CHAPTER V
JUDICIAL APPROACH TOWARDS CAPITAL PUNISHMENT

Capital Punishment which was once fully accepted and practised, is now questioned in the changed social and political conditions. The new human rights jurisprudence provided a fertile ground to challenge the validity of Capital Punishment before the Courts. In this chapter an attempt is made to analyse the judicial response to the practice of awarding Capital Punishment and the impact of judicial decisions on Capital Punishment. This chapter is divided into two sections. Section I deals with American Supreme Court on Capital Punishment and Section II deals with the attitude of Indian Supreme Court towards Capital Punishment.

5.1. AMERICAN SUPREME COURT ON CAPITAL PUNISHMENT:

It is not clear when and where the death penalty was first challenged.\(^1\) In this century the issue has been raised time and again. The 1960s brought an unprecedented flurry of activity, but, did not result in a declaration that the death penalty is unconstitutional per se. However, advocates of abolition were encouraged by a number of decisions, which by circuitous means, prevented the death penalty from being imposed.\(^2\) The instances are Witherspoon,\(^3\) where Supreme Court held individuals with conscientious scruples against Capital Punishment could not be automatically excluded from the jury as had earlier been the case;\(^4\) Jackson\(^5\) where the Supreme Court held invalid the death penalty provision of the Federal Kidnapping Act\(^6\) and Pope\(^7\) in which relying on the Jackson, Supreme Court held that the death penalty provision of Federal Bank Robbery Act was unconstitutional.

At the same time retentionists could assert with equal confidence several reasons why the Supreme Court would and / or could never declare the death penalty as unconstitutional per se. In the first instance, the Court had time and again upheld various methods of inflicting the punishment of death. Each time it has implied that the penalty was constitutional. Between 1967 and 1972, no fewer than twenty six State Courts had held the death penalty constitutional, when attacked as inflicting cruel and unusual punishment as against the spirit of Eighth Amendment.\(^8\)
5.2. THE MODE OF EXECUTION WAS CHALLENGED AS UNCONSTITUTIONAL:

In the last century the mode of inflicting the death was challenged. In Wilkerson's shooting to death was challenged as unconstitutional. In re Kemmler electrocution was challenged as unconstitutional. In Wilkerson the Court observed that shooting was a common mode of execution and in Kemmler the Court found it safe to hold that punishments of torture and analogous punishments inflicting unnecessary cruelty are forbidden and it further observed “If the punishment prescribed for an offence against the laws of the state were manifestly cruel and unusual, such as burning at stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.” In Francis the Supreme Court approved a second attempt of electrocution after the first had failed. The Court found that the Fourteenth Amendment would prohibit by its due process clause execution by a State in a cruel manner but that the abortive attempt did not make the execution any more cruel in the constitutional sense than any other execution.

All these decisions explain that never was the death penalty challenged as unconstitutional per se, but only the method of inflicting death penalty was challenged. The Court did not hold either shooting or electrocution - for that matter a second attempt of electrocution even as unconstitutional.

5.3. PENALTIES OTHER THAN DEATH SENTENCE WERE CHALLENGED AS BEING AGAINST THE VIII AMENDMENT:

Though death penalty was not challenged as unconstitutional per se prior to Furman other penalties were challenged as against the spirit of VIII Amendment. Trop was the first case where United States Supreme Court struck down a statute applying “cruel and unusual punishment” clause of VIII Amendment. Warren Ch.J. observed, “Citizenship is not a licence that expired upon his behaviour.” He further pointed out that the phrase “cruel and unusual” punishment appearing in the Eighth Amendment has not been detailed by the Supreme Court earlier. He made references to Weem's case where the Supreme Court recognised that the words of the Eighth Amendment were not precise and that their scope was not static. It was clear to Warren Ch. J. that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. He further observed that “denationalization” as a punishment is barred by Eighth Amendment. It is a form of
punishment more primitive than torture. This punishment according to him is an offence to cardinal principles for which the Constitution stands. He consequently struck down Sec. 401(g) of Nationality Act of 1940, as ultra vires being offending Eighth Amendment. This decision was not without the minority opinion. As Sen.J, of Indian Supreme Court in death penalty cases, Frankfurter,J., opined that it was not the business of the Court to pronounce "policy".

This decision was followed by Robinson in which the majority held that the California Health and Safety Code under which appellant was convicted - inflicted "cruel and unusual punishment" in violation of the Eighth Amendment and Fourteenth Amendments. The Court observed that it is "cruel and unusual punishment" in the sense of Eighth Amendment to treat a drug addict as criminal. It further held,"If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person." He concluded with the following observations: "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."

Unfortunately this decision was also not without minority opinion. However, the trend was shortlived. In Powell the Court fell back from its earlier stand. The Judges ostensibly dissented from Robinson's case. The peculiarity is that Marshall J. who had been espousing the cause of the underdog upheld the conviction in this case. He pointed out:"... appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk. The state of Texas thus has not sought to punish a mere status, as California did in Robinson's case. Nor has it attempted to regulate appellant's behaviour in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behaviour which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and aesthetic sensibilities of a large segment of the community." However, the Court observed, "Powell did not show that his conviction offended the Constitution." Minority dissented from this observation stating that, "the essential constitutional defect here is the same as Robinson, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid."
Powell was the last case decided by the United States Supreme Court interpreting the VIII Amendment, before it dropped a bombshell through the now famous Furman.31

5.4. FURMAN’S CASE: THE TREND SETTER IN DEATH PENALTY JURISPRUDENCE:

Prior to Furman, definitive standards for imposing the death penalty were non-existent. In McGautha32 and Crampton 33 while affirming the sentences, the Supreme Court of United States held that, “In light of history and experience, and the present limitation of human knowledge we find it quite impossible to say that committing to the untramelled discretion of the jury power to pronounce life or death in capital cases is offensive to anything in the Constitution...” This statement is highly illustrative of the Supreme Court’s policy prior to Furman.

Jurists did not know what this particular phrase “cruel and unusual” means. The United States Supreme Court interpreted this provision “as prohibiting the infliction of a punishment which is “beneath human dignity”. The standard for determining which punishments are "beneath human dignity" is to be determined by contemporary social values. However Furman was decided with 5:4 majority. This case came before the United States Supreme Court along with two other cases.36 The Court held that the convictions of the three appellants was bad by 5:4 margin. Brennan and Marshall JJ. wrote extensive majority opinions whereas Burger, Ch.J. wrote leading minority opinion. Referring to V Amendment37 Brennan, J. declared that if a particular crime was punishable by death, a person charged with that crime is entitled to certain procedural protections.38 He summed up, “... the punishment of death is inconsistent with all four principles of: Death is an unusually severe and degrading punishment: there is strong probability that it is inflicted arbitrarily: its rejection by contemporary society is virtually total: and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply does not.”39 Brennan, J. thus held that Capital Punishment is no more possible to be inflicted in the United States. Douglas, J. held that the discriminatory application of the death penalty violates the doctrine of equal protection, which he believed was an inherent element of the VlII Amendment’s “Cruel and Unusual punishment provision”.40

By far the lengthiest and most drastic and sweeping opinion is that of Marshall, J.41 He divided his
opinion into several chapters. In the first chapter he made historical survey of ban of cruel and unusual punishments envisaged by Eighth Amendment. In chapter II, he surveyed case law: in chapter III he explained the principles emerging from the case law: chapter IV was devoted to history of Capital Punishment in England and United States. In chapter V, Marshall, J. propounded that retribution, deterrence, prevention, encouragement of guilty pleas, eugenics and economy as the six possible purposes of Capital Punishment. He negatived the imposition of Capital Punishment on every one of those counts. In chapter VI, he concluded that Capital Punishment is violative of Eighth Amendment on the ground that it was morally unacceptable to the people of United States at the given time. He also examined incidence of imposition and execution of death penalty and observed that blacks vis-a-vis whites and men vis-a-vis women are subjected to Capital Punishment more.

Marshall, J. finally concluded in chapter VII, “In striking down Capital Punishment, this Court does not malign our system of government. On the contrary it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization records its magnificent advancement. In recognising the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve a major milestone in the long road up from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning Capital Punishment.”

The dissenting opinion is also noteworthy in this context. Chief Justice Burger filed the leading dissenting opinion. He held that “the constitutional prohibition against ‘cruel and unusual punishments’ cannot be construed to bar the imposition of the punishment of death.” He further observed that “the Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelise the sentencing process.” He declared that “he would have preferred the total abolition if the legislatures provided mandatory death sentences, thereby denying juries the opportunity to bring in a verdict of a lesser charge.” By pointing out that the highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits, he argued that the contention that the world-wide trend towards limiting the use of Capital Punishment is not a judicial solution in a written constitution.
5.5. GREGG v. GEORGIA: THE PRODUCT OF NEW LAWS:

To sum up, in Furman, though the Court held Capital Punishment as unconstitutional, it did not expressly elucidate as to what particular elements would make a death penalty statute constitutional. In response to this decision, States began drafting new death penalty statutes in an attempt to comport with the mandates of Furman. Thirty-five states re-drafted their Capital Punishment statutes to make death penalty constitutional. Within four years after Furman decision, more than 600 persons had been sentenced to death under ‘new laws’. The judicial product of this legislative scramble was a group of cases which became known as “76 cases”. The “76 cases” represented the first challenge to newly implemented, Furman guided death penalty statutes. The “76 cases” also signified the first opportunity the Court had to solidify and implement the abstract dictates set forth in Furman.47

Of the five “76 cases” presented for review the first decided by the Court was Gregg.48 This case was heard and decided along with four other cases, namely Profitt,49 Jurek,50 Woodson,51 and Roberts.52 The “new statutes” typically required, a bifurcated (two-stage) trial procedure, in which the jury first determines guilt or innocence and then chooses imprisonment or death in the light of aggravating or mitigating circumstances.

In Gregg,53 a jury sentenced the petitioner to death based on a finding of two statutory aggravating factors. In Profitt,54 a Florida trial Court sentenced the petitioner to death based on a jury’s recommendation, which was predicated on a finding of three statutory aggravating factors. In Jurek,55 the petitioner’s jury unanimously recommended death sentence. Two of the five “76 cases” presented for review namely, Woodson 56 and Roberts 57 involved “mandatory” Capital Punishment statutes.

Troy Leon Gregg challenged the imposition of death sentence under the Georgia statutes as “cruel and unusual” punishment under the Eighth and Fourteenth Amendments. Stewart,58 filed the majority opinion in which he held, “Although public perceptions of standards of decency were not conclusive - the Eighth Amendment requiring that punishment must accord with the dignity of man - and not be excessive either as to its form or severity - nevertheless a legislature was not required to select the least severe penalty possible, so long as the penalty selected was not cruelly inhuman or disproportionate to the crime involved.” The Court further held, “The view of the Furman decision that the death penalty
should not be imposed in an arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentencing proceeding being preferable as a general proposition.”

Stating this the Court held that the impugned Georgia statute was intra vires of the constitution since the statute required the jury to consider the circumstances of the crime and the character of the defendant before recommending sentence.

White, J., whose opinion was concurred by Burger, Ch. J., and Rehnquist J. held that the death penalty imposed for murder under the new Georgia statutory scheme could be constitutionally carried out.58

However, the Judge concurred with the opinion of the Court that death penalty is not cruel and unusual punishment under all circumstances. Brennan and Marshall J. held that the death penalty is cruel and unusual in all circumstances and is banned by Eighth and Fourteenth Amendments.

In Profitt also the Court opined that the Florida procedure satisfied the constitutional concern identified in Furman decision that the death penalty was not be imposed in an arbitrary and capricious manner.59

In Jurek also the Court opined that the death penalty did not under all circumstances, constitute cruel and unusual punishment. It further held that “the Texas Capital sentencing Procedure” did not violate the Eighth and Fourteenth Amendments.60

Though the reasons differed, all the justices of the Court with the exception of Brennan and Marshall J. held that the death penalty did not offend the spirit of Eighth and Fourteenth Amendments. As usual the two justices held that “Capital Punishment is cruel and unusual punishment prohibited by the said Amendments, because, it is excessive, being unnecessary to promote the goal of deterrence of crime or further any legitimate notion of retribution.”

5.6. MANDATORY DEATH SENTENCE AND UNCONSTITUTIONALITY:

The case of Woodson and Roberts involved mandatory death sentence. In these two cases the United States Supreme Court held death which is mandatory is unconstitutional. In the case of Woodson
while holding the imposition of death penalty did not under all circumstances constitute cruel and unusual punishment, Stewart, J. opined that the VIII Amendment was to assume that the State’s power to punish was exercised within the limits of civilized standards, thus requiring a determination of contemporary standards regarding the infliction of Capital Punishment. He further observed that although the mandatory death sentence for specified offences was uniformly followed by the States at the time of VIII Amendment’s inception, the Jurors reacted unfavourably to the harshness of mandatory death sentence. This resulted in frequent refusals to convict in order to avoid automatic death sentence, and thus most State Legislatures eventually replaced automatic death penalty statutes with discretionary Jury sentencing. With these observations the Court held that the North Carolina mandatory death penalty statute was unconstitutional as being inconsistent with contemporary standards. However, the impugned statute did not provide any standards to guide the Jury in its inevitable exercise of the power to determine which first degree murderers should live and which first degree murderers should die. The VIII Amendment required consideration of the character, record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting death penalty. This could not be fulfilled by North Carolina Statute.

In the case of Roberts also the United States Supreme Court held that mandatory Capital Punishment is unconstitutional. Brennan, J. recalled the case of Washington, where the offender was sentenced to death but, in appeal the United States Supreme Court vacated the death sentence holding that “The imposition and carrying out the death penalty constitutes cruel and unusual punishment in violation of VIII and XIV Amendments.” Coming to the present case, Brennan J. held that the killing of an officer of Police Force is no doubt an aggravating factor, but the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol and emotional disturbances are mitigating factors. The Court consequentially held that death penalty is unconstitutional and violative of VIII and XIV Amendments. The dissenting judgment of Rehnquist Ch.J. is also noteworthy in this context. He observed that the mandatory death sentence in the given case was not violative of VIII and XIV Amendments. According to him “There is nothing in the constitution’s prohibition against cruel and unusual punishment which disables a legislature from imposing a mandatory death sentence on a defendant
convicted after a fair trial of deliberately murdering a police officer."

