PETITIONER:
RAJENDRA PRASAD ETC. ETC.

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT09/02/1979

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
DESAI, D.A.
SEN, A.P. (J)

CITATION:
1979 AIR 916 1979 SCR (3) 78
1979 SCC (3) 646
CITATOR INFO :
R 1979 SC 964 (1,23,27,28,29)
E 1979 SC1384 (2,10,11,13,14,15,20,22,23,24,
O 1980 SC 898 (4,5,6,7,8,142,198,202)
MR 1982 SC1325 (19,20,26,38,40,61,67,72,78)
RF 1983 SC 361 ((2)10)

ACT:
Penal Code-5. 302-Scope of-death Sentence-When should be award

HEADNOTE:
(Per majority-Krishna Iyer and Desai, JJ.)
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1. The only question before the Court is as to when and why shall capital punishment be pronounced on a murderer and why not in other cases, within the confines of the Code. Urgency to the solution is obvious. The overt ambivalence and covert conflict among judges concerning continued resort to the death sentence mirrors the uncertainties and conflicts of values in the community itself. [89G & 90D]
2. Section 302 of the IPC throws little light on when the court shall be the sentence of why the lesser penalty shall be preferred. Since law reflects life, new meanings must permeate the Penal Code. Deprivation of life under our system is too fundamental to be permitted except on the gravest ground and under the strictest scrutiny. [90F: 94C-D]
3. To say that discretion of the Judge passing the sentence under s. 302 IPC is guided by well-recognised principles shifts the issue to what those recognised rules are. The big margin of, subjectivism. a preference for old precedents, theories of modern penology, behavioral emphasis or social antecedents, judicial hubris or human rights perspectives, reverence for outworn social philosophers-this plurality of forces plays a part in swining the pendulum of sentencing justice erratically. Until Parliament speaks, this Court cannot be silent. [95; 97G]
4. Executive commutation is no substitute for judicial justice, at best it is administrative policy and at worst pressure-based partiality. The criteria for clemency are often different [99C]

5. In so far as s. 302 IPC is concerned several attempts had been made to restrict or remove death penalty but never to enlarge its application. Parliamentary pressure has been to cut down death penalty, although the section formally remains the same. In the case of the Criminal Procedure Code the legislative development has shifted the punitive centre of gravity from life taking to life sentence. In other words, the legislative trend seems to be while formerly the rule was to sentence to death a person who is convicted for murder, it is now to impose a lesser sentence for reasons to be recorded in writing. Formerly, capital punishment was to be imposed unless special reasons could be found to justify the lesser sentence. After 1955 courts were left equally free to award either sentence. The 1973 Code has made an an mistakable shift in legislative emphasise under which life imprisonment for murder is the rule and capital sentence the exception for reasons to be stated. [101D:104B-C]

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6. Criminologists all the world over, however, argued that death has decisively lost the battle, and even in our Codes it has shrunk into a weak exception. What are the exceptional cases ? 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 man or the convict's poverty might be responsible for the crime. [106G: 107B]

7. In the post Constitution period s. 302 IPC and s. 345(3) of the Cr. P.C. have to be read in the humane light of Parts III and IV illumined by the Preamble to the Constitution. In other words the sacrifice of a life sentence is sanctioned only if otherwise public interest and social defence and public order would be smashed irretrievably. Such extraordinary grounds alone constitutionally qualify as special reasons. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing may be. The searching question the Judge must put to himself is what is so-extra-ordinarily reasonable as to validate the wiping out of life itself and with it the great rights which inhere in him in the totality of facts. [121F; 110E-F]

8. The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal penacea. [122C]

9. The current ethos, with its strong emphasis on human rights and against death penalty, together with the ancient strains of culture spanning the period from Buddha to Gandhi must ethically inform the concept of social justice which is a paramount principle and cultural paradigm of our Constitution [l22C-D]

10. The personal and social, the motivational and physical circumstances, of the criminal are relevant factors in adjudging the penalty as clearly provided for under the Code of 1973. So also the intense suffering already endured by prison torture or agonishing death penalty hanging over head consequent on the legal process. [112D-El

11. Although the somewhat obsolescent Mc'Naughten Rules codified in s. 84 of the Penal Code alone are exculpatory, mental imbalances, neurotic upsets and psychic crises may be extenuatory and the sense of diminished responsibility may manifest itself in judicial clemency of commuted life incarceration. [l22F]

12. The social justice which the Preamble and Part IV (Art. 38) highlight, as paramount in the governance of the

country has a role to mould the sentence. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated. One test for imposition of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. Some of the principles are-never hang unless society or its members may lose more lives by keeping alive an irredeemable convict. Therefore social justice projected by Art. 38 colours the concept of reasonableness in Art. 19 and non-arbitrariness in Art. 14. This complex of articles validates death penalty in limited cases. Maybe train dacoity and bank robbery bandits reaching menacing proportions, economic offenders profit killing in an intentional and organised way, are such categories in a Third World setting. [112D: 114C: 112G]
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13. Survival of an orderly society without which the extinction of human rights is a probability compels the higher protection of the law to those officers who are charged with the fearless and risky discharge of hazardous duties in strategic situations. Those officers of law, like policemen on duty or soldiers and the like have to perform their functions even in the face of threat of violence, sometimes in conditions of great handicap. If they are killed by designers of murder and the law does not express its strong condemnation in extreme penalisation, justice to those called upon to defend justice may fail. This facet of social justice also may in certain circumstances and at certain stages of societal life demand death sentence. [123D-E]

14. Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. [124E]

Jagmohan Singh v. State of U.P., [1973] 1 SCC 20; Ediga Annama v. State of A.P., [1974] 4 SCC, 443; Sunil Batra v. Delhi Admn., [1978] 4 SCC 494 at 569 & 572; referred to.

Capital punishment in India; The Impact of the Ediga Anamma, by Prof. A. R. Blackshield-(July 1977), referred to.

Rajendra Prasad's case:

The family to which the appellant and the deceased belonged were on inimical terms. The appellant who was the son of one of the families murder ed the deceased. After some years in the prison, he was released on Gandhi Jayanti day. On return some minor incident ignited his latent feud and he stabbed to death a friend of the opposite family, he was sentenced to death.

The second murder is not to be confounded with the persistent potential for murderous attacks by the murderer. This was not-a menace to the social order but a specific family feud. Here was not a youth of controllable violent propensities against the community but one whose paranoid preoccupation with a family quarrel goaded him to go the rival. So long as the therapeutic processes are absent from prisons these institutions, for from being the healing hope of society, prove hardening schools to train desperate criminals. Desperate criminal is a convenient description to brand a person. Seldom is the other side of the story exposed to judicial view. There is nothing on record to suggest that the appellant was beyond redemption; nothing on record hints at any such attempt inside the prison. The appellant showed no incurable disposition to violent outbursts against his fellow-men. There is therefore, no special reason to hang him. He should be awarded life imprisonment.

Kunjukunju's case:

The appellant, a married man with two children, developed illicit sex relations with a fresh girl. In order to win her hand he murdered his wife and two children. There is no evidence to show that he was a desperate hedonist or randy rapist. He is not a social security risk altogether beyond salvage by therapeutic life sentence. Death sentence is commuted to life imprisonment.

Dubey's case:

The appellant, a young man, aged about 20, stabbed to death three members of the family with whom his family had a quarrel over partition of

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property. It is illegal in this case to award capital sentence without considering correctional possibilities inside prison. He was not a murderer born but made by the passion of family quarrel. He could be saved for society with correctional techniques and directed into repentance. A family feud, an altercation, a sudden passion, although attended with extraordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstance that the assailant is a habitual murderer or given to chronic violence-these catenate of circumstances bearing on the offender call fol the lesser sentence.

Sen l. (Dissenting)

1. (a) It is constitutionally and legally impermissible for the Supreme Court while hearing an appeal by special leave under Art. 136 of the Constitution, on a question of sentence, to restructure s. 302 of the Indian Penal Code, 1860 or s. 354, sub-s. (3) of the Code of Criminal Procedure 1973, so as to limit the scope of the sentence of death provided for the offence of murder under s. 302. [131F-G]

(b) The question whether the scope of the death sentence should be curtailed or not, is one for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of statesmen and, therefore, properly the domain of the legislature, not the judiciary. [137E]

(c) In an appeal confined to sentence under Article 136 of the Constitution, Supreme Court has not only the power but as well as the duty to interfere if it considers that the appellant should be sentenced 'differently', that is, to set aside the sentence of death and substitute in its place the sentence of imprisonment for life, where it considers, taking the case as a whole, the sentence of death to be erroneous, excessive or indicative of an improper exercise of discretion; but at the same time, the Court must impose some limitations on itself in the exercise of this broad power. In dealing with a sentence which has been made the subject of an appeal, the Court will interfere with a sentence only where it is 'erroneous in principle'. The question, therefore, in each case is whether there is an 'error of principle' volved.[134G-Hl

(d) The Court has the duty to see that on the particular facts and circumstances of each case the punishment fits the crime. Mere compassionate sentiments of a humane feelings cannot be a sufficient reason for not confirming a sentence of death but altering it into a sentence of imprisonment for life. In awarding sentence, the Court must, as it should, concern itself with justice, that is, with unswerving obedience to established law. It is, and must be, also concerned with the probable effect of its sentence both on the general public and the culprit. Judges are not concerned with the morales or ethics of a

punishment. It is but their duty to administer the law as it is and not to say what it should be. It is not the intention of the Supreme Court to curtail the scope of the death sentence' under s. 302 by a process of judicial construction inspired by the personal views [35B: 137D-E]

2. It is also-not legally permissible for this Court while hearing an appeal in a particular case where a capital sentence is imposed, to define the expression "Special reasons" occurring in sub-s. (3) of s. 354 of the Code, in such

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JUDGMENT:

virtually has the effect of abolishing the death sentence. [137H]

(a) Under s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973, the Court is required to state the reasons for a sentence awarded, and in the case of imposition of a sentence of death the Judge has to record "special reasons" for imposing death sentence. Punishment for murder as a rule should be life imprisonment and death sentence is only an exception. [l59A]

(b) It is neither feasible nor legally permissible for this Court to give a definite connotation to the expression "special reasons" occurring in s. 354 sub-s. (3) of the Code of Criminal Procedure, 1973. It is difficult to put "special reasons" in a straight-jacket. Each case must depend on its own particular facts. The question of sentence must be left to the discretion of the Sessions Judge trying the accused. Under the present Code, a trial for murder is divided into two stages. There is a bifurcated trial. The first part of the trial is directed solely to the issue of guilt or innocence, and concludes with the finding of the Sessions Judge on that issue. At the end of the trial when he comes to a conclusion of guilt, he has to adjourn the case for hearing the accused on the question of sentence. [159C-D]

Section 235, sub-s. (2) of the Code specifically provides for an opportunity of hearing to the accused on the question of sentence after a verdict of guilt is recorded against him. The burden is upon the prosecution to make out a case for imposition of the extreme penalty. Where a sentence of death is passed, the Sessions Judge has to make a reference to the High Court under s. 366, sub-s. (1) of the Code. Under s. 367, sub-s. (1) if the High court thinks a further inquiry should be made into, or additional evedence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Sessions. In a case submitted under s. 366, the High Court under s. 368(a) may either confirm the sentence, or pass any other sentence, i.e. reduce the sentence of death into a sentence of imprisonment for life. thereafter an appeal lies to this Court by a special leave under Article 136 on the question of sentence. [159E-H]

Failing the appeal, there is the President's power to grant reprieve and pardon under Article 72 (1), as well as the Governor's power of commutation under Article 161 of the Constitution which is a sovereign function. The power of the President and of the Governor to grant reprieves and pardons is wide enough to include the power to commute and to remit sentence of punishment. All cases of capital punishment are closely scrutinised by the Executive at both the levels to see whether there are such extenuating circumstances as would justify a reprieve, and the power to commute a death sentence is freely exercised, whenever there is some doubt as to the severity of the punishment. Under the present

system the Prerogative of Mercy in the case , of persons under sentence of death works well and it produces results gene rally regarded as satisfactory. It helps in mitigating the rigour of the death sentence, particularly in case of those murderers whose execution would offend the public conscience. Very few persons under a sentence of death-may be one or two in a year, in a State are usually executed. It is, therefore, not proper for the Court to trench upon the President's or the Governor's perogative to grant pardon or reprieve under Articles 72(1) and 161 in taking
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upon itself the task of commutation of a death sentence, which is properly imposed, in the facts and circumstances of a particular case, merely because there is a doubt that the Executive may commute the sentence ultimately, or by one's views as to the utility of death penalty. [160A-E]

Balwant Sing case [1976] 2 SCR 684; Ambaram's Case 11974] 4 SCC 298 and Sarveshwar Prasad Sharma's case 11978] 1 SCR 360; referred to.

(c) Judges are entitled to hold their own views, but it is the bounden duty of the Court to impose a proper punishment, depending upon the degree of criminality and the desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders. It is only in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience that the Court has the power, as well as the duty, to impose the death sentence. In view of these adequate safeguards, it can hardly be asserted that the sentence of death provided for an offence of murder punishable under s. 302, is 'dehumanizing' or that it is 'unnecessary'. Where the crime is cruel and inhuman a death sentence may be called for. [160F-H]

Ediga Anamma, [1974] 4 S.C.C. 443; Bishan Das & Ors. [1975] 3 S.C.C. 700; referred to.

(d) If Parliament thought it right to give to the Judges discretion as to the sentence, they would not or ought not to shrink from their onerous responsibility. It would not be appropriate to curtail the ambit of their discretion by judicial process. A sentence of a wrong type, that is, to substitute a sentence of imprisonment for life where the death sentence is called for, causes grave miscarriage of justice. A sentence or pattern of sentences which fails to take due account of gravity of the offence can seriously undermine respect for law. [164E-F]

(e) In the three cases there were 'special reasons' within the meaning of s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973 for the passing of the death sentence in each and, therefore, the High Courts were justified in confirming the death sentence passed under s. 368(a) of the Code. Indeed, they are illustrative of the rate type of cases, that is, first degree murders, where a death sentence is usually awarded in any civilised country. These were cases of diobolical, cold-blooded brutal murders of innocent persons, that is, first degree murders of extreme brutality or depravity. The inhumanity of some of the offences defied belief Any interference with the sentence of death, would be wholly unwarranted in each case. [l64G]

(f) It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders. Failure to impose a death sentence in such grave cases where it is a crime against the society-particularly

in cases of murders committed with extreme brutality, will bring to nought the sentence of death provided for by s. 302 of the Indian Penal Code, 1860. To allow the appellants to escape with the lesser punishment after they had committed such intentional, cold-blooded deliberate and brutal murders will deprive the law of its effectiveness and result in travesty of justice. [l68A-B]
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(g) In these appeals it cannot be asserted that the award of death sentence to the appellants was "erroneous in principle". Nor can it be said that the sentence of death passed on them was arbitrary or excessive or indicative of an improper exercise of discretion. [167H]
(i) Rajendra Prasad's case is destructive of the theory of reformation. The 'therapeutic touch' which it is said is the best way of preventing repetition of the offence has been of no avail. Punishment must be designed so as to deter, as far as possible from commission of similar offences. It should also serve as a warning to other members of society. In both respects, the experiment of reformation has miserably failed. There is no doubt, with the commutation of his death sentence, the accused will commit a few more murders and he would again become a menace to the community. [165G]
(ii) In Kunjukunju Janardhan's case the accused, who acted as a monster, did not even spare his two innocent minor children in order to get rid of his wife and issues through her. The death sentence was the only and appropriate penalty which should be awarded in such a case. [166D]
(h) There is no inexorable rule that either the extreme youth of the accused or the fact that he acted in a heat of passion must always irrespective of the enormity of the offence or otherwise be treated as a sufficient ground for awarding the lesser punishment. The Court has to take into consideration all the circumstances which do not merit the extreme penalty. In the facts and circumstances of this particular case i.e. Sheo Shanker . Dubey's case these factors cannot outweigh other considerations. Three precious lives have been lost by the dastardly act of the accused. A family has ' been wiped off. The death sentence was clearly called for in this case-E firstly, as a threat or warning to deter potential murderers, and secondly as the guarantee against the brutalisation of human nature. All facts and circumstances, constitute 'special reasons' why the accused should be sentenced to death. [167E-Fl
3. It cannot be said that imposition of death penalty, except in the classes of cases indicated in the majority Judgment would be violative of Articles 14,19 and 21 of the Constitution. Such a question really does not arise forconsideration. [136G]
(a) The citizen's right to life and personal liberty are guaranteed by Article 21 of the Constitution irrespective of his political beliefs, class, creed or religion. The Constitution has, by Article 21 itself forged certain procedural safeguards for protection to the citizen of his life and personal liberty. The idealistic considerations as to the inherent worth and dignity of man is a fundamental and prevasive theme of the Constitution, to guard against the execution of a citizen for his political beliefs. [136C-D]
(b) A patriot cannot be equated with an ordinary criminal. A humanistic approach should not obscure one's sense of realities. When a man commits a crime against the society by committing a diabolical, cold-blooded, pre-planned murder, of an innocent person the brutality of which

shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life. [136E3]

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Jagmohan Singh v. State of U.P. [1973] 2 S.C.R. 541 followed.

Furman v. Georgia, 408 U.S. 238, 33 L. ed, 2nd 346 explained and differed from.

Michael de Freites v. Gaorgie Ramouter Benny, L.R. [1975] AC 39; quoted with approval.

(c) If the Courts were to be guided by the classification for inflicting death penalty only in the case of three categories of criminals, namely, (i) for white collar offences (ii) for anti-social offences, and (iii) for exterminating a person who is a menace to the society, that is, a 'hardened murderer', the death sentence for an offence of murder punishable under section 302, for all practical purposes would be virtually non-existent. Unfortunately our penal laws do not provide for death sentence for either white collar crimes or anti-social offences. As regards 'hardened' murderers, there are few to be found. Many murders unfortunately go undetected and many a brutal murderer has to be acquitted for want of legal evidence bringing his guilt beyond reasonable doubt. Nevertheless, when the guilt is proved, the Court should leave aside all humanitarian considerations if the extreme penalty is called for. A 'professional' murderer must, as matter of course, be sentenced to death because he is menace to the society. Whatever sympathy the Court can have should be reserved for the victims of the crime rather than for the perpatrators. In such cases, the law must take its course. [162B-E; 163C-D]

4. The criminality of a crime consists not only in the criminal act but in what that signifies. Its immediately apparent features, the obvious damage to person or property or to public security, are symptoms of a deeper disorder. It betokens, and it fosters, an attitude in man to man, of reckless selfishness, decit or malice, which is incompatible in the long run with any decent social life. In any advanced society it is, in part at least, on account of this wider character, less easily discerned, that the graver offence are Punished. [l43E-F]

(a) All punishment properly implies moral accountability. It is related to injury and not only to damage or danger however greater. Capital punishment does so in an eminent degree. It is directed against one who is ex-hypothesi an inhuman brute, i.e. it is imposed simply to eliminate who is held to have become irretrievably, a. Iiability or a menace to society. [142E]

(b) Punishment like crime has a dual character. The penalty which the convicted murderer incurs is not simply death, but death in disgrace and death as a disgrace. In so far as capital punishment is a threat, the threat consists not only in death but in infamy. Any theory which ignores this characteristic is certainly defective. [l43F]

Sir Walter Moberly The Ethics of Punishment Ch. Xl Capital Punishment pp. 271-81: referred to.

(c) Punishment inflicted by the State in response to a violation of criminal law has been justified in various ways namely, as society's vengeance upon the criminal as atonement by the wrong-doer, as a means of deterring other criminals, as protection for the law-abiding and as a way of rehabilitating the criminal.

