V. DYNAMICS OF PROCESSUAL JUSTICE EMERGING FROM MANEKA GANDHI’S CASE

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CHAPTER V

DYNAMICS OF PROCESSUAL JUSTICE
EMERGING FROM MANEKA GANDHI'S CASE

5.1 The right to life and personal liberty is being interpreted with increasing concern by our Supreme Court after Maneka Gandhi's case. The laws relating to prisons and prisoners have received revolutionary interpretation in recent years. Whether it is a question of life sentence or death sentence, bail or jail, hand-cuffing or bar fetters, our Courts have come out boldly in favour of prisoners asserting the dignity of the human beings within a short span of ten years (since Maneka). Our judiciary has by judicial activism changed its own image and has come nearer to the common people. Orders have been issued for release of hundreds of under-trial prisoners, who were in prison for unduly long periods and for humanising jail administration.

5.2 In Chapter IV rights of prisoners and undertrials were discussed. Here another concept of personal liberty of prisoners and undertrials will be dealt with and that is about the bar fetters and hand-cuffing of prisoners. Maintenance of discipline within four walls of the prison is a complex and arduous task for jail authorities. Many a times for the sake of maintaining discipline the authorities make use of custodial violence and even tortures. An important situation in which custodial violence becomes necessary and legitimate is that of escapes.

5.3 The jail officials always have an apprehension in their mind about the possibility of escape of the prisoners. In fact every prisoner is considered to be a potential escapee.\(^{1}\) To prevent the incidents of escapes or jail breaks, the jail authorities use custodial violence in the form of iron-fetters
and hand cuffing. At times excessive force is used to prevent the escape bid. Physical violence is accompanied by various other deprivations within the jail including medical facilities.

5.4 The jail authorities try to justify the use of force and physical violence on the ground of security and deterrence, but in doing so they cross all the limits of rationality and they forget that they are dealing with prisoners who are human beings and for indulging in these illegalities they take shelter of obnoxious and out-dated Prison Acts, Jail Manuals and other rules. A bare perusal of section 56 of the Prison Act, 1894 would show that a jail Superintendent may put a prisoner in bar fetters:

(1) When he considers it necessary

(2) with reference either to the state of the prison or character of the prisoner, and

(3) for the safe custody of the prisoner.

5.5 A writ petition was filed by Charles Sobraj in the Supreme Court which questioned the validity of section 56 of the Prison Act. The petitioner was a detenu under MISA with a terrible Interpol dossier and jail breaks exploits to his credit. He questioned the validity of section 56 under Article 14 and 21 as construed in Maneka’s case. Justice Krishna Iyer (along with Justice Beg and Kailasam) had visited Tihar Jail and seen Sobraj fettered with iron on wrists, iron on ankles, iron on waist, iron in between welded strongly and these fetters hampered his movement all through the day and the night for a period of two years.

5.6 The Supreme Court had ordered that "the barbaric fetters inflicted on him" should be removed. The Court upheld the vires of section 56, but
it imposed rigorous requirements upon the Superintendent. It held that:

(1) There must be a nexus between imposition of irons and the consideration of "the security of the prison and safety of the prisoner".

(2) The determination has to be that there is a "necessity" of putting the prisoner in bar fetters and necessity is certainly opposed to mere expediency.

(3) The determination of the necessity to put a prisoner in bar fetters has to be made after application of mind to the peculiar and special characteristics of each individual prisoner. The nature and the length of the sentence or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question.

5.7 Although the Court resisted the contention that section 56 was bad because of excessive delegation by uncannalised and unguided discretion being conferred upon the Superintendent, it had no hesitation in holding that imposition of bar fetters in violation of the foregoing requirements, and for an unusually long period would be arbitrary and violative of Article 14 of the Constitution. In faithful upholding of the Constitution the spirit of human rights could be perceived that not only a non-citizen, but also a confirmed criminal deserved better treatment in our prisons.

5.8 How the concept of personal liberty consistent with human dignity gets defeated is amply proven by the case of Charles Sobraj. If he escaped from prison, it was basically the corrupt and lax administration of the prison but to brand him as a dangerous criminal because he exploited the mal-practices and laxity of the administration does not necessarily make him dangerous and surely this can never be the definition for "dangerous criminal". Any ordinary pick-pocket can also exploit the laxity and escape.
5.9 But the State administrative machinery seems to have adversely influenced the judicial thinking with the result that he remains fettered even within the prison walls like an animal chained. Though we say that equality before law is the basic precept, we often wonder how far equality before law for a criminal undergoing parallel imprisonment, lacking the resources of Charles Sobraj and, therefore, lacking in exploiting the prison conditions to escape can be distinguished from the case of Charles Sobraj. The judicial thinking can be justified only on one ground. For conceding to the request of the State administration to put Charles Sobraj in fetters, this ground can only be that the Court has taken cognizance of the corrupt and lax administration and, therefore, Charles Sobraj has to remain in fetters. Consistent with human dignity as well as by the dictum of equality before law the Court should insist on the State to make its own arrangement for safe keeping of the prisoners.

