

**DE JURE NEXUS LAW JOURNAL**

Author:

Hardik Bansal

Dr. Ram Manohar Lohia University

3<sup>rd</sup> Year.

**DEATH PENALTY IN INDIA****Abstract**

*Death penalty debate is one that has been happening since the beginning of the criminal jurisprudence itself. In this article death penalty as a concept is first introduced with a brief description of various different views on death penalty. This is followed by examining the constitutionality of death penalty and the various important landmark judgements related to the same. It then moves forward to talk about the needs of the society and how in any society law is governed by people's aspirations and needs and thus any opinion on death penalty cannot be in isolation of them. It then seeks to highlight certain problems related to death penalty especially with regards to India and finally concludes by providing three broad solutions that can be worked on.*

**Introduction**

The concept of death penalty in India has perhaps been one of the most discussed and yet the most complex problem in being. It is a dynamic issue that contains not only the aspect of constitutional law and criminal jurisprudence but also aspects of the human rights law by and large. The views on death penalty range from the most extreme to the most liberal wherein one is the retentionist view that focuses on retaining the death penalty or the capital punishment so as to punish the worst of the worst or in the most heinous of the cases. The other view in this regard is the abolitionist view that focuses on abolishing the death penalty altogether as people that have such a view often feel that no crime in this world deserves a death penalty wherein most countries in the world have also taken up the view of the abolitionists by and large.

## Constitutionality of Death Penalty

Coming to the constitutionality of death penalty by and large the opinion of the Supreme court has evolved from time to time and has changed according to the needs of the society. Herein the reenactment of the criminal procedure code<sup>1</sup> in 1973 and the change in criminal jurisprudence the constitutional understanding and the view of the Supreme court by and large also changed in this regard. The first case in this regard that diverted away from the concept of the retributive theory and the so-called deterrence effect that the death penalty might cause was the landmark judgement of *Rajendra Prasad v. State of Uttar Pradesh*.<sup>2</sup> In this landmark judgement the social goals of reformation were thus focused on which arguably has been the aspects that our criminal law still focuses on.

This concept of death penalty was then highlighted in the constitutional 5 judge bench case of *Bachan Singh v. State of Punjab*<sup>3</sup>, wherein the *Maneka Gandhi v. Union of India*<sup>4</sup> case had just happened in its backdrop. In the *Bachan Singh* case thus the concept of rarest of the rare doctrine was famously propagated wherein the constitutionality of the death penalty was found to be sound with even the expanded and expansive view of Article 21<sup>5</sup> of the Indian constitution and the golden triangle as expounded in the *Maneka Gandhi* case. Herein it is important to note that 2 years after the *Bachan Singh* judgement the sole dissent of honorable Justice P.N. Bhagwati was published he opined that death penalty is unconstitutional and further that the rarest of the rare doctrine is itself arbitrary as it subjects the due process of law on the sole and arbitrary discretion of the judges. Law by and large should be as objective as possible at least at a prima facie level to remove any doubts on the mind of the people when it comes to the fairness of law, as law should be fair, just and reasonable at all times and never at all arbitrary.

Further in *Mithu v. State of Punjab*<sup>6</sup> section 303<sup>7</sup> of the Indian Penal Code was found to be unconstitutional as it mandatorily called for death penalty if someone who is on death row commits another murder. This was found to be violative of Article 14<sup>8</sup> and Article 21<sup>9</sup> of the Indian Constitution. Similarly, the constitutionality of death penalty was again reviewed in the

---

<sup>1</sup>The Code of Criminal Procedure, 1973 (Act 2 of 1974).

<sup>2</sup>*Rajendra Prasad v. State of Uttar Pradesh*, 1979 SCR (3) 78.

<sup>3</sup>*Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

<sup>4</sup>*Maneka Gandhi v. Union of India*, 1978 SCR (2) 621.

<sup>5</sup>The Constitution of India, art. 21.

<sup>6</sup>*Mithu v. State of Punjab*, 1983 SCR (2) 690.

<sup>7</sup>The Indian Penal Code, 1860 (Act 45 of 1860), s. 303.

<sup>8</sup>The Constitution of India, art. 14.

<sup>9</sup>The Constitution of India, art. 21.

very recent case of *Channulal Verma v. State of Chhattisgarh*<sup>10</sup> wherein again it was found to be constitutional. Thus, one thing that can be certainly established is that by and large death penalty has been found to be constitutional by the honorable courts and the honorable judges.