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Theories of rehabilitation are largely speculative, since

there is lack of scientific evidence to support them, though it has been influential in the development of modern penology.[144A-B]

5. (a) The capital punishment controversy falls within the strict limits of 'independent' parliamentary law-making, and is a typical or representative of the kind of problems that leaders of Parliament face every day. In short, the case for abolition of the death sentence is political, not constitutional, The Government carries the responsibility of law and order. That is the first' and fundamental duty of any Government. The Executive has the duty of advising the Government of the laws it believes necessary for the national wellbeing. It is the duty of the Court, including this Court, to administer the laws as they are. [l57D-E]

(b) Analysing the substantive merits of the cases for and against the death penalty for murder is essentially a question for the Parliament to resolve and not for the Supreme Court to decide. Therefore, it would not be proper for the Judges to attempt to project their personal views in a matter which lies in the realm of political decision-making, by focussing on a single controversy, the question of the proper penalty for the crime of murder. [157B]

(c) Any justification for the capital sentence, as for other salient features of the penal system must be sought in the protection of the society and that alone. [145E]

Even where it has been legally retained, as in India, Capital Punishment is now seldom employed except in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience. Indeed the death penalty satisfies the society's retributive goals and is still presumed to be a deterrent to potential offenders Of the three purposes commonly assigned to punishment-retribution, deterrence and reformation-deterrence is generally held to be the most important, although the continuing public demand for retribution cannot be ignored. Prima facie, the death sentence is likely to have a stronger affect as a deterrent upon normal human beings than any other form of punishment. People are believed to refrain from crime because they fear punishment. Since people fear death more than anything else, the death penalty is the most effective deterrent. [146C-E]

(d) If the appeal of capital punishment were merely to fear of death, it would be a very inefficient protector of society. In civilised society and in peace time, government relies for obedience more on its moral prestige than on violent repression of crime. Punishment only protects life effectively if it produces in possible-murderers, not only fear of the consequences of committing murder, but a horrified recoil for the thing itself It can only achieve, this, more ambitious, task, if sentence of death is felt to embody society's strongest condemnation of murder and keenest sense of its intolerable wickedness. It is not by the fear of death but by exciting in the community a sentiment of horror against any particular act, that the offenders could be deterred from committing it. [143B-C]

Royal Commission on Capital Punishment Para 59: referred to.

(e) The punishment of death should reflect adequately the revulsion felt for the gravest of crimes by the great majority of citizens. Legislators and Judges:

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share this revulsion themselves; otherwise indeed their action would be morally indefensible. Their aim then should be, not only to strike terror nor even to awaken popular indignation in a direction convenient to Government. It

would be to arouse in all and sundry their Own indignant repudiation of a wicked act and at the same time, to deepen it in themselves. In this vain sentence of death has been pronounced, carried out and acclaimed with stern satisfaction. Otherwise the conscience of the community would be revolted if the criminals were allowed to live.[145F-G]

6.(a) The theory that (i) the death penalty is per se cruel and unusual punishment and (ii) alternatively the inordinate delay in carrying it out makes it so has now been completely destroyed by two recent decisions of the Privy Council.[149F]

Eaton Baker v The Queen, L.R. [1975] AC 774 Freites v. George Ramouter Benny, LR [1975] AC 239; discussed.

(b) ln the United States of America also the death penalty has practically existed more or less harmoniously with humane theories of criminal justice for over two hundred years (e.g). [151E]

(i) In Trop v. Dulles, [1958] 356 US 86, L. ed. 630, the Court refused to consider the death penalty as an indent of the constitutional limit of punishment; (ii) In McGouths v. California, [1971] 402 U.S. 183, it was held that the absence of any guidelines was not a violation of "due process" and (iii) In Furman v. Georgia the multiple opinions did not rule out altogether re-imposition of the death penalty in the future provided there was legislative structuring of a permissible system providing for sufficient procedural safeguards; (iv) Later on, the death penalty has been reimposed and this judicial approach stood reoriented. The constitutionality of the death-penalty was supported by four factors (1) the reference to capital punishment in the Constitution (ii) the past Supreme Court decisions on the death penalty (iii) the limitations of judicial restraints and (iv) the doctrine of separation of powers. [151F; 152D; 154E]

M. Cherif Bassi Owni; Substantive Criminal Law p. 120-128; referred to

and (v) In Gregg v. Georgia, [1976] 428 U.S. 153; 49 L.ed. 2d. 859; Proffit v. Floride, [1976] 428 242; 49 L.ed. 2nd. 913; Jurek Texas, [1976] 428 US 262; 49 L.ed. 2nd, 929-all concerned with discretionary sentencing procedures- and in Woodson v. North Carolina, [1975] 428 US 280; 49 L.ed. 944 and Roberts v. Lonisiana [1976] 428 US 326; 49 L.ed. 2d 974-both concerned with mandatory death sentence-it was held that (a) the punishment of death did not invariably violates the Constitution (b) history and precedent did not support the conclusion that the death sentence was per se violation of 8th and 14th Amendments (c) the evolving standards of decency arguments had been substantially under cut in the last four years because a large segment of the enlightened population regarded the death penalty as appropriate and necessary as seen in the new legislation passed in response to Furman (d) the death penalty was not inherently cruel and unusual. It served two principal social purposes retribution and deterrence, and therefore the death sentence for the crime of murder was (1) not without justification (2) not unconstitutionally severe and (3) not invariably disproportionate to the crime and (e) that Furman mandated, where discretionary sentencing was used, there must be suitable direction and

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limitation to minimise the risk of wholly and arbitrary and capricious action, the bifurcated trial with standards modelled after the Modern Penal Code juries gave just such guidance. [155F-G; 156A]

Observation:
If there has to be a law reform at all, some regard must be had to the plight of the victim or his or her family by making provision for payment of compensation. While it is commonly accepted that these convicted of violations of the criminal law must "pay their debt to society, little emphasis is placed upon requiring offenders to "pay their debt" to their victims. These again are matters for the Parliament to Provide.]

&
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 512 of 1978.
Appeal by Special Leave from the Judgment and Order dated 12-9-74 of the Allahabad High Court in Criminal Appeal No. 501/74.
AND
CRIMINAL APPEAL NO. 513 of 1978
Appeal by Special Leave from the Judgment and Order dated 9-1-1978 Kerala High Court in Crl. A. No. 213/77 and Ref. Trial No. 3/77.
AND
CRIMINAL APPEAL NO. 513 of 1978
Appeal by special leave from the Judgment and Order dated 28-9-77 of the Allahabad High Court in Criminal Appeal No. 261/73 and Reference No. 6/77.
R. K. Garg for the Appellant in Crl. A. No. 513/78.
S. K. Bagga, Amicus Curiae for the Appellant in Crl. A.512/78
P. K. Pillai, Amicus Curiae for the Appellant in Crl. A. No. 511/78
D. P. Uniyal and M. V. Goswami for the State of U.P.
K.R. Nambiar for the State of Kerela.
The Judgment of Krishna Iyer and Desai, JJ. was delivered by Krishna Iyer, J.; Sen, J. gave a dissenting opinion.
KRISHNA IYER, J.
THE DEADLY QUANDARY
To be or not to be: that is the question of lethal import and legal moment, in each of these three appeals where leave is confined to the
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issue of the propriety of the impost of capital penalty against which the brutal culprits desparately beseech that their dear life be spared by the Summit Court and the incarceratory alternative be awarded instead. There is, as here, a judicial dimension to the quasi-Hamletian dilemma when "a murder most foul" demands of sentencing justice punitive infliction of death or the lesser punishment of life imprisonment, since the Penal Code leaves the critical choice between physical liquidation and life-long incarceration to the enlightened conscience and sensitized judgment of the Court.
A narration of facts is normally necessary at this early stage but we relegate it to a later part, assuming for the nonce the monstrosity the murder in each case. Is mere shock at the horrendous killing sufficient alibi to extinguish one more life, de hors circumstances, individual and social, motivational and psychical ? The crime and the criminal, contemporary societal crisis, opinions of builders and moulders of the nation, cultural winds of world change and other profound factors, spiritual and secular, and above all, constitutional, inarticulately guide the Court’s

faculty in reading the meaning of meanings in preference to a mechanistic interpretation of s. 302 I.P.C. projected in petrified print from Macaulay's vintage mint.

We banish the possible confusion about the precise issue before us -it is not the constitutionality of the provision for death penalty, but only the canalisation of the sentencing discretion in a competing situation. The former problem is now beyond forensic doubt after Jagmohan Singh(') and the latter is in critical need of tangible guidelines, at once constitutional and functional. The law reports reveal the impressionistic and unpredictable notes struck by some decisions and the occasional vocabulary of horror and terror, of extenuation and misericordia, used in the sentencing tailpiece of judgments. Therefore, this jurisprudential exploration, within the framework of s. 302 I.P.C., has become necessitous, both because the awesome 'either/or' of the Section spells out no specific indicators and law in this fatal area cannot afford to be conjectural. Guided missiles. with lethal potential, in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process. The core question-the only question that occupies our attention, within the confines of the Code, is as to when and why shall capital sentence be pronounced on a murderer and why not in other cases.

The penological poignancy and urgency of the solution is obvious since the human stakes are high, and error, even judicial error

(1) Jagmohan Singh v State of Uttar Pradesh (1973) I S.C.C.20.

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silences for ever a living being and despatches 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'. The macabre irrevocability of the extreme penalty makes the sombre issue before us too important to be relegated, as often happens, to a farewell paragraph, with focus on fright ful features of the crime and less stress on the crime-doer and related factors. When human rights jurisprudence and constitutional protections have escalated to sublime levels in our country and heightened awareness of the gravity of death penalty is growing all over the civilised globe in our half-century, is it right to leave s. 302 I.P.C. in vague duality and value-free neutrality? Any academic who has monitored Indian sentencing precedents on murder may awaken to 'the overt ambivalence and covert conflict' among judges 'concerning continued resort to the death sentence' which, according to Prof. Blackshield,(') 'seems to minor the uncertainties and conflicts of values in the community itself'. This tangIed web of case-law has been woven around the terse terms of s. 302, I.P.C. during the last hundred years.

THE OLD TEXT AND THE NEW LIGHT

> Section 302. Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Such stark brevity leaves a deadly discretion but beams little legislative light on when the court shall hang the sentencee or why the lesser penalty shall be preferred. This facultative fluidity of the pro vision reposes a trust in the court to select. And 'discretionary navigation in an unchartered sea is a hazardous undertaking unless recognised and recognizable principles, rational and constitutional,

are crystallised as 'interstitial legislation' by the highest court. The flame of life cannot flicker uncertain! and so s. 302 I.P.C. must be invested with pragmatic concreteness that inhibits ad hominem Responses of individual judges and is in penal conformance with constitutional norms and world conscience. Within the dichtomous frame-work of s. 302 I.P.C., upheld in Jagmohan Singh, we have to evolve working rules of punishment bearing the markings of enlightened flexibility and societal sensibility. Hazy law, where human life hangs in the balance, injects an agonising consciousness that judicial error may

(1) Prof. A. R. Blackshield, Associate Professor of Law, University of New South Wales: Capital Punishment in India: The Impact of the Ediga Anamma Case-July 1977.

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prove to be 'crime' beyond punishment'. And history bears testimony to reversal of Court verdict by Discovery of Time. The tragic speech in the Commons of former Home Secretary (Chuter Ede) makes ghastly reading (1)

> "I was the Home Secretary who wrote on Evans' papers. "The law must take its course." I never said, in 1948 that a mistake was impossible. I think Evans' case shows, in spite of all that has been done since, that a mistake was possible, and that, in the form in which the verdict was actually given on a particular case, a mistake was made. I hope that no future Home Secretary, which in office or after he has left office, will ever have to feel that although he did his best and no one could accuse him of being either careless or inefficient, he sent a man to the gallows who was not "guilty as charged."

That is why we devote a whole judgment to what ordinarily is a brief finale at the end of a long opinion.

ln Ediga Annamma(2), this Court did set down some working formulae whereby a synthesis could be reached as between death sentence and life imprisonment. Notwithstanding the catalogue of grounds warranting death sentence as an exceptional measure, 'life' being the rule, the judicial decisions have been differing (and dithering) at various levels, with the result the need for a thorough re-examination has been forced on us by counsel on both sides. Prof. Blackshield makes an acid comment: (3)

> "The fact is that decisions since Ediga Anamma have displayed the same pattern of confusion, contradictions and aberrations as decisions before that case ....To test this, I have abstracted from the All India Reporter seventy cases in which the Supreme Court has had to choose between life and death under Section 302: the last twenty-five reported cases before the date of Ediga Anamma, and the next forty five (including, of course, Ediga Anamma itself) on or after that date."
>
> "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

(1) The Crusade against Capital Punishment in Great Britain by Elizabeth Orman Tuttle, 1961, p. 96.

(2) Ediga Annama v. State of Andhra Pradesh (1974) 4 S.C.C. 43.

(3) Prof. A. R. Blackshield, Associate Professor of Law, University of New South Wales: Capital Punishment in India. The Impact of Ediga Annamma.

Case-July 1977.

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conclusion that, at least in contemporary India, Mr. Justice Douglas' argument in Furman v. Georgia(l) is correct: that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment; and that therefore- in Irritant constitutional terms, and in spite of Jagmohan Slngh-the-retention of such a system necessarily violates Article 14's guarantee of "equality before the law."

The author further observes:

"One source of the confusion seems to have been an under-current of disagreement as to the correctness and applicability of the argument in Ediga Anamma. But the only direct challenge has been in Bishan Dass v. State of Punjab, AIR 1975 SC 573 (January 10, 1975: Case 52) and, with respect, the challenge there seems clearly misconceived."

What a study of the decisions of the higher courts on the life-or-death choice shows is that judicial impressionism still shows up and it is none too late to enunciate a systematised set of criteria or at least reliable beacons Ediga Annamma (supra) in terms, attempted this systematisation:

"Let us crystallise the positive indicators against death sentences under Indian Law currently. Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to down-grade the crime into a lesser one, judicial com mutation is permissible. Other general social pressures, war ranting judicial notice, with an extenuating impact may in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Like wise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive (i.e. combining the "murder" provision with the "unlawful assembly" provisione again (if) the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life, even life where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use the

(1) 408 U. S. at 238.

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horrendous features of the crime and hapless, helpless state A of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad-hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.''(l)

From what we have said and quoted and from the persistence Or forensic divarication, it has now become

necessary to have a second look at the life versus death question, not for summarising hitherto decided cases and distilling the common factors but for applying the Constitution to cut the Gordian knot. The Suprema lex must set the perspective and illumine the meaning of subordinate statutes especially where some provisions contain obfuscatory elements, for, our founding fathers have not hammered out a merely pedantic legal text but handed down a constellation of human values, cherished principles and spiritual norms which belight old codes and imperial laws and impel new interpretations and legislations to tune up the New Order. The Indian Penal Code must be sensitized by the healing touch of the Preamble and Part lII. Wrote Wheeler, J :(2)

> "That court best serves the law which recognises that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society..."

Benjamin N. Cardozo, said: (3)

> "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."

Such a solution to the death/life alternatives, where the Code leaves the Judge in the cold, has its limits. "Justice Homes put his view pithily when he said that judges make law interstitially, that they are confined from molar to molecular motion. Justice Frankfurter puts

(1) Ediga Annamma v. State of A. P. (1974) 4 S.C.C. 443 at 453.

(2) Dwy v. Connecticut Co., 89 Conn. 74, 99.

(3) The Nature of the Judicial Process by Benjamin N. Cardozo. p. 152.

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it more colloquially saying that judges make law at retail, legislators at wholesale.''(l) Therefore, it is no heresy to imbibe and inject the social philosophy of the Constitution into the Penal Code to resolve the tension between the Past and the Present.

QUO VADIS DISCRETIONARY DEATH SENTENCE ?

lndian Justice and the constitutional order are centuries ahead of the barbarities of Judge Jeffreys of 'Bloody Assizes' fame; and ideologically away from the years of imperial butchery of Indian uprising when the Penal Code was drafted. Since Law reflects Iife, new meanings must permeate the Penal Code. The deprivation of life under our system is too fundamental to be permitted save on the gravest ground and under the strictest scrutiny if Justice, Dignity, Fair Procedure and Freedom are creedally constitutional. So it is that in this bunch of appeals the court is called upon by counsel for the appellants to repel sentence by hunch and to lay down broad norms and essential principles as beacon lights which make the law of murder, in the sentencing sector, most restrictive and least vagarious.

More illumination and closer examination of the provisions viz., s.302 in the larger humanist context and constitutional conspectus, is necessitous. Legal justice must be made of surer stuff where deprivation of life may be the consequence. So we have heard a wider range of submissions and sought the,'amicus' services of the learned Solicitor General. An intervener (Committee for Abolition of Death Penalty, interested in abolition of death penalty has

submitted, through Dr. L. M. Singhvi, some material. We record our appreciation af the assistance given by the former and take due note of the views presented by the latter. Light, not heat, is welcome from any source in aid of judicial justice.

We are cognizant of the fact that no inflexible formula is feasible which will provide a complete set of criteria for the infinite variety of circumstances that may affect the gravity of the crime of murder, as pointed out by Palekar, J. in Jagmohan Singh (supra). The learned Judge further observed:

> "The impossibility of laying down standards is at the very core of the criminal law as administered in India which in vests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is, as already pointed out, liable to be corrected , by superior courts." (p. 35)
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> (1) "Social Justice" Ed. by Richard B. Brandt, p. 109.

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What is important to remember is that while rigid prescriptions and random prescriptions which imprison judicial discretion may play tricks with justice, the absence, altogether, of any defined principles except a variorum of rulings may stultify sentencing law and denude is of decisional precision. 'Well-recognised principles' is an elegant phrase. But what are they, when minds differ even on the basics ?

Fluctuating facts and keleidoscopic circumstances, bewildering novelties and unexpected factors, personal vicissitudes and societal variables may defy standard-setting for all situations; but that does not mean that humane principles should be abandoned and blanket discretion endowed, making life and liberty the plaything of the mentality of human judges. Benjamin Cardozo has pricked the bubble of illusion about the utter objectivity of the judicial process: (1)

> "I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. . .Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."

Section 302 is silent; so the judges have to speak, because the courts must daily sentence. Merely to say that discretion is guided by wellrecognised principles shifts the issue to what those recognised rules are. Are they the same as were exercised judicially when Bhagat Singh was swung into physical oblivion ? No. The task is to translate in new terms the currently consecrated principles, informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life'. The error of parallax which dated thought processes, through dusty precedents, may project needs to be corrected. That is the essay we undertake here.

Moreover, the need for well-recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power may even militate against Art. 21 as expounded in Maneka Gandhi's case(2), an aspect into which we do not enter here. Judicial absolutism or ad-hocism is anathema in our constitutional scheme. It

(1) The Nature of the Judicial Process by Benjamin N. Cardozo p. 167. (2) Maneka Gandhi v. Union of India (1978) I S.C.C. 248.

(2) Maneka Gandhi v Union of India (1978) 1 S.C.C.248

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has been said that 'a judge untethered by a text is a dangerous instrument'; and we may well add, judge-power, uncanalised by clear principles may be equally dangerous when the consequence of his marginal indiscretion may be horrific hanging of a human being until he be dead. Palekar, J. himself accepted that "well-recognised principles" must govern sentencing discretion.

The precise criteria which constitute, and the normative nature of those principles did not directly fall for decision as that case proceeded on the basis that the lower courts had rightly exercised the sentencing discretion. The precise and only issue that was mooted and decided in Jagmohan Singh(l) was the constitutionality of s. 302 I.P.C. and the holding was that 'the death sentence imposed after trial in accordance with procedure established by law is not unconstitutional'. The acceptance of the invulnerability of discretionary power does not end the joureney; it inaugurates the search for those 'well recognised principles' Palekar, J., speaks of in the Jagmohan case. Incidental observations without concentration on the sentencing criteria are not the ratio of the decision. Judgments are not Bible for every line to be venerated.

When the legislative text is too bald to be self-acting or suffers zigzag distortion in action the primary obligation is on Parliament to enact necessary clauses by appropriate amendments to s. 302 I.P.C. But if legislative undertaking is not in sight judges who have to implement the Code cannot fold up their professional hands but must make the provision viable by evolution of supplementary principles even if it may appear to possess the flavour of law-making. Lord Dennings observations are apposite:

> "Many of the Judges of England have said that they (lo not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now being discarded everywhere. Every new decision-on every new situation-is a development of the law. Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole, building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends."

(1) The Supreme Court of India-A Socio-Legal Critique of its Juristic Techniques by Rajeev Dhavan-Foreword by Lord Denning, M. R.