5.7. IMPOSITION OF DEATH PENALTY IS NOT UNUSUAL AND CRUEL:

Coker was one of the last cases decided by U.S. Supreme Court regarding constitutional validity of Capital Punishment, in the decade of 1970s. The accused was convicted of murder, rape, kidnapping and aggravated assault. Jury's verdict on the rape count was death by electrocution.

White, J., wrote the leading opinion joined by Stewart, Blackmun and Stevens, JJ. White, J., summarised the legal position as: "It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment, it is not inherently barbaric or an unacceptable mode of punishment for crime, neither always disproportionate to the crime for which it is imposed. It is also established that imposing Capital Punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia Capital punishment statute in Furman v. Georgia." However, White, J., struck down the death sentence holding that death sentence for the rape of adult woman was cruel and unusual punishment. Powell, J., also took the same stand, while Brennan and Marshall, JJ., concurred with the opinion of the Court but taking their earlier stand in Furman and Gregg that Capital Punishment is cruel and unusual under all circumstances.

Burger, Ch. J., wrote the main dissenting opinion. He formulated the question as: "Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity?" He then concluded that the imposition of death penalty to Coker was not cruel and unusual punishment within the meaning of Eighth Amendment.

5.8. AGGRAVATING AND MITIGATING FACTORS IN IMPOSITION OF DEATH PENALTY:

The next case before the United States Supreme Court challenging the constitutional validity of Capital Punishment is that of Lockett. The importance of this case lies in the fact that the petitioner was a woman.
The State of Ohio mandates the death sentence for her crime. But, the absence of direct proof that she intended to cause the death of the victim is a mitigating factor. Her role in the offence was relatively minor and her age was also considered by the Court.

While reversing the death sentence the Court held, "The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio Statute is incompatible, with the VIII and XIV Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."

Blackmun and Rehnquist JJ. concurred in so far as the reversal of the sentence of death upon Lockett, but held that it does not violate the Eighth Amendment for a State to impose the death penalty on a mandatory basis when the defendant has been found guilty beyond reasonable doubt of committing a deliberate, unjustified killing.

Another landmark judgement in death penalty jurisprudence is that of Godfrey. This case came before the Court four years after Gregg is decided. The sentencing body found that the murder was "outrageously or wantonly vile, horrible or inhuman". The petitioner challenged the statute, alleging that the language of the statute was vague and overbroad. The generalized language allowed for arbitrariness in the jury's decision making process.

While reversing the death sentence, the Court held that "the statutory aggravating factor in question was susceptible to several interpretations, thus allowing for injudiciousness in violation of Furman." The imposition of death penalty based on vague statutory aggravating factor would be unconstitutional.

Godfrey was decided in 1980. After three years the Court decided Zant. The Georgia trial Court sentenced him to death based on a jury's finding of two statutory aggravating factors.

Georgia Supreme Court upheld the sentence. The United States Supreme Court affirmed the decision holding that under the Georgia statutory scheme a jury was required to find only one statutory aggravating factor inorder to determine that a defendant was "death eligible". As long as the jury found that the evidence supported at least one valid statutory aggravating factor, the decision was constitutionally permissible. Thus, the Court enunciated the principle that "the role of statutory aggravating factors as a sine quo non of a constitutional death penalty statute."
Approximately two weeks after Zant was decided, the United States Supreme Court decided the case of Barclay. In Barclay, the petitioner was sentenced to death based on judge’s finding of four statutory aggravating factors, as well as one non-statutory aggravating factor.

The Florida Supreme Court acceded that the petitioner’s argument was meritorious. However, employing a harmless error analysis, the Court determined that the judgement was constitutionally permissible. On appeal, the United States Supreme Court affirmed the sentence, holding that pursuant to Profitt, consideration of non-statutory aggravating factors was not violative of the United States Constitution. The Court recognized that Florida has an established procedure by which to review death penalty challenges and found that these procedures adequately safeguarded the rights of the individual.

The unconstitutionality of aggravating factors was confronted in Maynard once again. Maynard was sentenced to death based on a jury’s finding of two statutory aggravating factors. Maynard contended on the ground that the second factor was vague and hence failed to provide the factfinding body with sufficient guidance. Thus it was unconstitutional. On review the United States Supreme Court held that the statutory provision as unconstitutional.

It is not the first time for the United States Supreme Court to hold death penalty as unconstitutional. Though, it might not have said death penalty itself as unconstitutional but, it held in several cases other factors which are involved in death penalty jurisprudence as unconstitutional. For example in Mc Clesky the Court held that the sentence based on race was held unconstitutional. In Zant, the Court held, “sentencer may not consider information constitutionally impermissible or irrelevant to sentencing process. In Enmund the Court held that the evidence considered must relate to defendant’s personal responsibility and moral guilt.

5.9. DEATH PENALTY ON JUVENILE OFFENDERS:

After Maynard the United States Supreme Court tried the case of Wayne. The importance of this case was that the defendant was only fifteen years old. Being fifteen years old, he was a “child” for the purpose of Oklahoma criminal law. The prosecutor sought an order to allow the boy to be tried as an adult, pursuant to an Oklahoma statute which allows such a trial if the prosecution shows the
prosecutive merit of the case and the Court finds that there are no reasonable prospects for rehabilitation of the child within the juvenile system. The prosecutor was accorded permission to try the defendant as if he were an adult. He was found guilty of the charge. Holding that the defendant falls within the statutory term of crime committed which was “especially einous, atrocious or cruel”, the trial court sentenced the defendant to death. Oklahoma Court of Criminal Appeals confirmed the sentence. However, the United States Supreme Court held that the execution of any person who was less than sixteen years old at the time of his or her offence would offend civilized standards of decency and thus violates the Eighth and Fourteenth Amendments.

However, shortly thereafter in Kevin N. Stanford v. Kentucky and Heath A. Wilkins v. Missouri Scalia, J. filed the opinion of the Court that there is no consensus forbidding the imposition of Capital Punishment on any person who murders at sixteen or seventeen years of age and that the death sentence in the cases at hand were valid. Brennan, Marshall, Blackmun and Stevens, JJ. however, dissented.

\[5.10. \text{LEGITIMACY OF DEATH PENALTY:}\]

In 1990, Clemons’ case came before the United States Supreme Court. He was sentenced to death by the trial Court after a jury found the existence of two statutory aggravating factors. The sentence was upheld by the Mississippi Supreme Court. The United States Supreme Court affirmed the sentence holding that it was not violative of Fourteenth Amendment’s due process clause, or Eighth Amendment’s cruel or unusual provision to outweigh the aggravating and mitigating factors.

Then came the case of Blystone before the Court. A Pennsylvania trial Court sentenced him to death based on a jury’s finding of one statutory aggravating factor and no mitigating factors. The State Supreme Court affirmed the sentence. On review the United States Supreme Court rejected the petitioner’s contention. Chief Justice Rehnquist filed the opinion of the Court affirming the death penalty. He observed that death penalty was not automatically imposed, but imposed only after a determination that the aggravating factors outweighed the mitigating factors rather or there were no mitigating factors, in this particular case.

The case of Lankford stands apart from the above discussed cases.

This is a case where the Fourteenth Amendment was applied to reverse the Capital Punishment
imposed on the petitioner. The trial judge advised the accused that the maximum punishment that the accused could receive if convicted on either charge was life imprisonment or death. Between the time the accused was convicted on both counts and the time of the accused’s sentencing hearing, the State pursuant to a Court order requiring the state to notify the Court and the accused whether the state would ask for the death penalty, formally indicated that the state would not recommend the death penalty for either conviction. At the sentencing hearing, the prosecutor explained why the prosecutor had not recommended the death penalty, and recommended an indeterminate life sentence. The defense counsel urged the Court to impose concurrent, rather than consecutive, indeterminate life sentence. At that stage, there was no discussion of the death penalty as a possible sentence.

At the conclusion of the sentencing hearing, the trial judge indicated that the seriousness of the accused’s crimes warranted more severe punishment than that which the state had recommended, and that the death penalty was a sentencing option. Subsequently, the judge sentenced the accused to death. The trial Court denied the accused’s request for post conviction relief that was based on the contention that the trial Court had violated the Federal Constitution by failing to give notice of its intention to impose the death sentence in spite of the state’s notice that the state was not seeking the death penalty. The trial Court held that the Idaho Code provided the accused with sufficient notice of a possible death sentence, and that the prosecutor’s statement that the prosecutor did not intend to seek the death penalty has no bearing on the adequacy of notice to the accused that the death penalty might be imposed.

The Idaho Supreme Court concluded that the express advice given to the accused at the accused’s arraignment, together with the terms of the Idaho Code were sufficient notice concerning the death penalty. It affirmed the death penalty. On certiorari, the United States Supreme Court remanded the matter for fresh consideration. The Idaho Court once again maintained the death penalty.

On the second certiorari, the United States Supreme Court reversed the order of the Idaho Supreme Court. Steven, J. on behalf of the majority held, that at the time of the sentencing hearing the accused and the accused’s counsel did not have notice, sufficient to satisfy the due process clause of
the Federal Constitution's Fourteenth Amendment, that the judge might sentence the accused to death, because i) the character of the sentencing proceeding did not provide the accused with any indication that the judge contemplated death as a possible sentence, ii) the pre-sentencing order was comparable to a pretrial order limiting the issues to be tried, and therefore, it was responsible for the defence to assume that there was no reason to present argument or evidence directed at the question whether the death penalty was either appropriate or permissible, iii) the notice of a possible death sentence provided by the state statute authorising the imposition of the death penalty, and provided by the arraignment, did not survive the state's response to an order that would have no purpose other than to limit the issues in future proceedings, iv) the question was whether inadequate notice concerning the character of the hearing had frustrated defense counsel's opportunity to make an argument that might have persuaded the judge to impose a different sentence, where at the very least, reasonable judges might have differed concerning the appropriateness of the death sentence for the accused, v) the judge's silence following the state's response to the presentencing order had concealed the principal issue to be decided at the hearing, and vi) the lack of adequate notice of a possible death sentence had created an impermissible risk that the adversary process might have malfunctioned in the case.

Scalia, J. filed the dissenting opinion on behalf of himself, Rehnquist Ch.J, White and Souter, JJ. He observed that i) the death penalty had remained at issue in the sentencing hearing, and the judge had not misled the accused to think otherwise, because a) the Idaho Code authorised the death penalty of every person guilty of first-degree murder and nowhere suggested that a judge's full responsibility for determining the sentence dissolved upon the state's recommending a lower sentence, b) Idaho case law confirmed that a Court was not bound by the state's sentence recommendation, and c) the judge had indicated that regardless of the state's sentence recommendation the death penalty would be at issue; and ii) that it had not been established that the accused and the accused's counsel had detrimentally relied upon the state's declaration by assuming that the death penalty opinion had been foreclosed.

The United States Supreme Court - for better or worse, but not without precedential support- has embraced the conception of legitimacy of the death sentence and made it the foundation of current
Capital Punishment jurisprudence. In so doing, the Court has accomplished what few would have imagined possible a decade ago. The Justices have brought methodological coherence, doctrinal stability, and a measure of constitutional respectability to this once unruly area of the law. Moreover, they have managed to do so while reaffirming the fundamental norms that animated Eighth Amendment death penalty law since its conception.

Consideration of governmental structure, institutional capacity, and institutional responsibility clearly weigh heavily in the current Court’s Eighth Amendment balance. Anyone expecting to engage in useful Eighth Amendment discussions today must be prepared to hear about them and must be willing to talk about them. But makes no mistake about it: the central normative vocabulary of Capital Punishment discourse since Furman - the principles of rational orderliness, moral appropriateness, and procedural fairness - survives today. Securely recognized under the Eighth Amendment, those norms remain powerful enough to sustain meaningful inquiries into the appropriateness of death practices, to reveal injustices, to fashion claims for redress, and to make the case for continued reform.

5.11. INDIAN SUPREME COURT ON CAPITAL PUNISHMENT:

It is to be noted that in India the “essential features” of any legislative scheme including the basic “policy” must remain in the hands of the legislature. But one cannot expect judges to be silent spectators watching the changes brought in the jurisprudence of Capital Punishment around the world. The Indian Supreme Court has expressed its views on Capital Punishment in a series of cases. It is proposed to discuss only the trend setter decisions of the Supreme Court on Capital Punishment in India.

5.12. AGE OF THE OFFENDER AND CAPITAL PUNISHMENT:

Prior to Ediga Annamma that is prior to New Criminal Procedure Code, the Supreme Court of India did not expressly recognise any factors as mitigating or aggravating while awarding the Capital Punishment. But, in majority of cases the Apex Court considered the “young age” of the offender as a mitigating factor for commutation of Capital Punishment. Though youth or old age of an accused may not in itself be a ground for leniency especially when the murder is committed in a most high handed and cruel manner, but considering along with other circumstances, Courts took a lenient view in the
Opposed to the stand taken in above cases, the Supreme Court in Raghomani confirmed the death sentence of the accused who was a young man of 28 years. There is divergence of opinion as to what should be the age at which the offender may be regarded as young man deserving commutation.

It is not out of place to reiterate the observations of the 35th Law Commission and 42nd Law Commission regarding the age factor. The Commissions recommended that a person who is under the age of 18 years at the time of the commission of the offence, should not be sentenced to death and that a provision to that effect could be conveniently inserted in the Indian Penal Code as section 55 B. The reasoning given by the Law Commissions was that death is not the only punishment provided by law for the offence.

5.13. GENDER OF THE ACCUSED AND CAPITAL PUNISHMENT:

The gender of the accused is not considered either as an aggravating factor or a mitigating factor while awarding Capital Punishment. Women criminality, especially in murder cases, is less in Indian circumstances. In many cases women are not brought to the police station. If they are brought also, they are not produced in the Court. But, where a man and woman are jointly charged with an offence, the Court often takes the view that the woman acted under the influence of the man and may impose a lesser sentence to the woman. But, if the Court comes to the conclusion that both parties are equally guilty, the fact that one of them is a woman is no ground for making a distinction in the sentence. Ediga Annamma was the first case, where the Apex Court openly considered her femininity as one of the extenuating factors in the commutation of sentence.

However, now the total scenario is changed. No more woman are away from criminality. In dowry death cases - women -in the position of mothers-in-law and sisters-in-law are the main culprits. The Apex Court does not want to be lenient in this kind of gruesome murders, where the barbaric process of pouring kerosene oil on the body and setting fire as the culmination of a long process of physical and mental harassment for extraction of dowry

Inspite of this observation, the Apex Court did not sentence any woman to death on this count, taking regard to other extenuating factors. In regard of sentencing women to death, the opinion of
Law Commission of India and Royal Commission of British run on the same line.

