

LIFE IMPRISONMENT WITHOUT REMISSION: A REPLACEMENT TO DEATH PENALTY

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Recently, the Indian cabinet has approved the ordinance to award capital punishment to rapists of a girl less than 12 years of age. The change in law has also increased the minimum sentence for rape to 10 years. Amidst these changes, the article examines the possibility of substituting death penalty by life imprisonment without the possibility of release in India. The basis of comparison between the two is the penological justification, human rights and the victim rights. An analysis on the basis of these grounds justifies the hypothesis adopted by the researcher.

JUSTIFYING LIFE IMPRISONMENT WITHOUT REMISSION AS A REPLACEMENT TO DEATH PENALTY

In the opinion of the researcher, there is no need to retain death penalty as a punishment. There is an alternative of life imprisonment without remission that can satisfy the requirements of incapacitation, deterrence and retribution thereby ensuring public protection.

While death penalty is focused on evoking fear in people other than the offenders; the incapacitative rationale is focused on permanently eliminating these offenders. ¹There are major problems in the use of incapacitation for death penalty. The use of incapacitation requires the court to consider the probability of the offender taking to crime. This assessment is not based on certainty ²

¹ Matthew H. Kramer, *The Ethics of Capital Punishment*, oxford university press

² *Jurek v Texas*, 428 U.S. 153

Amnesty International asserts that incapacitation cannot be the justification for death penalty. If an offender is sentenced to death on the ground of incapacitation, the judgement is based on sheer probability. There is no way to ascertain if the offender would have taken to crime if allowed to live. Amnesty international therefore vouches for life imprisonment without remission as it provides a way to keep the offender away from the public without resorting to execution³

The report submitted by Amnesty International and the People's Union for Civil Liberties in 2008 analysed the judgement given by the Supreme Court of India. The report was titled Lethal Lottery. It concluded that the sentencing system in India with respect to awarding death penalty is inconsistent and non-uniform, there by a violation of human rights⁴

One of the major shortcomings of citing incapacitation as the justification for the death penalty is that it focuses on not what they have done but what they are likely to do in future.⁵The drawback of the finality clause of execution viz a viz incapacitation was highlighted through a survey undertaken post the Furman V Georgia⁶ judgment which spared the execution of hundreds of offenders. The survey revealed that 98.7% of the 558 prisoners examined did not commit crime in the future. This implied a failure of the use of incapacitation as a justification for death penalty.⁷

Even if the life of the convict is taken by justifying it in terms of 'an eye for an eye' i.e retribution, the life of both the convict and his family is taken away. Execution brings misery and suffering to the family of the convict thereby taking away the dignity of their lives.⁸Punishing the offender is not wrong but if such punishment is justified on retributive grounds, it isolates the offender and his family from the mainstream society⁹

³ Amnesty International, The death penalty v human rights, Why abolish the death penalty, 2007, AI Index ACT 51/002/2007 pp 1-6

⁴ 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

⁵ Ewing v California 538 US 11 (2003)

⁶ 408 US 238

⁷ James R. Acker, Questioning Capital Punishment, Criminology and Justice series Studies

⁸ Andrew Oldenquist, Retribution and The Penalty, University Of Dayton Law Review

⁹ *Ibid*

The family of the death row convict has to bear the consequences of retribution after the execution. Once the offender is hanged his pain comes to an end but the family continues to suffer. The family undergoes guilt, anger, isolation, shame and stigma. The family tends to blame the upbringing of the offender that instigated him to resort to crime. For instance, each offender has different histories including drug abuse, sexual abuse etc. The family is also surrounded by the regret of not controlling the aggressive behaviour when first signs were unveiled¹⁰

One of the major arguments supporting death penalty is the presence of a deterrent effect on potential criminals. However it has been argued that there is no proof of the same. A survey was conducted by the U.N in 1988 and was updated in 2002. The focus of the survey was to compare the relation between homicide and death penalty. The findings revealed that there is no basis to assert that death penalty deters potential murderers than any other form of punishment which is not as grave as death penalty.¹¹

In the case of *Gregg v. Georgia* no statistical proof has been found that favours the fact that death penalty act as a deterrent for potential offenders.¹²

With respect to India, in the case of *Swamy Shraddananda V State of Karnataka*¹³ the court resorted to the punishment of life imprisonment without remission by rejecting death penalty.