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The Court's tryst with the Constitution obligates it to lay down A general rules, not a complete directory, which will lend predictabilily to the law vis-a-vis the community and guide the judiciary in such a grim verdict as choice between life and death. The right to life, in- our constitutional order, is too sacred to be wished away without so much as Directive Principles for its deprivation, save sweeping judical discretion and reference for confirmation or appellate review_ the know-how for exercise

of either being left to the assumed infallibility of the curial process in the face of the daily reality that there are cxtreme variations among judges themselves on 'when' and 'why' the extreme penalty shall or shall not be inflicted.

Currently, the welter of the British Indian and post-Independence decisions and the impact of laconic legislative changes in the Criminal Procedure Code the competition among the retributive, deterrent, the reformative and even the existentialist theories of punishment and of statistical studies and sociological and cultural winds settle the lethal fate of the living man in the cage.

Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapons 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, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculus. Stranger still, a good sentence of death by the trial court is sometimes upset by the Supreme Court because of Law's delays. Courts have been directed execution of murderers who are mental cases, who do not fall within the McNaghten rules, because of the insane fury of the slaughter. A big margin of subjectivism, a preference for old English precedents, theories of modern penology, behavioural 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. Therefore, until Parliament speaks, the court cannot be silent. (Hopefully, s.302 l.P.C. is being amended, at long last, but it is only half-way through as the Rajya Sabha proceedings show. We will revert to it later).

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Prof. Blackshield, on an analytical study of Indian death sentence decisions, has remarked with unconventional candour:

> "But where life and death are at stake, inconsistencies which are understandable may not be acceptable."

His further comments are noteworthy:

> "The fact is that in most cases where the sentence of death under S.302 is confirmed by the Supreme Court, there is little or no discussion of the reasons for confirmation. Sometimes there is a brief assertion of "no extenuating circumstances" (which seems to imply that the Court is making its own discretionary judgment; at other times there is a brief assertion of "no ground to interfere" (which seems to imply that the Court is merely reviewing the legitimacy of the High Court's choice of sentence). The result is to obfuscate, probably beyond any hope of rationalisation, the analytical issues involved."(supra)

The twists and turns in sentencing pattern and the under-emphasis on the sentencee's circumstances in decided cases make an in-depth investigation of the 'principles' justifying the award of death sentence a constitutional duty of conscience. This Court must extricate, until Parliament legislates, the death sentence sector from judicial sub

jectivism and consequent uncertainty. As Justice Cardozo, in The Nature of the Judicial Process, bluntly states: (1)

> "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 chills 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."

It is fair to mention that the humanistic imperatives of the Indian Constitution, as paramount to the punitive strategy of the Penal code, have hardly been explored by courts in this field of 'life or death' at the hands of the law. The main focus of our judgment is on this poignant gap in 'human rights jurisprudence' within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy

(l) pp. 167-168.

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charged with compassion, an interpretative liberation from colonial A callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interact with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19 and 21.

Nor can courts be complacent in the thought that even if they err the clemency power will and does operate to save many a life condemned by the highest court to death. For one thing, the uneven politics of executive clemency is not an unreality when we remember it is often the violent dissenters, patriotic terrorists, desperadoes nurtured by the sub-culture of poverty and neurotics hardened by social neglect, and not the members of the Establishment or conformist class, who get executed through judicial and clemency processes. Executive commutation is no substitute for judicial justice; at best it is administrative policy and at worst pressure-based partiality. In either case, that court self-condemns itself which awards death penalty with a sop to its conscience that the habitual clemency of Government will soften the judicial excess in sentence. If justice under the law justifies the lesser sentence it is abdication of judicial power to inflict the extreme penalty and extraneous to seek consolation in the possible benign interference by the President. The criteria for clemency are often different. We arc thus left with the necessity to decipher sentencing discretion in the death/life situation.

SENTENCING CYNOSURES

Having stated the area and object of investigation we address ourselves to this grave penological issue purely as judges deciding a legal problem, putting aside views, philosophical or criminological, one holds. But law, in this area, cannot go it alone; and cross-fertilisation from sociology, history, cultural anthropology and current national perils and developmental goals and above all, constitutional currents, cannot be eschewed.

Let us leave 'law' a while and begin with drawing the backdrop with a lurid brush. Every sombre dawn a human being is hanged by the legal process, the flag of humane justice shall be hung half-mast. Such is the symbolic reverence the land of Gandhi should pay to human life haltered up by

lethal law. The values of a nation and ethos of a generation mould concepts of crime and punishment. So viewed, the lode-star of penal policy to day, shining through the finer culture of former centuries, strengthens the plea against death penalty. Moreover, however much judicially screened and constitutionally legitimated, there is a factor of fallibility, a pall that falls beyond recall and a core of sublimated cruelty implied in every death penalty.

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This is the starting point of our re-appraisal of presidential and legislative texts, with a view to evolving clearer criteria for choice between the Life-Death Alternatives enacted into the Penal Code. We may, for emphasis, recall s. 302 I.P.C.,-at once laconic and draconic, which reads:

> s.302.-Punishment for murder.-Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

We approach the resolution of the punishment predicament in a manner at once legal, logical and criminological and impregnated with values constitutional. Therefore, we will first study the significant legislative developments in the two interacting Codes and related par liamentary essays at change. Where broad conclusions emerge from such an investigation, constitutional reinforcement may be sought. Since the Constitution is paramount and paramountcy is paramountcy, its expansive humanism must overpower traditional 'terrorism' in the practice of sentencing. When this stage is reached and formulation of guidelines made, we will consider the criminological foundations of theories of punishment which harmonise with the human rights jurisprudence of our cultural cosmos. Finally, we will set down the salient cynosures for judges in their day-to-day labours.

One sentencing aspect which has found prominent place in the Criminal Procedure Code, 1973, but more often ignorantly ignored, needs to be highlighted for future guidance. The cases actually de manding decision, their factual matrices and the actual application of The principles we have formulated to the appeals under consideration are the decisive part of the judgment.

The sister Codes-the Indian Penal Code and the Criminal Procedure Code-are interwoven into the texture of sentencing. So much so, the various changes in s.367 of the Procedure Code, 1898 and its re-incarnation in s.354 of the Code of 1973 impact on the inter pretation of s. 302 of the Penal Code. The art of statutory construction seeks aid from connective tissues, as it were, of complementary enactments. This mode offers a penological synthesis Parliament legislatively intended. From this angle, we may examine the history of the amendments to the Procedure Code in so far as they mould' the sentencing discretion vested by s. 302 I.P.C.

Vintage words adapt their semantic content with change in Society's thoughtways and people's mores. Linkwise, Law-Life mutuaIity moulds judicial construction. So when a nineteenth century Code,

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with vital impact on life and liberty, falls for examination in the last quarter of the twentieth century, criminological developments finds their way into the process of statutory decoding. This is obviously permissible, even necessary. A progressive construction which up-dates the sense of statutory language has been adopted in Weems v. United States(1) and commended by jurists.

We may ask ourselves whether the Procedure Code, which intertwines with the Penal Code lends discretionary direction? Similarly, a brief suruey of the trend of legislative endeavours may also serve to indicate whether the people's consciousness has been projected towards narrowing or widening the scope for infliction of death penalty. Current criminological theories, the march of the abolitionist movement across the continents, the national heritage and voice of the makers of modern India and parliamentary re-thinking on reform of the Penal Code may also be indicators. In this setting, let us rationalize and humanize the discretionary exercise under s.302 I.P.C.

Several attempts have been made to restrict or remove death penalty under s. 302 but never even once to enlarge its application. Parliamentary pressure has been to cut down death penalty, although the section formally remains the same and is very nearly being wholly recast benignly. The cue for the Court is clear.

"In 1931, an abolition bill was introduced in the Legislative Assembly by Gaya Prasad Singh; but a motion for circulation of the bill was defeated after it was opposed by the government.

The pattern after independence has been much the same. In 1956, a bill introduced in the Lok Sabha by Mukund Lal Agarwal was rejected after government opposition. In 1958 a Resolution for abolition, moved in the Rajya Sabha by Prithvi Raj Kapur, was withdrawn after debate. (Its purpose had been served, said Shri Kapur). "The ripples are created and it is in the air": Rajya Sabha Debates, April 25, 1958, Cols.444-528. In 1961 a further Resolution, moved in the Rajya Sabha by Mrs Savitry Devi Nigam, was negatived after debate.

In 1962, however Resolution moved in the Lok Sabha by Raghunath Singh received more serious attention: Lok Sabha Debates, April 21, 1962, Cols.307-365. The Resolution was withdrawn, but only after the government had given an undertaking that a transcript of the debate would be forwarded to the Law Commission, for consi-
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deration in the context of its review of the Penal Code and the Criminal Procedure Code. The result was a separate Law Commission Report on Capital Punishment, submitted to the government in September, 1967." (supra)

At pages 354-55, the Law Commission summarized its main conclusions as follows

> It is difficult to rule out that the validity of or the strength behind, many of the arguments for abolition. Nor does the commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.
>
> Having regard, however, to the conditions in India, to the variety of the social upbringing 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 for main taining, law and order in the country at the present juncture India cannot risk the experiment of abolition of capital punishment."

Currently, there is a Bill introduced in the Lok Sabha for total abolition. The most meaningful contribution to 'human rights legality' in the 'terminal' territory of punitivity is the parliamentary amendment to s.302 I.P.C.

half-way through and, if we may say so with respect, half-fulfinling both the humanist quintessence of the Constitution and, may be, the creed of the Father of the Nation. Gandhiji long ago wrote in the Harijan:

> "God Alone Can Take Life Because He Alone Gives it"

We will dwell on this Indian Penal Code (Amendment) Bill, 1972 passed by the Rajya Sabha in 1978, later in this Judgment but mention this seminal event as a kindly portent against the 'homicidal' exercise of discretion, often an obsession with retributive justice in disguise. And the parliamentary prospects, to the extent relevant to judicial discretion disappoint those who are restless if murder is divorced from death penalty. The Future shapes the Present on occasions and therefore we take note of this big change in the offing. Section 302, as now recast by the Rajya Sabha, reads:

302. (1) Whoever commits murder shall, save as otherwise vided in sub-section (2), be punished with imprisonment for life and shall also be liable to fine.

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(2) Whoever commits murder shall,-

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty;

(ii) in consequence of anything done or attempted to be done by such member of public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of this duty under section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under section 37 or section 129 of the said Code; or

(e) if the murder has been committed by him, while under sentence of imprisonment for- life, and such sentence has become final,

be punished with death, or imprisonment for life, and shall also be liable to fine.

(3) Where a person while undergoing sentence of imprisonment for life is sentenced to imprisonment for an offence under clause (e) of sub-section (2) such sentence shall run consecutively and not concurrently:(1)

Maybe, the fuller and finer flow of the constitutional stream of human dignity and social justice will shape the provision more reformatively. Suffice it to say that the

battle against death penalty by parliamentary action is gaining ground and those who do live in the ivory tower-and Judges, hopefully, do not-will take cognizance of this compassionate trend.

The inchoate indicators gatherable from the direct reforms of death penalty take us to the next 'neon sign' from the changes in the

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Procedure Code. Section 302 I.P.C., permits death penalty but s.354 (3) of the Procedure Code, 1973 processes the discretionary power. The central issue of death/life discretion is not left naked by the Procedure Code which, by necessary implication, has clothed it with pro life language. The legislative development, through several successive amendments, has shifted the punitive centre of gravity from life-taking, to life sentence. To start with, s. 367(5) obligated the court to 'state the reason why sentence of death was not passed'. In other words, the discretion was directed positively towards death penalty. The next stage was the deletion of this part of the provision leaving the judicial option open. And then came the new humanitarian sub-section [s. 354 (3)] of the Code of 1973, whereby the dignity and worth of the human person, under-scored in the Constitution, shaped the penal policy related to murder. The sub-section provides:

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

Thus on the statutory side, there has been a significant shift since India became free. In practice, the effect of the pre-1955 version is that while the former rule was to . sentence to death a person convicted for murder and to impose the lesser sentence for reasons to be recorded in writing, the process has suffered a reversal now. Formerly, capital punishment was to be imposed unless special reasons could be found to justify the lesser sentence. The 1955 amendment, removing the requirement, had left the courts equally free to award either sentence. Finally, with the new 1973 provision-

> "a great change has overtaken the law.....The unmistakable shift in legislative emphasis is that life imprisonment for murder is the rule and capital sentence the exception to be resorted to for reasons to be stated... It is obvious that the disturbed conscience of the State on the vexed question of legal threat to life by. way of death sentence has sought to express itself legislatively, the stream of tendency being to wards cautious, partial abolition and a retreat from total retention."

The twin survey of attempted and half accomplished changes in the Penal Code and the statutory mutation, pregnant with significance,

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wrought into the procedure Code, definitely drives judicial discretion to a benign destination. The message of the many legislative exercises is that murder will ordinarily be visited only with life imprisonment and it is imperative that death sentence shall not be directed unless there exist "special reasons for such sentence."

The era of broad discretion when Jagmohm's case was decided has ended and a chapter of restricted discretion

has since been inaugurated. This is a direct response, not merely to the humane call of the Constitution, but also to the wider cultural and criminological transformation of opinion on the futility of the law of 'Life for Life' 'red in tooth and claw'. No longer did judicial discretion depend on vague 'principles'. It became accountable to the strict requirements of s.354(3) of the 1973 Code.

By way of aside, we may note that the consolation that judicial discretion in action is geared to justice is not always true to life.

> "The discretion of a judge is said by Lord Camden to be the law of tyrants: it is always unkonwn; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is of ten times caprice; in the worst, it is every vice, folly and passion to which human nature is liable..... " 1 Bouv. Law Dict., Rawles' Third Revision p.885."
>
> "An appeal to a judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law." (Griffin v. State, 12 Ga. App. 615)"

Here is thus an appeal to the informed conscience of the sentencing judge not to award death penalty save for special reasons which have direct nexus with the necessity for hanging the murderer by law.

The revolutionary import of the target expression, in a death sentence situation, viz., 'the special reasons for such sentence demands perceptive exploration with emotional explosion or sadistic sublimation disguised as 'special reason'. Here we enter the penological area of lethal justice, social defence and purpose-oriented punishment.

Before launching on the decisive discussion it is fair to be frank on one facet of the judicial process. To quote Richard B Brandt:

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> "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."

THE CODES, THE CONSTITUTION AND THE CULTURAL BACKDROP

Primarily we seek guidelines from the two Codes, in the omnipresence and omnipotence of the over-arching Constitution. The Indian cultural current also counts and so does our spiritual chemistry, based on divinity in everyone, catalysed by the Buddha-Gandhi compassion. 'Every saint has a past and every sinner a future'-strikes a note of reformatory potential even in the most ghastly crime. This axiom is a vote against 'death' and hope in 'life'.

Many humane movements and sublime souls have cultured

the higher consciousness of mankind, chased death penalty out of half the globe and changed world view on its morality. We will, in the culminating part of our judgment, cull great opinions to substantiate this assertion but content here with pointing to their relevance as part of the conspectus.

Criminologists have elaborately argued that 'death' has decisively lost the battle as the dominant paradigm and even in our Codes has shrunk into a weak exception. Even so, what are these exceptional cases? Not hunch or happen-stance but compelling grounds, lest the 'Chancellor's foot' syndrome reappear in different form. So let us examine the grounds in this new sheen.

An easy confusion is over-stress on the horror of the crime and the temporary terror verging on insane violence the perpetrator displays, to the exclusion of a host of other weighty factors when the scales are to settle in favour of killing by law the killer who resorts to unlaw.
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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 illtreated orphan, a jobless starveling, a badgered brother, wounded son, a tragic person hardened by societal cruelty or vengeful justice, even a Hamlet or Parasurama. He might have been angelic boy but thrown into mafia company or inducted into dopes and drugs by parental neglect or moraly-mentally retarded or disordered. Imagine a harijan village backed 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. Judges may be of moods, soft or severe; their weaknesses may be sublimated prejudices; their sympathies may be persona hyper-sensitivity. Did not Lord Camden, one of the greatest and purest of English judges, say

> "that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable." (State v. Cummings 36 Mo.263 278 (1865)?

When life is at stake, can such frolics of fortune play with judicial veriest?

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 Annamma (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.

If we go only by the nature of the crime we get derailed by subjective paroxysm. 'Special reasons' must vindicate the sentence and so
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must be related to why the murderer must be hanged and why life imprisonment will not suffice. Decided cases have not adequately identified the manifold components of comprehensive sentencing. Resultantly, what is regarded as decisive is only relevant and what is equally telling remains untold. For reasons of ' special' grimness may be cancelled by juvenile justice. Brutality of the crime may be mollified at the level of sentencing justice by background of despair. Even a planned barbarity may be induced by an excessive obsession by one who could be a good person under other surroundings. Why, the ghastly crime may in rare cases be due to a brain tumour. Myriad factors of varying validity may affect the death penalty either way. The criminal will be projected on the scene and examined from different angles since the punishment is on the person though for the offence.

CAPITAL PENALTY AND THE CONSTITUTION

In these pathless woods we must seek light from the Constitution regarding 'special reasons'. After all, no Code can rise higher than the Constitution and the Penal Code can survive only if it pays homage to the suprema lex. The only correct approach is to read into s.302 I.P.C. and s.354(3) Cr.P.C., the human rights and humane trends in the Constitution. So examined, the right to life and to fundamental freedoms is deprived when he is hanged to death, his dignity is defiled, when his neck is noosed and strangled. What does s.302 do by death penalty to the sentence? It finally deprives him of his fundamental rights. True, fundamental rights are not absolute and may be restricted reasonably, even prohibited totally, if social defence compels such a step. Restriction may expand into extinction in extreme situations. (see Narendra Kumar)

Punishment by deprivation of life or liberty must be validated by Arts. 21, 14 and 19-the first guarantees fair procedure, the second is based on reasonableness of the deprivation of freedom to live and exercise the seven liberties and the last is an assurance of non-arbitrary and civilized punitive treatment. But in the connotation of these and other Articles of Part III, the social justice promise of Part IV and the primordial proposition of human dignity set high in the Preamble must play upon the meaning.

Crime and penal policy have to obey the behests set out above and we may gain constitutional light on the choice of 'life' or death' as appropriate punishment. Article 14 surely ensures that principled sentences of death, not arbitrary or indignant capital penalty, shall be imposed. Equal protection emanates from equal principles in
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exercise of discretion. In other words, the constraint of consistency and the mandate against unreasoning disregard of material circumstances are implicit lest discretion attracts the acrid epigram of judicial caprice.

The dignity of the individual shall not be desecrated by infliction of atrocious death sentence merely because there is a murder proved although crying circumstances demand the lesser penalty. To exemplify, supposing a boy of fifteen incited by his elder brothers, chases with them a murderer of their father and after hours of search confronts the villain and vivisects him in blood-thirsty bestiality. Do you hang the boy, blind to his dignity and tenderness intertwined?

We mean to illustrate the applicability, not to exhaust the variables. Even here we may make it clear that equality is not to be confounded with flat uniformity.

The element of flexibility and choice in the

process of adjudicating is precisely what justice requires in many cases. Flexibility permits more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass-produced.

In urging that discretion is the "effective individualizing agent of the law", Dean Pound pointed out that

> In proceedings for custody of children, where compelling consideration(s) cannot be reduced to rules.. determination must be left, to no small extent, to the disciplined but personal feeling of the judge for what justice demands." (22 Syracuse L.R. 635, 636) (1).

Every variability is not arbitrary. On the contrary, it promotes rationality and humanity. Article 19 is a lighthouse with seven lamps of liberty throwing luminous indications of when and when only the basic freedoms enshrined therein can be utterly extinguished. The Judge who sits to decide between death penalty and life sentence must ask himself: Is it 'reasonably' necessary to extinguish his freedom of speech, of assembly and association, of free movement, by putting out finally the very flame of life? It is constitutionally permissible to swing a criminal out of corporeal existence only if the

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security of State and society, public order and the interests of the general public compel that course as provided in Art. 19(2) to (6). They are the special reasons which s.354(3) speaks of. Reasonableness as envisaged in Art.19 has a relative connotation dependent on a variety of variables-cultural, social, economic and otherwise. We may give concrete instances at a later stage of this judgment but feel it necessary to state here that what is reasonable at a given time or in a given country or in a situation of crisis may not be the same as on other occasions or in other cultural climates. Indeed, that is the unspoken but inescapable silent command of our constitutional system.

