Supreme Court of India
Bachan Singh, Sher Singh And Anr. ... vs State Of Punjab And Ors. on 16 August, 1982
Equivalent citations: AIR 1982 SC 1325
Bench: P Bhagwati
JUDGMENT

1. These writ petitions challenge the constitutional validity of Section 302 of the Indian Penal Code read with Section 354, Sub-section (3) of the CrPC 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 CrPC 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 CrPC 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 Bernad 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 similar 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 10 of Mahabarata 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, 21 of the Constitution.

2. 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. 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 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 presidential 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 on "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, 264 US 646 : 68 Lawyers Edn. 219 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 painted 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 Worshiped 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 be effaced by the advancing tides. Some of them even go so far as to adjure us to give over the vain guest, to purge ourselves of these yearnings for an unattainable idea), 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 ourselves 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 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. 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 CrPC 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 5 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 CrPC 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 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 CrPC 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 Covenant 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).

3. 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 answer. 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 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 50 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 Ors. v. State of Punjab 1979 (3) SCR 1959 "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 a question of constitutional interpretation, it is as important to a Judge :

...to have at least 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.

4. 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 of 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 1978. 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.

5. 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 individual'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 40 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 restricting its apply 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 2200 (XXI) 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 Convenant 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 authorize any State Party to the present Convenant to derogate in any way from any obligation assumed under the provision 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 Covenant.

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.

6. So deep and profound was the United Nation's concern with the issue of death penalty that the General Assembly in its resolution 1396 (XIV) of 20th 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 was prepared by the noted French Jurist Marc Ancel. The report entitled "Capital Punishment" was the first major survey of the problem from 50 an international standpoint 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 demonstrated." This view had been expressed not only by abolitionists countries in their replies to the questionnaires but also by some retentions countries. The Ancel report along with 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 t 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 40 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".

(Emphasis supplied.)

7. 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 reaffirmed "the desirability of abolishing this" that is capital "punishment" in all countries.

8. 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.

9. 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 center 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 arid spiritual development would be meaningless and ineffectual unless there is rule of law to invest them with life and force.

10. 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 law 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 10 where the political set up is dictatorial, it is law that governs the relationship between men and men and between men arid 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 a 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 Fundamental 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.

11. 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 Minerva Mills case 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 45 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.

12. This view was reaffirmed by the Court in another outstanding decision in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 CSR 1014 There, tenders were invited by the Airport Authority for giving a contract for running a canteen at they 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 court held that the action of the Airport Authority was illegal. The court pointed out that a new form of property consisting of government largesse in the shape of jobs, contracts, 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.

13. 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 person 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 rove 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.

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, Temper, 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 some times even tries to discover the policy of 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 45 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.

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.

15. 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 a most astonishing development of the law. It is with this decision that the Court burst forth into unprecedented creative activity and gave to the law a new dimension 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 35 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 (1950) SCR 88 the law provided that the Bishop of Rochester be boiled in oil, 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 person of his" life or personal liberty must be reasonable, 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 his life-and 'life' according to the decision of this Court in Francis Coralie Mullen's v. Administrator, Union Territory of Delhi and Ors. 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.

16. It will thus be seen that 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 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 chains of the Constitution; and lastly there must be an independent judiciary 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, 40 or Article 21, whichever be applicable.

17. 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 CrPC is constitutionally valid. Now one thing is certain that 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. 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, 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 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 CrPC.

18. 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 endeavors will, as pointed out by Krishna Iyer, J. in Rajendra Prasad v. State of U.P. (1979) 3 SCR 646 "serve to indicate whether! the people's consciousness has been projected 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 30 Code and the CrPC, 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 has shifted the punitive center of gravity from life taking to life sentence. Sub-section (5) of Section 367 of the CrPC 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 sentence 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 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 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 CrPC 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 cautious abolition.

19. 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 imposing 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 CrPC 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 constitutionality on the ground that it still leaves the door open for arbitrary exercise of discretion in imposing death penalty.