It submitted certain concerns on the way death penalty was awarded in India. In para 31 of the judgement, Justice Aftab Alam has highlighted the inconsistency in the sentencing system in India with respect to death penalty. In the case of *Bachan Singh*, the court had laid down the principle of rarest of the rare doctrine emphasizing the circumstances in which death penalty could be awarded. Thereafter, in the case of *Machhi Singh* the court had laid down the categories which fall within the ambit of the rarest of the rare category. However, the court expressed its concern on how these guidelines were not being followed and the death penalty was being awarded non uniformly and inconsistently. In the case of *Alok Nath Dutta v State Of*

¹⁰ *Ibid*

¹¹ Roger Hood, *The Death Penalty: A World-wide Perspective*, Oxford, Clarendon Press, third edition, 2002, p. 23

¹² *Gregg v Georgia* 196 S. Ct. 2909 (1976)

¹³ *Swamy Shraddananda@ Murali Manohar Mishra v. State of Karnataka* (2008) 13 SCC 767.

West Bengal¹⁴, Justice Sinha had given illustrations where the court had applied death penalty in one case and refused to apply it in similar circumstances that emerged later in a different case. It was held

“Courts in the matter of sentencing act differently although the fact situation may be somewhat similar.”

Further, in Para 32 of the judgment, the Report of Amnesty International and The Peoples Union Of civil Liberties-‘ Lethal Lottery- the Death Penalty in India’ highlighting the inconsistency in the supreme court judgements awarding death penalty has been discussed. The court held as

“The inability of the Criminal Justice System to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.”

PENOLOGICAL JUSTIFICATION OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF REMISSION

Awarding death penalty would be a disproportionate sentence. The researcher believes that crime is not just committed by one individual. The circumstances that unfold in the society are strong motivators of crime.

However cases like Nirbhaya gang rape, rape of a five year old infant seem to challenge such an assertion. Society then demands retribution. **One thing that it fails to recognise is the fact**

¹⁴ (2007) 12 SCC

that it is somewhere, down the lane, responsible for shaping the psychology of the individual who took to crime.

In a country like India, the Criminal justice system is not fool proof. Violence to extract confessions in police custody, conducting 4am trial to reject the mercy petition of a death row convict(yakub memon) highlight the procedural failures. About 30% of individuals sentenced to death by the trial court are acquitted.

Even in the United States of America, the Steiker Report highlighted that the death penalty was awarded in an arbitrary manner. In the case of Gregg v Georgia, Justice Blackburn highlighted the same.

Considering the violent and inhuman crimes committed by individuals, the punishment of life imprisonment without remission is available.

By sentencing one prisoner to life imprisonment without remission, thousands of potential offenders can be deterred. Since there is no prospect of release, the deterrent value is undeniably high.¹⁵ It acts as a warning in display. It is a better alternative.

The analysis of cost-benefit is not required for showing the incapacitation effect. The probability to identify the offenders who can commit a crime in future is the key to successful incapacitation. There should be a minimum of 'false positives' (the ones who appear to commit a felony, but do not do so). Prior criminal records come handy though they provide only a rough estimate.¹⁶

This type of sentence caters to the public outrage thereby satisfying the feeling of vengeance and retribution.¹⁷

¹⁵, Catherine Appleton and Bent Grøver, The pros and cons of life without parole, 2007 *The British Journal of Criminology*, Oxford University Press, pp8-10

¹⁶ Esther Gumboh, The penalty of life imprisonment under international criminal law, 2011, *African human rights law journal*, pp76-78

¹⁷ *ibid*

A research on the disciplinary conduct of the life sentenced inmates demonstrated that such convicts are less likely to commit rule violations than inmates who have a chance of parole. They abide by the rules of the correctional homes.¹⁸

It basically gives the offender what he deserves. It attaches a moral blame on him. A punishment is given as what the offender is entitled after committing a wrong. However, since offences related to drug, serious felonies are not always committed intentionally, a new rule was developed.-The rule of 'empirical deserts'. It implies doing justice in order to control crime. Thereby, justifying the punishment of life imprisonment without remission.¹⁹

The dangerous crimes that are committed by certain offenders render them dangerous to be let loose in public. Public protection is the rationale behind sentencing them with life imprisonment without remission.²⁰

Such a sanction removes dangerous offenders from the community

Life imprisonment without remission is considered to be a punishment based on the justification of retribution. It brings the offender on the gateway of death. However indeterminate incarceration leads to an overcrowded prison population. In the United States of America the number of such offenders has increased hundred times in thirty years.