So, we search for guidelines within s.302 I.P.C. read with s.354 Cr. P.C., and find that ordinarily, for murder a life-term is appropriate save where 'special reasons' are found for resort to total extinction of the right to life and farewell to fundamental rights. Public order and social security must demand it. That is to say, the sacrifice of a life is sanctioned only if otherwise public interest, social defence and public order would be smashed irretrievably. Social justice is rooted in spiritual justice and regards individual dignity and human divinity with sensitivity. So, such extra-ordinary grounds alone constitutionally qualify as 'special reasons as leave no option to the court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing or pathetic the situation, unless the inhere t testimony oozing from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a bloodthirsty tiger, he has to quit his terrestrial tenancy. Exceptional circumstances,

beyond easy visualisation, are needed to fill this bill.

To repeat for emphasis, death-corporeal death-is adieu to fundamental rights. Restrictions on fundamental rights are permissible if they are reasonable. Such restriction may reach the extreme state of extinction only if it is so compellingly reasonable to prohibit totally. While sentencing, you cannot be arbitrary since what is arbitrary is per se unequal.

As stated earlier you cannot be unusually cruel for that spells arbitrariness and violates Art.14. Douglas, J. made this point clear: (1)

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> "There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty .... should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."
>
> They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments."

In Maneka Gandhi, this Court wrote

> We must reiterate here what was pointed out by the majority in E.P.Royappa v. State of Tamil Nadu (2) namely that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch."

You cannot inflict degrading punishment since the preamble speaks of 'dignity of the individual'. To stone a man to death is lynch law which breaches human dignity and is unreasonable under Art.19 and unusually cruel and arbitrary under Art. 14. Luckily, our country is free from that barbarity legally.

The searching question the Judge must put to himself is: what then is so extra-ordinarily reasonable as to validate the wiping out of life itself and with it the great rights which inhere in him in the totally of facts, the circle being drawn with ample relevancy.

Social justice, which the Preamble and Part IV (Art.38) hignlight as paramount in the governance of country, also has a role to mould the sentence. But what is social justice? Despite its shadowy semantics we may get its essence once we grasp the Third World setting, the ethos and cultural heritage and the national goal or tryst with destiny.

Balakrishna Iyer, J., in Sridharan Motor Service, Attur v. Industrial Tribunal, Madras and Others(3) observed:

> "Concepts of social justice have varied with age and clime. What would have appeared to be indubitable social justice to a Norman or Saxon in the days of William the

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> Conqueror will not be recognised as such in England today. What may apear to be incontrovertible social justice to a resident of Quebec may wear a different aspect to a resident of Peking. If it could be possible for Confusius, Manu, Hammurabi and Solomon to meet together at a conference table, I doubt whether they would be able to evolve agreed formulae as to what constitutes social justice, which is a very controversial field.... In countries with democratic forms of Government public opinion and the law act and react on each other."

We may add that in a developing country, in the area of crime and punishment, social justice is to be rationally measured by social defence and, geared to developmental goals.

Thus, we are transported to the region of effective social defence as a large component of social justice. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated.

When, then, does a man hold out a terrible and continuing threat to social security in the setting of a developing country? He does so if, by his action, he not only murders but by that offence, poses a grave peril to societal survival. If society does not survive, individual existence comes to nought. So, one test for impost of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. To illustrate, if an economic offender who intentionally mixes poison in drugs professionally or willfully adulterates intoxicating substances injuriously, and knowingly or intentionally causes death for the sake of private profit, such trader in lethal business is a menace to social security and is, therefore, a violator of social justice whose extinction becomes necessary for society's survival. Supposing a murderous band of armed dacoits inteintionally derails a train and large number off people die in consequence, if the ingredients of murder are present and the object is to commit robbery inside the train, they practise social injustice and imperil social security to a degree that death penalty becomes a necessity if the crime is proved beyond doubt. There may be marginal exceptions or special extenuations but none where this kind of dacoity or robbery coupled with murder becomes a contagion and occupation, and social security is so gravely imperilled that the fundamental rights of the defendant become a deadly instrument whereby many are wiped out and terror strikes community life. Then he 'reasonably' forefeits his fundamental rights and takes leave of life under the law. The style of violence and

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systematic corruption and deliberately planned economic offences by corporate top echelons are often a terrible technology of knowingly causing death on a macro scale to make a flood of profit. The definition of murder will often apply to them. But because of corporate power such murderous depradations are not charged. If prosecuted and convicted for murder, they may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain.

Likewise, if a man is a murderer, so hardened, so blood-thristy, that within the prison and without, he makes no bones about killing others or carries on a prosperous business in cadavers, then he becomes a candidate for death sentence. If psychoanalysts and psychiatrists find him irredeemable in the reasonable run of time then his being alive will involve more lives being lost at his hands. If, however, he can be reformed in a few years' time by proper techniques of treatment imprisonment for life is good enough. But, on the other hand if he is far too hadened that it has become his second nature to murder, society cannot experiment with correctional strategy, for, when he comes out of jail, he may kill others. Such an incurable murderer deserves to be executed under the law as it stands. Difficult to imagine though, but even the bizarre may

happen. The social setting, the individual factors and like imponderables still remain to be spelt out. While the world is spiralling spiritually towards a society without State-sanctioned homicide, a narrow category may under current Indian societal distortions deserve death penalty although realistically the Law is held at bay by corporate criminals killing people through economic, product, environmental and like crimes.

Death penalty functionally fails to operate in this area for reasons not relevant to unravel here but theta justice often claims human lives by hanging sentences by a distorted vision of the penological purposes anu results. What we mean is that the retention of death sentence in s. 302 is rigorously restricted to these macro-purposes of social defence, state security and public order. But in practice, purblind application of capital penalty claims victims who should not be hanged at all. The gross misapplication springs from professional innocence of the ideological, constitutional, criminological and cultural trends in India and abroad. Judicial decisions have hardly investigated these areas, have conjured up grisly images of crime and criminal, and, fed on discarded doctrines of retribution and deterrence, indulged in death awards blind to the socio-spiritual changes taking place in theoretical foundations of criminology and sublime movements on our human

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planet. The 'robes' are a repository of many rare qualities but shall add to its repertory latest developments in sentencing wisdom.

A paranoid preoccupation with the horror of the particular crime oblivious to other social and individual aspects is an error. The fact that a man has been guilty of barbaric killing hardly means that his head must roll in the absence of proof of his murderous recidivism, of incurable criminal violence, of a mafia holding society in ransom and of incompatibility of peaceful co-existence between the man who did the murder and society and its members.

We may constellate some of the principles. Never hang unless society or its members may probably lose more lives by keeping alive an irredeemable convict. If rehabilitation is possible by long treatment in jail, if deterrence is possible by life-long prison terms, capital sentence may be misapplied. Death penalty is constitutionalised by reading into s. 354(3) Cr. P.C., those 'special reasons' which validate the sentence as reasonably necessitous and non-arbitrary, as just in the special societal circumstances.(1)

Social justice turns on culture and situation. We must listen, even as judges who are human and not wholly free from sublimated violence, to the words of great men condensed in the message to the Delhi Conference Against Death Penalty a few months ago. Lok Nayak Jai Prakash Narain said :

To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition sufficiently improved to become useful citizens. In a minority of cases, this may not be possible. They may be kept in prison houses till they die a natural death. This may cast a heavier economic burden on society than hanging.

But I have no doubt that a humane treatment even of a murderer will enhance man's dignity and make society more human."

(emphasis added)

Andrie Sakharov, in a message to the Stockholm Conference on Abolition organised by Amnesty International last year, did put the point more bluntly: (2)

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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 influences, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act the deprivation of life. Such a State cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true-that savagery begets only savagery....I am convinced that society as a whole and each of its members individually, not just the person who comes before the courts, bears a responsibility for the occurrence of a crime....I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Blood-thirsty and calculated revenge with no temporary insanity on the part of the judges, and therefore, shameful and disgusting."

(emphasis added)

Tolstoy wrote an article "I cannot be silent" protesting against death sentence where he said :

"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 they 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 are to be hung, and they are led to the gallows."

Victor Hugo's words are not vapid sentimentalism:

"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,

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Reason is on our side, feeling is on our side, and experience is on our side."

Gandhiji wrote:

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

Quotations from noble minds are not for decoration but for adaptation within the framework of the law. This

Gandhian concept was put to the test without effects calamitous in the Chambal dacoits' cases :

> "Take the classic example of the blood-thirsty dacoits of Chambal. The so-called dacoits, in reality the Thakurs of Delhi in the 12th century, were driven to the desolate Chambal Valley. They had no other recourse except to steal and, if necessary, murder for their survival. The 800 years injustice they suffered can be remedied only by their economic emancipation. Remember, no one is born a criminal. Sarvodaya leaders Jayaprakash Narain and Vinoba Bhave won over dacoits with love, affection and understanding- something sophisticated, automatic weapons failed to do."

We have, unfortunately no follow-up study of this experiment.

Coming down to unhappy pragmatism, death penalty is permissible only where reformation within a reasonable range, is impossible. The confusion is simple but die-hard. We lawfully murder the murderer, not the murder, by infliction of capital sentence. for which the strictest justification is needed if human ignity assured by the Constitution is not to be judicially dismissed as an expandable luxury.

The deduction is inevitable that simply because a murder is brutal, lex talionis must not take over nor humane justice flee. This proposition is tested in a crisis and the court's responsibility is heavy to satisfy itself that the nature of the crime is considered, not for its barbarity as such but for its internal evidence of incurably violent depravity. We have dealt with this aspect earlier but repeat, since it is horrendous or many lives have been lost. Our culture is at stake, our Karuna is threatened, our Constitution is brought into contempt by a cavalier indifference to the deep reverence for life and a superstitious offering of human sacrifice to propitiate the Goddess of Justice.

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These illustrations show that angry or scary irrationality has no place in awarding death sentence because 'reasonableness' and fairness are the touchstone of the constitutionality of capital penalty. Thus, we hold that only in these very limited circumstances can the court award the extreme penalty. The terrible nature of the murder should not frenzy the court into necessary 'capital' penalty, for its pertinence is only to the extent it helps to decide whether the prisoner, if released after a few years in a penitentiary, will reasonably be prone to continued killing. If life-long imprisonment will prevent further killing, he may be allowed to live with the limited fundamental rights allowed in a prison setting.

Even in extreme cases, one has to judge carefully whether the social circumstances, personal remorse, the excruciation of long pendency of the death sentence, with the prisoner languishing in nearsolitary suffering all the time, are not adequate infliction, so as to make capital sentence too cruel and arbitrary and agonising not to violate Art. 14. Our penal pharmacopoeia must provide for the extreme remedy of extinction of the whole personality only in socially critical situations. This is spiritual-social justice.

Sometimes the thought is expressed that the life of the victim, the misery of his family and the great pain cruelly caused, are forgotton by those who advocate mercy for the brutal culprit. This is a fallacy fraught with miscarriage of justice. Punishment is not compensation like the 'blood

money' of Islamic law. It is not lex talionis of retributive genre. To be strictly compensatory or retributive, the same type of cruel killing must be imposed on the killer. Secondly, can the hanging of the murderer bring the murdered back to life ? 'The dull cold ear of death' cannot hear the cries or see the tears of the dying convict. There is a good case for huge fines along with life-terms in sentences where the sum is realisable and payable to the bereaved.

The Indian Penal Code fabricated in the imperial foundry well over a century ago has not received anything but cursory parliamentary attention in the light of the higher values of the National Charter which is a testament of social justice. Our Constitution respects the dignity and, therefore, the divinity of the individual and preservation of life, of everyone's life. So the Court must permeate the Penal Code with exalted and expanded meaning to keep pace with constitutional values and the increasing enlightenment of informed public opinion. A nineteenth century text, when applied to twentieth century conditions, cannot be construed by signals from the grave. So, while courts cannot innovate beyond the law, the law cannot be viewed as cavemen's pieces. The penological winds of change, reflected in

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juristic debates, bills for abolition of death penalty in Parliament and the increasing use of clemency and commutation by the highest Executive, must affect the living law of statutory application.

There is yet another consideration of grave moment which must, weigh with the court, vowed to uphold Justice-Social, Economic and Political. Who, by and large, are the men whom the gallows swallow ? The white-collar criminals and the corporate criminals whose wilful economic and environmental crimes inflict mass deaths or who hire assassins and murder by remote control ? Rarely. With a few exceptions, they hardly fear the halter. The feuding villager, heady with country liquor, the striking workers desperate with defeat, the political dissenter and sacrificing liberator intent on changing the social order from satanic misrule, the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife driven by dire necessity or burst of tantrums-it is this person who is the morning meal of the macabre executioner.

Justice Douglas, in a famous death penalty case, observed:

> Former Attorney Ramsey Clark has said: 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed."
>
> "A characteristic of village murderers in India: over 60 per cent of them have lost their parents, either one or both, at the time of commission of the crime. Inadequate parental protection is thus one of the primary factors in the upbringing of a murderer. The very existence of parents helps the healthy growth of the offspring and prevents the children from falling into the whirlpool of crime."

Comments the Editor, the Illustrated Weekly of India dated August 29, 1976.

Historically speaking, capital sentence perhaps has a class bias and colour bar, even as criminal law barks at both but bites the proletariat to defend the proprietariat, a reason which, incidentally, explains why corporate criminals including top executives who, 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. Penal
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law is not what the printed text professes but what the prison cell and the condemned man testify.

Courts take a close-up of the immediate circumstances not the milieu which made the murderer nor the environs which make him man again. In equal justice under the law, this imbalance of s. 302 I.P.C., in action cannot be missed.

The tradition-bound agencies of justicing cocooned by judicial precedents reflecting by-gone values make sentencing processes 'soft' where they should be severe and tainted with torture where a healing touch comports with culture. Indeed, the habitual cerebrations of both wings of the profession have been guiltless of the great experiment of injecting the humanism of the National Charter through the interpretative art into criminal statistics. Social justice on the one hand, means social defence from white-collar and kindred criminals not through procrastinating illusions of punishment but instant deterrents to anti-social delinquents and, on the other, Prison Justice, Reforms of offenders, non-institutional strategies through community participation in correction and, above all, sentencing essays which ensure dignity of the individual human decencies and uplifting projects which re-make the criminal into a good citizen. Several of our prison houses and practices make us wonder about institutional criminality and 'punishment' becoming a brand of crime and, worse, a manufacturing process of dehumanized criminals. Prison Reform is on the national agenda. Sentencing Reform soon deserves to be added.

An Indo-Anglian appreciation of British Justice is sometimes relied on subconsciously, strengthened by the ambiguous Report of the Royal Commission on Capital Penalty to substantiate the retentionist theory. But it is note-worthy that Sir Samuel Romilly, critical of the brutal penalties in the then Britain, said in 1817: 'The Laws of England are written in blood'. Alfieri has suggested: 'Society prepares the crime, the criminal commits it. 'We may permit ourselves the liberty to quote from Judge Sir Jeoffrey Streatfield: 'If you are going to have anything to do with the criminal courts, you should see for yourself the conditions under which prisoners serve their sentence.'

> "It would be extremely gratifying to scan the pages of British legal and social history and to find that the members of the judiciary were invariably in the fore-front of the movement towards enlightenment, progress and humanity. Unfortunately until very recently, this has never been the case; in fact, it would be fair to say the judges have usually been amongst the principal opponents of penal reform. It may be
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> that they were too far divided from the rest of the populace in the remoteness of their dignity, and too far removed in their standards of physical comfort and intellectual elegance. Perhaps if a number of them had personally investigated the pitiable squalor of the prisons, the depravity of the haulks, and the bestial cruelties on the scaffold, some at least might have

been shocked into a public condemnation of the entire penal system. But, as it was, they preferred to remain either ignorant of or acquiescent to the aftermath of their judgments and of all the ensuing horrors which were being carried out in the name of the law.''(1)

British Justice has abandoned death penalty for murder for two decades now (Homicide Act, 1957) without escalation of murderous crime. Attempts to get round the Murder (Abolition of Death Penalty) Act, 1965 have failed in Parliament and as Barbara Wooton says, 'Capital punishment thus appeared to be itself sentenced to death' for murder. To quote the Royal Commission's recommendation for retention after Parliament has abolished death penalty is only of historical interest: "After the Abolition Act had been in force for over seven years, the Criminal Law Revision Committee considered whether any further changes in the penalty for murder were desirable. Their conclusions were almost entirely negative."

This perspective justifies judicial evolution of a humane penal doctrine because the legislative text is not static; and as Chief Justice Warren wrote in Trop v. Dulles the court 'must draw its meaning from the evolving standards of a maturing society'. The great answer to grave crime is culturing of higher consciousness, removing the pressure of a perverted social order, and nourishing the inner awareness of man's true nature. This is true penal reform, including jail reform.

A difficult category which defies easy solution, even in the developmental-social justice background, is the political or ideological murderer. Where freedom of faith and conscience is affirmed, as in our Constitution, where concentration of wealth and ethnic and social suppression are anathema and egalitarian-cum-distributive justice are positive goals, 'criminals' motivated by the fundamental creed of our Constitution may well plead for the benefit of life imprisonment. Count Leo Tolstoy in his Recollections and Essays denounces death penalty even against revolutionaries by arguments too Gandhian to be dismissed by Indian judges in the sentencing sector of discretion. We

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do not dogmatise but suggest the trend. Law by itself is no answer to Justice as the sublime instances of Socrates, Jesus are martyrs galore in the long story of Man point.

We do not underrate the importance of strong public denunciation of serious crimes like murder and heavy punishment for it. The critical question is whether capital sentence or incarceration for life in a hospital setting- both stern, but the former a final farewell to life itself, the latter a protracted living ordeal-which of the two harsh alternatives should be inflicted.

Criminologists have reached near-consensus that death penalty for murder is judicial futility as a deterrent and is a vulgar barbarity, if fruitless. And Reformationists have made headway so much that about 80 countries have given up capital sentence. England had 200 offences which carried death sentences and publicly hanged boys and girls for stealing spoons and the like. Stealing persists, death penalty has disappeared. The importance of death sentence as a deterrent is brought out with characteristic wit by Dr. Johnson, who according to Boswell, noted pickpockets plying their trade in a crowd assembled to see one of their number executed. There is no moral defence against the application of Justitia dulcore misericordiac temperate (Justice tempered by mercy, literally by sweetness of compassion) even in the name of deterrence.

CONDENSED GUIDELINES

We may summarise our conclusions to facilitate easier application and to inject scientific formulation.

1. The criminal law of the Raj vintage has lost some of its vitality, notwithstanding its formal persistence in print in the Penal Code so far as s. 302 I.P.C. is concerned. In the post-Constitution period s. 302 I.P.C., and s. 345(3) of the Code of Criminal Procedure have to be read in the humane light of Parts III and IV, further illumined by the Preamble to the Constitution. In Sunil Batra a Constitution Bench of this Court has observed:

> "Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution" "Cases are not unknown where merely on account of a long lapse of time the Courts have commuted the sentence of
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> death to one of life imprisonment on the sole ground that the prisoner was for a long time hovering under the formenting effect of the shadow of death."
>
> "The scheme of the Code, read in the light of the Constitution, leaves no room for doubt that reformation, not retribution, is the sentencing lode-star."
>
> (emphasis added)

2. The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea.

3. The current ethos, with its strong emphasis on human rights and against death penalty, together with the ancient strains of culture spanning the period from Buddha to Gandhi must ethically inform the concept of social justice which is a paramount principle and cultural paradigm of our Constitution.

4. The personal and social, the motivational and physical circumstances, of the criminal are relevant factors in adjudging the penalty as clearly provided for under the new Code of 1973. So also the intense suffering already endured by prison torture or agonising death penalty hanging over head consequent on the legal process.

5. Although the somewhat absolescent M'Naughten Rules codified in s. 84 of the Penal Code alone are exculpatory mental imbalances, neurotic upsets and psychic crises may be extenuatory and the sense of diminished responsibility may manifest itself in judicial clemency of commuted life incarceration.

6. Social justice, projected by Art. 38, colours the concept of reasonableness in Art. 19 and non-arbitrariness in Art. 14. This complex of articles validates death penalty in a limited class of cases as explained above. Maybe, train dacoity and bank robbery bandits, reaching menacing proportions, economic offenders profit-killing in an intentional and organised way, are such categories in a Third World setting.

