Bachan Singh Etc. Etc vs State Of Punjab Etc. Etc on 16 August, 1982

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Author: P.N. Bhagwati

Bench: P.N. Bhagwati, Y.V. Chandrachud

PETITIONER:
BACHAN SINGH ETC. ETC.

Vs.

RESPONDENT:
STATE OF PUNJAB ETC. ETC.

DATE OF JUDGMENT16/08/1982

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
CHANDRACHUD, Y.V. ((CJ)
SARKARIA, RANJIT SINGH
GUPTA, A.C.
UNTWALIA, N.L.

CITATION:
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RF 1989 SC 653 (17)
E&D 1989 SC1335 (10)
R 1989 SC2299 (2,3)
RF 1991 SC 345 (6,11)

ACT:
(A) Death Penalty, whether constitutionally valid ?-Right to live, whether the provisions of section 302, Penal Code, offends Article 19 of the Constitution-Distinction between "Public order" and "Law and Order"-Whether section 302, Penal Code, violates Article 21, the basic structure of the Constitution and Article 6(1) of the International Covenant on Civil and Political Rights as adopted by the

General Assembly of the United Nations and reiterated in the Stockholm Declaration.

(B) Code of Criminal Procedure, 1973, section 354(3)-If section 302, Penal Code, is constitutional, whether the sentencing procedure provided in section 354(3) of the Code of Criminal Procedure, 1973 (Act II of 1974) is unconstitutional on the ground that it invests with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative with imprisonment for life.

(C) Powers of the Supreme Court to lay down standards or norms restricting the area of imposition of death penalty to a narrow category of murders.

HEADNOTE:

Upholding the constitutionality of section 302, Penal Code, and section 354 (3) of the Code of Criminal Procedure Code. the Court.

^

HELD: Per majority.

Sarkaria, J. [On behalf of Chandrachud, C.J., A.C. Gupta, N.L. Untwalia, JJ. and on his own behalf].

The right to life is not one of the rights mentioned in Article 19 (1) of the Constitution and the six fundamental freedoms guaranteed under Article 19(1) are not absolute rights. The condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises, must be within the purview of and protection of Article 19 (1). [173 E, 174 A, B-C]

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State of Bombay v. R.M.D. Chamarbaugwala, [1957] SCR 874 @ 920; Fatechand Himmatlal and Ors. v. State of Maharashtra, [1977] 2 SCR 828 @ 840; A.K. Gopalan v. The State of Madras, [1950] 1 SCR 88, followed.

2. The Indian Penal Code, particularly those of its provisions which cannot be justified on the ground of unreasonableness with reference to any of the specified heads, such as "public order" in clauses (2), (3) and (4) is not a law imposing restrictions on any of the rights conferred by Article 19 (1). There are several offences under the Penal Code, such as, theft, cheating, ordinary assault, which do not violate or affect "public order", but only "law and order". These offences injure only specific individuals as distinguished from the public at large. It is now settled that "public order" means "even tempo of the life of the community". That being so, even all murders do not disturb or affect "public order". Some murders may be of purely private significance and the injury or harm resulting therefrom affects only specific individuals, and,

consequently, such murders may not be covered by "public order" within the contemplation of clauses (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say that punishment of such murderers is not in the general public interest. It may be noted that general public interest is not specified as a head in clauses (2) to (4) on which restriction on the rights mentioned in clause (i) of the Article may be justified.

[181 D-H, 182 A-B]

The real distinction between the areas of "law and order" and "public order" lies not merely in the nature or quality of the act, but in the degree and extent. Violent crimes similar in nature, but committed in different contexts and circumstances might cause different reactions. A murder committed in given circumstances may cause only a slight tremor, the wave length of which does not extend beyond the parameters of law and order. Another murder committed in different context and circumstances may unleash a tidal wave of such intensity, gravity and magnitude, that its impact throws out of gear the even flow of life. Nonetheless, the fact remains that for such murders which do not affect "public order", even the provision for life imprisonment in section 302, Indian Penal Code, as an alternative punishment, would not be justifiable under clauses (2), (3) and (4) as a reasonable restriction in the interest of "public order". Such a construction must, therefore, be avoided. Thus construed, Article 19 will be attracted only to such laws, the provisions of which are capable of being tested under clauses (2) to (5) of Article 19. [182 B-E]

R.S. Cooper v. Union of India, [1970] 3 SCR 530; Maneka Gandhi v. Union of India, [1978] 2 SCR 621; Dr. Ram Manohar Lohia's case, [1966]1 SCR 709; Hardhan Saha and Anr. v. State of West Bengal, [1975] 1 SCR 778@ 784, followed.

3. From the decided cases of the Supreme Court, it is clear that the test of direct and indirect effect was not scrapped. Indeed there is no dispute that the test of "pith and substance" of the subject-matter and of direct and of incidental effect of legislation is a very useful test to determine the question of legislative competence, i.e., in ascertaining whether an Act falls under one Entry
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while incidentally encroaching upon another Entry. Even for determining the validity of a legislation on the ground of infringement of fundamental rights, the subject matter and the object of the legislation are not altogether irrelevant. For instance, if the subject matter of the legislation directly covers any of the fundamental freedoms mentioned in Article 19 (1). It must pass the test of reasonable ness under the relevant head in clauses (2) to (6) of that Article. If the legislation does not directly deal with any of the rights in Article 19 (1), that may not conclude the

enquiry. It will have to be ascertained further whether by its direct and immediate operation, the impugned legislation abridges any of the rights enumerated in Article 19 (1). [189 B-D]

The mere fact that the impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid must pass the test of reasonableness under Article 19. But if the impact of the law on any of the rights under clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity. [190 A-C]

R.C. Cooper v. Union of India, [1970] 3 SCR 530; Maneka Gandhi v. Union of India, [1978] 2 SCR 621; Subrahmanyam Chattiar's case, [1940] FCR 188; Ram Singh v. State of Delhi, [1951] SCR 451; Express Newspapers (P) Ltd. and Anr v. The Union of India & Ors., [1959] SCR 12; Minnesota Ex. Rel. Olson, [1930] 283 U.S. 697 @ 698; Sakal Papers (P) Ltd. and Ors. v. The Union of India, [1962] 3 SCR 842; Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr., [1966] 3 SCR 744; Bennett Coleman's case, AIR 1973 SC 106, referred to.

4. Section 299 defines "culpable homicide" and section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19 (1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19 (1). It cannot be said that the object of the penal laws is generally such as not to involve any violation of the rights conferred by Article 19 (1) because after the decision of this Court in the Bank Nationalisation case the theory, that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, stands discredited. But the point of the matter is that, in pith and substance, penal laws do not deal with the subject-matter of rights enshrined in Article 19 (1). That again is not enough for the purpose of deciding upon the applicability of Article 19, because even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19 (1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19 (1) shall have to be attracted. It would then become necessary to test the

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validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, it is clear that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Section 302 of the Penal Code, therefore, does not have to stand the test of Article 19 (1) of the Constitution. [190 C-H, 191 A-B]

The onus of satisfying the requirements of Article 19, assuming that the Article applies. lies on the person challenging its validity. There is initial presumption in favour of the constitutionality of the state and the burden of rebutting that presumption is thrown on the party who challenges the constitutionality on the ground of Article 19. Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. Even where the burden is on the State to show that the restriction imposed by the impugned statute is reasonable and in public interest, the extent and the manner of discharge of the burden necessarily depends on the subject-matter of the legislation, the nature of the inquiry, and the scope and limits of judicial review.

[192 C-D, 193 A, C-D, 194 D-E]

Saghir Ahmad v. State of Uttar Pradesh, [1955] 1 SCR 707; Khyerbari Tea Co. v. State of Assam & Ors., A.I.R. 1964 SC 925; B. Banerjee v. Anita Pan, [1975] 2 SCR 774 @ 787; Pathumma v. State of Kerala, [1978] 2 SCR 537; Dennis v. United States, 341 US 494, 525: 95 L.Ed. 1137: 71 S. Ct. 857; Gregg v. Georgia, 428 US 153: 49 L.Ed. 2nd 859; State of Madras v. V.G. Rao, [1952] SCR 597 @ 607; Jagmohan Singh v. State of U.P., [1973] 2 SCR 541, referred to.

5. Statistical attempts to assess the true penological value of capital punishment remain inconclusive. Firstly, statistics of deterred potential murderers are hard to obtain. Secondly, the approach adopted by the Abolitionists is over simplified at the cost of other relevant but imponderable factors, the appreciation of which is essential to assess the true penological value of capital punishment. The number of such factors is infinitude, their character variable, duration transient and abstract formulation difficult. Conditions change from country to country and time to time. Due to the inconsistancy of social conditions,

it is not scientifically possible to assess with any degree of accuracy, as to whether the variation in the incidence of capital crime is attributable to the presence or absence of death penalty in the penal law of that country for such crimes.

[215 E-H, 216 A]

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6. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in section 302, Penal Code, on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people the world over, including sociologists, legislators, jurists, judes and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion chanalised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new sections 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder another capital offences were before the Parliament and presumably considered by it when in 1972-73 it took up revision of the Code of 1898, and replaced it by the Code of Criminal Procedure, 1973, it cannot be said that the provision of death penalty as an alternative punishment for murder, in section 302, Penal Code, is unreasonable and not in public interest. Therefore, the impugned provision in section 302, violates neither the letter nor the ethos of Article 19. [221 B-H, 222 A]

7. (i) Neither the new interpretative dimensions given

to Articles 19 and 21 by the Supreme Court in Maneka Gandhi, [1978] 2 SCR 621, and Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi, [1979] 1 SCR 512, nor the acceptance by India of the International Covenant on Civil and Political Rights, makes any change in the prevailing standards of decency and human dignity. The International Covenant does not outlaw capital punishment for murder altogether. [225 C-E]

(ii) In accordance with the interpretative principle indicated by the Supreme Court in Maneka's case, Article 21 will read as "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law" or in its converse positive form as "A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law." Article 21, thus, clearly

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brings out the implication, that the Founding Fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. In view of the constitutional provisions-Entries 1 and 2 in List III Concurrent List of Seventh Schedule Articles 72 (1) (c), 161 and 134-it cannot be said that death penalty under section 302, Penal Code, per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution. [222 E-H, 223 A-B, F-H]

(iii) Clauses (1) and (2) of Article 6 of the International Covenant on Civil and Political Rights do not abolish or prohibit the imposition of death penalty in all circumstances. All that they require is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law which shall not be an ex post facto legislation. Thus, the requirements of these clauses are substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of our Constitution. India's commitment, therefore, does not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code. The Penal Code prescribes death penalty as an alternative punishment only for heinous crimes which are not more than seven in number. Section 354 (3) of the Criminal Procedure Code, 1973 in keeping with the spirit of the International Covenant, has further restricted the area

of death penalty. India's penal laws, including the impugned provisions and their application, are thus entirely in accord with its international commitment. [224 G-H, 225 A-C]

8. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable or unjust. Nor can it be said that this sentencing discretion, with which the Courts are invested, amounts to delegation of its power of legislation by Parliament. The impugned provisions do not violate Articles 14, 19 and 21 of the Constitution.

[238 B, G-H, 239 A-B]

Section 235 (2) of the Code of Criminal Procedure makes not only explicit what according to the decision in Jagmohan's case was implicit in the scheme of the Code, but also bifurcates the trial by providing two hearings, one at the preconviction stage and another at the pre-sentence stage. And, section 354 (3) of the Code marks a significant shift in the legislative policy underlying the Code, 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of section 354 (3), the normal punishment for murder and six other capital offences under the Penal Code is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. [229 F-G, A-B]

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Although sub-section (2) of section 235 of the Code does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. [230 E-F]

Jagmohan Singh v. State of U.P., [1973] 2 SCR 541, reiterated.

Santa Singh v. State of Punjab, AIR 1973 SC 2385, referred to.

9. The expression "special reasons" in the context of section 354 (3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to crime as well as criminal. Thus, the legislative policy now writ large and clear on the face of section 354 (3) is that on conviction of murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. [236 C-D]

Balwant Singh v. State of Punjab, [1976] 2 SCR 684,

referred to.

10. Section 235 (2) of the Code provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless have, consistently with the policy underlined in section 354 (3), a bearing on the choice of sentence. The present legislative policy discernible from section 235(2) read withsection 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under section 302, Penal Code, the Court should not confine its consideration "principally" or "merely" to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal. [237 C-E]

11. The Supreme Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature can be laid down. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of "special reasons" in section 354(3), circumstances found on the facts of a particular case, must evidence aggravation of an abnormal or special degree. [243 E-F, 254 B-C]

Gurbakash Singh Sibbia and Ors. v. State of Punjab, [1980] 3 SCR p. 383, applied.

Hyman and Anr. v. Rose, [1912] AC 623, referred to.

12. Sections 354 (3) and 235 (2) and other related provisions of the Code of 1973 make it clear that for making the choice of punishment or for ascertaining
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the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man." In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

[251 G-H, 252 A-C]

Rajendra Prasad v. State of U.P. [1979] 3 SCR p. 78,

Bishnu Deo Shaw v. State of West Bengal, [1979] 3 SCR p. 355, overruled.

13. There are numerous other circumstances justifying the passing of the lighter sentence, as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3) . Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by the Supreme Court, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354 (3), viz., that for persons convicted of murder life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought Lot to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. [255 E-H, 256 A-C]

Per Bhagwati J. (Dissenting)

1:1. Ordinarily, on the principle of stare decisis, Judges would hold themselves bound by the view taken in an earlier case and resist any attempt at reconsideration of the same issue. But, for several weighty and given considerations, the Court can depart from this precedential rule in any particular case.

[258 A-B]

1:2. The rule of adherence to precedence is not a rigid and inflexible rule of law, but it is a rule of practice adopted by the Courts for the purpose of ensuring uniformity and stability in the law. Otherwise there will be no certainty and predictability in the law, leading to chaos and confusion and in the process

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destroying the rule of law, and increasing the labour of judges. But this rule of adherence to precedents; though a necessary tool "in the legal smithy," is only a useful servant and can not be allowed to turn into a tyrannous master. If the rule of stare decisis were followed blindly and mechanically, it would dwarf and stultify the growth of the law and affect its capacity to adjust itself to the

changing needs of the society. [258 B-C, D,E,F]

1:3 There are certain issues which transcend technical considerations of stare decisis and if such an issue is brought before the Court, it would be nothing short of abdication of its constitutional duty for the Court to refuse to consider such issue by taking refuge under the doctrine of stare decisis. The Court may refuse to entertain such an issue like the constitutional validity of death penalty because it is satisfied that the previous decision is correct but it cannot decline to consider it on the ground that it is barred by the rule of adherence to precedents. [259 E-G]

In the present case, there are two other supervening circumstances which justify, may compel, re-consideration of the decision in Jagmohan's case. The first is the introduction of the new Code of Criminal Procedure in 1973, which by section 354, sub-section (3) has made life sentence the rule, in case of offences punishable with death or in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons. The second and the still more important circumstance which has supervened since the decision in Jagmohan's case is the new dimension of Articles 14 and 21 unfolded by the Supreme Court in Maneka Gandhi v. Union of India (1978) 2 SCR 663. This new dimension of Articles 14 and 21 renders the death penalty provided in section 302 of the Indian Penal Code read with section 354(3) of the Code of Criminal Procedure vulnerable to attack on a ground not available at the time when Jagmohan's case was decided. Furthermore, since Jagmohan's case was decided, India has ratified two international instruments on Human Rights and particularly the International Covenant on civil and political rights.

[259 G-H, 260 A-D]

Jagmohan v. State of U.P. A.I.R. 1973 SC 947, dissented from.

State of Washington v. Dawson and Company 264 U.S. 646; 68 L. Edn. 219 dissenting judgment quoted with approval.

Maneka Gandhi v. Union of India, [1978] 2 SCR 663 applied.

2:1. The constitutional validity of the death penalty provided as an alternative punishment in section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure cannot be sustained. Death penalty does not serve any social purpose or advance any constitutional value and is totally arbitrary and unreasonable so as be violative of Articles 14, 19, and 21 of the Constitution, [256 F, 257 E]

Jagmohan Singh v. State of Uttar Pradesh, AIR 1973 SC 947. not followed.

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2:2 The culture and ethos of the nation as gathered from its history, its tradition and its literature would

clearly be relevant factors in adjudging the constitutionality of death penalty and so would the ideals and values embodied in the Constitution which lays down the basic frame-work of the social and political structure of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. So also standards or norms set by International organisations and bodies have relevance in determining the constitutional validity of death penalty and equally important in construing and applying the equivocal formulae of the Constitution would be the "wealth of non-legal learning and experience that encircles and illuminates" the topic of death penalty. [261 B-E]

2:3. The objective of the United Nations has been and that is the standard set by the world body that capital punishment should be abolished in all countries. This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid. [268 B-C]

2:4. The Constitution of India is a unique document. It is not a mere pedantic legal text but it embodies certain human values, cherished principles, and spiritual norms and recognises and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality. The several provisions enacted in the constitutions for the purpose of ensuring the dignity of the individual and providing for his material, moral and spiritual development would be meaningless and ineffectual unless there is rule of law to invest them with life and force.

[268 C-D, G-H]

2:5. The rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire'. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. "Law" in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever arbitrary or despotic it may be. Otherwise even under a dictatorship it would be possible to say that there is rule of law, because every law made by the dictator howsoever arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial, it is law that governs the relationship between men and men and between men and the

State. But still it is not a rule of law as understood in modern jurisprudence because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator, it is in effect and substance the rule of man and not of law which prevails in such a situation. What is a necessary element of the rule of law is that the law must not be arbitrary and irrational and it must satisfy the test of reason and the democratic form of polity seeks to ensure this element by making the framers of the law accountable to the people. [269 A-E]
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2:6. The rule of law has much greater vitality under our Constitution than it has in other countries like the United Kingdom which has no constitutionally enacted Fundamental Rights. The rule of law has really three basic and fundamental assumptions; one is that law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinance effective for a short duration while the legislation is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature; the other is that, even in the hands of a democratically elected legislature, there should not be unfettered legislative power; and lastly there must be an independent judiciary to protect the citizen against excesses of executive and legislative power and we have in our country all these three elements essential to the rule of law. It is plain and indisputable that under our Constitution law cannot be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14 or Article 19 or Article 21, whichever be applicable. [275 E-H. 276 A-B]

Minerva Mill's case [1981] 1 SCR 206; Maneka Gandhi's case [1978] 2 SCR 621; Airport Authority of India's case [1979] 3 SCR 1014; A.K. Gopalan's case [1950] 3 SCR 88; F.C. Mullen's case [1981] 2 SCR 516 referred to.

2:7. The Constitution does not in so many terms prohibit capital punishment. In fact, it recognises death sentence as one of the penalties which may be imposed by law. Apart from Article 21, Clause (C) of Article 72 also recognises the possibility of a sentence of death being imposed on a person convicted of an offence inasmuch as it provides that the President shall have the power to suspend, remit or commute the sentence of any person who is convicted of an offence and sentenced to death. Therefore, the imposition of death sentence for conviction of an offence is not in all cases forbidden by the Constitution. But that does not mean that the infliction of death penalty is blessed by the Constitution or that it has the imprimatur or seal of approval of the Constitution. The Constitution is not a transient document but it is meant to endure for a long time to come and during its life, situations may arise where death penalty may be found to serve a social purpose

and its prescription may not be liable to be regarded as arbitrary or unreasonable and therefore to meet such situations, the Constitution had to make a provision and this it did in Article 21 and clause (c) of Article 72 so that, even where death penalty is prescribed by any law and it is otherwise not unconstitutional, it must still comply with the requirement of Article 21 and it would be subject to the clemency power of the President under clause (c) of Article 72. [276 D-H, 277 A-B]

2:8. From the legislative history of the relevant provisions of the Indian Penal Code and the Code of Criminal Procedure, it is clear that in our country there has been a gradual shift against the imposition of death penalty. Life sentence is now the rule and it is only in exceptional cases, for special reasons, that death sentence can be imposed. The legislature has however not indicated what are the special reasons for which departure can be made from the normal rule and death penalty may be inflicted. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal
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rule, death sentence may be imposed. This is left entirely to the unguided discretion of the court, a feature, which has lethal consequences so far as the constitutionality of death penalty is concerned. [277 C-D, 278 E-G]

Rajendra Prasad v. State of U.P. [1979] 3 S.C.R. 646, referred to.

2:9. The problem of constitutional validity of death penalty cannot be appreciated in its proper perspective without an adequate understanding of the true nature of death penalty and what it involves in terms of human anguish and suffering. In the first place, death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life for ever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. Of course, the imprisonment that he has suffered till then cannot be undone and the time he has spent in the prison cannot be given back to him in specie but he can come back and be restored to normal life with his honour vindicated, if he is found innocent. But that is not possible where a person has been wrongly convicted and sentenced to death and put out of existence in pursuance of the sentence of death. In his case, even if any mistake is subsequently discovered, it will be too late, in every way and for every purpose it will be too late, for he cannot be brought back to life. The execution of the sentence of death in such a case makes miscarriage of justice irrevocable. [281 F-H, 282 A-D]

2:10. Howsoever careful may be the procedural safeguards, erected by the law before death penalty can be

imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguards can prevent conviction of the innocent. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionaly valid alternative, the Court or the State acting through the instrumentality of the Court may have on its conscience the blood of an innocent man. [283 D-E. G-H]

2:11. Judicial error in imposition of death penalty would indeed be a crime beyond punishment. This is the drastic nature of death penalty, terrifying in its consequences, which has to be taken into account in determining its constitutional validity. Death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. [284 E-F]

Furman v. Georgia 408 US 238; In Re Kemmler 136 US 436; In Re Medley 134 US 160; quoted with approval.

2:12. Penological goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. The standards of human decency with reference to which the proportionality of the punishment to the offence is required to be judged vary from society to society depending on the cultural and spiritual
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tradition of the society, its history and philosophy and its sense of moral and ethical values. [302 A-B]

Moreover, it is difficult to see how death penalty can be regarded as proportionate to the offence of murder when legislatively it has been ordained that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be imposed. It is obvious from the provision enacted in section 354 (3) of the Code of Criminal Procedure that death sentence is legislatively regarded as disproportionate and excessive in most cases of murder and it is only in exceptional cases that it can at all be contended that death sentence is proportionate to the offence of murder. But, then the legislature does not indicate as to what are those exceptional cases in which death sentence may be regarded as proportionate to the offence and, therefore, reasonble and just. Death penalty cannot be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking. The nature and magnitude of the offence or the motive and purposes underlying it or the manner and extent of its commission cannot have any relevance to the proportionality of death penalty to the offence. [304 H, 305 A-D, 306 D-E]

2:13 The historical course through which death penalty has passed in the last 150 years shows that the theory that death penalty acts as a greater deterrent than life

imprisonment is wholly unfounded. Even the various studies carried out clearly establish beyond doubt that death penalty does not have any special deterrent effect which life sentence does not possess and that in any event there is no evidence at all to suggest that death penalty has any such special deterrent effect. [316 A, 321 G-H]

2:14. Death penalty as provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure, 1973 does not sub-serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformation purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment, it cannot have any legitimate place in an enlightened philosophy of punishment. Therefore, death penalty has no rational penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution.

[340 D-F]

2:15. On a plain reading of section 302 of the Indian Penal Code which provides death penalty as alternative punishment of murder it is clear that it leaves it entirely to the discretion of the Court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. Section 302 does not lay down any standards or principles to guide the discretion of the Court in the matter of imposition of death penalty. The critical choice between physical liquidation and life long incarceration is left to the discretion of the Court and no legislative light is shed as to how this
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deadly discretion is to be exercised. The court is left free to navigate in an unchartered sea without any compass or directional guidance. [341 A-C]

2:16. Actually section 354 (3) of the Criminal Procedure Code makes the exercise of discretion more difficult and uncertain. It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the Court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide the Court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is

the judge called upon to make the decision. The reason for his uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers. Even if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bona fide and conscientiously find such reasons to be 'special reasons'. It is now recognised on all hands that judicial conscience is not a fixed conscience; it varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression "social philosophy". Further, the various decisions in which special reasons have been given singly and cumulatively indicate not merely that there is an enormous potential of arbitrary award of death penalty by the High Court and the Supreme Court but that, in fact, death sentence have been awarded arbitrarily and freakishly.

[341 G, E-H, 342 E-H. 343 A-B, 353 E-F]

2:17. But where the discretion granted to the Court is to choose between life and death without any standards or guide-lines provided by the legislature,

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the death penalty does become arbitrary and unreasonable. The death penalty is qualitatively different from a sentence of imprisonment. Whether a sentence of imprisonment is for two yeaes or five years or for life, it is qualitatively the same, namely, a sentence of imprisonment, but the death penalty is totally of different. It is irreversible; it is

beyond recall or reparation; it extinguishes life. It is the choice between life and death which the court is required to make and this is left to its sole discretion unaided and unguided by any legislative yardstick to determine the choice. [356 G-H. 357 A-B]

2:18. The only yardstick which may be said to have been provided by the legislature is that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded, but it is no where indicated by the legislature as to what should be regarded as 'special reasons' justifying imposition of death penalty. The awesome and fearful discretion whether to kill a man or to let him live is vested in the Court and the Court is called upon to exercise this discretion guided only by its own perception of what may be regarded as 'special reasons' without any light shed by the legislature. It is difficult to appreciate how a law which confers such unguided discretion on the Court without any standards or guidelines on so vital an issue as the choice between life and death can be regarded as constitutionally valid. [357B-D]

2:19. Death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21. [366G-H]

3:1. When a law is challenged on the ground that it imposes restrictions on the freedom guaranteed by one or the other sub-clause of clause (1) of Article 19 and the restrictions are shown to exist by the petitioner, the burden of estabilshing that the restrictions fall within any of the permissive clauses (2) to (6) which may be applicable, must rest upon the State. The State would have to produce material for satisfying the Court that the restrictions imposed by the impugned law fall with the appropriate permissive clause from out of clauses (2) to (6) of Article 19 Of course there may be cases where the nature of the legislation and the restrictions imposed by it may be such that the Court may, without more, even in the absence of any positive material produced by the State, conclude that the restrictions fall within the permissible category, as for example, where a law is enacted by the legislature for giving effect to one of the Directive Principles of State Policy and prima facie, the restrictions imposed by it do not appear to be arbitrary or excessive. Where such is the position, the burden would again shift and it would be for the petitioner to show that the restrictions are arbitrary or excessive and go beyond what is required in public interest. But once it is shown by the petitioner that the impugned law imposes restrictions which infringe one or the other sub-clause of clause (1) of Article 19, the burden

of showing that such restrictions are reasonable and fall within the permissible category must be on the State and this burden the State may discharge either by producing socio economic data before the Court or on consideration of the provisions in the impugned
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law read in the light of the constitutional goals set out in the Directive Principles of State Policy. The test to be applied for the purpose of determining whether the restrictions imposed by the impugned law are reasonable or not cannot be cast in a rigid formula of universal application. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, the value of human life. the disproportion of the imposition, the social philosophy of the Constitution and the prevailing conditions at the time would all enter into the judicial verdict. And in evaluating such elusive factors and forming his own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play a very important part. [293 G-H, 294 A-G]

State of Madras v. V.J. Row [1952] SCR 597. Shagir Ahmed v. State of U.P. [1955] 1 SCR 707 followed.

Khyerbari Tea Co. v. State of Assam [1964] 5 SCR 975; B. Banerjee v. Anita Pan [1975] 2 SCR 774; Ram Krishna Dalmia v. S.R. Tandolkar & Ors. [1959] SCR 279; State of Bombay v. R.M.D. Chamarbaugwala [1957] SCR 874; Mohd. Hanif v. State of Bihar [1959] SCR 629; discussed and distinguished.

Pathumma v. State of Kerala [1978] 2 SCR 537 referred to.

3:2. The position in regard to onus of proof in a case where the challenge is under Article 21 is much clearer and much more free from or doubt or debate than in a case where the complaint is of violation of clause (1) of Article 19. Wherever there is deprivation of life, i.e. not only physical existence, but also use of any faculty or limb through which life is enjoyed and basic human dignity, or of any aspect of personal liberty, the burden must rest on the State to establish by producing adequate material or otherwise that the procedure prescribed for such deprivation is not arbitrary but is reasonable, fair and just. Where therefore a law authorises deprivation of the right to life, the reasonableness, fairness and justness of the procedure prescribed by it for such deprivation must be established by the State. The burden must lie upon the State to show that death penalty is not arbitrary and unreasonable and serves a legitimate social purpose, despite the possibility of judicial error in convicting and sentencing an innocent man and the brutality and pain, mental as well as physical, which death sentence invariably inflicts upon the condemned

prisoner. The State must place the necesary material on record for the purpose of discharging this burden which lies upon it and if it fails to show by presenting adequate evidence before the Court or otherwise that death penalty is not arbitrary and unreasonable and does serve a legitimate social purpose, the imposition of death penalty under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure would have to be struck down as violative of the protection of Article 21. [295 A-C, 296 D-E]

3:3. There is a presumption in favour of the constitutionality of a statute and the burden of showing that it is arbitrary or discriminatory lies upon the petitioner, because it must be presumed that the legislature understands and
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correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It would be a wise rule to adopt to presume the constitutionality of a statute unless it is shown to be invalid. But this rule is not a rigid inexorable rule applicable at all times and in all situations. There may conceivably be cases where having regard to the nature and character of the legislation. the importance of the right affected and the gravity the injury caused by it and the moral and social issue involved in the determination, the Court may refuse to proceed on the basis of presumption of constitutionality and demand from the State justification of the legislation with a view to establishing that it is not arbitrary or discriminatory. [296 G-H, 298 C-E]

The burden rests on the State to establish by producing material before the Court or authorities, that death penalty has greater deterrent effect than life sentence in order to justify its imposition under the law. If the State fails to discharge this burden which rests upon it, the Court would have to hold that death penalty has not been shown to have greater deterrent effect and it does not therefore serve a rational legislative purpose. [315 F-H]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 273 of 1979.

Appeal by special leave from the Judgment and Order dated the 14th August, 1978 of the Punjab & Haryana High Court in Criminal Appeal No. 234 of 1978) WRIT PETITIONS NOS. 564, 165, 179, 168, 434, 89, 754, 756 & 976 of 1979.

(Under Article 32 of the Constitution of India) AND Special Leave Petition (Criminal) No. 1732 of

1979 R.K. Jain, R.P. Singh, Shiv Kumar Sharma Suman, Kapoor and Sukumar Sahu for the Petitioner in W.P. 564/79.

Dr. Y.S. Chitale, Mukul Mudgal and A.K. Ganguli for the Petitioner in W.P. No. 165 of 1979.

Vimal Dave and Miss Kailash Mehta for the Petitioner in W.P. 179 of 1979.

WP. Nos. 168 & 89 of 1979; Jail Petitions.

H.K. Puri, A.C. for the Appellant in Crl. Appeal. S.S. Khanduja and Lalit Kumar Gupta for the Petitioner in W.P. No. 434 of 1979.

L.N. Gupta for the Petitioner in S.L.P. L.M. Singhvi and S.K. Jain for the Petitioner in WP. 754/79.

Harbans Singh for the Petitioner in W.P. 756/79 N.D. Garg for Mr. S.K. Bisaria and T.L. Garg for the Petitioner in WP. 976 of 1979.

Soli J. Sorabjee, Sol. Genl. in WP. 564 & 165- U.R. Lalit, in WP. 564; for U.O.I., R.N. Sachthey, for U.O.I., Gujarat, Haryana States, M.L. Shroff for Gujarat, Haryana & Maharashtra, Miss A. Subhashini, and Mr. K.N. Bhatt, for U.O.I. for Respondent No. 1 in WPs. 554, 179, R. 2 in WPs. 434 & 754, R.1 in WP. 165, R. 3 in WP. 756, R. 2 in WPs. 564 & 165. R in 168 & 89, RR 1 & 2 in WP. 756 and RR 1 and 3 in WP. 754 of 1979.

D.P. Singh Chauhan, Addl. Advocate General, U.P. and O.P. Rana for R. 2 in WP. 179.

R.S. Sodhi and Hardev Singh for R. 1 in WP. 434 & Respondent in Crl. A. 273 of 1979.

R.S. Sodhi for Respondent No. 3 in WP. 434/79. R.L. Kohli and R.C. Kohli for the compalinant in WP. 754/79.

D.P. Mukherjee for the Intervener No. 1.

Dr. LM Singhvi for the Intervener No. 2. Intervener No. 3 in person.

V.J. Francis for the intervener No. 4.

R.K. Garg and R.K. Jain for the intervener No. 5. FOR THE ADVOCATES GENERAL:

1. Andhra Pradesh : P. Ramachandra Reddy, Advocate General A.P. Rao and G. Narayana

2. Gujarat : D.V. Patel, (Maharashtra)

3. Maharashtra : R.N. Sachthey, (Gujarat) M.N. Shroff Gujarat & Maharashtra

4. Jammu & : Altaf Ahmed Kashmir

5. Madhya : S.K. Gambhir Pradesh

6. Punjab : R.S. Sodhi and Hardev Singh

7. Orissa : G.B. Patnaik, Advocate General and R.K. Mehta

8. Tamil Nadu : A.V. Rangam

9. West Bengal : Sukumar Ghosh and G.S. Chatterjee The following Judgments were delivered:

SARKARIA, J. This reference to the Constitution Bench raises a question in regard to the constitutional validity of death penalty for murder provided in Section 302, Penal Code, and the sentencing procedure embodied in sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973.

The reference has arisen in these circumstances:

Bachan Singh, appellant in Criminal Appeal No. 273 of 1979, was tried and convicted and sentenced to death under Section 302, Indian Penal Code for the murders of Desa Singh, Durga Bai and Veeran Bai by the Sessions Judge. The High Court confirmed his death sentence and dismissed his appeal.

Bachan Singh's appeal by special leave, came up for hearing before a Bench of this Court (consisting of Sarkaria and Kailasam, JJ.). The only question for consideration in the appeal was, whether the facts found by the Courts below would be "special reasons" for awarding the death sentence as required under Section 354(3) of the Code of Criminal Procedure 1973.

Shri H.K. Puri, appearing as Amicus Curiae on behalf of the appellant, Bachan Singh, in Criminal Appeal No. 273 of 1979.

contended that in view of the ratio of Rajendra Prasad v. State of U.P.,(1) the Courts below were not competent to impose the extreme penalty of death on the appellant. It was submitted that neither the circumstance that the appellant was previously convicted for murder and committed these murder after he had served out the life sentence in the earlier case, not the fact that these three murders were extremely heinous and inhuman, constitutes a "special reason" for imposing the death sentence within the meaning of Section 354(3) of the Code of Criminal Procedure 1973. Reliance for this argument was placed on Rajendra Prasad (ibid) which according to the counsel, was on facts very similar, if not identical, to that case.

Kailasam, J. was of opinion that the majority view in Rajendra Prasad taken by V.R. Krishna Iyer, J, who spoke for himself and D.A. Desai, J., was contrary to the judgment of the Constitution Bench in Jagmohan Singh v. State of Uttar Pradesh(2), inter alia, on these aspects:

(i) In Rajendra Prasad, V.R. Krishna Iyer, J. observed :

> "The main focus of our judgment is on this poignant gap in 'human rights jurisprudence' within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy charged with compassion, an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interest with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19 and 21."

According to Kailasam, J., the challenge to the award of the death sentence as violative of Articles 19, 14 and 21, was repelled by the Constitution Bench in Jagmohan's case.

(ii) In Jagmohan's case, the Constitution Bench held:

> "The impossibility of laying down standards (in the matter of sentencing) is at the very core of criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment and that this discretion in the matter of sentence in liable to be corrected by superior Courts... The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused."

In Rajendra Prasad, the majority decision characterised the above observations in Jagmohan as: "incidental observations without concentration on the sentencing criteria", and said that they are not the ratio of the decision, adding. "Judgments are not Bible for every line to be venerated."

(iii) In Rajendra Prasad, the plurality observed:

> "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)."

This view again, according to Kailasam, J., is inconsistent with the law laid down by the Constitution Bench in Jagmohan, wherein it was held that deprivation of life is constitutionally permissible if that is done according to "procedure established by law".

(iv) In Rajendra Prasad, the majority has further opined:

> "The only correct approach is to read into Section

> 302. I.P.C. and Section 354(3) Cr. P.C., the human rights and humane trends in the Constitution. So examined, the rights to life and the fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled."

Against the above, Kailasam, J. commented : 'The only change after the Constitution Bench delivered its judgment is the introduction of Section 354(3) which requires special reasons to be given if the Court is to award the death sentence. If without the restriction of stating sufficient reasons death sentence could be constitutionally awarded under the I.P.C. and Cr. P.C. as it stood before the amendment, it is difficult to perceive how by requiring special reasons to be given the amended section would be unconstitutional unless the "sentencing sector is made most restrictive and least vagarious".

(v) In Rajendra Prasad, the majority has held that:

> "Such extraordinary grounds alone constitutionally qualify as special reasons as leave on option to the Court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, however, gruesome the killing or pathetic the situation, unless the inherent testimony coming from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable, like a bloodthirsty tiger, he has to quit his terrestrial tenancy."

According to Kailasam, J., what is extracted above, runs directly counter to and cannot be reconciled with the following observations in Jagmohan's case:

> "But some (murders) at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country, society is liable to be recked to its very foundation. Such murders cannot be simply wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval by the society A very responsible body (Law Commission) has come to the conclusion after considering all the relevant factors. On the conclusions thus offered to us, it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest."

(vi) Kailasam, J. was further of the opinion that it is equally beyond the functions of a Court to evolve "working rules for imposition of death sentence bearing the markings of enlightened flexibility and social sensibility" or to make law "by cross-fertilisation from sociology, history, cultural anthropology and current national perils and developmental goals and, above all, constitutional currents". This function, in his view, belongs only to Parliament. The Court must administer the law as it stands.

(vii) The learned Judge has further expressed that the view taken by V.R. Krishna Iyer, J. in Rajendra Prasad that " 'special reasons' necessary for imposing death penalty must relate not to the crime as such, but to the criminal" is not warranted by the law as it stands today.

Without expressing his own opinion on the various questions raised in that case including the one with regard to the scope, amplification and application of Section 354 (3) of the Code of Criminal Procedure, 1974, Sarkaria, J., in agreement with Kailasam, J., directed the records of the case to be submitted to the Hon'ble the Chief Justice, for constituting a large Bench "to resolve the doubts, difficulties and inconsistencies pointed out by Kailasam, J."

In the meanwhile, several persons convicted of murders and sentenced to death, filed writ petitions (namely, Writ Petitions 564, 165, 179, 434, 89, 754, 756 and 976 of 1979) under Article 32 of the Constitution directly challenging the constitutional validity of the death penalty provided in Section 302 of the Indian Penal Code for the offence of murder, and the sentencing procedure provided in Section 354 (3) of the Code of Criminal Procedure, 1974. That is how, the matter has now come up before this larger Bench of five Judges.

