory: Context and Consequences*,

p.29, Sage, 3rd edn., (2002).

³ Ibid.

- a) an intention to do the forbidden act or to otherwise bring out the external elements of the offence (whether one knew of the prohibition or not) or
- b) (in most cases) recklessness as to such elements⁴.

Thus, though the individual offender's free will was considered, this did not prevent the adjudicator from taking into consideration the socio-economic realities, which surrounded such a crime. This is reflected in the fact that, general defences of necessity, insanity, etc. were recognised and allowed to be pleaded. Thus there was a progression from a situation where all acts of the individual were considered voluntary to a reluctant acceptance that there are certain situations in which an individual's acts can be considered involuntary. This progression was however riddled with ambivalence on the part of the Judges. They had to weigh the need for the recognition of the potential effects of general defences on legal guilt and the political and social implications of permitting such defences. The reluctance in accepting the impact of socio-economic conditions on guilt is best borne out in the development of necessity as a defence against crime. The most famous necessity case of *Queen v. Dudley and Stephens*⁵, is a classic illustration of the interface between legal discourse and social reality. All the questions of social control, attribution of guilt, security of personal property, deterrence, legally acceptable standards of temptation, feature in this judgement. Individual justice was weighed against social consequence and found wanting. This necessitated a conviction and a sentence of death. But this was later commuted to six months imprisonment without hard labour. This implies that the Court did not mean what it said, and that though overtly they safeguarded personal property, covertly they upheld individual justice. In the later cases on necessity, the Court has openly upheld individual justice and over a period of time, necessity has been firmly established as a defence against crime⁶. In effect, the Court agreed with Blackstone and his contemporaries, that criminal activity could be the result of social conditions⁷.

One of the social conditions present in all the countries across the world is, poverty. Though the nexus between poverty and crime is well

⁴ Glanville Williams, *Textbook of Criminal Law*, p. 71, Stevens & Sons, London, 2nd edn., (1983).

⁵ [1881] 5 *All ER* 61, CCR.

⁶ *Humphries v. Connor*, (1864) 17 *Ir. CLR.*; *Connors v. Pearson* [1921] 21 *IR* 51; *Johnson v. Philips* [1976] 1 *WLR* 65.

⁷ *Supra* n. 1 at p. 153.

documented and proven⁸, the Courts refuse to accept the defence of necessity arising from poverty as a condition for negating guilt. *Hale*, who opined that theft under necessity for want of victuals or clothes was still a felony, in the civil case of *London Borough of Southwark v. Williams* observed that a defence of necessity would render private property insecure. He rebuked those who claimed that there was a necessity defence for thereby advising “apprentices and servants to rob their masters”⁹. The writings of Bacon, Blackstone, and Stephen, reflect the same concerns that were expressed during the evolution of the defence of necessity. The concerns being security of private property, giving a *carte blanche* to the poor to commit crime, re-determination of legal standards of resistance to temptation, and negation of individual guilt. These arguments are valid and the concerns real. The problems outlined can, however be circumvented, as was done in the case of necessity, by reducing the scope of the defence and allowing it to be pleaded in very particular situations. One such particular situation would be that where a poor starving person on the brink of death, steals food or money for survival. For instance, in India a country with a large number of poor people, the measure used to arrive at a finding of absolute poverty would be crucial for the defence. The ability to procure food—the most basic of the three essentials for survival, is used to distinguish the poor from the non-poor. The nutritional norm for “survival”¹⁰ is consumption of 2250 calories per adult male. All those falling within the poverty line are people who are unable to meet this nutritional norm. If such a person commits a crime, for food or money to buy food, should not the Court then take into account the social conditions driving the person and acquit such a person of guilt? At this point the question may be raised that is not allowing the defence would be equal to absolving the State of its responsibility towards the individual. In reply it may be pointed out that the defence is not a substitution for the right to food but a protection in situations where the right is infringed or not honoured. Further there may be situations where though the State may provide for the required facilities, an individual may not be able to access them. A similar rationale dictates recognition of the right to private defence. This defence is a recognition of the fact that when inspite of all the efforts of the State, situations arise where an individual is unable to access the State machinery of security he will be entitled to use force to defend himself.