Apart from various considerations which may weigh with the Court, one consideration which may be relevant in given circumstances, is the planned motivation that goaded the accused to commit the crime. Largely in India death is caused not by a cool, calculated, professionally cold blooded planning but something that happened on the spur of the moment. In fact in faction-ridden society factions come to grip on a minor provocation and a gruesome tragedy

occurs.
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But with the development of the complex industrial society there has come into existence a class of murderers who indulge in a nefarious activity solely for personal, monetary or property gain. These white collar criminals in appropriate cases do deserve capital punishment as the law now stands, both as deterrent and as putting an end to an active mind indulging in incurably nefarious activities. It is such characteristics that determine more or less the gravity and the character of the offence and offender. We may venture that sometimes there is big money in the subtle "murder" business disguised as economic offences or industrial clashes; and there social justice in certain circumstances punctures 'soft' justice and opts for lethal sentence. Where intractable mafia shows up in murderous profusion, the sentence of death must, reluctantly though, defend society.

7. The survival of an orderly society without which the extinction of human rights is a probability compels the higher protection of the law to those officers who are charged with the fearless and risky discharge of hazardous duties in strategic situations. Those officers of law, like policemen on duty or soldiers and the like have to perform their functions even in the face of threat of violence sometimes in conditions of great handicap. If they are killed by designers of murder and the law does not express its strong condemnation in extreme penalisation, justice to those called upon to defend justice may fail. This facet of social justice also may in certain circumstances and at certain stages of societal life demand death sentence.

8. When an environmental technologist, food and drug chemist or engine manufacturer intentionally acts in the process, abetted by the top decision-makers in the corporation concerned, in such manner that the consumer will in all probability die but is kept wilfully in the dark about the deadly consequence by glittering advertisement or suppressio veri, he deserves dealth penalty for society's survival, if he fulfils the elements of murder. Maybe, a re-definition of murder may be needed to make this legal mandate viable. Parliamentarians and judicial personnel may benefit by the observations made by Ralph Nader on American Law-in-action.

> "In no clearer fashion has the corporation held the law at bay than in the latter's paralysis toward the corporate crime wave. Crime statistics almost wholly ignore corporate or business crime; there is list of the ten most wanted corporations; the law affords no means of regularly collecting

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> data on corporate crime; and much corporate criminal behaviour (such as pollution) has not been made a crime because of corporate opposition. For example, wilful and knowing violations of auto, tire, radiation, and gas pipe-line safety standards are not considered crimes under the relevant statutes even if lives are lost as a result. The description of an array of corporate crimes in this forthright book reveals a legal process requiring courage, not routine duty, by officials to enforce the laws against such outrages. The law is much more comfortable sentencing a telephone coin box thief to five years than sentencing a billion-dollar price-fixing executive to six weeks in jail. In one recounting after another, the authors pile up the evidence toward one searing conclusion-that corporate

economic, product, and environmental crimes dwarf other crimes in damage to health, safety and property, in confiscation or theft of other people's monies, and in control of the agencies which are supposed to stop this crime and fraud. And it all goes on year after year by blue-chip corporate recidivists.

Why ? It is easy to answer-"power." But that is the beginning, not the end, of understanding."

9. 'Special reasons' necessary for imposing death penalty must relate, not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserve death penalty. The crime may be less shocking than other murders and yet the callous criminal, e.g. a lethal economic offender, may be jeopardizing societal existence by his act of murder. Likewise, a hardened murderer or dacoit or armed robber who kills and relishes killing, the raping and murdering to such an extent that he is beyond rehabilitation within a reasonable period according to current psycho-therapy or curative techniques may deserve the terminal sentence. Society survives by security for ordinary life. If officers enjoined to defend the peace are treacherously killed to facilitate perpetuation of murderous and often plunderous crimes social justice steps in to demand death penalty dependent on the totality of circumstances.

10. We must always have the brooding thought that there is a divinity in every man and that none is beyond redemption. But death penalty, still on our Code, is the last step in a narrow category where, within a reasonable spell, the murderer is not likely to be cured and tends to murder others, even within the prison or immediately on release, if left alive-a king cobra which, by chronic habit, knows only

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to sting to death unless defanged if possible. The patience of society must be tempered by the prudence of social security and that is the limited justification for deprivation of fundamental rights by extinguishment of the whole human being. The extreme penalty can be invoked only in extreme situations.

The criminology of higher consciousness claims that by expanding inner awareness through meditational and yogic techniques the worst offender can be reformed, if prisons can function more fulfillingly and less fatuously a consummation devoutly to be wished ! Murderers are not born but made and often can be unmade.

This claim, if experimented with and found credible, goes a long way to remove from the scales of justice stains of human blood. When this healing hope is developed adequately, may be the penal pharmacopoeia may remove death sentence from the system. The journey is long and we are far from home. Currently, our prisons often practice zoological, not humanising strategies, as some competent reports and writings tend to prove.

What we have laid down is not in supersession of those extenuating situations already considered by this Court as sufficient to commute death sentence but is supplementary to them and seeks to streamline, so that erratic judicial responses may be avoided.

In Ediga Annamma(supra), for instance, this Court has held, and while endorsing, we repeat it for emphasis:

"Where the murderer is too young or too old, the clemency of penal justice help him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception

or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under s. 302 read with s. 149, or again the accused had acted suddenly under another's instigation, without pre-meditation, perhaps the Court may humanely opt for life, even like where a just cause or real suspicion of wifely indefility pushed the criminal into the crime. On the other hand, the weapons used and

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

In Srirangan v. State of Tamil Nadu the Court set aside a death sentence even though three had been killed. That was a case of three innocent lives put down without provocation and although the courts below had concurrently inflicted death sentence, a Bench of three judges confining the focus on sentence alone commuted the punishment. The crucial role of young age (in his twenties) and a trace of mental imbalance in robbing the propriety of a death impost even from such a ghastly case of tripe murder was emphasised. This Court's observations on the sensitive attitude to sentencing and the wide spectrums of considerations under s. 354(3) Cr. P.C. are helpful here:

"The plurality of factors bearing on the crime and the doer of the crime must carefully enter the judicial verdict. The winds of penological reform notwithstanding, the prescription in s. 302 binds, the death penalty is still permissible in the punitive pharmacopoeia of India. Even so, the current of precedents and the relevant catena of clement facts, personal, social and other, persuade us to hold that even as in Nanu Ram v. State of Assam (AIR 1975 SC 762), the lesser penalty of life imprisonment will be a more appropriate punishment here."

A brief word about Lalla Singh. That was a case of murder of three persons and the head of one of the deceased, a lady, was severed. The trial judge awarded the extreme penalty to him who did this gruesome deed. But the court reduced the sentence to life term grounded on the long and agonising gap between the date of offence and the disposal of the case by the Supreme Court:

"While we are unable to say that the learned Sessions Judge was in error in imposing the extreme penalty, we feel that as the offence was committed on 18-6-1971 more than six years ago, the ends of justice do not require that we should confirm the sentence of death passed on the first respondent."

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We have read the penal Code (s. 302) in harmony with the Procedure Code (s. 354(3)) and tuned up both the Codes to receive the command of the Constitution. 'Too kind for too long to criminals' is a cynical comment which comes with a call for revival of more hangings as a gut reaction to a horrible crime, forgetting that crimelessness comes only

from higher consciousness. And, in a democracy, if such offences escalate beyond endurance and such cries rise from all over, penal policy may change, whether the judges and jurists and moralists and murderers relish it or not. Even so, the basic humanity of mankind cannot be surrendered to panicky calls and passionate reactions provoked by stray though shocking, events.

Two significant developments need to be stressed before we conclude the general discussion. The first is the functional failure, at the forensic level, of the meaningful provision in the Procedure Code, 1973 intended to help the court to individualise sentencing justice to fit the crime and the criminal.

The sentence of death can be imposed by the Sessions Judge and it can only be executed after it is confirmed by the High Court as provided in Chapter XXVIII of the Code. The procedure prescribed for the trial of sessions cases is contained in Chapter XVIII. Section 235 which is relevant for this purpose reads as under:-

> "235(1) After hearing arguments and points of law(if any), the Judge shall give a judgment in the case.
>
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

A specific stage is prescribed in the trial of cases tried by the Sessions Court in accordance with the procedure prescribed in Chapter XVIII. After the prosecution evidence is complete and the accused is called upon to enter the defence and if evidence is led on behalf of defence, after the defence evidence is complete, the Court should hear arguments of the Prosecutor and the advocate on behalf of the accused (see s. 234). Thereafter comes s. 235 which obligates the Court to give a judgment. The question of sentence does not enter the verdict or consideration at this stage. If the accused is to be acquitted, the matter ends there. If the Court, upon consideration of the evidence led before it, holds the accused guilty of any offence it must pronounce judgment to the extent that it holds accused guilty of a certain offence.

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Thereafter a statutory duty is cast upon the Court to hear the accused on the question of sentence. Sub-s. (2) obligates the Court to hear the accused on the question of sentence. In fact, this provision should be construed to mean that where the Court has to choose one or the other sentence and if with a view to inflicting a certain sentence, special reasons are required to be recorded, obviously the State which is the prosecutor, must be called upon to state to the Court which sentence as prosecutor it would consider appropriate in the facts and circumstances of the case.

Where the accused is convicted for an offence under s. 302, I.P.C., the Court should call upon the Public Prosecutor at the stage of s. 235(2) to state to the Court whether the case is one where the accused as a matter of justice should be awarded the extreme penalty of law or the lesser sentence of imprisonment for life. If the Public Prosecutor informs the Court that the State as Prosecutor is of the opinion that the case is not one where extreme penalty is called for and if the Sessions Judge agrees with the submission, the matter should end there.

If on the other hand the Public Prosecutor states that

the case calls for extreme penalty prescribed by law, the Court would be well advised to call upon the Public Prosecutor to state and establish, if necessary, by leading evidence, facts for seeking extreme penalty prescribed by law. Those reasons and the evidence in support of them would provide the special reasons according to the State which impel capital punishment. It would be open to the accused to rebut this evidence either by submissions or if need be, by leading evidence. At that stage the only consideration relevant for the purpose of determining the quantum of punishment would be the consideration bearing on the question of sentence alone and not on the validity of the verdict of guilty. After considering the submissions and evidence it would be for the Court with its extreme judicious approach and bearing in mind the question that the extreme penalty is more an exception, to determine what would be the appropriate sentence. This would ensure a proper appreciation of vital considerations entering judicial verdict for determining the quantum of sentence.

We hope the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference only to materials brought on record for proof or disproof of guilt.

The second major development is the amendment of s. 302 IPC moved by Government and already passed by the Rajya Sabha doing

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away with death penalty for murder save in exceptional categories. So far as it goes, the benignity of the change reflects the constitutional culture we have explained. The discretion still left, in our view, must be guided by the mariner's compass we have supplied in this Judgment.

THE FACTS AND CONCLUSIONS

Having stated the law at length, we have to apply it to the facts of the cases, which we proceed to state. After all, "Let the facts be known as they are, and the law will sprout from the seed and turn its branches towards the light". We may now state the facts needed for the application of the principles set out above.

RAJENDRA PRASAD'S CASE

A long-standing family feud, with years-long roots, let to a tragic murder. The houses of Ram Bharosey and Pyarelal had fallen out and periodic fuelling of the feud was furnished by the kidnapping of a wife, the stabbing of a brother and the like. Lok Adalats of village elders brought about truce, not peace. The next flare-up was a murder by the appellant, a rash son of one of the feuding elders Pyarelal. He was sentenced to life imprisonment (which means no reformation but hardening process, since our jails are innocent of carefully designed programme of re-humanizing but have an iatrogenic, inherited drill of de-humanising). The young man, after some years served in prison, was released on Gandhi Jayanti Day. But Gandhian hospital setting was, perhaps, absent in the prison which, in all probability, was untouched by reformation of diseased minds, the fundamental Gandhian thought. The result was the release kept alive his vendetta on return, aggravated by the 'zoological' life inside. Some minor incident ignited his latent feud and he stabbed Ram Bharosey and his friend Mansukh several times, and the latter succumbed. The 'desperate character' once sentenced, deserved death this second time, said the Sessions Court and the High Court confirmed the view.

An application of the canons we have laid down directly

arises. There is the common confusion here. A second murder is not to be confounded with the persistent potential for murderous attacks by the murderer. This was not a menace to the social order but a specific family feud. While every crime is a breach of social peace, the assailant is bound over only if he is a public menace. Likewise, here was not a youth of uncontrollable violent propensities against the com-
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munity but one whose paranoid preoccupation with a family quarrel goaded him to go at the rival. The distinction is fine but real. How do we designate him 'desperate' without blaming the jail which did little to make a man out of the criminal clay ? So long as therapeutic processes are absent from prisons, these institutions, far from being the healing hope of society, prove hardening schools to train desperate criminals. The pitiless verse of Oscal Wilde is pitifully true even today:

"The vilest deeds, like poison weeds,
Bloom well in prison air;
It is only what is good in Man
That wastes and withers there"

"Desperate criminal" is a convenient description to brand a person. Seldom is the other side of the story exposed to judicial view-the failure of penal institutions to cure criminality and their success in breaking the spirit or embittering it.

Prasad's prison term never 'cured' him. Who bothered about cure ? The blame for the second murder is partly on this neglect.

Nothing on record suggests that Rajendra Prasad was beyond redemption; nothing on record hints at any such attempt inside the prison Lock-up of a criminal for long years behind stone walls and iron bars, with drills of breaking the morale, will not change the prisoner for the better Recidivism is an index of prison failure, in most cases. Any way, Rajendra showed no incurable disposition to violent outbursts against his fellow-men. We see no special reason, to hang him out of corporeal existence. But while awarding him life imprisonment instead, we direct for him mental-moral healing courses through suitable work, acceptable meditational techniques and psychotherapic drills to regain his humanity and dignity. Prisons are not human warehouses but humane retrieval homes.

Even going by precedents like Lalla Singh (supra) this convict has had the hanging agony hanging over his head since 1973, with nearsolitary confinement to boot. He must, by now, be more a vegetable than a person and hanging a vegetable is not death penalty. This is an additional ground for our reduction.

THE KUNJUKUNJU CASE

The next case is no different in the result but very different on the facts. The scenario is the usual sex triangle, terribly perverted. One
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randy Janardanan-the appellant-with a wife and two children, developed sex relations with a fresh girl and the inevitable social resistance to this betrayal of marital fidelity led to a barbaric short-cut by this in criminal of cutting to death the innocent wife and the immaculate kids in the secrecy of night. To borrow the vivid words of the courts below, 'deliberate', 'cold-blooded' was the act, attended as it was with 'considerable brutality'. This ruled out mitigation and supplied 'special reasons', according to both the courts below, for the awesome award of death penalty.

Was that right ? If the crime alone was the criterion, yes; but if the criminal was the target, no.

The brucial question is whether the crime and its horrendous character except to the extent it reveals irreparable depravity and chronic propensity is relevant. The innocent three will not be happy because one guilty companion is also added to their number. Is Janardanan a social security risk, altogether beyond salvage by therapeutic life sentence ? If he is, the pall must fall on his cadayer. If not, life must burn on. So viewed, no material, save juridical wrath and grief, is discernible to invoke social justice and revoke his fundamental right to life. A course of anti-aphrodisiac treatment or willing castration is a better recipe for this hypersexed human than outright death sentence. We have not even information on whether he was a desperate hedonist or any rapist with 'Y' chromosomes in excess, who sipped every flower and changed every hour, so as to be a sex menace to the locality. Sentencing is a delicate process, not a bling man's buff. We commute the death sentence to life imprisonment.

THE DUBEY CASE

There were three accused to begin with. The appellant was convicted of the murder of three relatives and sentenced to death. The other two were held guilty, by the Sessions Judge of an offence of s. 302 read with s. 34 I.P.C. and awarded life imprisonment. The appeal of the latter was allowed and that of the former dismissed both on crime and punishment. The learned Judges expressed themselves thus:

> "Considering that Sheo Shankar, appellant caused the death of three persons so closely related to him, by stabbing each of them in the chest one after the other, and that too on no greater provocation than that there had been an exchange of abuses, I do not see how it can be said that sentence of death errs on the side of severity. It was urged that this appellant was only 17, 18 years old and so in view of

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> the ruling of the Supreme Court in Harnam v. State (AIR 1976 SC 2071), he should not be sentenced to death. In the first place, the note of learned Sessions Judge on his statement shows that he was 19, 20 years old and he had understated his age. Secondly, I doubt that the observation of the Supreme Court in the said case can be applicable to such a case of triple murder, where such victim is deliberately stabbed in the chest."

The whole reasoning crumbles on a gentle probe. A thumbnail sketch of the case is that the appellant, his father and his brother were angrily dissatisfied with a family partition and, on the tragic day, flung the vessels over the division of which the wrangle arose, went inside the house, emerged armed, picked up an altercation eventuating in the young man (whose age was around 18 or 20) stabbing to death three members of the other branch of the family. He chased and killed, excited by the perverted sense of injustice at the partition. It is illegal to award capital sentence without considering the correctional possibilities inside prison. Anger, even judicial anger, solves no problems but creates many.

Have the courts below regarded the question of sentence from this angle ? Not at all. The genesis of the crime shows a family feud. He was not a murderer born but made by the passion of family quarrel. He could be saved for society with correctional techniques and directed into repentance like the Chambal dacoits.

What startles us is the way the adolescence of the

accused has been by-passed and a ruling of this Court reduced to a casualty by a casual observation. Hardly the way decisions of the Supreme Court, read with Art. 141 should be by-passed.

Had the appellant been only 18 years of age, he would not have been sentenced to death as the High Court expressly states. The High Court is right in stating so. Tender age is a tender circumstance and in this country, unlike in England of old, children are not executed. Since the age of the accused is of such critical importance in a marginal situation like the present one, one should have expected from the courts below a closer examination of that aspect. Unfortunately, they have not got the accused medically examined for his age nor have they received any specific evidence on the point but have disposed of the question in a rather summary way: "In the first place, the note of the learned Sessions Judge on his statement shows that he was 19/20 years old and he had understated his age. Secondly,
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I doubt that the observations of the Supreme Court in the said case (AIR 1976 SC 2071) can be applicable to such a case of triple murder, where each victim is deliberately stabbed in the chest." A judge is no expert in fixing the age of a person and when precise age becomes acutely important reliance on medical and other testimony is necessary. One cannot agree with this manner of disposal of a vital factor bearing on so grave an issue as death sentence. Nor are we satisfied with the court vaguely distinguishing a ruling of this Court. It is not the number of deaths caused nor the situs of the stabs that is telling on that decision to validate the non-application of its ratio. It is a mechanistic art which counts the cadavers to sharpen the sentence oblivious of other crucial criteria shaping a dynamic, realistic policy of punishment.

Three deaths are regrettable, indeed, terrible. But it is no social solution to add one more life lost to the list. In this view, we are satisfied that the appellant has not received reasonable consideration on the question of the appropriate sentence. The criteria we have laid down are clear enough to point to the softening of the sentence to one of life imprisonment. A family feud, an altercation, a sudden passion, although attended with extra-ordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstance that the assailant is a habitual murderer or given to chronic violence-these catena of circumstances bearing on the offender call for the lesser sentence.

It is apt to notice in this context that even on a traditional approach this is not a case for death sentence, if we are to be belighted by the guidelines in Carlose John. The murder there was brutal but the act was committed while the accused were in a grip of emotional stress. This was regarded as persuasive enough, in the background of the case, to avoid the extreme penalty. The ruling in Kartar Singh related to a case of brutal murder and of hired murderers with planning of the criminal project. In that background, the affirmation of the death sentence, without any discussion of the guidelines as between 'life' and 'death' awards was hardly meant as a mechanical formula. It is difficult to discern any such ratio in that ruling on the question of sentence in the grey area of life versus death. The holding was surely right even by the tests we have indicated but to decoct a principle that if three lives are taken, death sentence is the sequel, is to read, without warrant, into that decision a reversal of the process spread

over decades.
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Social defence against murderers is best insured in the short run by caging them but in the long run, the real run, by transformation through re-orientation of the inner man by many methods including neuro-techniques of which we have a rich legacy. If the prison system will talk the native language, we have the yogic treasure to experiment with on high-strung, high-risk murder merchants. Neuroscience stands on the threshold of astounding discoveries. Yoga, in its many forms, seems to hold splendid answers. Meditational technology as a tool of criminology is a mascent-ancient methodology. The State must experiment. It is cheaper to hang than to heal, but Indian life-any human life-is too dear to be swung dead save in extreme circumstances.