At the outset, Shri R.K. Garg submitted with some vehemance and persistence, that Jagmohan's case needs reconsideration by a larger Bench if not by the Full Court. Reconsideration of Jagmohan, according to the learned counsel, is necessitated because of subsequent events and changes in law. Firstly, it is pointed out that when Jagmohan was decided in 1972, the then extant Code of Criminal Procedure, 1898 left the choice between death and life imprisonment as punishment for murder entirely to the discretion of the Court. This position has since undergone a complete change and under Section 354 (3) of the Code of Criminal Procedure, 1973, death sentence has ceased to be the normal penalty for murder. Secondly, it is argued, the seven-Judge decision of this Court in Maneka Gandhi v. Union of India(1) has given a new interpretative dimension of the provisions of Articles 21, 19 and 14 and their inter-relationship, and according to this new interpretation every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three Articles. It is stressed that an argument founded on this expansive interpretation of these Articles was not available when Jagmohan was decided. Thirdly, it is submitted that India has since acceded to the international Covenant of Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force in December 16, 1976. By virtue of this Covenant. India and the other 47 countries who are a party to it, stand committed to a policy for abolition of the 'death penalty'.

Dr. L.M. Singhvi submitted that the question of death penalty cannot be foreclosed for ever on the abstract doctrine of stare decisis by a previous decision of this Court. It is emphasised that the very nature of the problem is such that it must be the subject of review from time to time so as to be in tune with the evolving standards of decency in a maturing society.

The learned Solicitor-General, Shri Soli Sorabji opposed the request of Shri Garg for referring the matter to a larger Bench because such a course would only mean avoidable delay in disposal of the matter. At the same time, the learned counsel made it clear that since the constitutionality of the death penalty for murder was now sought to be challenged on additional arguments based on

subsequent events and changes in law, he would have no objection on the ground of stare decisis, to a fresh consideration of the whole problem by this very Bench.

In view of the concession made by Shri Sorabji, we proceeded to hear the counsel for the parties at length, and to deal afresh with the constitutional questions concerning death penalty raised in these writ petitions.

We have heard the arguments of Shri R.K. Garg. appearing for the writ-petitioners in Writ Petition No. 564/79 for more than three weeks and also those of Dr. L.M. Singhvi, Dr. Chitaley and S/Shri Mukhoty, Dave and R.K. Jain, appearing for interveners or for the other writ-petitioners.

We have also heard the arguments of Shri Soli Sorabji, Solicitor-General, appearing for the Union of India and Shri Patel appearing for the State of Maharashtra and the other counsel appearing for the respondents.

The principal questions that fall to be considered in this case are:

> (I) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.
>
> (II) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354 (3) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

We will first take up Question No. (I) relating to the constitutional validity of Section 302, Penal Code. Question No. (I):

> Before dealing with the contentions canvassed, it will be useful to have a short survey of the legislative history of the provisions of the Penal Code which permit the imposition of death penalty for certain offences.
>
> The Indian Penal Code was drafted by the First Indian Law Commission presided over by Mr. Macaulay. The draft underwent further revision at the hands of well-known jurists, like Sir Barnes Peacock, and was completed in 1850. The Indian Penal Code was passed by the then Legislature on October 6, 1860 and was enacted as Act No XLV of 1860.
>
> Section 53 of the Penal Code enumerates punishments to which offenders are liable under the provisions of this Code. Clause Firstly of the Section mentions 'Death' as one of such punishments. Regarding 'death' as a punishment, the authors of the Code

say: "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed." Accordingly, under the Code, death is the punishment that must be awarded for murder by a person under sentence of imprisonment for life (Section 303). This apart, the Penal Code prescribes 'death' as an alternative punishment to which the offenders may be sentenced, for the following seven offences:

(1) Waging war against the Government of India. (s.

121) (2) Abetting mutiny actually committed. (s. 132) (3) Giving or fabricating false evidence upon which an innocent person suffers death. (s. 194) (4) Murder which may be punished with death or life imprisonment. (s. 302) (5) Abetment of suicide of a minor or insane, or intoxicated person. (s. 305) (6) Dacoity accompanied with murder. (s. 396) (7) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused. (s. 307) In the instant cases, the impugned provision of the Indian Penal Code is Section 302 which says: "Whoever commits murder shall be punished with death, or imprisonment for life, and also be liable to fine." The related provisions are contained in Sections 299 and 300. Section 299 defines 'culpable homicide'. Section 300 defines 'murder'. Its material part runs as follows:

"Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or Secondly-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or Thirdly-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or Fourthly-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits, such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

The first contention of Shri Garg is that the provision of death penalty in Section 302, Penal Code offends Article 19 of the Constitution. It is submitted that the right to live is basic to the enjoyment of all the six freedoms guaranteed in clauses (a) to (e) and (g) of Article 19 (1) of the Constitution and death penalty puts an end to all these freedoms: that since death penalty serves no social purpose and its value as a deterrent remains unproven and it defiles the dignity of the individual so solemnly vouchsafed in the Preamble of the Constitution, its imposition must be regarded as an 'unreasonable restriction' amounting to total prohibition, on the six freedoms guaranteed in Article 19 (1).

Article 19, as in force today, reads as under:

"19 (1). All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) .....;

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right con-

ferred by the said sub-clause, and in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

It will be seen that the first part of the Article declares the rights in clause (1) comprising of six sub-clauses namely, (a) to (e) and (g). The second part of the Article in its five clauses (2) to (6) specifies the limits upto which the abridgement of the rights declared in one or more of the sub-clauses of clause (1), may be permitted. Broadly speaking, Article 19 is intended to protect the rights to the freedoms specifically enumerated in the six sub-clauses of clause (1) against State action, other than in the legitimate exercise of its power to regulate these rights in the public interest relating to heads specified in clauses (2) to (6). The six fundamental freedoms guaranteed under Article 19 (1) are not absolute rights. Firstly, they are subject to inherent restraints stemming from the reciprocal obligation of one member of a civil society to so use his rights as not to infringe or injure similar rights of another. This is on the principle sic utere tuo ut alienum non laedas. Secondly, under clauses (2) to (6) these rights have been expressly made subject to the power of the State to impose reasonable restrictions, which may even extend to prohibition, on the exercise of those rights.

The power, if properly exercised, is itself a safeguard of the freedoms guaranteed in clause (1). The conferment of this power is founded on the fundamental truth that uncontrolled liberty entirely freed from restraint, degenerates into a licence, leading to anarchy and chaos; that libertine pursuit of liberty, absolutely free, and free for all, may mean liberticide for all. "Liberty has, therefore," as Justice Patanjali Sastri put it, "to be limited in order to be effectively possessed."

It is important to note that whereas Article 21 expressly deals with the right to life and personal liberty, Article 19 does not. The right to life is not one of the rights mentioned in Article 19 (1).

The first point under Question (1) to be considered is whether Article 19 is at all applicable for judging the validity of the impugned provision in Section 302, Penal Code.

As rightly pointed out by Shri Soli Sorabji, the condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises, must be within the purview and protection of Article 19 (1). Thus considered, can any one say that he has a legal right or fundamental freedom under Article 19 (1) to practise the profession of a hired assassin or to form associations or unions or engage in a conspiracy with the object of committing murders or dacoities. The argument that the provisions of the Penal Code, prescribing death sentence as an alternative penalty for murder have to be tested on the ground of Article 19, appears to proceed on the fallacy that the freedoms guaranteed by Article 19 (1) are absolute freedoms and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition. Such an argument was

advanced before the Constitution Bench in The State of Bombay v. R.M.D. Chamarbaugwala.(1) In that case the constitutional validity of certain provisions of the Bombay Lotteries and Prize Competition Control Act, 1952, as amended by Bombay Act No. XXX of 1952, was challenged on the ground, inter alia, that it infringes the fundamental rights of the promoters of such competitions under Article 19 (1) (g), to carry on their trade or business and that the restrictions imposed by the said Act cannot possibly be supported as reasonable restrictions in the interest of the general public permissible under Article 19 (b). It was contended that the words "trade" or "business" or "commerce" in sub-clause (g) of Article 19 (a) should be read in their widest amplitude as any activity which is undertaken or carried on with a view to earning profit since there is nothing in Article 19 (1) (g) which may qualify or cut down the meaning of the critical words; that there is no justification for excluding from the meaning of those words activities which may be looked upon with disfavour by the State or the Court as injurious to public morality or public interest. Speaking for the Constitution Bench, S.R. Das, C.J. repelled this contention, in these terms:

> "On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, or house- breaking, or selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstance be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words."

This approach to the problem still holds the field. The observations in Chamarbaugwala, extracted above, were recently quoted with approval by V.R. Krishna Iyer., J., while delivering the judgment of the Bench in Fatehchand Himmatlal & Ors. v. State of Maharashtra(1).

In A.K. Gopalan v. The State of Madras (2), all the six learned Judges constituting the Bench held that punitive detention or imprisonment awarded as punishment after conviction for an offence under the Indian Penal Code is outside the scope of Article 19, although this conclusion was reached by them by adopting more or less different approaches to the problem.

It was contended on behalf of A.K. Gopalan that since the preventive detention order results in the detention of the detenu in a cell, his rights specified in clauses (a) to

(e) and (g) of Article 19 (1) have been infringed.

Kania, C J. rejected this argument, inter alia, on these grounds:

> (i) Argument would have been equally applicable to a case of punitive detention, and its acceptance would lead to absurd results. "In spite of the saving clauses (2) to (6),

> permitting abridgement of the rights connected with each other, punitive detention under several sections of the Penal Code, e.g. for theft, cheating, forgery and even ordinary assault, will be illegal, (because the reasonable restrictions in the interest of "public order" mentioned in clauses (2) to (4) of the Article would not cover these offences and many other crimes under the Penal Code which injure specific individuals and do not affect the community or the public at large). Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution."

(The underlined words within brackets supplied.) (At page 100 of the Report)

(ii) Judged by the test of direct and indirect effect on the rights referred to in article 19 (1), the Penal Code is not a law imposing restrictions on these rights. The test is that "the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub- clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life." (Pages 100-101).

(iii)"The contents and subject-matter of articles 19 and 21 are thus not the same..." (Page 105).

> "Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty." "Article 19 (1) does not purport to cover all aspects of liberty or of personal liberty. Personal liberty would primarily mean liberty of the physical body. The rights given under article 19 (1) do not directly come under that description. In that Article only certain phases of liberty are dealt with". (Page 106) "In my opinion therefore, Article 19 should be read as a separate complete Article". (Page 107).
>
> Patanjali Sastri, J., also, opined "that lawful deprivation of personal liberty on conviction and sentence for committing a crime, or by a lawful order of preventive detention is "not within the purview of Article 19 at all, but is dealt with by the succeeding Articles 20 and 21."

(Page 192). In tune with Kania, C.J., the learned Judge observed: "A construction which would bring within Article 19 imprisonment in punishment of a crime committed or in prevention of a crime threatened would, as it seems to me, make a reductio ad absurdum of that provision. If imprisonment were to be regarded as a 'restriction' of the right mentioned in article 19 (1) (d), it would equally be a restriction on the rights mentioned by the other sub-clauses of clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to

run the gauntlet of clauses (2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would on that view, fall to be justified under clause (2) as a law sanctioning restriction of freedom of speech and expression." (Page 192).

> "Article 19 confers the rights therein specified only on the citizens of India, while article 21 extends the protection of life and personal liberty to all persons citizens and non-citizens alike. Thus, the two Articles do not operate in a coterminous field." (Page 193).
>
> "(Personal liberty) was used in Article 21 as a sense which excludes the freedoms dealt in Article 19 ....."

Rejecting the argument of the Attorney General, the learned Judge held that clauses (4) to (7) of Article 22 do not form a complete Code and that "the language of Article 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons." (Page 207).

Mahajan, J., however, adopted a different approach. In his judgment, "an examination of the provisions of Article 22 clearly suggests that the intention was to make it self- contained as regards the law of preventive detention and that the validity of a law on the subject of preventive detention cannot be examined or controlled either by the provisions of Article 21 or by the provisions of Article 19(5)." (Page 229).

Mukerjee, J. explained the relative scope of the Articles in this group, thus: "To me it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised. In my opinion, the group of articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law." (Page 255).

> "The only proper way of avoiding these anomalies is to interpret the two provisions (articles 19 and 21) as applying to different subjects. It is also unnecessary to enter into a discussion on the question...as to whether article 22 by itself is a self-contained Code with regard to the law of Preventive Detention." (Page 257).
>
> S.R. Das, J., also, rejected the argument that the whole of the Indian Penal Code is a law imposing reasonable restriction on the rights conferred by Article 19 (1), with these observations (at Page 303) :
>
> "To say that every crime undermines the security of the State and, therefore, every section of the Indian Penal Code, irrespective of whether it has any reference to

> speech or expression, is a law within the meaning of this clause is wholly unconvincing and betrays only a vain and forlorn attempt to find an explanation for meeting the argument that any conviction by a Court of law must necessarily infringe article 19 (1) (a). There can be no getting away from the fact that a detention as a result of a conviction impairs the freedom of speech for beyond what is permissible under clause (2) of article 19. Likewise, a detention on lawful conviction impairs each of the other personal rights mentioned in sub-clauses (3) to (6). The argument that every section of the Indian Penal Code irrespective of whether it has any reference to any of the rights referred to in sub-

clauses (b) to (e) and (g) is a law imposing reasonable restriction on those several rights has not even the merit of plausibility. There can be no doubt that a detention as a result of lawful conviction must necessarily impair the fundamental personal rights guaranteed by article 19 (1) far beyond what is permissible under clauses (2) to (6) of that article and yet nobody can think of questioning the validity of the detention or of the section of the Indian Penal Code under which the sentence was passed."

(ii) Das, J. then gave an additional reason as to why validity of punitive detention or of the sections of the Penal Code under which the sentence was passed, cannot be challenged on the ground of article 19, thus :

> "Because the freedom of his person having been lawfully taken away, the convict ceases to be entitled to exercise .. any of the .. rights protected by clause (1) of article 19."

(iii) The learned Judge also held that "article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men." (Page 299).

Fazal Ali, J. dissented from the majority. In his opinion: "It cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under article 20 and 21 and also under article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in article 22, also amounts to deprivation of personal liberty which is referred to in article 19 (1)

(d)." (Page 148).

Fazal Ali, J. held that since preventive detention, unlike punitive detention, directly infringes the right under Article 19(1)(d), it must pass the test of clause (5). According to the learned Judge, only those laws are required to be tested on the anvil of Article 19 which directly restrict any of the rights guaranteed in Article 19(1). Applying this test (of direct and indirect effect) to the provisions of the Indian Penal Code, the learned Judge pointed out that the Code "does not primarily or necessarily impose restrictions on the freedom of movement, and it is not correct to say that it is a law imposing

restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement. The punishment may consist in imprisonment or a pecuniary penalty. If it consists in a pecuniary penalty, it obviously involves no restriction on movement, but if it consists in imprisonment, there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement but under a law defining crime and making it punishable. The punishment is correlated with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, therefore, the Indian Penal Code does not come within the ambit of the words "law imposing restriction on the right to move freely."

(Pages 145-146).

In applying the above test, which was the same as adopted by Kania, C.J., Fazal Ali, J. reached a conclusion contrary to that reached by the Chief Justice, on the following reasoning ;

> "Punitive detention is however essentially different from preventive detention. A person is punitively detained only after trial for committing a crime and after his guilt has been established in a competent court of justice. A person so convicted can take his case to the State High Court and sometimes bring it to this Court also; and he can in the course of the proceedings connected with his trial take all pleas available to him including the plea of want of jurisdiction of the Court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under article 19(1)(d) has been violated. But a person who is preventively detained has not to face such an obstacle whatever other obstacle may be in his way."

(Page 146) We have copiously extracted from the judgments in A.K. Gopalan's case, to show that all the propositions propounded, arguments and reasons employed or approaches adopted by the learned Judges in that case, in reaching the conclusion that the Indian Penal Code, particularly those of its provisions which do not have a direct impact on the rights conferred by Article 19(1), is not a law imposing restrictions on those rights, have not been overruled or rendered bad by the subsequent pronouncements of this Court in Bank Nationalizaton(1) case or in Maneka Gandhi's case. For instance, the proposition laid down by Kania, C.J., Fazal Ali, Patanjali Sastri, and S.R. Das, J.J. that the Indian Penal Code particularly those of its provisions which cannot be justified on the ground on reasonableness with reference to any of the specified heads, such as "public order" in clauses (2), (3) and (4), is not a law imposing restrictions on any of the rights conferred by Article 19(1), still holds the field. Indeed, the reasoning, explicit, or implicit in the judgments of Kania, C.J., Patanjali Sastri and S.R. Das JJ. that such a construction which treats every section of the Indian Penal Code as a law imposing 'restriction' on the rights in Article 19(1), will lead to absurdity is unassailable. There are several offences under the Penal Code, such as theft, cheating, ordinary assault, which do not violate or effect 'public order,' 'but only law and order'. These offences injure only specific individuals as distinguished from the public at large. It is by now settled that 'public order' means 'even tempo of the life of the community.' That being so, even all murders do not disturb or affect 'public order'. Some murders may be of purely private significance and the injury or

harm resulting therefrom affects only specific individuals and, consequently, such murders may not be covered by "public order" within the contemplation of clauses (2), (3) and (4) of article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say (1) [1970] 3 SCR 530.

that punishment of such murders is not in the general public interest. It may be noted that general public interest is not specified as a head in clauses (2) to (4) on which restriction on the rights mentioned in clause (1) of the Article may be justified.

It is true, as was pointed out by Hidayatullah, J. (as he then was) in Dr. Ram Manohar Lohia's(1) case, and in several other decisions that followed it, that the real distinction between the areas of 'law and order' and 'public order' lies not merely in the nature or quality of the act, but in the degree and extent. Violent crimes similar in nature, but committed in different contexts and circumstances might cause different reactions. A murder committed in given circumstances may cause only a slight tremor, the wave length of which does not extent beyond the parameters of law and order. Another murder committed in different context and circumstances may unleash a tidal wave of such intensity, gravity and magnitude, that its impact throws out of gear the even flow of life. Nonetheless the fact remains that for such murders which do not affect "public order", even the provision for life imprisonment in Section 302, Indian Penal Code, as as alternative punishment, would not be justifiable under clauses (2), (3) and (4) as a reasonable restriction in the interest of 'Public Order'. Such a construction must, therefore, be avoided. Thus construed, Article 19 will be attracted only to such laws, the provisions of which are capable of being tested under clauses (2) to (5) of Article 19.

This proposition was recently (1975) reiterated in Hardhan Saha & Anr. v. State of West Bengal(2). In accord with this line of reasoning in A.K. Gopalan's case, a Constitution Bench of this Court in Hardhan Saha's case restated the principle for the applicability of Article 19 by drawing a distinction between a law of preventive detention and a law providing punishment for commission of crimes, thus :

> "Constitution has conferred rights under Article 19 and also adopted preventive detention to prevent the greater evil of elements imperilling the security, the safety of a State and the welfare of the nation. It is not possible to think that a person who is detained will yet be free to move (1) [1966] 1 S.C.R. 709.
>
> (2) [1975] 1 S.C.R. 778 at p. 784.

for assemble or form association or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is convicted of an offence of cheating and prosecuted (and imprisoned) after trial, it is not open to say that the imprisonment should be tested with reference to Article 19 for its reasonableness. A law which attracts Article 19 therefore must be such as is capable of being tested to be reasonable under clauses (2) to 5 of Article 19." (emphasis and parenthesis supplied.) The last sentence which has been underlined by us, appears to lend implicit approval to the rule of construction adopted by the majority of the learned Judges in A.K. Gopalan's case, whereby they excluded from the purview of Article 19 certain provisions of the

Indian Penal Code providing punishment for certain offences which could not be tested on the specific grounds-embodied in clauses (2) to (5) of that Article. This proposition enunciated in A.K. Gopalan's case is only a product of the application of the basic canon that a construction which would lead to absurdity, should be eschewed.

In R.C. Cooper v. Union of India (popularly known as Bank Nationalization case), the majority adopted the two- fold test for determining as to when a law violated fundamental rights, namely: "(1) It is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim. (2) It is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. The direct operation of the act upon the rights forms the real test."

In Maneka Gandhi v. Union of India (ibid), Bhagwati, J. explained the scope of the same test by saying that a law or and order made thereunder will be hit by article 19, if the direct and inevitable consequence of such law or order is to abridge or take away any one or more of the freedoms guaranteed by Article 19(1). If the effect and operation of the statute by itself, upon a person's fundamental rights is remote or dependent upon "factors which may or may not come into play", then such statute is not ultra-vires on the ground of its being violative of that fundamental right. Bhag-

wati J. described this proposition as "the doctrine of intended and real effect" while Chandrachud, J. (as he then was) called it "the test of proximate effect and operation of the statute."

The question is, whether R.C. Cooper & Maneka Gandhi have given a complete go-by to the 'test of direct and indirect effect, sometimes described as form and object test' or 'pith and substance rule', which was adopted by Kania, C.J. and Fazal Ali, J. in A.K. Gopalan's case. In our opinion, the answer to this question cannot be in the affirmative. In the first place, there is nothing much in the name. As Varadachariar, J. put it in Subrahmanyan Chettiar's(1) case, such rules of interpretation were evolved only as a matter of reasonableness and common sense and out of the necessity of satisfactorily solving conflicts from the inevitable overlapping of subjects in any distribution of powers. By the same yardstick of common sense, the 'pith and substance rule' was applied to resolve the question of the constitutionality of a law assailed on the ground of its being violative of a fundamental right.

Secondly, a survey of the decisions of this Court since A.K. Gopalan, shows that the criterion of directness which is the essence of the test of direct and indirect effect, has never been totally abandoned. Only the mode of its application has been modified and its scope amplified by judicial activism to maintain its efficacy for solving new constitutional problems in tune with evolving concepts of rights and obligations in a strident democracy.

The test of direct and indirect effect adopted in A.K. Gopalan was approved by the Full Court in Ram Singh v. State of Delhi.(2) Therein, Patanjali Sastri, J. quoted with approval the passages (i) and (ii) (which we have extracted earlier) from the judgment of Kania, C. J. Although Mahajan and Bose, JJ. differed on the merits, there was no dissent on this point among all the learned Judges.

The first decision, which, though purporting to follow Kania, C. J's. enunciation in A.K. Gopalan, imperceptibly added another dimension to the test of directness, was Express Newspapers (Private) Ltd. & Anr. v. The Union of India & Ors.(3) In that case, the cons-

(1) [1940] FCR 188.

(2) [1951] SCR 451.

(3) [1959] SCR 12.

titutional validity of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, and the legality of the decision of the Wage Board, constituted thereunder, were challenged. The impugned Act, which had for its object the regulation of the conditions of service of working journalists and other persons employed in newspaper establishments, provided, inter alia, for the payment of gratuity to a working journalist who had been in continuous service for a certain period. It also regulated hours of work and leave and provided for retrenchment compensation. Section 9 (1) laid down the principles that the Wage Board was to follow in fixing the rates of wages of working journalists.

One of the contentions of the petitioners in that case was that impugned Act violated their fundamental rights under Articles 19 (1) (a), 19 (1) (g), 14 and 32 of the Constitution and that the decision of the Wage Board fixing the rates and scales of wages which imposed too heavy a financial burden on the industry and spelled its total ruin, was illegal and void. It was contended by the learned Attorney General in that case that since the impugned legislation was not a direct legislation on the subject of freedom of speech and expression. Art. 19 (1)(a) would have no application, the test being not the effect or result of legislation but its subject-matter. In support of his contention, he relied upon the observations on this point of Kania, C. J. in A. K. Gopalan. It was further urged that the object of the impugned Act was only to regulate certain conditions of service of working journalists and other persons employed in the newspaper establishments and not to take away or abridge the freedom of speech or expression enjoyed by the petitioners and, therefore, the impugned Act could not come within the prohibition of Article 19 (1) (a) read with Article 32 of the Constitution.

On the other hand, the petitioners took their stand on a passage in the decision of the Supreme Court of United States in Minnesota Ex Rel. Olson,(1) which was as under :

> "With respect to these contentions it is enough to say that in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

(1) [1930] 283 US 697 at p. 708.

It was further submitted that in all such cases, the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. Thus considered, proceeded the argument, the Act by laying a direct and preferential burden on the press, would tend to curtail the circulation, narrow the scope of dissemination of information and fetter the petitioners' freedom to choose the means of exercising their rights of free speech (which includes the freedom of the press). It was further submitted that those newspaper employers who were marginally situated may not be able to bear the strain and have to disappear after closing down their establishments.

N.H. Bhagwati, J. who delivered the unanimous Judgment of the Constitution Bench, after noting that the object of the impugned legislation is to provide for the amelioration of the conditions of the workmen in the newspaper industry, overruled this contention of the employers, thus:

> "That, however would be a consequence which would be extraneous and not within the contemplation of the legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized in the behalf by the petitioners, viz., the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners' freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid; the imposition of penalty on the petitioners' right to choose the instruments for exercising the freedom or compelling them to seek alternative media, etc., would be remote and depend upon various factors which may or may not come into play. Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation."

(emphasis added) The learned Judge further observed that the impugned Act could be "legitimately characterised as a measure which affects the press", but its "intention or the proximate effect and operation" was not such as would take away or abridge the right of freedom of speech and expression guaranteed in Article 19 (1) (a), therefore, it could not be held invalid on that ground. The impugned decision of the Wage Board, however, was held to be ultra vires the Act and contrary to the principles of natural justice.

It may be observed at this place that the manner in which the test of direct and indirect effect was applied by N.H. Bhagwati, J., was not very different from the mode in which Fazal Ali, J. applied it to punitive detention as punishment after conviction for an offence under the Indian Penal Code. N.H. Bhagwati, J., did not discard the test adopted by Kania, C.J., in A.K. Gopalan, in its entirety; he merely extended the application of the criterion of directness to the operation and effect of the impugned legislation.

Again, in Sakal Papers (P) Ltd. & Ors. v. The Union of India(1) this Court, while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960, held that the "direct and immediate" effect of the impugned Order would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it

has a fundamental right under Article 19 (1) (a) and, therefore, the Order was violative of the right of the newspapers guaranteed by Article 19 (1) (a), and as such, invalid. In this case, also, the emphasis had shifted from the object and subject- matter of the impugned State action to its direct and immediate effect.

In Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra & Anr.,(2) an order prohibiting the publication of the evidence of a witness in a defamation case, passed by a learned Judge (Tarkunde, J.) of the Bombay High Court, was impugned on the ground that it violated the petitioners' right to free speech and expression guaranteed by Article 19 (1) (a). Gajendragadkar, C.J., (Wanchoo, Mudholkar, Sikri and Ramaswami, JJ., concurring) repelled this contention with these illuminating observations:

> "The argument that the impugned order affects the fundamental rights of the petitioners under Article 19 (1), is based on a complete misconception about the true nature and (1) [1962] 3 SCR 842.
>
> (2) [1966] 3 SCR 744.

character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19 (1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19 (1)."

> "It is well-settled that in examining the validity of legislation, it is legitimate to consider whether the impugned legislation is a legislation directly in respect of the subject covered by any particular article of the Constitution, or touches the said article only incidentally or indirectly'.' "If the test of direct effect and object which is sometimes described as the pith and substance test, is thus applied in considering the validity of legislation, it would not be inappropriate to apply the same test to judicial decisions like the one with which we are concerned in the present proceedings. As we have already indicated, the impugned order was directly concerned with giving such protection to the witness as was thought to be necessary in order to obtain true evidence in the case with a view to do justice between the parties. If, incidentally, as a result of this-order, the petitioners were not able to report what they heard in court, that cannot be said to make the impugned order invalid under Article 19 (1) (a)."

We have already mentioned briefly how the test of directness was developed and reached its culmination in Bank Nationalization's case and Maneka Gandhi's case.

From the above conspectus, it is clear that the test of direct and indirect effect was not scrapped. Indeed, there is no dispute that the test of 'pith and substance' of the subject-matter and of direct and of incidental effect of legislation is a very useful test to determine the question of legislative competence i.e., in ascertaining whether an Act falls under one Entry while incidentally encroaching upon another Entry. Even for determining the validity of a legislation on the ground of infringement of fundamental rights, the subject-matter and the object of the legislation are not altogether irrelevant. For instance, if the subject- matter of the legilation directly covers any of the fundamental freedoms mentioned in Article 19 (1), it must pass the test of reasonableness under the relevant head in clauses (2) to (6) of that Article. If the legislation does not directly deal with any of the rights in Article 19 (1), that may not conclude the enquiry. It will have to be ascertained further whether by its direct and immediate operation, the impugned legislation abridges any of the rights enumerated in Article 19 (1).

In Bennett Coleman,(1) Mathew, J. in his dissenting judgment referred with approval to the test as expounded in Express Newspapers. He further observed that "the 'pith and substance' test, though not strictly appropriate, must serve a useful purpose in the process of deciding whether the provisions in question which work some interference with the freedom of speech, are essentially regulatory in character". From a survey of the cases noticed above, a comprehensive test which can be formulated, may be re- stated as under:

> Does the impugned law, in its pith and substance, whatever may be its form and object, deal with any of the fundamental rights conferred by Article 19 (1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), is the Direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights? The mere fact that the impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But if the impact of the law on any of the rights under clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be avilable for judging its validity.
>
> Now, let us apply this test to the provisions of the Penal Code in question. Section 299 defines 'culpable homicide' and Section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say, laws which define offences and prescribe

> punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of course, say that the object of penal laws is generally such as not to involve any violation of the rights conferred by Article 19(1) because after the decision of this Court in the Bank Nationalization case the theory, that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, stands discredited. But the point of the matter is that, in pith and substance, penal laws do not deal with the subject matter of rights enshrined in Article 19(1). That again is not enough for the purpose of deciding upon the applicability of Article 19 because as the test formulated by us above shows, even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19(1) shall have been attracted. It would then become necessary to test the validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, we are of the opinion that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution.

This is particularly true of crimes, inherently vicious and pernicious, which under the English Common Law were classified as crimes mala in se as distinguished from crimes mala prohibita crimes mala in se embrace acts immoral or wrong in themselves, such as, murder, rape, arson, burglary, larceny (robbery and dacoity); while crimes mala prohibita embrace things prohibited by statute as infringing on others' rights, though no moral turpitude attaches to such crimes. Such acts constitute crimes only because they are so prohibited. (See Words and Phrases, Permanent Edition, Vol.

10). While crimes mala in se do not per se, or in operation directly and inevitably impinge on the rights under Article 19(1), cases under the other category of crimes are conceivable where the law relating to them directly restricts or abridges such rights. The illustration given by Shri Sorabji will make the point clear. Suppose, a law is enacted which provides that it shall be an offence to level any criticism, whatever, of the Government established by law and makes a further provision prescribing five years' imprisonment as punishment for such an offence. Such a law (i.e. its provision defining the offence) will directly and inevitably impinge upon the right guaranteed under clause

(a) of Article 19(1). Therefore, to be valid, it must pass the test of reasonableness embodied in clause (2) of the Article. But this cannot be said in regard to the provisions of the Penal Code with which we are concerned.

Assuming arguendo, that the provisions of the Penal Code, particularly those providing death penalty as an alternative punishment for murder, have to satisfy the requirements of reasonableness

and public interest under Article 19 the golden strand of which according to the ratios of Maneka Gandhi runs through the basic structure of Article 21 also the further questions to be determined, in this connection, will be: On whom will the onus of satisfying the requirements under Article 19, lie ? Will such onus lie on the State or the person challenging its validity ? And what will be the nature of the onus?

With regard to onus, no hard and fast rule of universal application in all situations, can be deducted from the decided cases. In some decisions, such as, Saghir Ahmad v. State of Uttar Pradesh(1) and Khyerbari Tea Co. v. State of Assam & Ors. (2) it was laid down by this Court that if the writ petitioner succeeds in showing that the impugned law ex facie abridges or transgresses the rights coming under any of the sub-clauses of clause (1) of Article 19, the onus shifts on the respondent state to show that the legislation comes within the permissible limits imposed by any of the clauses (2) to (6) as may be applicable to the case, and, also to place material before the court in support of that contention. If the State does nothing in that respect, it is not for the petitioner to prove negatively that it is not covered by any of the permissive clauses.

A contrary trend, however, is discernible in the recent decisions of this Court, which start with the initial presumption in favour of the constitutionality of the statute and throw the burden of rebutting that presumption on the party who challenges its constitutionality on the ground of Art. 19.

In B. Banerjee v. Anita Pan (3) this Court, speaking through V.R. Krishna Iyer, J., reiterated the ratio of Ram Krishna Dalmia's case,(4) that :

> "there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attack it to show that there has been a clear transgression of the constitutional principles"; and "that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

It was emphasised that "Judges act not by hunch but on hard facts properly brought on record and sufficiently strong to rebuff the initial presumption of constitutionality of legislation. Nor is the Court a third Chamber of the House to weigh whether it should draft the clause differently". Referring, inter alia, to the decision of this Court in R.M.D. Chamarbaugwala (ibid), and Seervai's 'Constitutional Law of India', Vol. I, page 54, it was recalled, "Some courts have gone to the extent of holding that there is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; and to doubt the constitutionality of a law is to resolve it in favour of its validity". Similar view was taken by a Bench of seven learned Judges of this Court in Pathumma v. State of Kerala.(1) Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review; a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is

to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. "The job of a Judge is judging and not law- making". In Lord Devlin's words : "Judges are the keepers of the law and the keepers of these boundaries cannot, also, be among out-riders."

A similar warning was echoed by the Supreme Court of the United States in Dennis v. United States(2) in these terms :

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

In Gregg v. Georgia,(1) one of the principal questions for consideration was, whether capital punishment provided in a statute for certain crimes was a "cruel and unusual"

> punishment. In that context, the nature of the burden which rests on those who attack the constitutionality of the statute was explained by Stewart, J., thus :
>
> "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constituted to respond to the will and conse quently the moral values of the people."

Even where the burden is on the State to show that the restriction imposed by the impugned statute is reasonable and in public interest, the extent and the manner of discharge of the burden necessarily depends on the subject- matter of the legislation, the nature of the inquiry, and the scope and limits of judicial review. (See the observations of Sastri. J. in State of Madras v. V.C. Rao,(2) reiterated in Jagmohan).

In the instant case, the State has discharged its burden primarily by producing for the persual of the Court, the 35th Report of the Law Commission, 1967, and the judgments of this Court in Jagmohan Singh and in several subsequent cases, in which it has been recognised that death penalty serves as a deterrent. It is, therefore, for the petitioners to prove and establish that the death sentence for murder is so outmoded, unusual or excessive as to be devoid of any rational nexus with the purpose and object of the legislation.

The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, published and submitted its 35th Report in 1967 to the Government. After examining, a wealth of evidential material and considering the arguments for and against its retention, that high-powered Body summed up its conclusions at page 354 of its Report, as follows :

> "The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.
>
> It is difficult to rule out the validity of, of the strength behind, many of the arguments for abolition nor does, the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.
>
> Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to 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."

This Report was also, considered by the Constitution Bench of this Court in Jagmohan. It was the main piece of evidence on the basis of which the challenge to the constitutional validity of Section 302 of the Penal Code, on the ground of its being violative of Article 19, was repelled. Parliament must be presumed to have considered these views of the Law Commission and the judgment of this Court in Jagmohan, and must also have been aware of the principles crystallised by judicial precedents in the matter of sentencing when it took up revision of the Code of Criminal Procedure in 1973, and inserted in it, Section 354(3) which indicates that death penalty can be awarded in exceptional cases for murder and for some other offences under the Penal Code for special reasons to be recorded.

Death penalty has been the subject of an age-old debate between Abolitionists and Retentionists, although recently the controversy has come in sharp focus. Both the groups are deeply anchored in their antagonistic views. Both firmly and sincerly believe in the rightcousness of their respective stands, with overtones of sentiment and emotion. Both the camps can claim among them eminent thinkers, penologists, sociologists, jurists; judges, legislators, administrators and law enforcement officials.

The chief arguments of the Abolitionists, which have been substantially adopted by the learned counsel for the petitioners, are as under :

> (a) The death penalty is irreversible. Decided upon according to fallible processes of law by fallible human beings, it can be-and actually has been- inflicted upon people

innocent of any crime.

(b) There is no convincing evidence to show that death penalty serves any penological purpose :

(i) Its deterrent effect remains unproven. It has not been shown that incidence of murder has increased in countries where death penalty has been abolished, after its abolition.

(ii) Retribution in the sense of vengeance, is no longer an acceptable end of punishment.

(iii)On the contrary, reformation of the criminal and his rehabilitation is the primary purpose of punishment. Imposition of death penalty nullifies that purpose.

(c) Execution by whatever means and for whatever offence is a cruel, inhuman and degrading punishment.

It is proposed to deal with these arguments, as far as possible, in their serial order.

Regarding (a) : It is true that death penalty is irrevocable and a few instances, can be cited, including some from England, of persons who after their conviction and execution for murder, were discovered to be innocent. But this, according to the Retentionists is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theore-

tically, such errors of judgment cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. We will presently see, while dealing with the procedural aspect of the problem, that in India, ample safeguards have been provided by law and the Constitution which almost eliminate the chances of an innocent person being convicted and executed for a capital offence.

Regarding (b): Whether death penalty serves any penological purpose.

Firstly, in most of the countries in the world, including India, a very large segment of the population, including notable penologists judges, jurists, legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serve as a deterrent, and a greater deterrent than life imprisonment. We will set out very briefly, by way of sample, opinions of some of these distinguished persons.

In the first place, we will notice a few decisions of Courts wherein the deterrent value of death penalty has been judicially recognised.

In Paras Ram v. State of Punjab,(1) the facts were that Paras Ram, who was a fanatic devotee of the Devi, used to hold Satsangs at which bhajans were sung in praise of the Goddess. Paras Ram ceremonially beheaded his four year old boy at the crescendo of the morning bhajan. He was tried, convicted and sentenced to death for the murder. His death sentence was confirmed by the High Court. He filed a petition for grant of special leave to appeal to this Court under Article 136 of the Constitution. It was contended on behalf of Paras Ram that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender under Section 84, Indian Penal Code, or material for mitigation of the sentence of death. V. R. Krishna Iyer, J., speaking for the Bench, to which one of us (Sarkaria, J.) was a party, refused to grant special leave and summarily dismissed the petition with these observations :

> "The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butehery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some blood-thirsty diety. Secular India, speaking through the Court, must administer shock therepy to such anti- social 'piety' when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants."