14. INFIDELITY OF THE SPOUSE AND DESTRUCTION OF MATRIMONIAL HOME:

Where the Legislature recognised two sorts of punishments, it implicitly recognised the existence of degrees in the criminality. These degrees are to be determined by the circumstances of the crime and among them, and perhaps the most important of them, is the state of mind of the offender especially when he suspects the chastity of his wife. The Apex Court observed “The Baluchi custom of killing for unchastity cannot be taken into consideration in mitigation of sentence to be passed under Section 302 of the Indian Penal Code.” Inspite of this observation the sympathy of the Apex Court was undoubtedly with the husband.

But, the Apex Court seldom spared an intruder in the harmony of a matrimonial home.

15. MOTIVE AND MANNER:

The motive of the murderer and the manner of the murder played a vital role in imposition of Capital Punishment. Where the motive is unholy and cruel, where the manner of killing the deceased is brutal and callous and where the injuries are many and severe, the Apex Court did not hesitate to impose Capital Punishment on the accused.

While this sort of dilemma was going on between life and death, contemplating various factors as mitigating and aggravating, the American Supreme Court delivered its judgment in Furman. This decision had become a weapon in the hands of abolitionists. It had come at the right time when they were disappointed by the Legislature. Naturally, taking cue from the American judgment, they turned to the Supreme Court for the abolition of Capital Punishment.

16. CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT CHALLENGED:

The case which occasioned a series of constitutional challenges and rulings on constitutional issues was Jagmohan Singh v. State of Uttar Pradesh. In this case, the validity of death penalty was challenged on the grounds that it violates the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution.

It was argued that Article 14 of Indian Constitution, forbids the conferment of uncontrolled discretionary power. Section 302 of Indian Penal Code, which prescribes death sentence as an alterna-
tive punishment confers among the judges an unguided and uncontrolled discretionary power and hence hits Article 14 of the Constitution. But, Supreme Court did not find any merit in this contention. The Court referred to Bhudan Chodary’s case in which it held that judicial discretion depends upon the facts and circumstances of each case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to present in it an element of intentional and purposeful discrimination. Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial tribunals.

It was argued that the death sentence puts an end to all fundamental rights guaranteed under clauses (a) to (g) of sub-clause (i) of Article 19 and therefore the law with regard to Capital Punishment is unreasonable and not in the interest of general public. It was further contended that freedom to live is basic to all the seven freedoms enshrined in the Article 19 and since the enjoyment of those freedoms is impossible without conceding freedom to live, the latter cannot be denied by any law unless such punishment is reasonable and is required in general public interest.

Rejecting the arguments, the Court held that Capital Punishment cannot be described as unusual because that kind of punishment has been with us from ancient times up to the present day. The framers of the constitution were well aware of the existence of Capital Punishment as a permissible punishment under the law. Article 72 of Indian Constitution confers the power of commutation, remission etc., on the President of India and Governors of the States. Article 134 gives a right to appeal from the lower courts. All these provisions clearly go to show that the framers of the Constitution had recognised the death sentence as a permissible punishment and had made necessary constitutional provisions for appeal, reprieve etc., But, more important than these provisions in the Constitution is Article 21 which provides that “no person shall be deprived of his life except according to procedure established by law.” The implication is very clear. Deprivation of life is constitutionally permissible, if that is done according to procedure established by law. In the face of these indications of constitutional postulates, it will be very difficult to hold that Capital sentence is regarded per se unreasonable or not in the public interest.
The Supreme Court listed out the procedural safeguards in the Criminal Procedure Code and felt that an error can always be corrected by appeals and revisions. The Court further maintained that the Law Commission recommended for the retention of Capital Punishment and the Legislature decided to retain it. In this state of affairs, in the absence of objective evidence regarding its unreasonableness, the Court is not prepared to conclude that Capital Punishment is unreasonable in the public interest.

The last Constitutional issue raised by the counsel for the appellant is that according to Article 21 no person shall be deprived of his life except according to procedure established by law and in his submission, before the sentence of death is passed there is, in fact, no procedure established by law. The procedure of Criminal Procedure Code is limited to the finding of the guilt. After the accused is found guilty of the offence, there is no other procedure laid down under the law for determining whether the sentence of death or something less is appropriate, in the case. Therefore, death penalty is unconstitutional.

Rejecting the arguments based on Article 21 the Court maintained that right to life can be deprived in accordance with the procedure prescribed under Criminal Procedure Code.

The Court also pointed out that Section 306(2) and Section 309(2) are part of the procedure established by law and unless it is shown that they are invalid for any other reasons, they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21.

Commenting on Jagmohan’s decision, one Jurist rightly pointed out that “In Jagmohan Singh’s case the court felt unable to eliminate Capital Punishment from Indian Penology by the sledgehammer method of Constitutional invalidation: but the possibility remained that it might achieve a similar goal by the subtle common lawyer’s technique of statutory interpretation.”

Ediga Annamma’s case is a landmark decision in the jurisprudence of Capital Punishment. The case was decided before the new Criminal Procedure Code came into force. In Annamma Krishna Iyer, J. observed: “The unmistakable shift in legislative emphasis is that life imprisonment for murder is the rule and Capital sentence the exception to be resorted for reasons to be stated.” Though the Legislature wanted the Court to give special reasons for imposing death sentence, Justice Iyer had given
a list of special reasons for not imposing the death penalty. While imposing life imprisonment, Justice Krishna Iyer in Annamma’s case pointed out that “..... the criminal’s social and personal factors are less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy - these individually inconclusive and cumulatively marginal facts and circumstances tend towards award of life imprisonment.”

It is important to note that Justice Krishna Iyer laid down certain guidelines for imposing death penalty and for awarding life imprisonment. The learned Judge observed:

“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 downgrade the crime into a lesser one, judicial commutation is permissible. 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 Section 302 read with Section 149, or again the accused has acted suddenly under another’s instigation, without premeditation, perhaps the Court may humanely opt for life. On the other hand the weapons used and the manner of the use, the horrendous features of the crime and helpless state of the victim and the like, steal the heart of the law for a sterner sentence.”

After Annamma, the judicial trend was clearly towards partial abolition, though not complete abolition of Capital Punishment, for the Supreme Court, inspite of its judicial interpretation always felt complete abolition of Capital Punishment as the responsibility of the Legislature. Though within the constraints, the Indian Supreme Court did its best to commute many a death sentence into life imprisonment. The following cases reflect the judicial mind.

Raghubir Singh’s case was decided the next day after Annamma, by the same Bench consisting of Justice Iyer and Sarkaria. J. Basing on the ‘new found’ penological theory the Court commuted the death sentence into that of life imprisonment, giving weightage to the other factors such as his youth and delay in execution of his sentence although it was convinced that the murder was treacherous.
and preplanned.

Aslam’s case 127 which was also decided on the same day was no exception to this judicial new wave. The Court did not hesitate to criticise the Sessions Court and the High Court for not giving any consideration to the age of the accused (he was hardly nineteen or twenty), and for adopting a very mechanical approach. In Chawla & another vs. State of Haryana 128 the learned Judge considered factors such as provocation given by the deceased, the fact that the appellant had given only one fatal blow, he with the other accused acted under the instigation of an elderly person, the other accomplice was given life imprisonment in the High Court and the prolonged delay 129 in the process as mitigating factors, though not taken singly, but in their totality tilt the judicial scale in favour of life rather than putting it out.

In Keshar Singh v. State of Punjab 130 though it was a case of triple murder, the Supreme Court was compassionate enough to commute his sentence on the ground that the appellant has grown up from childhood, hearing the woeful story from his widowed sister of the murder of his brother-in-law and also taking into consideration the offender’s youth. The Court further observed that nothing was disclosed about the antecedents of the appellant. If it was more likely as we think it was, that the appellant was one of the several murderers and that he had caused the death of only one man with his gun, the other having been killed by others who were probably not recognised, the real basis adopted for awarding a death sentence to him would disappear. 131

In the case of Hari Singh, 132 where two brothers were involved in a feud and murder case and where one of them was awarded life imprisonment in the High Court, Supreme Court refused to affirm death penalty on the other and observed, “however, the occurrence took place several years ago (five years), so we refrain to award death sentence.”

John’s case 133 was a peculiar case, where the Apex Court observed virtual double jeopardy. The appellants (father and son) were convicted and sentenced to death by trial court in July 1971. In November, 1971, the State High Court set aside the convictions and sent the case back for new trial: in February, 1972, they were again convicted and sentenced to death: and the High Court confirmed the sentence in August 1972. The appellants thus had to undergo the ordeal of facing two successive trials
for the same offence. Other factors which biased the Court were long delay, and the emotional stress of the offenders.

In the case of Ram Swarup, the reason for commutation given by the Supreme Court was that "the possibility of a scuffle, of course, not enough to justify the killing of the deceased but bearing relevance on the sentence cannot be overlooked." In Francis' case, the Supreme Court justified the commutation in comparison with Ediga Annamma's case. In the latter case, the murders were premeditated and cleverly planned by a young woman whose mind had been filled with frenzy and irrational jealousy. Her sentence was reduced to life imprisonment. If that was done in that case, the motive of the appellant, Francis, before us, who decided in his obviously alarmed and frenzied state of mind, to do away with someone who appeared to him to be a standing menace to the lives and limbs of his near and dear ones, could not be said to be more reprehensible. In the case of Vasant Laxman More where the accused killed his lover with a razor and then had consumed poison himself in an attempt to commit suicide, the sudden quarrel which preceded the murder and mental distress of the appellant tilted the judicial scale towards a lesser penalty.

After Annamma's case, Supreme Court commuted in many cases death sentence into life imprisonment, on the grounds of "sudden quarrel which preceded the murder and the mental distress under which the appellant was smarting", "the quarrelsome nature of the deceased", "the weakness of approver's evidence" "mental imbalance of the accused", "comparatively minor injuries were attributed to the appellant," the young age of the offender", "the murder was neither brutal nor ghastly", "sudden excitement on the part of the accused" and "the release of the other accused in the High Court".

Thus, after Annamma, the Apex Court seldom imposed death sentence showing its indifference towards the extreme penalty. But, the fact is that decisions after Annamma have displayed the same pattern of confusion, contradictions and aberrations as decisions before that case. But, where life and death are at stake, inconsistencies which are understandable may not be acceptable.

On this background, after six years since Jagmohan's case, the constitutionality of Capital
Punishment was again challenged in the Apex Court. Three petitions were filed in the Court, challenging the constitutionality of Capital Punishment. They are Rajendra Prasad, Kunju Kunju Janardhan and Sheo Shankar Dubey.\textsuperscript{150} In these cases where death penalty was confirmed by the respective High Courts, appeals were preferred in the Apex Court.

Justice Krishna Iyer maintained that, "It is not the constitutionality, but only the canalisation of the sentencing discretion in a compelling situation. The former problem is now beyond forensic doubt,\textsuperscript{151}, after Jagmohan Singh and the latter is in critical need of tangible guidelines, at once constitutional and functional."\textsuperscript{152} Needless to say Iyer, J. based his reasoning entirely on this 'canalisation' of the sentencing discretion.

The Judge opined that Section 302 of Indian Penal Code beams little legislative light on, when the Court shall award death penalty or why the lesser penalty be preferred.\textsuperscript{153} Professor Blackshield viewed this point from a different angle. He maintained that "Part of the trouble is that different judges have different attitudes to capital cases. Part of the trouble, too, is the Supreme Court's crushing workload, which both magnifies variations and reduces judicial opportunity for control of even awareness of these. The Court's total output of decisions in any one year would be closer to 750. To cope up with the deluge of appeals, the Court over the years has steadily increased its total number of judges, but also decreased the size of the Benches constituted to hear particular cases. Inevitably, the increase in manpower adds to the room for diversity, while the frequent use of very small Benches adds to its practical impact. The plight of these embattled judges, struggling to provide legal services to a population of 600 million is what is surely the world's most overworked high appellate Court, deserves the sympathy of lawyers everywhere. .....that arbitrariness and uneven incidence are inherent and inevitable in a system of Capital Punishment: and that, therefore, - in Indian Constitutional terms, and inspite of Jagmohan Singh the retention of such a system necessarily violates article 14's guarantee of "equality before the law".\textsuperscript{154}

Iyer, J. further maintained that the Courts cannot 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. Because executive clemency is no substitute to judicial justice: at best it is administrative policy and worst pressure-based partiality. Thus the Courts are left with the necessity as to decipher sentencing discretion in the death or life situation. While mentioning about the Indian Penal Code (Amendment) Bill, 1972 passed by the Rajya Sabha in 1978, he expressed hope that the battle against death penalty by Parliamentary action is gaining ground. Section 354(3) of Criminal Procedure Code, 1973 supported his hope. The era of broad discretion when Jagmohan’s case was decided has ended...no longer did juridical discretion depend on vague principles.

After dealing at length with all the aspects of criminology, penology, sentencing process, judicial discretion etc., the learned Judge shifted his attention to the Constitution - the supreme lex, stating that in the pathless woods we must seek light from the constitution regarding special reasons. The only correct approach is to read into Section 302 of Indian Penal Code, and Section 354(3) of Criminal Procedure Code, the human rights and human trends in the Constitution.

The learned Judge referred to the case of Narendra Kumar where the Supreme Court held “Fundamental rights are not absolute and may be restricted reasonably, even prohibited totally, if social defence compels such a step. Restrictions may expand into extinction in extreme situations. Section 302 of Indian Penal Code deprives a person of his fundamental rights. The right to life and fundamental freedom is deprived when the offender is handged to death, his dignity is defiled when his neck is nooed and strangled. But, punishment by deprivation of life or liberty must be validated by Articles 14,19 and 21. Death - corporeal death- is adieu to fundamental rights. Restrictions on fundamental rights are permissible for the sake of public order and social security. No other reasons than these can be “special reasons” to take away the life. Unusual cruelty spells arbitrariness and violative of Article 14. One cannot inflict degrading punishment since the preamble of our Constitution speaks of dignity of the individual.”

In Rajendra Prasad Iyer, J. certainly delivered a judgment for postesrity, which is evident from the length of the judgment.
He concluded the judgment with the following observations:

1. In the Post-Constitution period, Section 302 of Indian Penal Code and Section 354(3) of Criminal Procedure Code have to be read in the humane light of parts III and IV, further illumined by the Preamble to the Constitution.

2. 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.138

3. The scheme of the Code, read in the light of the Constitution leaves no room for doubt that reformation, not retribution, is the sentencing lodestar.