We are painfully mindful that this Judgment has become prolix and diffuse. But too many pages are not too high a price where death sentence jurisprudence demands de novo examination to do justice by the Constitution.

Much of what we have said is an exercise in penal philosophy in the critical area of death sentence.

"Philosophizing is distrusted by most of the professions that are concerned with the penal system. It is suspect for lawyers because they are conscious that if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby."

After all, the famous words of Justice Holmes "The Law must keep its promises" must be remembered.

The appeals stand allowed and the death sentences stand reduced to life imprisonment; and, hopefully, human rights stand vindicated.

SEN, J. In an appeal confined to sentence under Article 136 of the Constitution, this Court has not only the power, but as well as the duty to interfere if it considers that the appellant should be sentenced 'differently', that is, to set aside the sentence of death and substitute in its place the sentence of imprisonment for life, where it considers, taking the case as a whole, the sentence of death to be erroneous, excessive or indicative of an improper exercise of discretion; but at the same time, the Court must impose some limitations on itself in the exercise of this broad power. In dealing with a sentence which has been made the subject of an appeal, the Court will interfere with a
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sentence only where it is 'erroneous in principle'. The question, therefore, in each case is whether there is an 'error of principle' involved.

The Court has the duty to see that on the particular facts and circumstances of each case the punishment fits the crime. Mere compassionate sentiments of a humane feeling cannot be a sufficient reason for not confirming a sentence of death but altering it into a sentence of imprisonment for life. In awarding sentence, the Court must, as it should, concern itself with justice, that is, with unswerving obedience to established law. It is, and must be, also concerned with the probable effect of its sentence both on the general public and the culprit.

In the three cases before us, there were 'special reasons' within the meaning of s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973 for the passing of the death sentence in each and, therefore, the High Courts were justified in confirming the death sentence passed under s. 368(a) of the Code. Indeed, they are illustrative of the rare type of cases, that is, first degree murders, where a

death sentence is usually awarded in any civilised country. These were cases of diabolical, cold blooded brutal murders of innocent persons, that is, first degree murders of extreme brutality or depravity. The inhumanity of some of these offenders defies belief.

I had the advantage of reading the judgment as originally prepared by my learned brother Krishna Iyer J., which, by defining the class of cases in which a death sentence may be passed upon conviction of a person for having committed an offence of murder punishable under s. 302 of the Indian Penal Code, 1860, and by putting a restrictive construction on the words "special reasons" appearing in s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973, does, in my opinion, virtually abolish the death sentence.

I was, therefore, constrained to write this dissenting opinion, as it is difficult to share the views of my learned brother Krishna Iyer J. He has now completely revised his draft judgment in which he has endeavoured to meet my point of view, and I have had the advantage of reading it. But I see no particular reason to change my views on the subject or to re-write or revise my dissenting opinion as the matter essentially involves a question of principle.

My learned brother Krishna Iyer J. pleads for abolition of the death penalty, in accordance with the Stockholm Declaration of the Amnesty International. He believes that the death penalty is not only physically but psychologically "brutal", referring to the lengthy period between sentencing and execution as a "lingering death". He recalls the names of many patriots who faced the firing squad or died by the hangmen's
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noose, in the cause of the country's freedom, and pleads that it is the duty of the State to protect the life of all persons without exception. He asserts that by its application, the death penalty contradicts the very sanctity of life which all human society claims to hold among the highest values. He tells us that almost all civilised countries have abolished it as a symbol of their respect for human life, and expresses deep anguish that we, in our country, still cling to it with little regard to the basic rights of the man.

I fully reciprocate the feelings of my learned brother Krishna Iyer J. in so far as he speaks of the barbarity involved in killing of patriots who have sacrificed their lives in the country's struggle for freedom. The citizen's right to life and personal liberty are guaranteed by Article 21 of the Constitution irrespective of his political beliefs, class, creed or religion. The Constitution has, by Article 21 itself forged certain procedural safeguards for protection to the citizen of his life and personal liberty. The idealistic considerations as to the inherent worth and dignity of man is a fundamental and pervasive theme of the Constitution, to guard against the execution of a citizen for his political beliefs.

1, however, must enter a dissent when my learned brother Krishna Iyer J. tries to equate a patriot with an ordinary criminal. The humanistic approach should not obscure our sense of realities. When a man commits a crime against the society by committing a diabolical, cold-blooded, pre-planned murder, of an innocent person the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life.

The main thrust of his judgment is the decision of the

Supreme Court of the United States of America in Furman v. Georgia am afraid, Furman no longer holds the field even in the United States. I shall deal with this aspect in detail at a later stage.

The constitutionality of the death sentence provided for the offence of murder under s. 302 of the Indian Penal Code is not before the Court. I fail to appreciate how can we say that imposition of death penalty, except in the classes of cases indicated by my learned brother, would be violative of Articles 14, 19 and 21 of the Constitution. The question really does not arise for our consideration. In Jagmohan Singh v. State of U.P. this Court rejected the contention that capital punishment for an offence of murder punishable under s. 302 infringes Article 19 of the Constitution in as much as it could not be said that such punishment was unreasonable or not required in public interest. It fur-

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ther held that s. 302 was not violative of Article 14 as it did not suffer by the vice of excessive delegation of legislative functions, merely because it does not provide for the cases in which a Judge should sentence the accused to death and the cases in which he should sentence him to life imprisonment. It was observed that the exercise of judicial discretion in the matter of fixing the degree of punishment was based on well recognised principles and on the final analysis, the safest possible safeguard for the accused. Nor it could be said that s. 302 confers uncontrolled and unguided discretion to Judges in the matter of sentence and is, therefore, hit by Article 14. The Court further held that s. 302 did not contravene Article 21 of the Constitution insofar as the trial was held as per provisions of the Code of Criminal Procedure 1973 and the Evidence Act 1872 which were undoubtedly part of the procedure established by law.

I, therefore, take it that the opinion of my learned colleague that imposition of a death sentence in a case outside the categories indicated would be constitutionally invalid, is merely an expression of his personal views. As Judges we are not concerned with the morals or ethics of a punishment. It is but our duty to administer the law as it is and not to say what it should be. It is not the intention of this Court to curtail the scope of the death sentence under s. 302 by a process of judicial construction inspired by our personal views. The question whether the scope of the death sentence should be curtailed or not, is one for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of statesmen and, therefore, properly the domain of the legislature, not the judiciary

Two propositions, I think, can be stated at the very outset:

(1) It is constitutionally and legally impermissible for this Court while hearing an appeal by special leave under Art. 136 of the Constitution, on a question of sentence, to re-structure s. 302 of the Indian Penal Code, 1860 or s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973, so as to limit the scope of the sentence of death provided for the offence of murder under s. 302.

(2) It is also not legally permissible for this Court while hearing an appeal in a particular case where capital sentence is imposed, to define the expression "special reasons"

occurring in sub-s. (3) of s. 354 of the Code, in such a manner, by a process of judicial interpretation, which virtually has the effect of abolishing the death sentence.

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Section 302 of the Indian Penal Code, 1860, provides:

"Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine"

Sub-section (3) of s. 354 of the Code of Criminal Procedure, 1973, enacts:

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

The question of abolition of capital punishment is a difficult and controversial subject, long and hotly debated and it has evoked, during the past two centuries strong conflicting views.

Opinion as to whether the death penalty is necessary in order to prevent an outraged community from taking the law into its own hands has been sharply divided. Immanual Kant in his 'Philosophy of Law', in upholding the death penalty observes:

"It is better that one man should die than the whole people should perish for if justice and righteousness perish, human life could no longer have any value in the world."

"Even if a Civilised Society resolve to dissolve itself with the consent of all its members-as might be supposed in the case of People inhabiting an island resolve to separate and scatter itself throughout the world-the last murderer lying in the prison ought to be executed before the resolution is carried out". This ought to be done in order that everyone may realise the dessert of his deeds."

Montesquieu in L'Esprit des Lois regarded the death penalty as repugnant, but necessary-"the remedy of a sick society". John Stuart Mill, made a very strong speech in the House of Commons(1) advocating the use of the death penalty when it was applied to the most heinous cases. Attacking the argument that this punishment was not a deterrent to crime, he said:

"As for what is called the failure of death sentence, who is able to judge that. We partly know who those are whom it has not deterred; but who is there who knows whom it has deterred, or how many human beings saved who should have lived."

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Mill felt that the probability of an innocent person's suffering the death penalty was very slight indeed. Judges and juries would let the guilty escape before the innocent would suffer. If there were the slightest doubt of a man's innocence the death sentence would not be imposed or carried out.

Sir Henry Maine, the English legal historian, observed that punishment evolved from social necessity. The concept of punishment as a form of expiation or atonement reaches far back into human nature as well as into human history. The notion that the threat of punishment by the State will restrain the potential criminal is one of the most commonly accepted justifications for it. The idea has a philosophical basis in the utilitarians' concept of the rational man

acting upon a deliberate calculation of possible losses and gains. If men choose rationally among possible future courses of action then surely the likelihood of a criminal course of action could be decreased by attaching to it a quick, certain and commensurate penalty.

The value of capital punishment, as an aspect of deterrence, was perhaps most strongly put forward and very clearly stated by the great jurist, Sir James Fitzjames Stephen more than a hundred years ago:

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

Supporters of capital punishment commonly maintain that it has a uniquely deterrent force which no other form of punishment has or
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could have. The arguments adduced both in support of this proposition and against it fall into two categories. The first consists of what we may call the 'common sense argument' from human nature applicable particularly to certain kinds of murders and certain kinds of murderers. This, a priori argument proceeds on the view that by doing so, the law helps to foster in the community a special abhorrence of murder as "a crime of crimes". By reserving the death penalty for murder the criminal law stigmatises the gravest crime by the gravest punishment, so that the element of retribution merges into that of deterrence. The second justifies the ethics of capital punishment. Whatever be the ultimate justification for the punishment, the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought sometimes to give a lead to public opinion, it is dangerous to move too far in advance of it.

The movement to abolish death penalty started with the humanitarian doctrine evolved by Marchese De Cesars Bonesana Beccaria, Italian publicist. In 1764, Bonesana published the famous little treaties Dei Delitti e della Pen. The French translation contained anonymous preface by Voltaire. In the preface to this book first appeared the phrase "the greatest happiness of the greatest number". It advocated the prevention of crime rather than punishment, and promptness in punishment, where punishment was inevitable; above all it condemned confiscation, capital punishment, and torture. Beccaria's ideas directly influenced the reforming activities of many social thinkers and philosophers. This represented a school of doctrine, born of the new humanitarian impulse of the Eighteenth Century with which

Rousseau, Voltaire and Montesquieu in France and Bentham in England were associated, which came afterwards to be known as the classical school.

Moved by compassionate sentiment of a humane feeling, Beccaria asserted that all capital punishment is wrong in itself and unjust. He maintained that since man was not his own creator, he did not have the right to destroy human life, either individually or collectively. It is the ultimate cruel, inhuman and degrading punishment, and violates the right to life. Its basic value, he affirmed, is its incapacitative effect. Beccaria claimed capital punishment was justified in only two instances, first if an execution would prevent a revolution against a popularly established government, and secondly, if an execution was the only way to deter others from committing a crime.

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The policy of retribution is justified and sustained by an ethical philosophy which regards punishment as an integral and inviolative element in wrong doing, as a moral necessity. This doctrine has been consistently maintained by intuitive or idealistic philosophers from Plato to Thomas Aquinas and from Kant to T. H. Green and his disciples. The deterrent effect of punishment has also been claimed by adherents of this school but its widespread adoption as a policy has probably been due more to the influence of the utilitarian philosophy of Bentham, Paley, John Stuart Mill and Herbert Spencer, which makes the welfare of the society "the greatest good of the greatest number", the aim of all moral activity. It is this utilitarian philosophy which is now in the ascendent in penal legislation and which governs the view of most modern penologists. It still survives in the death penalty for murder and in the drastic penalties imposed for rape and other crimes which are peculiarly offensive to the moral sentiment as to the sense of security of the community.

Nearly everywhere, in the more recent stages of social development, this motive has been supplemented, but never wholly supplanted, by an unquestioning faith in the deterrent effect on potential offenders of exemplary, i.e., drastic, punishment, inflicted on actual offenders which, in practice if not in theory, comes to much the same thing.

The doctrine of the "individualisation of punishment", that is to say of the punishment of the individual rather than the crime committed by him, which is of commanding importance in present day penology, is only a development of the neo-classical school of the revolutionary period in France, which modified Beccaria's rigorous doctrine by insisting on the recognition of the varying degrees of moral, and therefore, legal responsibility. Its fundamental doctrine is that the criminal is doomed by his inherited traits to a criminal career and is, therefore, a wholly irresponsible actor. Society must, of course, protect itself against him, but to punish him as if he were a free moral agent is as irrational as it is unethical.

In his 'Introduction to Principles of Morals and Legislation', the great work in which the English philosopher and jurist, Jeremy Bentham was engaged for many years, was published in 1789. Mankind, he said, was governed by two sovereign motives-pain and pleasure, and the principle of utility recognised this subjection. The object of all legislation must be the "greatest happiness of the greatest number". On the legal side, he deduced from the principle of utility that since all punishment is itself evil it ought only to be admitted "so far as it promises to exclude some greater evil".

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The English social reformer, Sir Samuel Romilly devoted himself primarily to reform the criminal law of England, then at once cruel and illogical, by attempting to influence Parliament to pass three Bills designed to repeal the death penalty for theft. By statute law innumerable offences were punishable with death in England, but, as wholesale execution would be impossible, the larger number of those convicted and sentenced to death at every assizes were respited, after having heard the sentence of death solemnly passed upon them. This led to many acts of injustice, as the lives of convicts depended on the caprice of the Judges, while, at the same time it made the whole system of punishment and of the criminal law ridiculous. In 1808 Romilly managed to repeal the Elizabethian statute, which made it a capital offence to steal from the person. In the following year, three equally sanguinary statutes were thrown out of the House of Lords under the influence of Lord Ellenborough. Year after year the same influence prevailed, and Romilly saw his bills rejected; but his patient efforts and his eloquence ensured victory eventually for his cause by opening the eyes of Englishmen to the barbarity of their criminal law. In spite of the efforts which Romilly made to procure the abolition of the death penalty in many cases, it should be noted, however, that he was not an "abolitionist" in the sense of the term today.

All punishment properly implies moral accountability. It is related to injury and not only to damage or danger, however great. Capital punishment does so in an eminent degree. It is directed against one who is ex-hypothesi an inhuman brute, i.e. it is imposed simply to eliminate one who is held to have become, irretrievably, a liability or a menace to society.

As Aristotle put it, just retribution consists not in simple but in proportionate retaliation, that is, in receiving in return for a wrongful act not the same thing but its equivalent, and, what this is, can only be estimated if the whole context is taken into account. It may be argued that murder for instance, as the one crime which is quite irrevocable, as justly met by the one punishment which is equally irrevocable, a unique form of punishment for a unique form of crime. To reduce its punishment to something of the same order as other punishments, is to weaken the abhorrence which it should express and diffuse. On this showing an execution expresses absolute condemnation. It both satisfies and educates the public conscience; for those in authority thus deepen in themselves and diffuse throughout the community their sense of "the wickedness of wickedness, the criminality of crime". It is an outward and visible sign of the utmost imaginable disgrace. The death

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penalty has signified shame and infamy and has generally been understood to do so; and all this is expressed in symbolic action of a kind that is both spontaneous and calculated to arrest attention.

If the appeal of capital punishment were merely to fear of death, it would be a very inefficient protector of society. In civilized society and in peacetime, government relies for obedience more on its moral prestige than on violent repression of crime. Punishment only protects life effectively if it produces in possible murderers, not only fear of the consequences of committing murder, but a horrified recoil from the thing itself. It can only achieve this, more ambitious, task, if sentence of death is felt to embody society's strongest condemnation of murder and

keenest sense of its intolerable wickedness. It is not by the fear of death but by exciting in the community a sentiment of horror against any particular act, that we can hope to deter offenders from committing it. The Royal Commission sucinctly explained the normal character of capital punishment thus:

> "by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder."

The criminality of a crime consists not only in the criminal act, but in what that signifies. Its immediately apparent features, the obvious damage to person or property or to public security, are symptoms of a deeper disorder. It betokens, and it fosters, an attitude in man to man, of reckless selfishness, deceit or malice, which is incompatible in the long run with any decent social life. In any advanced society it is, in part at least, on account of this wider character, less easily discerned, that the graver offences are punished. Also punishment like crime has a dual character. The penalty which the convicted murderer incurs is not simply death, but death in disgrace and death as a disgrace. In so far as capital punishment is a threat, the threat consists not only in death but in infamy. Any theory which ignores this characteristic is certainly defective.

For a long time the problem of capital punishment was regarded as a purely academic question. Everything that could be said appear to have been said on a question which Beccaria had brilliantly brought to public notice in the second half of the Eighteenth Century, but which had been exhausted by subsequent controversy. Punishment inflicted by the State in response to a violation of the criminal law
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has been justified in various ways. It has been seen as society's vengeance upon the criminal as atonement by the wrong doer, as a means of deterring other criminals, as protection for the law-abiding and as a way of rehabilitating the criminal. The individual who has inflicted harm on another, runs the revenge argument, should be made to suffer in return; for only an act of vengeance can undo the harm that has been done and assuage the suffering of the victim.

As against this, some social reformers have maintained that punishment ought to be decent to transform the values and attitudes of the criminal so that he no longer wishes to commit illegal acts. The problem, of course, has been to discover how to do it. Theories of rehabilitation are largely speculative, since there is lack of scientific evidence to support them. Nevertheless, it has been influential in the development of modern penology.

In England, during the Nineteenth Century, Disraeli and Gladstone, the leading politicians in the country, took no part in the movement to abolish the death penalty. Leadership in this crusade fell to lesser men, and the abolitionists formed a distinct minority. The majority in the House of Commons evidently felt, as Sir John Holkar, the Attorney General felt, that criminals were deterred from adding deliberate murder to their other crimes by the fear of the death penalty. In the period between the first and second world wars, however, the emergence of authoritarian systems of penal law raised once more the problem of capital punishment in a particularly acute manner. At the end of the second world war, there was a renewed upsurge of this humanitarian tendency which, like the desire to safeguard human rights and human dignity, had been the mainspring of the movement for the abolition of the death penalty.

Several attempts were made to break the parliamentary fortress but without any success. Very little was actually accomplished by the abolitionists in Parliament till after the second world war, when the Labour Government came to power. In between 1949 and 1953 the Royal Commission on Capital Punishment carried out an exhaustive inquiry.

The Royal Commission made a study of this complex and many-sided task. It held its inquiries not only in Great Britain but also in the United States and several European countries and heard evidence from every possible source. It listened to an impressive array of witnesses. In addition to all this, information was collected from Commonwealth countries and several other European countries. Its
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result is reflected in the Royal Commission Report on Capital Punishment which presents a comprehensive and dispassionate picture of the whole subject.

The Commission was debarred by their terms of reference from considering the question of abolition of capital punishment, but in the course of their investigation they naturally accumulated a good deal of information which is just as relevant to this issue as to the question of limiting the scope of capital punishment. The report contains a good deal of material on the "Deterrent Value of Capital Punishment". It is evident from the report that some of the most distinguished judicial witnesses including Lord Goddard, the Lord Chief Justice of England, Lord Denning, the Master of Rolls, and some very experienced Judges like Mr. Justice Humphreys, Sir John Beaumont, Mr. Justice Byrne, were firmly of the view that the capital punishment must be retained for the protection of the society. They went to the extent of expressing their strong disapprobation of the free use of prerogative as being an interference by the Executive with the Judiciary and argued that the exercise of the power should be narrowly confined.

As a justification for retention of death penalty, some of these distinguished Judges put forth the principle of retribution, and the others placed greater importance on deterrence. There was, however, general agreement that justification for the capital sentence, as for other salient features of the penal system must be sought in the protection of the society and that alone.