⁸ *Global Report On Crime And Justice*, 42, United Nations Office for Drug Control and Crime Prevention, (1999).

⁹ *Supra* n. 1 at p. 155.

¹⁰ The National Sample Survey Organization assumes a daily intake of 2250 calories per adult male as a nutritional norm for survival.

I shall now try to make a case for a defence of poverty against crime.

- a) under circumstances which are affected by economic causes and
- b) are available irrespective of the causes of such starvation.

For this we must first examine the medical condition of a starving person.

I

Medical Condition of a Starving Person

A person who is starving from a minimum of 48 hours is bound to feel weak. A person who has had no food at all for 4 days and is surviving only on water, will start showing signs of dehydration. When this state of deprivation continues to the 7th day he will suffer from a shock. His blood pressure drops, palpitation ensues, and slowly there is damage to brain cells. Hypoglycemia and other problems set in. This causes the person to be in a state similar to temporary insanity, wherein, the person loses his cognitive capacity. His overpowering need to eat, removes his inhibitions and overrides his sense of right and wrong and the capacity to apprehend consequences¹¹.

II

Types of Crimes Committed by a Starving Person

The offences that a poor starving person commits in his struggle for existence are,

i. Offences affecting the human body

- a. Affecting life-manslaughter only,
- b. Hurt and grave bodily hurt,
- c. Criminal force and assault.

ii. Offences affecting property

- a. Theft

¹¹ Interview with Dr.Uma Rani, M.B.B.S., M.D, Challa Nursing Home, Hyderabad.

It is the offences against property that may ultimately result in offences against human body¹². The forms of offences affecting property other than theft requires some amount of cognitive capacity, planning, capacity to observe and other mental faculties. These are capacities absent in a starving person. A person, though poor, who commits these offences gives a clear proof of cognitive capacities. Hence he/she cannot be categorised with the starving person. Therefore, cases of house breaking, committed by the poor primarily to gain access to money to buy food, cannot be classed in the same category as that of a starving person. Thus, the kind of offence that a poor starving person commits in his attempt to gain access to food or money to buy food is restricted to theft. The reason is simple. The ability to commit any other offence is a clear proof of the person's cognitive capacity. Judging from the medical conditions such capacity will be absent in a person starving for 6-7 days.

III

Cognitive Capacity

The basis of no liability of a temporarily insane person is the principle that "*Criminal intention is the foundation of all criminal responsibility*". A temporarily insane person is incapable of judging whether his actions are right or wrong or contrary to law and of working out the necessary intention to constitute a crime. Hence, these people are in effect held to be not liable for their actions¹³. This also forms the basis for the no liability principle of an involuntarily drunken person¹⁴. In both these cases—the temporarily insane and the involuntarily drunk—there is no criminal intention, and hence no criminal liability. Similarly in cases where a person is suffering from shock due to non-availability of food, the overpowering need for food deprives that person of his ability to appraise his actions or their consequences. Automatism sets in when a person starves for more than eight days. The basic instinct of survival becomes the guiding factor of his life. His actions are involuntary—

¹² The offences like those where a mother kills her children and then tries to kill herself because she is unable to provide for them will not be covered by this paper as they are clearly cases of suicide and murder—there is cognitive capacity and so absence of criminal intention cannot be pleaded. This paper seeks to provide a defense in only those cases where the crime has been committed by the person as a last resort for that person's survival itself and not for ensuring the survival of any of his dependents.

¹³ *Clarke*, (1972) 1 *All ER* 219, where a woman was charged with theft from a super market and her defence that she had taken the goods in a state of absent-mindedness resulting from depression was accepted; also see *Bratty* [1963] AC 403; *Hatnave-tete* [1965-66] P and NGLR 336.

