

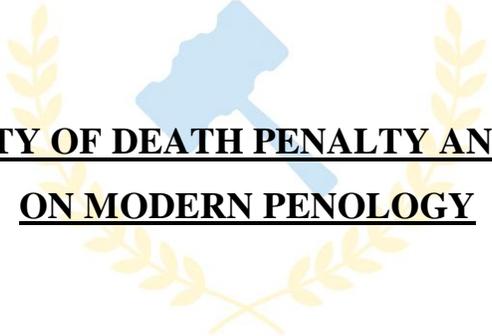
**DE JURE NEXUS LAW JOURNAL**

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**CONSTITUTIONALITY OF DEATH PENALTY AND ITS IMPLICATION  
ON MODERN PENOLOGY**

**Introduction**

The topic of the day aims to scrutinize that whether the provision of death penalty stands constitutional along with analyzing the impact that it can have on the modern-day study of crimes/punishments. We are no alien to the fact that every country has its own unique and distinct constitution which lays down the very basis of legal polity in the State. It specifies the intrinsic and fundamental principles that the state aims to uphold. Given that each State has a different constitution, we might want to streamline our area of study to a particular State to understand the constitutionality of Capital Punishment in lieu of the constitution of the selected State. For this purpose, let us unfurl this issue in light of the Indian constitution as it is the constitution which governs our society.

When one talks about death penalty, it can be understood as a deliberate and legal process by which a wrongdoer is deprived of his life and body. The practice of inflicting death onto convicts as a consequence to their deviant acts is what formulates capital punishment.

## Position in India

Article 21 of the Indian Constitution<sup>1</sup> enshrines the principle of right to life, it lays down that each and every person, be it a citizen or a non-citizen, is entitled to his life and it also enshrines that no such person shall be made to part with his life except when a due procedure of law requires to do so. Herein we find that it is a fundamental right of each being to have its organic presence protected but on the other hand, it is the same article that lays down that such organic presence can be taken away after a due procedure of law is followed. It hints towards the constitutional validity of Capital Punishments. Hence, legal deprivation of life is absolutely and constitutionally sound in the Indian context.

Now that we have a fair idea of the constitutional provisions, let us delve into the Judicial Interpretations on the matter. The 1<sup>st</sup> judicial discussion on this matter can be traced back in the case; *Jagmohan Singh v. State of U. P*<sup>2</sup>, in this case, the applicants contended that the provision of Capital punishment is in violation Articles 14,21 of the Indian constitution, they argued that the discretion vested in the judges while deciding the question of death stood in violation of Article 14 which requires equality before the law. Another contention put forward by them was that Death penalty itself was violative of right to life which is upheld by Article 21, the grounds for this claim were that there were no concrete provisions which highlighted the circumstances under which death was to be preferred over life imprisonment. The supreme court was then called upon to decide this issue, the court held that death penalty was a permissible punishment, and did not violate the Constitution.

A similar judgement of *Bachan Singh V. State of Punjab*<sup>3</sup> then came up and laid down the doctrine of rarest of the rare cases. In this case, the honorable supreme court held that Capital punishment is absolutely constitutional when imposed in exceptional and rarest of the rare cases. The cases falling under the above said category are of such nature that they are capable of intensely pestering the society and are capable of bumfuzzling the collective conscience of a society.

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<sup>1</sup>The Constitution of India, Article 21

<sup>2</sup> *Jagmohan Singh v. State of U. P* 1973 AIR 947

<sup>3</sup> *Bachan Singh V. State of Punjab* (1980) 2 SCC 684

In *Sher Singh & Others vs The State of Punjab*<sup>4</sup>, the Supreme Court held that capital punishment is constitutionally legitimate and admissible inside the imperatives of the standard laid down in *Bachchan Singh* and thus, this must be acknowledged as the *lex loci*.

Having considered all the relevant constitutional provisions and the judicial interpretations of the law, it can be safely concluded that death penalty is absolutely legal and constitutional in the State. Now that we know the constitutional status of the punishment, we may now consider the objectives that this punishment achieves or in simpler words we would now discuss its impact on penology in India.

