

# STATUS OF DEATH PENALTY AND LIFE IMPRISONMENT IN INDIA AND NORWAY: A CRITICAL COMPARISON OF THE TWO EXTREMES

*Written by Sayesha Chadha\* & Sidhanth Mor\*\**

*Law Practitioner, LLM, National Law University Delhi*

*5th Year BALLB Student, Amity Law School Delhi (GGSIPU)*

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## INRODUCTION

Punishment has always been used as a response to crime. Broadly speaking, there are two approaches to punishing a criminal- rehabilitative and retributive. Other theories like incapacitation and deterrence also surround this concept. The researcher, through this paper, aims to bring to light to different systems of criminal punishment-India and Norway. While in India the death penalty still stands constitutionally valid, Norway has abolished it citing it as toxic to human rights. Norway believes that death penalty is incompatible with humane treatment and correctional system of punishment. India has retained it within the exception of Article 21 which provides the state to devoid an individual of his life according to a procedure established by law. Through the case of *Bachan Singh V State of Punjab* , India awards death penalty only in rarest of the rare cases in order to serve the purpose of deterrence and incapacitation .Norway, on the other hand believes that there is no conclusive evidence of the deterrent effect of death penalty and vouches for the abolition of this irreversible form of punishment. This approach has placed certain extradition hurdles on Norway .If there is a possibility that a country will use death penalty on a Norwegian citizen, the person is not extradited. Also, cooperation on criminal investigation and judicial assistance will be limited. In India, with the case of *Swami Shraddananda* the punishment of life imprisonment without remission has been formulated to avoid multiple executions and using the same if the case falls outside the scope of rarest of the rare thereby asserting *bachan singh*. The same was also reiterated in the case of *Sriharan v Union of India*. This is in stark contrast to Norway. Norway puts complete ban on the punishment of a life term. The maximum life term that can be awarded

in Norway is that of 21 years or 30 years if the crime is one against humanity. The Norwegian jails also offer amenities like personal trainers, television, saunas, cinema rooms etc. The crime of waging war against the state lands one to capital punishment in India whereas in Norway, Anders Behring Breivik – the man who was responsible for twin attacks on Norway killing 76 people – served the maximum sentence of only 21 years jail term. The crime rate in Norway is way below than that in India. Lack of social inequality and the rehabilitative approach of the state are the plausible explanations. The researcher through this article aims to analyse the laws of both the countries viz a viz death penalty and life imprisonment and shall also cite the reasoning of philosophers who vouch for retaining and those who vouch for abolition of death penalty as a form of punishment.

## **RATIONALE BEHIND DEATH PENALTY AND LIFE IMPRISONMENT**

### ***Deterrent theory***

When an offender commits an evil voluntarily, it is justified to give him the same in return. It is to be presumed that once the offender has committed an evil, he has paved way for infliction of punishment on him hence

When any one commits an evil on another, is to be regarded as perpetrated on him. Moreover, under Kant's strong view on the demands of retributivism, a society is not merely authorized to execute murders, it is duty bound to do so. The only punishment that is proportionate to the gravity of crime is the murderer's life because that has infinite value<sup>1</sup>.

In 2012, the National Research Council of the nation academies found no scientific basis for claiming anything about the deterrent effects of death penalty so there was no support for the claim that the death penalty has greater deterrence than long-term imprisonment.

Recently, however, an economist, Isaac Ehrlich, has complete an objectively superior statistical test of capital punishment deterrence in the case of murder. Ehrlich discovers a statistically significant trade-off between the murder rate and executions per conviction. The trade-off

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<sup>1</sup> Immanuel Kant, *The philosophy of law* (W. Hastie 1887, Edinburg, Clarke), p.196

implies that a 1 percent increase in the execution rate will reduce murders by about 0.06 percent. This translates into the "eight lives saved per execution"<sup>2</sup>

### ***Incapacitation theory***

According to Amnesty International, Undeniably the death penalty, by permanently "incapacitating" a prisoner, prevents that person from repeating the crime. But there is no way to be sure that the prisoner would indeed have repeated the crime if allowed to live, nor is there any need to violate the prisoner's right to life for the purpose of incapacitation: dangerous offenders can be kept safely away from the public without resorting to execution, as shown by the experience of many countries who have abolished the death penalty, it is a violation of fundamental human rights.<sup>3</sup>

One of the major shortcomings of incapacitation rationale for the death penalty is that it discounts the significance of moral responsibility. It deals with dangerously violent people as if they are wild animals, instead of dealing with them as moral agents who are responsible for their misdeeds. It focuses on not what they have done but what they are likely to do in future.<sup>4</sup>