(emphasis added) In Jagmohan, also, this Court took due note of the fact that for certain types of murders, death penalty alone is considered an adequate deterrent:

> "A large number of murders is undoubtedly of the common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders cannot simply be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society."

Examining whether life imprisonment was an adequate substitute for death penalty, the Court observed:

> "In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of punishment, and it may be seriously questioned whether that sole alter-
>
> native will be an adequate substitute for the death penalty."

In Ediga Anamma v. State of Andhra Pradesh,(1) V.R. Krishna Iyer, J., speaking for the Bench to which one of us (Sarkaria, J.,) was a party, observed that "deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime." It was further observed that "horrendous features of the crime and the hapless and helpness state of the victim steel the heart of law for the sterner sentence."

In Shiv Mohan Singh v. State (Delhi Administration),(2) the same learned Judge, speaking for the Court, reiterated the deterrent effect of death penalty by referring to his earlier judgment in Ediga Annamma's case, as follows:

> "In Ediga Annamma this Court, while noticing the social and personel circumstances possessing an extenuating impact, has equally clearly highlighted that in India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful areas of barbarous murder."

Again, in Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi,(3) the same learned Judge, speaking for a Bench of three learned Judges of this Court, reiterated that deterrence was one of the vital considerations of punishment.

In Trop v. Dulleh,(4) Brennan, J. of the supreme Court of the United States, concurring with the majority, emphasised the deterrent end of punishment, in these words:

> "Rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution."

In Furman v. Georgia, Stewart, J. took the view that death penalty serves a deterrent as well as retributive purpose. In his view, certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehablitation of the perpetrator, and that, despite the inconclusive empirical evidence, only penalty of death will provide maximum deterrence.

Speaking for the majority, in Gregg v. Georgia, Stewart, J. reiterated his views with regard to the deterrent and retributive effect of death penalty.

Now, we may notice by way of specimen, the views of some jurists and scholars of note. Sir James Fitzjames Stephen, the great jurist, who was concerned with the drafting of the Indian Penal Code, also, was a strong exponent of the view that capital punishment has the greatest value as a deterrent for murder and other capital offence. To quote his words:

> "No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole

> experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. No one goes to certain inevitable death except by compulsion. Put the matter the other the way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse to offer of commutation of his sentence for the severest secondary punishment? Surely not. Why is this ? It can only be because 'All that a man has will he give for his life'. In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

Even Marchese De Cesare Bonesana Beccaria, who can be called the father of the modern Abolitionist movement, concedes in his treatise, "Dei Delitti a della Pana" (1764), that capital punishment would be justified in two instances:

> Firstly, in an execution would prevent a revolution against popularly established Government; and, secondly, if an execution was the only way to deter others from committing a crime. The adoption of double standards for capital punishment in the realm of conscience is considered by some scholars as the biggest infirmity in the Abolitionists' case.
>
> Thorsten Sallin is one of the penologists who has made a scientific study of the subject of capital punishment and complied the views of various scholars of the 19th and 20th centuries. In his book "Capital Punishment", he has made an attempt to assemble the arguments for and against the death penalty. He has also given extracts from the Debates in the British House of Commons in 1956 and, also, in March and April 1966, in the Candian House of Commons. In the last part of his book, the learned Editor summarises his ideas about capital punishment. In his opinion, Retribution seems to be outdated and unworkable. It is neither efficient nor equitably administered. "Justice is a relative concept that changes with the times". A retributive philosophy alone is not now socially acceptable. "In the last analysis, the only utilitarian argument that has being to be given attention is the one that defends capital punishment as a uniquely powerful means of protecting the community." He ends his book with the observation : "I have attempted to show that, as now used, capital punishment performs none of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions. It is an archaic custom of primitive origin that has disappeared in most civilized countries and is withering away in the rest."
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> In his article appearing in "Criminology Review Year Book" (1979) Vol. 1, complied by Sheldon L. Messinger & Egon Bittner(1), Isaac Ehrlich, after surveying the past literature on the relation between capital punishment and capital crimes, has (at pp. 31-33) pointed out the following shortcomings in the thesis of Sellin :

"The principal shortcoming of the work by Sellin and others using his methodology is that the approach taken and the methods applied do not permit a systematic examination of the main implications emanating from the general theory of deterrence. The shortcoming is basic, because the implications following from the general deterrence hypothesis are what Sellin was challenging. Yet his work neither develops nor tests the full range of implications following from the theory he attempts to reject; nor does he develop or test a competing theory. In addition, to my knowledge, Sellin never reported in any of his studies the results of any systematic (parametric or non-parametric) statistical tests that could justify his strong and unqualified inferences."

... ...

"Another fundamental shortcoming of Sellin's studies is their failure to account systematically for other factors that are expected by the deterrence hypothesis to affect the frequency of murder in the population, apart from the relevant risk of execution. These are variables such as the probability of apprehension, the conditional probability of conviction given apprehension, the severity of alternative punishments for murder, the distribution of income, the probability of unemployment, and other indicators of differential gains from criminal activities occurring jointly with murder. Since, as I shall argue later, some of these variables are expected to be highly correlated with the conditional probability of execution given conviction of murder, their exclusion from the statistical analysis can seriously bias estimates of the partial deterrent effect of capital punishment. Aware of the problem, Sellin attempted to compare states that are as alike as possible in all other respects. However, his "matching procedure", based on the assumption that neighbouring states can satisfy such pre-requisites without any explicit standardization, is simply insufficient for any valid inferences. Pairs of states, such as New York, and Rhode Island, Massachusetts and Maine, or Illinois and Wisconsin all included in his comparisons, differ in their economic and demographic characteristics, in their law enforcement activities, and in the opportunities they provide for the commission of other crimes. Moreover, the direction of the causal relationship between the murder rate and the overall risk of punishment-be it the death penalty or any other sanction - is not self-evident because, for example, states with high murder rates are expected to and, in fact do devote more resources to apprehend, convict and execute offenders than do states with lower rates. Specifically, variations in the legal or practical status of the death penalty occasionally may be the result of, rather than the cause for, changes in the murder rate, and thus may give rise to an apparent positive association between these two variables. The same general point applies in connection with the identification of the effect of any other variable which is a product of law enforcement activity or private protection against crime. For these reasons, the true deterrent effect of a sanction such as the death penalty cannot be readily inferred from simple comparisons of the sort performed by Sellin."

The learned author then (at page 33) arrives at this conclusion :

> "If investigations indicate that probability and length of imprisonment do impart significant deterrent effects, then failure of the research to demonstrate specifically the deterrent efficacy of capital punishment may be taken more as evidence for shortcomings in the research design and methodology or in the measures of the theoretically relevant variables used than as a reflection on the validity of the deterrence theory itself."

The scholar then stresses another purpose of capital punishment, namely, incapacitation of the offender, which, in fact, is another aspect of its deterrent effect. To quote his words :

> "There is an additional point worth stressing. Even if punishment by execution or imprisonment does not have any deterrent effect, surely it must exert some incapacitative effect on punished offenders by reducing or eliminating the possibility of recidivism on their part."

This eminent social scientist, Prof. Ehrlich(1) whose views we have extracted, has made intensive studies of the deterrent effect of capital punishment. Then, a result of his study was also published in the American Economic Review in June, 1975. He includes a specific test for the presence of a deterrent effect of capital punishment to the results of earlier studies. He has in his study(1) claimed to identify a significant reduction in the murder rate due to the use of capital punishment. A version of his detailed study is said to have been filed with the United States Supreme Court on March 7, 1975 in the case of Fowler v. North Carolina.(2) In 1975, Robert Martinson, a sociologist, published the results of a study he had made in New York regarding the rehabilitation of of prisoners. Among the conclusions he drew: "The prison which makes every effort at rehabilitation succeeds no better than the prison which leaves its inmates to rot....The certainty of punishment rather than the severity, is the most effective crime deterrent. We should make plain that prisons exist to punish people for crimes committed."

(Quoted in Encyclopaedia Britannica 1978 Book of the Year, pp. 593-594) Many judges-especially in Britain and the United States, where rising crime rates are the source of much public concern-have expressed grave doubts about the wisdom of the view that reform ought to take priority in dealing with offenders. "They have argued that the courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime."

(Encyclopaedia Britannica, ibid.) Professor Jean Graven, Judge of the Court of Appeal of Geneva, and a distinguished jurist, maintains in his learned analysis, (see the Postscript in reply to A World View of Capital Punishment by James Avery Joyce), of the views of Camus and Koestler, that neither of these two authors has faced up to the really basic objection to the abolitionist's case. According to Graven, there are two groups of people, which are not covered by the abolitionist's case and Camus and Koestler have therefore left their cause open to attack at its _____ (1) See Lee S. Friedman's article at pages 61-87, Review Year Book, 1979, compiled by Messinger and Bittner. (2) 428 US 904=49 L. Ed. 1212 (1976).

weakest point. "The true problem", as Graven sees it, "is the protection of the organized, civilized community", the legitimate defence of society against criminal attacks made upon it by those anti-social elements which can be stopped only by being eliminated, in the "last resort". "For such, the death penalty should be preserved, and only for such".

Professors Graven's second challenge is, which the abolitionist must accept, the existing division between civil and military protection. According to him, in doing so, the abolitionist cannot avoid applying double standard and two mutually destructive criteria to their approach to the death penalty. "For if the death penalty is accepted as protective in principle to society, then it should be so in all cases and in all circumstances in troubled times as well as in peaceful times, in respect of the traitor, the spy, the deserter, or the hostage, as well as of the brigand, the "gangster", or the professional killer. We must be logical and just at the same time. In the realm of conscience and of 'principles', there cannot be two weights and measures. There cannot be a morality for difficult times and another morality for easy times; one standard for military justice and another for civil justice. What then should be done with those individuals who have always been considered proper subjects for elimination? If the capital sentence is objectionable and illegal...If the death penalty must be absolutely repudiated because it 'degrades man, (quoting Camus) then we accept the position. But, in that case, no right to kill exists any longer...the greatest war criminals, those responsible conscious of what they have done and intended to do-for the worst crimes of genocide, who gassed, incinerated in ovens or buried in quicklime a million innocent victims, or allowed them to perish in mines and marshes...Society has not the right then to kill even these "Monsters".

(Quoted in A World View of Capital Punishment, by James Avery Joyce).

J.J. Maclean, a Parliamentarian, articulated his views with regard to the deterrent, value of capital punishment in the Canadian House of Commons in the March-April, Debates 1966, as follows:

> "Whether it (capital punishment) is a greater or lesser deterrent than life imprisonment. This is an argument that cannot be proven on either side but I would not like to have to try to convince any one that capital punishment is not a deterrent. Statistically this cannot be proven because the deterrent effect on both capital punishment and life imprisonment is obscured by the fact that most criminals plan a crime on the basis that they are going to avoid any penalty...I say, the deterrent value is with respect to people who did not commit crimes, who were deterred from becoming murderers by the fact that capital punishment or some other heavy penalty would be meted outto them if caught."

(Quoted in Sellin's Capital Punishment).

The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows:

> "In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that

have weighed with us in arriving at this conclusion:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any otber punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers-are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

(f) Statisties of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect; neither can they be regarded as conclusively disproving it."

Views of the British Royal Commission:

The British Royal Commission, after making an exhaustive study of the issue of capital punishment and its deterrent value, in their Report (1949-53), concluded:

"The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible."

We may add that whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potentisim murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind.

Retribution in the sense of reprobation whether a totally rejected concept of punishment.

Even retribution in the sense of society's reprobation for the worst of crimes, i.e., murder, is not an altogether outmoded concept. This view is held by many distinguished sociologist, jurists and judges.

Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

> "Punishment is the way in which society expresses its denunciation of wrong-doing, and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else...The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not."

That retribution is still socially acceptable function of punishment, was also the view expressed by Stewart, J., in Furman v. Georgia, at page 389, as follows:

> "...I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instant, in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy of self help, vigilant justice, and lynch law."

Patrick Devlin, the eminent jurist and judge, in his book, "The Judge", emphasises the retributive aspect of the purpose of punishment and criminal justice, thus:

> "I affirm that justice means retribution and nothing else. Vindictiveness is the emotional outflow of retribution and justice has no concern with that. But it is concerned with the measurement of deserts. The point was put lucidly and simply by the Vicar of Longton in a letter to The Times, from which with his permission I quote: Firstly, far from pretending that retribution should have no place in our penal system, Mr. Levin should recognize that it is logically impossible to remove it. If it were removed, all punishments should be rendered unjust. What could be more immoral than to inflict imprisonment on a criminal for the sake of deterring others, if he does not deserve it? Or would it be justified to subject him to a compulsory attempt to reform which includes a denial of liberty unless, again he deserves it?. Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one. How these ends of punishment coalesce into one was described by the Law Commission of India, thus:

> "The retributive object of capital punishment has been the subject-matter of sharp attack at the hands of the abolitionists. We appreciate that many persons would regard the instinct of revenge as barbarous. How far it should form part of the penal philosophy in modern times will always remain a matter of controversy. No useful purpose will be served by a discussion as to whether the instinct of retribution is or is not commendable. The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct the feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence."

[Para 265 (18), 35th Report] Earlier in 1949-1953, the British Royal Commission in Para 59 of its Report spoke in a somewhat similar strain:

> "We think it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. The fact that men are hung for murder is one great reason why murder is considered so dreadful a crime. This widely diffused effect on the moral consciousness of society is impossible to assess, but it must be at least as important as any direct part which the death penalty may play as a deterrent in the calculations of potential murderers."

According to Dr. Ernest Van Den Haag, a New York psychologist and author, and a leading proponent of death penalty, "a very strong symbolic value" attaches to executions. "The motives for the death penalty may indeed include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed."

(See The Voice (USA) June 4, 1979) The views of Lloyd George, who was the Prime Minister of England during the First World War, have been referred to in the book "Capital Punishment" (1967) by Thorsten Sellin at page 65, as below:

> "The first function of capital punishment is to give emphatic expression to society's peculiar abhorrence of murder....It is important that murder should be regarded with peculiar horror...I believe that capital punishment does, in the present state of society, both express and sustain the sense of moral revulsion for murder."

This view is not without respectable support in the jurisprudential literature of today, despite an opinion to the contrary. (See also the Royal Commission's Report, 1949-

53). In relying, inter alia, upon the evidence before it, including that of Lord Denning, the Royal Commission recognised a strong and widespread demand for retribution. It is a common phenomenon in all the civilized countries that some murders are so shockingly offensive that there is a general outcry from the public for infliction of the ultimate penalty on the criminal.

In regard to the retributive aspect of capital punishment, we may cite one recent illustration showing how demand for retribu-

tion, in the sense of society's instinctive disapproval of the outrageous conduct of the murderer is indelibly ingrained in contemporary public opinion even in advanced countries.

In November 1978, George Moscone (Mayor) and Harvey Milk (Supervising Officer) of San Francisco were cruelly, assassinated by Dan White, a police-man. Six months later, on May 22, 1979, a jury of seven men and five women rejected the charge of first-degree murder, and in consequence, did not award capital punishment to Dan White for this heinous double murder. Public opinion reacted sharply. Public protest against this decision spontaneously manifested itself in a burst of flame and fury. Thousands of outraged demonstrators rampaged through the Civic Centre, smashing windows, burning police cars, chanting: "We want justice"

> Writing in 'The Voice', a local paper from San Franscisco, in its issue of June 4, 1979, Lawrence Mullen, fired at the jury a volley of questions, to which the agitated public would demand answers:
>
> "What comment did the jury make on the value of life? Was the tragedy of the execution-style murders the central issue, or was the jury only concerned with technicalities, absurdities and loopholes of the law? Was justice considered not revenge but justice? High irony, Dan White's strong belief in capital punishment has found thousands of new converts. From now on, a lot of people will die because Dan White lives. Are we so insensitive, callous and inhuman that we accept or excuse violence and brutality? Consider White's defence lawyer, Douglas Schmidt's reference to that tragic Monday in November: "It was a tragedy. Now it's behind us."
>
> "For those who loved and still miss George Moscone and Harvey Milk, for those who were cast into darkness and cried for justice, for those who still seek answers, the lawyer's words are a chilling reminder that we must not forget-that we must not 'put it behind us'."

The former cop, a law and order and capital punishment advocate driven by his passion, by his lack of reason, to destroy those who he disagreed with, and by doing so demonstrated the greatest human failure-the inability to co-exist.

> "Dan White symbolizes the violence and brutality that is undermining civilization."

Dan White's case and the spontaneous reaction of the public opinion that followed, show that opposition to capital punishment has (to use the words of Raspberry),"(1) much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response".

The Editor of 'Capital Punishment', Thorsten Sellin has noted at page 83 of his compilation, the following views of an outstanding Justice of the Ontario Appeal Court:

> "The irrevocable character of the death penalty is a reason why all possible measures should be taken against injustice-not for its abolition. Now a days, with the advent of armed criminals and the substantial increase in armed robberies, criminals of long standing if arrested, must expect long sentences. However, if they run no risk of hanging, when found guilty of murder, they will kill police men and witnesses with the prospect of a future no more unhappy, as one of them put it, than being fed, lodged, and clothed for the rest of their lives. In addition, once in prison, such people who are capable of anything could kill their guards and their fellow inmates with relative impunity."

J.J. Maclean, the Canadian Parliamentarian justifies, from another angle, the right of the State to award capital punishment for murder:

> "If the State has the right and the duty to defend the community against outside aggression, such as in time of war, and within the country, for instance, in case of treason _____ (1) Raspberry, Death Sentence, the Washington Post, March 12, 1976, p, 27 cols. 5-6.

crimes against the State, etc., and that to the extent of taking the life of the aggressors and guilty parties, if the citizen wants to protect his own life by killing whoever attacks him without any reason, the State can do the same when a criminal attacks and endangers the life of the community by deciding to eliminate summarily another human being. Capital punishment must be retained to prove the sanctity of that most precious thing which is the gift of life; it embodies the revulsion and horror that we feel for the greatest of crimes...For most people, life is priceless and they will do anything and suffer the worst privations to preserve it, even when life itself does not hold many consolations or bright prospects for the future. As a deterrent, the death penalty is playing its part for which there is no substitute...I suggest that statistics do not prove much, either on one side or the other.... There are too many variations, too many changes as regards circumstances, condition between one period and the other, to enable us to make worthy comparisons."

(See page 84 of Sellin's Capital Punishment). Some penologists justify capital penalty and life imprisonment on the 'isolation' or 'elimination' theory of crime and punishment. Vernon Rich in his "Law & the administration of justice" (Second Edition, at page 10), says:

> "The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole, so that they cannot commit other antisocial acts. The isolation theory is used to justify the death penalty and long- term imprisonment. Obviously, this theory is effective in preventing criminal acts by those executed or permanently incarcerated."

While the Abolitionists look upon death penalty as something which is per se immoral and inhuman, the Retentionists apprehened that if we surrender even the risk of the last remaining horrifying deterrent by which to frighten the toughts of the underworld, we may easily tip the scales in favour of the anti-social hoodlums. They fear that abolition of capital punishment, will result in increase of murders motivated by greed, and in affable "crime passionelle."

> "It is feared", wrote George A. Floris,(1) "the most devastating effects of the abolition will, however, show themselves in the realm of political murder. An adherent of political extremism is usually convinced that the victory of his cause is just round the corner. So, for him long term imprisonment holds no fear. He is confident that the coming ascendency of his friends will soon liberate him." To prove this proposition, Floris cites the instance of Von Paper's Government who in September 1932, reprieved the death sentence passed on two of Hitler's storm-troopers for brutal killing of one of their political opponents. The Retentionists believe that the dismantling of the gallows will almost everywhere enhance the hit and run attacks on political opponents. On this premise, they argue that capital punishment is the most formidable safeguard against terrorism.
>
> The argument cannot be rejected out of hand. A number of instances can be cited where abolitionist States feeling the inadequacy of their penological armour to combat politically motivated gangsterism, have retrieved and used their capital weapon which they had once thrown away. Despite their traditional abhorrence of death penalty, the Norwegians executed Major Vedkun Quisling after World War II. The Belgians, too, executed no less than 242 collaborators' and traitors after the liberation, although in their country, the death penalty was otiose since 1880.
>
> In England, death penalty was retained for high treason in the Silverman Bill of 1956. Even at present, for that offence, death penalty is a valid sanction in England. In the aftermath of assassination of Prime Minister Bandernaike in 1959, Ceylon hurriedly reintroduced capital punishment for murder. Owing to similar considerations, Israel sanctioned death penalty for crimes committed against the Jewish people, and executed the notorious Jew-baiter, Adolf Eichmann in 1962. Recently, on April 9, 1979, confronted with a wave of violent incidents after the signing of Egypt- Israel Peace Treaty. Israel sanctioned the use of death penalty "for acts of inhuman cruelty".

_____ (1) Sunday Tribune, December 8, 1963.

In India, very few scientific studies in regard to crime and punishment in general, and capital punishment, in particular, have been made. Counsel for the petitioners referred us to Chapter VI, captioned 'Capital Punishment, in the book, 'Quantum of Punishment in Criminal Law in India, written by Dr. Kripal Singh Chhabra, now on the staff of G.N. University, Amritsar. In this article, which was primarily meant as LL. D. thesis, the learned author concludes:

> "On the basis of statistics both of India and abroad, U.N.O. findings and other weighty arguments, we can safely conclude that death penalty is not sustainable on merits. Innately it has no reformative element. It has been proved that death penalty as operative carries no deterrent value and crime of murder is governed by factors other than death penalty. Accordingly, I feel that the death penalty should be abolished."

It will be seen, in the first place, that the analysis by Dr. Chhabra in coming to the conclusion, that death penalty is of no penological value, is based on stale, incomplete and inadequate statistics. This is more particularly true of the data relating to India, which does not cover the period subsequent to 1961. Secondly, the approach to the problem adopted by him, like the other Abolitionists referred to by him, is mainly, if not merely, statistical.

As already noticed, the proponents of the opposite view of capital punishment, point out that statistics alone are not determinative of the question whether or not death penalty serves any deterent or other penological purpose. Firstly, statistics of deterred potential murderers are hard to obtain. Secondly, the approach adopted by the Abolitionists is oversimplified at the cost of other relevant but imponderable factors, the appreciation of which is essential to assess the true penological value of capital punishment. The number of such factors is infinitude, their character variable duration transient and abstract formulation difficult. Conditions change from country to country and time to time. Due to the inconstancy of social conditions, it is not scientifically possible to assess with any degree of accuracy, as to whether the variation in the incidence of capital crime is attributable to the presence or absence of death penalty in the penal law of that country for such crimes.

That is why statistical attempts to assess the true penological value of capital punishment, remain inconclusive.

Pursued beyond a certain point, both the Abolitionists and the Retentionists retreat into their own conceptual bunkers firmly entrenched in their respective "faiths". We need not take sides with either of them. There is always a danger in adhering too rigidly to concepts. As Prof. Brett has pointed out "all concepts are abstractions from reality, and that in the process of abstraction something of the reality is bound to be lost''(1). We must therefore, view the problem against the perspective of the hard realities of the time and the conditions prevailing in the world, particularly in our own country.

A review of the world events of the last seven or eight years, as evident from Encyclopaedia Britannica Year Books and other material referred to by the learned counsel, would show that most countries in the world are in the grip of an ever-rising tide of violent crime. Murders for monetary

gain or from misdirected political motives, robbery, rape assault are on the increase. India is no exception. The Union of India has produced for our perusal a statement of facts and figures showing the incidence of violent crime, including murder, dacoity and robbery, in the various States of India, during the years 1965 to 1975. Another statement has been furnished showing the number of persons convicted of murder and other capital offences and sentenced to death in some of the States of India during the period 1974 to 1978. This statement however, is incomplete and inadequate. On account of that deficiency and for the general reasons set out above, it cannot, even statistically show conclusively or with any degree of certainty, that capital punishment has no penological worth. But the first statement does bring out clearly the stark reality that the crimes of murder, dacoity and robbery in India are since 1965 increasing.

Now, looking around at the world during the last decade, we may recall that in Purman v. Georgia (decided on June 29, 1976), the Supreme Court of the United States held by a majority, that the imposition and carrying out of the death penalty constitutes 'cruel and unusual' punishment, in violation of the Eighth and Fourteenth _____ (1) An Enquiry into Criminal Guilt by Prof. Peter Brett, 1963 Edn. Melbourne, page 13.

Amendments. Brennan and Marshall, JJ. (differing from the plurality) went to the extent of holding that death penalty was per se unconstitutional as it was a cruel and unusual punishment. In so holding, these learned Justices purported to adopt the contemporary standards of decency prevailing among the enlightened public of the United States. Justice Marshall ruled that "it was morally unacceptable to the people of the United States". This opinion of the learned Justices was sharply rebuffed by the people of the United States through their chosen representatives. Soon after the decision in Furman, bowing to the thrust of public opinion, the Legislatures of not less than 32 States, post-haste revised their penal laws and reinstituted death penalty for murder and certain other crimes. Public opinion polls then taken show that approximately 70 per cent of Americans have been in favour of death penalty. (See 'The Voice', supra). In 1976, a Gallup Poll taken in the Unitted States showed that more than 65 per cent of those polled preferred to have an operative death penalty.

Incidently, the rejection by the people of the approach adopted by the two learned Judges in Furman, furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the same time, it is a reminder that Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.

Coming back to the review of the world crime situation, during the last decade, Saudi Arabia and some other countries have reinstated death penalty or enacted harsher punishments not only for murder but some other crimes, also. In America, apart from 32 States which reinstated death penalty under revised laws after Furman, the legislatures of some of the remaining 15 States have either reinstituted or are considering to reintroduce death penalty. Currently, a federal legislation for reinstituting or prescribing capital punishment for a larger range of offences of homicide is under consideration of United States' Congress. According to the report of the Amnesty

International, in U.S.A., as on May 1, 1979, death penalty can be imposed for aggravated murder in 35 States. Attempts have been made in other countries, also to reintroduce death penalty. In Britain, in the wake of serious violent incidents of terrorism, a Bill was moved in Parliament to reintroduce capital punishment for murder and certain other offences. It was defeated by a free vote on April 19, 1979. Even so, no less than 243 Members of Parliament had voted in favour of this measure. We have noted that Israel has also recently reinstituted death penalty for certain criminal 'acts of in human cruelty'. In People's Republic of China, a new legislation was adopted on July 1, 1979 by China's Parliament, according to Article 43 of which, death penalty can be imposed "for the most heinous crimes". In Argentina, the death penalty was reintroduced in 1976. Similarly, Belgium reintroduced death penalty and increased the number of crimes punishable with death. In France, in 1978 a movement in favour of abolition initiated by the French bishops failed to change the law under which death penalty is a valid sanction for murder and certain other offences. In Japan, death penalty is a legal sanction for 13 crimes. In Greece and Turkey, death penalty can be imposed for murder and other capital offences. In Malaysia and the Republic of Singapore under the Drugs Act of May, 1979, misuse of drugs is also punishable with death. Cuba introduced a new penal code in February 1978, which provides punishment of death by shooting for crimes ranging from some types of murder and robbery to hijacking and rape.

In the U.S.S.R. (Russia), as many as 18 offences are punishable with death. In Russia, at present, the following offences committed in peacetime are punishable with death under the RSFSR Criminal Code:

> "Treason (Article 64); espoinage (Article 65); terrorism (if the offence includes the killing of an official (Article 66); terrorism against representative of foreign State (if the offence includes the killing of such a representative "for the purpose of provoking war or international compli cations") (Article 67); sabotage (Article 68); organizing the commission of any of the above-named offences (Article 72); commission of any of the above-named offences against other Working People's State (Article 73); banditry (Article 77); actions disrupting the work of corrective labour institutions (Article 77-1); making or passing counterfeit money or securities (when the offence is committed as a form of business) (Article 87); violation of rules for currency transactions (when committed as a form of business or on a large scale, or by a person previously convicted under this Article) (Art. 88); stealing of State property on an especially large scale, regardless of the manner of stealing (Article 93-1); intentional homicide with aggravating circumstances (Article 102); rape, when committed by a group of persons or by an especially dangerous recidivist, or resulting in especially grave consequences, or the rape of a minor (Article 117); taking a bribe, with especially aggravating circumstances (Article 173); infringing the life of a policeman or People's Guard, with aggravating circumstances (Article 191-2); hijacking an aircraft, if the offence results in death or serious physical injuries (Article 213-2); resisting a superior or compelling him to violate official duties, an offence applicable only to military personnel, and carrying the death penalty in peace-time if committed in conjunction with intentional homicide of a superior or any other person performing military duties (Article 240)."

(Vide, Report of Amnesty International, 1979) Our object in making the above survey is to bring out the hard fact that in spite of the Abolitionist movement, only 18 States (as on 30 May 1979) in the world have abolished the death penalty for all offences, while 8 more have retained it for specific offences committed in time of war, only. (See Amnesty International Report (1979) page 92). This means, most of the countries in the modern world still retain death penalty as a legal sanction for certain specified offences. The countries which retain death penalty in their penal laws, such as, Russia, U.S.A., France, Belgium, Malaysia, China and Japan, etc., cannot, by any standard, be called uncivilized nations or immature societies.

Surveyors and students of world events and current trends believe that the reversal of the attitudes towards criminals and their judicial punishments in general, and capital punishment in particular in several countries of the world, is partly due to the fact that milder sanctions or corrective processes, or even the alternative of imprisonment, have been found inadequate and wanting to stem the mounting tide of serious crime. Writing in Encyclopaedia Britannica, 1978 Book of the Year under the caption, 'Changing Attitudes Towards Criminals', Richard Whittingham sums up the cause that has led to the adoption of this New Hard Line, thus :

> "Horror Story after horror story of dangerous criminals sent back into society on bail or parole from a penitentiary or (in many cases) release from a mental institution to commit further crimes have forced people to say that enough is enough. The consensus seemed to be that there must be no repetition of such situations as the one described by Chicago Sun-Times Columnist Roger Simon in a September 4, 1977, article about a man who had just been convicted of a particularly despicable crime."

Faced with the spectre of rising crime, people and sociologists alike, have started questioning the rehabilitation policy. "In California another study from the Rand Cooperation, suggests that keeping habitual criminals locked up would do more to reduce crime than any rehabilitation efforts. Despite treatment or preventive measures, habitual criminals commonly go back to crime after they are released from prison, the study showed. In addition, the study found that deterrence to crime was in direct proportion to the relative certainty of going to jail, after being caught."

According to Encyclopaedia Britannica Year Book 1979, in 1978 also penologists were seriously divided in their views about the end of punishment. Some penologists argued that "It is not possible to punish and reform simultaneously": while "others would prefer to strip punishment of its moral overtones", "While many Legislators and most penologists have supported the idea that reform ought to take priority in dealing with offenders, many Judges especially in Britain and the United States, where rising crime rates are the source of much public concern have expressed grave doubts about the wisdom of this view. They have argued that the courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime".

India also, as the statistics furnished by the respondent (Union of India) show, is afflicted by a rising rate of violent crime, particularly murder, armed robbery and dacoity etc., and this has been the cause of much public concern. All attempts made by individual members to move Bills in the

Parliament for abolition or restriction of the area of death penalty have ended in failure. At least four of such unsuccessful attempts were made after India won Independence, in 1949, 1958, 1961 and 1978. It may be noted that the last of these cttempts was only to restrict the death penalty to a few types of murders specified in the Bill. Though it was passed by the Rajya Sabha after being recast, it has not been passed by Lok Sabha.

To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion chanalised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for pre- sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.

We will now consider the issue whether the impugned limb of the provision in Section 302, Penal Code contravenes Article 21 of the Constitution.

Before dealing with the contention canvassed on the point, it will be proper to notice briefly the principles which should inform the interpretation of Article 21.

In Maneka Gandhi's case, which was a decision by a Bench of seven learned Judges, it was held by Bhagwati, J. in his concurring judgment, that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights under Article 19. It

was further observed that Articles 14, 19 and 21 are not to be interpreted in water-tight compartments, and consequently, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Article 14. The principle of reasonableness pervades all the three Articles, with the result, that the procedure contemplated by Article 21 must be 'right and just and fair' and not 'arbitrary' fancifu or 'oppressive', otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.

Article 21 reads as under:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows:

> "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."

In the converse positive form, the expanded Article will read as below:

> "A peron may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law."

Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the Founding Fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications, also, in the Constitution which show that the Constitution-makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in List III-Concurrent List-of the Seventh Schedule, specifically refer to the Indian Penal Code and the Code of Criminal Procedure as in force at the commencement of the Constitution. Article 72 (1) (c) specifically invests the President with power to suspend, remit or commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, inter alia the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial Court. Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under Section 302, Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of

the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.

Before we pass on to the main Question No. II, we may dispose of another contention convassed by Dr. L.M. Singhvi.

It is pointed out that India, as a member of the International Community, was a participating delegate at the international conference that made the Stockholm Declaration on December 11, 1977, that India has also accepted the International Covenant on Civil and Political Rights adopted by the Central Assembly of the United Nations, which came into force on March 23, 1966, and to which some 47 countries, including India, are a party. This being the position, it is stressed, India stands committed to the abolition of the death penalty. It is contended that the constitutional validity and interpretation of the impugned limb of Section 302, Penal Code, and the sentencing procedure for capital cases provided in Section 354 (3) of the Code of Criminal Procedure, 1973, must be considered in the light of the aforesaid Stockholm Declaration and the International Covenant, which represent the evolving attitudes and standards of decency in a maturing world.

Let us examine this contention. The European Convention of Human Rights came into force on September 1, 1953, and 18 countries had signed this Convention on November 4, 1950. India acceded to this Resolution of the Convention on March 27, 1979. The International Covenant on Civil and Political Rights, inter alia, provides:

> "Article 6 (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime...

It will be seen that clauses (1) and (2) of Article 6 do not abolish or prohibit the imposition of death penalty in all circumstances. All that they require is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ex post facto legislation. Thus, the requirements of these clauses are substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of our Constitution. India's commitment therefore does not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code. The Penal Code prescribes death penalty as an alternative punishment only for heinous crimes which are not more than seven in number. Section 354 (3) of the Criminal Procedure Code, 1973, as we shall presently discuss, in keeping with the spirit of the International Covenant, has further restricted the area of death penalty. India's penal laws, including the impugned provisions and their application, are thus entirely in accord with its international commitment.

It will be pertinent to note that most of the countries including those who have subscribed to this International covenant, retain death penalty for murder and certain other crimes even to the present day in their penal laws. Neither the new interpretative dimensions given to Articles 19 and 21 by this Court in Maneka Gandhi and Charles Sobraj v. The Superintendent Central Jail, Tihar, New Delhi(1) nor the acceptance by India of the International Covenant on Civil and Political Rights, makes any change in the prevailing standards of decency and human dignity by which counsel require us to judge the constitutional validity of the impugned provisions. The International Covenant, as already noticed, does not outlaw capital punishment for murder, altogether.

For all the foregoing reasons, we would answer the first main question in the negative. This takes us to Question No. II.

Question No.II.

Are the provisions of Section 354 (3) of the Code of Criminal Procedure, 1973 unconstitutional ? That is the question. The constitutional validity of section 354 (3) is assailed on these grounds:

> (i) (a) Section 354 (3) of the Code of Criminal Procedure, 1973, delegates to the Court the duty to legislate the field of 'special reasons' for choosing between life and death, and _____ (1) [1979] 1 S.C.R. 512.
>
> (b) permits imposition of death penalty in an arbitrary and whimsical manner in as much as it does not lay down any rational principies or criteria for invoking this extreme sanction. (Reliance has been placed on Furman v. Georgia (ibid).
>
> (ii) If Section 354 (3) is to be saved from the vice of unconstitutionality, the Court should so interpret it and define its scope that the imposition of death penalty comes to be restricted only to those types of grave murders and capital offences which imperil the very existence and security of the State. (Reliance for this argument has been placed on Rajendra Prasad's case (ibid)).

As against this, the learned Solicitor-General submits that the policy of the law in the matter of imposition of death sentence is writ large and clear in Section 354 (3), namely, that life imprisonment is the rule and death sentence an exception; that the correct approach should be to apply this policy to the relevant facts of the particular case, bearing on the question of sentence, and to find out if there are any exceptional reasons justifying imposition of the death penalty, as a departure from the normal rule.

It is submitted that conferment of such sentencing discretion on the courts, to be exercised judicially, in no sense, amounts to delegation of the legislative powers by Parliament.

Shri Sorabji further submits that there is no inherent impossibility in formulating broad guidelines consistent with the policy indicated by the legislature, for the exercise of the judicial functions under Section 354 (3). He emphasises that only broad guidelines, as distinct from rigid rules, can be laid

down by the Court. Since the discretion-proceeds the argument-is to be exercised judicially after taking into consideration all the aggravating and mitigating circumstances relating to the crime and the criminal in a particular case, and ample safeguards by way of appeal and reference to the superior courts against erroneous or arbitrary exercise of the sentencing discretion have been provided, Section 354 (3) cannot be said to be violative of Articles 14, 19 and 21 or anything else in the Constitution, Before embarking upon a discussion of the arguments advanced on both sides, it is necessary to have a peep into the history and the legislative background of the procedural provisions relating to sentencing in the Code of criminal Procedure.

Under the Code of Criminal Procedure, 1898, as it stood before its amendment by Act No. 26 of 1955, even for the seven offences mentioned earlier, which are punishable in the alternative with death, the normal sentence was the death sentence, and if the Court wanted to depart from this rule, it had to give reasons for doing so. This requirement was embodied in subsection (5) of Section 367, which, as it then stood, was as follows: "If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

The Law Commission in its 35th Report (Vol. I), made the following comments on this provision:

> "...a considerable body of opinion is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt...It would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death) or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment of life."

In deferance to this recommendation, section 66 of the Code of Criminal Procedure (Amendment) Act, 1955 (XXVI of 1955) deleted old sub-section (5) of Section 367 with effect from January 1, 1956, and thereafter, for such capital offences, it was left to the Court, on the facts of each case, to pass, in its discretion, for reason to be recorded, the sentence of death or the lesser sentence. This led to some difference of opinion whether, even after the Amendment of 1955, in case of murder the normal punishment was death or imprisonment for life (See A.I.R. Commentaries on the Code of Criminal Procedure, Vol. 3, page 565, by D.V. Chitaley and S. Appu Rao). Overruling its earlier decision, the Bombay High Court in the State v. Vali Mohammad,(1) held that death is not a normal penalty for murder. As against this, the Division Bench of the Madras High Court in Veluchami Thevar,(2) held that death was the normal punishment where there were no extenuating circumstances. The third set of cases held that both the sentences were normal but the discretion as regards sentence was to be exercised in the light of facts and circumstances of the case.