HUMAN RIGHTS

Death penalty violates the right to life and the right of not being subjected to cruel, inhuman or degrading punishment as mentioned in the United Nations Declaration on Human Rights. The ICCPR does not completely abolish the death penalty but article 6 of the protocol provides certain safeguards to right to life. Abolition was not mandated but if done, it would be considered a step taken towards right to life.²¹

The Second Optional Protocol of ICCPR is the only treaty that asserts full abolition of death penalty. Further, article 37(a) of the convention on the rights of child prohibits the use of death

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Law commission report of India, Death Penalty, number 262, pp 51-53

penalty on convicts below 18 years of age. The convention against torture and cruel, inhuman or degrading treatment or punishment prohibits certain procedures of administering death penalty.²²

Despite these international obligations, certain countries continue to use death penalty. There are major concerns as to why death penalty results is a violation of human rights. The Steiker's report highlighted the following procedural glitches.²³

1. The criminal statute states the offences under which death penalty can be given as a punishment however there has to be an individual assessment in each case thereby leading to inconsistencies and a violation of human rights.
2. The impossibility to deal with the unconscious bias that exists in awarding death penalty.
3. The degree of legal representation available to these convicts is inadequate.
4. Sometimes, after execution it comes to light that the person had not actually committed the crime. However the irrevocable nature of death penalty makes it against human rights.
5. The judicial decisions are often motivated by politics. They rest their judgment in order to punish political opponents

In India, The Death Penalty India Report addresses a major violation of human rights. The empirical study involved conducting interviews of 15 convicts who had raised claims of being juveniles. However, the judgement that sentenced them to death did not deal with any such claims clearly highlighting the ignorance of a mitigating circumstance. The courts had cited some claims to be a 'tactic to avoid death penalty' or a 'false and frivolous application'. Courts in some cases have also based their conclusion on the age of the accused on the last day of trial and not on the date when the incident occurred. In India, there is also a caste and religious bias

²² *Ibid*

²³ Report of the council to the membership of American Law Institute, Matter of Death Penalty, American Law Institute, 2009, pp9

that exists in administering death penalty. 76% of prisoners sentenced to death belong to backward and religious classes.²⁴

93.5% of prisoners sentenced to death for terror offences are Muslims or of the scheduled caste category.²⁵

Various accounts of violence in police custody have been reported to extort confessions. 89.4 % of the death row convicts had engaged private defence lawyers. Often, lawyers did not give them full account of what happened in the trial. The offenders have reported that they also suspected connivance with the defence lawyer.²⁶

The issue of death penalty has now been taken over by life imprisonment globally. While the former condemns the prisoner to die, the latter requires him to die in prison.²⁷ The global shift towards abolition of death penalty has made life imprisonment as the severest sanction. However it has been asserted that life imprisonment is a violation of human rights.²⁸

Imprisonment shall not be of such a nature that it goes against social justice. It should not psychologically and emotionally damage the offender. The aim of imprisonment shall not be to worsen the behaviour of the inmate and make him do pro criminal activities. Such a sanction also curtails the development and confidence of the offender to face the world.²⁹

Life imprisonment is considered to be an inhuman punishment. It fails the **proportionality test**. The indeterminate sentence to which the offender is sentenced to snatches away individual freedom and subjects him to an emotional and a psychological trauma which makes it an arbitrary sentence.

As far as life imprisonment is concerned, it too is considered as a violation of human rights if shut with the possibility of release.

²⁴ Death penalty India report, NLU Delhi, Volume 1, pp 96

²⁵ *Ibid*, pg 111

²⁶ *Ibid*, pg 132-141

²⁷ Esther Gumboh, The penalty of life imprisonment under international criminal law, 2011, African Human Rights Law Journal, , pp 2

²⁸ Frank J. Porporino and Edward Zamble, Coping With Imprisonment, 1984, Canadian Journal of Criminology, pp2

²⁹ Esther Gumboh The penalty of life imprisonment under international criminal law, 2011, African Human Rights Law Journal, , pp 4

In the case of *Vinter V White*, the court held the sentence of life imprisonment without remission to be against the ECHR. It was stated

“For a life sentence to remain compatible with article 3, there had to be both a possibility of release and a possibility of review.”