20. 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 man 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, 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. Bloodthirsty and calculated revenge with no temporary insanity on the part of the judges, and therefore, shameful and disgusting.

Tolstoy also protested against death sentences 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 the 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 evildoers 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?

21. 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 dispatches him to that 'undiscovered country from whose bourn no traveller returns' nor, once executed, 'can storied urn or animated bust back to its mansion call the fleeting breath.' It is by reasons 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 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. 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 Lafavatte said: "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated me."

22. It is argued on behalf of the retentions 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 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 infinitively high. When Huge 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 forever. 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.

23. 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.

24. 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? Bat 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 beset 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 J 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 its constitutional validity.

25. 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 experimental stress 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 408 US 238 408 US 238 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 35 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 It self and the pain incident thereto, but also in the dehumanizing 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 136 us 436 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 134 US 160 that "when a prisoner sentenced by a court to death is confined to the 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." He acknowledged that such uncertainty is inevitably 'accompanied by an immense mental anxiety amounting to a great increase of the oflender's punishment.'

26. 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 President and if it is turned down, then until the time appointed for the 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 cruelly 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.

27. 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, 13 the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. 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 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 measurements 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 that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder ard 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 considerable 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.

28. 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.

29. 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 CrPC 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 petitioners contended that the imposition of death penalty under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC 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 argument 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 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 paragraph.

30. 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 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 10 not covered by any of the permissive clauses. This view as to the onus of proof was reiterated by this Court in Khyerbari Tea Co. v. State of Assam . 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 where Krishna Iyer, J. speaking on behalf of himself and Beg, J. as he then was, recalled the following statement of the law from the judgment of this Court in Ram Krishna Dalmia v. S.R. Tendolkar and Ors.: 1959 SCR 297 there is always a presumption 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 1957 SCR 874 the learned Judge again emphasized:

Some courts have gone to the extent of holding that their 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.

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 Article 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, T. 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 Sagir Ahmed's case and Khyerbari Tea Company's case (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 "excessive ness 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).

31. The respondents also relied on the observations of Fazal Ali, J. in Pathumma v. State of Kerala (1970) 2 SCR 537. 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 1959 SCR 629 1959 SCR 629:

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 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 Sagir Ahmed and Khyerbari Tea Company's cases (supra), It is clear on first principle that Sub-clauses (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 sub-clause 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, 20 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 35 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 (1952) SCR 597 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.

32. Before I proceed to consider the question of burden of proof in case of challenge under Article 14, it would be convenient first, to 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. he 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 right 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, ft 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 50 justify imposition of death penalty. 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 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 CrPC would have to be struck down as violative of the protection of Article 21.

33. 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. Hunnif Qureshi's case (supra) and several other subsequent decisions of this 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 discriminatory 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 constitutionality "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 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 30 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, 'jusdicere 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 a 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 jusdicere, that, as pointed out by David Pannick in his "Judicial Review of the Death Penalty," "we have, to a substantial extent, ignored the Judge in administering the judicial process. So heavy a preoccupation we have made with the law, its discovery and its application by independent 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 eunuchs 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 subconsciously, 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 CrPC 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.

34. Now it is an essential element of the rule of law that the sentence 45 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 Article 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.

35. The Courts in the United States have also recognised the validity of the proportionality principle. In Gregg v. Georgia 428 US 153 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 433 US 584 to invalidate the death penalty for rape of an adult woman. White, 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 438 US 586 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 basis of the reasoning in these three American decisions, the principle of proportionality 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 70 DLR (3d) 324 the principle of proportionality has been recognised by Laskin CJ. speaking on behalf of Canadian Supreme Court as "one of the constitutional criteria of 'cruel and unusual treatment or punishment' prohibited 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 Section 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 Section 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 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.

36. 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 not a 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 2E. H.R.R.I. (1978) 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 1 need not repeat that the international standard or norms 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 evolving 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 my self 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.