### ***Retributive theory***

The retributivists argue that criminals deserve punishment on account of their wrong doing. It is backward looking. If they deserve punishment, then justice demands we punish. We do injustice if we fail to punish criminals, because they then do not receive what they deserve.<sup>5</sup>

**Retributive justice** combines features of both corrective and distributive justice. The corrective dimension consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her suffering.<sup>6</sup>

It is not respect for the wrongdoer's independence, but rather respect for the equality of the victim that gives rise to the duty to punish. Punishment is required to destroy the wrong done

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2 The Deterrent Effect of the Death Penalty:

A Statistical Test, Peter Passelt, Stanford Law Review, pg 61-62

<sup>3</sup> The death penalty v. Human rights

Why Abolish the Death Penalty? September 2007 AI Index: ACT 51/002/2007 Amnesty International pg 1-6

<sup>4</sup> Matthew H. Kramer, The Ethics of Capital Punishment, Oxford University Press

<sup>5</sup> Thom Brooks, Punishment, pg 16-17

<sup>6</sup> . The Place of Victims in the Theory of Retribution

Author(s): George P. Fletcher

Source: Buffalo Criminal Law Review, Vol. 3, No. 1 (April 1999), p58

to the victim or to restore the equilibrium of benefits and burdens.<sup>7</sup>H.L.A. Hart backs away from the mandatory aspect and argues that wrongdoing provides merely gives a license to punish the offender rather than a duty to so <sup>8</sup>There is a growing discomfort with India's capital sentencing system the rarest of the rare formulation has been criticized as arbitrary by Amnesty International and the People's Union for Civil Liberties 2008 which, after analyzing judgments of the Indian Supreme Court over five decades, termed the arbitrary Sentencing system a Lethal Lottery, thereby violating human rights<sup>9</sup>

## **DEATH PENALTY AND LIFE IMPRISONMENT IN NORWAY**

In 1979, the capital punishment was abolished in Norway. The constitution of Norway was amended in 2014. It states 'Every person has the right to life. No one can be sentenced to death.'

<sup>10</sup> The maximum life sentence in Norway is 21 years and this can be extended indefinitely after every five years if the prisoner poses a threat of repeating the offence.<sup>11</sup> This caters to the incapacitation rationale of punishment.

The foundation on which the punishment must be based on is rehabilitation. It includes giving out short sentences, following the 'return to society policy', and not treating prison and probation as two distant words. The correctional system in Norway corresponds to the human rights norms set up by the international community through conventions and customs.<sup>12</sup>

The incarceration rate in Norway is 75/1, 00,000. The country relies on the concept of restorative justice which includes repairing the harm rather than punishing the criminal. The Halden and the Bastoy prisons at Norway are designed to provide all amenities to the prisoners. The intention is to only curtail the freedom and not the right of a dignified life.<sup>13</sup> Garland labels it as 'penal welfarism'. The policy of open prisons is a part of the Nordic culture. Such prisons

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<sup>7</sup> Herbert Morris, *On Guilt and Innocence* :(1976 Berkeley: University of California Press) p.34

<sup>8</sup> H.L.A. Hart, *punishment and responsibility: essays in the philosophy of law* (second ed. 2008, oxford: oxford university press) p.236-237.

<sup>9</sup> Amnesty International India and People's Union for Civil Liberties .2008.Lethal Lottery- the death penalty in India: a study of Supreme Court judgments on Death Penalty 1950 -2006.New Delhi: Amnesty International

<sup>10</sup> Article 93, Constitution of Norway

<sup>11</sup> The criminal code of Norway

<sup>12</sup> The White paper, Report on Punishment that works less crime-a safer society, Norwegian Ministry of Justice,2008

<sup>13</sup> The Journal, Why Norway's Prison system is successful, 13<sup>th</sup> December 2014

do not depend on giving physical restraints but confer a sense of responsibility on the prisoners, thereby supporting their self-esteem.<sup>14</sup>

The lack of evidence on recidivism suggests that punishment cannot be based on vengeance and revenge. Public safety is of paramount importance for Norway. However, a long prison sentence followed by a sudden freedom to the outside society increases the risk of the prisoner taking to retribution, which entails a threat to public safety. The goal of incapacitation can be ensured by a correctional system that is not based on an individual event,<sup>15</sup> unlike the rarest of the rare policy in India. The penal policy has to take care the victims, offenders and their families. Hence, a rehabilitative model is essential. Work training, school, cultural facilities, leisure activities and telephonic communication are part of the prison sentence. Special staffs to arrange family visits are also there. All this provides a boost to work on returning back to the society.<sup>16</sup>

The scholars have described the Norwegian Penal norms to be ‘an exceptional penal policy.’ It thrives on the principles of reformation, devoid of retribution and vengeance.