4. Special reasons necessary for imposing the death penalty must relate not to the crime as such but to the criminal. In support of this point he referred to the cases of Annamma,139 where her youth, her womanhood, her ten years old child, the delay in her execution, her unbalanced sex and her expulsion from the conjugal home played a vital role in the commutation, Sriramnagam,160 where his young age, Namu Ram,161 in which case the social and personal facts played a role in commutation of sentence and Lalla Singh,162 in which the delay played an important role in the commutation of their sentences. In all the above cases the crime was brutal and dastardly.

Coming to the present cases, in Rajendra Prasad's case, Justice Iyer found fault with jail authorities who failed to reform him. He did not see any social security risk in this case, because Prasad was not a youth of uncontrollably violent propensities against the community but one whose paranoid preoccupation with a family quarrel goaded him to at the rival. Iyer, J. suggested for him mental-moral healing courses through suitable work, acceptable meditational techniques and psychotherapeutic drills to regain humanity and dignity. Apart from the above grounds for commutation the delay which lasted for six years is an additional ground.

In Janradhan also the Court did not find a social security risk. The Court did not have any idea whether he was a desperate hedonist or randy rapist with ‘Y’ chromosomes in excess, so as to be a sex menace to the society. “Sentencing is a delicate process not a blindman’s buff.” With this observation
the Apex Court commuted his sentence.

In the case of Dubey the Court accepted three deaths which the offender committed as are regrettable and terrible and adding one more to that list by way of Capital Punishment is no social solution. The Court referred to Carlose John's case where the murder was brutal but the act was committed in a grip of emotional stress and thus deserved commutation. In Dubey's case the Court took into consideration his adolescence for commuting the sentence.

This Judgment which involved Rajendra Prasad, Kunju Kunju Janardhan and Sheo Shankar Dubey is like Furman v. Georgia of United States, a very lengthy one and as in that case not without a minority opinion. The dissenting judgment was delivered by Sen, J. Unlike Justice Iyer, he did not enter into the area of Constitution. He strongly opined that mere compassionate sentiments of a human feeling cannot be a sufficient reason for not confirming a sentence of death. The Courts must be concerned with the probable effect of its sentence both on the general public and the culprit. He discussed at length the history of Capital Punishment in England, the present state of affairs in United States, the 35th Law Commission Report, the replacement of Section 367 (1) and Section 366. He did not leave even the Constitutional provisions regarding Executive Clemency such as Article 72 and Article 161. Commuting the death sentence is nothing but trenching upon the President's and Governor's prerogative according to Justice Sen. Judges are entitled to hold their views, but it is the bounden duty of the Court to impose a proper punishment, depending upon the degree of the criminality and desirability to impose such punishment as a measure of social necessity and as a measure of deterring other potential offenders.

As for the three cases before the Court, he did not find even a single case which deserved the commutation. In Rajendra Prasad's case the murder was preplanned, cold blooded and his family members used to wield out threats to the members of the victim's family that after Prasad's release they be dealt with. In Janardhan's case Justice Sen could not understand how an "eternal triangle of love" could be a mitigating factor as Justice Iyer had seen it. If the death sentence was not to be awarded in a case like that he said that he did not see the type of offence which calls for a death sentence. In Dubey's case
he held that there was no exorable rule that either of the extreme youth of the accused or the fact 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 lesser punishment. To allow the appellants to escape with the lesser punishment after they have committed such intentional, coldblooded, deliberate and brutal murders will deprive the law of its effectiveness and results in travesty of justice.

Immediately after the decision in Rajendra Prasad’s case, another appeal came before the Supreme Court.167 The appellant Bishnu Deo killed his son because he suspected that the deceased was not his own son and he had for years been brooding over the suspected infidelity of his wife and the injustice of having a son foisted on him, and High Court confirmed the death sentence awarded on the basis that the murder was ‘cruel and brutal’ and the accused deserved no mercy because he showed no mercy, to his victim.168

Peculiarly, in this particular case the constitutional validity of death penalty was not challenged. The Bench consisted of O. Chinnappa Readdy and V.R. Krishna Iyer, JJ. Chinnappa Reddy, J. delivered the judgment setting aside the death sentence and held “mere use of adjectives like ‘brutal and cruel’ does not supply the special reasons. The Supreme Court further held that the Sessions Judge was wrong in imposing the death penalty and criticised the High Court for stating that the accused deserved no mercy because he showed no mercy to the victim on the ground smacks very much of punishment by way of retribution. “In the light of Rajendra Prasad 169 we do not think that there are any special reasons justifying the death penalty. Krishna Iyer, J. concurring with his brother Judge held “ The ratio of Rajendra Prasad, if applied to the present case as it must be, leads to the conclusion that death sentence cannot be awarded in the circumstances of the present case.”

The ruling of Rajendra Prasad’s case was followed in the subsequent cases decided by the Supreme Court in that very year. In the case of Guru Swamy 170 the accused was sentenced to death by the High Court but on appeal his sentence was commuted to life imprisonment. The Supreme Court held that “The offence was committed during a family quarrel and though the victims are the father and brother of the appellant in this case, the extreme penalty was not called for.” The accused had also been
under sentence of death for a period of six years. The Court awarded compensation to the widow and minor children of the second deceased.\textsuperscript{171}

In another case \textsuperscript{172} the accused killed four persons. Commuting his death sentence into life imprisonment the Supreme Court through Krishnag Iyer, J. held that “Death sentence on death sentence is Parliament’s function. Interpretative non-application of death sentence when legislative alternatives exist is within judicial jurisdiction.”\textsuperscript{173} The Court further held that “Counting the casualties is not the main criterion for sentencing to death: nor recklessness in the act of murder. The sole focus on the crime and total farewell to the criminal and his social, personal circumstances mutilate sentencing justice.”

An interesting question which arose in Dalbir Singh was whether the decision in Rajendra Prasad was binding or not. Krishna Iyer and Chinnappa Reddy JJ. held that they were binding precedent until overruled by a larger Bench. Sen, J. was of the opinion that it was not so. According to him only a principle laid down in sentencing could be binding but not the rules made by the Court for reducing the scope of death sentence, which in any case the Court was not competent to do. According to Sen, J. there was no ratio decidendi in Rajendra Prasad to be followed in subsequent cases.\textsuperscript{174} Within less than an year, after Rajendra Prasad was decided the Apex Court had been once again challenged with the constitutional validity of the death penalty in the case of Bachhan Singh.\textsuperscript{175}

In Bacchan Singh, according to Kailasam, J. the challenge to the award of the death sentence as violative of Articles 14, 19 and 21 was repelled by the Constitution Bench in Jagmohan’s case, which held “The existence of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused.”\textsuperscript{176}

In Rajendra Prasad the majority opined this observation as an ‘incidental observation’ and not the ratio of the decision. Thus, Jagmohan’s decision was overruled by Rajendra Prasad’s decision. After Rajendra Prasad the Supreme Court decided many a case depending upon the ruling of that case. In Dalbir Singh \textsuperscript{177} Supreme Court observed that it was binding precedent and binds the courts till it is over ruled by a larger Bench. But, now in Bacchan Singh’s case Kailasam, J. did not agree with the majority reasoning in Rajendra Prasad’s case, mainly on the ground that it was not in conformity with
the decision of the Constitutional Bench of the Court in Jagmohan’s case and that the propositions laid down were not within the competence of the Court. Eventhough the decision, in the opinion of Kailasam, J. could not be treated as a binding precedent, he nevertheless directed the matter to be placed before the Chief Justice for constitution of a larger Bench to decide the case. Accordingly, a larger Bench consisting of five Judges proceeded to hear the case at length and to deal afresh with the constitutional questions concerning death penalty raised in these writ petitions.

5.17. THE DOCTRINE OF RAREST OF RARE CASES:

Bachhan Singh’s case along with the above mentioned writ petitions evolved a new penological doctrine namely rarest of rare cases. While Bhagwati, J. was the only Judge who delivered a dissenting judgment Sarkaria, J. delivered the majority judgment on behalf of himself and other Judges.

The principal questions considered in Bacchan Singh are:

(i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.

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

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

The argument that the provision of the Penal Code, prescribing death sentence as an alternative penalty for murder has to be considered in the ground of Article 19 appears to proceed on the fallacy that freedoms guaranteed by Article 19 (1) are absolute freedoms and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition, Sarkaria, J. further observed, “A law which attracts Article 19 must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Article 19.

The condition precedent for the applicability of Article 19 is
that the activity which the impugned law prohibits and penalises, must be within the purview and pro-
tection of Article 19 (1). Thus considered can any one say that he has a legal right or fundamental freedom under Article 19 (1) to practise the profession of hired assasin or to form associations or unions or engage in a conspiracy with the object of committing murders or dacoities.” He ultimately concluded that the framers of Indian Constitution were fully aware of the existence of death penalty, so much so the impugned provisions of Section 302, Penal Code violates neither the letter nor the spirit of Article 19.

As far as Article 21 is concerned it reads “No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.” In the converse positive form, the expanded Article will read as below:

“A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.” Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.183

If Section 354(3) of Criminal Procedure Code is to be saved from the vice of unconstitutionality, the Court should so interpret it and define its scope that the imposition of death penalty comes to be restricted only to those types of grave murders and capital offences which imperil the very existence and security of the State.184

After upholding the constitutionality of Section 302 of Indian Penal Code and Section 354(3) of Criminal Procedure Code the Supreme Court made some interesting observations which are quite contrary to the findings in Rajendra Prasad’s case. The Court observed, “Standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. We must leave unto the Legislature the things that are Legislature’s. The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside those limits. As Judges we have to resist the temptation to substitute our own value choices for the will of the people.” 185

Though the Court held neither Section 302 of Indian Penal Code nor Section 354(3) of Criminal
Procedure Code as unconstitutional, they observed death penalty shall not be imposed arbitrarily. There are a large number of extenuating and aggravating circumstances which cannot be fed into judicial computer since they are astrological imponderables in an imperfect and undulating society. The Courts should be aided by the broad illustrative guidelines indicated by Supreme Court and should function with even more scrupulous care and humane concern and bear in mind that life is the rule and death is the exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

With these observations Supreme Court rejected the challenge to the constitutionality of death penalty leaving what is rarest of rare case to the guess of jurists and academicians alike. Bachhan Singh laid down a principle ‘rarest of rare cases’. In some cases where the Supreme Court commuted the death sentence into life imprisonment the Court gave other reasons for such an award but, did not hold that they did not fall in the ambit of rarest of rare cases. A judgement which was expected to set certain guidelines and principles helped in no way except creating further confusion. This state continued till another landmark judgment of the Supreme Court, which elaborately explained the rarest of rare case principle. The Supreme Court held in this case that though the community has reverence for life, when its collective conscience is shocked, it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion. When the conscience of community gets shocked? As an answer the Supreme Court laid down certain guidelines to identify the rarest of rare cases for the purpose of awarding death penalty. The guidelines are classified under the following heads, namely(i) manner of the commission of the offence (ii) motive of the commission of offence (iii) Nature of the offence committed (iv) Magnitude of the offence and (v) personality of the victim. The Court elaborated the scope of each one of the above parameters illustratively.

In this background the guidelines indicated in Bachhan Singh case will have to be culled out and applied to the facts of each each individual case where the question of imposing of death sentence arises. The Apex Court took pains to evaluate the guidelines of Bachhan Singh’s case. The Apex
Court framed certain questions to be asked and answered as a test to determine the 'rarest of rare' case in which death sentence can be inflicted.

In Machhi Singh’s case as regards the three appellants (others being Kashmir Singh and Jagir Singh) the rarest of rare case rule prescribed in Bachhan Singh’s case was clearly attracted. They committed calculated and cold-blooded murders of innocent and defenceless women, children, veterans and newly married couples in an exceptionally depraved, heinous, horrendous and gruesome manner for reprisal as a result of family feud with a view to wipe out the entire family and relatives of the opponent. The murders were hair-raising to the society at large in the sequence in which it was committed, spreading horror of a killing spree. In the circumstances, only death sentence and not life imprisonment was considered to be adequate. Accordingly, the death sentence imposed upon them is confirmed.

After Machhi Singh the Supreme Court maintained some consistency while imposing Capital Punishment - taking the guidelines into consideration. Thus, Machhi Singh is the law of the land as far as Capital Punishment is concerned at present.

5.18. THE CONSTITUTIONAL VALIDITY OF SECTION 303 OF INDIAN PENAL CODE:

While deciding the case of Mithu on 7th April, 1983 the Supreme Court of India struck down S.303 of Indian Penal Code as ultravires of constitution since it is very severe and is a combination of deterrence and retributive theories and violates Articles 14 and 21 of the Indian Constitution.

This is not for the first time for the Supreme Court to express dissatisfaction over Section 303 of Indian Penal Code. In Dilip Kumar’s case which was decided in the year 1976 the Court made the following observations. "The Court has no discretion to award sentence of death notwithstanding existence of mitigating circumstances in which any normal judicial standards and modern notion of penology do not justify the imposition of Capital Punishment. The Court further observed that this section was Draconian in severity, relentless and inexorable in operation.

In Dilip Kumar’s case, where three accused were tried for the murder of Arun Bhargava, one of the accused Rohit Singh was already under the sentence of life imprisonment for the murder of one
Prabhu, imposed by the Sessions Court of Ujjain. His appeal to the High Court of Madhya Pradesh in that case was allowed and he was acquitted on February 27, 1974. On the same day the same High Court took up Arun’s murder case and Rohit singh was awarded death sentence under Section 303 of the Indian Penal Code.

The Supreme Court felt that the award of death to Rohit Singh was not justified under law. When Section 303 speaks of a person under sentence of life imprisonment it means a person under an operative, executable sentence of imprisonment for life. A sentence once imposed (by the Sessions Court) and later set aside (by the High Court) is not executable and therefore the Court convicting an accused of murder cannot take such sentence into account for the imposition of death under section 303.

If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness and eschew the other which makes its operation unduly oppressive, unjust and unreasonable.195

The dissatisfaction culminated over the years and ultimately resulted in the striking down of the said section as violative of Constitution by a Full Bench.196 In the instant case the Court held “The provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which section 303, authorised the deprivation of life is unfair and unjust, the section is unconstitutional.” The Apex Court reiterated the principle established in Maneka Gandhi’s case.197 “...... a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirement of Article 21. The procedure prescribed by law has to be fair, just and reasonable not fanciful, oppressive and arbitrary.”