¹⁴ *Majewski* [1977] AC 443.

a state similar to that of a person who is involuntarily drunk. One can therefore conclude, that in cases of starving persons as well, there is no criminal intention. Further, the scope of the principle should be extended to give protection to starving persons who steal food or money as a last resort for survival.

At this juncture, another parallel can be drawn between the right to private defence and poverty as a defence against crime. The State on recognizing the right to private defence accepts the fact that the State cannot at all times come to protect every individual in every situation on every day of his life. Due to this handicap the State has recognized the individual's right to commit a crime while defending himself and his property. Similarly when the State cannot guarantee that every person shall get food for basic survival, it is in effect bound to allow at least, the defense of necessity to steal food for survival when further starvation would mean imminent death.

If the State does not allow for the defense then it is in effect saying that it gives more importance to the right to property than the right to life. *Lord Colridge in Queen v. Dudley and Stephens* says, "to preserve one's life is generally speaking a duty but it may be the plainest and the highest duty to sacrifice it"¹⁵. It may be true that sacrificing one's life is of greater value but for there to be a sacrifice, there must be somebody in whose favour the sacrifice is made. In this case, if a person sacrifices his life for another's right to property then is there an efficient transfer? Are property rights so sacrosanct that they can never be violated even in cases of grave emergencies?

Moreover, the State has a right and an interest in the life and survival of an individual. An individual in India does not have a right to die. Thus, if an individual on the brink of death steals, he will be prosecuted for theft and if he does not steal, he will die. Also, an individuals natural instinct is of survival and this requiresw that the starving person steal rather than die.

IV

Tests for Defence

The defence that is proposed is not to be allowed across the board. To avail himself of this defence, certain conditions are to be met. The conditions mentioned below have been constructed with a view to harmonizing the needs of the individual in society and the society's needs of safety. The conditions to be fulfilled are as follows:

¹⁵ Sir Hari Singh Gour, *Criminal Law: Cases and Materials*, p.433, Law Publishers (India) Pvt. Ltd., Allahabad, 11th edn., (2002).

- i) The person should have been starving for 6-7 days consecutively.
- ii) This starvation should be involuntary.
- iii) The person should not have any asset on him, i.e., any kind of commodity on his person, which can be sold for money to buy food.
- iv) Shock should have set in.
- v) The thing stolen should have been either food or money.

In the defence of insanity, the enormity of the crime raises doubts on the sanity of a criminal. Similarly in the defence of poverty the triviality of the crime should provide indications of the necessity to eat food and consequently proof of the conditions required to avail the defence. A detailed analysis of each test for the application of this test and defence has been done as under:

i. The person should have been starving for 6-7 days consecutively.

It is clear that a person who has not been eating for at least 6 days, starts showing signs of suffering from shock. A person who has had neither water nor food, undergoes shock from the fourth day itself. But, in our country there are many places where municipal water taps are present and therefore, a poor person has easy access to water. Moreover, people almost always do not mind sparing some water as compared to food, primarily because water is cheap, almost freely available. A person can survive only on water for a maximum of seven days. Moreover, a person, who is essentially poor, will definitely be suffering from some degree of malnutrition. He will be less able to withstand hunger for any period longer than 6-7 days. Hence, a minimum period of 7 days has been proposed. Any period more than this would render the protection to be given under this defence a nullity because a poor starving person will already have reached a state of semi-consciousness and will not be in a position to make any further efforts to ensure survival. Also a minimum period of 6-7 days has been proposed. Any reduction in the number of days will rob the act of stealing of the essential element of being the desperate, last resort that it ought to be and may provide any hungry person the licence to steal.

ii. The person should not have any asset on his person.