Some regard the high employment rate, low income inequality, low poverty rate to be the reason for the low crime rate and hence low rates for sentencing people to imprisonment. However, these are not the only factors. The events that take place in a country also play an important role. For instance, the 9/11 bombings in USA, 26/11 bombings in India. Such events result in public outrage.

The **Oslo bombings** of Norway are one similar event. It claimed the lives of 77 innocent people. The people of Norway were satisfied with the fact that the accused was a Norwegian, born and brought up in Norway. The sympathy condones the public outrage. However such solidarity is only for their own people.<sup>17</sup>

However such sympathy showing attitude is absent in countries like India which has a vast extent of social, cultural and religious diversity.

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<sup>14</sup> Kenin Warner, Resisting the New punitiveness, Penal policy in Denamrk, Finland and Norway and some lessons for Ireland.

<sup>15</sup> Supra 3

<sup>16</sup> ibid

<sup>17</sup> Su Syan Jou, Norwegian Penal Norms: Political Consensus, public knowledge, suitable sentiment and a hierarchy of otherness , National Taiwan University Law Review , 2014



One pertinent question that erupts here is the fact that how a life term of 21 years can satisfy public outrage, cater to victim rights and rights of indirect victims. After the court's sentence was passed, a poll was conducted in Norway. 80% supported the court's judgement and the victim's families were satisfied. Also the gunman did not prefer an appeal and showed faith in the judicial system. According to the European Social Survey, Norway is a country displaying remarkable trust in its criminal justice system.<sup>18</sup>

One third crimes in Norway are property related crimes and the victims get compensation via state insurance. The police is not pressurised. The victim is not shown sympathy. The crimes in Norway carry such approach because of the public provision of welfare. In countries like India and China, the victim can be compensated only by filing a civil suit.<sup>19</sup>

THE ROLE OF MEDIA in influencing public sentiment is huge. The media in Norway is far more rationalised in its approach. Unlike India, the accused is not portrayed as a monster responsible for the teary eyed victim and its family. The rising competition among media houses is the determinant factor of the way of reporting a crime.<sup>20</sup>

Green compared the media coverage and noticed and noticed that the same crime in England was reported with the focus on cursing the criminal justice system while in Norway the focus was on rehabilitation of the criminal. The coverage is more bent towards rationality and knowledge. It should not be sentiment based but on a professional front. A mother whose daughter was one of the 77 people killed said that she did not want the convict to be hanged. Revenge is not an option.

However there were opposite reactions as well. Another event is worth mentioning. The murder of a 16 year old girl – she was reported missing before she was found murdered. There was extraordinary public support in finding her, no public outrage and no pressure on police.<sup>21</sup>

Hence it can be included that there are three important ingredients of the criminal justice system in Norway.(1) rationality is embedded in their behaviour (2) the homogeneity of Norway's population (3) sympathy towards the offender.

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<sup>18</sup> ibid

<sup>19</sup> ibid

<sup>20</sup> ibid

<sup>21</sup> ibid

In a country like Norway with less population the aim of the criminal justice system of a civilised country is not to satisfy the feelings of vengeance and revenge of those affected.<sup>22</sup>

## **DEATH PENALTY AND LIFE IMPRISONMENT IN INDIA**

Both death penalty and life imprisonment have been provided as punishments in the Indian Penal Code and also sanctioned by Article 21 of the constitution of India.

The 35th Report on Capital Punishment (1967)

The Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books. Based on its analysis of the existing socio-economic cultural structures (including education levels and crime rates) and the absence of any Indian empirical research to the contrary, it concluded that the death penalty should be retained. Its recommendation said:

*“Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold well in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country”.*<sup>23</sup>

### ***Constitutionality of the Death Penalty in India***

In *Jagmohan Singh v. State of U. P.*,<sup>24</sup> it was argued that the death penalty violated Articles 14, 19 and 21 of the Constitution of India. And also that the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment

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<sup>22</sup> The economist, Plush and Unusual, July 28 2011

<sup>23</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at Para 1.(Last viewed on 7.10.2016).

<sup>24</sup> (1973) 1 SCC 20

and imprisonment for life. The court held that the death penalty was a permissible punishment, and did not violate the Constitution and the exercise of judicial discretion on well-recognised principles is the safest possible safeguard for the accused.