The punishment of death, said Lord Denning to the Royal Commission, should reflect adequately the revulsion felt for the gravest of crimes by the great majority of citizens. But, in saying this, he implied that legislators and Judges share this revulsion themselves; otherwise indeed their action would be morally indefensible. Their aim then should be, not only to strike terror nor even to awaken popular indignation in a direction convenient to Government. It would be to arouse in all and sundry their own indignant repudiation of a wicked act and, at the same time, to deepen it in themselves. In this vein, sentence of death has been pronounced, carried out and acclaimed, with stern satisfaction. This principle of action is still avowed in high places, and, I believe, it is semi-consciously at work more often than it is avowed, for it is said that otherwise, the conscience of the community would be revolted if the criminal were allowed to live. In the same vein, Lord Chief Justice Goddard said in 1948:
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> "The public conscience will not tolerate that persons who deliberately condemn others to painful, and it may be lingering, deaths should be allowed to live .... Some of these bestial murderers should be

destroyed."

The use of capital punishment has declined in recent times, although it is still permitted by law, as in this country, for various kinds of offences like treason, murder etc. The issue of abolishing it has aroused much controversy. The advocates of capital punishment claim it as a necessary deterrent to crime and relatively painless if done properly. Even where it has been legally retained, as here, capital punishment is now seldom employed except in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience. Indeed, the death penalty satisfies the society's retributive goals and is still presumed to be a deterrent to potential offenders. Of the three purposes commonly assigned to punishment-retribution, deterrence and reformation-deterrence is generally held to be the most important, although the continuing public demand for retribution cannot be ignored. Prima facie, the death sentence is likely to have a stronger effect as a deterrent upon normal human beings than any other form of punishment. There is some evidence that this is, in fact, so and also that abolition may be followed by an increase in homicides and crimes of violence.

In brief, people are believed to refrain from crime because they fear punishment. Since people fear death more than anything else the death penalty is the most effective deterrent.

In Britain, following the Report of the Royal Commission on Capital Punishment, the Homicide Act, 1957 was enacted due to the growing pressure of public opinion to mitigate the rigour of the criminal law. (1=6) It brought about a division of criminal homicide into degrees of murder. It resulted in the establishment of a distinction between capital and non-capital murders. It not only eliminated long-standing iniquities and rigidities in the law of murder such as the doctrine of "constructive malice", but also brought the law into accord with modern criminological thoughts by the importation of the doctrine of "diminished responsibility".

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By s. 7 the Act abolished the liability to suffer the death penalty on conviction of murder and substituted the sentence of imprisonment for life by s. 9, sub-s. (1) except in cases of first degree murders falling within s. 5 or s. 6. Section 5 reserved the death penalty for five classes of first degree murders, namely:

(i) any murder done in the course or furtherance of theft;
(ii) any murder by shooting or by causing an explosion;
(iii) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
(iv) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting; and
(v) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.

Sub-section (2) of s. 5 provided for death penalty on the principal assailant and not his accessories before the

fact, where a group of persons made a murderous assault causing grievous bodily hurt resulting in death. The distinction drawn in felonies between principals in the first and second degree and accessories before the fact have since been abolished by virtue of the Criminal Law Act 1967, s. 1, and all these participants have to be punished in accordance with the Accessories and Abettors Act 1861. Section 6 provided the death penalty for repeated murders.

The cases in which the death penalty was retained were those where, in the view of the Government, murder was most dangerous to the preservation of law and order, and where the death penalty was likely to be a particularly effective deterrent. The death penalty for murder was thereafter temporarily abolished for a period of five years, as an experimental measure by the Murder (Abolition of Death Penalty) Act 1965. This Act was to expire on July 31, 1970 but was made permanent by resolution of both Houses of Parliament.

The punishment for murder in Britain is now imprisonment for life by s. 1, sub-s. (1) of the Murder (Abolition of Death Penalty) Act
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1965. On sentencing any person convicted of murder to imprisonment for life, the Court may at the same time declares a period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence under s. 27 of the Prison Act 1952. In R. v. Flemming it has been suggested that no such recommendation should be for a period of less than twelve years.

It must, however, be observed that in Britain a sentence of death can still and only be awarded for high treason (Treason Act 1814) s. 1; piracy with violence (Piracy Act 1837) s. 2; setting fire to the Queen's ships, arsenals etc. (Dockyards etc. Protection Act 1772) s. 1. When a person is convicted of treason, sentence of death must be pronounced, but in case of piracy with violence and setting fire to the Queen's ships, arsenals, etc., it may be merely recorded. Sentence of death cannot, however, be pronounced on or recorded against an expectant mother [Sentence of Death (Expectant Mothers) Act 1931] s. 1, or against a person who was under the age of eighteen when the offence was committed (Children and Young Persons Act 1933) s. 53 (1).

The successful campaign to abolish the death penalty in Britain has been achieved in a comparatively short period of time by no more than a handful ardent penal reformers like Sydney Silverman who carried out the unfinished work of Romilly and other reformers, pertinacious in their lobbying and propaganda, in the face of majority opinion favouring retention of an admittedly barbaric but, to that majority, necessary penal instrument. If the final debates were protracted-Silverman's private members' Bill (with invaluable Legislative time given by the Government) was introduced on December 4, 1964, and reached the Statute Book only on November 2, 1965-the history of the campaign is a remarkable testament to British democracy which can convert convinced minority opinion into progressive legislative action

Due to an increase in the incidence of criminal behaviour, and steady rise in the volume of reported crime, there is a genuine public concern in Britain for re-assessment of the penal policy of the Government.
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D.A. Thomas in his article "Development in Sentencing 1964-1973" observes:

> "As a society, we have made inconsistent demands on our official system of social control expecting greater security from violence, disorder and depreciation and simultaneously requiring that penal sanctions become less rigorous and more adopted to the individual offender."

The learned author proceeds to say:

> "The provisions of the Murder (Abolition of Death Penalty) Act 1965 provides a simple illustration. Taken in isolation, they provide that a person convicted of murder shall be sentenced to life imprisonment, and the judge passing such a sentence may make a recommendation that a specified minimum period should elapse before the offenders may be released on licence. The mandatory life sentence, part of the political price of the abolition of the death penalty, cannot be defended on any rational grounds."

And then concludes:

> "In assessing the future trend of penal policy in this country, it is probably wise to bear in mind that the problems facing the criminal justice system are unlikely to diminish during the next decade of their own accord-things will almost certainly become worse rather than better. There seems to be no reason to suppose that the relatively steady rate of increase in the volume of reported crime over the last ten years will not continue."

The two recent decisions of the Privy Council in Eaton Baker v. The Queen and Michael de Freitas v. George Ramoutar Benny are completely destructive of the theory that the death penalty is per se cruel and unusual punishment, and (2) alternatively, the inordinate delay in carrying it out, makes it so. In Eaton Baker's case the appeal was on a question of sentence. The issue was whether the Court of Appeal of Jamaica was right in sentencing to death the two youngmen who when they committed the murder were under the age of eighteen years, but when they were convicted of the offence and sentenced to death, had both attained the age of 18 years. The mandatory sentence of death upon conviction for murder is imposed

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by s. 2 of the Offences against the Person Act 1925. The exception on account of youth is contained in s. 29(1) of the Juveniles Law which interdicts that a sentence of death shall not be pronounced on or recorded against a person under the age of 18 years. The Judicial Committee while holding that the statutory exemption from death penalty under s. 29(1) of the Juveniles Law was not applicable, observed that the time for ascertaining whether the appellants were to be treated as Juveniles was the date on which the sentence was passed and not the date of the offence. As to the constitutional issue, the Judicial Committee held that when a person was held guilty of a charge of murder, the death sentence passed on him cannot be treated as a contravention of s. 20(7) of the Constitution of Jamaica, stating:

> "One's opinion as to whether the consequences of giving effect to the sub-section would be irrational or unjust is inevitably coloured by whether one starts with the belief that capital punishment should be abolished for all offences except, perhaps, for treason-a view accepted by the legislature, if not by public opinion in general, in the United Kingdom; or

with the contrary belief that capital punishment is normally the appropriate penalty for murder-a view which the continuance in force of section 2 of the Offences against the Person Law suggests is accepted by the legislature in Jamaica." (Emphasis supplied).

In de Freitas case the Privy Council confirmed the sentence of death passed by the Court of Appeal of Trinidad and Tobago, and held that there was no violation of the human rights and fundamental freedoms guaranteed under ss. 1 and 2 of the Constitution of Trinidad and Tobago inasmuch as the sentence of death was passed according to the "due process of law". In repelling the alternative argument based upon delay, it observed that " the delay was of the appellant's own making" and he could not put forth this as a ground for commutation of the sentence of death. It stated:

"It is not contended that the executive infringed the appellant's constitutional rights by refraining from executing him while there were still pending legal proceedings that he himself had instituted to prevent this execution."

There was evidence that prior to independence, the normal period spent in condemned cell by the prisoner before execution was five months and that this practice was sufficient to give rise to an 'unwritten rule of law' in force at the commencement of the Constitution. The contention was that the executive was, therefore, bound to so organise the procedure for carrying out the death sentence that the

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average lapse of time is not more than five months, and the carrying out of the death sentence beyond the period was incompatible with the right of the individual under s. 1 (a) of the Constitution not to be deprived of life "execpt by due process of law" because it involves the imposition of "cruel and unusual punishment" within the meaning of s. 2,(b). The Judicial Committee rejected the contention saying:

"This contention in their Lordships' view needs only to be stated to be rejected. Not only does it involve attributing to the expression "unwritten rule of law" in section 105(1) of the Constitution a meaning which it is incapable of bearing, but it conflicts with the very concept of the nature of law."

That takes us to the decision of the Supreme Court of the United States of America in Furman v. Georgia (supra) in which my learned brother Krishna Iyer J. strongly relies. There, the question was whether the death penalty at least as generally practised in the United States, per se, was 'cruel and unusual' because the imposition of capital punishment "does not comport with human dignity" or because it was "morally unacceptable" and "excessive" and thus violative of the Eighth Amendment.

In the United States of America, the death penalty has paradoxcally existed more or less harmoniously with humane theories of criminal justice for over two hundred years. The Eighth Amendment prohibits 'cruel and unusual punishment'.

The Eighth Amendment's ban on cruel and unusual punishment has raised some very difficult moral issues. The Supreme Court applied various standards in interpreting the provision. In Trop v. Dulles the Court by a majority of five to four, refused to consider "the death penalty as an index of the constitutional limit on punishment", stating:

"Whatever the arguments may be against capital punishment...the death penalty has been employed throughout our history and, in a day when it is still

widely accepted, it cannot be said to violate the constitutional concept or cruelty."

Chief Justice Warren, speaking for Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittakar, asserted that:

"this Court has had little occasion to give precise content to the Eighth Amendment", that it content is not static, but

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"must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

This amendment whose "basic concept is nothing less than the dignity of man" guarantees "the principle of civilised treatment."

There began concerted legal attacks on the constitutionality of capital punishment in the 1960s, stimulated in part by the fact that those receiving death sentences were disproportionately Blacks. The issue as to the constitutionality of the death penalty in a State usually arose in the Supreme Court of the United States on procedural grounds, that is, on the question of fairness of the procedural aspect and its application, viz., the practice under which state statutes left a jury to mote out the death penalty at its discretion, with no standards of any sort to guide them, or the application of the penalty without judicial standards. In McGoutha v. California the Supreme Court rejected the contention holding that the absence of any guidelines was not a violation of "due process". Mr. Justice Harlan thought it would be impossible to draft statutory standards for this purpose, saying:

"To identify before the fact these 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."

In Furman v. Georgia, the Court by a majority of five to four ultimately held that capital punishment, at least as generally administered, did violate the Eighth Amendment. It held that imposition of the death penalty in the three cases, one for murder and two for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court issued a brief per curiam order, followed by substantial statements by every member of the Court. The judgment in the case was reversed and the cases remanded for further proceedings. Each of the five majority Justices and four dissenters wrote a separate opinion, supporting his position.

The five Justices in the majority each wrote a concurring opinion which approached the matter from a different angle so that clear categorisation is impossible. It can thus be seen that the multiple opinions did not rule out altogether re-imposition of the death penalty in the future provided there was legislative structuring of a permissible system

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providing for sufficient procedural safeguards. This is exactly what has happened in the United States where the death penalty has been re-imposed and the judicial approach stands re-oriented.

Broadly stated, Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice White held that the death Penalty as imposed, is arbitrarily and infrequently meted out, in violation of the Eighth and the Fourteenth Amendments. They

took an analytic and empirical approach, appraising the practice under the Eighth Amendment in the light of due process and equal protection. Their concern was whether the death penalty was evenly applied, and of course they found that it was not. This is reflected in the opinion of Mr. Justice Douglas who held that the death penalty was cruel and unusual because applied irregularly and "selectively to minorities whose members are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards"

Mr. Justice Stewart's comment was:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."

Mr. Justice White conceded that the death penalty, while cruel in "the dictionary sense", would nevertheless be justified if it served "social ends". But he did not believe "that society's need" for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient.

Mr. Justice Brennan and Mr. Justice Marshall took a normative approach. They advocated the total abolition of the death penalty because it is in all cases violative of the Eighth Amendment cruel and unusual punishment clause. For them, the Eighth Amendment posed a core question of values; they were concerned less with fairness and equality and more with mercy and charity. For Mr. Justice Brennan, "the primary principle....is that a punishment must not by its severity be degrading to human dignity". Mr. Justice Marshall, in by far the longest opinion of the day pleaded for an humanistic approach. His impassioned conclusion was that ending the death sentence would recognise "the humanity of our fellow beings" and achieve "a major milestone in the long road up from barbarism".

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The opinions of the four dissenting Justices were as important as the majority statements because any subsequent challenges on Furman would incorporate their reasoning. Mr. Justice Blackman and Mr. Justice Rehnquist, who are advocates of strict judicial conservation, felt that the matter was essentially political, and properly the domain of the legislature, not the judiciary.

Chief Justice Burger, admitting that since the ruling a Trop v. Dulles (supra) in 1958, it is necessary to evaluate a challenged punishment in terms of the "evolving standards of decency.... of a maturing society", felt nonetheless that there is no judicially significant public opposition to capital punishment in the United States. Pointing out that the decision rejecting the death penalty was essentially based on procedural grounds, as the majority agreed that the arbitrary infliction of the death penalty was unconstitutional, Burger contends that the Eighth Amendment does not deal with procedure, and with only the substantive nature of the punishment in question. He believes that the imposition of a mandatory death penalty for certain offences would not be invalidated by the holding in this case because a mandatory penalty could not be arbitrily meted out.

Mr. Justice Powell dissented by establishing that the constitutionality of the death penalty is supported by four factors, viz., (i) the references to capital punishment in

the Constitution, (ii) the past Supreme Court decisions on the death penalty, (iii) the limitation of judicial restraint, and (iv) the doctrine of separation of powers. He found that the evidence of the petitioners fell short of satisfying their burdens of persuasion with respect to these factors.

Due to the ambiguity of the Furman decision, it is fortunate that the Supreme Court gave further indication of its intentions regarding the death penalty in subsequent decisions. But Furman was not determinative of the issue on the merits, namely, the constitutionality of the penalty because it violates the Eighth Amendment cruel and unusual punishment. It was widely assumed that the Court had not declared capital punishment unconstitutional per se but only its unpredictable and fortuitous use.

Since the Furman decision, the legislatures of thirty-five states in the United States acted to tighten up the laws under which the death penalty was to be imposed. They took two different approaches. Some State including Georgia, Florida and Texas, established new procedures for capital cases requiring sentencing judges and juries to
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consider certain specified aggravating or mitigating circumstances of the crime and the offender. There was a bifurcated trial with pre-sentencing, hearing. Courts of Appeal were given broader authority to decide whether the death penalty was fair in the light of the sentences for similar offences These laws were intended to redress the arbitrariness and racial prejudices renounced in Furman. But the other States, including North Carolina, Louisiana and Oklahoma sought to meet the Furman objections by removing all flexibility from the sentencing process, though limiting the offences for which the death sentence could be imposed. Anyone found guilty of the specified offences was to be sentenced to death automatically. The constitutionality of the sentences imposed under such procedures has been upheld by five State Supreme Courts.

On July 2, 1976, the Supreme Court of the United States delivered the judgment it had postponed a year earlier. It handed down five opinions dealing with the death penalty. Three of these were concerned with the mandatory sentence of death. All involved the crime of murder. The five cases were: Gregg v. Georgia, Proffitt v Florida, Jurek v. Texas Woodson v. North Carolina, and Roberts v. Louisiana.

The issue in the three cases dealing with discretionary sentencing (Gregg, Proffitt and Jurek) was whether imposition of the sentence of death for the crime of murder under the laws of the respective states violated the Eighth and Fourteenth Amendments. In all three, the Court reached the same conclusion, that the punishment of death did not invariably violate the Constitution.

The Court's reasons in Gregg as to why the death sentence was not a per se violation of the Eighth and Fourteenth amendments were as follows: First, history and precedent do not support the conclusion that the death sentence is a per se violation. Second, the evolving standards of decency argument has been substantially undercut in the last four years because a large segment of the enlightened population regards the death penalty as appropriate and necessary, as seen in the new legislation passed in response to Furman.

The Court came to the conclusion that the death penalty was not inherently cruel and unusual. It served two principal social purposes,
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retribution and deterrence, and held that the death sentence for the crime of murder was (1) not without justification, (2) not unconstitutionally severe, and (3) not invariably disproportionate to the crime.

The Court found that Furman mandated, where discretionary sentencing was used there must be suitable direction and limitation to minimise the risk of wholly arbitrary and capricious action. The bifurcated trial with standards modelled after the Model Penal Code gives juries just such guidance. Therefore, the concerns of Furman can be met by carefully drafted statutes that ensure sentencing authorities are given adequate information and guidance in making their decision. As a general proposition, the Court concluded that these concerns were best met by bifurcated proceedings with standards to guided the use of the evidence.

I wish to conclude this part of the judgment by quoting Herbert L.A. Hart, who in his article on "Murder and the Principles of Punishment: England and the United States, admirably sums up the two points of view:

> "There are indeed ways of defending and criticising the death penalty which are quite independent of the utilitarian position and of the questions of fact which the utilitarian will consider as crucial. For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should never be used however many lives it might save. Those who take this view find that they are sometimes met by the counter-assertion that the death penalty is some thin which morality actually demands, a uniquely appropriate means of retribution or "reprobation" for the worst of crimes, even if its use adds nothing to the protection of human life.
>
> "Here we have two sharply opposed yet similar attitudes: for the one the death penalty is morally excluded; for the other it is moral necessity; but both alike are independent of any question of fact or evidence as to what the use of the death penalty does by way of furthering the protection of society. Argument in support of views as absolute as these can consist only of an invitation, on the one hand, to consider in detail the execution of a human being, and on the other hand, to consider in detail some awful murder, and then to await the

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> emergence either of a conviction that the death penalty must never be used or, alternatively, that it must never be completely abandoned."

The controversy over capital punishment is not new. Its roots lie deep in human history, and its battles have been waged on and off on a political level for almost two centuries. It is not necessary for this Court to attempt to analyse the substantive merits of the cases for and against the death penalty for murder. It is in my view, essentially, a question for the Parliament to resolve and not for this Court to decide.

I feel that it is futile for us to attempt to project our personal views in a matter which lies in the realm of political decision-making, by focussing on a single controversy, the question of the proper penalty for the crime of murder. The capital punishment controversy falls within the strict limits of 'independent' parliamentary law-making, and is a typical or representative of the kind of problems that leaders of Parliament face every day. In short, the case for abolition of the death sentence is

political, not constitutional. The Government carries the responsibility of law and order. That is the first and fundamental duty of any Government. The Executive has the duty of advising the Government of the laws it believes necessary for the national well-being. It is the duty of the courts, including this Court, to administer the laws as they are.

The Law Commission, in its Thirty-fifth Report has dealt with the question of abolition of capital punishment, of limiting the scope of death sentence under s. 302, and of the mode of execution of the sentence. It sent out questionnaires. Almost all the State Governments, all High Court Judges, all the Bar Associations throughout the country, many distinguished lawyers were in favour of retention of the death sentence. There was, in fact, almost complete 'unanimity' of view on this complex question. The Commission examined a large number of witnesses including many distinguished Judges and lawyers and ultimately was in favour of its retention. It concluded stating that -

> "Having regard to the conditions in India, to the variety of social upbringing of its inhabitants, to the disparity of the level of morality and education in the country, the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order, the country can not risk the abolition of capital punishment."