This view appears to be in accord with the decision of this Court in Iman Ali & Anr. v. State of Assam.(3) In that case, there was a clear finding by the Court of Session which had been upheld by

the High Court, that each of the two appellants therein, committed a cold-blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by them. Those persons were shot and killed even though they had not tried to put up any resistence. It was held by this Court (speaking through Bhargava, J.) that in these circumstances where the murders were committed in cold-blood with the sole object of committing dacoity, the Sessions Judge had not exercised his discretion judicially in not imposing the death sentence, and the High Court was justified in enhancing the sentence of the appellants from life imprisonment to death.

Jagmohan Singh's case, which we shall notice presently in further detail, proceeds on the hypothesis that even after the deletion of sub-section (5) of Section 367 in the Code of 1898, both the alternative sentences provided in Section 302, Penal Code are normal punishment for murder, and the choice of either sentence rests in the discretion of the Court which is to be exercised judicially, after taking into account all the relevant circumstances of the case. _____ (1) AIR 1959 Bom. 294 (299).

(2) A.I.R. 1965 Mad. 48 at p. 49.

(3) [1968] 3 S.C.R. 610.

Section 354 (3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before Apr. 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354 (3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report, stated the object and reason of making this change, as follows:

> "A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence"

Accordingly, sub-section (3) of Section 354 of the current Code provides:

> "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

In the context, we may also notice Section 235 (2) of the Code of 1973, because it makes not only explicit, what according to the decision in Jagmohan's case was implicit in the scheme of the Code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

> "If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The Law Commission on its 48th Report had pointed out this deficiency in the sentencing procedure:

> "45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal or several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background of the offender.
>
> The aims of sentencing:-Themselves obscure-become all the more so in the absence of information on which the correctional process is to operate. The public as well so the courts themselves are in the dark about judicial approach in this regard.
>
> We are of the view that the taking of evidence as to the circustances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process."

By enacting Section 235 (2) of the New Code, Parliament has accepted that recommendation of the Law Commission. Although sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course", as was pointed out by this Court in Santa Singh v. State of Punjab,(1) "care would have to be taken by the Court to see that this hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."

We may also notice Sections 432, 433 and 433A, as they throw light as to whether life imprisonment as currently administered in _____ (1) A.I.R. 1976 SC. 2286.

India, can be considered an adequate alternative to the capital sentence even in extremely heinous cases of murder.

Sections 432 and 433 of the Code of 1973 continue Sections 401 and 402 of the Code of 1898, with necessary modifications which bring them in tune with Articles 72 and 161 of the Constitution. Section 432 invests the "appropriate Government" (as defined in sub-section (7) of that Section) with power to suspend or remit sentences. Section 433 confers on the appropriate Government power to commute sentence, without the consent of the person sentenced. Under clause (a) of the Section, the appropriate Government may commute a sentence of death, for any other punishment provided by the Indian Penal Code.

With effect from December 18, 1978, the Code of Criminal Procedure (Amendment) Act, 1978, inserted new Section 433A, which runs as under :

> "433A. Restriction on powers of remission or commutation in certain cases-Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

It may be recalled that in Jagmohan this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433, so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years.

We may next notice other provisions of the extent Code (corresponding to Sections 374, 375, 376 and 377 of the repealed Code) bearing on capital punishment. Section 366

(i) of the Code requires the Court passing a sentence of death to submit the proceedings to the High Court, and further mandates that such a sentence shall not be executed unless it is confirmed by the High Court. On such a reference for confirmation of death sentence, the High Court is required to proceed in accordance with Sections 367 and

368. Section 367 gives power to the High Court to direct further inquiry to be made or additional evidence to be taken. Section 368 empowers the High Court to confirm the sentence of death or pass any other sentence warranted by law or to annul or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such court consists of two or more Judges, be made, passed and signed by at least two of them. Section 370 provides that where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be referred to a third Judge.

In this fasciculus of Sections relating to confirmation proceedings in the High Court, the Legislature has provided valuable safeguards of the life and liberty of the subject in cases of capital sentences. These provisions seek to ensure that where in a capital case, the life of the convicted person is at stake, the entire evidential material bearing on the innocence or guilt of the accused and the question of sentence must be scrutinised with utmost caution and care by a superior Court.

The High Court has been given very wide powers under these provisions to prevent any possible miscarriage of justice. In State of Maharashtra v. Sindhi, (1) this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects reappraise, reassess and reconsider the entire facts and

law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge.

Similarly, where on appeal, the High Court reverses an acquittal, and convicts the accused person and sentences him to death, Section 379 of the Code of 1973, gives him a right of appeal to the Supreme Court. Finally, there is Article 136 of the Constitution under which the Supreme Court is empowered, in its discretion, to _____ (1) A.I.R. 1975 S.C. 1665.

entertain an appeal on behalf of a person whose sentence of death awarded by the Sessions Judge is confirmed by the High Court.

In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan's case. These propositions may be summed up as under :

> (i) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facts to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to McGauthe v. California(1)

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un- _____ (1) [1971] 402 US 183.

guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process"

clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the judges an unguided and uncontrolled discretion in the matter of awarding capital punishment of imprisonment for life.

(v) (a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the Court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. Where counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, "the Court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the Cr. P.C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2) Cr. P.C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21."

(emphasis added) A study of the propositions set out above, will show that in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan's case. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No.

(iv) (a) which postulates, that according to the then extant Code of Criminal Procedure both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to impose the sentence of death on that person unless there are "special reasons"- to be recorded-for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases.

In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab (1), wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J,) speaking for the Court, summed up the scope and implications of Section 354 (3), thus :

> "Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case."

While applying proposition (iv) (a), therefore, the Court has to bear _____
(1) A.I.R.1976 SC 231=[1976] 2 SCR 684.

in mind this fundamental principle of policy embodied in Section 354(3).

Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302, Penal Code, the Court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre- sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally" or merely to the

circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.

Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v)

(b) in Jagmohan, shall have to be recast and may be stated as below :

> (a) The normal rule is that the offence of muder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

The soundness or application of the other propositions in Jagmohan, and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary these changes reinforce the reasons given in Jagmohan, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354(3) given a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder-a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystalised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

The new Section 235 (2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair

unreasonable and unjust, Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, re- affirm the view taken by this Court in Jagmohan, and hold that the impgned provisions do not violate Articles 14, 19 and 21 of the Constitution.

Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders.

Dr. Chitale contends that the wide observations in Jagmohan as to the impossibility of laying down standards or norms in the matter of segtencing are too sweeping. It is submitted that soon after the decision in Furman, several States in U.S.A. amended their penal statutes and brought them in conformity with the requirements of Furman. Support has also been sought for this argument from Gregg v. Georgia, wherein the Supreme Court of the United States held that the concern expressed in Furman decision that death penalty may not be imposed in an arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentencing proceeding being preferable as a general proposition.

If by "laying down standards", it is meant that 'murder' should be categorised before hand according to the degrees of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free-play of discretion, the argument merits rejection.

As pointed out in Jagmohan, such "standardisation" is well-nigh impossible.

Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement 'crimes are only to be measured by the injnry done to society'. But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of the actor's culpability". But how is the degree of that culpability to be measured. Can any thermometer be devised to measure its degree ? This is a very baffling, difficult and intricate problem.

Secondly, criminal cases do not fall into set- behavioristic patterns. Even within a single-category offence there are infinite, unpredictable and unforceable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blame-worthiness or dessert criminal cases are diferent from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated."(1) This is particularly true of murder. "There is probably no offence", observed Sir Ernest Growers,

Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder." The futility of attempting to lay down exhaustive standards was demonstrated by this Court in Jagmohan by citing the instance of the Model Penal Code which was presented to the American Supreme Court in McGoutha.

Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the alter of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.

Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that incompassed by the broad contours delineated in Section 354 (3), _____ (1) Messinger and Bittner's Crimonology Year Book (Ibid) Albert W, Alcherler's article at page 421.

the Court would not by over-leaping its bounds rush to do what Parliament, in its wisdom, varily did not do.

We must leave upto the Legislature, the things that are Legislature's. "The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits". As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted judicial 'made-to-order' standards, howsoever painstakingly made, do not bear the peoples imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves, the responsibility of setting down social norms of conduct. There is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal pre-dilection into the law, sincerely mistaking that changeling for what they perceive to be the community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people. In Furman, the Hon'ble Judges claimed to articulate the contemporary standards of morality among the American people. But speaking through public referenda, Gallup polls and the state legislatures, the American people sharply rebuffed them. We must draw a lesson from the same.

What the learned Chief Justice, who is amongst us in this case has said recently in Gurbaksh Singh Sibbia and others v. State of Punjab(1) in the context of laying down standards in the discre-

_____ (1) Criminal Appeals Nos. 335 etc. of 1977 and 81 and 82 of 1978.

tionary area of anticipatory bail, comes in as a timely reminder. In principle, these observations aptly apply to the desirability and feasibility of laying down standards in the area of sentencing discretion, also. Let us therefore, hark to the same:

> "Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and, therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn L.C. said in Hyman and Anr. v. Rose(1).
>
> "I desire in the first instance to point out that the discretion given by the section is very wide. Now it seems to me that when the Act is so express to provide a wide discretion...it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point-of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained
> _____ (1) [1912] A.C. 623, in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe. I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand."
>
> "Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory

> bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence."

From what has been extracted above, it is clear that this Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature in Section 354(3) can be laid down. Before we come to this aspect of the matter, it will be fair to notice briefly the decisions of the Supreme Court of U.S.A. in Gregg v. Georgia and companion cases.

Soon after the decision in Furman, the Georgia Legislature amended its statutory scheme. The amended statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the extreme penalty of death, as provided in that statute, are:

> "(1) The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions).
>
> (2) The offence of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree. (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazaradous to the lives of more than one person. (4) The offender committed the offence of murder for himself or another, for the purpose of receiving money or any other thing of monetary value. (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to committed murder as an agent or employee of another person.
>
> (7) The offence of murder, rape, armed robbery, or kidnapping was outrageiously or want only vile horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance or his official duties.

(9) The offence of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

The Supreme Court of Georgia in Arnold v. State(1), held unconstitutional the portion (within brackets) of the first circumstances encompassing persons who have a "substantial history of serious assaultive criminal convictions" but did not set clear and objective standards.

The amended statute, also, provided for a bifurcated trial and a pre-sentence hearing. It also provides for an automatic appeal of death sentence to the Supreme Court of Georgia, which may or may not affirm the death sentence. The appellate court is also required to include reference to similar cases that the court considered.

The defendant (accused) in that case was convicted of two counts of armed robbery and two counts of murder. The accused had committed the murders for the purpose of receiving money and an automobile of one of the victims. After reviewing the trial record, the Georgia Supreme Court affirmed the convictions and the imposition of death sentences for murder, only. The constitutional validity of the amended statutory scheme of Georgia was challenged before the Supreme Court of U.S.A. on the ground that the imposition of the death penalty for the crime of murder under the Georgia statute violated the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Likewise in the companion case Proffitt v. Florida (2), the Florida Legislature adopted new statutes that authorised the imposition of the death penalty on those convicted of first-degree murders. Under the new Florida statutes, if a defendant (accused) is found guilty of first-degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence.

_____ (1) 236 Ga 534, 540, 224 SE 2d 386, 391 (1976) (2) 428 US 242, 49 L. Ed 2d 913 (1976).

The actual sentence is, however, determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances. If a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances. Just as in the Georgia statute, a death sentence is to be automatically reviewed by the Supreme Court of Florida. Under this new

statutory scheme, the Florida Court found Proffitt (defendant) guilty of first-degree murder and sentenced him to death on the finding that these aggravating circumstances were established :

> "(1) The murder was premeditated and occurred in the course of a felony (burglary);
>
> (2) the defendant had the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel ; and (4) the defendant knowingly, through his intentional act, had created a great risk of serious bodily harm and death to many persons."

The trial judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed the death sentence. Before the Supreme Court of U.S.A. the constitutional validity of the imposition of death penalty for the crime of murder under the Florida statutes was challenged on the same ground as in Gregg v. Georgia. The Supreme Court of U.S.A. in both the aforesaid cases negatived the challenge to the statutes and upheld their validity.

It may be recalled that in Furman, that Court had held that if clear, definite and articulate standards channeling the sentencing discretion for imposition of the death penalty are not laid down in a statute, it would violate the Eighth and Fourteenth Amendments. It may be noted that the aggravating circumstance No. (7) is couched in a very wide and elastic language. The expressions "outrageously or wantonly vile", "horrible or inhuman" employed therein are of the widest amplitude and give this aggravating circumstance the character of an omnibus clause. Likewise, in the Florida statute, the scope of the words "especially heinous, atrocious and cruel" was equally large and imprecise.

It can be seriously questioned whether these extremely elastic standards really exclude the uncontrolled exercise of sentencing discretion so as to meet the requirements of Furman.

In Gregg v. Georgia, the petitioner attacked the seventh statutory aggravating circumstance which authorises imposition of the death penalty if the murder was "outrageously, or wantonly vile, horrible or inhuman" on the ground that it was so broad that capital punishment could be imposed by its application in any murder case. Stewart, J., speaking for himself and for Powell and Stevens, JJ., got over this attack, in three ways:

> Firstly, by reading down the concerns expressed in Furman. In this connection, Stewart, J. said, all that Furman mandates is that discretion in so grave a matter must be suitably directed "so as to minimize the risk of wholly arbitrary and capricious action." This was, if we may say so with respect, an admission of the fact that a considerable range of sentencing discretion has perforce to be left with the sentencing body to be exercised by it according to its own good sense and reason, and that no standards howsoever meticulously drafted can totally exclude scope for arbitrary and capricious action.
>
> The second reason given to parry this attack was of a general nature. It was observed:

> "As a general proposition these concerns (expressed in Furman) are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."

The third course adopted to foil the attack was:

> "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction,"

White, J. with whom the Chief Justice and Rehnquist, J. joined, negatived the change of these standards being vague and incomplete, with these observations:

> "The argument is considerably overstated The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed became more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate as they are in Georgia by reasons of the aggrvating-circumstance requirement, it becomes reasonable to expect that Georgia's current system would escape the infirmities which invalidated its previous system under Furman. Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed wantonly or freakishly for any given category of crime will be set aside."

Similarly, in Proffit v. Florida, it was contended that the enumerated aggravating and mitigating circumstances in the Florida statute are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty". In particular, the petitioner attacked the eighth and third statutory aggravating circumstances which authorise the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel" or if "the defendant knowingly created a great risk of death to many persons".

Agreeing with the Supreme Court of Florida, the Supreme Court of U.S.A. recognised that "while it is arguable that all killing are atrocious, still we believe that the Legislature intended something especially heinous, atrocious, of cruel" when it authorised the death penalty for first-degree murder. As a consequence, the Court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim".

It appears to us that in Gregg v. Georgia and the companion cases, the Supreme Court of U.S.A. was obliged to read down the requirements of Furman and to accept these broadly worded, looseended and not-all-inclusive 'standards' because in the area of sentencing discretion, if it was to retain its

judicial character, exhaustive standardisation or perfect regulation was neither feasible nor desirable.

Moreover, over-standardisation of the sentencing process tends to defeat its very purpose, and may actually produce opposite results.

Messinger and Bittner's Criminology Year Book (ibid) Albert W. Alcherler's article at page 421 highlights this danger, by taking, inter alia, the example of the guided- discretion capital punishment statutes favoured by the Supreme Court in Gregg v. Georgia and its companion cases, as follows:

> A defendant convicted of capital murder might wish to make the following speech to the jury about to consider whether capital punishment should be imposed:
>
> "I am deeply sorry for my crime which I recognize was about as bad as any that can be imagined. I did, in fact, go to the police station shortly after the killing to surrender and make a full confession. Although I have done some terrible things in my life you may wish to know, before deciding whether I should live or die, that I have also done some good. I once risked my life in combat to save five comrades-an action for which I was awarded the Silver Star-and for the last 10 years I have personally cared for my invalid mother while supporting 5 younger brothers and sisters.
>
> "The mitigating factors listed in today's capital punishment statutes are sometimes quite general, but none that I have seen in any statute would permit a jury to consider any of the circumstances mentioned in this defendant's speech (or, for that matter any other evidence of pre-crime virtue or past-crime remorse). Apparently the Florida statute's upheld in Proffitt v. Florida would not; yet the Supreme Court plurality, seemingly oblivious to the statutes limitations, declared in a companion case, 'A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

(Jurek v.Texas.(1) Critically examined, it is clear that the decisions in Gregg v.Georgia and its companion cases demonstrate the truth of what we have said earlier, that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the straitjacket of exhaustive and rigid standards, Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from ironcased standards, which will minimise the risk of arbitrary imposition of death penalty for murder and some other offences under the Penal Code.

This takes us to the question of indicating the broad criteria which should guide the Courts in the matter of sentencing a person convicted of murder under Section 302, Penal Code. Before we embark on this task, it will be proper to remind ourselves, again that "while we have an obligation to ensure that the constitutional bounds are not over- reached, we may not act as judges as we might as legislatures."(2) In Jagmohan, this Court had held that this sentencing discretion is to be exercised

judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those eases. The legislative changes since Jagmohan-as we have discussed already-do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354 (3) and 235 (2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offences, also. _____ (1) 428 US 262, 271(1976).

(2) Per Stewart. J. in Gregg. v. Georgia.

We will first notice some of the aggravating circumstances which, in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms:

> "The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence."

It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the Code of Criminal Procedure, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ram's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti- social piety commits "blood-curdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2:1) has completely reversed the view that had been taken in Ediga Anamma, regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3) 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons"

> necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that

context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

Drawing upon the penal statutes of the States in U.S.A. framed after Furman v. Georgia, in general, and clauses (2)(a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances".

> "Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:
>
> (a) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (b) if the murder involves exceptional depravity; or
>
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed.
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
>
> (d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

In Rajendra Prasad, the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the

general public compel that course as provided in Article 19(2) to (6)." Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its 'ethos'; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302, Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in Bishnu Deo Shaw v. State of West Bengal, (1) which follows the dictum in Rajendra Prasad (ibid).

In several countries which have retained death penalty, preplanned murder for monetary gain, or by an assassin hired for _____ (1) [1979] S.C.C. 714.

monetary reward is, also, considered a capital offence of the first-degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), circumstances found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

Dr. Chitaley has suggested these mitigating factors:

> "Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a 'child', that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

According to some Indian decisions, the post-murder remorse, penitance or repentence by the murderer is not a factor which may induce the Court to pass the lesser penalty (e.g. Mominaddi Sardar). But those decisions can no longer be held to be good law in views of the current penological trends and the sentencing policy outlined in Section 235(2) and 354(3). We have already extracted the view of A.W. Alchuler in Cr. Y.E. by Messinger and Bittner (ibid), which are in point.

There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood-thirsty. Hedging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

For all the foregoing reasons, we reject the challenge to the constitutionality of the impugned provisions contained in Sections 302, Penal Code, and 354(3) of the Code of Criminal Procedure, 1973.

The writ petitions and the connected petitions can now be heard and disposed of, on their individual merits, in the light of the broad guidelines and principles enunciated in this judgment.

BHAGWATI, J. These writ petitions challenge the constitutional validity of Section 302 of the Indian Penal Code read with Section 354, sub-section (3) of the Code of Criminal Procedure in so far as it provides death sentence as an alternative punishment for the offence of murder. There are several grounds on which the constitutional validity of the death penalty provided in Section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure is assailed before us, but it is not necessary to set them out at this stage, for I propose to deal with them when I examine the arguments advanced on behalf of the parties. Suffice it to state for the present that I find, considerable force in some of these grounds and in my view, the constitutional validity of the death penalty provided as an alternative punishment in section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure cannot be sustained. I am conscious that my learned brethren on the Bench who constitute the majority have taken a different view and upheld the constitutional validity of the death penalty but, with the greatest respect to them and in all humility, I cannot persuade myself to concur with the view taken by them. Mine is unfortunately a solitary dissent and it is therefore, with a certain amount of hesitation that I speak but my initial diffidence is overcome by my deep and abiding faith in the dignity of man and worth of the human person and passionate conviction about the true spiritual nature and dimension of man. I agree with Bernard Shaw that "Criminals do not die by the hands of the law. They die by the hands of other men. Assassination on the scaffold is the worst form of assassination because there it is invested with the approval of the society.....Murder and capital punishment are not opposites that cancel one another but similars that breed their kind." It was the Father of the nation who said years ago, reaffirming what Prince Satyavan said on capital punishment in Shanti Parva of Mahabharata that "Destruction of individuals can never be a virtuous act" and this sentiment has been echoed by many eminent men such as Leonardo Da Vinci, John Bright, Victor Hugo and Berdyaev. To quote again from Bernard Shaw from Act IV of his play "Caesar and Cleopatra:

> "And so to the end of history, murder shall breed murder, always in the name of right and honour and peace, until the Gods are tired of blood and-create a race that can understand."

I share this sentiment because I regard men as an embodiment of divinity and I am therefore morally against death penalty. But my dissent is based not upon any ground of morality or ethics but is founded on constitutional issues, for as I shall presently show, death penalty does not serve any social purpose or advance any constitutional value and is totally arbitrary and unreasonable so as to be violative of Articles 14, 19 and 21 of the Constitution.

Before I proceed to consider the various constitutional issues arising out of the challenge to the validity of the death penalty, I must deal with a preliminary objection raised on behalf of the respondents against our competence to entertain this challenge. The learned counsel appearing on behalf of the respondents urged that the question of constitutional validity of the death penalty stood concluded against the petitioners by the decision of a constitution bench of five Judges of this Court in Jagmohan v. State of U.P.(1) and it could not therefore be allowed to be reagitated before this Bench consisting of the same number of Judges. This Bench, contended the respondents, was bound by the decision in Jagmohan's case(supra) and the same issue, once decided in Jagmohan's

case (supra), could not be raised again and reconsidered by this Bench. Now it is true that _____ (1) AIR 1973 SC 947.

the question of constitutional validity of death penalty was raised in Jagmohan's case (supra) and this Court by a unanimous judgment held it to be constitutionally valid and, therefore, ordinarily, on the principle of stare decisis, we would hold ourselves bound by the view taken in that case and resist any attempt at reconsideration of the same issue. But there are several weighty considerations which compel us to depart from this precedential rule in the present case. It may be pointed out that the rule of adherence to precedence is not a rigid and inflexible rule of law but it is a rule of practice adopted by the courts for the purpose of ensuring uniformity and stability in the law. Otherwise, every Judge will decide an issue according to his own view and lay down a rule according to his own perception and there will be no certainty and predictability in the law, leading to chaos and confusion and in the process, destroying the rule of law. The labour of the judges would also, as pointed out by Cardozo J. in his lectures of "Nature of Judicial Process" increase" almost to the breaking point if every past decision could be reopened in every case and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." But this rule of adherence to precedents, though a necessary tool in what Maitland called "the legal smithy", is only a useful servant and cannot be allowed to turn into a tyrannous master. We would do well to recall what Brandies J. said in his dissenting judgment in State of Washington v. Dawson and company,(1) namely; "Stare decisis is ordinarily a wise rule of action. But it is not a universal and inexorable command." If the Rule of stare decisis were followed blindly and mechanically, it would dwarf and stultify the growth of the law and affect its capacity to adjust itself to the changing needs of the society. That is why Cardozo pointed out in his New York State Bar Address:

> "That was very well for a time, but now at last the precedents have turned upon us and are engulfing and annihilating us-engulfing and annihilating the very devotees that worshipped at their shrine. So the air is full of new cults that disavow the ancient faiths. Some of them tell us that instead of seeking certainty in the word, the outward sign, we are to seek for something deeper, a certainty of ends and aims. Some of them tell us that certainty is merely relative and temporary, a writing on the sands to _____ (1) 264 US 646 : 68 Lawyers Edu. 219 be effected by the advancing tides. Some of them even go so far as to adjure us to give over the vain quest, to purge ourselves of these yearnings for an unattainable ideal, and to be content with an empiricism that is untroubled by strivings for the absolute. With all their diversities of form and doctrine, they are at one at least in their emphasis upon those aspects of truth that are fundamental and ultimate. They exemplify the method approach, the attitude and outlook, the concern about the substance of things, which in all its phases and disguises is the essence of philosophy."

We must therefore rid stare decisis of something of its petrifying rigidity and warn ourselves with Cardozo that "in many instances the principles and rules and concepts of our own creation are merely apercus and glimpses of reality" and remind oursevels "of the need of reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social

consciousness of the hour,...the social consciousness which it is our business as Judges to interpret as best as we can." The question at issue in the present writ petitions is one of momentous significance namely, whether the state can take the life of an individual under the cover of judicial process and whether such an act of killing by the State is in accord with the constitutional norms and values and if, on an issue like this, a Judge feels strongly that it is not competent to the State to extinguish the flame of life in an individual by employing the instrumentality of the judicial process, it is his bounden duty, in all conscience, to express his dissent, even if such killing by the State is legitimized by a previous decision of the court. There are certain issues which transcend technical considerations of stare decisis and if such an issue is brought before the court, it would be nothing short of abdication of its constitutional duty for the court to consider such issue by taking refuge under the doctrine of stare decisis. The court may refuse to entertain such an issue like the constitutional validity of death penalty because it is satisfied that the previous decision is correct but it cannot decline to consider it on the ground that it is barred by the rule of adherence to precedents. Moreover, in the present case, there are two other supervening circumstances which justify, nay compel, reconsideration of the decision in Jagmohan's case (supra). The first is the introduction of the new Code of Criminal Procedure in 1973 which by sec-

tion 354 sub-section (3) has made life sentence the rule in case of offences punishable with death or in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons. I shall presently refer to this section enacted in the new Code of Criminal Procedure and show how, in view of that provision, the imposition of death penalty has become still more indefensible from the constitutional point of view. But the more important circumstance which has supervened since the decision in Jagmohan's case (supra) is the new dimension of Articles 14 and 21 unfolded by this Court in Maneka Gandhi v. Union of India.(1) This new dimension of Articles 14 and 21 renders the death penalty provided in section 302 of the Indian Penal Code read with sec. 354 (3) of the Code of Criminal Procedure vulnerable to attack on a ground not available at the time when Jagmohan's case (supra) was decided. Furthermore, it may also be noted, and this too is a circumstance not entirely without significance, that since Jagmohan's case (supra) was decided, India has ratified two international instruments on human rights and particularly the International Convenant on Civil and Political Rights. We cannot therefore consider ourselves bound by the view taken in Jagmohan's case (supra) and I must proceed to consider the issue as regards the constitutional validity of death penalty afresh, without being in any manner inhibited by the decision in Jagmohan's case (supra).

It must be realised that the question of constitutional validity of death penalty is not just a simple question of application of constitutional standards by adopting a mechanistic approach. It is a difficult problem of constitutional interpretation to which it is not possible to give an objectively correct legal anwer. It is not a mere legalistic problem which can be answered definitively by the application of logical reasoning but it is a problem which raises profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the Judge. This would be so in case of any problem of constitutional interpretation but much more so would it be in a case like the present where the constitutional conundrum is enmeshed in complex social and moral issues defying a formalistic judicial attitude. That is the reason why in some countries like the United States and Canada where _____ (1) [1978] 2 SCR 663.

there is power of judicial review, there has been judicial disagreement on the constitutionality of death penalty. On an issue like this, as pointed out by David Pannick in his book on "Judicial Review of the Death Penalty" judicial conclusions emanate from the judicial philosophy of those who sit in judgment and not from the language of the Constitution." But even so, in their effort to resolve such an issue of great constitutional significance, the Judges must take care to see that they are guided by "objective factors to the maximum possible extent." The culture and ethos of the nation as gathered from its history, its tradition and its literature would clearly be relevant factors in adjudging the constitutionality of death penalty and so would the ideals and values embodied in the Constitution which lays down the basic frame-work of the social and political structure of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. So also standards or norms set by International organisations and bodies have relevance in determining the constitutional validity of death penalty and equally important in construing and applying the equivocal formulae of the Constitution would be the "wealth of non-legal learning and experience that encircles and illuminates" the topic of death penalty. "Judicial dispensers", said Krishna Iyer, J. in Dalbir Singh and Others v. State of Punjab(1) "do not behave like cavemen but breathe the fresh air of finer culture." There is no reason why, in adjudicating upon the constitutional validity of death penalty. Judges should not obtain assistance from the writings of men like Dickens, Tolstoy, Dostoyevsky, Koestter and Camus or from the investigations of social scientists or moral philosophers in deciding the circumstances in which and the reasons why the death penalty could be seen as arbitrary or a denial of equal protection. It is necessary to bear in mind the wise and felicitous words of Judge Learned Hand in his "Spirit of Liberty" that while passing on question of constitutional interpretation, it is as important to a Judge:

> ".....to have atleast a bowing acquaintance with Acton and Maitland. With Thucydides, Gibbon and Carlyle, with Homer, Dante Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalisations of universal applicability."

Constitutional law raises, in a legal context, problems of economic, social, moral and political theory and practice to which non-lawyers have much to contribute. Non-lawyers have not reached unanimity on the answers to the problems posed; nor will they ever do so, But when judges are confronted by issues to which there is no legal answer, there is no reason (other than a desire to maintain a fiction that the law provides the answer) for judicial discretion to be exercised in a vacuum, immune from non-legal learning and extra-legal dispute. "Quotations from noble minds are not for decoration (in hard constitutional cases) but for adaptation within the framework of the law." Vide: David Pannick on 'Judicial Review of the Death Penalty.' The Judges must also consider while deciding an issue of constitutional adjudication as to what would be the moral, social and

economic consequences of a decision either way. The consequences of course do not alter the meaning of a constitutional or statutory provision but they certainly help to fix its meaning. With these prefatory observations I shall now proceed to consider the question of constitutional validity of death penalty.

I shall presently refer to the constitutional provisions which bear on the question of constitutionality of death penalty, but before I do so, it would be more logical if I first examine what is the international trend of opinion in regard to death penalty. There are quite a large number of countries which have abolished death penalty de jure or in any event, de facto The Addendum to the Report of the Amnesty International on "The Death Penalty" points out that as on 30th May 1979, the following countries have abolished death penalty for all offences : Australia, Brazil, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Finland, Federal Republic of Germany, Honduras, Iceland, Luxembourg, Norway, Portugal, Sweden, Uruguay and Venezuela, and according to this Report, Canada, Italy, Malta, Netherlands, Panama, Peru, Spain and Switzerland have abolished death penalty in time of peace, but retained it for specific offences committed in time of war. The Report also states that Algeria, Belgium, Greece, Guyana, Ivory Coast, Seychelles and Upper Volta have retained the death penalty on their statute book but they did not conduct any executions for the period from 1973 to 30th May 1979. Even in the United States of America there are several States which have abolished death penalty and so also in the United Kingdom, death penalty stands abolished from the year 1965 save and except for offences of treason and certain forms of piracy and offences committed by members of the armed forces during war time. It may be pointed out that an attempt was made in the United Kingdom in December 1975 to reintroduce death penalty for terrorist offences involving murder but it was defeated in the House of Commons and once again a similar motion moved by a conservative member of Parliament that "the sentence of capital punishment should again be available to the courts" was defeated in the House of Commons in a free vote on 19th July 1979. So also death penalty has been abolished either formally or in practice in several other countries such as Argentina, Bolivia, most of the federal States of Mexico and Nicaragua, Israel, Turkey and Australia do not use the death penalty in practice. It will thus be seen that there is a definite trend in most of the countries of Europe and America towards abolition of death penalty.

It is significant to note that the United Nations has also taken great interest in the abolition of capital punishment. In the Charter of the United Nations signed in 1945, the founding States emphasized the value of individuals's life, stating their will to "achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." Though the San Francisco Conference did not address itself to the issue of death penalty specifically, the provisions of the charter paved the way for further action by United Nations bodies in the field of human rights, by establishing a Commission on Human Rights and, in effect, charged that body with formulating an International Bill of Human Rights. Meanwhile the Universal Declaration of Human Rights was adopted by the General Assembly in its Resolution 217 A (III) of 10 December 1948. Articles 3 and 5 of the Declaration provided:

3. "Everyone has the right to life, liberty and security of person."

5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The United Nations' position on the question of death penalty was expected to be stated more specifically in the International Covenant on Civil and Political Rights, the drafting of which had been under way since the first session of the Commission on Human Rights in 1947. But during the 11 year period of drafting of the relevant provision of the Covenant, two main approaches to the issue of capital punishment became evident: one stressed the need for barring the death penalty and the second placed emphasis on resstricting its application to certain cases. The proponents of the first position suggested either the total abolition of the death penalty or its abolition in time of peace or for political offences. This approach was however regarded as unfeasible, since many countries, including abolitionist ones, felt that the provision for an outright ban on the death penalty would prevent some States from ratifying the Covenant, but at the same time, it was insisted by many countries that the Covenant should not create the impression of supporting or perpetuating death penalty and hence a provision to this effect should be included. The result was that the second approach stressing everyone's right to life and emphasizing the need for restricting the application of capital punishment with a view to eventual abolition of the death penalty, won greater support and Article 6 of the Covenant as finally adopted by the General Assembly in its resolution 2000(XXX) of 16 December 1966 provided as follows :

1. Every human being has the inherent right to life.

This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood, that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligatlon assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek, pardon or commutation of the sentence. Amnesty pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covennt."

Article 7 of the Covenant corresponding to Article 5 of the Universal Declaration of Human Rights reaffirmed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

So deep and profound was the United Nation's concern with the issue of death penalty that the General Assembly in its resolotion 1396 (XIV) of 20 November, 1959 invited the Economic and Social Council to initiate study of the question of capital punishment, of the laws and practices relating thereto, and of the effects of capital punishment and the abolition thereof on the rate of criminality. Pursuant to this resolution, the Economic and Social Council activised itself on this issue and at its instance a substantive report report was prepared by the noted French jurist Marc Ancel. The report entitled "Capital Punishment"

> was the first major survey of the problem from an international stand point on the deterrent aspect of the death penalty and in its third chapter, it contained a cautious statement "that the deterrent effect of the death penalty is, to say the least, not demons-
>
> trated". This view had been expressed not only by abolitionists countries in their replies to the questionaires but also by some retentionist countries. The Ancel report alongwith the Report of the ad hoc Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders which examined it in January 1963 was presented to the Economic and Social Council at its 35th Session when its Resolution 934 (XXXV) of 9th April 1963 was adopted. By this Resolution the Economic and Social Council urged member governments inter alia to keep under review the efficacy of capital punishment as a deterrent to crime in their countries and to conduct research into the subject and to remove this punishment from the criminal law concerning any crime to which it is, in fact, not applied or to which there is no intention to apply it. This Resolution clearly shows that there was no evidence supporting the supposed deterrent effect of the death penalty and that is why the Economic and Social Council suggested further research on the topic. Moreover, the urging of the de facto abolitionist countries by this Resolution to translate the position into de jure terms constituted an implicit acceptance of the principle of abolition. The same year, by Resolution 1918 (XVIII) of 5th December 1963, the General Assembly endorsed this action of the Economic and Social Council and requested the Economic and Social Council to invite the Commission on human Rights to study and make recommendations on the Ancel Report and the comments of the ad hoc Advisory Committee of Experts. The General Assembly also requested the Secretary General to present a report on new developments through the Economic and Social Council. Norval Morris, an American professor of criminal law and criminology, accordingly prepared a Report entitled "Capital Punishment; Developments 1961-1965" and amongst other things, this Report pointed out that there was a steady movement towards legislative abolition of capital punishment and observed with regard to the deterrent effect of death penalty, that:

> "With respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase where the rate is decreasing abolition does not appear to interrupt the decrease; where the rate is stable, the presence or absence of capital punishment does not appear to affect it."

The Commission on Human Rights considered this Report and adopted a draft General Assembly Resolution which was submitted by the Economic and Social Council to the General Assembly and on 26th November 1968, the General Assembly adopted this draft with certain modifications as its Resolution 2393 (XXIII) inviting member governments to take various measures and requesting the Secretary General to invite member governments "to inform him of their present attitude to possible further restricting the use of the death penalty or to its total abolition" and to submit a report to the Economic and Social Council. The Secretary General accordingly submitted his report to the Economic and Social Council at its 50th session in 1971. This Report contained a finding that "most countries are gradually restricting the number of offences for which the death penalty is to be applied and a few have totally abolished capital offences even in war times". The discussion in the Economic and Social Council led to the adoption of Resolution 1574 (L) of 20th May 1971 which was reaffirmed by General Assembly Resolution 2857 (XXVI) of 20th December 1971. This latter resolution clearly affirmed that:

> "In order to guarantee fully the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries".

(Emphasais supplied) In 1973 the Secretary General submitted to the Economic and Social Council at its 54th session his third report on capital punishment as requested by the Council and at this session, the Council adopted Resolution 1745 (LIV) in which, inter alia, it invited the Secretary General to submit to it periodic updated reports on capital punishment at five-year intervals starting from 1975. A fourth report on capital punishment was accordingly submitted in 1975 and a fifth one in 1980. Meanwhile the General Assembly at its 32nd Session adopted Resolution 32/61 on 8th December 1977 and this Resolution re-affirmed "the desirability of abolishing this"

> that is capital "punishment" in all countries.

> It will thus be seen that the United Nations has gradually shifted from the position of a neutral observer concerned about but not committed on the question of death penalty, to a position favouring the eventual abolition of the death penalty. The objective of the United Nations has been and that is the standard set by the world body that capital punishment should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.

I will now proceed to consider the relevant provisions of the Constitution bearing on the question of constitutional validity of death penalty. It may be pointed out that our Constitution is a unique document. It is not a mere pedantic legal text but it embodies certain human values cherished principles and spiritual norms and recognises and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality. The Preamble makes it clear that the Constitution is intended to secure to every citizen social, economic and political justice and equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The Fundamental Rights lay down limitations on the power of the legislature and the executive with a view to protecting the citizen and confer certain basic human rights which are enforceable against the State in a court of law. The Directive Principles of State Policy also emphasise the dignity of the individual and the worth of the human person by obligating the State to take various measures for the purpose of securing and protecting a social order in which justice social, economic and political, shall inform all the institutions of national life. What is the concept of social and economic justice which the founding fathers had in mind is also elaborated in the various Articles setting out the Directive Principles of State Policy. But all these provisions enacted for the purpose of ensuring the dignity of the individual and providing for his material, moral and spiritual development would be Meaningless and ineffectual unless there is rule of law to invest them with life and force.