As Krishna Iyer,J. observed in Sunil Batra v. Delhi Administration 198 though our Constitution did not have a “due process” clause as in the American Constitution the same consequence ensued after the decision in the Bank of Nationalisation case.199 For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counter productive, is unarguably unreasonable and arbitrary and
is shot down Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.”

Section 354(3) of Criminal Procedure Code does not have an application to Section 303 of Indian Penal Code. Is such law just and fair, if in the very nature of things, it does not require the Court to state the reasons why the supreme penalty of law is called for.

Section 235 (2) of the Criminal Procedure Code which confers a right upon the accused to be heard on the question of sentence, becomes a meaningless ritual in cases arising under section 303 of Indian Penal Code. Is a law which provided for the sentence of death for the offence of murder without affording the accused an opportunity to show cause why that sentence should not be imposed just and fair?

Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?

Can this type of offenders (who are already under the imprisonment for life while committing a murder) be put in a special class or category and be subjected to hostile treatment by making it obligatory upon the Court to sentence them to death? Chinnappa Reddy, J. observed “Section 303 excludes judicial discretion. The scales of Justice are removed from the hands of judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irresistible is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable.

The measure of punishment for an offence is not determined by the label which the offence bears, as for example “Theft”, “Breach of Trust” or “Murder”. The gravity of the offence furnished the guidelines of punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and repercussions.

Equity and good conscience are the hallmarks of Justice. The Legislature cannot inflict upon the Court the dubious and unconscionable duty of imposing a preordained sentence of death.

There are as many as 51 sections of Penal Code which provide for the sentence of life imprisonment. Sections 121,121-A,122,1244-A,125,128,129,131,132,194,222,225,232,238,255,302,304 part-
Under Section 303 as it stands, a person who is sentenced to life imprisonment for breach of trust (though such a sentence is rarely imposed) or for sedition or for counterfeiting a coin or forgery will have to be sentenced to death, if he commits a murder while he is under the sentence of life imprisonment. There is nothing in common between such offences previously committed and subsequent offence of murder.

Assuming that Section 235(2) Criminal Procedure were applicable to the case and the Court was under the obligation to hear the accused on the question of sentence, is it not a mockery to ask the accused: “you are sentenced to life imprisonment for the offence of forgery. Now you committed murder. Why shall you not be sentenced to death?” The question carries its own refutation. It highlights how arbitrary and irrational it is to provide death in such circumstances.

Even the 35th Law Commission Report considered that Section 303 is not in conformity with the modern times. Other observations made by the Law Commission: “It would be an extremely rare case where a juvenile under the age of 18, being under the sentence of life imprisonment, committed murder or other capital offence. If ever such a case did occur, there would be conflict between the Section 303 which makes the death sentence obligatory and the proposed exception in the case of any juvenile under the age of 18. We consider that the proposed exception should not apply where the offender is convicted under section 303. If at all there are any extenuating circumstances in his favour, the President and the Governor may be vested to exercise their power of commuting the sentence to one of the imprisonment for life?”

It was enacted during the British Rule in order to prevent assaults by indigenous breed upon the jail officials, who are mostly Englishmen. A savage sentence is anathema to the civilised jurisprudence of the Article 21. It is a relic of ancient history. In the time in which we live, this is the lawless law of the military regime. It is an anachronism. It is out of tune with the march of times. It is out of tune with the philosophy of an enlightened Constitution like ours. Such a law must neces-
sarily be stigmatised as arbitrary and oppressive. It must go the way of all bad laws. It must be struck
down as unconstitution.205

5.19 DELAY IN EXECUTION OF CAPITAL PUNISHMENT

Sentence of death is one aspect: sentence of death followed by lengthy imprisonment prior to
execution is another. The prolonged anguish of altering hope and despair, the agony of uncertainty, the
consequences of such suffering on the mental, emotional and physical integrity and health of the
individual can render the decision to execute the sentence of death an inhuman and degrading punish­
ment in the circumstances of a given case.206

Once a person is sentenced to death, waiting for execution is likely to be psychologically pain­
ful. Prof. Earnest Van Den Haag observes: “At present, the period of waiting and uncertainty is usually
very long - upto ten years in some cases until all appeals are exhausted. The result is that in 1982 there
were about one thousand convicts on death row. Nobody knows how many of them will actually be
executed and will be spared, after expecting execution for years.”207 For Americans Caryl Chessman
was the best example of this. He was arrested on January 23, 1948 and after twelve years of excruciat­
ing mental torture in a California Jail, on May 2, 1960 he was gassed to death.

India is no exception for this. Even in India the time of waiting in a condemned cell for death is
too long. The delay varied from one year 208 to twelve years 209 and even fifteen years 210 in some cases.

The cruelty is gratuitous. It is not inherent in the death penalty or in any way required by it. The
nature of the death penalty distorts the entire criminal justice system. Trial becomes interminable and
inspite of all precautions, elaborate appellate processes preoccupy the courts at vast expense not only
of money but also of public confidence in the judicial process. The inevitability of protracted waiting
for death mocks the fundamental purpose of justice, the swift and sure imposition of the penalty of
crime. The procedure of American justice requires inordinate delays in the punishment of any crimi­
nal, but where the death penalty is demanded, the delay is interminable.211 That is why, most men who
go to the gas chamber always do so, after a long stay from the Supreme Court review and any other
legal manoeuvres that their lawyers could arrange.212

In Indian legal system also, the procedure - especially when it involves the question of life and death - is and has to be elaborate. Inspite of the legal safeguards or rather because of the safeguards the trial of capital crime takes a lot of time in revisions, appeals, special leave petitions, application by the convict for pardon, mercy, etc., But, every step is important. No one step could be dispensed with rules and practices mandating a reduction a speed up of appeals are making sure that persons under death sentence are treated no worse than other persons confined to prison. Convicts are not by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess.213 But, the prison personnel are habituated to treat them inhumanly. If the convict is a lifer or sentenced to death the treatment gets worsened. The following observations by the Apex Court reflect the state of affairs. “If this argument were to be accepted, it would mean that the detenu could be starved to death if there was no condition providing for giving food to the detenu.”214

Inspite of the ruling in Sunil Batra,215 prison personnel continue to detain condemned prisoners in solitary cells. “Death row is barren and uninviting, the death row inmate must contend with segregated environment marked immobility, reduced stimulation and the prospect of harassment by staff.”216 The inmates of the death row waver between hope and despair. A continuing and pressing concern is whether one will join the substantial minority who obtain a reprieve or will be counted among the to-be dead. This uncertainty makes life miserable. They live in with his metal torture in a condemned cell, which is a prison within a prison physically and socially isolated from the prison community and the outside world. Condemned prisoners live twenty-three and one-half hours alone in their cells. 217

Indian Judiciary started considering the aspect of delay way back in 1944 itself. In the case of Piare Dusadh218 the Federal Court of India took into consideration the circumstances that the appellant had been awaiting the execution of death sentence for over a year to alter the sentence to one of transportation for life.

The ratio was again implemented in 1973, in the case of Neti Sriramulu.219 While commuting the death sentence of the appellant the Apex Court observed that “He must have been in the condemned
cell ever since October 30, 1971 where the sentence of death was imposed on him by the trial Court. The High Court confirmed the sentence, as far back as January 24, 1972. Since then the agonising consciousness and feeling of being under the sentence of death must have constantly haunted the appellant.” In another case which was decided in the same year, when the lapse of time between the offence and by the time the appellant approached Supreme Court was eight and half years, the Court automatically applied the ratio of the previous case.

In the case of Ediga Annamma her youth, womanhood, her having a child to look after, her unbalanced sex, expulsion from the conjugal home are added factors to the delay consideration. Justice Krishna Iyer observed “What may perhaps be an extrinsic factor but recognised by the Court as of human significance in the sentencing context is the brooding horror hanging which has been haunting the prisoner in her condemned cell for over two years. He went further and gave a general statement “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.”

In Raghubir Singh’s case the appellant was under the spectre of death for twenty months, and like in the case of Annamma other factors were considered along with delay factor for commutation of his sentence. For Chawla the reasons given for commutation along with delay factor were the provocation he received from the victim, his giving only one out of three fatal injuries which caused death and his immature youth. The delay involved in this case was one year and ten months. Perhaps none of the above circumstances, taken singly and judged rigidly by the old Draconian standards would be sufficient to justify the imposition of the lesser penalty. But, in their totality, they tilt the judicial scales in favour of commutation, the Court observed.

But, in the succeeding cases, the Court did not stick to the ratio which was evolved in its previous decisions. In the case of Lajar Masih, the Court observed that though the delay involved was much more than in the previous cases, after his death sentence was confirmed by the Allhabad High Court, he did not approach Supreme Court for a period of more than eighteen months. Due to the heavy workload of High Court and Supreme Court it was delayed further. But, the Courts stated that
the delay was not extraordinary. Anyhow, the value of such delay as a mitigating factor depends upon the features of a particular case. The Court refused to commute the sentence.227

In case of Bhoomaiah 228 the delay was four years. Krishna Iyer, J. known to be a very compassionate Judge who considered two years delay as a mitigating factors in Annamma’s case observed “Sentence of death having been awarded by the Court, judicial frontiers been crossed and, however, regrettable and irrevocable, taking of human life by the State’s coercive apparatus, may be our sympathies have no jural relevance.” The learned Judge expressed his inability to halt the hangman’s rope, for the reasons best known to him.

In the later cases 229 again the Apex Court commuted the death sentence into life imprisonment. In Suresh v. State of Uttar Pradesh, 230 the Apex Court observed that the appellant had been in jail for ten long years. If he were sentenced to life imprisonment, by now he would have earned the right to be released by way of remission. Giving this as the sole reason the Supreme Court commuted his sentence of death. In sahai 231 though the Supreme Court felt by acquitting the accused the High Court erred which resulted in a grave and substantial miscarriage of justice taking other factors such as that the incident took place eight years ago, the appellant was acquitted by the High Court and the present appeal is pending before the Supreme Court since five years - into consideration the Court commuted the death penalty.

The above discussed decisions related to the sentencing discretion of Apex Court. There was no hard and fast rule regarding the ‘delay factor.’ In some decisions the Court counted the delay from the date of occurrence, in some from the date of sentence by the trial Court, from the date of confirmation of death penalty by High Court in some cases, sometimes from the date of final judgment by Supreme Court. In certain cases only the time spent by the offender in the condemned cell was taken into consideration.

The delay factor in criminal cases in the light of Article 21 was discussed first time in Vathee swaran.232 Though it is a case where the offender deserves death, the factors that forced the Court to be compassionate were that as an under trial he was in jail for two years. After being sentenced
to death by sessions Judge, for eight years he was kept in solitary confinement contrary to the ratio of Sunil Batra.233

The Court turned to examine Article 21 of Constitution, the dimensions of which at one time appeared to be constricted 234 and which were truly expanded later 235 - stating that the procedure contemplated by the Article had to be fair, just and reasonable not fanciful, oppressive and arbitrary. The Court reiterated that ".....even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law." 236

Right to life includes right to speedy trial. It is implicit in the right to fair trial, which has been held to be part of the right to life and liberty guaranteed by Article 21 of the Constitution. Referring Hussainara Khatoon,237 the learned Judge held ".....speedy trial means reasonably expeditious trial. It is an integral part of the fundamental right to life and liberty enshrined in Article 21." 238

The Judge took into notice the time involves in trial of a capital offence, confirmation by High Court, appeals and Constitutional provisions of remission, commutation etc., 239 and concluded, "Making all reasonable allowances to the time necessary for appeal and considerations of reprieve, we think the delay exceeding two years on the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death." 240 Referring to the American practice 241 the Judge further held, "Procedure established by law does not end with the pronouncement of sentence..... that prolonged detention to await the execution of sentence of death is unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the death sentence." 242

Sher Singh's case 243 which was decided within one month after Vatheeswaran turned down the ratio of the latter. Court accepted its power of commutation in cases where delay took place and with many other views expressed in Vatheeswaran regarding delay. Inspite of this the learned Judges244 in this case differed with the hard and fast Vatheeswaran rule of 'two years delay' which automatically commutes the death penalty. The fixation of time limit of two years does not seem to be in accordance
with the common experience of the time normally consumed by the litigative process and the proceedings before the executive relating to mercy petitions, stay orders obtained in those proceedings and at the end of it comes the argument that there has been prolonged delay in implementation of the judgment. So the Court must find out why the delay was caused and who was responsible for it. Not only that while vacating the death sentence for the reason that its execution is delayed the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and the pattern of crime are such as are likely to lead to its repetition if death sentence is vacated are to be borne in mind. However, when the Courts are imposing death penalty in rarest of rare cases the order of the Court ought not be allowed to be defeated by applying any rule of thumb. The substitution of death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of "quod errat demonstrandum."245

After Sher Singh three more appeals 246 were dismissed by the Apex Court though the delay (for which some of the accused were responsible) was five years. While upholding the sentence, the Court held "each accused was involved in atleast seven murders out of ten, having regard to the magnitude, the gruesome nature of the offence and the manner of perpetrating the murders clearly called for Capital Punishment." The Court expressed apprehension that any leniency in the matter of sentence would lead to private vengeance and destabilisation of the society.

Javed’s case,247 really deserves to stand on a different footing for the reason that when it was first decided in 1983 the Court observed “the appellant like demon, killed four people in a cruel, callous and fiendish fashion for monetary gain.” Inspite of his young age (22 years) Court awarded death sentence to him. After two years, for the same Javed 348 the Supreme Court granted commutation observing that “an overall view of the circumstances, where the convict is a young man and his conduct in jail was reported to be genuinely repentant and he wanted to atone for the grievous wrong done by him and such repentance and such desire appeared to be sincere, may, and in that case did entitle the accused sentenced to death to invoke Article 21 of the Constitution for substitution of his sentence of death by sentence of imprisonment.”
Though the trial Courts were justified in imposing death sentence, when an acquittal by High Court intervened along with ‘delay factor’ Supreme Court takes a lenient view. The commutation was available when it is not a ‘rarest of rare case’ and the delay was over three years. But, when the delay was caused by accused himself by filing proceedings after proceedings the commutation cannot be granted.

Inspite of much discussion and decisions in various cases under varied circumstances the position was in a fluid state. The Pandora’s box was opened in Vatheeswran’s case by applying Article 21 to the delay factor in capital offences. This was overruled in Sher Singh. Since none of the cases were decided by a full Bench no ratio was set in this regard.