37. 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 Rajendra 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, catalyzed by the Buddha-Gandhi compassion.... Many humane movements and sublime souls have cultured the higher consciousness of mankind," and emphasized the reformatory potential in every man. 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 norm 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 personality 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 along with basic human dignity is highly prized and cherished and torture and cruel or inhuman 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 ethics. 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 soul-force 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 Vinoba 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 committed by them and the imposition of death penalty on them. 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 CrPC 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 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 Hamlet or Parasurama. He might have been an angelic boy but thrown into mafia company or inducted into dopes and drugs by parental neglect or morally-mentally 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. Maybe, 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 Anamrna (supra) has hardened here. But 'murder most foul' is not the test, speaking scientifically. The doer may be a patriot, a revolutionary, a weak victim of an overpowering passion who, given better 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 proposition which 1 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.

38. I will now examine whether death penalty for the offence of murder serves any legitimate social purpose. There are three justifications 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 end of punishment.

It would be convenient first to examine the constitutionality of death penalty with reference to the reformatory 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 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 certainty 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, lo± [kyq bna czã] 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 Brahman; 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 murders 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 experience as well as faith and to legitimise 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 alter 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 penalty 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 "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 are 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.

39. I will now turn to examine the constitutional 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 extent 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 be 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 45 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, some times, 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 regard 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 the 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 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 Iry 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? 45 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 regenarated. 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 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 Budha and Gandhi. The law of Jesus must prevail over the lex tallionis of Moses, "Thou shalt not kill" must pen logically 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 long as the offender can be reformed through the rehabilitate 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 constitutional 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 his kind as ve`rL; iq=k% that is, "children of Immortality," it is difficult to appreciate how 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.

40. 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 1 N.Y. 2dd. 152 :

The punishment or treatment of offenders is directed toward one or more of three ends : (1) 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 "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."

41. 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."

42. The reason for the general rejection of retribution as a purpose of the criminal system has been stated concisely by Professors Mechael 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 part of 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 their lurks a tiny Stone Age man, dangling a club to robe and rape, and screaming an eye for 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 Article 14 and 21.

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

44. 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 un willingness to abandon this retributive instinct and seek to justify the death penalty by attributing 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. 0' Neal (No. 2) 339 N.E. 2d 675 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 Massachusettes 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 that 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.

45. 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 civilized country like England, death penalty was awardable even for offences like shoplifting, 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 ground 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 commission 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 with

draw 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 supertitious 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 40 death penalty has any additionally deterrent effect not possessed by life sentence. Arther 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 surrounding 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 25 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 New Zealand 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 neighbouring 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 neighbouring 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 states, which are abolition and which are retention states; this indicates that capital crimes are dependent upon factors other than the mode of punishment.

46. 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."

47. 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.

48. 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 Queensland 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) Wildconcin Law Review 703 namely, that "given the preponderance of evidence, 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." 1 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 Massachusetes Special Commission Relative to the Abolition of the Death Penalty in Capital Cases, "The use of the Death Penalty-Factual Statement" by Walter C Reckless, "Why was Capital Punishment resorted in Delware" 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, Void and "Findings en Detterence 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 Kcestler 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 the 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 possess and that in any event there is no evidence at all to suggest that penalty has any such special deterrent effect.

49. 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 Capital 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 Capital 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 of murder did not increase at all during the period of six years when the capital punishment was in abeyance. This is in line with the experience of other countries where death penalty has been abolished.

50. 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 crime rate. His paper was catapulted into the center 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 Carolina 96 S.C.R. 3212 (1976) and delivered copies of it to the court. The Solicitor General called it an "important empirical support for the a priori logic belief that use of the death penalty decreases the number of murders." In view of the evidence available up to 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.

51. 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 logarithmic form and in the more conventional linear regression framework, 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 Passell Taylor finding 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 criticisms 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."

52. 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.

53. 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.

54. By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went onto reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable reflecting 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.

55. Klein also found Ehrlich's results to be affected by an unusually 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."

56. 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 sharps 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.

57. I may also at this stage refer once again to the opinion expressed 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 Sri 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 of protracted imprisonment.