Now if we look at the various constitutional provisions including the Chapters on Fundamental Rights and Directive Principles of State Policy, it is clear that the rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire'. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. That is why Aristotle preferred a government of laws rather than of men. 'Law', in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever arbitrary or despotic it may be. Otherwise even under a dictatorship it would be possible to say that there is rule of law, because every law made by the dictator howsoever arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial, it is law that governs the relationship between men and men and between men and the State. But still it is not rule of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator it is in effect and substance the rule of man and not of law which prevails in such a situation. What is necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of polity seeks to ensure this element by making the framers of

> the law accountable to the people. Of course, in a country like the United Kingdom, where there is no written constitution imposing fetters on legislative power and providing for judicial review of legislation, it may be difficult to hold a law to be invalid on the ground that it is arbitrary and irrational and hence violative of an essential element of the rule of law and the only remedy if at all would be an appeal to the electorate at the time when a fresh mandate is sought at the election. But the situation is totally different in a country like India which has a written Constitution enacting Pundamental Rights and conferring power on the courts to enforce them not only against the executive but also against the legislature. The Fundamental Rights erect a protective armour for the individual against arbitrary or unreasonable executive or legislative action.
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> There are three Fundamental Rights in the Constitution which are of prime importance and which breathe vitality in the concept of the rule of law. They are Articles 14, 19 and 21 which, in the words of Chandrachud, C.J. in Minverva Mills case(1) constitute a golden triangle. It is now settled law as a result of the decision of this Court in Maneka Gandhi's case (supra) that Article 14 enacts primarily a guarantee against arbitrariness and inhibits State action whether legislative or executive, which suffers from the vice of arbitrariness.

This interpretation placed on Article 14 by the Court in Maneka Gandhi's case has opened up a new dimension of that Article which transcends the classificatory principle. For a long time in the evolution of the constitutional law of our country, the courts had construed Article 14 to mean only this, namely, that you can classify persons and things for the application of a law but such classification must be based on intelligible differentia having rational relationship to the object sought to be achieved by the law. But the court pointed out in Maneka Gandhi's case that Article 14 was not to be equated with the principle of classification. It was primarily a guarantee against arbitrariness in State action and the doctrine of classification was evolved only as a subsidiary rule for testing or determining whether a particular State action was arbitrary or not. The Court said "Equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies. One belongs to the rule of law while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14." The Court thus laid down that every State action must be non-arbitrary and reasonable; if it is not, the court would strike it down as invalid.

This view was reaffirmed by the Court in another outstanding decision in Ramana Dayaram Shetty International Airport Authority of India & Ors. There tenders were invited by the Airport Authority for giving a contract for running a canteen at the Bombay Airport. The invitation for tender included a condition that the applicant must have at least 5 years' experience as a registered 2nd class hotelier. Several persons tendered. One was a person who had considerable experience in the catering business but he was not a registered 2nd class hotelier as required by the condition in the invitation to tender. Yet his tender was accepted because it was the highest. The contract given to him was challenged and the court held that the action of the Airport Authority was illegal. The court pointed out that a

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(1) [1979] 3 SCR 1014.

new form of property consisting of government largesse in the shape of jobs, cotracts licences, quotas, mineral rights and other benefits and services was emerging in the social welfare State that India was and it was necessary to develop new forms of protection in regard to this new kind of property.

The court held that in regard to government largesse, the discretion of the government is not unlimited in that the government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. The government action must be based on standards that are not arbitrary or irrational. This requirement was spelt out from the application of Article 14 as a constitutional requirement, and it was held that having regard to the constitutional mandate of Article 14, the Airport Authority was not entitled to act arbitrarily in accepting the tender but was bound to conform to the standards or norms laid down by it. The Court thus reiterated and reaffirmed its commitment against arbitrariness in State action.

It can, therefore, now be taken to be well-settled that if a law is arbitrary or irrational, it would fall foul of Article 14 and would be liable to be struck down as invalid. Now a law may contravene Article 14 because it enacts provisions which are arbitrary; as for example, they make discriminatory classification which is not founded on intelligible differentia having rational relation to the object sought to be achieved by the law or they arbitrarily select persons or things for discriminatory treatment. But there is also another category of cases where without enactment of specific provisions which are arbitrary, a law may still offend Article 14 because it confers discretion on an authority to select persons or things for application of the law without laying down any policy or principle to guide the exercise of such discretion. Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason. Unfettered and uncharted discretion conferred on any authority, even if it be the judiciary, throws the door open for arbitrariness, for after all a judge does not cease to be a human being subject to human limitations when he puts on the judicial robe and the nature of the judicial process being what it is, it cannot be entirely free from judicial subjectivism. Cardozo, J. has frankly pointed this out in his lectures on "Nature of the Judicial Process":

> "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations... if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.
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> This facet of the judicial process has also been emphasized by Richard B. Brandt in his book on "Judicial Discretion"

where he has said :

"Much of law is designed to avoid the necessity for the judge to reach what Holmes called his 'can't helps', his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may, therefore, be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.

That is why Lord Camden described the discretion of a judge to be "the law of tyrants; it is always unknown; it is different in different men; it is casual and depends on Constitution,Tamper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly and Passion to which human Nature is liable." Doe d. Hindson v. Kersey (1765) at p. 53 of the pamphlet published in London by J. Wilkes in 1971 entitled "Lord Camden's Genuine Argument in giving Judgment on the Ejectment between Hindson, and others against Kersey". Megarry J. also points out in his delightful book "Miscellany at Law" that "discretion is indeed a poor substitute for principles, however, great the Judge". Therefore, where discretion is conferred on an authority by a statute, the court always strains to find in the statute the policy or principle laid down by the legislature for the purpose of guiding the exercise of such discretion and, as pointed out by Subba Rao, J. as he then was, the court sometimes even tries to discover the policy or principle in the crevices of the statute in order to save the law from the challenge of Article 14 which would inevitably result in striking down of the law if the discretion conferred were unguided and unfettered. But where after the utmost effort and intense search, no policy or principle to guide the exercise of discretion can be found, the discretion conferred by the law would be unguided and unstructured, like a tumultuous river overflowing its banks and that would render the law open to attack on ground of arbitrariness under Article 14.

So also Article 19 strikes against arbitrary legislation in so far as such legislation is violative of one or the other provision of clause (1) of that Article. Sub-clauses (a) to (g) of clause (1) of Article 19 enact various Fundamental freedoms; sub-clause (1) guarantees freedom of speech and expression, sub-clause (b), freedom to assemble peacefully and without arms; sub-clause (c), freedom to form associations or unions; sub-clause (d), freedom to move freely throughout the territory of India; sub-clause (e) to reside and settle in any part of the territory of India and sub-clause (g), freedom to practise any profession or to carry on any occupation, trade or business. There was originally sub-clause (f) in clause (1) of Article 19 which guaranteed freedom to acquire, hold and dispose of property but that sub-clause was deleted by the Constitution (Forty Fourth Amendment) Act 1978. Now the freedoms guaranteed under these various sub-clauses of clause (1) of Article 19 are not absolute freedoms

but they can be restricted by law, provided such law satisfies the requirement of the applicable provision in one or the other of clauses (2) to (6) of that Article. The common basic requirement of the saving provision enacted in clauses (2) to (6) of Article 19 is that the restriction imposed by the law must be reasonable. If, therefore, any law is enacted by the legislature which violates one or the other provision of clauses (1) of Article 19, it would not be protected by the saving provision enacted in clauses (2) to (6) of that Article, if it is arbitrary or irrational, because in that event the restriction imposed by it would a fortiorari be unreasonable.

The third Fundamental Right which strikes against arbitrariness in State action is that embodied in Article

21. This Article is worded in simple language and it guarantees the right to life and personal liberty in the following terms.

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

This Article also came up for interpretation in Maneka Gandhi's case (supra). Two questions arose before the Court in that case : one was as to what is the content of the expression "personal liberty" and the other was as to what is the meaning of the expression "except according to procedure established by law". We are not concerned here with the first question and hence I shall not dwell upon it. But so far as second question is concerned, it provoked a decision from the Court which was to mark the beginning of amost astonishing development of the law. It is with this decision that the Court burst forth into un-precedented creative activity and gave to the law a new dimenston and a new vitality. Until this decision was given, the view held by this Court was that Article 21 merely embodied a facet of the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by executive action unsupported by law. It was intended to be no more than a protection against executive action which had no authority of law. If there was a law which provided some sort of procedure, it was, enough to deprive a person of his life or personal liberty. Even if, to take an example cited by S.R. Das, J, in his Judgment in A.K. Gopalan v. State of Madras(1) the law provided that the Bishop of Rochester be boiled in old, it would be valid under Article 21. But in Maneka Gandhi's case (supra) which marks a watershed in the history of development of constitutional law in our country, this Court for the first time took the view that Article 21 affords protection not only against executive action but also against legislation and any law which deprives a person of his life or personal liberty would be invalid unless it prescribes a procedure for such deprivation which is reasonable fair and just. The concept of reasonableness, it was held, runs through the entire fabric of the Constitution and it is not enough for the law merely to provide some semblance of a procedure but the procedure for depriving a _____ (1) [1950] SCR 88.

person of his life or personal liberty must be rasonable, fair and just. It is for the court to determine whether in a particular case the procedure is reasonable, fair and just and if it is not, the court will strike down the law as invalid. If therefore a law is enacted by the legislature which deprives a person of the life-and 'life' according to the decision of this Court in Francis Coralie Mullen's v.

Administrator, Union Territory of Delhi and Ors.,(1) would include not merely physical existence but also the use of any faculty or limb as also the right to live with human dignity-or any aspect of his personal liberty, it would offend against Article 21 if the procedure prescribed for such deprivation is arbitrary and unreasonable. The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law. Take for example, a law of preventive detention which sets out the grounds on which a person may be preventively detained. If a person is preventively detained on a ground other than those set out in the law, the preventive detention would obviously not be according to the procedure prescribed by the law, because the procedure set out in the law for preventively detaining a person prescribes certain specific grounds on which alone a person can be preventively detained, and if he is detained on any other ground, it would be violative of Article 21. Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21.

It will thus be seen that the rule of law has much greater vitality under our Constitution that it has in other countries like the United Kingdom which has no constitutionally enacted Fundamental Rights. The rule of law has really three basic and fundamental assumptions one is that law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinances effective for a short duration while the legislature is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature; the other is that, even in the hands of a democratically elected legislature, there should not be unfettered legislative power, for, as Jefferson said: "Let no man be trusted with power but tie him down from making mischief by the _____ (1) [1981] 2 SCR 516.

chains of the Constitution"; and lastly there must be an independent judicially to protect the citizen against excesses of executive and legislative power. Fortunately, whatever uncharitable and irresponsible critics might say when they find a decision of the court going against the view held by them, we can confidently assert that we have in our country all these three elements essential to the rule of law. It is plain and indisputable that under our Constitution law cannot be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14 or Article 19 or Article 21 whichever be applicable.

It is in the light of these constitutional provisions that I must consider whether death penalty provided under Section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure is constitutionally valid. Now one thing is certain that the Constitution does not in so many terms prohibit capital panishment. In fact, it recognises death sentence as one of the penalties which may be imposed by law. Article 21 provides inter alia that no one shall be deprived of his life except according to procedure established by law and this clearly postulates that a person may be deprived of his life in accordance with the procedure prescribed by law or in other words, law may provide a procedure, which of course according to the decision of this Court in Maneka Gandhi's case (supra) must be reasonable, fair and just procedure, for inflicting death penalty on a person depriving him of his life. Clause(c) of Article 72 also recognises the possibility of

a sentence of death being imposed on a person convicted of an offence inasmuch as it provides that the President shall have the power to suspend, remit or commute the sentence of any person who is convicted of an offence and sentenced to death. It is therefore not possible to contend that the imposition of death sentence for conviction of an offence is in all cases forbidden by the Constitution. But that does not mean that the infliction of death penalty is blessed by the Constitution or that it has the imprimatur or seal of approval of the Constitution. The Constitution is not a transient document but it is meant to endure for a long time to come and during its life, situations may arise where death penalty may be found to serve a social purpose and its prescription may not be liable to be regarded as arbitrary or unreasonable and therefore to meet such situations, the Constitution had to make a provision and this it did in Article 21 and clause (c) of Article 72 so that, even where death penalty is prescribed by any law and it is otherwise not unconstitutional, it must still comply with the requirement of Article 21 and it would be subject to the clemency power of the President under clause

(c) of Article 72. The question would however still remain whether the prescription of death penalty by any particular law is violative of any provision of the Constitution and is therefore rendered unconstitutional. This question has to be answered in the present case with reference to section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure.

Now in order to answer this question it is necessary first of all to examine the legislative trend in our country so far as the imposition of death penalty is concerned. A "brief survey of the trend of legislative endeavours" will, as pointed out by Krishna Iyer, J. in Rajendra Prasad v. State of U.P.(1) "serve to indicate whether the people's consciousness has been protected towards narrowing or widening the scope for infliction of death penalty." If we look at the legislative history of the relevant provisions of the Indian Penal Code and the Code of Criminal Procedure we find that in our country there has been a gradual shift against the imposition of death penalty. "The legislative development, through several successive amendments had shifted the punitive centre of gravity from life taking to life sentence." Sub-section (5) of section 367 of the Code of Criminal Procedure 1898 as it stood prior to its amendment by Act 26 of 1955 provided :

> "If the accused is convicted of an offence punishable with death, and the court sentences to any punishment other than death, the court shall in its judgment state the reasons why sentence of death was not passed."

This provision laid down that if an accused was convicted of an offence punishable with death, the imposition of death sentence was the rule and the awarding of a lesser sentence was an exception and the court had to state the reasons for not passing the sentence of death. In other words, the discretion was directed positively towards death penalty. But, by the Amending Act 26 of 1955 which came into force with effect from 1st January 1956, this provision was deleted with the result that from and after that date, it was left to the discretion of the court on the facts of each case to pass a sen-

_____ (1) [1979] 3 SCC 646.

tence of death or to award a lesser sentence. Where the court found in a given case that, on the facts and circumstances of the case, the death sentence was not called for or there were extenuating circumstances to justify the passing of the lesser sentence, the court would award the lesser sentence and not impose the death penalty. Neither death penalty nor life sentence was the rule under the law as it stood after the abolition of sub-section (5) of the section 367 by the Amending Act 26 of 1955 and the court was left "equally free to award either sentence". But then again, there was a further shift against death penalty by reason of the abolitionist pressure and when the new Code of Criminal Procedure 1973 was enacted, section 354 sub-section (3) provided ;

> "When the conviction is for a sentence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, special reasons for such sentence."

The court is now required under this provision to state the reasons for the sentence awarded and in case of sentence of death, special reasons are required to be stated. It will thus be seen that life sentence is now the rule and it is only in exceptional cases, for special reasons, that death sentence can be imposed. The legislature has however not indicated what are the special reasons for which departure can be made from the normal rule and death penalty may be inflicted. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, death sentence may be imposed. This is left entirely to the unguided discretion of the court, a feature, which, in my opinion, has lethal consequences so far as the constitutionality of death penalty is concerned. But one thing is clear that through these legislative changes "the disturbed conscience of the State on the question of legal threat to life by way of death sentence has sought to express itself legislatively", the stream of tendency being towards cautions abolition.

It is also interesting to note that a further legislative attempt towards restricting and rationalising death penalty was made in the late seventies. A Bill called Indian Penal Code (Amendment) Bill 1972 for amending section 302 was passed by the Rajya Sabha in 1978 and it was pending in the Lok Sabha at the time when Rajendra Prasad's case was decided and though it ultimately lapsed with the dissolution of the Lok Sabha, it shows how strongly were the minds of the elected representatives of the people agitated against "homicidal exercise of discretion" which is often an "obsession with retributive justice in disguise". This Bill sought to narrow drastically the judicial discretion to impose death penalty and tried to formulate the guidelines which should control the exercise of judicial exercise in this punitive area. But unfortunately the Bill though passed by the Rajya Sabha could not see its way through the Lok Sabha and was not enacted into law. Otherwise perhaps the charge against the present section of 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure that it does not indicate any policy or principle to guide the exercise of judicial discretion in awarding death penalty, would have been considerably diluted, though even then, I doubt very much whether that section could have survived the attack against its constitutionally on the ground that it still leaves the door open for arbitrary exercise of discretion in imposing death penalty.

Having traced the legislative history of the relevant provisions in regard to death penalty, I will now turn my attention to what great and eminent men have said in regard to death penalty, for their words serve to bring out in bold relief the utter barbarity and futility of the death penalty. Jaiprakash Narain, the great humanist, said, while speaking on abolition of death penalty ;

> "To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition sufficiently improved to become useful citizens. In a minority of cases, this may not be possible. They may be kept in prison houses till they die a natural death. This may cast a heavier economic burden on society than hanging. But I have no doubt that a humane treatment even of a murderer will enhance man's dignity and make society more human.
>
> (emphasis added) Andrei Sakharov in a message to the Stockholm Conference on Abolition of death Penalty organised by Amnesty International in 1978 expressed himself firmly against death penalty:
>
> "I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of a society. A state, in the person of its functionaries who like all people are inclined to making superficial conclusions, who like all people are subject to influence, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act-the deprivation of life. Such a State cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true-that savagery begets only savagery...I am convinced that society as a whole and each of its members individually, not just the person who comes before the courts, bears a responsibility for the occurrence of a crime. I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Blood thirsty and calculated revenge with no temporary insanity on the part of the judges, and therefore, shameful and disgusting."

(emphasis added) Tolstoy also protested against death sentence in an article "I Cannot be Silent":

> "Twelve of those by whose labour we live, the very men whom we have depraved and are still depraving by every means in our power-from the poison of vodka to the terrible falsehood of a creed we impose on them with all our might, but do not ourselves believe in- twelve of those men strangled with cords by those whom we feed and clothe and house, and who have depraved and still continue to deprave them. Twelve husbands, fathers, and sons, from among those upon whose kindness, industry and simplicity alone rests the whole of Russian life, are seized, imprisoned,

> and shackled. Then their hands are tied behind their backs lest they should seize the ropes by which they are to be hung, and they are led to the gallows."

So also said Victor Hugo in the spirit of the Bishop created by him in his 'Les Miserables' :

> "We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold, reason is on our side, feeling is on our side, and experience is on our side."

Mahatma Gandhi also wrote to the same effect in his simple but inimitable style :

> "Destruction of individuals can never be a virtuous act. The evil doers cannot be done to death. Today there is a movement afoot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease."

This Gandhian concept was translated into action with commendable success in the case of Chambal dacoits who laid down their arms in response to the call of Vinobha Bhave and Jaiprakash Narayan. See "Crime and Non-violence" by Vasant Nargolkar. There is also the recent instance of surrender of Malkhan Singh, a notorious dacoit of Madhya Pradesh. Have these dacoits not been reformed ? Have they not been redeemed and saved ? What social purpose would have been served by killing them ?

I may also at this stage make a few observations in regard to the barbarity and cruelty of death penalty, for the problem of constitutional validity of death penalty cannot be appreciated in its proper perspective without an adequate understanding of the true nature of death penalty and what it involves in terms of human anguish and suffering. In the first place, death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life for ever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible. It silences for ever a living being and despatches him to that 'undiscovered country from whose bourn no traveller returns' nor, once executed, 'can stored urn or animated bust back to its mansion call the fleeting breath'. It is by reason of its cold and cruel finality that death penalty is qualitatively different from all other forms of punishment. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. Of course the imprisonment that he has suffered till then cannot be undone and the time he has spent in the prison cannot be given back to him in specie but he can come back and be restored to normal life with his honour vindicated if he is found innocent. But that is not possible where a person has been wrongly convited and sentencted to death and put out of existence in pursuance of the sentence of death. In his case, even if any mistake is subsequently discovered, it will be too late; in every way and for every purpose it will be too late, for he cannot be brought back to life. The execution of the sentence of death in such a case makes miscarriage of justice irrevocable. On whose conscience will this death of an innocent man lie ? The State through its judicial instrumentality would have killed an innocent man. How is it different from a private murder ? That is why Lafayatte said : "I shall ask for the abolition of the penalty of death until I have the infallibility of

human judgment demonstrated me."

It is argued on behalf of the retentionists that having regard to the elaborate procedural safeguards enacted by the law in cases involving capital punishment, the possibility of mistake is more imaginary than real and these procedural safeguards virtually make conviction of an innocent person impossible. But I do not think this argument is well founded. It is not supported by factual data. Hugo Bedau in his well known book, "The Death Penalty in America" has individually documented seventy four cases since 1893 in which it has been responsibly charged and in most of them proved beyond doubt, that persons were wrongly convicted of criminal homicide in America. Eight out of these seventy four, though innocent, were executed. Redin, Gardener, Frank and others have specifically identified many more additional cases. These are cases in which it has been possible to show from discovery of subsequent facts that the convictions were erroneous and innocent persons were put to death, but there may be many more cases where by reason of the difficulty of uncovering the facts after conviction, let alone after execution, it may not be possible to establish that there was miscarriage of justice. The jurist Olivecroix, applying a calculus of probabilities to the chance of judicial error, concluded as far back as in 1860 that approximately one innocent man was condemned out of every 257 cases. The proportion seems low but only in relation to moderate punishment. In relation to capital punishment, the proportion is infinitivelly high. When Hugo wrote that he preferred to call the guillotine Lesurques (the name of an innocent man guillotined in the Carrier de Lyon case) he did not mean that every man who was decapitated was a Lesurques, but that one Lesurques was enough to wipe out the value of capital punishment for ever. It is interesting to note that where cases of wrongful execution have come to public attention, they have been a major force responsible for bringing about abolition of death penalty. The Evans case in England in which an innocent man was hanged in 1949 played a large role in the abolition of capital punishment in that country. Belgium also abjured capital punishment on account of one such judicial error and so did Wisconsin, Rhode Island and Maine in the United States of America.

Howsoever careful may be the procedural safeguards erected by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguards can prevent conviction of the innocent. Students of the criminal process have identified several reasons why innocent men may be convicted of crime. In the first place, our methods of investigation are crude and archaic. We are, by and large, ignorant of modern methods of investigation based on scientific and technological advances. Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Some times they are even got up by the police to prove what the police believes to be a true case. Sometimes there is also mistaken eye witness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an over zealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man.

Then again it is sometimes argued that, on this reasoning, every criminal trial must necessarily raise the possibility of wrongful conviction and if that be so, are we going to invalidate every form of punishment ? But this argument, I am afraid, is an argument of despair. There is a qualitative difference between death penalty and other forms of punishment. I have already pointed out that the former extinguishes the flame of life altogether and is irrevocable and beyond recall while the latter can, at least to some extent be set right, if found mistaken. This vital difference between death penalty and imprisonment was emphasized by Mahatma Gandhi when he said in reply to a German writer :

> "I would draw distinction between killing and detention and even corporal punishment. I think there is a difference not merely in quantity but also in quality. I can recall the punishment of detention. I can make reparation to the man upon whom I inflict corporal punishment. But once a man is killed, the punishment is beyond recall or reparation."

The same point was made by the distinguished criminologist Leon Radzinowicz when he said : "The likelihood of error in a capital sentence case stands on a different footing altogether." Judicial error in imposition of death penalty would indeed be a crime beyond punishment. This is the drastic nature of death penalty, terrifying in its consequences, which has to be taken into account in determining in constitutional validity.

It is also necessary to point out that death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. One Psychiatrist has described Death Row as a "grisly laboratory" "the ultimate experiment alstress in which the condemned prisoner's personality is incredibly brutalised." He points out that "the strain of existence on Death Row is very likely to produce..... acute psychotic breaks." Vide the article of "West on Medicine and Capital Punishment." Some inmates are driven to ravings or delusions but the majority sink into a sort of catatonic numbness under the over-whelming stress." Vide "The Case against Capital Punishment" by the Washington Research Project. Intense mental suffering is inevitably associated with confinement under sentence of death. Anticipation of approaching death can and does produce stark terror. Vide article on "Mental Suffering under Sentence of Death". 57 Iowa Law Review 814. Justice Brennan in his opinion in Furman v. Georgia(1) gave it as a reason for holding the capital punishment to be unconstitutional that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." Krishna Iyer, J. also pointed out in Rajendra Prasad's case (supra) that because the condemned prisoner had "the hanging agony hanging over his head since 1973 (i.e. for six years)..."he must by now be more a vegetable than a person." He added that "the excruciation of long pendency of the death sentence with the prisoner languishing near-solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonising." The California Supreme Court also, in finding the death penalty per se unconstitutional remarked with a sense of poignancy :

> "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

In Re Kemmler(2) the Supreme Court of the United States accepted that "punishments are cruel when they involve a lingering death, something more than the mere extinguishment of life." Now a death would be as lingering if a man spends several years in a death cell awaiting execution as it would be if the method of execution takes an unacceptably long time to kill the victim. The pain of mental lingering can be as intense as the agony of physical lingering. See David Pannick on "Judicial Review of the Death Penalty." Justice Miller also pointed out in Re Medley(3) that "when a prisoner sentenced by a court to death is confined to the _____ (1) 408 US 238.

(2) 136 US 436.

(3) 134 US 160.

penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it..... as to the precise time when his execution shall take place." We acknowledged that such uncertainty is inevitably 'accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.' But quite apart from this excruciating mental anguish and severe psychological strain which the condemned prisoner has to undergo on account of the long wait from the date when the sentence of death is initially passed by the sessions court until it is confirmed by the High Court and then the appeal against the death sentence is disposed of by the Supreme Court and if the appeal is dismissed, then until the clemency petition is considered by the Pesident and if it is turned down, then until the time appointed for actual execution of the sentence of death arrives, the worst time for most of the condemned prisoners would be the last few hours when all certainty is gone and the moment of death is known. Dostoyevsky who actually faced a firing squad only to be reprieved at the last instant, described this experience in the following words :

> "...the chief and the worst pain is perhaps not inflicted by wounds, but by your certain knowledge that in an hour, in ten minutes, in half a minute, now this moment your soul will fly out of your body, and that you will be a human being no longer, and that that's certain-the main thing is that it is certain ..Take a soldier and put him in front of a cannon in battle and fire at him and he will still hope, but read the same soldier his death sentence for certain, and he will go mad or burst out crying. Who says that human nature is capable of bearing this without madness ? Why this cruel, hideous, unnecessary and useless mockery ? Possibly there are men who have sentences of death read out to them and have been given time to go through this torture, and have then been told, You can go now, you've been reprieved. Such men could perhaps tell us. It was of agony like this and of such horror that Christ spoke. No you can't treat a

man like that."

We have also accounts of execution of several prisoners in the United States which show how in these last moment condemned prisoners often simply disintegrate. Canns has in frank and brutal language bared the terrible psychological cruelty of capital punishment :

> "Execution is not simply death. It is just as different in essence, from the privation of life as a concentration camp is from prison..... It adds to death a rule, a public premeditation known to the future victim, an organisation, in short, which is in itself a source of moral sufferings more terrible than death... For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

There can be no stronger words to describe the utter depravity and inhumanity of death sentence.

The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan,(1) the Japanese Supreme Court held that execution by hanging does not corrospond to 'cruel punishment' inhibited by Article 36 of the Japanese Constituion. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security _____ (1) Vide : David Pannick on "Judicial Review of Death Penalty, page 73, prison in the United States of America, describes the hanging process with brutal frankness in lurid details :

> "The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurement et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face and that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the

> hanged person and holds the body steady, because during the first few minutes there is usually considerables struggling in an effort to breathe."

If the drop is too short, there will be a slow and agonising death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote :

> "The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer...Dislocation of the neck is the ideal aimed at, but, out of all my post- mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxin."

These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas.

If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilised society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong doer. That is not a permissible penological goal.

It is in the context of this background that the question has to be considered whether death penalty provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure is arbitrary and irrational for if it is, it would be clearly violative of Articles 14 and 21. I am leaving aside for the moment challenge to death penalty under Article 19 and confining myself only to the challenge under Article 14 and

21. So far as this challenge is concerned the learned counsel appearing on behalf of the petitioner contended that the imposition of death penalty under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure was arbitrary and unreasonable, firstly because it was cruel and inhuman, disproportionate and excessive, secondly because it was totally unnecessary and did not serve any social purpose or advance any constitutional value and lastly because the discretion conferred on the court to award death penalty was not guided by any policy or principle laid down by the legislature but was wholly arbitrary. The Union of India as also the States supporting it sought to counter this argu-

ment of the petitioners by submitting first that death penalty is neither cruel nor inhuman, neither disproportionate nor excessive, secondly, that it does serve a social purpose inasmuch as it fulfils two penological goals namely, denunciation by the community and deterrence and lastly, that the judicial discretion in awarding death penalty is not arbitrary and the court can always evolve standards or norms for the purpose of guiding the exercise of its discretion in this punitive area. These were broadly the rival contentions urged on behalf of the parties and I shall now proceed to examine them in the light of the observations made in the preceding paragraphs.

The first question that arises for consideration on these contentions is-and that is a vital question which may well determine the fate of this challenge to the constitutional validity of death penalty-on whom does the burden of proof lie in a case like this ? Does it lie on the petitioners to show that death penalty is arbitrary and unreasonable on the various grounds urged by them or does it rest on the State to show that death penalty is not arbitrary or unreasonable and serves a legitimate social purpose. This question was debated before us at great length and various decisions were cited supporting one view or the other. The earliest decision relied on was that of Saghir Ahmed v. State of Uttar Pradesh(1) where it was held by this Court that if the petitioner succeeds in showing that the impugned law ex facie abridges or transgresses the rights coming under any of the sub-clauses of clause (1) of Article 19, the onus shifts on the respondent State to show that the legislation comes within the permissible limits authorised by any of clauses (2) to (6) as may be applicable to the case, and also to place material before the court in support of that contention. If the State fails to discharge this burden, there is no obligation on the petitioner to prove negatively that the impugned law is not covered by any of the permissive clauses. This view as to the onus of proof was reiterated by this Court in Khyerbari Tea Company v. State of Assam(2). But contended the respondents, a contrary trend was noticeable in some of the subsequent decisions of this Court and the respondents relied principally on the decision in B. Banerjee v. Anita Pan(3) where Krishna Iyer, J. speaking on behalf of himself and Beg, J. as he then was, _____ (1) [1955] 1 SCR 707.

(2) [1964] 5 SCR 975.

(3) [1975] 2 S.C.R. 774.

recalled the following statement of the law from the Judgment of this Court in Ram Krishna Dalmia v. S.R. Tendolkar & others: (1) "there is always a presu mption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

and "that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

and added that "if nothing is placed on record by the challengers, the verdict ordinarily goes against them." Relying inter alia on the decision of this Court in State of Bombay v. R.M.D. Chamarbaugwala(2) the learned Judge again emphasized:

> "Some courts have gone to the extent of holding that there is a presumption in favour of constitutionality, a law will not be declared unconstitutional unless the case is so clear as to be free from doubt."

These observations of Krishna Iyer, J. undoubtedly seem to support the contention, of the respondents, but it may be pointed out that what was said by this Court in the passage quoted above from the judgment in Ram Krishna Dalmia's case (supra) on which reliance was placed by Krishna Iyer, J. was only with reference to the challenge under Article 14 and the Court was not considering there the challenge under Articles 19 or 21. This statement of the law contained in Ram Krishna Dalmia's case (supra) could not therefore be applied straightaway without anything more in a case where a law was challenged under Articles 19 or 21. The fact, however, remains that Krishna Iyer, J. relied on this statement of the law even though the case before him involved a challenge under Article 19(1) (f) and not under Article 14. Unfortunately, it seems that the attention of the learned Judge was not invited to the decisions of this Court in Saghir Ahmed's case and Khyerbari Tea Company's case _____ (1) [1959] SCR 297.

(2) [1957] SCR 874.

(supra) which were cases directly involving challenge under Article 19. These decisions were binding on the learned Judge and if his attention had been drawn to them, I am sure that he would not have made the observations that he did casting on the petitioners the onus of establishing "excessiveness or perversity in the restrictions imposed by the statute" in a case alleging violation of Article 19. These observations are clearly contrary to the law laid down in Saghir Ahmed and Khyerbari Tea Company cases (supra) The respondents also relied on the observations of Fazal Ali, J. in Pathumma v. State of Kerala (1). There the constitutional validity of the Kerala Agriculturists' Debt Relief Act 1970 was challenged on the ground of violation of both Articles 14 and 19(1) (f). Before entering upon a discussion of the arguments bearing on the validity of this challenge, Fazal Ali. J. speaking on behalf of himself, Beg, C.J., Krishna Iyer and Jaswant Singh. JJ. observed that the court will interfere with a statute only "when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution" and proceeded to add that it is on account of this reason "that courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same." The learned Judge then quoted with approval the following passage from the Judgment of S.R. Das, C.J. in Mohd. Hanif v. State of Bihar (2) "The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

It is difficult to see how these observations can be pressed into service on behalf of the respondents. The passage from the judgment of _____ (1) [1970] 2 SCR 537.

(2) [1959] S.C.R. 629.

S.R. Das, C.J. in Mohd. Hanif's case (supra) relied upon by Fazal Ali, J. occurs in the discussion relating to the challenge under Article 14 and obviously it was not intended to have any application in a case involving challenge under Article 19 or 21. In fact, while discussing the challenge to the prevention of cow slaughter statutes under Article 19(1)(g), S.R. Das, C.J. proceeded to consider whether the restrictions imposed by the impugned statutes on the Fundamental Rights of the petitioners under Article 19(1)(g) were reasonable in the interest of the general public so as to be saved by clause (6) of Article 19. Moreover, the observations made by Fazal Ali, J. were general in nature and they were not directed towards consideration of the question as to the burden of proof in cases involving violation of Article 19. What the learned Judge said was that there is always a presumption in favour of the constitutionality of a statute and the court will not interfere unless the statute is clearly violative of the Fundamental Rights conferred by Part III of the Constitution. This is a perfectly valid statement of the law and no exception can be taken to it. There must obviously be a presumption in favour of the constitutionality of a statute and initially it would be for the petitioners to show that it violates a Fundamental Right conferred under one or the other sub-clauses of clause (1) of Article 19 and is therefore unconstitutional, but when that is done, the question arises, on whom does the burden of showing whether the restrictions are permissible or not, lie? That was not a question dealt with by Fazal Ali, J. and I cannot therefore read the observations of the learned Judge as, in any manner, casting doubt on the validity of the statement of law contained in Saghir Ahmed and Khyerbari Tea Company's cases (supra). It is clear on first principle that subclauses (a) to (g) of clause (1) of Article 19 enact certain fundamental freedoms and if sub clauses (2) to (6) were not there, any law contravening one or more of these fundamental freedoms would have been unconstitutional. But clauses (2) to (6) of Article 19 save laws restricting these fundamental freedoms, provided the restrictions imposed by them fall within certain permissible categories. Obviously therefore, when a law is challenged on the ground that it imposes restrictions on the freedom guaranteed by one or the other subclause of clause (1) of Article 19 and the restrictions are shown to exist by the petitioner, the burden of establishing that the restrictions fall within any of the permissive clauses (2) to (6) which may be applicable, must rest upon the State. The State would have to produce material for satisfying the court that the restrictions imposed by the impugned law fall within the appropriate permissive clause from out of clauses (2) to (6) of Article 19. Of course there may be cases where the nature of the legislation and the restrictions imposed by it may be such that the court may, without more, even in the absence of any positive material produced by the State, conclude that the restrictions fall within the permissible category, as for example, where a law is enacted by the legislature for giving effect to one of the Directive Principles of State Policy and prima facie, the restrictions imposed by it do not appear to be arbitrary or excessive. Where such is the position, the burden would again shift and it would be for the petitioner to show that the restrictions are arbitrary or excessive and go beyond what is required in public interest. But, once it is shown by the petitioner that the impugned law imposes restrictions which infringe one or the other sub-clause of clause (1) of Article 19, the burden of showing that such restrictions are reasonable and fall within the permissible category must be on the State and this burden the State may discharge either by producing socio economic data before the court or on consideration of the provisions in the impugned law read in the light of the constitutional goals set out in the Directive Principles of State Policy. The test to be applied for the purpose of determining whether the restrictions imposed by the impugned law are reasonable or not cannot be cast in a rigid formula of universal application, for, as pointed out by Patanjali Shastri, J. in State of Madras

v. V.J. Row (1) "no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases". The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, the value of human life, the disproportion of the imposition, the social philosophy of the Constitution and the prevailing conditions at the time would all enter into the judicial verdict. And we would do well to bear in mind that in evaluating such elusive factors and forming his own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play a very important part.

Before I proceed to consider the question of burden of proof in case of challenge under Article 14, it would be convenient first to (1) [1952] SCR 597.

deal with the question as to where does the burden of proof lie when the challenge to a law enacted by the legislature is based on violation of Article 21. The position in regard to onus of proof in a case where the challenge is under Article 21 is in my opinion much clearer and much more free from doubt or debate than in a case where the complaint is of violation of clause (1) of Article 19. Wherever there is deprivation of life, and by life I mean not only physical existence, but also use of any faculty or limb through which life is enjoyed and basic human dignity, or of any aspect of personal liberty, the burden must rest on the State to establish by producing adequate material or otherwise that the procedure prescribed for such deprivation is not arbitrary but is reasonable, fair and just. I have already discussed various circumstances bearing upon the true nature and character of death penalty and these circumstances clearly indicate that it is reasonable to place on the State the onus to prove that death penalty is not arbitrary or unreasonable and serves a compelling State interest. In the first place, death penalty destroys the most fundamental right of all, namely, the right to life which is the foundation of all other fundamental rights. The right to life stands on a higher footing than even personal liberty, because personal liberty too postulates a sentient human being who can enjoy it. Where therefore a law authorises deprivation of the right to life the reasonableness, fairness and justness of the procedure prescribed by it for such deprivation must be established by the State. Such a law would be 'suspect' in the eyes of the court just as certain kinds of classification are regarded as 'suspect' in the United States of America. Throwing the burden of proof of reasonableness, fairness and justness on the State in such a case is a homage which the Constitution and the courts must pay to the righ to life. It is significant to point out that even in case of State action depriving a person of his personal liberty, this Court has always cast the burden of proving the validity of such action on the State, when it has been challenged on behalf of the person deprived of his personal liberty. It has been consistently held by this Court that when detention of a person is challenged in a habeas corpus petition, the burden of proving the legality of the detention always rests on the State and it is for the State to justify the legality of the detention. This Court has shown the most zealous regard for personal liberty and treated even letters addressed by prisoners and detenus as writ petitions and taken action upon them and called upon the State to show how the detention is justified. If this be the anxiety and concern shown by the court for personal liberty, how much more should be the judicial anxiety and concern for the right to life which indisputably stands on a higher pedestal. Moreover, as already pointed out above, the international standard or norm set by the United Nations is in favour of abolition of death penalty and that is the ultimate objective towards which the world body is moving. The trend of our national legislation is also towards

abolition and it is only in exceptional cases for special reasons that death sentence is permitted to be given. There can be no doubt that even under our national legislation death penalty is looked upon with great disfavour. The drastic nature of death penalty involving as it does the possibility of error resulting in judicial murder of an innocent man as also its brutality in inflicting excruciating mental anguish severe psychological strain and agonising physical pain and suffering on the condemned prisoner are strong circumstances which must compel the State to justify imposition of death penalty. The burden must lie upon the State show that death penalty is not arbitrary and unreasonable and serves a legitimate social purpose, despite the possibility of judicial error in convicting and sentencing an innocent man and the brutality and pain, mental as well as physical, which death sentence invariably inflicts upon the condemned prisoner. The State must place the necessary material on record for the purpose of discharging this burden which lies upon it and if it fails to show by presenting adequate evidence before the court or otherwise that death penalty is not arbitrary and unreasonable and does serve a legitimate social purpose, the imposition of death penalty under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure would have to be struck down as violative of the protection of Article 21.