### **Penological implications<sup>5</sup>**

Penology can be understood as theory and practice of different social orders in their endeavors to curb crimes, and fulfill general assessment by means of a proper treatment system for people sentenced for criminal offenses. The following are the ways in which the punishment creates a penological impact in curbing the crime and satisfying the general public opinion:

- A) Deterrence: this penological concept contends that we humans being rational beings dread to be dead, the imposition of death penalty rather than mere imprisonment is bound to have a far greater impact on our psyche. It would make us, the rational beings averse to crimes that attract the death penalty, for the desire to live would outweigh the derivations from the potential deviant act. Having considered this basic rationale behind the concept of deterrence, it is obvious to follow that the penological impact of death penalty on modern day penology is that it would discourage the commission of certain offences, for every man has the desire and will to live.
- B) Incapacitation: this penological concept advocates that an offender shall be deprived of the ability to commit another offence. The direct impact of capital punishment on the modern-day penology is that it nullifies the ability of the wrongdoer to recommit any subsequent

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<sup>4</sup> *Sher Singh & Others vs The State of Punjab* 1983 AIR 465, 1983 SCR (2) 582

<sup>5</sup>Law Commission of India, 2015, Death Penalty, Report no.262 available at <https://lawcommissionofindia.nic.in/reports/report262.pdf>

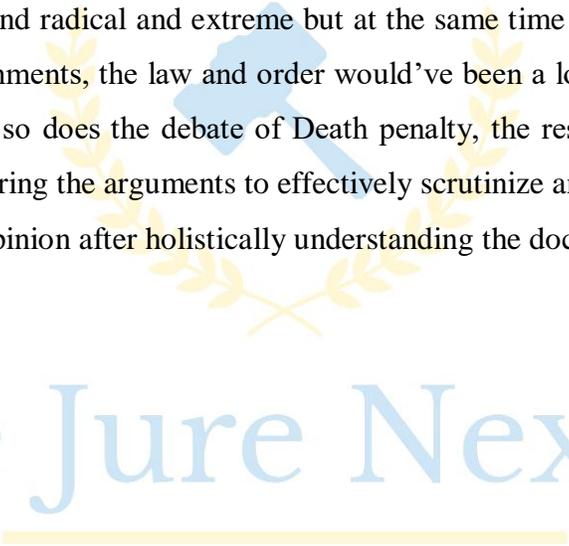
offence. For instance, a murderer once executed would never be able to indulge in any deviant act.

- C) Retribution: this penological concept vouches for meting out just treatment to a wrongdoer as a consequence for his wrongful act. It calls for an unpleasant experience for the offender for the defiance of law on his part. Considering its impact on modern day penology, we may come to a point that it satisfies the society's collective consciousness and their "call for justice". It upholds the society's faith in the law and provides the members of a social setting with a reason to abide by the law.
- D) Reformation: this penological concept calls for an opportunity for all offenders to serve their sentence and transform into a productive and law-abiding member of the society. When this concept is studied in lieu of capital punishments, we find that this opportunity to transform is lost. Even if a death row convict is willing to reform himself, he is deprived of such an opportunity. It can also be considered as a criticism of capital punishments.

### Conclusion

Having studied all the relevant provisions and judicial opinions on the constitutionality of death penalty along with its impact on penology, we can conclude that the doctrine of capital punishment has been upheld to be constitutionally sound. The relevant case laws discussed above have shed light on the judicial opinions and circumstances for imposing the capital punishment. Another facet to establish that the *lex loci* is in favor of the death penalty is that under section 302 of the Indian penal code, 1860, we find that death penalty is provided as an alternative to life imprisonment and yet till date it has not been struck down as unconstitutional. The said section bestows the judge with the power to decide on the question of the punishment under it. Not only section 302 but also sections 120B, 121, 132, 396 etc. provide for an alternative punishment of death penalty and yet all of them remain intact and have not held to be unconstitutional. Also in the very recent times, India saw the execution of various criminals like Ajmal Kasab, Yakub Memon and the Nirbhaya convicts. All of these people were hanged after a due process of law. They were tried and held guilty after which they were sentenced to death. The honorable supreme court did not pardon any of these people from their death sentence. All of these facts when studied with all the arguments advanced earlier make the fact that Capital punishments are constitutional irrefutable. We further

considered what impact does it have on the modern-day penology, we discussed that what exactly the study of penology is along with its concepts in light of death penalty. We unfurled that death penalty is not only a deterrent but also promotes Incapacitation and Retribution. We further discussed the reformatory aspect of penology in light of the death penalty and concluded that this penological element remains absent in Death sentences and thus is a limitation of the doctrine. Hence, it can be concluded that death penalty in a society so vast like ours cannot be done away with, we have large numbers of crimes attracting the doctrine committed every day and this doctrine acts as an efficient weapon of our judicial setup to fight the rising crime. One may accuse this doctrine to be harsh and radical and extreme but at the same time one cannot refute the fact that without capital punishments, the law and order would've been a lot worse. All debates have 'for(s)' and 'against' and so does the debate of Death penalty, the responsibility is now on the reasonable person considering the arguments to effectively scrutinize and weigh its pros and cons in order to formulate an opinion after holistically understanding the doctrine.



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