The controversy was set at rest in the case of Triveniben. In this case the following issues are taken for consideration:

(i) What should be the starting point for computing the delay?
(ii) What are the rights of the condemned prisoner who has been sentenced to death but not executed?
(iii) What could be the circumstances which could be considered along with the time that has been taken before the sentence is executed?
(iv) What is the binding nature of the decision of a larger Division Bench over a smaller division Bench?

In some cases the Court computes delay from the date of occurrence of the offence. In some from the date of judgment by the trial Court. In certain cases from the date of committal under a warrant under Section 366 (2) of Criminal Procedure Code after the Apex Court delivers its judgement,

Basically the delay which is sought to be relied upon by the accused consists of two parts: The first part covers the time taken in the judicial proceedings. It is the time that the parties have spent for trial, appeal, further appeal and review. The second part takes into fold the time utilised by the executive in the exercise of its prerogative clemency.

The delay which could be considered while considering the question of commutation of sen-
ence of death into one of life imprisonment could only be from the date judgment by the Apex Court is pronounced that is when the judicial process comes to an end. True, this process consumes a lot of time. But, it is for the benefit of the accused, which ensures fair trial and avoids hurry up justice. The time is spent in the public interest and proper administration of justice. Therefore, the delay in disposal of the case is not mitigating circumstance for lesser sentence. However when such delay is caused at the instance of the accused himself he shall not be entitled to gain any benefit out of such delay.

After considering the judicial delay the Court turned its attention to executive delay. The time taken by the executive for disposal of mercy petitions may depend upon the nature of the case and the scope of enquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. So we cannot prescribe a time limit for disposal of mercy petitions," the Court observed. But, when such petitions under Article 72 and Article 161 are received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously.

On the question of delay the Court opined that undue delay in execution of the sentence of death will entitle the condemned prisoner to approach this Court under Article 32 of the Constitution. But, this Court will only examine the nature of the delay caused and the circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death.

On the third issue the Court maintained that it only considers whether there was undue delay in disposing mercy petition: whether the state was guilty of dilatory conduct and whether the delay was for no reason at all.

The inordinate delay may be a significant factor, but that itself cannot render the execution unconstitutional. Nor can it be divorced from the diabolical circumstances of the crime itself. The petitioner has improved after the sentence is no ground for commutation. Further, the Court also maintained that the decision of a larger Division Bench is binding upon the smaller Division Benches. The Court in Trivenben concluded that "No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran cannot be said to lay down the correct law.
and therefore to that extent stands overruled.”

"Though the delay is an important factor for considering whether death sentence may be commuted to life imprisonment, no fixed period of delay can be considered to be decisive." This principle which was laid down in Triveniben was reiterated in the successive decisions also. The Court takes note of the delay in the disposal of mercy petitions very seriously. In Jaising Babbar the Apex Court observed, “without expressing any precise and decisive opinion as to the fixed period within which a mercy petition should be disposed of, we feel the justice demands modification of the sentence of death into life imprisonment.”

Before drawing the curtain down on ‘delay factor’ the case of DayaSingh may be referred. The petitioner killed Punjab Chief Minister Pratap Singh Kairon in 1965. Trial Court sentenced him to death in 1978. High Court confirmed his death sentence in 1980. After five months in the same year Supreme Court dismissed his special leave petition. In 1981 his review petition was rejected, thus bringing the judicial controversy to an end.

Then started the executive procedure. The petitioner filed mercy petition before the Governor and the President of India which were also rejected. Several orders of stays were passed from time to time. In 1988 yet another mercy petition was filed before the Governor of Haryana. The matter remained pending and since then he has been waiting for the final outcome.

The Supreme Court inquired into the cause of delay. The last petition to the Governor was referred to President, which was referred to the Chief Minister, from there to the Department of Legal affairs, Ministry of Law and Justice and at the end to the Attorney General of India. The Court observed that the respondent was in way responsible for the “embarassing gap” and this would have been an “avoidable delay”. The Court further observed “we are not laying down any rule of general application that the delay of two years entitle a convict sentenced to death, to conversion of his sentence into one of life imprisonment.” But, he was detained in prison since 1972 and for the pending of his last mercy petition filed in 1988 he was not responsible. Taking these factors into consideration the Court commuted his death sentence.
In this context it is not out of place to refer to the recently delivered judgment of Zimbabwe Supreme Court in the case of “Catholic Commission for Justice and Peace in Zimbabwe"\textsuperscript{265}. The applicant Commission moved the Supreme Court of Zimbabwe to restrain the respondents from carrying the death sentence on four persons who were convicted for murder and sentenced to death. The Commission contended that the delay in executions have been too prolonged. The convicts have been kept in condemned cells of Harare Central Prison under harsh and degrading conditions. The Commission challenged the constitutionality of the sentence.\textsuperscript{266}

The Supreme Court of Zimbabwe, allowed the appeal and commuted the death sentence into life imprisonment.\textsuperscript{267}

5.20. VALIDITY OF MODE OF EXECUTION OF CAPITAL PUNISHMENT:

During ancient period several modes of execution of death sentence were in practice.\textsuperscript{268}

5.21. HANGING: Hanging is one of the methods of inflicting Capital Punishment.\textsuperscript{269} It is clearly traceable to Biblical days.\textsuperscript{270} Today 78 countries in the world use this method. Even in Early America it was the most popular method.\textsuperscript{271} In its crudest form it merely involved the putting of a slip noose around the victim’s neck, pulling him from the ground or platform and leaving him to die of slow strangulation.\textsuperscript{272} By 15th Century, outside each prison stood a traditional gallows. By the middle of the century, it was the most popular method of execution and almost every man of repute had his own gallows. During Elizabeth’s reign the gallows were redesigned into triangular shape.

5.22. HANGING AND CONSTITUTIONAL VALIDITY:

The Constitutional validity of Section 354 (5)\textsuperscript{273} of Criminal Procedure Code which prescribes hanging by rope as a mode of execution of death sentence was challenged before Indian Supreme Court in Deena\textsuperscript{274} on the ground that it is ultra vires Article 21 of Indian Constitution.

It is not the first time for the Indian Supreme Court to consider the issue of hanging in the light of fundamental rights. In Bacchan Singh\textsuperscript{275} also the Supreme Court considered the validity of death sentence from the substantial and procedural aspects, with special reference to the method of hanging. While upholding the validity of death sentence, the majority took into consideration the mode pre-
scribed by the Criminal Procedure Code for executing the death sentence namely hanging by rope and approved it. On the otherhand, while striking down the death sentence as unconstitutional, Bhagawati, J. declared the mode of hanging prescribed by law for executing the death sentence as cruel and barbarous.

However, in Deena the Court felt that the question raised is important not only from the legal and constitutional point of view but also from the sociological point of view. In Bachhan Singh the procedural aspect of the death sentence received only incidental consideration. So, this time the Court wanted to examine the issue at length. 276

The petioner argued that the method prescribed by Section 354(5) of Criminal Procedure Code is inhuman, barbarous and degrading and hence it cannot be employed for executing the death sentence. Dr. Ghatate, who began the arguments on behalf of the petitioners, contended that the method of hanging involves pain, degradation and suffering, wherefor that method violates Article 21 and cannot be used for executing the death sentence. In support of this he referred to the minority judgment of Bhagawati, J. in Bachhan Singh. But, the State contended that it was the constitutional obligation of the State to provide for humane and dignified mode of execution, which will not involve torture or cruelty of any kind. In the light of this position the Code prescribed only one method. If it violates Article 21 of the Constitution, the sentence shall remain unexecuted, since the Court cannot substitute any other method for the only method envisaged and prescribed by law.

The Apex Court to some extent accepted the contention of the State. Chandrachud C.J., observed, "This Court is not a third Chamber of Legislature, it has no such extra-territorial ambitions." But, at the same time the powers of that Court are not so restrained also."If the Court opines that the method prescribed by Section 354(5) of Criminal Procedure Code involves undue torture, degradation and cruelty as for example causing more pain than necessary or by bringing about lingering death or because a particular method is liable, frequently to fail in its mechanism, the Court can declare that the method is contrary to the mandate of Constitution. The task of the Court ends there, no further. Court cannot suggest lethal gas or some other method of execution. Because that would amount to Legislation. But to pronounce upon the Constitution is not legislation.

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Thus, refused to suggest any other method of execution (because it amounts to legislation), Court took up the other part of the issue, “Whether hanging is constitutional or not?” the remaining part of this landmark judgment consists of observations made by the Court regarding Capital Punishment and methods of execution all over the world.

First, the Court went through the Royal Commission Report on Capital Punishment 1949-53 and the findings of the report, which concluded “The method of execution ought to be certain, humane, simple, instantaneous and expeditious. Hanging fulfills all these criteria more satisfactorily than any other method.”

Then Supreme Court turned to the 35th Law Commission Report of India which concluded, “It is difficult to express an opinion positively as to which of the three methods (lethal gas, lethal injection and hanging) satisfied the test, most particularly when the other methods are still untried. We are not, at present, in a position to come to a firm conclusion. We, do not therefore recommend a change in the law on this point.

The opinion of Dr. Hira Singh, Prison Adviser to the National Institute of Social Defence, the observations of the study ‘On Capital Punishment’ by the United Nations in 1962 and accepted with the observations of Kenny who says, “Hanging does not operate now, through suffocation, but by a ‘long drop’, invented by Prof. Haughton of Dublin, which dislocates the vertebrae and is calculated to produce an instantaneous and a painless death also.” Above all, the Court allowed a physician Dr. Chándrakant of All India Institute of Medical Sciences to intervene in these proceedings who deposed that hanging is the best method for executing the death sentence since by that method, death ensures instantaneously due to combination of shock, asphyxia and crushing of spinal medulla.

Court did not accept any other contention. It held, “We have come to the conclusion that on the basis of the material to which we have referred extensively, the State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by Section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the Constitution. The material before us shows that the system of hanging which is now in vogue consists of mechanism
which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner’s apprehension. It is quick and certain. It eliminates the possibility of lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system now avoids the chances of strangulation. The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality.282

The United States Supreme Court has never been called upon directly to decide whether hanging is cruel and unusual punishment. The Court has intimated time and again that hanging is perfectly constitutional. Literally hundreds of times it has upheld death sentence by inference which were to be executed by means of gallows.283

A number of State Courts have ruled directly on this question. The Supreme Court of Maryland came very close to doing so in 1914. Eight years later Iowa Supreme Court left no room for doubt. “The infliction of death penalty by hanging” stated the Court is of ancient origin, and is not cruel and unusual punishment, within the meaning of the constitution. This decision was followed shortly by similar holdings in Minnesota and Oregon.284

5.23.ELECTROCUTION:

In Washington the electric chair is a permanent fixture in a special chamber. In some states moveable chairs are used which can be installed by any competent electrocutor. The procedure is as follows:285

The execution takes place at 10 A.M., At midnight on the preceding night the condemned man is taken from the condemned cell block to a cell adjoining the electrocution chamber. About 5.30 A.M., the top of his head and the calf of one leg are shaved to afford direct contact with the electrodes. (The prisoner is usually handcuffed during this operation to prevent him from seizing the razor.) At 7.15 A.M., the death warrant is read to him and about 10’O clock he is taken to the electrocute chamber. Five witnesses are present (including representatives of the press) and two doctors - the prison medical officer and the city coroner. The witnesses watch the execution through a grilled or dark glass and
cannot be seen by the prisoner. Three officers strap the condemned man to the chair, tying him around the waist, legs and wrists. A mask is placed over his face and the electrodes are attached to his head and legs. As soon as this operation is completed the signal is given and the switch is pulled by the electrician: the current is left on for two minutes, during which there is alternation of two or more different voltages. When it is switched off, the body slumps forward in the chair.

5.24. INTRODUCTION OF ELECTRIC CHAIR AS A MODE OF EXECUTION:

In the 1880s, as one story has it, in order to fight the growing success of General Electric Company, which was pressing for nationwide electrification with alternating current, the advocates of direct current staged public demonstrations to show how dangerous their competitor’s product really was: if it could kill animals and awed spectators saw that, indeed, it could kill human beings as well. Within few years this sombre warning was turned completely around.

In 1885, the Governor of New York, David H. Hill announced in his annual message to the Legislature that “the present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life such as are condemned to die in a less barbarous manner? He appointed a commission to investigate and to report to the Legislature the most humane and practical method known to modern science of carrying into the effect the sentence of death in capital cases. The commission ultimately recommended electrocution as the most humane method of executing death.

As a result of its findings, the New York Legislature enacted a statute that provided that anyone convicted of capital crime committed be electrocuted rather than hanged. Shortly thereafter, the new law faced its first challenge. William Kemmler was convicted for first degree murder on May 10, 1889.

5.25. THE CONSTITUTIONAL VALIDITY OF ELECTROCUTION WAS CHALLENGED:

Kemmler, contended that his sentence was invalid because electrocution imposed cruel and unusual punishment in violation of both Eighth Amendment and the New York Constitution. The Court found that Kemmler did not satisfy the burden of proving that electrocution was cruel and unusual. The constitutionality of the Electrocution Act was presumed. The Court observed that certain methods of
inflicting the death penalty, such as boiling in oil or water, would be considered illegal but that both methods, such as death by hanging or gunshot would not. The Court turned in particular to Wilkerson v. Utah in which the Supreme Court concluded in dicta that shooting is not a cruel or unusual punishment under the Eighth Amendment. The Court further observed, “If the Electrocution Act were held to be unconstitutional, Kemmler and other individuals who have committed crimes since the beginning of the of the year possibly could evade punishment.

Kemmler appealed to the Supreme Court of Newyork which consisted a panel of three Judges, who concluded that the Courts had an obligation to enforce the cruel and unusual punishment provision even if it restricted legislative authority. The Court conceded that electrocution was unusual but stated that “no common knowledge or concept that it is cruel existed.” Therefore, it was a question of fact whether an electrocution current of sufficient intensity and skilfully applied will produce death without unnecessary suffering.

On March 21, Kemmler again appealed to New York Court of Appeals. The Court explained that any method of inflicting the death penalty “must necessarily be accompanied with some degree of cruelty.” Then he appealed to Unites States Supreme Court on May 20, 1890. He contended that his execution would violate both the privileges and immunities and due process clause of the Fourteenth Amendment by depriving of life without due process of law. The Supreme Court unanimously denied Kemmler’s appeal stating that the Eighth Amendment did not apply for the states.