It is a strange irony of faith 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.

58. 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 be cause 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 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.

59. 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 note able 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 penologist?, 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 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 35 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 tenors 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 Fitz 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 or 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 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 deterrent 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 can 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 CrPC, 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 5 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 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 30 (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. New, according to the statistical information supplied by the Government of India, out of these approximately 85000 cases 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 infinite singly small number of cases, only 29 out of an aggregate number of approximately 85COO 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 State of 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 CrPC 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 what-ever 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.

60. 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 view which is entertained by quite a few lawyers, judges and legislators with out any scientific investigation or empirical 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 not 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 and 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." Tt 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 case is that death penalty has. no 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."

61. 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 inconclusive 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 asentinal 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 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.

62. 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 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) 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 acts as a deterrent. The statement made in Clause (b) is perfectly correct and I agree with the 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 send 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 evidentiary 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 can not 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 Stale, it must be 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.

63. 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 need 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 the 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 counteract 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 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 CrPC 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.

64. 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 CrPC, 1973 does not sub-serve any legit mate 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.

65. 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 CrPC, 1973 on the ground that these sections confer an unguided and standardl ess 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 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 the 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 Jong 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 CrPC 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 I 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 I Commission on Capital Punishment:

I myself think that the bench-we lawyers who become 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, 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." 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 tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and 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 James'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 may try to see things as objectively as we please. Nonetheless, 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 predispositions and the process of education, formal and informal, and, our own subjective experiences create attitudes which affect 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 emotionless human being.

It must be remembered that "a Judge does not shed the attributes of common humanity when he 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 preconceptions, 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 Naxalites 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.

66. 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 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 preceptions, 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, the 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 observed that according to these statistics "the preponderance from November 1972 to January 1973 of the Benches consisting of Justice Vaidialingam, Dua and Alagiriswamy may have been unfortunate for the appellants involved." 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 CrPC 1973. If a similar exercise is performed with reference to cases decided by the Supreme Court after 8th March 1976, that being the date up to which the survey carried out by Prof. Blackshield was limited, the analysis will reveal the same pattern of incoherence and arbitrariness, the decision to kill or not kill being guided to a large extent by the composition 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, . when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasarn, 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. stuck to the original view taken by him in Rajendra Prasad'scase 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. If for example Justice A.P. Sen and Justice Kailasam had constituted the Bench hearing Rajendra Prasad's case, then without meaning the slightest disrespect to these two eminent Judges, one can hazard a guess that perhaps the death sentence of Rajendra Prasad would have been confirmed.

67. 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 16th 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 A.N. 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 CrPC 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

68. 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 justfication 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 canalize 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 Me Gautha v. California 402 US 183 the difficulty of formulating standards or guidelines for canalizing 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 inconsistent 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 up to 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," "heinous" or "violent". But the use of these labels for describing the nature of the murder is indicative only of the degree of the courts' 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 awarded on the basis of constructive or joint liability arising under Sections 34 and 149. Vide: Babu v. State of U.P. 1965 Criminal Law Journal SC 539 Mukhtiar Singh v. State of Punjab 1965 Criminal Law Journal SC 1298 Masalt v. State of U.P. 1965 Criminal Law Journal SC 226 Gurcharan Singh v. State of Punjab 1973 Criminal Law Journal SC 323 But, there are equally a large number of cases where death sentence has not been awarded because the criminal liability of the accused was only under Section 34 or Section 149. There are no established 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 commuting 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 such cases as State of U. P. v. Suman Das 1972 Criminal Law Journal SC 489 : Raghubir Singh v. State of Haryana and Gurudas Singh v. State of Rajasthan 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 Swamp v. State of U.P. 1971 Criminal Law Journal SC 413 and Raghomani v. State of U.P. 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 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 Anamma v. State of Andhra Pradesh Chawla v. State of Haryana, Raghubir Singh v. State of Haryana (supra) Bhur Singh v. State of Punjab State of Punjab v. Hari Singh and Gurudas Singh v. State of Rajasthan 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 months the specter of death penalty must have been to impending 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. Bharmal Mapa v. State of Bombay 1960 Criminal Law Journal SC 494 1955 Criminal Law Journal SC 873. 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 importance should be given to the factor of delay and if so to what extent are matters entirely within the discretion 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 corollary 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 while in Lajar Masih v. State of U.P it has been condemned and in effect treated as an aggravating factor. There is thus no uniformity of approach even so far as this factor is concerned.