A poor starving person, who has stolen food or money, to be acquitted on this defence must not have had absolutely any commodity or goods on him, which could have been sold. The person should not have had any means of acquiring money—including begging or borrowing.

iii. This starvation should be involuntary

A person who is starving voluntarily for whatever reasons, example, hunger-strikes, has voluntarily brought upon himself this condition. People who are voluntarily starving, fasting rather, have a greater willpower to continue fasting. Also these are people who have access to lawful money or food. Hence for availing this defence, the starvation should not have been self-imposed but forced upon the individual due to poverty.

iv. Shock should have set in

This test has been primarily introduced to make the defence stringent and not easily accessible to everyone who steals when hungry. People who have great willpower can withstand hunger pangs for a long time. Such kind of people will not suffer shock within the proposed 6-7 days of starvation. These people still retain their cognitive capacity, are not on the brink of death and can still survive without any need to steal. This defence may be claimed only when stealing is the last option for survival.

v. The thing stolen should have been either food or money

When a person has been starving for 6-7 days without any access to food, the thought uppermost in his mind would be hunger, the immediate solution for which would be to eat and inability to acquire food due to absence of money. Hence, he can avail of this defence only if he steals money or food.

A person who steals any other thing may be to sell and use the proceeds for buying food, still shows proof of cognitive capacity. Hence a person who steals a bicycle to buy food does not qualify to avail of this defence as he has shown proof of his cognitive capacity of thinking, planning and then going to the second hand market, bargaining with the buyer, taking the money and then buying food and satisfying his hunger. It is also proof of the fact that he is not actually on the brink of death because a person in such a situation will not have the energy levels to engage in such a series of actions. He may have a sudden spurt of energy to snatch and run some distance or hit somebody and snatch the food. But beyond the momentary spurt of energy, he will not have the energy levels required to sustain any long term activities¹⁶.

¹⁶ This is also the reason why this defense cannot be availed when the offence committed is anything other than theft, because, for any other kind of offence, say house-breaking, there is a need for far greater levels of energy and cognitive capacity, than are present in a starving person on the brink of death. Hence, this defense is restricted to only cases of theft.

Primarily that is why a person on the brink of death cannot exercise the option of begging for money and then buying food with the money so collected. Begging for sufficient money requires time. Time is of utmost importance to a starving person on the brink of death.

V

Application of Theory

The first question, which will arise regarding the application of this defence, is how to ascertain the condition of the person who has been caught stealing food or money. When a person who has fulfilled the above mentioned conditions is caught stealing, then obviously he would not have been able to eat the food he stole or buy food with the money he stole as it would be snatched away. He would then go into deeper shock resulting in semi-consciousness and then enter coma if not treated at that stage. This would require that on arrest the offender must be put under medical supervision and thus, proof of his physical condition can be obtained.

A second question that may arise is what should be done if the person has stolen the food or money from another poor person? A person who has satisfied all the tests for being eligible to have a defence of poverty is a person who has no cognitive capacity. He does not have the mental capacity to differentiate between the degrees of loss of stealing food caused to a rich man or to a poor man. He is only concerned with the food, the owner thereof does not matter. Hence, the person whose food or money has been stolen should not be relevant in adjudicating guilt.

A third question could be regarding the quantity of food or money stolen and its effect on the culpability. When such a poor and starving person steals he will not be able to steal a very large quantity as he will not have the energy levels required to commit a large theft and then successfully cover it up. He will be more likely to steal a packet or two of food or grab how much ever money he can at the first attempt. He cannot be penalized for his good luck whereby he got away with two large packets of food or was able to steal money amounting to a couple of hundreds¹⁷.

¹⁷ A person stealing money under the above conditions cannot have acquired the money by picking pockets because a person who has been reduced to a state of such starvation will not be a person who can masterfully pick pockets without the owner's knowledge. Being a first timer, if he attempts to pick pockets, he is bound to be caught. Moreover no professional pickpocket is ever likely to remain starving for 4 to 5 continuous days. Hence, the quantity of food or money stolen should not be considered as a matter relevant for the adjudication of his guilt.