### **Needs of the Society**

It is worth noting that the crimes that call and ask for death penalty have increased in the recent years especially after the case of *Nirbhaya*<sup>11</sup> that shook the very conscience of the society at large and led to many changes in law as well as in criminal jurisprudence by and large. Further special acts that have been made in the recent years also have harsher penalties and provisions specifically talking about death penalty such as the POSCO Act.<sup>12</sup> It is pertinent to note that the societal narrative in India calls for death penalty by and large. Whenever protests happen, and it is up for debate that laws have to be made more stringent, one of the foremost things that is asked for is an addition of death penalty in the cases and the execution and implementation of the same. Although, it can be argued that logically speaking it is impossible to measure the deterrence effect or in very simple terms we cannot measure how many people have not committed an offence because the punishment for the same was death penalty. Herein, the important question also remains while committing of an offence does an individual has the knowledge and the omniscience to be aware of the future consequences of his or her actions herein. It can be further said that psychologically speaking they might have committed the offence on this simple belief that they would not get caught or without any thought about the repercussions of their actions in the first place, thus the final punishment being immaterial in the first place. Regardless one aspect that would nonetheless stand is that society wants death penalty and demands the same. Some might call it barbaric in the sense of execution of the same however, one thing is certain that people who are given death penalty are not considered reformable individuals that can contribute to the society or again become well-functioning and contributing members of the same. Thus, because they cannot join back the society and the society itself does not want them to be their part, the retribution theory herein and the justice being done in the form of the criminal getting his due perhaps provide some respite.

### **Problems With Death Penalty**

---

<sup>10</sup>*Channulal Verma v. State of Chhattisgarh*, 2018 SCC OnLine SC 2570.

<sup>11</sup>*Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1.

<sup>12</sup>The Protection of Children From Sexual Offences Act, 2012 (Act 32 of 2012).

In the landmark case of *Balchand v. State of Madhya Pradesh*<sup>13</sup> wherein Justice Krishna Iyer for the first time promoted the concept of bail not jail being the rule and also that even if many guilty are found innocent, no innocent should be found guilty. This highlights the first and foremost the most detrimental problems of death penalty which is the finality of it. This basically means that once an individual has been granted death penalty and later new evidence is found to suggest that an individual was not guilty there is absolutely no turning back. Still in India cases are common wherein people have been in jail for 10+ years and later it has been found that the accused who was found guilty was innocent all along and thus this problem of death penalty can never be ignored. Apart from this another issue that still stems about is that death penalty causes no deterrence effect and is equally deterrent if not less as compared to the life imprisonment. Further, a lot of cases wherein death penalty is initially given the decision is later overturned when the same comes in the note of the higher courts. Also, the manner in which the death penalty is given which is through hanging is another aspect that has to be taken a look at and perhaps lethal injection should be added as an alternative as it has been argued that the same is less lethal.

### **Conclusion and The Way Forward**

After looking at the constitutionality of the death penalty, the needs of the society as well as the problem of deterrence effect and capital punishment in general one can perhaps see why the world at large and various countries are moving towards abolishment of death penalty. From a religious and a spiritual point one can argue that God has given you your life and he or she is the only one that has the right to take it away. It is my humble opinion that one of three things should be looked upon and then subsequently the concept of death penalty should be retained or abolished. First and foremost, the rarest of rare doctrine should properly be elucidated upon and further elaborated and build upon as the same becomes very subjective and can change from one judge and one court to another. If some clear guidelines or clear points or reasons are given to determine objectively when and where the death penalty is the rule and jail is the exception as opposed to the contrary which is the norm then it can lead to a lot of clarity and perhaps less overturning of decision. Secondly, considering the supreme court has upheld the constitutionality of death penalty time and time again, the Parliament of India which is in the best position to understand the needs of the society and the people should form a committee to examine whether an act of parliament should remove death penalty as a

---

<sup>13</sup>*Balchand v. State of Madhya Pradesh*, 1977 SCR (2) 52.

punishment once and for all or not. Lastly, and the most importantly if death penalty has to be given then the same should happen in a speedy manner as justice delayed is justice denied. Delaying of death penalty and putting a criminal in death row is a mental torture of its own and amounts to grave mental cruelty. The honorable Supreme Court<sup>14</sup> has categorically held that right to speedy trial comes under the aspect of Article 21<sup>15</sup> and thus it should be done even in cases of death penalty.



# De Jure Nexus

LAW JOURNAL

---

<sup>14</sup>*Sheela Barse v. Union of India*, 1986 SCR (3) 443.

<sup>15</sup>The Constitution of India, art. 21.