So far as the question of burden of proof in a case involving challenge under Article 14 is concerned, I must concede that the decisions in Ram Krishan Dalmia's case (supra) and Mohd. Hannif Qureshi's case (supra) and several other subsequent decisions of the Court have clearly laid down that there is a presumption in favour of constitutionality of a statute and the burden of showing that it is arbitrary or discriminary lies upon the petitioner, because it must be presumed "that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds." Sarkaria, J. has pointed out in the majority judgment that underlying this presumption of constitu-

tionality "is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions and the judicial responsibility to guard the tresspass from one side or the other." The learned Judge with a belief firmly rooted in the tenets of mechanical jurisprudence, has taken the view that "the primary function of the Courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy making." Now there can be no doubt that in adjudicating upon the constitutional validity of a statute, the Judge should show deference to the legislative judgment and should not be anxious to strike it down as invalid. He does owe to the legislature a margin of tolerance and he must constantly bear in mind that he is not the legislator nor is the court a representative body. But I do not agree with Sarkaria, J. when he seems to suggest that the judicial role is, as it was for Francis Bacon, 'jus dicere and not jus dare; to interpret law and not to make law or give law.' The function of the Court undoubtedly is to interpret the law but the interpretative process is highly creative function and in this process, the Judge, as pointed out by Justice Holmes, does and must legislate. Lord Reid ridiculed as 'a fairytale' the theory that in some Aladdin's cave is hidden the key to correct judicial interpretation of the law's demands and even Lord Diplock acknowledged that "The court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic Oracle. But whoever has final authority to explain what Parliament meant by the words that it used, makes law as if the explanation it has given were contained in a

new Act of Parliament. It will need a new Act of Parliament to reverse it." Unfortunately we are so much obsessed with the simplicities of judicial formalism which presents the judicial role as jus dicere, that, as pointed out by David Pannick in his "Judicial Review of the Death Penalty", "we have, to a substatial extent, ignored the Judge in administering the judicial process. So heavy a preoccupation we have made with the law, its discovery and its agents who play no creative role, that we have paid little, if any, regard to the appointment, training, qualities, demeanour and performance of the individuals selected to act as the mouth of the legal oracle." It is now acknowledged by leading jurists all over the world that judges are not descusitized and passionless instruments which weigh on inanimate and impartial scales of legal judgment, the evidence and the arguments presented on each side of the case. They are not political and moral enuchs able and willing to avoid impregnating the law with their own ideas and judgment. The judicial exercise in constitutional adjudication is bound to be influenced, consciously or subconsciouly, by the social philosophy and scale of values of those who sit in judgment. However, I agree with Sarkaria, J. that ordinarily the judicial function must be characterised by deference to legislative judgment because the legislature represents the voice of the people and it might be dangerous for the court to trespass into the sphere demarcated by the Constitution for the legislature unless the legislative judgment suffers from a constitutional infirmity. It is a trite saying that the Court has "neither force nor will but merely judgment" and in the exercise of this judgment, it would be a wise rule to adopt to presume the constitutionality of a statute unless it is shown to be invalid. But even here it is necessary to point out that this rule is not a rigid inexorable rule applicable at all times and in all situations. There may conceivably be cases where having regard to the nature and character of the legislation, the importance of the right affected and the gravity the injury caused by it and the moral and social issues involved in the determination, the court may refuse to proceed on the basis of presumption of constitutionality and demand from the State justification of the legislation with a view to establishing that it is not arbitrary or discriminatory. There are times when commitment to the values of the Constitution and performance of the constitutional role as guardian of fundamental rights demands dismissal of the usual judicial deference to legislative judgment. The death penalty, of which the constitutionality is assailed in the present writ petitions, is a fundamental issue to which ordinary standards of judicial review are inappropriate. The question here is one of the most fundamental which has arisen under the Constitution, namely, whether the State is entitled to take the life of a citizen under cover of judicial authority. It is a question so vital to the identity and culture of the society and so appropriate for judicial statement of the standards of a civilised community-often because of legislative apathy-that "passivity and activism become platitudes through which judicial articulation of moral and social values provides a light to guide an uncertain community." The same reasons which have weighed with me in holding that the burden must lie on the State to prove that the death penalty provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure is not arbitrary and unreasonable and serves a legitimate penological purpose where the challenge is under Article 21 must apply equally to cast the burden of the proof upon the State where the challenge is under Article 14.

Now it is an essential element of the rule of law that the sentence imposed must be proportionate to the offence. If a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational, for it would not pass the test of reason and would be contrary to

the rule of law and void under Articles 14, 19 and 21. The principle of proportionality is implicit in these three Articles of the Constitution. If, for example, death penalty was prescribed for the simple offence of theft-as indeed it was at one time in the seventeenth century England-it would be clearly excessive and wholly disproportionate to the offence and hence arbitrary and irrational by any standards of human decency and it would be impossible to sustain it against the challenge of these three Articles of the Constitution. It must therefore be taken to be clear beyond doubt that the proportionality principle constitutes an important constitutional criterion for adjudging the validity of a sentence imposed by law.

The Courts in the United States have also recognised the validity of the proportionality principle. In Gregg v. Goergia (1) Stewart, J. speaking for the plurality of the American Supreme Court said that "to satisfy constitutional requirements, the punishment must not be excessive...the punishment must not be out of proportion to the severity of the crime. This constitutional criterion was also applied in Coker v. Georgia (2) to invalidate the death penalty for rape of an adult woman. While, J. with whom Stewarts and Blackmun, JJ. agreed, said, with regard to the offence of rape committed against an adult woman : "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment". Likewise in Lockette v. Ohio (3) where the defendant sat outside the scene of robbery waiting to drive her accomplices away and contrary to plan, the robbers murdered three victims in the course of their robbery and she was convicted and sentenced to death by resort to the doctrine of vicarious liability, the Supreme Court of the United States applying the same principle of proportionality held the death sentence unconstitutional. Marshall, J. pointed out that because the appellant was convicted under a theory of vicarious liability, the death penalty imposed on her "violates the principle of proportionality embodied in the Eighth Amendment's prohibition" and White J. also subscribed to the same reasoning when he said, "the infliction of death upon those who had no intent to bring about the death of the victim is .....grossly out of proportion to the severity of the crime". Of course, the Supreme Court of the United States relied upon the Eighth Amendment which prohibits cruel and unusual treatment or punishment and we have no such express prohibition in our Constitution, but this Court has held in Francis Mullen's case (supra) that protection against torture or cruel and inhuman treatment or punishment is implicit in the guarantee of Article 21 and therefore even on the basic of the reasoning in these three American decisions, the principle of proportionallty would have relevance under our Constitution. But, quite apart from this, it is clear and we need not reiterate what we have already said earlier, that the principle of proportionality flows directly as a necessary element from Articles 14, 19 and 21 of the Constitution. We find that in Canada too, in the case of Rex v. Miller and Cockriell (1) the principle of proportionality has been recognised by Laskin C.J. speaking on behalf of Canadian Supreme Court as "one of the constitutional criteria of 'cruel and unusual treatment or punishment' prohited under the Canadian Bill of Rights. Laskin C.J. pointed out in that case "It would be patent to me, for example, that death as a mandatory penalty today for theft would be offensive to s. 2(b). That is because there are social and moral considerations that enter into the scope and application of section 2(b). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. That is not a precise formula for s. 2(b) but I doubt whether a more precise one-can be

found." Similarly, as pointed out by Mr. David Pannick in his book on "Judicial Review of the Death Penalty" international charters of rights express or imply the principle of proportionality. Article 7 of the International Covenant on Civil and Political Rights forbids torture and cruel inhuman or degrading treatment or punishment and so does Article A 3 of the European Convention on Human Rights. It has been suggested by Francis Jacobs, a commentator on the European Convention that "among the factors to be considered in deciding whether the death penalty, in particular circumstances, was contrary to Article 3, would be whether it was disproportionate to the offence.

It is necessary to point out at this stage that death penalty cannot be said to be proportionate to the offence merely because it may be or is believed to be an effective deterrent against the commission of the offence. In Coker v. Georgia (supra) the Supreme Court of the United States held that capital punishment is disproportionate to rape "even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so." The absence of any rational purpose to the punishment inflicted is a separate ground for attacking its constitutionality. The existence of a rational legislative purpose for imposing the sentence of death is a necessary condition of its constitutionality but nota sufficient one. The death penalty for theft would, for example, deter most potential thieves and may have a unique deterrent effect in preventing the commission of the offence; still it would be wholly disproportionate and excessive, for the social effect of the penalty is not decisive of the proportionality to the offence. The European Court of Human Rights also observed in Tyrer v. United Kingdom (1) that "a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the court must emphasize, it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be." The utilitarian value of the punishment has nothing to do with its proportionality to the offence. It would therefore be no answer in the present case for the respondents to say that death penalty has a unique deterrent effect in preventing the crime of murder and therefore it is proportionate to the offence. The proportionality between the offence and death penalty has to be judged by reference to objective factors such as international standards or norms or the climate of international opinion, modern penological theories and evolving standards of human decency. I have already pointed out and I need not repeat that the international standard or norm which is being evolved by the United Nations is against death penalty and so is the climate of opinion in most of the civilized countries of the world. I will presently show that penological goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. The standards of human decency with reference to which the proportionality of the punishment to the offence is required to be judged vary from society to society depending on the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of theft or a sentence of stoning to death for the offence of adultery were prescribed by law, there can be no doubt that such punishment would be condemned as barbaric and cruel in our country, even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries. So also the standards of human decency vary from time to time even within the same society. In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the envolving standards of human decency, be regarded as

barbaric and inhuman punishment wholly disproportionate to the offence. There was a time when in the United Kingdom a sentence of death for the offence of theft or shop lifting was regarded as proportionate to the offence and therefore quite legitimate and reasonable according to the standards of human decency then prevailing, but today such punishment would be regarded as totally disproportionate to the offence and hence arbitrary and unreasonable. The question, therefore, is whether having regard to the international standard or norm set by the United Nations in favour of abolition of death penalty, the climate of opinion against death penalty in many civilized countries of the world and the prevailing standards of human decency, a sentence of death for the offence of murder can be regarded as satisfying the test of proportionality and hence reasonable and just. I may make it clear that the question to which I am addressing myself is only in regard to the proportionality of death sentence to the offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State.

Now in order to determine what are the prevailing standards of human decency, one cannot ignore the cultural ethos and spiritual tradition of the country. To quote the words of Krishna Iyer, J. in Raiendra Prasad's case "The values of a nation and ethos of a generation mould concepts of crime and punishment. So viewed, the lode-star of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty...The Indian cultural current also counts and so does our spiritual chemistry, based on divinity in everyone, catalysed by the Buddha Gandhi compassion. Many humane movements and sublime souls have cultured the higher consciousness of mankind." In this land of Buddha and Gandhi, where from times immemorial, since over 5000 years ago, every human being is regarded as embodiment of Brahman and where it is a firm conviction based not only on faith but also on experience that "every saint has a past and every sinner a future", the standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norms frown upon imposition of death penalty for the offence of murder. It is indisputable that the Constitution of a nation reflects its culture and ethos and gives expression to its sense of moral and ethical values. It affords the surest indication of the standards of human decency cherished by the people and sets out the socio-cultural objectives and goals towards which the nation aspires to move. There can be no better index of the ideals and aspirations of a nation than its Constitution. When we turn to our Constitution, we find that it is a humane document which respects the dignity of the individual and The worth of the human person and directs every organ of the State to strive for the fullest development of the per - sonality of every individual. Undoubtedly, as already pointed out above, our Constitution does contemplate death penalty, and at the time when the Constitution came to be enacted, death penalty for the offence of murder was on the statute book, but the entire thrust of the Constitution is in the direction of development of the full potential of every citizen and the right to life alonggwith basic human dignity is highly prized and cherished and torture and cruel or in-human treatment or punishment which would be degrading and destructive of human dignity are constitutionally forbidden. Moreover, apart from the humanistic quintessence of the Constitution, the thoughts, deeds and words of the great men of this country provide the clearest indication of the prevailing standards of human decency. They represent the conscience of the nation and are the most authentic spokesmen of its culture and ethos. Mahatma Gandhi, the Father of the Nation wrote long ago in the Harijan. "God alone can take life because He alone gives it. He also said and this I may be permitted to

emphasize even at the cost of repetition: "Destruction of individuals can never be a virtuous act. The evil doers cannot be done to death . . Therefore all crimes including murder will have to be treated as a disease." I have also quoted above what Jai Prakash Narain said in his message to the Delhi Conference against Death Penalty. The same humanistic approach we find in the utterances of Vinoba Bhave. His approach to the problem of dacoits in Chambal Valley and the manner in which he brought about their surrender through soulforce bear eloquent testimony to the futility of death penalty and shows how even dacoits who have committed countless murders can be reclaimed by the society. But, the more important point is that this action of Vinoba Bhave was applauded by the whole nation and Dr. Rajendra Prasad who was then the President of India, sent the following telegram to Binoba Bhave when he came to know that about 20 dacoits from the Chambal region had responded to the Saint's appeal to surrender .

> "The whole nation looks with hope and admiration upon the manner in which you have been able to rouse the better instincts and moral sense, and thereby inspire faith in dacoits which has led to their voluntary surrender. Your efforts, to most of us, come as a refreshing proof of the efficacy of the moral approach for reforming the misguided and drawing the best out of them. I can only pray for the complete success of your mission and offer you my regards and best wishes."

These words coming from the President of India who is the Head of the nation reflect not only his own admiration for the manner in which Vinoba Bhave redeemed the dacoits but also the admiration of the entire nation and that shows that what Vinoba Bhave did, had the approval of the people of the country and the standards of human decency prevailing amongst the people commended an approach favouring reformation and rehabilitation of the dacoits rather than their conviction for the various offences of murder com- mitted by them and the imposition of death penalty on them. More over, it is difficult to see bow death penalty can be regarded as pro-

portionate to the offence of murder when legislatively it has been A ordained that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be imposed. It is obvious from the provision enacted in section 354(3) of the - Code of Criminal Procedure that death sentence is legislatively regarded as disproportionate and excessive in most cases of murder and it is only in exceptional cases what Sarkaria, J. speaking on -. - behalf of the majority, describes as "the rarest of rare" cases, that it can at all be contended that death sentence is proportionate to the offence of murder. But, then the legislature does not indicate as to what are those exceptional cases in which death sentence may be regarded as proportionate to the offence and, therefore, reasonable and just. Merely because a murder is heinous or horrifying, it cannot be said that death penalty is proportionate to the offence when it is not so for a simple murder. How does it become proportionate to the offence merely because it is a 'murder most foul'. I fail to appreciate how it should make any difference to the penalty whether the murder is a simple murder or a brutal one. A murder is a murder all the same whether it is carried out quickly and inoffensively or in a gory and gruesome manner. If death penalty is not proportionate to the offence in the former case, it is difficult to see how it can be so in the latter. I may usefully quote in this connection the words of Krishna Iyer, J. in Rajendra Prasad's case where the learned Judge said;

"Speaking illustratively, is shocking crime, without more, good to justify the lethal verdict ? Most murders are horrifying, and an adjective adds but sentiment, not argument. The personal story of an actor in a shocking murder, if considered, may bring tears and soften the sentence. He P . might have been a tortured child, an ill-treated orphan, a jobless starveling, a badgered brother, a wounded son, a tragic person hardened by societal cruelty or vengeful justice, - even a Hemlet or Parasurarna. He might have been an - - angelic boy but thrown into mafia company or inducted into dopes and drugs by parental neglect or morally-ment-ally retarded or disordered. Imagine a harijan village hacked out of existence by the genocidal fury of a kulak ' group and one survivor, days later, cutting to pieces the villain of the earlier outrage. Is the court in error in reckoning the prior provocative barbarity as a sentencing factor ?

Another facet. May be, the convict's poverty had disabled his presentation of the social milieu or other circumstances of extenuation in defence.. When life is at stake, can such frolics of fortune play with judicial , verdicts ?

"The nature of the crime-too terrible to contemplate has often been regarded a traditional peg on which to hang a death penalty. Even Ediga Anamma (supra) has hardened here. But 'murder most foul' is not the test, speaking J- scientifically. The doer may be a patriot, a revolutionary, a weak victim of an overpowering passion who, given better a environment, may be a good citizen, a good administrator, a good husband, a great saint. What was Valmiki once ? And that sublime spiritual star, Shri Aurobindo tried once - for murder but by history's fortune acquitted."

I agree with these observations of the learned Judge which clearly show that death penalty cannot be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking. The nature and magnitude of the offence or the motive and purposes underlying it or the manner and extent of its commission cannot have any relevance to the proportionality of death penalty to the offence. It may be argued that though these factors may not of themselves be relevant,. they may go to show that the murderer is such a social monster, a psychopath, that he cannot be reformed and he should therefore be regarded as human refuse, dangerous to society, and deserving to be hanged and in such a case death penalty may legitimately be regarded as proportionate to the offence. But I do not think this is a valid argument. It is for reasons which I shall presently state, wholly untenable and it has dangerous implications. I do not think it is possible to hold that death penalty is, in any circumstances, proportionate to the offence of murder. Moreover, when death penalty does not serve any legitimate social purpose, and this is a proportion which I shall proceed to establish in the succeeding paragraphs, infliction of mental and physical pain and suffering on the condemned prisoner by sentencing him to death penalty cannot but be regarded as cruel and inhuman and therefore arbitrary and unreasonable.

I will now examine whether death penalty for the offence of murder serves any legitimate social purpose. There are three justi-

fications traditionally advanced in support of punishment in general, namely, (1) reformation; (2) denunciation by the community or retribution and (3) deterrence. These are the three ends of punishment, its three penological goals, with reference to which any punishment prescribed by law must be justified. If it cannot be justified with reference to one or the other of these three penological purposes, it would have to be condemned as arbitrary and irrational, for in a civilised society governed by the rule of law, no punishment can be inflicted on an individual unless it serves some social purpose. It is a condition of legality of a punishment that it should serve a rational legislative purpose or in other words, it should have a measurable social effect. Let us therefore examine whether death penalty for the offence of murder serves any legitimate and of punishment.

It would be convenient first to examine the examine the constutionality of death penalty with reference to the reform tory end of punishment. The civilised goal of criminal justice is the reformation of the criminal and death penalty means abandonment of this goal for those who suffer it. Obviously death penalty cannot serve the reformatory goal because it extinguishes life and puts an end to any possibility of reformation. In fact, it defeats the reformatory end of punishment. But the answer given by the protagonists of death penalty to this argument is that though there may be a few murderers whom it may be possible to reform and rehabilitate, what about those killers who cannot be reformed and rehabilitated ? Why should the death penalty be not awarded to them ? But even in their cases, I am afraid, the argument cannot be sustained. There is no way of accurately predicting or knowing with any degree of moral certainty that a murderer will not be reformed or is incapable of reformation. All we know is that there have been many many successes even with the most vicious of cases. Was Jean Valjean of Les Miserbles not reformed by the kindness and magnanimity of the Bishop ? Was Valmiki a sinner not reformed and did he not become the author of one of the world's greatest epics ? Were the dacoits of Chambal not transformed by the saintliness of Vinoba Bhave and Jai Prakash Narain ? We have also the examples of Nathan Leopold, Paul Crump and Edger Smith who were guilty of the most terrible and gruesome murders but who, having escaped the gallows, became decent and productive human beings. These and many other examples clearly show that it is not possible to know before hand with any degree of cartainty that a murderer is beyond reformation. Then would it be right to extinguish the life of a human being merely on the basis of speculation and it can only be speculation and not any definitive inference-that he cannot be reformed. There is divinity in every man and to my mind no one is beyond redemption. It was Ramakrishna Paramhansa, one of the greatest saints of the last century, who said, "Each soul is potentially divine". There is Brahman in every living being, serve khalu idan bramh, as the Upanishad says and to the same effect we find a remarkable utterance in the Brahmasukta of Atharvaveda where a sage exclaims: "Indeed these killers are Brahman; these servants (or slaves) are Brahmaa; these cheats and rogues are also manifestation of one and the same Brahman itself." Therefore once the dross of Tamas is removed and satva is brought forth by methods of rehabilitation such as community service, yoga, meditation and sat sang or holy influence, a change definitely takes place and the man is reformed. This . is not just a fancy or idealised view taken by Indian philosophical thought, but it also finds Support from the report of the Royal Commission on Capital Punishment set up in the United Kingdom where it has been said: "Not that murderers in general are incapable of reformation, the evidence plainly shows the contrary. Indeed, as we shall see later" (in paragraphs 651-652) "the experience of countries without capital punishment indicates that the prospects of reformation are at least as favourable with

murderers as with those who have committed other kinds of serious crimes." The hope of reforming even the worst killer is based on exeperience as well as faith and to legitimate the death penalty even in the so called exceptional cases where a killer is said to be beyond reformation, would be to destroy this hope by sacrificing it at the altar of superstition and irrationality. I would not therefore, speaking for myself, be inclined to recognise any exception, though Justice Krishna Iyer has done so in Rajendra Prasad's case, that death panalty may be legally permissible where it is found that a killer is such a monster or beast that he can never be-reformed. Moreover, it may be noted, as pointed out by Albert Camus, that in resorting to this philosophy of elimination of social monsters, we would be approaching some of the worst ideas of totalitarianism or the selective racism which the Hitler regime propounded. Sir Ernest Gowers, Chairman of the Royal Commission on Capital Punishment also emphasized the disturbing implications of this argument favouring elimination of a killer who is a social monster and uttered the following warning A "If it is right to eliminate useless and dangerous members of the community why should the accident of having committed a capital offence determine who should be selected. These ar. Only a tiny proportion and not necessarily the most dangerous.... It can lead to Nazism." This theory that a killer who is believed to be a social monster or beast should be eliminated in defence of the society cannot therefore be accepted and it cannot provide a justification for imposition of death penalty even in this narrow class of cases.

I will now turn to examine the constiutional validity of death penalty with reference to the second goal of punishment, namely, denunciation by the community or retribution. The argument which is sometimes advanced in support of the death penalty is that every punishment is to some exetent intended to express the revulsion felt by the society against the wrong doer and the punishment must, therefore, be commensurate with the crime and since murder is one of the gravest crimes against society, death penalty is the only punishment which fits such crime and hence it must he held to be reasonable. This argument is founded on the denunciatory theory of punishment which apparently claiming to justify punishment, as the expression of the moral indignation of the society against the wrong doer, represents in truth and reality an attempt to legitimise the feeling of revenge entertained by the society against him. The denunciatory theory was put forward as an argument in favour of death penalty by Lord Denning before the Royal Commission on Capital Punishment:

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty.. The truth is that some crimes are so outrageous that it, irrespective of whether it is a deterrent or not."

The Royal Commission on Capital Punishment seemed to agree with Lord Denning's view about this justification for the death penalty and observed.".. the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought sometimes, to give a lead to public opinion, it is dangerous to move too far in advance of it." Though garbed in highly euphemistic language by labelling the sentiment

underlying this observation as reprobation and not revenge, its implication can hardly be disguised that the death penalty is considered necessary not because the preservation of the society demands it, but because the society wishes to avenge itself for the wrong done to it. Despite its high moral tone and phrase, the denunciatory theory is nothing but an echo of what Stephen said in rather strong language: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." The denunciatory theory is a remnant of a primitive society which has no respect for the dignity of man and the worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrong doer. Revenge is an elementary passion of a brute and betrays lack of culture and refinement. The manner in which a society treats crime and criminals affords the surest index of its cultural growth and development. Long ago in the year 1910 Sir Winston Churchill gave expression to this social truth when he said in his inimitable language:

> "The mood and temper of the public with regad to the treatment of crime and the criminals is one of the most unfailing tests of civilization of any country. A calm dispassionate recognition of the right of accused, and even of the convicted, criminal against the State, a constant heart searching by all charged with the duty of punishment tireless efforts towards the discovery of curative and , regenerative processes, unfailing faith that there is a treasure if you can only find it in the heart of every man-these are the symbols, which, in treatment of crime and the criminals, mark and measure the stored-up strength of a nation and are sign and proof of the living virtue in it.-
>
> A society which is truly cultured-a society which is reared on a spiritual foundation like the Indian society-can never harbour a feeling of revenge against a wrong doer. On the contrary, it would A try to reclaim the wrong doer and find the treasure that is in his heart. The wrong doer is as much as part of the society as anyone else and by exterminating him, would the society not injure itself ? If a limb of the human body becomes diseased, should we not try to cure it instead of amputating it ? Would the human body not be partially disabled: would it not be rendered imperfect by the . amputation ? Would the amputation not leave a scar on the human body ? Would the human body not cease to be what it was intended by its maker? But if the diseased limb can be cured, would it not be so much better that the human body remains intact in all its perfection. Similarly the society also would benefit if one of its members who has gone astray and done some wrong can be reformed and regenerated. It will strengthen the fabric of the society and increase its inner strength and vitality. Let it not be forgotten that no human being is beyond redemption. There is divinity in every human being, if only we can create conditions in which it can blossom forth in its full glory, and effulgence. It can dissolve the dross of criminality and make God out of man. "Each soul", said Shri Ramakrishna Paramhansa, "is potentially divine" and it should be the endeavour of the society to reclaim the wrong doer and bring out the divinity J in him and not to destroy him in a fit of anger or revenge. Retaliation can have no place in a civilised society and particularly in the Land of Buddha and Gandhi. The law of Jesus must prevail over the lex tallionis of Moses, "Thou shalt not kill" must penologically over power "eye for an eye and tooth

for a tooth." The society has made tremendous advance in the last few decades and today the concept of human rights has taken firm root in our soil and there is a tremendous wave of consciousness in regard to the dignity and divinity of man. To take human life even with the sanction of the law and under the cover of judicial authority, is retributive barbarity and violent futility:

travesty of dignity and violation of the divinity of man. So lang as the offender can be reformed through the rehabilitatory therapy which may be administered to him in the prison or other correctional institute and he can be reclaimed as a useful citizen and made conscious of the divinity within him by techniques such as meditation, how can there be any moral justification for liquidating him out of existence ? In such a case, it would be most unreasonable and arbitrary to extinguish the flame of life within him, for no social purpose would be served and no consti-

tutional value advanced by doing so. I have already pointed out that death penalty runs counter to the reformatory theory of punishment and I shall presently discuss the deterrent aspect of death penalty and show that death penalty has not greater deterrent effect than life imprisonment. The only ground on which the death penalty may therefore be sought to be justified is reprobation which as already pointed out, is nothing but a different name for revenge and retaliation. But in a civilised society which believes in the dignity and worth of the human person, which acknowledges and protects the right to life as the most precious possession of mankind, which recognises the divinity in man and describes a his kind as "Amaratsaya Putra" that is "children of Immortality", it is difficult to appreciate now retaliatory motivation can ever be countenanced as a justificatory reason. This reason is wholly inadequate since it does not justify punishment by its results, but it merely satisfies the passion for revenge masquerading as righteousness.

I may point that in holding this view I am not alone, for I find that most philosophers have rejected retribution as a proper goal of punishment. Plato wrote: "He who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention...."

Even in contemporary America, it is firmly settled that retribution has no proper place in our criminal system. The New York Court of Appeals pointed out in a leading judgment in People v. Oliver:

"The punishment or treatment of offenders is directed toward one or more of three ends: (I) to discourage and act as a deterrent upon future criminal activity. (2) to confine the offender so that he may not harm society; and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution."

Similarly, the California Supreme Court has held that "to conclude that the Legislature was motivated by a desire for vengeance" would be "a conclusion not permitted in view of modern theories of penology."

The same view has been adopted in official studies of capital punishment. The British Royal Commission on Capital Punishment concluded that "modern penological thought discounts retribution in the sense of vengeance. "The Florida Special Commission on capital punishment, which recommended retention of the death penalty on other grounds, rejected "vengeance or retaliation" as justification for the official taking of life."

The reason for the general rejection of retribution as a purpose of the criminal system has been stated concisely by Professors Michael and Wechsler:

> "Since punishment consists in the infliction of pain it is, apart from its consequence, an evil:
>
> consequently it is good and therefore just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population-Retribution is itself unjust since it requires some human beings to inflict pain upon others, regardless of its effect upon them or upon the social welfare."

The Prime Minister of Canada Mr. Pierre Trudeaux, addressing the Canadian Parliament, pleading for abolition of death penalty, posed a question in the same strain:

> "Are we as a society so lacking in respect for ourselves, so lacking in hope for human betterment, so socially bankrupt that we are ready to accept state vengeance as our penal philosophy"

It is difficult to appreciate how a feeling of vengeance whether on the individual wronged or the society can ever be regarded as a healthy sentiment which the State should foster. It is true that when a heinous offence is committed not only the individual who suffers as a result of the crime but the entire society is oppressed with a feeling of revulsion, but as Arthur Koestler has put it in his inimitable style in his "Reflections on Hanging":

> "Though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion-whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda-yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to robe and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the

land."

I have no doubt in my mind that if the only justification for the death penalty is to be found in revenge and retaliation, it would be clearly arbitrary and unreasonable punishment falling foul of Articles 14 and 21.

I must then turn to consider the deterrent effect of death penalty, for deterrence is undoubtedly an important goal of punishment.

The common justification which has been put forward on behalf of the protagonists in support of capital punishment is that it acts as a deterrent against potential murderers. This is, to my mind, a myth, which has been carefully nurtured by a society which is actuated not so much by logic or reason as by a sense of retribution. It is really the belief in retributive justice that makes the death penalty attractive but those supporting it are not inclined to confess to their instinct for retribution but they try to bolster with reasons their unwillingness to abandon this retributive instinct and seek to justify the death penalty by attribution to it a deterrent effect. The question whether the death penalty has really and truly a deterrent effect is an important issue which has received careful attention over the last 40 years in several countries including the United States of America. Probably no single subject in criminology has been studied more. Obviously, no penalty will deter all murders and probably any severe penalty will deter many. The key question therefore is not whether death penalty has a deterrent effect but whether death penalty has a greater deterrent effect than life sentence. Does death penalty deter potential murderers better than life imprisonment ? I shall presently consider this question but before I do so let me repeat that the burden of showing that death penalty is not arbitrary and unreasonable and serves a legitimate penological goal is on the State. I have already given my reasons for taking this view on principle but I find that the same view has also been taken by the Supreme Judicial Court of Massachusettes in "Commonwealth v. O'Neal (No.2)(1) where it has been held that because death penalty impinges on the right to life itself, the onus lies on the State to show a compelling State interest to justify capital punishment and since in that case the State was unable to satisfy this onus, the Court ruled that death penalty for murder committed in the course of rape or attempted rape was unconstitutional. The Supreme Judicial Court of Massachusttes also reiterated the same view in opinion of the Justices 364 N.E. 2d 184 while giving its opinion whether a Bill before the House of Representatives was compatible with Article 26 of the Constitution which prohibits cruel or unusual punishment. The majority Judges stated hat Article 26 "forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose-for example, the purpose of deterring criminal conduct than the availability in like cases of the penalty of life imprisonment." It is therefore clear that the burden rests on the State to establish by producing material before the Court or otherwise, that death penalty has greater deterrent effect than life sentence in order to justify its imposition under the law. If the State fails to discharge this burden which rests upon it, the Court would have to hold that death penalty has not been shown to have greater deterrent effect and it does not therefore serve a rational legislative purpose.

The historical course through which death penalty has passed in the last 150 years shows that the theory that death penalty acts as a greater deterrent than life imprisonment is wholly unfounded. Not more than a century and a half ago, in a civilised country like England, death penalty was awardable even for offences like shop lifting, cattle stealing and cutting down of trees. It is interesting to note that when Sir Samuel Romully brought proposals for abolition of death penalty for such offences, there was a hue and cry from lawyers, judges, Parliamentarians and other so called protectors of social order and they opposed the proposals on the grounds that death penalty acted as a deterrent against commission of such offences and if this deterrent was removed, the consequences would be disastrous. The Chief Justice said while opposing abolition of capital punishment for shop-lifting:

> "Where terror of death which now, as the law stood, threatened the depredator to be removed, it was his opinion the consequence would be that shops would be liable to unavoidable losses from depredations and, in many instances, bankruptcy and ruin must become the lot of honest and laborious tradesmen. After all that had been said in favour of this speculative humanity, they must all agree that the prevention of crime should be the chief object of the law; and terror alone would prevent the com mission of that crime under their consideration."

and on a similar Bill, the Lord Chancellor remarked:

> "So long as human nature remained what it was, the apprehension of death would have the most powerful co operation in deterring from the commission of crimes; and he thought it unwise to withdraw the salutary influence of that terror."

The Bill for abolition of death penalty for cutting down a tree was opposed by the Lord Chancellor in these terms:

> "It did undoubtedly seem a hardship that so heavy a punishment as that of death should be affixed to the cutting down of a single tree, or the killing or wounding of a cow.
>
> But if the Bill passed in its present state a person might root up or cut down whole acres of plantations or destroy the whole of the stock of cattle of a farmer without being subject to capital punishment."

Six times the House of Commons passed the Bill to abolish capital punishment for shop lifting and six times the House of Lords threw out the Bill, the majority of one occasion including all the judicial members, one Arch Bishop and six Bishops. It was firmly believed by these opponents of abolition that death penalty acted as a deterrent and if it was abolished, offences of shop-lifting etc would increase. But it is a matter of common knowledge that this belief was wholly unjustified and the abolition of death penalty did not have any adverse effect on the incidence of such offences. So also it is with death penalty for the offence of murder. It is an irrational belief unsubstantiated by any factual data or empirical research that death penalty acts as a greater deterrent than life sentence

and equally unfounded is the impression that the removal of death penalty will result in increase of homicide. The argument that the rate of homicide will increase if death penalty is removed from the statute book has always been advanced by the established order out of fear psychosis, because the established order has always been apprehensive that if there is any change and death penalty is abolished, its existence would be imperilled. This argument has in my opinion no validity because, beyond a superstitious belief for which there is no foundation in fact and which is based solely on unreason and fear, there is nothing at all to show that death penalty has any additionally deterrent effect not possessed by life sentence. Arthur Koestler tells us an interesting story that in the period when pick-pockets were punished by hanging in England, other thieves exercised their talents in the crowds sorrounding the scaffold where the convicted pick-pocket was being hanged. Statistics compiled during the last 50 years in England show that out of 250 men hanged, 170 had previously attended one or even two public executions and yet they were not deterred from committing the offence of murder which ultimately led to their conviction and hanging. It is a myth nurtured by superstition and fear that death penalty has some special terror for the criminal which acts as a deterrent against the commission of the crime. Even an eminent judge like Justice Frank Furter of the Supreme Court of the United States expressed the same opinion when he said in the course of his examination before the Royal Commission on Capital Punishment:

> "I think scientifically the claim of deterrence is not worth much."

The Royal Commission on Capital Punishment, after four years of investigation which took it throughout the continent and even to the United States, also came to the same conclusion:

> "Whether the death penalty is used or not and whether executions are frequent or not, both death penalty states and abolition states show rates which suggests that these rates are conditioned by other factors than the death penalty."

and then again, it observed in support of this conclusion:

> "The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increasing homicide rate or that its reintroduction has led to a fall."

Several studies have been carried out in the United States of America for the purpose of exploring the deterrent effect of death penalty and two different methods have been adopted. The first and by far the more important method seeks to prove the case of the abolitionists by showing that the abolition of capital punishment in other countries has not led to an increase in the incidence of homicide. This is attempted to be shown either by comparing the homicide statistics of countries where capital punishment has been abolished with the statistics for the same period of countries where it has been retained or by comparing statistics of a single country in which capital punishment has been abolished, for periods before and after abolition or where capital punishment has been reintroduced, then for the period before and after its reintroduction. The second method relates to comparison of the number of executions in a country in particular years with the homicide rate in the years succeeding. Now, so far as the comparison of homicide statistics of countries which

have abolished capital punishment with the statistics of countries which have retained it, is concerned, it may not yield any definitive inference, because in most cases abolition or retention of death penalty may not be the only differentiating factor but there may be other divergent social, cultural or economic factors which may affect the homicide rates. It is only if all other factors are equal and the only variable is the existence or non-existence of death penalty that a proper comparison can be made for the purpose of determining whether death penalty has an additional deterrent effect which life sentence does not possess, but that would be an almost impossible controlled experiment. It may however be possible to find for comparison a small group of countries or States, preferably contiguous and closely similar in composition of population and social and economic conditions generally, in some of which capital punishment has been abolished and in others not. Comparison of homicide rates in these countries or States may afford a fairly reliable indication whether death penalty has a unique deterrent effect greater than that of life sentence. Such groups of States have been identified by Professor Sellin in the United States of America and similar conditions perhaps exist also in Newzealand and the Australian States. The figures of homicide rate in these States do not show any higher incidence of homicide in States which have abolished death penalty than in those which have not. Professor Sellin points out that the only conclusion which can be drawn from these figures is that there is no clear evidence . Of any influence of death penalty on the homicide rates of these States. In one of the best known studies conducted by him, Professor Sellin compared homicide rates between 1920 and 1963 in abolition States with the rates in neighboring and similar retention States. He found that on the basis of the rates alone, it was impossible to identify the abolition States within each group. A similar study comparing homicide rates in States recently abolishing the death penalty and neighboring retention States during the 1960's reached the same results. Michigan was the first State in the United States to abolish capital punishment and comparisons between Michigan and the bordering retention states of Ohio and Indiana States with comparable demographic characteristics did not show any significant differences in homicide rates. Professor Sellin therefore concluded: "You cannot tell from .... the homicide rates alone, in contiguous, which are abolition and which are retention states; this indicates that capital crimes are dependent upon factors other than the mode of punishment."

Students of capital punishment have also studied the effect of abolition and reintroduction of death penalty upon the homicide rate in a single state. If death penalty has a significant deterrent effect? abolition should produce a rise in homicides apart from the general trend and reintroduction should produce a decline. After examining statistics from 11 states, Professor Sellin concluded that "there is no evidence that the abolition of capital punishment generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere."

Some criminologists have also examined the short term deterrent effects of capital punishment. One study compared the number of homicides during short periods before and after several well-publicized executions during the twenties and thirties in Philadelphia. It was found that there were significantly more homicides in the period after the executions than before-the opposite of what the deterrence theory would suggest other studies have also shown that in those localities where capital punishment is carried out, the incidence of homicide does not show any decline in the period immediately following well-publicized executions when, if death penalty had any special

deterrent effect, such effect would be greatest. Sometimes, as Bowers points out in his book on "Executions in America" the incidence of homicide is higher. In short, there is no correlation between the ups and downs of the homicide rate on the one hand and the presence or absence of the death penalty on the other.