Specifying the quantity of the sentence is essential to get in line with human dignity. The life sentence ends with the life of the prisoner thereby quantifying it with death.³⁰ It puts the individual in the waiting room of death. Human life does not involve mere survival but a life of dignity. It puts the individual on the entrance of death. The author has argued that it is even worse than death penalty.³¹

In the case of *Sriharan V Union of India* the sentence of life imprisonment without remission was advocated on the following grounds,

1. Devising a sentence of life imprisonment without the possibility of remission will be an intervention in the work of the legislature.
2. Any sentence depriving the possibility of release will prejudice the convict.
3. It is a form of a brutal and unusual punishment.
4. It was argued that as the way the court cannot command the executive on giving remissions, it cannot even withhold it.
5. The European Commission of Human Rights has also held the punishment of life imprisonment without remission to be contrary to human rights
6. Such a punishment would be a violation of Article 14 and Article 21.
7. Also, also article 20 of the constitution of India would be violated as it provides a protection against ex post facto law and greater punishment. Previously all life convicts had the right to be considered for release after 14 years.(section 433A CrPC)

³⁰ Frank J. Porporino and Edward Zamble, *Coping With Imprisonment*, 1984, *Canadian Journal of Criminology*, pp2

³¹ *Ibid*, pp 5

COMPARISON OF HUMAN RIGHTS

The researcher after examining the two punishments believes that life imprisonment can still be considered to be a replacement for death penalty.

The punishment of death penalty is irrevocable and usually motivated by politics. The criminal justice system of India does not support a death sentence. The unsound way in which remissions are granted in India induced the courts to find a mid way. The courts, in this way are prevented from administering death penalty. In order to cater to heinous crimes, the category of life imprisonment without remission is thus essential.

In the case of *Shraddananda V State of Karnataka*, the court placed reliance on the report of amnesty international and PUCL. 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 analysing judgments of the Indian Supreme Court over five decades, termed the arbitrary Sentencing system a Lethal Lottery, thereby violating human rights³²

In the case of Kulbhushan Jadhav , death sentence was passed by the Pakistan military court, India had appealed to stay the execution of the capital sentence on the following grounds

1. Jadhav was denied consular access and when the charge is so serious, due regard shall be placed on procedure.
2. Pakistan had violated Article 36 of the Vienna Convention and the elementary human rights of the accused as prescribed under article 14 of the ICCPR
3. India sought annulment of the death sentence otherwise it would amount to violation of the international law and treaty rights.

The researcher believes that India's submission of the importance of following the procedures is essential should be applied in the Indian scenario too.

³² 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

When India's criminal justice system cannot support such a sentence, we shall do away with it. Moreover, the alternative of life imprisonment without remission is available to cater to dangerous offenders.

On a comparative analysis of the human rights violation, the court in both Sriharan and Shraddananda case abstained itself from awarding death penalty and resorted to life imprisonment without remission. Unlike the irrevocable wrongful execution, life imprisonment without remission allows the court to undo the wrongful convictions. Moreover, it offers some of release by way of executive clemency.

VICTIM RIGHTS

Victims have a place at each step of the criminal justice system. While victims are the ones directly affected, their families are the indirect victims.

It is the responsibility of the state to punish the offender. Punishment helps in restoration of equilibrium with respect to independence of the wrongdoer and the sufferings of the victim

Victim rights can be broadly understood by

1. Demand for retribution and closure
2. Proportionality principle

Retributive justice is based on two elements distributive justice and corrective justice. The aim of retributive justice is to provide justice to the victim which can be done by punishing the offender. This is a way by which the victim derives closer³³

The proponents of death penalty have argued that in order to make legal sanctions effective it is necessary that they are not only severe but also swift. Whatever statistical evidence that regarded or disregarded the deterrent effect of death penalty has not considered celerity as an essential factor. The system of appeal in death penalty cases is very lengthy. The average of

³³ George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 1999, *Buffalo Criminal Law Review*, pp58

the appeal process in case of death penalty is about 17 years in California which is not the case with life imprisonment without remission.

The author Nancy Berns argues that closure to victim families can come by way of life without parole. In case of death penalty, the sufferings of the victim families are worse.

These include-:

1. The false hope of closure due to the lengthy system of appeal
2. Execution of the offender extinguishes any hope of reconciliation between the victim's family and the family of the offender.³⁴

In case of offenders serving life imprisonment without parole, the system of appeal is not that tedious. There is one right of appeal within the initial 2 years. This is reason why the punishment of death penalty does not bring finality and certainty in the minds of the victim and their families. Life imprisonment ensures that justice is swiftly and certainly served.

The common argument of life imprisonment without the possibility of release being a burden on tax payer's money is wrong. Sentencing a person to death is three times costlier than sentencing a person to life imprisonment without parole.

Penn Harrisburg has used Maryland the target place to compare. The incarceration cost is \$1.13 million and the cost for execution is from \$1.8-3 million.³⁵

The measure of punishment shall not be based on retributive sentiments but on moral and decency grounds. The punishment can not be ascertained by the principle of proportionality in literal sense.³⁶ This is the reason why we do not burn down houses of those offenders who have been convicted of arson.