However, the Court observed, “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.” Anyhow, the Court felt that the Electrocution Act was a legitimate use of the State, because, the main purpose of the said Act was to provide more humane method of applying the death penalty. Whether electrocution was a more humane method of execution was a question left solely for the legislature, whose decision the Court would follow. It may be recalled that in Deena the Indian Supreme Court also expressed the same opinion observing that, “The Court is not a third chamber of legislature. It has no such extra-territorial ambitions.”
On August 6, 1890 Kemmler was electrocuted. Electrocution became a popular means of Capital Punishment beginning with Ohio in 1896, Massachusetts in 1898, New Jersey in 1907, Virginia in 1908, North Carolina in 1909 and Kentucky in 1910. Today, Kemmler generally represents the propositions that a punishment may be constitutional if it is unusual, so long as it has a humanitarian purpose and effect.

In 1915 the Supreme Court again rejected a challenge to electrocution. In 1947 Willie Francis challenged in the United States Supreme Court the constitutional validity of electrocution. But, Francis case stands on a different footing, because contrary to Kemmler, the issue in Francis was not whether electrocution was unconstitutional per se, but whether state constitutionally could execute Francis after the electric chair had malfunctioned accidentally during the first attempt. By five to four vote the United States Supreme Court concluded that nothing had taken place which amounted to cruel and unusual punishment in a constitutional sense. They denied relief to Francis stating that a second attempt would not be unconstitutional. Accidents do happen for which no man is to be blamed. However, the cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.

Fifteen years later Court held in Robinson v. California that Eighth Amendment did apply to the States through the due process clause of the Fourteenth Amendment.

Though advocates of electrocution argue that the method is painless, recent observations and research however, indicate that electrocution causes severe burning that lead to great pain. Brennan, J. contended in Glass v. Louisiana that burning at the stake and electrocution are similar in content though forms may differ.

On July 27, 1990 the United States Supreme Court upheld that Eleventh Circuit’s three Judge panel ruling that had affirmed a Florida Federal Judge’s conclusion that Chair’s 2,000 volts are sufficient to cause painless termination of life.

In Wilkerson v. Utah the United States Supreme Court held that shooting is constitu-
No Court either Indian or American declared any mode as unconstitutional. For retentionists of Capital Punishment any mode of execution is pretty good and the offender deserves it. For abolitionists of Capital Punishment every mode is inhuman, degrading and barbarous. Discussing any mode of execution as painless and humane is contrary to their philosophy of abolition of Capital Punishment.

However, the blame for cruel executions lies not with those who create the methods. Rather the blame rests with the State and Judiciary that enforce them.

**SUMMARY:**

With the evolution of new human rights jurisprudence the validity of Capital Punishment is challenged before the Courts. In America in the last century the mode of execution was challenged. In re Kemmler challenged the electrocution and in Wilkerson shooting as a mode of execution was challenged, but, never the death penalty itself. It is in 1973, the constitutionality of death penalty was challenged in the case of Furman. The Supreme Court of United States upheld the contention with 5:4 majority. But, the wisdom of Furman was shortlived. Four years after Furman in the case of Gregg the Court overruled the decision of Furman.

In respect of India, after Independence several times Bills were introduced in both the Houses for the abolition of Capital Punishment. After the legislative attempts failed, the abolitionists of India turned to the Indian Supreme Court with the hope that the Apex Court would declare death penalty as unconstitutional as it was done by the United States Supreme Court in Furman. The case which occasioned the issue regarding constitution was Jagmohan. But, the Indian Supreme Court held that Capital Punishment as intra vires the constitution. Six years after Jagmohan, Rajendra Prasad was decided by the Court, where it was held that Capital Punishment was uncalled for in an era of enlightenment. In 1980 Bachhan Singh was decided by the Court, where the Court evolved a new doctrine of "rarest of rare cases" without explaining the scope of the doctrine. It was in Machhi Singh in 1983 that the Apex Court elaborately explained the scope of "rarest of rare cases." In Mithu, the Apex Court held that Section 303 of Indian Constitution which prescribes a mandatory death sentence for the
murder committed by a life convict was ultra vires of the constitution.

In the case of Vatheeswaran the Apex Court considered that delayed executions are offensive to Article 21 of Indian Constitution. Later decisions were controversial to this view. However, in Triveni Ben, the Court maintained that each case has to be considered on its own merits and no hard and fast rule can be followed in this regard. The mode of execution was also challenged in Apex Courts of America as well as India. Both the Courts held that the existing modes were intra vires of the constitution.

NOTES AND REFERENCES

6. In essence the Act allowed the imposition of death penalty if the defendant chose to be tried before a jury, but allowed a maximum of only life imprisonment if he waived the trial.
8. Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
11. Supra note 9.
12. Supra note 10.
14. Amendment XIV (1): "All Persons born or naturalised in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United
States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.


16. Trop v. Dullas: 356 U.S. 86 (1958): In 1944 Trop was a member of United States Army. On 22nd May, he escaped from a stockade in Casablanca, where he had been confined following a previous breach of discipline. The next day along with a companion was found walking back to the stockade, by an army truck. Without resistance and not uttering a word he boarded the truck. Court Martial convicted him to three years of hard labour, forfeiture of all pay and allowances and dishonourable discharge. After eight years in 1952 Trop applied for a passport. His application was denied on the ground that under provision of S. 401 (g) of Nationality Act of 1940, as amended he had lost his citizenship by reason of his conviction and dishonourable discharge for war time dissention. Trop commenced his legal battle in the District Court in 1955, seeking a declaration that he is a citizen of United States. But, he failed. He preferred an appeal to the Supreme Court.

17. Ibid at 92.


19. Supra note 16 at 101.

20. Ibid at 102.


22. Ibid at 668.

23. Ibid at 674.

24. Ibid at 678.


26. Supra note 21.

27. Powell was arrested and charged for being found in a state of intoxication in a public place, in violation of Article 477 of Texas Penal Code. He was convicted by the lower Courts. He applied to the United States Supreme Court. His counsel urged that appellant was afflicted with disease of chronic
alcoholism, his appearance in public (while drunk), was not of his own volition, and therefore to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

28. Supra note 25 at 532.

29. Ibid at 554.

30. Ibid at 568.


36. William Furman, a twenty-six year old, black was convicted of the murder of a white house holder; Lucious Jackson, a twenty-one year old black was convicted of the rape of a white woman; and third case involved Elmer Branch, a border line mentally deficient black, who entered the rural home of a sixty-five year old white widow and raped her while holding his arm against her throat.

37. V Amendment: "No person shall be held to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use without just compensation."

38. Supra note 31 at 283.

39. Ibid at 305.

40. Ibid at 257.

41. It may be recalled that Marshall, J. was the only Black Judge in Burger’s Court and the three appellants who questioned their death sentence were Blacks.
42. Supra note 31 at 305.
43. Ibid at 375.
44. Ibid at 399.
45. Ibid at 401.
46. Ibid at 404.
53. Gregg was charged with committing armed robbery and murder of two men.
54. Profitt was convicted for first degree murder.
55. Jurek kidnapped a ten year old girl, and killed her by choking and strangling her while attempting a rape.
56. Woodson along with Waxton was charged with first degree murder.
57. Roberts was charged with the murder of a peace officer.
58. The reasons he gave for this observation are (a) The statute not only guided the jury in its exercise of discretion in determining whether it would impose the death penalty, but also gave the Georgia Supreme Court the power and duty to decide whether in fact the death penalty was being administered for any given class of crime in a discretionary, standardless or rare fashion and (b) the defendant has failed to establish that the Georgia Supreme Court had not performed its task in the instant case or that it was incapable of performing its task adequately in all cases.
59. This is so because under the Florida Statute, the trial Judge was required to weigh the aggravat-
ing and mitigating factors, thus focussing on the circumstances of the crime and the character of the individual defendant, and since any risk of arbitrary or capricious sentencing minimised by the appellate review system ensuring that a death sentence was consistent with other sentences imposed in similar circumstances. The statutory provision specifying “aggravating” and “mitigating” circumstances were not so vague or overbroad as to fail to adequately guide the trial Court’s sentencing discretion.

60. It is so because, Texas Law required that if a defendant has been convicted of Capital offence, the trial Court must conduct a separate sentencing proceedings before the same Jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding, and both prosecution and defence may present arguments for and against the sentence of death. The Jury then considers the two statutory questions relevant to the case: i) Whether the evidence established beyond reasonable doubt that the murder of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, and ii) whether the evidence establish beyond reasonable doubt that there will be a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to the society.

61. James Tyrone Woodson and Luby Waxton v. State of North Carolina: 428 U.S. 280 (1977): Woodson along with Waxton was convicted for the first degree murder as the result of their participation in an armed robbery in a food store, in the course of which the cashier was killed and a customer was seriously wounded.

62. Roberts v. State of Louisiana: 431 U.S. 633 (1977): Roberts murdered a police officer while he was engaged in the performance of his lawful duties. According to Louisiana statute, he was sentenced to death, which was affirmed by the Supreme Court of Louisiana. Then he filed a writ petition of certiorari in the United States Supreme Court.

63. Washington v. Louisiana: 428 U.S. 906 (1976): He was sentenced to death for killing a police officer. He appealed to United States Supreme Court.

64. Supra note 62 at 650.

66. While serving a jail term for these offences Coker escaped from the correctional institution. Then he entered a house where Carver couple were living, arrested the husband and raped Mrs. Carver. Then he took their car and drove it away with Mrs. Carver. He was charged with escape, armed robbery, motor vehicle theft, kidnapping and rape.

67. Ibid at 607.


69. Lockett with others planned a robbery in a pawn-shop. While the robbery was taking place, she was in the car, ready to escape. One of the accused shot the shop owner dead. When the case came to the Court of trial, she was offered a chance to plead guilty to attract a lesser punishment. But, at every stage she refused to plead guilty and ultimately was awarded death sentence.


71. Ibid at 427-433.


73. a) The offence of murder was committed by a person with a prior record of conviction for a capital felony, or the offence of murder was committed by a person who has substantial history of serious assaultive criminal convictions: and b) the offence of murder was committed by a person who has escaped from the lawful custody of a peace office or place of lawful confinement. The Jury also considered the fact the “offence of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.”

74. Supra note 72 at 891.


76. Barclay was convicted of first degree murder and sentenced to death. The aggravating factors which went against him were: i) the petitioner knowingly created a great risk of death to many persons, ii) he had committed the murder while engaged in a kidnapping iii) he had endeavoured to disrupt governmental functions and law enforcement and iv) he had been especially heinous, atrocious or cruel.


79. i) The accused had knowingly created a great risk of death to more than one person and ii) the murder was especially heinous, atrocious or cruel.


83. Thompson murdered his former brother-in-law with premeditation, the motive being that he physically abused Thompson's sister.


85. Clemons v. Mississippi 494 U.S. 738 (1990): In this case the defendant was convicted of capital murder.

86. i) the murder was committed during the course of a robbery and ii) it was especially heinous, atrocious or cruel.

87. Supra note 85 at 754.


89. The Jury convicted him for first degree murder, robbery, criminal conspiracy to commit homicide and criminal conspiracy to commit robbery.


93. i) Madho v. Emperor: AIR 1926 Mad. 21: accused was 14 years old: (ii) Haranum v. Em-

94. Rameshwar v. State of Uttar Pradesh: AIR 1973 S.C 916: In Raghubir Singh v. State of Haryana: AIR 1974 S.C. 677, where the accused murdered the woman with whom he had illicit intimacy by administering poison, Justice Krishna Iyer observed, “though treachery and pre-planning in committing the murder are the aggravating factors in his case, his youth (he is in his twenties) and the delay in executing the sentence are the mitigating factors and taking separately they may not be sufficient to commute the sentence, but the conceptuous factors, personal and social tilt the scale in favour of a life term.”


cheated by a married doctor with three children shot him dead Supreme Court observed life imprison-
ment is sufficient punishment.


99. Supra note 2.


101. In Kailash Kaur the Supreme Court observed, “We only express our regret that the Sessions
Judge did not treat this as a fit case for awarding the death penalty, and no steps were taken by the State
Government before the High Court for enhancement of sentence.” In Laxman Kumar v. State( Delhi
Administration): AIR 1986 S.C. 251, where the mother-in-law was the accused along with the hus-
band of the deceased, the Court observed though the death sentence may not be improper in case of
bride burning the particular case was not a fit case for the extreme penalty for the reasons, acquittal
intervened by the High Court and almost two years have elapsed since the respondents were acquitted
and set at liberty. In Attorney General of India v. Lichhma Devi (AIR 1986 S.C. 467) the Court ob-
served, “The persons who perpetrated such barbarous crime, without human consideration must be
given the death penalty. But, in the present case accused was acquitted by the trial court. After eight
years of gap, the High Court reversed her acquittal and sentenced her to death.” This delay involved
stole the judicial heart. Moreover, the Apex Court felt that the High Court’s decision was more out of
anger than reason.

102. “We have considered the question whether woman generally should be exempted from the sen-
tence of death. While we appreciate that it would be natural desire to avoid the death sentence on
females, in most cases we do not think that a general exemption is called for.” [Law Commission of
India: Thirty-fifth Report: para 270 (September, 1996)]

103. “If there is a valid case for the retention of Capital Punishment it must apply to women as well
as to men, although possibly not to an equal degree.”[Royal Commission on Capital Punishment: 1949-
53: 65]


110. After several moves in the Lok Sabha and Rajya Sabha since 1931, for the abolition of Capital Punishment in 1962 however, a resolution was moved in the Lok Sabha, by Raghunandan Singh received more serious attention. As a result of this a separate Law Commission Report was submitted to the Government, exclusively on Capital Punishment in September, 1967. This Report was a thorough disappointment from the abolitionists’ point of view. Then came the sensation judgment of all times from the Supreme Court of United States [Furman v. Georgia: 408 U.S.238 (1972)]. Now, losing hope from the Legislature, the Indian abolitionists turned to the Supreme Court of India for the abolition of


13. Supra note 111.

14. Ibid.

15. Ibid.

16. Ibid.

17. Supra note 91.

18. Supra note 92.

19. Ibid.

20. Ibid at 804-805.

21. Ibid at 806.


23. But, in Annamma's case the murders were brutal and one of the victim was a baby of months old.

24. Supra note 92 at 806.

25. Ibid.


29. One year and ten months.


31. Ibid at 989.


196
136. Supra note 92.
137. Supra note 135 at 2283.
139. Ibid.
148. Supra note 91 at 145.
149. Supra note 111.
151. Because Jagmohan’s case was heard by a five judges Bench, consisting of S.M. Sikri, C.J. A.N.Ray, I.D.Dua, D.G. Palekar and M.H. Beg JJ.
152. Supra note 150 at 920.
153. Ibid at 921.
154. Supra note 91 at 166.
155. Section 302 (1): Whoever commits murder shall save as otherwise provided in sub-section (2), be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever commits murder shall, (a) after previous planning and involves extreme brutality; or (b) if the murder involves exceptional brutality; or (c) if the murder is of a member of any of the armed forces.
forces or of any public servant and was committed - (i) when such member or public servant was on duty, or (ii) in consequence of anything done or attempt to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such a 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 the 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 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.