I may also refer to numerous other studies made by jurists and sociologists in regard to the deterrent effect of death penalty Barring only one study made by Ehrlich to which I shall presently refer, all the other studies are almost unanimous that death penalty has no greater deterrent effect than life imprisonment. Dogan D. Akman, a Canadian Criminologist, in a study made by him on the basis of data obtained from the records of all Canadian penitentiaries for the years 1964 and 1965 observed that the threat of capital punishment has little influence on potential assaulters. So also on the basis of comparison of homicide and execution rates between Queensland and other Australian States for the period 1860-1920, Barber and Wilson concluded that the suspension of capital punishment from 1915 and its abolition from 1922 in Qneensland did not have any significant effect on the murder rate. Chambliss, another Criminologist, also reached the same conclusion in his Article on "Types of Deviance and the Effectiveness of Legal Sanctions" (1967) Wisconsin Law Review 703 namely, that "given the preponderance of evi- dence, it seems safe to conclude that capital punishment does not act as an effective deterrent to murder." Then we have the opinion of Fred J. Cook who says in his Article on "Capital Punishment: Does it Prevent Crime ?" that "abolition of the death penalty may actually reduce rather than encourage murder." The European Committee on Crime Problems of the Council of Europe gave its opinion on the basis of data obtained from various countries who are Members of the Council of Europe that these data did not give any "positive indication regarding the value of capital punishment as a deterrent". I do not wish to burden this judgment with reference to all the studies which have been conducted at different times in different parts of the world but I may refer to a few of them, namely "Capital Punishment as a Deterrent to Crime in Georgia" by Frank Gibson, "The Death Penalty in Washington State" by Hayner and Crannor, Report of the Massachusett Special Commission Relative to the Abolition of the Death Penalty in Capital Cases, "The use of the Death Penalty-Factual Statement" by Walter Reckless, "Why was Capital Punishment resorted in Delaware"

> by Glenn W. Samuelson, "A Study in Capital Punishment" by Leonard o. Savitz, "The Deterrent Influence of the Death Penalty" by Karl F. Schuessler, "Murder and the Death Penalty" by E.H. Sutherland, "Capital Punishment: A case for Abolition" by Tidmarsh, Halloran and Connolly, "Can the Death Penalty Prevent Crime" by George B. Vold and "Findings on Deterrence with Regard to Homicide" by Wilkens and Feyerherm. Those studies, one and all, have taken the view that "statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value" and that death penalty "fails as a deterrent measure". Arthur Koestler also observes in his book on "Reflections on Hanging" that the figures obtained by him from various jurisdictions which have abolished capital punishment showed a decline in the homicide rate following abolition. The Report made by the Department of Economic and Social Affairs of the United Nations also reaches the conclusion that "the information assembled confirms the now generally held opinion that the abolition or ..suspension of death penalty does not have the immediate effect

of appreciably increasing the incidence of crime."

These various studies to which I have referred clearly establish beyond doubt that death penalty does not have any special deterrent effect which life sentence does not posses and that in any event there is no evidence at all to suggest that death penalty has any such special deterrent effect.

There is unfortunately no empirical study made in India to assess, howsoever imperfectly, the deterrent effect of death penalty. But we have the statistics of the crime of murder in the former States of Travancore and Cochin during the period when the capital punishment was on the statute book as also during the period when it was kept in abeyance. These figures have been taken by me from - the Introduction of Shri Mohan Kumar Mangalam to the book entitled "Can the State Kill its Citizen" brought out by Shri Subramaniam:

Statistics of murder cases during the period when Capi- tal Punishment was kept in abeyance.

Year	Travancore	Cochin	Total for Travancore & Cochin
1945	111 cases	22	133
1946	135 cases	13	148
1947	148-cases	26	174
1948	160 cases	43	203
1949	114 cases	26	140
1950	125 cases	39	164
Total	793	169	962

Statistics of murder cases during the period when capi- tal punishment was in vogue.

1951	141 cases	47	188
1952	133 cases	32	165
1953	146 cases	54	200
1954	114 cases	57	171
1955	99 cases	30	129
1956	97 cases	17	114
Total	730	237	967

These figures show that the incidence of the crime murder did not A increase at all during the period of six years when the capital punishment was in abeyance. This is in line with the experience of ether countries where death penalty has been abolished.

I must at this stage refer to the study carried out by Ehrlich on which the strongest reliance has been placed by Sarkaria, J. in the majority judgment. Ehrlich was the first to introduce regression analysis in an effort to isolate the death penalty effect, if it should exist, uncontaminated by other influences on the capital crirme rate. His paper was catapulated into the centre of legal attention even before it was published, when the Solicitor General of the United States cited it in laudatory terms in his brief

in Fowler v. North Cerolina(l) and delivered copies of it to the court. The Solicitor General called it an "important empirical support for the a priori logical belief that use of the death penalty decrease the number of murders." In view of the evidence available upto that time, Ehrlich's claim was indeed formidable both in substance and precision. The conclusion he reached was: "an additional execution per - year.. may have resulted in . seven or eight fewer murders." The basic data from which he derived this conclusion were the executions and the homicide rates as recorded in the United States during the years 1933 to 1969, the former generally decreasing, the latter, especially during the sixties, sharply increasing. Ehrlich considered simultaneously with the execution and homicide rates, other variables that could affect the capital crime rate and sought to isolate the effect of these variables through the process of regression analysis. It is not necessary for the purpose of the present judgment to explain this process of mathematical purification or the various technical refinements of this process, but it is sufficient to point out that the conclusion reached by Ehrlich was that death penalty had a greater - deterrent effect than the fear of life imprisonment. Ehrlich's study because it went against all the hitherto available evidence, received extra ordinary attention from the scholarly community.

First, Peter Passell and John Taylor attempted to replicate Ehrlich's findings and found that they stood scrutiny only under an unusually restrictive set of circumstances. They found, for example that the appearance of deterrence is produced only when the regression equation is in logarathmic form and in the more conventional linear regression frame work, the deterrent effect disappeared. They also found that no such effect emerged when data for the years after 1962 were omitted from the analysis and only the years 1953-61 were considered. Kenneth Avio of the University of Victoria made an effort to replicate Ehrlich's findings from Canadian experience but that effort also failed and the conclusion reached by the learned jurist was that "the evidence would appear to indicate that Canadian offenders over the period 1926-60 did not behave in a manner consistent with an effective deterrent effect of capital punishment." William Bowers and Glenn Pierce also made an attempt to replicate Ehrlich's results and in replicating Ehrlich's work they confirmed the Passel-Taylor findings that Ehrlich's results were extremely sensitive as to whether the logarithmic specification was used and whether the data for the latter part of 1960's were included. During 1975 the Yale Law Journal published a series of Articles reviewing the evidence on the deterrent effect of death penalty and in the course of an Article in this series, Ehrlich defended his work by addressing himself to some of the criticism raised against his study. Hans Zeisel, Professor Emeritus of Law and Sociology in the University of Chicago points out in his article on The deterrent effect of death penalty; Facts v. Faith that in this article contributed by him to the Yale Law Journal, Ehrlich did refute some criticisms but the crucial ones were not met. Ehrlich in this Article referred to a second study made by him, basing it this time on a comparison by States for the years 1940 and 1950. He claimed that this study bolstered his original thesis but conceded that his findings were "tentative and inconclusive". In the mean time Passell made a State-by-State

comparison for the years 1950 and 1960 and as a result of his findings, concluded that "we know of no reasonable way of interpreting the cross sections (i.e. State-by State) data that would lend support to the deterrence hypothesis."

A particularly extensive review of Ehrlich's time series analysis was made by a team led by Lawrence Klein, President of the American Economic Association. The authors found serious methodological problems with Ehrlich's analysis. They raised questions about his failure to consider the feedback effect of crime on the economic variables in his model, although he did consider other feedback effects in his analysis. They found some of Ehrlich's technical manipulations to be superfluous and tending to obscure the accuracy of his estimates. They, too, raised questions about variables omitted from the analysis, and the effects of these omissions on the findings.

Like Passell-Taylor and Bowers-Pierce, Klein and his collaborators replicated Ehrlich's results, using Ehrlich's own data which by that time he had made available. As in previous replications, Ehrlich's results were found to be quite sensitive to the mathematical specification of the model and the inclusion of data at the recent end of the time series.

By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went on to reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable rejecting the factors that caused other crimes to increase during the latter part of the period of analysis. The inclusion of such a variable would seem obligatory not only to substitute for the factors that had obviously been omitted but also to account for interactions between the crime rate and the demographic characteristics of the population.

Klein also found Ehrlich's results to be affected by an unusual construction of the execution rate variable, the central determinant of the analysis. Ehrlich constructed this variable by using three other variables that appeared elsewhere in his regression model: the estimated homicide arrest rate the estimated homicide conviction rate, and the estimated number of homicides. Klein showed that with this construction of the execution rate, a very small error in the estimates of any of these three variables produced unusually strong spurious appearances of a deterrent effect. He went on to show that the combined effect of such slight errors in all three variables was likely to be considerable, and that in view of all these considerations, Ehrlich's estimates of the deterrent effect were so weak that they "could be regarded as evidence.. (of) a counter deterrent effect of capital punishment." In view of these serious problems with Ehrlich's analysis, Klein concluded: "We see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder" and further observed: "Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty."

This is the analysis of the subsequent studies of Passell and Taylor, Bowers and Pierce and Klein and his colleagues made by Hans Zeisel in his Article on "The deterrent effect of the Death Penalty: Facts v. Faith". These studies which were definitely more scientific and refined than Ehrlich's demolish to a large extent the validity of the conclusion reached by Ehrlich and establish that death penalty does not possess an additional deterrent effect which life sentence does not. But, according to Hans Zeisel, the final blow to the work of Ehrlich came from a study of Brian Forst, one of Klein's collaborators on the earlier study. Since it had been firmly established that the Ehrlich phenomenon, if it existed emerged from developments during the sixties, Forst concentrated on that decade. He found a rigorous way of investigating whether the ending of executions and the sharp increase in homicides during this period was casual or coincidental. The power of Forst's study derives from his having analysed changes both over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross- state observations, hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides. Forst's analysis, according to Hans Zeisel, was superior to Ehrlich's and it led to a conclusion that went beyond that of Klein. "The findings" observed Forst "give no support to the hypothesis that capital punishment deters homicide" and added: "our finding that capital punishment does not deter homicide is remarkably robust with respect to a wide range of alternative constructions." It will thus be seen that The validity of Ehrlich's study which has been relied upon very strongly by Sarkaria J. in the majority judgment is considerably eroded by the studies carried out by leading criminologists such as Passell and Taylor, Bowers and Pierce, Klein and his colleagues and Forst and with the greatest respect, I do not think that Sarkaria, J. speaking on behalf of the majority was right in placing reliance on that study. The validity, design and findings of that study have been thoroughly discredited by the subsequent studies made by these other econometricians and particularly by the very scientific and careful study carried out by Forst. I may point out that apart from Ehrlich's study there is not one published econometric analysis which supports Ehrlich's results.

I may also at this stage refer once again to the opinion expressed ed by Professor Sellin. The learned Professor after a serious and thorough study of the entire subject in the United States on behalf of the American Law Institute stated his conclusion in these terms:

"Any one who carefully examines the above data is bound to arrive at the conclusion that the death penalty as we use it exercises no influence on the extent or fluctuating rate of capital crime. It has failed as a deterrent.

(Emphasis supplied.) So also in another part of the world very close to our country, a Commission of Inquiry on capital punishment was appointed by late Prime Minister Bhandarnaike of Shri Lanka and it reported:

> "If the experience of the many countries which have suspended or abolished capital punishment is taken into account, there is in our view cogent evidence of the unlikelihood of this 'hidden protection'...It is, therefore, our view that the statistics of homicide in Ceylon when related to the social changes since the suspension of the death penalty in Ceylon and when related to the experience of other countries tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that in deciding on the question of reintroduction or abolition of the capital punishment reintroduction cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative or protracted imprisonment."

It is a strange irony of fate that Prime Minister Bhandarnaike who suspended the death penalty in Sri Lanka was himself murdered by a fanatic and in the panic that ensued death penalty was reintroduced in Sri Lanka.

The evidence on whether the threat of death penalty has a deterrent effect beyond the threat of life sentence is therefore overwhelmingly on one side. Whatever be the measurement yardstick adopted and howsoever sharpened may be the analytical instruments they have not been able to discover any special deterrent effect. Even regression analysis, the most sophisticated of these instruments after careful application by the scholarly community, has failed to detect special deterrent effect in death penalty which is not to be found in life imprisonment. One answer which the protagonists of capital punishment try to offer to combat the inference arising from these studies is that one cannot prove that capital punishment does not deter murder because people who are deterred by it do not report good news to their police departments. They argue that there are potential murderers in our midst who would be deterred from killing by the death penalty, but would not be deterred by life imprisonment and there is no possible way of knowing about them since these persons do not commit murder and hence are not identified. Or to use the words of Sarkaria, J. "Statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind." But this argument is plainly a unsound and cannot be sustained. It is like saying, for example, that we have no way of knowing about traffic safety because motorists do not report when they are saved from accidents by traffic safety programmes or devices. That however cannot stop us from evaluating the effectiveness of those programmes and devices by studying their effect on the accident rates where they are used for a reasonable time. Why use a different standard for evaluating the death penalty, especially when we can measure its effectiveness by comparing homicide rates between countries with similar social and economic conditions in some of which capital punishment has been abolished and in others not or homicide rates in the same country where death penalty has been abolished or subsequently reintroduced. There is no doubt that if death penalty has a special deterrent effect not possessed by life imprisonment, the number of those deterred by capital punishment would appear statistically in the homicide rates of abolitionist jurisdictions but according to all the evidence gathered by different studies made by jurists and criminologists, this is just not to be found.

The majority speaking through Sarkaria, J. has observed that "in most of the countries of the world including India, a very large segment of the population including noteable penologists, Judges,

jurists, legislators and other enlightened people believe that death penalty for murder and certain other capital offences does serve as a deterrent and a greater deterrent than life imprisonment." I do not think this statement represents the correct factual position. It is of course true that there are some penologists, judges, jurists, legislators and other people who believe that death penalty acts as a greater deterrent but it would not be correct to say that they form a large segment of the population. The enlightened opinion in the world, as pointed out by me, is definitely veering round in favour of A abolition of death penalty. Moreover, it is not a rational conviction but merely an unreasoned belief which is entertained by some people including a few penologists, judges, jurists and legislators that death penalty has a uniquely deterrent effect. When you ask these persons as to what is the reason why they entertain this belief, they will not be able to give any convincing answer beyond stating that basically every human being dreads death and therefore death would naturally act as a greater deterrent than life imprisonment. That is the same argument advanced by Sir James Fitz James Stephen, the draftsman of the Indian Penal Code in support of the deterrent effect of capital punishment. That great Judge and author said in his Essay on Capital Punishment:

> "No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results.... No one goes to certain inevitable death except by compulsion. Put the matter the other way, was there ever yet a criminal who when sentenced to death and brought out to die would refuse the offer of a commutation of a sentence for a severest secondary punishment ? Surely not. Why is this ? It can only be because 'all that a man has will be given for his life'. In any secondary punishment, however terrible, there is hope, but death is death; its terrors - cannot be described more forcibly."

The Law Commission in its thirty-fifth report also relied largely on this argument for taking the view that "capital punishment does act as a deterrent." It set out the main points that weighed with it in arriving at this conclusion and the first and foremost amongst them was that:

> "Basically every human being dreads death", suggesting that death penalty has therefore a greater deterrent effect than any other punishment. But this argument is not valid and a little scrutiny will reveal that it is wholly unfounded. In the first place, even Sir James Fitz James Stephen concedes that the proposition that death penalty has a uniquely deterrent effect not possessed by any other punishment, is one which is difficult to prove, though according to him it is Self- evident. Secondly, there is a great fallacy underlying the argument of Sir James Stephen and the Law Commission. This argument makes no distinction between a threat of certain and imminent punishment which faces the convicted murderer and the threat of a different problematic punishment which may or may not influence a potential murderer Murder may be unpremeditated under the stress of some sudden outburst

of emotion or it may be premeditated after planning and deliberation. Where the murder is unpremeditated, as for example, where it is the outcome of a sudden argument or quarrel or provocation leading to uncontrollable anger or temporary imbalance of the mind-and most murders fall within this category-any thought of possibility of punishment is obliterated by deep emotional disturbance and the penalty of death can no more deter than any other penalty. Where murder is premeditated it may either be the result of lust, passion, jealousy hatred frenzy of frustration or it may be a cold calculated murder for monetary or other consideration. The former category of murder would conclude any possibility of deliberation or a weighing of consequences, the thought of the likelihood of execution after capture, trial and sentence would hardly enter the mind of the killer. So far as the latter category of murder is concerned, several considerations make it unlikely that the death penalty would play any significant part in his thought. Since both the penalties for murder, death as well as life sentence, are so severe as to destroy the future of any one subjected to them, the crime would not be committed by a rational man unless he thinks that there is little chance of detection. What would weigh with him in such a case is the uncertainty of detection and consequent punishment rather than the nature of punishment. It is not the harshness or severity of death penalty which acts as a deterrent. A life sentence of twenty years would act as an equally strong deterrent against crime as death penalty, provided the killer feels that the crime would not go unpunished. More than the severity of the sentence, it is the certainty of detection and punishment that acts as a deterrent. The Advisory Council on the Treatment of offenders appointed by the Government of Great Britain stated in its report in 1960 "We were impressed by the argument that the greatest deterrent to crime is not the fear of punishment but the certainty Of detection." Professor Hart emphasized the same point, refuting the argument of Sir James Fitz James Stephen in these words:

"This (Stephen's) estimate of the paramount place in human motivation of the fear of death reads impressively but surely contains a suggestio falsi and once this is detected its cogency as an argument in favour of the death penalty for murder vanishes for there is really no parallel between the situation of a convicted murderer over the alternative of life imprisonment in the shadow of the gallows and the situation of the murderer contemplating his crime. The certainty of death is one thing, perhaps for normal people nothing can be compared with it. But the existence of the death penalty does not mean for the murderer certainty of death now. It means not very high probability of death in the future. And, futurity and uncertainty, the hope of an escape, rational or irrational, vastly diminishes the difference between death and imprisonment as , deterrent and may diminish to vanishing point... The way in which the convicted murderer may view the immediate prospect of the gallows after he has been caught, must be a poor guide to the effect of this prospect upon him when he is contemplating committing his crime."

It is also a circumstance of no less significance bearing on the question of detection effect of death penalty, that, even after detection and arrest, the likelihood of execution for the murderer is almost nil. In the first place, the machinery of investigation of offences being what it is and the criminal law of our country having a tilt in favour of the accused, the killer and look forward to a chance of acquittal at the trial. Secondly, even if the trial results in a conviction, it would not, in all probability, be followed by a sentence of ... , death. Whatever may have been the position prior to the enactment of the Code of Criminal Procedure, 1973, it is now clear that under section 354 sub-section (3), life sentence is the rule and it is only in exceptional cases for special reasons that death sentence may be awarded. The entire drift of the legislation is against infliction of death penalty and the courts are most reluctant to impose it save in the rarest of rare cases. It is interesting to note that in the last 2 years, almost every case where death penalty is confirmed by the High Court has come up before this Court by way of petition for special leave, and, barring the case of Ranga and Billa, I do not think there is a single case in which death penalty has been affirmed by this Court. There have been numerous cases where even after special leave petitions against sentence of death were dismissed, review petitions have been entertained and death sentence commuted by this Court. Then there is also the clemency power of the President under Article 72 and of the Governor under Article 161 of the Constitution and in exercise of this power, death sentence has been commuted by the President or the Governor, as the case may be, in a number of cases. The chances of imposition of death sentence following upon a conviction for the offence of murder are therefore extremely slender. This is also evident from the figures supplied to a us by the Government of India for the years 1974 to 1978 pursuant to the inquiry made by us. During the course of the hearing, we called upon the Government of India to furnish us statistical information in regard to following three matters, namely, (i) the number of cases in which and the number of persons on whom death sentence was imposed and whose death sentence was confirmed by various High Courts in India; (ii) the number of cases in which death sentence was executed in the various States and the various Union Territories; and (iii) the number of cases in which death sentence was commuted by the President of India under Article 72 or by the Governors under Article 161 of the Constitution. The statistical information sought by us was supplied by the Government of India and our attention was also drawn to the figures showing the total number of offences of murder committed inter alia during the years 1974-77. These figures showed that on an average about 17,000 offences of murder were committed in India every year during the period 1974 to 1977, and if we calculate on the basis of this average, the total number of offences of murder during the period of five years from 1974 to 1978 would come to about 85,000. Now, according to the statistical information supplied by the Government of India, out of these approximately 85,000 case of murder, there were only 288 in which death sentence was imposed by the sessions court and confirmed by the High Courts and out of them, in 12 cases death sentence was commuted by the President and in 40 cases, by the Governors and death sentence was executed in only 29 cases. It will thus be seen that during the period of five years from 1974 to 1978, there was an infinitesingly small number of cases, only 29 out of an aggregate number of approximately 85,000 cases of murder, in which death sentence was executed. Of course, the figures supplied by the Government of India did not include the figures from the States of A Bihar, Jammu and Kashmir, West Bengal and Delhi Administration but the figures from these three States and from the Union Territory of Delhi would not make any appreciable difference. It is obvious therefore that even after conviction in a trial, there is high degree of probability that death sentence may not be imposed by the sessions court and even If

death sentence is imposed by the sessions court, it may not be confirmed by the High Court and even after confirmation by the High Court, it may not be affirmed by this Court and lastly, even if affirmed by this Court, it may be commuted by the President of India under Article 72 or by the Governor under Article 161 of the Constitution in exercise of the power of clemency. The possibility of execution pursuant to a sentence of death is therefore almost negligible, particularly after the enactment of section 354 sub-section (3) of the Code of Criminal Procedure 1973 and it is difficult to see how in these circumstances death penalty can ever act as a deterrent. The knowledge that . death penalty is rarely imposed and almost certainly, it will not be imposed takes away whatever deterrent value death penalty might otherwise have. The expectation, bordering almost on certainty, that death sentence is, extremely unlikely to be imposed is a factor that would condition the behaviour of the offender and death penalty cannot in such a situation have any deterrent effect. The risk of death penalty being remote and improvable, it cannot operate as a greater deterrent than the threat of life imprisonment. Justice Brennan and Justice White have also expressed the same view in Furman v. Georgia (supra), namely, that, when infrequently and arbitrarily imposed, death penalty is not a greater deterrent to murder than is life imprisonment.

The majority speaking through Sarkaria, J. has referred to a few decisions of this Court in which, according to majority Judges, the deterrent value of death penalty has been judicially recognised. But I do not think any reliance can be placed on the observations in these decisions in support of the view that death penalty has a uniquely deterrent effect. The learned Judges who made these observations did not have any socio-legal data before them on the basis of which they could logically come to the conclusion that death penalty serves as a deterrent. They merely proceeded upon an impressionistic in view which is entertained by quite a few lawyers, judges and legislators without any scientific investigation or empiri-

cal research to support it. It appears to have been assumed by these learned judges that death penalty has an additional deterrent effect which life sentence does not possess. In fact, the learned judges were-not concerned in these decisions to enquire and determine whether death penalty has any special deterrent effect and therefore if they proceeded on any such assumption, it cannot be said that by doing so they judicially recognised the deterrent value of death penalty. It is true that in Jagmohan's case (supra) Palekar J. speaking on behalf of the court did take the view that death penalty has a uniquely deterrent effect but I do Dot think that beyond a mere traditional belief the validity of which cannot be demonstrated either by logic or by reason, there is any cogent and valid argument put forward by the learned Judge in support of the view that death sentence has greater deterrent effect than life sentence. The majority judges have relied on some of the observations of Krishna Iyer, J. but it must not be forgotten that Krishna Iyer, J. has been one of the strongest opponents of death penalty and he has pleaded with passionate conviction for 'death sentence on death sentence'. In Dalbir Singh & Ors. v. State of Punjab (supra) he emphatically rejected the claim of deterrence in most unequivocal terms: ".. the humanity of our Constitution historically viewed (does not) subscribe to the hysterical assumption or facile illusion that a crime free society will dawn if hangmen and firing squads were kept feverishly busy." It would not be right to rely on stray or casual observations of Krishna Iyer, J. in support of the thesis that death penalty has a uniquely deterrent effect. It would be doing grave injustice to him and to the ideology for which he stands. In fact, the entire basis of the judgment of Krishna Iyer, J. in Rajendra Prasad's is that death penalty

has not deterrent value and that is only where the killer is found to be a social monster or a beast incapable of reformation that he can be liquidated out of existence. Chinnappa Reddy, J. has also in Bishnu Deo Shaw's case (supra) taken the view that "there is no positive indication that the death penalty has been deterrent" or in other words, "the efficacy of the death penalty as a deterrent is unproven."

Then reliance has been placed by Sarkaria, J. speaking on behalf of the majority on the observations of Stewart, J. in Furman v. Georgia (supra) where the learned Judge took the view that death penalty serves a deterrent as well as retributive purpose. In his view, certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator and that, despite the on conclusive empirical evidence, only penalty of death will provide maximum deterrence. It has also been pointed out by Sarkaria, J. that in Gregg v. Georgia (supra) Stewart, J. reiterated the same view in regard to the deterrent and retributive effect of death penalty. But the view taken by Stewart, J. cannot be regarded as decisive of the present question as to the deterrent effect of death penalty. It is just one view like any other and its validity has to be tested on the touchstone of logic and reason. It cannot be accepted merely because it is the view of an eminent judge, I find that as against the view taken by him, there is a contrary view taken by at least two judges of the United States Supreme Court, namely. Brennan J. and Marshall J. who were convinced in Gregg v. Georgia (supra) that "capital punishment is not necessary as a deterrent to crime in our society." It is natural differing judicial observations supporting one view or the other that these should be particularly on a sensitive issue like this, but what is necessary is to examine objectively and critically the logic and rationale behind these observations and to determine for ourselves which observations represent the correct view that should find acceptance with us. The majority Judges speaking through Sarkaria, J. have relied upon the observations of Stewart, J. as also on the observations made by various other Judges and authors for the purpose of concluding that when so many eminent persons have expressed the view that capital punishment is necessary for the protection of society, how can it be said that it is arbitrary and unreasonable and does not serve any rational penological purpose. It has been observed by Sarkaria, J:

> "It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society……it is not possible to hold that the provision of death penalty as an alternative punishment for murder is unreasonable and not in the public interest. I find it difficult to accept this argument which proceeds upon the hypothesis that merely because some lawyers, judges and jurists are of the opinion that death penalty sub-serves a penological goal and is therefore in public interest, the court must shut its eyes in respectful deference to the views expressed by these scholars and refuse to examine whether their views are correct or not. It is difficult to understand how the

court, when called upon to determine a vital issue of fact, can surrender its judgment to the views of a few lawyers, judges and jurists and hold that because such eminent persons have expressed these views, there must be some substance in what they say and the provision of death penalty as an alternative punishment for murder cannot therefore be regarded as arbitrary and unreasonable. It is to my mind inconceivable that a properly informed judiciary concerned to uphold Fundamental Rights should decline to come to its own determination of a factual dispute relevant to the issue whether death penalty serves a legitimate penological purpose and rest its decision only on the circumstance that there are sociologists, legislators, judges and jurists who firmly believe in the worth and necessity of capital punishment. The court must on the material before it find whether the views expressed by lawyers, judges, jurists and criminologists on one side or the other are well founded in logic and reason and accept those which appear to it to be correct and sound. The Court must always remember that it is charged by the Constitution to act as a sentinel on the qui vive guarding the fundamental rights guaranteed by the Constitution and it cannot shirk its responsibility by observing that since there are strong divergent views on the subject, the court need not express any categorical opinion one way or the other as to which of these two views is correct. Hence it is that, in the discharge of my constitutional duty of protecting and upholding the right to life which is perhaps the most basic of all human rights, I have examined the rival views and come to the p conclusion, for reasons which I have already discussed, that death penalty has no uniquely deterrent effect and does not serve a penological purpose. But even if we proceed on the hypothesis that the opinion in regard to the deterrent effect of death penalty is divided and it is not possible to say which opinion is right and which opinion is wrong, it is obvious that, in this state of affairs, it cannot be said to be proved that death penalty has an additional deterrent effect not possessed by life sentence and if that be so, the legislative provision for imposition of death penalty as alternative punishment for murder fail, since, as already pointed out above, the burden of showing that death penalty has a uniquely deterrent effect and therefore serves a penological goal is on the State and if the State fails to discharge this burden which lies upon it, death penalty as alternative punishment for murder must be held to be arbitrary and unreasonable.

The majority Judges have, in the Judgment of Sarkaria, J. placed considerable reliance on the 35th Report of the Law Commission and I must therefore briefly refer to that Report before I part with this point. The Law Commission set out in their Report the following main points that weighed with them in arriving at the conclusion that capital punishment does act as a deterrent:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and legislatures and Members of the Bar and police officers-are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after under going imprisonment for life), it would be difficult lo come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

So far as the first argument set out in clause (a) is concerned, I have already shown that the circumstance that every human being dreads death cannot lead to the inference that death penalty act as a deterrent. The statement made in clause (b) is perfectly correct and I agree with they Law Commission that death as a penalty stands on a totally different level from life imprisonment and the difference between them is one of quality and not merely of degree, but I fail to see how from this circumstance an inference can necessarily follow that death penalty has a uniquely deterrent effect. Clause (c) sets out that those who are specially qualified to express an opinion on the subject have in their replies to the questionnaire stated their definite view that the deterrent effect of capital punishment is achieved in a fair measure in India. It may be that a large number of persons who sent replies to the questionnaire issued by the Law Commission might have expressed the view that death penalty does act as a deterrent in our country, but mere expression of opinion in reply to the questionnaire, unsupported by reasons, cannot have any evidenciary value. There are quite a number of people in this country who still nurture the superstitions and irrational belief, ingrained in their minds by a century old practice of imposition of capital punishment and fostered, though not consciously, by the instinct for retribution, that death penalty alone can act as an effective deterrent against the crime of murder. I have already demonstrated how this belief entertained by lawyers, judges, legislators and police officers is a myth and it has no basis in logic or reason. In fact, the statistical research to which I have referred completely falsifies this belief. Then, there are the arguments in clauses (d) and (e) but these arguments even according to the Law Commission itself are inconclusive and it is difficult to see how they can be relied upon to support the thesis that capital punishment acts as a deterrent. The Law Commission states in clause (f) that statistics of other countries are inconclusive on the subject. I do not agree. I have already dealt with this argument and shown that the statistical studies carried out by various jurists and criminologists clearly disclose That there is no evidence at all to suggest that death penalty acts as a deterrent and it must therefore be held on the basis of the available material that death penalty does not act as a deterrent. But even if we accept the proposition that the statistical studies are inconclusive and they cannot be regarded as proving that death penalty has no deterrent effect, it is clear that at the same

time they also do not establish that death penalty has a uniquely deterrent effect and in this situation, the burden of establishing that death penalty has an additional deterrent effect which life sentence does not have and therefore serves a penological purpose being on the State, it must held that the State has failed to discharge the burden which rests upon it and death penalty must therefore be held to be arbitrary and unreasonable.

There was also one other argument put forward by the Law Commission in its 35th Report and that argument was that having regard to the conditions in India to the variety of social up-bringing 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 Deed to maintain law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. This argument does not commend itself to me as it is based more on fear psychosis than on reason. It is difficult to see how any of the factors referred to by the Law Commission, barring the factor relating to the need to maintain law and order, can have any relevance to the question of deterrent effect of capital punishment. I cannot subscribe to the opinion that, because the social upbringing of the people varies from place to place or from class to class or there are demographic diversities and variations, they tend to increase the incidence of homicide and even if they do, I fail to see how death penalty can counter act the effect of these factors. It is true that the level of education in our country is low, because our developmental process started only after we became politically free, but it would be grossly unjust to say that uneducated people are more prone to crime than the educated ones. I also cannot agree that the level of morality which prevails amongst our people is low. I firmly hold the view that the large bulk of the people in our country, barring only a few who occupy positions of political, administrative or economic power, are actuated by a high sense of moral and ethical values. In fact, if we compare the rate of homicide in India with that in the United States, where there is greater homogeneity in population and the level of education is fairly high, we find that India compares very favourably with the United States. The rate of homicide for the year 1952 was 4.7 in the United States as against the rate of only 2.9 in India per 1,00,000 population and the figures for the year 1960 show that the rate of homicide in the United States was 5.1 as against the rate of only 2.5 in India per 1,00,000 population. The comparative figures for the year 1967 also confirm that the rate of homicide per 1,00,000 population in the United States was definitely higher than that in India because in the United States it was 6.1 while in India it was only 2.6. It is therefore obvious that, despite the existence of the factors referred to by the Law Commission, the conditions in India, in so far as the rate of homicide is concerned, are definitely better than in the United States and I do not see how these factors can possibly justify an apprehension that it may be risky to abolish capital punishment. There is in fact statistical evidence to show that the attenuation of the area in which death penalty may be imposed and the remoteness and infrequency of abolition of death penalty have not resulted in increase in the rate of homicide. The figures which were placed before us on behalf of the Union clearly show that there was no increase in the rate of homicide even though death sentence was made awardable only in exceptional cases under section 354 sub-section (3) of the new Code of Criminal Procedure 1973. I must therefore express my respectful dissent from the view taken by the Law Commission that the experiment of abolition of capital punishment, would involve a certain element of risk to the law and order situation.

It will thus be seen that death penalty as provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure, 1973 does not subserve any legitimate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment. I do not think, for reasons I have already discussed, that it can have any legitimate place in an enlightened philosophy of punishment. It must therefore be held that death penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution.

I must now turn to consider the attack against the constitutional validity of death penalty provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure, 1973 on the ground that these sections confer an unguided and standardless discretion on the court whether to liquidate an accused out of existence or to let him continue to live and the vesting of such discretion in the court renders the death penalty arbitrary and freakish. This ground of challenge is in my opinion well founded and it furnishes one additional reason why the death penalty must be struck down as violative of Articles A 14 and 21. It is obvious on a plain reading of section 302 of the Indian Penal Code which provides death penalty as alternative punishment for murder that it leaves it entirely to the discretion of Court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. This section does not lay down any standards or principles to guide the discretion of the Court in the matter of imposition of death penalty. The critical choice between physical liquidation and life long incarceration is left to the discretion of the court and no legislative light is shed as to how this deadly discretion is to be exercised. The court is left free to navigate in an uncharted sea without any compass or directional guidance. The respondents sought to find some guidance in section 354 sub-section (3) of the Code of Criminal Procedure 1973 but I fail to see how that section can be of any help at all in providing guidance in the exercise of discretion. On the contrary it makes the exercise of discretion more difficult and uncertain. Section 354 sub-section (3) provides that in case of offence of murder, life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded. But what are the special reasons for which the court may award death penalty is a matter on which section 354 sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected

of lawyers. This was pointed out clearly and emphatically by Mr. Justice Frankfurter in the course of the evidence he gave before the Royal Commission on Capital Punishment:

> "I myself think that the bench-we lawyers who be come Judges-are not very competent, are not qualified by experience, to impose sentence where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training has given you any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery-the rule of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent-I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I- think require very different and much more diversified talents than the lawyers and judges are normally likely to possess."

Even if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given By the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered To be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, H-but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bonafide and conscientiously find such reason to be 'special reasons'. It is now recognised on all hands that judicial conscience is not a fixed conscience; it varies from judge to judge depen- ding upon his attitudes and approaches, his predilections- and prejudices, his habits of mind and thought and in short all that goes with the expression "social philosophy". We lawyers and judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we refuse to admit the subjective element in judicial decision making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion. Every judgment necessarily bears the impact of the attitude and approach of the judge and his social value system. It would be pertinent here to quote Justice Cardozo's analysis of the mind of a Judge in his famous lectures on "Nature of Judicial Process":

> "We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of y tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and ' t action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them- inherited instincts, traditional beliefs, acquired convictions; - and the resultant is an outlook on life, a conception of ' social needs, a sense in Jame's phrase of 'the total push and pressure of the cosmos,' which when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We l may try to see things as objectively as we please. None-
>
> theless, we can never see them with any eyes except our own."

It may be noted that the human mind, even at infancy, is no blank sheet of paper. We are born with predisposition and the process of education, formal and informal, and, our own subjective experiences create attitudes which effect us in judging situations and coming to decisions. Jerome Frank says in his book; "Law and the Modern Mind", in an observation with which I find myself in entire agreement:

> "Without acquired 'slants' preconceptions, life could not go on. Every habit constitutes a pre- judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.. An 'open mind' in the sense of a mind containing no pre- conceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotion- less human being."

It must be remembered that "a Judge does not shed the attributes of common humanity when be assumes the ermine." The ordinary human mind is a mass of pre-conceptions inherited and acquired, often unrecognised by their possessor. "Few minds are as neutral as a sheet of plain glass and indeed a mind of that quality may actually fail in judicial- efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason, if human justice is to be done." It is, therefore, obvious that when a Judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and pre-conceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence. One Judge may have faith in the Upanishad doctrine that every human being is an embodiment of the Divine and he may believe with Mahatma Gandhi that every offender can be reclaimed and transformed by love and it is immoral and unethical to kill him, while another Judge may believe that it is necessary for social defence that the offender should be put out of way and that no mercy should be shown to him who did not show

mercy to another. One Judge may feel that the Naxalites, though guilty of murders, . are dedicated souls totally different from ordinary criminals as they are motivated not by any self-interest but by a burning desire to bring about a revolution by eliminating vested interests and should not therefore be put out of corporeal existence while another Judge may take the view that the Naxalities being guilty of cold premeditated murders are a menace to the society and to innocent men and women and therefore deserve to be liquidated. The views of Judges as to what may be regarded as 'special reasons' are bound to differ from Judge to Judge depending upon his value system and social philosophy with the result that whether a person shall live or die depends very much upon the composition of the bench. which tries his case and this renders the imposition of death penalty arbitrary and capricious.