In the landmark case of *Bachan Singh v. State of Punjab*,<sup>25</sup> the death penalty was challenged on the grounds of irreversibility, cruelty.. The Court adopted the ‘rarest of rare’ doctrine that allowed for the imposition of death penalty only in exceptional cases.

The Supreme Court has in many cases, noticed that sentencing in capital cases has become arbitrary and that the sentencing law of Bachan Singh has been interpreted in varied ways by different Benches of the Court.

In *Bachan Singh v. State of Punjab* the Supreme Court by 4:1 majority has overruled its earlier Judgment pronounced in Rajendra Prasad’s case and held that death sentence under section 302 IPC does not violate article 21. The International Covenant on Civil and Political Rights to which India has become a party in the year 1979, does not abolish imposition of death penalty wholly. But it must be reasonably imposed and not arbitrary; it should be imposed in most serious crimes. In this case the Court held that” Judges should not be blood thirsty.”<sup>26</sup>

## **LIFE IMPRISONMENT WITHOUT REMISSION**

According to the case of *Swamy Shraddananda*<sup>27</sup> the matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14

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<sup>25</sup> (1980) 2 SCC 684

<sup>26</sup> . *Bachan Singh v state of Punjab* AIR 1980 SC 898. See also (1980) 2 SCC 684, 715 para 88

<sup>27</sup> *Swamy Shraddananda v. State of Karnataka* (2008), a three Judge Bench of the Supreme Court para 91, 92



years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous.

In the case of *Sriharan v union of India*<sup>28</sup> (Rajiv Gandhi Assassination case) The way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

It can be concluded from these cases that Due to the irrevocable nature of death penalty and also by placing reliance on the report of amnesty international, lethal lottery, which highlighted the arbitrary way in which the remissions are granted, the court felt a strong need to introduce this type of punishment. Also, the unsound way in which remissions are granted due to which the life imprisonment usually amounts to 14 years in practicality, it cannot be used as a substitute to death penalty. The court held that by introducing this the category of life imprisonment without remission it would satisfy what was said in the case of *Bachan Singh* and death penalty would only be awarded in rarest of the rare case.

The Court also dismissed the argument that by forming this category of punishment, the judiciary was encroaching the power of the executive. The remissions under the jail manual and prisons act are merely administrative rules and cannot be claimed without the appropriate government under 401crpc. Also, s433a of crpc was introduced to curb the problem of life sentence ending in a dozen years. Section 57 of ipc does not suggest life imprisonment to be of a particular term but till the end of convict's life. Hence, introducing this type of punishment would cater to the need of awarding death penalty only in minimum cases and would be a correct substitute. Moreover the powers under article 72 and 161 of the constitution, to grant remissions stay intact.

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<sup>28</sup> *Union Of India V Sriharan* (2014) 4 SCC 242

## CONCLUSION

On a comparative analysis of India and Norway it is clear that there is a stark contrast between the penal policy of India and Norway. The justification for punishment in Norway is rehabilitation coupled with incapacitation. While that in India is deterrence and retribution.

Whenever a crime is reported, the diversity of the socio economic conditions in India raises public outrage to such a level that no sympathy can condone the feelings of vengeance and revenge. The criminal justice system in India has rationalised retribution thereby justifying death penalty by deterrence. Also, there is a huge difference in the way a crime is reported in India. The focus is on the sufferings of the victim and the act of the accused is depicted as a monstrous act. In Norway, a rationalised reporting trend is followed. They show a sense of brother hood for fellow Norwegians.

In India, the trend is moving towards awarding life imprisonment without the possibility of release as a substitute. It is subjecting the accused in the waiting room of death. It has been stated that life imprisonment is a death sentence and that it amounts to 'putting an individual in a waiting room until his death .It is therefore akin to death and results in a denial of dignity, because' a human life' involves not just existence and survival, but the unique development of a personality, creativity, liberty, and unfettered social intercourse.<sup>29</sup>

The rationale of Norway in fixing the life imprisonment to 21 years is far sighted. A longer sentence makes the convict a demon and does not incapacitate him. It instils the feelings of revenge and retribution with the victim and the criminal justice system. A hope of release means a hope of reform.

The Human Rights Committee set up under the International Covenant on Civil and Political Rights has recognized, "The right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."

The researcher believes that keeping the socio economic conditions of India in mind, death penalty cannot be abolished however; substituting it with life imprisonment without remission

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<sup>29</sup> African human rights law journal ,The penalty of life imprisonment under international criminal law, Esther Gumboh, ,p76-78

is highly condemned. The rationale behind Norway's policy shall be adopted and the hope of release shall never expire. India must balance punishment and human rights according to the standards of international community.