The correspondence with death penalty and the crime for which it is given is imperfect. A crime cannot technically be avenged by an eye for an eye.

³⁴ Peter Hodgkinson, *The international library of essays in capital punishment*, volume 1, ch 23

³⁵ James R. Acker, *Questioning Capital Punishment*, *Criminology and Justice series Studies*, edited by; Penn Harrisburg

³⁶ Alan Brudner, *Retribution and The Death Penalty*, University of Toronto Press

In India, in the case of swamy shraddananda. The state presented two extreme possibilities

1. The court would either sentence the convict to death sentence or
2. The convict would be sentenced to life imprisonment and gets remitted by virtue of the inconsistent way in which remissions are granted by the appropriate government under section 433A CrPC.

The court believed that the mid path of life imprisonment without remission would enable a balance of the victim rights and the rights of the accused. The accused would not be hanged since his case falls short of the rarest of the rare and would thereby get a punishment proportional to the crime committed by him.

The researcher believes that a criminal is never born a criminal. The society cannot shrug away its responsibility by simply executing such an offender to death. One thing that must be borne in mind is that there are various societal influences that make a person a criminal. The circumstances that unfold in the society are strong motivators of crime. . One thing that the society fails to recognise is the fact that it is somewhere, down the lane, responsible for shaping the psychology of the individual who took to crime.

Heinous crimes that defeat all purposes of humanity shall be served with the punishment of life imprisonment without parole. The justification behind a criminal punishment shall not be retribution but restitution or restorative justice. The fact that the offender will never be able to live a life of dignity and reintegrate with the outside world makes it a suitable substitute viz a viz victim rights.

If a criminal has committed an offence, sparing him from execution would be the truest form of justice that can be served to him. It is out of acknowledgement of the fact that human life is of value and no rights shall destroy it by wants of retribution

The researcher believes that death penalty is a pure manifestation of vengeance and not a means to serve justice. Moreover, the report of Amnesty international titled Lethal Lottery highlights the inconsistent way in which death penalty is awarded. Victim rights do not include injustice to the offender. The irrevocability of death penalty renders it more prone to injustice.

When an offender has to be sentenced to death, the authorities contact the families of the victim. They have to relive those atrocities once again. It traumatises them even more when the families of the offender and victims are related

Moreover, the families of the offender also become the victims once he has been executed. Their respect and dignity is hampered. They live with the guilt of raising a criminal

CONCLUSION

The criminal justice system of India is not fool proof and suffers from many systemic deficiencies. The architecture of the criminal justice system, the content of substantive and procedural criminal laws and the day to day functioning of criminal justice system, all operate to burden and victimize the poorest and the most marginalised sections of our society. This holds true with even greater tragic consequences when dealing with the administration of the death penalty in India. Rampant use of custodial violence to extract confessions, a broken legal aid system and the expensive costs of accessing meaningful justice, all contribute to making the death penalty an extremely undesirable option in India .The Death Penalty India Report published by the centre on death penalty at National Law University Delhi extensively documents the abovementioned concerns. Further, the ‘Lethal Lottery’ report of Amnesty International also highlighted the inconsistent use of the ‘rarest of rare’ doctrine in India.

However the aim of this article was to take the legal discussion forward by looking at the death penalty in the context of the newly evolved punishment of life imprisonment without release to the end of natural life. The article has attempted to show that any penological justification that can be put forward for the death penalty is also met by adopting the form of life imprisonment approved by the constitutional bench in the case of *Sriharan*.

The researcher believes that the punishment of life imprisonment without remission can certainly be used to substitute the death penalty. It satisfies the requirements of deterrence, incapacitation and retribution. Moreover, it upholds the victim rights and provides closure and restitution to the victim and the indirect victims. Though, in *Sriharan* and *Shraddananda* the court held that life imprisonment without release did not violate fundamental rights, that

position is unlikely to find support in international human rights law. However it is an extremely difficult question as to whether life imprisonment without the possibility of release is an acceptable replacement for the death penalty in the short term and as a first step .Telling an individual that he / she will live out the rest of their life in prison with not even the slightest possibility of release inflicts its own cruelty that is hard to imagine. There is the certain strategic attraction to call for the abolition of the death penalty by offering life imprisonment without release as an alternative. However, we must be clear that this option brings with it serious human rights violations as well. It might be a battle that must be fought after the abolition of the death penalty but we must, always, be acutely aware of the suffering it inflicts.