159. Supra note 92.
164. Supra note 109.
165. Supra note 157 at 945.
166. Ibid at 960.
168. Ibid at 972.
169. Supra note 157 at 916.
171. Ibid at 1179.


173. Ibid at 1385.

174. Ibid at 1390-1391.


177. Supra note 172.

178. The five judges are Y.N. Chandrachud, C.J., P.N. Bhagwati, R.S. Sarkaria, A.C. Gupta and N.L. Untawalia.


181. Ibid at 907.

182. Ibid at 911.

183. Ibid at 930.

184. Ibid at 931.

185. Ibid at 938.


down while asleep in one night in quick succession in different neighbouring villages. The murders were cold-blooded, calculated and gruesome.

188. (1) Manner of commission of murder: When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) Motive of commission of murder: When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassins for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

(3) Anti-social or socially abhorrent nature of the crime: When the murder of a member of a scheduled caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath; as in the case of bride-burning or dowry deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) Magnitude of crime: When the crime is enormous in proportion, for instance of a family or a large number of persons of a particular community, caste or locality are committed.

(5) Personality of victim of murder: When the victim of murder is an innocent child, or helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

189. (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime". (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all
the relevant circumstances. (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to struck between the aggravating and the mitigating circumstances before the option is exercised: Machhi Singh v. State of Punjab: AIR 1983 S.C. 957 at 966-67.

190. (i) Is there something uncommon about the crime which rendered sentence of imprisonment for life inadequate and calls for a death sentence? (ii) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. [Ibid at 967]


**Death penalty imposed relying on principle (2):** (i) West Muller Roberts v. State of Assam: AIR 1985 S.C. 823: Appellant committed murder of a young boy after kidnapping him for a ransom. (ii) Darshan Singh v. State of Punjab: AIR 1988 S.C. 727: This case covers principle (2) and (4) also because the offender killed three members of a family.

**Death Penalty not imposed though the cases were covered by principle (3):** (i) Kailash Kaur v. State of Punjab: AIR 1987 S.C. 1368 (ii) State v. Laxman Kumar: AIR 1986 S.C. 250: (iii) Lichhma Devi v. State of Rajasthan: AIR 1988 S.C. 1785: All the three cases are gruesome murders of daughters-in-law by mothers-in-law. Though the Court observed they are proper cases for death, relying on some mitigating factors did not impose death.

**Death Penalty imposed relying upon principle (4):** (i) Mahesh v. State of M.P.: AIR 1987 S.C. 1346: The offender killed five persons of a family and this case attracted principle (2) also, the motive being mean, the offender killed all the family members because the lady of the family which belonged to a higher caste married a harijan boy. Though it aroused social wrath as mentioned in principle (3), it does not attract that principle because the victims were not scheduled caste people (ii) Ranjeet Singh v. State
of Rajasthan: AIR 1985 S.C. 672: Entire family including small children were killed in diabolical and
cold-blooded murder: (iii) Lokpal v. State of M.P.: AIR 1985 S.C. 891: Entire family was murdered by
the appellant. (iv) Mehr Chand v. State of Rajasthan: 1983 SCC (Cri) 57 (2): Entire family of the
accused's brother consisting of five persons was murdered.

Death Penalty imposed relying on principle (5): Kehar Singh v. State (Delhi Administration): AIR
1988 S.C. 1883: This case which was sensational, because the victim involved was no other than the
country's Prime Minister, Indira Gandhi covered principle (2) also because it was committed in the
course of betrayal of motherland and covered principle (5) for the reason the victim was a helpless
woman and public figure loved and respected by people of India.


Dilip Kumar Sharma and others v. State of M.P: AIR 1976 S.C. 133 at 138 as per Sarkaria, J.

194. Ibid.

195. Supra note 193.

196. The Bench consisted of Y.V. Chandrachud, C.J., S. Murtaza Fazal Ali, V.D. Tulzapurkar, O.
Chinnappa Reddy and A. Varadarajan JJ. in its decision in Mithu v. State of Punjab: Mithu v. Union of


201. Ibid at 478.

202. Ibid at 479.

203. Ibid at 484.

205. Supra note 200.
210. Maqbool Ahmed Butt, a journalist and former President of the Jammu and Kashmir Liberation Front who was convicted in 1969 for killing an Indian Intelligence officer was executed in 1984.
212. Supra note 2 at 4.
217. Ibid at 47.
218. Piare Dushadh AIR 1944 PC 1.
220. State of Bihar v. Pashupati Singh; AIR 1973 S.C. 2699: Three bandits, while robbing the passengers of a train killed a husband and wife. Two of the bandits were apprehended, convicted of murder and sentenced to death.
222. Ibid at 806.
223. Raghubir Singh v. State of Haryana: AIR 1974 S.C. 677. The appellant killed the nurse with whom he had illicit intimacy, and who feigned pregnancy in order to marry him. Along with the delay, the personal and social circumstances tilted the judicial scale in favour of commutation.

226. Lajar Masih v. State of Uttar Pradesh: AIR 1976 S.C. 653: The appellant murdered his erstwhile love, who refused to go to bed with him, after being married to his nephew and stabbed three others fatally.

227. The appellant wanted to disrupt the matrimonial home of the deceased, the murder was premeditated and preplanned, committed in a dastardly manner and he attacked four unarmed and sleeping persons were the factors against the appellant.


230. AIR 1981 S.C. 764: The servant of a house killed the housewife and her three year old son and injured her five year old child in a bid to murder him also.

231. The State of Uttar Pradesh v. Sahai: AIR 1981 S.C. 1442: The appellant who was one of the four members coup, committed four murders. The case falls under “rarest of rate cases” category and was rightly awarded death penalty by the trial court.

232. T.V. Vatheeswaran v. State of Tamil Nadu: AIR 1983 S.C. 361(2): The accused was the brain behind a cruel conspiracy to impersonate customs officers, pretend to question unsuspecting visitors, to the city of Madras, abduct them on pretext of interrogating them, administering sleeping pills, steal their cash and jewels and finally murder them.


238. Supra note 232 at 366.
239. Article 72 and 161 which refer to the executive clemency.
240. Supra note 232 at 367.
241. In the United States of America where the right to a speedy trial is a constitutionally guaranteed right, the denial of speedy trial has been held to entitle the accused person to the dismissal of the indictment of the vacation of the sentence: Strunk v. United States (1973) 37 L.Ed 2d 56.
242. Supra note 232.
244. Y.V Chandrachud, C.J., V.D.Tulzapurkar and A. Varadarajan JJ.
245. Finally the Court expected the Indian Government and State Governments to dispose the mercy petitions within three months. Long and interminable delays tend to shake the confidence of people in the very system of Justice, the Court opined.
247. Javed Ahmed Abdulhamid Pawala v. State of Maharashtra: AIR 1983 S.C. 594: He killed his sister-in-law, her small babies (aged two years and one and half year and a servant girl, who also seven or eight years old.
249. In State (Delhi Administration) v. Laxman Kumar: AIR 1986 S.C. 251, though the trial Court imposed death which was not improper in a bride burning case, acquittal by High Court intervened and almost two years elapsed since the acquittal, palyed a vital role in commutation of his death sentence. In State of Uttar Pradesh v. Lalla: AIR 1986 S.C. 576, though the case is of gruesome and coldblooded
murder and the learned sessions judge was justified in awarding the sentence of death having regard to the fact that the incident took place over a decade ago, the Supreme Court commuted the sentence.


253. Ibid at 408.

254. Ibid at 393.

255. Ibid at 409.

256. Ibid at 393.

257. Ibid at 409.

258. In Vatheeswaran v. State of Tamil Nadu: AIR 1983 S.C. 361, the Court expected the executive delay be not more than three months.


260. See also Munawar Shah v. State of Maharashtra: AIR 1983 S.C.585: Some of the accused in this case took the plea that they had written and translated some books: In Javed's case(AIR 1985 S.C. 231), his repentance in jail was considered to be one of the mitigating factors.

261. Supra note 251.


S. 15 (1) of the Constitution of Zimbabwe provides that, “No Person shall be subjected to torture or inhuman or degrading punishment or other such treatment”.

The Court further observed that,

1. Prisoners retained all basic rights, save those inevitably removed from them by law, expressly or by implication. Therefore, a prisoner who had been sentenced to death did not forfeit the protection afforded by S. 15(1) of the Constitution in respect of his treatment while under confinement.

2. Section 15 (1) of the Constitution of Zimbabwe guarantees that punishment or treatment of the individual be exercised within the ambit of the civilised standards which must not only take account of the emerging consensus of values in the civilised international community of which Zimbabwe was a part, but of contemporary norms operative in Zimbabwe and the sensitivities of the people.

3. There was judicial and academic acceptance of the death row phenomenon, the confinement under sentence of death as an exquisite psychological torture, and the attitude of Courts that prolonged delay and harsh conditions of incarceration were a ground for constitutional attack upon the death penalty and as amounting to a violation of the prohibition against “torture or cruel or inhuman or degrading treatment or punishment”, in India, the United States of America, the West Indies, in the European Court of Human Rights and in the decisions of the United Nations Human Rights Committee. Madhu Mehta v. Union of India (1989) 3 SCR 775, People v. Anderson 493 P. 2d 880 (1972), District Attorney for Suffolk District v. Watson: Mass 411 N1 2d 1274 (1980) Riley and others v. Attorney General Jamaica and another (minority opinion) (1982) 3 All. E.R. 469 (P.C.) Soering v. United Kingdom (1989) 11 EHRR 439.

4. Although in Zimbabwe there was an automatic appeal against sentence of death the responsibility for the appeal process rested with the state resulting in long delays between the imposition of death penalty and the date of the confirmation by the Supreme Court. Such delay was, therefore, outside the responsibility of the condemned prisoner and as such the period the prisoner had spent in the condemned cell started with the imposition of the sentence of death as it was from that date that he began to suffer the “death row phenomenon”.

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5. The Criminal Law Amendment Act, 1992, which detained the death penalty only for murder, treason and certain military offences was passed on 8 May 1992 and it was on 21 January 1993 that the Cabinet considered the papers pertaining to the prisoners and it was on 9 March 1993 that the President confirmed the decisions not to commute their sentence. Therefore, the inordinate delays of 52 months and 72 months in this case were sufficient to invoke the protection against inhuman treatment afforded to the prisoners by S. 15 (1) of the Constitution.

6. An effective remedy for breach of S. 15(1) was that the sentence of death be set aside and substituted with a sentence of imprisonment for life.

7. The whole procedure relating to death sentence cases required to be revised and accelerated.

268. They are crucifixion, mostly practised by Jews, burning, “drawing, hanging and quartering” and throwing from the top of high hills which were practised in England. The other modes which were in force were drowning, breaking on wheel, crushing to death, gibbeting, live burial and guillotine. The other methods now in force are shooting, gaseous asphyxiation, lethal injection, beheading and shooting.


271. Now in United States only seven states use this method, eighth state- Utah gives a choice to the prisoner to choose between hanging and shooting.


273. Section 354(5) of Criminal Procedure Code provides that “When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.”


276. Supra note 274 at 1163.

278. The test is that the method of execution must be certain, humane, quick and decent.


280. The other references made by the Court are: i) Hanging through ages (History of Capital Punishment) by George R. Scott at p. 11; ii) Kenny: Outlines of Criminal Law at p. 618; iii) Barness and Teeters: New Horizons in Criminology; iv) United Nations Publication on Capital Punishment (1962) v) Time Magazine dated January 24, 1983: “Trop v. Dullas” in which 18 key cases were referred. vi) California Supreme Court’s judgment.

281. Supra note 274 at 1178.

282. Ibid at 1186-87.


284. Supra note 270 at 21-22.


286. In some other states the number of witnesses is greater and in some places they are not separated from the prisoner by any form of screen.

287. Lewis E. Lawyes: Life and Death in Sing Sing: 170-171 (1928): Sometimes the body leaps as if to break the strong leather straps that hold it. Some times a thin grey smoke pushes itself out from under the helmet that holds the head electrode, followed by the faint odour of burning flesh. The hands turn red, then white and the cords of the neck stand out like steel bands. After what seems an age but is, in fact, only two minutes, during which time the initial voltage of 2,000 to 2,200 and amperage of 7 to 12 are lowered and reapplied at various intervals, the switch is pulled and the body sags back and relaxes. As a rule the switch is thrown only once, but some times a second shock is given if the attending doctor considers it advisable.


290. He was a twenty-eight year old fruit peddler and wife disserter. He had been living with Matilda who left her husband. One morning, he had prolonged fight with her and in a fit of jealous rage he beat her repeatedly with the blunt end of a hatchet. She died the following day.

291. Supra note 289 at 149-50.


293. Supra note 289 at 148.

294. Supra note 289.

295. Ibid.

296. Ibid.

297. After Kemmler’s execution six more electrocutions took place while experiments were going on to better the process. The seventh man Mac. Elavaine was electrocuted with each hand starpped into a bucket of salt water. He appeared unconscious but still alive after the first charge of 1,600 volts was applied to his hand electrode for 50 seconds. When physician started examining his body, he wheezed, coughed and gasped. Electricity was applied to him once again.


301. William Francis, an illiterate seventeen years old black was convicted murdering a white druggist. He was sentenced to electrocution. On May 3, 1946 Francis was led into the death cell. The switch was on. He jumped and groaned. After two minutes, finding Francis alive the Sheriff ordered the current be terminated. Then Francis started his legal battle. He was granted a 30 day stay and he proceeded to seek a writ petition of habeus corpus in the Court on the ground to put him through the agonising experience once again would be cruel and unusual and therefore violates due process of law. The petition and four more petitions were rejected without being heard. After several attempts in the Board of Pardons he moved United States Supreme Court.

302. Ibid at 464.


307. Later the Legislature of Utah provided that a prisoner be given choice between shooting and hanging.