69. All these factors 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."

70. 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 decisions in Ediga Anamma's case, where this Court had to choose between life and death under Section 302 of the Indian Penal Code. The cases subsequent to the decision in Ediga Anamma's case have been chosen for study and analysis presumably 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 Black shield, 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 contradictions and inconsistencies in the matter of imposition of death penalty. This is how the learned author has summed up his conclusion after an examinations 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 Funman 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.

71. I may point out that Krishna Iyer, J. has also come to 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 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 offender 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, pro vocations, 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 some times upset by the Supreme Court because of law's delays. Courts have even directed execution of murderers who are mental cases, who do not fall within the McNaughten rules, because of the insane fury of the slaughter. A big margin of subjectivism, a preference for old English precedents, theories of modern penoJogv, behavioral emphasis or social antecedents, judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as part of history-this 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.

72. 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 pre-determined 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 has 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 channeling such discretion, cannot be regarded as arbitrary or unreasonable. This argument, plausible though it may seem, is in my opinion not well founded and must be rejected. It is true that criminal cases do not fall into set behaviorist patterns and it is 10 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 stratagem 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 a 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 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. 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 of men and it makes no difference in the application of this principle, 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 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 obligates 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 undeterred 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 unprincipled 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 imprisonment.

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.

73. The respondents however contended 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 the court but they are standards or principles enunciated by the legislature 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 (he 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 thermo meter be devised to measure its degree ?

This passage from the majority judgment provides a most complete and conclusive answer to the contention of the respondents 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 to judge having regard to his attitude and appproach, his predilections and prejudices and his scale of values and social

philosophy.

74. 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. Marshal], 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 Mullan'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 discriminatory" 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 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 counterproductive is unarguably unreasonable and arbitrary and is shot down by Article 15 and 19....

It should be clear from these observations in Sunil Batra's case to which Chandrachud, 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 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.

75. 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 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 the correctness of this decision, because in their view the guidelines 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 Massachu-settes, the Supreme Court of Massachusettes by a majority held in District Attorney for the Suffolk District v. Watson Mass Adv. Sh. (1980) 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 50 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 channeled 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 'standard less' and 'unprincipled.'

76. It is true that there are certain safeguards provided in the CrPC, 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 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 annul 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 provision in Section 369 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 way worldliness 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 affect is 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 Code read with Section 354 Sub-section (3) of the CrPC, 1973 must therefore be held to be arbitrary and capricious and hence violative of Articles 14 and 21.

77. 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 inasmuch 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 Ramsey 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 liguor, 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 proprietary 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.

78. Before I part with this topic I may point out that the 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 en bane 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 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 non 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.

79. 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 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 AK. 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 equipment on this attempt to resuscitate the obsolete 'form and object test' or 'pith and substance rule' which was evolved in A.K. 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. Cooper'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 protection 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 RC 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 Haradan Saha v. State of West Bengal Khudham Das v. State of West Bengal and Maneka Gandhi's case (supra). I cannot therefore assent to the proposition in the majority judgment that RC Cooper's case and Mancka 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, CJ. 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 case and Maneka Gandhi's case. It is significant to note that the doctrine of exclusivity 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 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 overruled the proposition laid down in State of Bombay v. Bhanji Munji that Article 19(1)(f) read with Clause (5) postulates the existence of property which can be enjoyed and there fore 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 if 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 that 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 (he decisions in RC 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.

80. 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 CrPC, 1973 as unconstitutional and void as being 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 collected from various sources and then examined and analysed and this took a large amount of time.