Now this conclusion reached by me is not based merely on theoretical or a priori considerations. On an analysis of decisions given over a period of years we find that in fact there is no uniform pattern of judicial behaviour in the imposition of death penalty and the judicial practice does not disclose any coherent guidelines for ' the award of capital punishment. The Judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is p apparent from a study of the judicial decisions that some Judges are readily and regularly inclined to sustain death sentences, other are . similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of capital punishment. If a case comes before one Bench consisting of Judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another Bench consisting of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment. The former would find and I say this not in any derogatory or disparaging sense, but as a consequence of psychological and attitudinal factors operating on the minds of the Judges constituting the Bench-'special reasons' in the case to justify award of death penalty while the latter would reject any such reasons as special reasons. It is also quite possible that one Bench may, having regard to its perceptions, think that there are special reasons in the case for which death penalty should be awarded while another Bench may bonafide and conscientiously take a different view and hold that there are no special reasons and that only life sentence should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong, because the exercise of discretion in a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude and approach of the Judges constituting the Bench, their value system, individual tone of their mind, the colour of their experience and the character and variety of their interests and their predispositions. This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented bench structure of our Courts where benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, sometimes before another sometimes before a third and so on. Prof. Blackshield has in his Article on 'Capital Punishment in India' published in Volume 21 of the Journal of the Indian Law Institute pointed out how the practice of bench formation contributes to arbitrariness in the imposition of death penalty. It is well-known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges on

Benches which hear capital punishment cases has actually decreased. Most cases are now heard by two judge Benches. Prof. Blackshield has abstracted 70 cases in which the Supreme Court had to choose between life and death while sentencing an accused for the offence of murder and analysing these 70 cases he has pointed out that during the period 28th April 1972 to 8th March 1976 only eleven Judges of the Supreme Court participated in 10% or more of the cases. He has listed these eleven Judges in an ascending order of leniency based on the proportion for each Judge of plus votes (i.e. votes for the death sentence) to total votes and pointed out that these statistics show how the judicial response to the question of life and death varies for judge to judge." It is significant to note that out of 70 cases analysed by Prof. Blackshield, 37 related to the period subsequent to the coming into force of section 354 sub-section (3) of the Code of Criminal Procedure 1973. If a similar exercise is performed with reference to cases decided by the Supreme A Court after 8th March 1976, that being the date upto which the survey carried out by Prof. Blackshield was limited, the analysis will x reveal the same pattern of incoherence and arbitrariness, the decision to kill or not to kill being guided to a large extent by the com position of the Bench. Take for example Rajendra Prasad's case (supra) decided on 9th February 1979. In this case, the death sentence imposed on Rajendra Prasad was commuted to life imprisonment by a majority consisting of Krishna Iyer, J. and Desai, J.A.P. Sen, J. dissented and was of the view that the death sentence should be confirmed. Similarly in one of the cases before us, namely, Bachan Singh v. State of Punjab,(l) when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasam, J. was definitely of the view that the majority decision in . Rajendra Prasad's case was wrong and that is why 'he referred that case to the Constitution Bench. So also in Dalbir Singh v. State of Punjab (supra), the majority consisting of Krishna Iyer, J. and Desai, J. took the view that the death sentence imposed on Dalbir Singh should be commuted to life imprisonment while A.P. Sen, J. struck to the original view taken by him in Rajendra Prasad's case and was inclined to confirm the death sentence. It will thus be seen that the exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the Judges constituting the Bench.

The most striking example of freakishness in imposition of death penalty is provided by a recent case which involved three accused, namely, Jeeta Singh, Kashmira Singh and Harbans Singh. These three persons were sentenced to death by the Allahabad High Court by a judgment and order dated 20th October 1975 for playing an equal part in jointly murdering a family of four persons. Each of these three persons preferred a separate petition in the Supreme Court for special leave to appeal against the common judgment sentencing them all to death penalty. The special leave petition of Jeeta Singh came up for hearing before a bench consisting of Chandrachud, J. (as he then was) Krishna Iyer, J. and N.L. Untwalia, J. and it was dismissed on 15th April 1976. Then came the special leave petition preferred by Kashmira Singh from jail and this petition was placed for hearing before another bench consisting of Fazal Ali, J. and myself. We granted leave to Kashmira Singh limited to the question of sentence and by an order dated 10th April 1977 we allowed his appeal and commuted his sentence of death into one of imprisonment for life. The result was that while Kashmira Singh's death sentence was commuted to life imprisonment by one Bench, - the death sentence imposed on Jeeta Singh was confirmed by another bench and he was executed on 6th October 1981, though both had played equal part in the murder of the family and there was nothing to distinguish the case of one from that of the other. The special leave petition of Harbans Singh then came up for hearing and this time, it was still another bench which heard his special leave

petition. The Bench consisted of Sarkaria and Singhal, JJ. and they rejected the special leave petition of Harbans Singh on 1 6th October, 1978. Harbans Singh applied for review of this decision, but the review petition was dismissed by Sarkaria, J. and A.P. Sen, J. On 9th May 1980. It appears that though the registry of this court had mentioned in its office report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the court specifically when the special leave petition of Harbans Singh and his review petition were dismissed. Now since his special leave petition as also his review petition were dismissed by this Court, Harbans Singh would have been executed on 6th October 1981 along with Jeeta Singh, but fortunately for him he filed a writ petition in this Court and on that writ petition, the court passed an order staying the execution of his death sentence. When this writ petition came up for hearing before a still another bench consisting of Chandrachud, C.J., D.A. Desai and AN. Sen. JJ., it was pointed out to the court that the death sentence imposed on Kashmira Singh had been commuted by a bench consisting of Fazal Ali, J. and myself and when this fact was pointed out, the Bench directed that the case be sent back to the President for reconsideration of the clemency petition filed by Harbans Singh. This is a classic case which illustrates the judicial vagaries in the imposition Of death penalty and demonstrates vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the bench, even in cases governed by section 354 sub-section (3) of the Code of Criminal Procedure 1973. The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time ? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21 ?

If we study the judicial decisions given by the courts over a number of years, we find Judges resorting to a wide variety of factors in justification of confirmation or commutation of death sentence and these factors when analysed fail to reveal any coherent pattern. This is the inevitable consequence of the failure of the legislature to supply broad standards or guidelines which would structure and channelise the discretion of the court in the matter of imposition of death penalty. Of course, I may make it clear that when I say this I do not wish to suggest that if broad standards or guidelines are supplied by the legislature, they would necessarily cure death penalty of the vice of arbitrariness or freakishness. Mr. Justice Harlan pointed out in Mc Gautha v. California(l) the difficulty of formulating standards or guidelines for channelising or regulating the discretion of the court in these words ":

> "Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history...To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

But whether adequate standards or guidelines can be formulated or not which would cure the aspects of arbitrariness and capriciousness, the fact remains that no such standards or guidelines are provided by the legislature in the present case, with the result that the court has unguided and untrammelled discretion in choosing between death and life imprisonment as penalty for the crime of murder and this has led to considerable arbitrariness and uncertainty. This is evident from a

study of the decided cases which clearly shows that the reasons for confirmation or commutation of death sentence relied upon by the court in different cases defy coherent analysis. Dr. Raizada has, in his monumental doctoral study entitled "Trends in sentencing; a study of the important penal statutes and judicial pronouncements of the High Courts and the Supreme Court" identified a large number of decisions of this Court where inconsis-

tent awards of punishment have been made and the judges have frequently articulated their inability to prescribe or follow consistently any standards or guidelines. He has classified cases upto 1976 in terms of the reasons given by the court for awarding or refusing to award death sentence. The analysis made by him is quite rewarding and illuminating.

(i) one of the reasons given by the courts in a number of cases for imposing death penalty is that the murder is "brutal", "cold blooded", "deliberate", "unprovoked", "fatal", "gruesome", "wicked", "callous", "heinous" or "violent". But the use of these labels for describing the nature of the murder is indicative only of the degree of the court's aversion for the nature or the manner of commission of the crime and it is possible that different judges may react differently to these situations and moreover, some judges may not regard this factor as having any relevance to the imposition of death penalty and may therefore decline to accord to it the status of "special reasons". In fact, there are numerous cases, where despite the murder being one falling within these categories, the court has refused to award death sentence. For example, Janardharan whose appeal was decided along with the appeal of Rajendra Prasad had killed his innocent wife and children in the secrecy of night and the murder was deliberate and cold blooded, attended as it was with considerable brutality, and yet the majority consisting of Krishna Iyer, J. and D.A. Desai, J. commuted his death sentence to life imprisonment. So also Dube had committed triple murder and still his death sentence was commuted to life imprisonment by the same two learned Judges, namely, Krishna Iyer, J. and D.A. Desai, J. It is therefore clear that the epithets mentioned above do not indicate any clearcut well defined categories but are merely expressive of the intensity of judicial reaction to the murder, which may not be uniform in all Judges and even if the murder falls within one of these categories, that factor has been regarded by some judges as relevant and by others, as irrelevant and it has not been uniformly applied as a salient factor in determining whether or not death penalty should be imposed.

(ii) There have been cases where death sentence has been A . . awarded on the basis of constructive or joint liability arising under sections 34 and 149. Vide: Babu v. State of U.P.,(1) Mukhtiar Singh v. State of Punjab,(2) Masalt v. State of U.P.,(3) Gurcharan Singh v. State - of Punjab.(4) But, there are equally a large number of cases whether death sentence has not been awarded because the criminal liability of the accused was only . under section 34 or Section 149. There are no establi- shed criteria for awarding or refusing to award death sentence to an accused who himself did not give the fatal blow but was involved in the commission of - murder along with other assailants under section 34 or section 149.

(iii)The position as regards mitigating factors also shows the same incoherence. One mitigating factor which -, has often been relied upon for the purpose of com- muting the death sentence to life imprisonment is the youth of the offender. But this too has been quite arbitrarily applied by the

Supreme Court. There are . cases such as State of U.P. v. Suman Das,(5) Raghubir Singh v. Sate of Haryana(6) and Gurudas Singh v. State of Rajasthan(7) where the Supreme Court took into account the young age of the appellant and refused to award death sentence to him. Equally there are

- cases such as Bhagwan Swarup v. State of U.P.(') and Raghomani v. State of U.P.(9) where the Supreme Court took the view that youth is no ground for extenuation of sentence. Moreover there is also divergence of opinion as to what should be the age at which an offender may be regarded as a young man deserving i of commutation. The result is that as pointed out by Dr. Raizada, in some situations young offenders who have committed multiple murders get reduction in life sentence whereas in others, "where neither the loss of as many human lives nor of higher valued properly" is involved, the accused are awarded death sentence.

(iv) one other mitigating factor which is often taken into account is delay in final sentencing. This factor of delay after sentence received great emphasis in Ediga Annamma v. State of Andhra Pradesh,(1) Chawla v. State of Haryana,(2) Raghubir Singh v. State of Haryana (supra) Bhur Singh v. State of Punjab,(3) State of Punjab v Hari Singh(4) and Gurudas Singh v. State of Rajasthan(5) and in these cases delay was taken into account for the purpose of awarding the lesser punishment of life imprisonment. In fact, in Raghubir Singh v. State of Haryana (supra) the fact that for 20 months the spectre of death penalty must have been tormenting his soul was held sufficient to entitle the accused to reduction in sentence. But equally there are a large number of cases where death sentences have been confirmed, even when two or more years were taken in finally disposing of the appeal; Vide: Rishdeo v. State of U.P.,(6) Bharmal Mapa v. State of Bombay(7) and other cases given by Dr. Raizada in foot-note 186 to chapter III. These decided cases show that there is no way of predicting. the exact period of prolonged proceeding which may favour an accused. Whether any im- portance should be given to the factor of delay and if so to what extent are matters entirely within the dis- cretion of the court and it is not possible to assert with any definitiveness that a particular period of delay after sentencing will earn for the accused immunity from death penalty. It follows as a necessary corrolary from these vagaries in sentencing arising from the factor of delay, that the imposition of capital punishment becomes more or less a kind of cruel judicial lottery. If the case of the accused is handled expeditiously by the prosecution, defence lawyer, sessions court, High Court and the Supreme Court, then this mitigating factor of delay is not available to him for reduction to life sentence. If, on the other hand, there has been lack of despatch, engineered or natural, then the accused may escape the gallows, subject of course to the judicial vagaries arising from other causes. In other words, the more efficient the proceeding, the more certain the death sentence and vice-versa.

(v) The embroilment of the accused in an immoral relationship has been condoned and in effect, treated as an extenuating factor in Raghubir Singh v. State of Haryana (supra) and Basant Laxman More v. State of Maharashtra(l) while in Lajar Masih v. State of U.P.,(2) it has been condemed and in effect treated as an aggravating factor. There is thus no uniformity l - of approach even so far as this factor is concerned.

All these facors singly and cumulatively indicate not merely that there is an enormous potential of arbitrary award of . death penalty by the High Courts and the Supreme Court but that, .; in fact,

death sentences have been awarded arbitrarily and freakishly. Vide: Dr. Upendra Baxi's note on "Arbitrariness of Judicial Imposition of Capital Punishment.

Professor Blackshield has also in his article on "Capital Punishment in India" commented on the arbitrary and capricious nature of imposition of death penalty and demonstrated forcibly and almost conclusively, that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment. He has taken the decision of this Court in Ediga Anamma v. State of Andhra Pradesh (supra) as the dividing line and examined the judicial decisions given by this Court subsequent to the decision in Ediga Anamma's case, where this Court had to choose between life and death under section 302 of the Indian Renal Code. The cases sub sequent to the decision in Ediga Anamma's case have been chosen for study and analysis presumbly because that was the decision in which the court for the first time set down some working formula whereby a synthesis could be reached between death sentence and life imprisonment and Krishna Iyer, J. speaking on behalf of the court, formulated various grounds which in his opinion, might warrant death sentence as an exceptional measure. But, despite this attempt made in Ediga Anamma's case to evolve some broad standards or guidelines for imposition of death penalty, the subsequent decisions, as pointed out by Professor Blackshield, display the same pattern of confusion, contradictions and aberrations as the decisions before that case. The learned author has taken 45 reported decisions given after Ediga Anamma's case and shown that it is not possible to discern any coherent pattern in these decisions and they reveal con tradictions and inconsistencies in the matter of imposition of death penalty. This is how the learned author has summed up his conclusion after an examination of these judicial decisions:

> "But where life and death are at stake, inconsistencies which are understandable may not be acceptable. The hard evidence of the accompanying "kit of cases" compels the conclusion that, at least in contemporary India, Mr. Justice Douglas' argument in Furman v. Georgia is correct: that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment and that therefore-in Indian constitutional terms, and in spite of Jagmohan Singh- the retention of such a system necessarily violates Article 14's guarantee of "equality before the law".

It is clear from a study of the decisions of the higher courts on the life-or-death choice that judicial adhocism or judicial impressionism dominates the sentencing exercise and the infliction of death penalty suffers from the vice of arbitrariness and caprice.

I may point out that Krishna Iyer, J. has also come to the the same conclusion on the basis of his long experience of the sentencing process. He has analysed the different factors which have prevailed with the Judges from time to time in awarding or refusing to award death penalty and shown how some factors have weighed A with one Judge, some with another, some with a third and so on, resulting in chaotic arbitrariness in the imposition of death penalty. I can do no better than quote his own words in Rajendra Prasad's case (supra):

> "Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapon used, others count the corpses or the

> degree of horror and yet others look into the age or sex of the offendar and even the lapse of time between the trial Court's award of death sentence and the final disposal. Of the appeal ? With some judges, motives, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing; the social milieu, the sublimated class complex and other odd factors enter the sentencing calculas. Stranger still, a good sentence of death by the trial Court is sometimes upset by the Supreme Court
>
> - I; because of law's delays. Courts have been directed execution of murderers who are mental cases, who do not fall within the McNaghten rules, because of the insane fury - of the slaughter. A big margin of subjectivism, a preference for old English precedents, theories of modern penology, behavioral emphasis or social antecedents, judicial hubris or human rights perspectives, criminological literacy -. or fanatical reverence for outworn social philosophers burried in the debris of time except as part of history-this h plurality of forces plays a part in swinging the pendulum of sentencing justice erratically."

This passage from the judgment of the learned Judge exposes, in language remarkable for its succinctness as well as eloquence, the vagarious nature of the imposition of death penalty and highlights a few of the causes responsible for its erratic operation. I find myself totally in agreement with these observations of the learned - Judge.

But when it was contended that sentencing discretion is inherent in our legal system, and, in fact, it is desirable, because no two cases or criminals are identical and if no discretion is left to the court and sentencing is to be done according to a rigid predetermined formula leaving no room for judicial discretion, the sentencing process would cease to be judicial and would de-generate into a bed of procrustean cruelty. The argument was that having regard to the nature of the sentencing process, it is impossible to lay down any standards or guidelines which will provide for the endless and often unforeseeable variations in fact situations and sentencing discretion his necessarily to be left to the court and the vesting of such discretion in the court, even if no standards or guidelines are provided by the legislature for structuring or challenging such discretion, cannot be regarded as arbitrary or unreasonable. This argument, plausible though it may seem, is in my opinion not well a founded and must be rejected. It is true that criminal cases do not fall into set behaviouristic patterns and it is almost impossible to find two cases which are exactly identical. There are, as pointed out by Sarkaria, J. in the majority judgment, "countless permutations and combinations which are beyond the anticipatory capacity of the human calculus". Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. That is why, in the interest of individualised justice, it is necessary to vest sentencing discretion in the court so that appropriate sentence may be imposed by the court in the exercise of its judicial discretion, having regard to the peculiar facts and circumstances of a given case, or else the. sentencing process would cease to be just and rational and justice would be sacrificed at the altar of blind uniformity. But at the same time, the sentencing discretion conferred upon the court cannot be altogether uncontrolled or unfettered. The strategem which is therefore followed by the legislatures while creating and defining offences is to prescribe the maximum punishment and in some cases, even the minimum and leave

it to the discretion of the court to decide upon the actual term of imprisonment. This cannot be regarded as arbitrary or unreasonable since the discretion that is left to the court is to choose an appropriate term of punishment between the limits laid down by the legislature, having regard to the distinctive features and the peculiar facts and circumstances of the case. The conferment of such sentencing discretion is plainly and indubitably essential for rendering individualised justice. But where the discretion granted to the court is to choose between life and death without any standards or guidelines provided by the legislature, the death penalty does become arbitrary and unreasonable. The death penalty is qualitatively different from a sentence of imprisonment. Whether Ia sentence of imprisonment is for two years or five years or for life, it is qualitatively the same, namely, a sentence of imprisonment, but the death penalty is totally different. It is irreversible; it is beyond recall or reparation; it extinguishes life. It is the choice between - life and death which the court is required to make and this is left to its sole discretion unaided and unguided by any legislative yardstick to determine the choice. The only yardstick which may be said to have been provided by the legislature is that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded. but it is nowhere indicated by legislature as to what should be regarded as f 'special reasons' justifying imposition of death penalty. The awesome and fearful discretion whether to kill a man or to let him live is vested in the court and the court is called upon to exercise . this discretion guided only by its own perception of what may be regarded as 'special reasons' without any light shed by the legislature. It is difficult to appreciate how a law which confers such unguided discretion on the court without any standards or guidelines on so vital an issue as the choice between life and death can be regarded as constitutionally valid. If I may quote the words of Harlan, J.:

> "our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principles, not on ad hoc notions of what is right or wrong in a particular case"

There must be standards or principles to guide the court in making the choice between life and death and it cannot be left to the court to decide upon the choice on an ad hoc notion of what it conceives to be "special reasons' in a particular case. That is exactly what we mean when we say that the government should be of laws and not y of men and it makes no difference in the application of this princi- ple, whether 'men' belong to the administration or to the judiciary. It is a basic requirement of the equality clause contained in Article 14 that the exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situate. Where unguided and unfettered discretion is conferred on any authority, whether it be the executive or the judiciary, it can be exercised arbitrarily or capriciously by such authority, because there would be no standards k or principles provided by the legislature with reference to which the exercise of the discretion can be tested. Every form of arbitrariness, whether it be executive waywardness or judicial adhocism is anathema in our constitutional scheme. There can be no equal protection without equal principles in exercise of discretion. Therefore. the equality clause of the Constitution obligate that whenever death sentence is imposed it must be a principled sentence, a sentence based on some standard or principle and not arbitrary or indignant capital punishment It has been said that 'a Judge untethered by a text is a dangerous instrument, and I may well add that Judge power, uncanalised by clear principles, may

be equally dangerous when the consequence of the exercise of discretion may result in the hanging of a human being It is obvious that if judicial discretion is not guided by any standard or norms, it would degenerate into judicial caprice, which, as is evident from the foregoing discussion, has in fact happened and in such a situation, unregulated and un-principled sentencing discretion in a highly sensitive area involving a question of life and death would clearly be arbitrary and hence violative of the equal protection clause contained in Article 14. It would also militate against Article 21 as interpreted in Maneka Gandhi's case (supra) because no procedure for depriving a person of his life can be regarded as reasonable, fair and just, if it vests uncontrolled and unregulated discretion in the court whether to award death sentence or to inflict only the punishment of life im- prisonment. The need for well recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power not structured or guided by any standards or principles would fall foul of Article 21.

The respondents however contendent that the absence of any standards or guidelines in the legislation did not affect the constitutional validity of the death penalty, since the sentencing discretion being vested in the court, standards or principles for regulating the exercise of such discretion could always be evolved by the court and the court could by a judicial fiat lay down standards or norms which would guide the Judge in exercising his discretion to award the death penalty. Now it is true that there are cases where the court lays down principles and standards for guidance in the exercise of the discretion conferred upon it by a statute, but that is done by the court only in those cases where the principles or standards are gatherable from the provisions of the statute Where a statute confers discretion upon a court, the statute may lay down the broad standards or principles which should guide the court in the exercise of such discretion or such standards or principles may be discovered from the object and purpose of the statute, its underlying policy and the scheme of its provisions and some times, even from the surrounding circumstances. When the court lays down standards or principles which should guide it in the exercise of its discretion, the court does not evolve any new standards or principles of its own but merely discovers them from the statute. The standards or principles laid down by the court in such a case are not standards or principles created or evolved by l' the court but they are standards or principles enunciated by the Iegislature in the statute and are merely discovered by the court as a matter of statutory interpretation. It is not legitimate for the court to create or evolve any standards or principles which are not found in the statute, because enunciation of such standards or principles is a legislative function which belongs to the legislative and not to the judicial department. Moreover, it is difficult to see how any standards or principles which would adequately guide the - exercise of discretion in the matter of imposition of death penalty can be evolved by the court. Sarkaria, J. himself has lamented the impossibility of formulating standards or guidelines in this highly ' sensitive area and pointed out in the majority judgment:

> ".. there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crime are only to be measured by the injury done to society.' But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch,

the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of actor's culpability." But how is the degree of that culpability to be measured. Can any thermometer be devised to measure its degree ? This passage from the majority judgment provides a most complete and conclusive answer to the contention of the respon-

dents that the court may evolve its own standards or principles for guiding the exercise of its discretion. This is not a function which can be satisfactorily and adequately performed by the court more particularly when the judicial perception of what may be regarded as proper and relevant standards or guidelines is bound to vary from judge having regards to his attitude and approach, his predilections and prejudices and his scale of values and social philosophy.

I am fortified in this view by the decision of the Supreme Court of the United States in Furman v. Georgia (supra). The question which was brought before the court for consideration in that Case was whether the imposition and execution of death penalty constituted "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. The court, by a majority of five against four, held that the death penalty as then administered in the United States was unconstitutional, because it was being used in an arbitrary manner and such arbitrariness in capital punishment was a violation of the Eighth Amendment prohibition against "cruel and unusual punishment" which was made applicable to the States by the Fourteenth Amendment. Brennan J. and Marshall, J. took the view that the death - penalty was per se unconstitutional as violative of the prohibition of the Eighth Amendment. Brennan, J. held that the death penalty constituted cruel and unusual punishment as it did not comport with human dignity and it was a denial of human dignity for a State arbitrarily to subject a person to an unusually severe punishment which society indicated that it did not regard as acceptable and which could not be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Marshall, J. stated that the death penalty violated the Eighth Amendment because it was an excessive and unnecessary punishment and also because it was morally unacceptable to the people of the United States. The other three learned Judges namely, Douglas, J. Stewart, J. and White, J. did not subscribe to the view that the death penalty was per se unconstitutional in all circumstances but rested their judgment on the limited ground that the death penalty as applied in the United States was unconstitutional. Douglas, J. argued that "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die dependent on the whim of one man or of twelve,"

Stewart, J. also voiced his concern about the unguided and unregulated discretion in the sentencing process and observed: "...the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so

freakishly imposed." The remaining four Judges, namely, Burger, C.J. Blackmun, J. Powell, J. and Rehnquist, J. took the opposite view and upheld the constitutional validity of the death penalty in its entirety. It will thus be seen that the view taken by the majority decision in this case was that a law which gives uncontrolled and unguided discretion to the Judge (or the jury) to choose arbitrarily between death sentence and life imprisonment for a capital offence violates the Eighth Amendment which inhibits cruel and unusual punishment. Now Sarkaria, J. speaking on behalf of the majority, has brushed aside this decision as inapplicable in India on the ground that we "do not have in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply the 'due process' clause." I am unable to agree with this reasoning put forward in the majority judgment. I have already pointed out that though there is no explicit provision in our Constitution prohibiting cruel and unusual punishment, this Court has in Francis Mullin's case (supra) held that immunity against torture or cruel and unusual punishment or treatment is implicit in Article 21 and therefore, if any punishment is cruel and unusual, it would be violative of basic human dignity which is guaranteed under Article 21. Moreover, in Maneka Gandhi's case (supra) this court has by a process of judicial interpretation brought in the procedural due process clause of the American Constitution by reading in Article 21 the requirement that the procedure by which a person may be deprived of his life or personal liberty must be reasonable, fair and just. Douglas, J. has also pointed out in Furman's case (supra) that "there is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishment. A penalty ....should be considered 'unusually' imposed. if it is administered arbitrarily or discriminatorily" and thus brought in the equal protection clause for invalidating the death penalty. It is also significant to note that despite the absence of provisions like the American Due Process Clause and the Eighth Amendment, this Court speaking through Desai, J. said in Sunil Batra v. Delhi Administration.(1) "Treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14.. ." Krishna Iyer, J. was more emphatic and he observed in the same case.

> "True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper.. and Maneka Gandhi..... the consequence is the same. For what is punitively outrageous, scandalizing unusual or cruel or rehabilitatively counter productive is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 "

It should be clear from these observations in Sunil Batra's case to which Cbandrachud, C.J. was also a party, that Sarkaria, J. speaking on behalf of the majority Judges, was in error in relying on the absence of the American due process clause and the Eighth Amendment for distinguishing the decision in Furman's case (supra) and upholding death penalty. The decision in Furman's case cannot, therefore, be rejected as inapplicable in India. This decision clearly supports the view that where uncontrolled and unregulated discretion is conferred on the court without any standards or guidelines provided by the legislature, so as to permit arbitrary and uneven imposition of death penalty, it would be violative of both Articles 14 and 21.

It may be pointed out that subsequent to the decision in Furman's case (supra) and as a reaction to it the legislatures of several States in the United States passed statutes limiting or controlling the exercise of discretion by means of explicit standards to be followed in the sentencing process. These 'guided discretion' statutes provided standards typically in the form of specific aggravating and mitigating circumstances that must be taken into account before death sentence can be handed down. They also provided for separate phases of the trial to determine guilt and punishment (I) A.l.R. 1978 SC 1675.

and for automatic appellate review of death sentences. The constitutional validity of some of these 'guided discretion' statutes was challenged in Gregg v. Georgia (supra) and companion cases and the Supreme Court of the United States upheld these statutes on the ground that providing specific sentencing guidelines to be followed in a separate post conviction phase of the trial would free the sentencing decision of arbitrariness and discrimination. There is considerable doubt expressed by leading jurists in the United States in regard to correctness of this decision, because in their view the guide lines provided by these statutes in the form of specific aggravating and/or mitigating circumstances are too broad and too vague to serve as an effective guide to discretion. In fact, while dealing with the challenge to the constitutional validity of a 'guided discretion' statute enacted by the Legislature of Massachusettes, the Supreme Court of Massachusettes by a majority held in District Attorney for the Suffolk District v. Watson (1) that the statute providing for imposition of death penalty was unconstitutional on the ground that it was violative of Article 26 of the Declaration of Rights of the Massachusettes Constitution which prohibits infliction of cruel or unusual punishment. Henneseey, C.J. pointed out that in enacting the impugned statute the Legislature of Massachusettes had clearly attempted to follow the mandate of the Furman opinion and its progeny by promulgating a law of guided and channelled jury discretion, but even so it transgressed the prohibition of Article 26 of the Declaration of Rights of the State Constitution. The learned Chief Justice observed: " .. it follows that we accept the wisdom of Furman that arbitrary and capricious infliction of death penalty is unconstitutional. However, we add that such arbitrariness and discrimination, which inevitably persists even under a statute which meets the demands of Furman, offends Article 26 of the Massachusettes Declaration of Rights." But we are not concerned here with the question as to whether the decision in Gregg's case represents the correct law or the decision of the Massachusettes Supreme Court in Watson's case. That controversy does not arise here because admittedly neither the Indian Penal Code nor any other provision of law sets out any aggravating or mitigating circumstance or any other considerations which must be taken into account in determining whether death sentence should be awarded or not. Here the sentencing discretion conferred upon the court is totally uncontrolled and unregulated or if I may borrow an expression from Furman's decision, it is 'standardless' and unprincipled'.

It is true that there are certain safeguards provided in the Code of Criminal Procedure, 1973 which are designed to obviate errors in the exercise of judicial discretion in the matter of imposition of death penalty. Section 235 sub section (2) bifurcates the trial by providing two hearings one at the pre-conviction stage and another at the pre- sentence stage so that at the second stage following upon conviction, the court can gather relevant information bearing on the question of punishment and decide, on the basis of such information, what would be the appropriate punishment to be imposed on the offender. Section 366 sub- section (1) requires the court passing a sentence of death

to submit the proceedings to the High Court and when such reference is made to the High Court for confirmation of the death sentence, the High Court may under section 367 direct further inquiry to be made or additional evidence to be taken and under section 368, confirm the sentence of death or pass any other sentence warranted by law or annual or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every reference so made, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such court consists of two or more judges, be made, passed and signed by at least two of them. Then there is also a proviso in section 379 which says that when the High Court on appeal reverses an order of acquittal and convicts the accused and sentences him to death, the accused shall have a right to appeal to the Supreme Court. Lastly there is an over-riding power conferred on the Supreme Court under Article 136 to grant, in its discretion, special leave to appeal to an accused who has been sentenced to death. These are undoubtedly some safeguards provided by the legislature, but in the absence of any standards or principles provided by the legislature to guide the exercise of the sentencing discretion and in view of the fragmented bench structure of the High Courts and the Supreme Court, these safeguards cannot be of any help in eliminating arbitrariness and freakishness in imposition of death penalty. Judicial ad hocism or waywardliness would continue to characterise the exercise of sentencing discretion whether the Bench be of two judges of the High Court or of two or three judges of the Supreme Court and arbitrary and uneven incidence of death penalty would continue to afflict the sentencing process despite these procedural safeguards. The reason is that these safeguards are merely peripheral and do not attack the main problem which stems from lack of standards or principles to guide the exercise of the sentencing discretion. Stewart, J. pointed out in Gregg's case (supra), "...the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." The first requirement that there should be a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence is met by the enactment of section 235 sub-section (2), but the second requirement that the sentencing authority should be provided with standards to guide its use of the information is not satisfied and the imposition of death penalty under section 302 of the Indian Penal "ode read with section 354 sub-section (3) of the Code of Criminal Procedure, 1973 must therefore be held to be arbitrary and capricious and hence violative of Articles 14 and 21.

There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death sentence has a certain class complexion or class bias in as much as it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows. Capital punishment, as pointed out by Warden Duffy is "a privilege of the poor." Justice Douglas also observed in a famous death penalty case "Former Attorney Pamsey Clark has said: 'it is the poor, the sick, the ignorant, the powerless and the hated who are executed'. "So also Governor Disalle of Ohio State speaking from his personal experience with the death penalty said:

> "During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless. There were other common denominators, low mental capacity, little or no education, few friends, broken homes-but the fact that they had no money was a principal factor in their being condemned to death..."

The same point was stressed by Krishna Iyer, J. in Rajendra Prasad's case (supra) with his usual punch and vigour and in hard hitting language distinctive of his inimitable style:

> "Who, by and large, are the men whom the gallows swallow. The white-collar criminals and the corporate criminals whose wilful economic and environmental crimes inflict mass deaths or who hire assassins and murder by remote control? Rarely. With a few exceptions, they hardly fear the halter. The feuding villager, heady with country liquor, the striking workers desperate with defeat, the political dissenter and sacrificing liberator intent on changing the social order from satanic misrule, the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife-driven by dire necessity or burst of tantrums-it is this person who is the morning meal of the macabre executioner."

> "Historically speaking, capital sentence perhaps has a class bias and colour bar, even as criminal law barks at both but bites the proletariat to defend the proprietariat a reason which, incidentally, explains why corporate criminals including top executives whom by subtle processes, account for slow or sudden killing of large members by adulteration, smuggling, cornering, pollution and other invisible operations, are not on the wanted list and their offending operations which directly derive profit from mafia and white-collar crimes are not visited with death penalty, while relatively lesser delinquencies have, in statutory and forensic rhetoric, deserved the extreme penalty."

There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.

Before I part with this topic I may point out that only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and

therefore, from a practical point of view death penalty would be almost nor-existent But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformative and rehabilitative therapy, he can never be reclaimed for the society, then he may be awarded death penalty. If this test is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands to-day.

This view taken by me in regard to the constitutional validity of the death penalty under Articles 14 and 21 renders it unnecessary for me to consider the challenge under Article 19 and I do not therefore propose to express any opinion on that question. But since certain observations have been made in the majority judgment of Sarkaria, J. which seem to run counter to the decisions of this Court in R.C Cooper v. Union of India (1) and Maneka Gandhi's case (supra). I am constrained to add a few words voicing my respectful dissent from those observations. Sarkaria, J. speaking on behalf of the majority judges has observed in the present case that the 'form and object test or 'pith and substance rule' adopted by Kania, C.J. and Fazal Ali, J. in A.K.. Gopalan v. State of Madras (supra) is the same as the 'test of direct and inevitable effect' enunciated in R.C. Cooper's case and Maneka Gandhi's case and it has not been discarded or jettisoned by these two decisions. I cannot look with equimanity on this attempt to resucitate the obsolute 'form and object test' or 'pith and substance rule' which was evolved in A.R. Gopalan's case and which for a considerable number of years dwarfed the growth and development of fundamental rights and cut down their operational amplitude. This view proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters and where the requirement of an Article dealing with a particular matter in question is satisfied and there is no infringement of the fundamental right guaranteed by that Article, no recourse can be had to a fundamental right conferred by another Article and furthermore, in order to determine which is the fundamental right violated, the court must consider the pith and substance of the legislation and ask the question: what is the object of the legislature in enacting the legislation; what is the subject matter of the legislation and to which fundamental right does it relate. But this doctrine of exclusivity of fundamental rights was clearly and unequivocally over-ruled in R.C. Cooper's case by a majority of the Full Court, Ray, J. alone dissenting and so was the 'object and form test' or 'pith and substance rule' laid down in A.K. Gopalan's case. Shah, J. speaking on behalf of the majority Judges said in R.C. Copper's case (supra) ".. it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."

> "We are of the view that the theory that the object and form of the State action determine the extent of pro-

> tection which the aggrieved party may claim is not consistent with the constitutional scheme...."
>
> "In our judgment, the assumption in A.K Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

This view taken in R.C. Cooper's case has since then been consistently followed in several decisions of which I may mention only a few, namely, Shambhu Nath Sarkar v. State of West Bengal (1); Haradhan Saha v. State of West Bengal;(2) Khudiram Das v. State of West Bengal (3) and Maneka Gandhi's case (supra). I cannot therefore assent to the proposition in the majority judgment that R.C. Cooper's case and Maneka Gandhi's case have not given a complete go by to the test of direct and indirect effect, some times described as 'form and object test' or 'pith and substance rule' evolved by Kania, C.J. and Fazal Ali, J. in A.K. Gopalan's case and that the 'pith and substance rule' still remains a valid rule for resolving the question of the constitutionality of a law assailed on the ground of its being violative of a fundamental right. Nor can I agree with the majority judgment when it says that it is Article 21 which deals with the right to life and not Article 19 and section 302 of the Indian Penal Code is therefore not required to be tested on the touchstone of any one or more of the clauses of Article

19. This approach of the majority judgment not only runs counter to the decision in R.C. Cooper's case and other subsequent decisions of this Court including Maneka Gandhi's case but is also fraught with grave danger inasmuch as it seeks to put the clock back and reverse the direction in which the law is moving towards realisation of the full potential of fundamental rights as laid down in R.C. Cooper's ease and Maneka Gandhi's case. It is significant to note that the doctrine of exclusi-

vity enunciated in A.K. Gopalan's case led to the property rights under Article 19(1)(f) and 31 being treated as distinct and different rights traversing separate grounds, but this view was over turned in Kochune's case (1) where this Court by a majority held that a law seeking to deprive a person of his property under Article 31 must be a valid law and it must therefore meet the challenge of other fundamental rights including Article 19(1)(f). This Court over ruled the proposition laid down in State of Bombay v. Bhanji Munji(2) that Article 19(1)(f) read with clause (5) postulates the existence of property which can be enjoyed and therefore if the owner is deprived of his property by a valid law under Article 31, there can be no question of exercising any rights' under Article 19(1)(f) in respect of such property. The court ruled that even io a law seeks to deprive a person of his property under Article 31, it must still, in order to be valid, satisfy the requirement of Article 19 (1)(f) read with clause (5). If this be the true position in regard to the inter-relation between Article 19 (1) (f) and Article 31, it is difficult to see why a law authorising deprivation of the right to life under Article 21 should not have to meet the test of other fundamental rights including those set out in the different clauses of Article 19. But even if section 302 in so far as it provides for imposition of death penalty as alternative punishment has to meet the challenge of Article 19. the question would still remain whether the 'direct and inevitable consequence' of that provision is to affect any of the rights

guaranteed under the Article. That is a question on which I do not wish to express any definite opinion. It is sufficient for me to state that the 'object and form test' or the 'pith and substance rule' has been completely discarded by the decision in R.C. Cooper's case and Maneka Gandhi's case and it is now settled law that in order to locate the fundamental right violated by a statute, the court must consider what is the direct and inevitable consequence of the statute. The impugned statute may in its direct and inevitable effect invade more than one fundamental right and merely because it satisfies the requirement of one fundamental right, it is not freed from the obligation to meet the challenge of another applicable fundamental right.

These are the reasons for which I made my order dated May 9, 1980 declaring the death penalty provided under section 302 of the Indian Penal Code read with section 354 sub-section (3) of the Code of Criminal Procedure, 1973 is unconstitutional and void as being 5 violative of Articles 14 and 21. I must express my profound regret at the long delay in delivering this judgment but. the reason is that there was a considerable mass of material which had to be collected from various sources and then examined and analysed and this took a large amount of time. B S.R. Appeal dismissed.