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Indeed, a distinguished lawyer while giving his evidence before the Joint Committee of the Indian Penal Code Bill thought that the abolition of death sentence would be a dangerous experiment and we should continue to have this form of deterrent punishment till we reach "a certain state of enlightenment".

The basic principle of the nineteenth century Indian Penal Code, said Lord Macauley who drafted it, is 'the principle of suppressing crime with the smallest possible amount of suffering(1) '. He lays this down as an unassailable axiom rather than as a contention for debate.

Section 302 of the Indian Penal Code, 1860 gives the Court a discretion as to the punishment to be imposed for an offence of murder and that discretion has to be exercised between the two alternatives mentioned, namely, a sentence of death and a sentence of imprisonment for life. Prior to the amendment of s. 367, sub-s. (5) of the Code of Criminal Procedure, 1898 by the Criminal Procedure Code (Amendment) Act, 1955 it was a well settled principle that where a person was convicted for an offence of murder, the Court was normally bound to sentence him to death unless there were extenuating or mitigating circumstances. This rule was stated in Rattanlal's Law of Crimes, 21st ed., p. 813;

> "The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask him self whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so

The reason probably was that this provision was not more than the restatement of the law as it stood in England at that time, where till the year 1965 the only penalty for murder was death, except in two specific cases.

The effect of the Criminal Procedure Code (Amendment) Act, 1955, which repealed s. 367, sub-s. (5) of the Code with effect from January 1, 1956, was to restore to the Court the discretion conferred by s. 302 to award the appropriate sentence having regard to the attendant circumstances, including the mitigating circumstances, if

any. This brought the law into conformity with the intentions of the framers of the Code. As regards the death sentence, far from making it the normal sentence for an offence of murder, they stated that it ought to be 'sparingly used'. Under s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973, the law is now entirely changed.
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Under s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973, the Court is required to state the reasons for a sentence awarded, and in the case of imposition of a sentence of death and Judge has to record "special reasons" for imposing death sentence. Punishment for murder as a rule should be life imprisonment and death sentence is only an exception. In Balwant Singh's case, Ambaram's case and Sarveshwar Prasad Sharma's case the Court held that it was neither necessary nor possible to specify the "special reasons" which may justify the passing of death sentence in a given case.

It would thus be obvious that it is neither feasible nor legally permissible for this Court to give a definite connotation to the expression "special reasons" occurring in s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973. It is difficult to put "special reasons" in a straight-jacket. Each case must depend on its own particular facts. The question of sentence must, in my view, be left to the discretion of the Sessions Judge trying the accused. Under the present Code, a trial for murder is divided into two stages. There is a bifurcated trial. The first part of the trial is directed solely to the issue of guilt or innocence, and concludes with the finding of the Sessions Judge on that issue. At the end of the trial when he comes to a conclusion of guilt, he has to adjourn the case for hearing the accused on the question of sentence.

Section 235, sub-s. (2) of the Code specifically provides for an opportunity of hearing to the accused on the question of sentence after a verdict of guilt is recorded against him. The burden is upon the prosecution to make out a case for imposition of the extreme penalty. Where a sentence of death is passed, the Sessions Judge has to make a reference to the High Court under s. 366, sub-s. (1) of the Code. Under s. 367, sub-s. (1) if the High Court thinks a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Sessions. In a case submitted under s. 366, the High Court under s. 368(a) may either confirm the sentence, or pass any other sentence, i.e. reduce the sentence of death into a sentence of imprisonment for life. Thereafter, an appeal lies to this Court by a special leave under Article 136 on the question of sentence.

Failing the appeal, there is the President's power to grant reprieve and pardon under Article 72(1), as well as the Governor's power of
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commutation under Article 161 of the Constitution which is a sovereign function. The power of the President and of the Governor to grant reprieves and pardons is wide enough to include the power to commute and to remit sentence of punishment. All cases of capital punishment are closely scrutinised by the Executive at both the levels to see whether there are such extenuating circumstances as would justify a reprieve, and the power to commute a death sentence is freely exercised, whenever there is some doubt as to the severity of the punishment. Under the present

system the prerogative of Mercy in the case of persons under sentence of death works well and it produces results generally regarded as satisfactory. It helps in mitigating the rigour of the death sentence, particularly in case of those murderers whose execution would offend the public conscience. Very few persons under a sentence of death-may be one or two in a year, in a State are usually executed. Such cases are usually of the kind indicated by me above, and even some of them escape the sentence of death.

It is, therefore, not proper for the Court to trench upon the President's or the Governor's prerogative to grant pardon or reprieve under Articles 72(1) and 161, in taking upon itself the task of commutation of a death sentence, which is properly imposed, in the facts and circumstances of a particular case, merely because there is a doubt that the Executive may commute the sentence ultimately, or by one's views as to the utility of a death penalty. Judges are entitled to hold their own views, but it is the bounden duty of the Court to impose a proper punishment, depending upon the degree of criminality and the desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders. It is only in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience that the Court has the power, as well as the duty, to impose the death sentence. In view of these adequate safeguards, it can hardly be asserted that the sentence of death provided for an offence of murder punishable under s. 302 is 'de-humanising' or that it is 'unnecessary'.

With respect, my learned brother Krishna Iyer J., despite his sense of humanism, does not appear to be wholly an 'abolitionist'. That is the impression I get from his various judgments on the subject. In Ediga Anamma and Bishan Dass he clearly accepts that where the crime is cruel and inhuman, a death sentence may be called for. In the present judgment also, he observes:

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> "If the murderous operation of a die-hard criminal jeopardises social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated.
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> If society does not survive, individual existence comes to nought. So, one test for impost of death sentence is to find out whether the murderer others such a traumatic threat to the survival of social order. To illustrate, if an economic offender who intentionally mixes poison in drugs professionally or wilfully adulterates intoxicating substances injuriously, and knowingly or intentionally causes death for the sake of private profit such trader in lethal business is a menace to social security and is, therefore, a violator of social justice whose extinction becomes necessary for society's survival.
>
> Supposing a murderous band of armed dacoits intentionally derails a train and large number of people die in consequence, if the ingredients of murder are present and the object is to commit robbery inside the train, they practise social injustice and imperil social security to a degree that death penalty becomes a necessity if the crime is proved beyond doubt. There may be marginal exceptions or special extenuations but none where this kind of dacoity or robbery coupled with murder becomes a contagion and occupation, and social security is so gravely imperilled that the fundamental rights of the defendant become a deadly instrument

whereby many are wiped out and terror strikes community life. Then he 'reasonably' forfeits his fundamental rights and takes leave of life under the law. The style of violence and systematic corruption and deliberately planned economic offences by corporate top echelons are often a terrible technology of knowingly causing death on a macro scale to make a flood of profit. The definition of murder will often apply to them. But because of corporate power such murderous depredations are not charged. If prosecuted and convicted for murder, they may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain.

Likewise, if a man is murderer, so hardened, so bloodthirsty, that within the prison and without, he makes no bones

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about killing others or carries on a prosperous business in cadavers, then he becomes a candidate for death sentence."

My learned brother Krishna Iyer J. wants the death penalty to be inflicted in the case of three categories of criminals, namely (1) for white-collar offences, (2) for anti-social offences, and (3) for exterminating a person who is a menace to the society, that is, a 'hardened murderer'. Edwin H. Stherland defines a white-collar offence as 'a crime in relation to business'. (1)The validity of white-collar crime as a crime has been a subject of severe controversy in social studies. Now 'white-collar crime', as commonly understood, means a crime committed by a person of respectability and of high social status in the course of his occupational role. It takes in such forms as restraint of trade, mis-representation in advertising, infringement of patents, unfair labour practices, financial fraud, unethical or illegal rebating and violation of trusts. It may also take the form of theft, sale and export of entiques like sculptures, any work of art of historical value, illegal sale of narcotics and alcohol, abortion, fraudulent accident report, income-tax frauds etc. An 'anti-social offence' may consist of sale of spurious drugs, adulteration of articles of food meant for human consumption, auto thefts, 'sharp' business practices which do not conform to the national well-being. Some of these offences must undoubtedly be ruthlessly dealt with. But unfortunately our penal laws do not provide for a death sentence for either white collar crimes or anti-social offences, although I wish they did, at least for certain anti-social offences.

There will be general measure of agreement that some of the serious anti-social offences call for a death sentence viz. acts of sabotage by a person who hijacks a plane and the like and large number of persons die or are injured in consequence, or disrupts lines of communications, or holds up a train and commits armed robbery with murder inside the train. He is a menace to the society and deserves a death sentence, as his existence does not conform to the national well-being. Like-wise, a person who indulges in theft or illegal trade and export of art treasures such as invaluable monuments, paintings and sculptures of historical importance and of priceless antiques of what remains of our national heritage, or in adulteration of articles of food meant for human consumption, or in manufacturing and selling of spurious drugs, or engages in illegal sale in narcotics or alcohol, which are injurious to the very life of the community, also deserves a death sentence, as in many other countries, or at any rate a sentence of imprisonment for

life. The same applies to economic offences which may disrupt the economic life of the community as a whole, like smuggling of gold and other contraband
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goods, which call for a very deterrent punishment. This is necessary to protect the basic economic order of the nation. But these are all matters for the Parliament to decide.

It may be stated that the State of West Bengal has taken a step forward in that direction. The Prevention of Adulteration of Food, Drugs and Cosmetics Act, 1973 (West Bengal Act 42 of 1973 makes the offence of sale of spurious drugs, adulteration of articles of food meant for human consumption etc., punishable with imprisonment for life.

As regards 'hardened' murderers, I am afraid, there are few to be found. Many murders unfortunately go undetected, and many a brutal murderer has to be acquitted for want of legal evidence bringing his guilt beyond all reasonable doubt. Nevertheless, when the guilt is proved, the Court should leave aside all humanitarian considerations, if, the extreme penalty is called for. A 'professional' murderer must, as a matter of course, be sentenced to death because he is a menace to the society. Whatever sympathy the Court can have should be reserved for the victims of the crime rather than for the perpetrators. In such cases, the law must take its course.

I do not intend to enter upon any philosophical dialectics as to the 'utility' of the death sentence or enter into the controversy whether it is 'unnecessary', 'brutal' or 'dehumanizing', but I would, for my part, like to say, that I am of the opinion-with much deference for the great authority of those who think otherwise-that the weight of evidence and reason is in favour of the retention of the death penalty.

I am afraid, if the Courts were to be guided by the classification made by the majority the death sentence for an offence of murder punishable under s. 302, for all practical purposes would be virtually non-existent.

I feel that it is not necessary for the purposes of these appeals to refer to the Indian Penal Code (Amendment) Bill, 1976, which by s. 125 introduces a new s. 302 in the Indian Panel Code, 1860. The re-drafted section seeks to bring about a change in the law. It abolishes the liability to suffer the death sentence on conviction of murder and substitutes the sentence of imprisonment for life by sub-s. (1) except in cases of certain first degree murders falling within sub-s. (2) thereof. The cases in which the death sentence is to be retained are those where, in the view of the Government, murder is most dangerous to the preservation of law and order, and where the death sentence is likely to be a particularly effective deterrent, viz., pre-planned murders involving extreme brutality and murders involving exceptional depravity. The Bill is not before the Court. It is, therefore, not proper to deal with it.
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It is, however, necessary to emphasise that if there has to be a law reform at all, some regard must be had to the plight of the victim or his or her family by making provision for payment of compensation. While it is commonly accepted that those convicted of violations of the criminal law must "pay their debt to society", little emphasis is placed upon requiring offenders to "pay their debt" to their victims. These again are matters for the Parliament to provide.

From a life time of experience, Sir John Beaumont, speaking with unrivalled authority, told the Royal

Commission on Capital Punishment(1) that the alternative sentence under s. 302 of the Indian Penal Code 1860 had "worked well" in India, and that he had never himself felt that the responsibility of choosing between the sentence of death and a lesser punishment was unfair or excessive, nor had he ever heard any Judge in India express such a feeling. He expressed the opinion that there was "no class of offences in which the degree of moral culpability differs more than in case of murder". It is wholly illogical to require a Judge to pass the same sentence in every case. In his view, the proper solution lies in giving to the Judge the same discretion that he had in regard to other offences. A large body of judicial opinion still shares the same view.

If Parliament thought it right to give to the Judges discretion as to the sentence, I do not think they would or ought to shrink from the onerous responsibility. I feel it would not be appropriate for this Court to curtail the ambit of their discretion by judicial process. We cannot but be oblivious that a sentence of a wrong type, that is, to substitute a sentence of imprisonment for life where the death sentence is called for, causes grave miscarriage of justice. A sentence or pattern of sentences which fails to take due account of the gravity of the offence can seriously undermine respect for law.

Turning to the appeals before us, I cannot say that the award of death sentence in any of these cases was not appropriate or uncalled for. In the three cases before us, there were "special reasons" within the meaning of s. 354, sub-s. (3) of the Code of Criminal Procedure, 1973 for the passing of the death sentence in each and therefore, the High Courts were justified in confirming the death sentences passed, under 368(a) of the Code. In the circumstances, any interference with the sentence of death, in my view, would be wholly unwarranted in each of these cases.

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In Rajendra Prasad's case, the Allabhabad High Court in confirming the death sentence observes that the accused Rajendra is a 'desperate character', who after having been convicted under s. 302 and undergone a sentence of imprisonment for life was released only a few days prior to the occurrence, on October 2, 1972, that is, on the occasion of Gandhi Jayanti, committed the brutal murder of the deceased Mansukh by striking him with a knife.

On the date of occurrence, that is, on October 25, 1972, at about 11 a.m. the accused along with his brother Pooran rushed towards Sri Kishan, brother of Rambharosay, armed with a knife but Sri Kishan ran to safety and was not hurt. Later in the evening at about 5.30 p.m., the same day, while Rambharosay and the deceased Mansukh were standing in the lane in front of Rambharosay's house, the accused suddenly appeared and dealt several blows with the knife on vital parts of the body of Rambharosay but Rambharosay released himself from his grip and ran inside his house and bolted the door. The accused chased him all the way with the blood-stained knife and knocked at the door asking him to open it. Meanwhile, the deceased Mansukh came and tried to entreat the accused not to assault Rambharosay. Thereupon the accused struck deceased Mansukh, who tried to escape, but the accused chased him over a distance of 200 to 250 feet and inflicted repeated knife blows on the deceased resulting in his death. The deceased was done to death by the accused merely because he tried to prevent him from assaulting Rambharosay.

Not only there are no mitigating circumstances but this was a pre-planned, cold-blooded murder. While Rajendra was

in jail, his family members used to wield out a threat that the members of the family of Rambharosay would be dealt with after Rajendra is released from jail.

The case of this accused is destructive of the theory of reformation. The 'therapeutic touch' which it is said is the best way of preventing repetition of the offence has been of no avail. Punishment must be designed so as to deter, as far as possible, from commission of similar offences. It should also serve as a warning to other members of society. In both respects, the experiment of reformation has miserably failed. I am quite sure that with the commutation of his death sentence, the accused will commit a few more murders and he would again become a menace to the community.

In Kunjukunju Janardhanan's case, the Kerala High Court while confirming the death sentence of the accused observes that he acted, with extreme depravity. Infatuated by the charm of a village girl, Smt.
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Santhamma, then aged about 21 years, the accused Kunjukunju Janardhanan, aged 28 years, committed the brutal murder of his innocent wife, Smt. Chandramathi, aged 26 years and his two minor sons, Sunil aged 7 and Manoj aged 5 at the dead of night while they were sleep by repeatedly striking them with a sharp-edged deadly weapon. It redounds to the credit of Smt. Santhamma, P.W. 2, the village girl, with whom the accused was on terms of illicit intimacy, that she used to entreat him in her letters not to court her as it would destroy the happiness of his family. It was then that the accused wrote the letter, Ext. P-2, that he would exterminate his wife and children once for all so that he may live happily with her.

I fail to understand what is meant by the 'eternal triangle' as a mitigating circumstance. The accused, who acted as a monster, did not even spare his two innocent minor children in order to get rid of his wife and issues through her. If the death sentence was not to be awarded in a case like this I do not see the type of offence which calls for a death sentence.

In Sheo Shankar Dubey's case, the Allahabad High Court has found the accused Sheo Shankar guilty of triple murder and rightly confirmed the sentence of death passed on him. The accused Sheo Shankar murdered his uncle Narottam Dubey, and his two sons Chandra Bhushan and Chandra Shekher.

On the date of occurrence, i.e., on June 15, 1976 after there was a partition of the joint family lands between the deceased Narottam and Purushottam, father of the accused Sheo Shankar, there was a dispute regarding division of three bataulis. The three bataulis could not be equally divided because they were of different sizes. The accused insisted that they should be broken and then partitioned. Smt. Vidyawati widow of Narottam, in fact, in trying to pacify her brother-in-law Purushottam, brought out one batauli and the remaining two were taken out by Chandra Shekhar. It all happened over the act of Chandra Shekher in flinging the two bataulis on the ground which collided making a sound showing his resentment. The expression of resentment implicit in the gesture of Chandra Shekhar infuriated the accused Sheo Shankar to such an extent that he committed the three murders in a row. These were nothing but first-degree murders.

The weapon used by the accused in committing the crime, the manner in which the operation was carried out, and the determination with which the accused acted, as well as the number of injuries inflicted on the unfortunate victims,

give a clear picture of the cruelty and brutality
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with which the accused murdered his uncle and his two sons. He first inflicted a knife blow on his uncle Narottam Dubey who tried to run away and as he turned, the accused dealt him another knife blow resulting in his death on the spot. Narottam Dubey, it appears, attempted his best to escape. Even after he had sustained bleeding injuries at the hands of the accused, he made an effort to run away but he was chased by the accused and the accused finished the victim with grim determination. His cousin Chandra Bhushan tried to intercept with a view to protect the life of his aged father but he was even not spared by the accused who struck a fatal blow on the chest. The second cousin, Chandra Shekher, who moved forward to save his brother was chased by the accused who also finished him of by a stroke of the blade of knife he wielded.

It was no doubt a trifling incident over the division of three betaulis resulting in the triple murder. It is said that the murders were not 'pre-meditated' but committed in the heat of passion over a 'family feud'. But that hardly furnishes a justification for the extreme brutality with which the accused acted.

There is no inexorable rule that either the extreme youth of the accused or the fact that he acted in a heat of passion must always irrespective of the enormity of the offence or otherwise be treated as a sufficient ground for awarding the lesser punishment. The Court has to take into consideration all the circumstances which do not merit the extreme penalty. I find that in the facts and circumstances of this particular case, these factors cannot outweigh other considerations. Three precious lives have been lost by the dastardly act of the accused. A family has been wiped off.

The death sentence was clearly called for in this case- firstly, as a threat or warning to deter potential murderers, and secondly, as the guarantee against the brutalisation of human nature. The grim determination of the accused to bring the entire operation to the end desired by him is also reflected in the manner of his repelling the interception of Chandra Bhushan who went to the rescue of his father and Chandra Shekher who tried to rescue his brother Chandra Bhushan, the unfortunate victims of the murderous assault. All these facts and circumstances, to my mind, constitute 'special reasons' why the accused should be sentenced to death.

In retrospect, I venture to say that in these appeals, it cannot be asserted that the award of death sentence to the appellants was 'erroneous in principle'. Nor can it be said that the sentence of death passed on them was arbitrary or excessive or indicative of an improper exercise of discretion. It is the duty of the Court to impose a proper punishment,
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depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders. Failure to impose a death sentence in such grave cases where it is a crime against the society-particularly in cases of murders committed with extreme brutality, will bring to nought the sentence of death provided by s. 302 of the Indian Penal Code, 1860. To allow the appellants to escape with the lesser punishment after they had committed such intentional, cold-blooded, deliberate and brutal murders will deprive the law of its effectiveness and result in travesty of justice.

I would, therefore, for these reasons dismiss the

appeals. The appellants are at liberty to apply for reprieve for commutation of their sentence which is an executive act of clemency.

ORDER

In the light of the opinion of the majority the death sentence in each of these appeals is commuted to a sentence of imprisonment for life.

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