VI

Repercussions on Society

Let us now consider the repercussions of recognising the defence of poverty on society. Recognising this defence does not give a licence to steal. By allowing for the defence under the conditions mentioned, the Court would be restricting the circumstances when this defence may be earned. The person who steals just because he is hungry is not allowed this defence. Moreover, if a person is found committing theft repeatedly and then claiming this defence then that behaviour is automatically a proof of his 'mens rea' or intention to steal and bypass the law by resorting to this defence. In such cases this defence will not apply and hence there is no licence given by law to steal.

A person who was caught stealing and was successfully able to avail this defence, should be honourably acquitted. The person should not be forced to undergo any rehabilitation programs. What a person in such a situation needs is a steady source of income, which can be achieved through employment. The person may require vocational training, but he should not be forced into it, nor should he be allotted a job. This is because there is an inherent danger of people starving and stealing food and then availing this defence with the sole objective of landing a job or obtaining free vocational training.

Hence, it is proposed that the person acquitted on the grounds of poverty should have a "no-strings attached" acquittal. His situation will be similar to a person acquitted due to the defence of 'temporary insanity' caused by hypoglycemia.

Conclusion

I have chosen to entitle it a defence of poverty and not of starvation so as to emphasise the *cause* of such starvation. I reiterate that the people who may have to avail this defence are those who have starved as a consequence of their poverty. This defence will also be applicable to all those cases of food riots or all other types of offences where the primary aim is to obtain food. So where all the people who have been charged with the offence of food riots, can prove that they acted in that manner to satisfy their hunger and if it is proved that they did not commit those riots so as to feed their dependents, then they should be allowed to avail this defence. Thus, this defence will be available even to a rich person who is stranded and is unable to access any source of money. There may be a minority of people who are actually rich but due to

circumstances are cut-off from all contacts and sources of food or money—but they still remain a minority.

Measures such as increased access to free vocational training centres, greater employment opportunities, greater efficiency of employment exchanges, governmental support and encouragement of self-employment will help the poor and hopefully reduce the number of starving people. Also it will help people who have availed of this defence to steer clear from the path of crime and create a Whole New World for themselves and their dependents.

However, the best way to tackle this problem would be to give people the Fundamental Right to food. The State should communise food and provide basic minimum nutrition to all its citizens free of cost. The National Human Rights Commission, in its report dated 17 January 2003, on the starvation deaths in the KBK districts of Orissa stated that the reading of Article 21¹⁸ together with Articles 39(a)¹⁹ and 47²⁰ made the Right to Food a guaranteed Fundamental Right. However, this interpretation has yet to find a resonance in the judgements of the Apex Court of India. If this right is enforced and there is communisation of 'bread', then this defence will automatically become redundant. But until such a measure is taken there will be starvation, theft, and sentencing of such thieves!

Another means of ensuring free food for all could be the enforcement of *annadanam*, as in ancient Indian culture. *Annadanam* was considered an essential function of every *Gruhastha*. There was great importance attached to it by religion that *annadanam* by itself was considered to be sufficient to reserve a place in heaven for the donor. *Nithya Annadanam* or giving of alms of food daily was considered to be the sure-fire method of obtaining salvation. The authenticity of this promise could not be verified but this system effectively took care of the poor and starving people. Religion thus played an important role in social dynamics. This cannot however be implemented now. But the State definitely can provide modern alternatives to *annadanam* by providing free, edible and nutritious food to all of its needy citizens.

* * *

¹⁸ Article 21 of the *Constitution of India* guarantees the right to life and liberty.

¹⁹ Article 39(a) of the *Constitution of India* requires the State to direct its policy towards securing that the citizens, men and women equally, have the right to adequate means of livelihood.

²⁰ Article 47 of the *Constitution of India* spells out the duty of the State to raise the level of nutrition and the standard of living of its people as its primary responsibility.