5.10 Even in Sunil Batra's case(3) our Supreme Court held that bar-fetters which curtail to a very considerable extent locomotion, which is one of the facet of personal liberty, cannot be put on a prisoner unless it is absolutely necessary to do so, having regard to the dangerous character and propensity of the prisoner. Subjecting a prisoner to bar-fetters for an unusually long period without due regard to the safety of the prisoner and the security of the prison would be violative of basic human dignity and hence it would be unconstitutional.

5.11 The Supreme Court held that the bar-fetters would not be put on the prisoner by the jail authorities unless accompanied by certain important procedural safeguards, which are as under:

(1) It must be absolutely necessary to put fetters.
(2) The reasons for doing so must be recorded.

(3) The basic conditions of dangerousness must be well-grounded.

(4) Natural justice must be observed.

(5) The fetters must be removed at the earliest opportunity.

(6) There should be a daily review of the absolute need for bar fetters.

(7) If it is found that the fetters must continue beyond a day, it would be illegal unless an outside agency like District Magistrate or Sessions Judge directs its continuance.

Having outlawed bar fetters except under specific circumstances and with adequate safeguards the Supreme Court proceeded to continue the use of handcuffs in chaining prisoners.

5.12 Prem Shankar Shukla's case arose out of a telegram sent to one of the Judges, the same group of Judges which decided Batra-II found unconstitutional handcuffing of undertrials during transit from prison to Court for trial of their cases. The telegram alleged that despite Batra-I, Prem Shankar was handcuffed. In his majority opinion Justice Krishna Iyer found that this case involved a conflict between considerations of escape and personhood of a prisoner. The Judge drew attention to Article 5 of the Universal Declaration of Human Rights forbidding torture, cruel, inhuman or degrading treatment or punishment and section 10 of the Covenant on Civil and Political Rights protecting the dignity and worth of a person deprived of his liberty and guaranteeing human treatment for him. He however hastened to add that even if these human rights coloured the mental process of the judges, the fundamental rights and Prisoners (Attendance in Courts) Act 1955 controlled their task.

The respondents pleaded that the petitioner was involved in over a score of cases and that police had the discretionary authority to handcuff a prisoner. Justice Krishna Iyer reiterated Maneka and Batra and held Article 21 now
"the sanctuary of human values, prescribes fair procedure and forbids barbarities punitive or processual"(5)

5.13 The Court strongly disapproved of the elitist concept, forbidding handcuffing of only a better class prisoner. It insisted on availability of material sufficiently stringent to satisfy a reasonable mind that the prisoner in transit was a dangerous and desperate character who could be kept in control only by handcuffing. It pointed out that it was the compulsion of Article 21 that where, in extreme circumstances, the prisoner was handcuffed, the escorting authority must record contemporaneously the reasons for doing so and show them to the judicial officer before whom the prisoner was produced and get his approval. And once the trial Court directed removal of the handcuffs the escorting authority should abide by it. Justice Krishna Iyer mandated the Judicial Officer to interrogate the prisoner as a rule whether he had been handcuffed, and if so, the official concerned should be asked to explain his action forthwith in the light of the judgement of this case.

5.14 Handcuffing is a daily phenomenon in our country as far as criminals are concerned. Inspite of numerous decisions given by the Supreme Court prohibiting handcuffing of prisoners and undertrials no change has been brought about in the system. With utter disregard for human rights and liberty of the individual, the police officials continue with the practice of handcuffing. An incident which took place in Delhi recently rocked the legal fraternity. An Advocate by the name of Rajesh Agnihotri was apprehended for having committed theft from a girl student. The allegation was of a petty theft and the alleged offender was handcuffed and paraded through a distance of four kilometres to the District Court. The offender's Bar Council identity card was torn off and the money that he was having was confiscated. He
was not allowed to contact his parents or other lawyers. On being produced before a Magistrate, he was acquitted. The treatment which was meted out to the lawyer was in a real bad taste and even a person who was a criminal may not be treated in such an undignified manner. To protest against handcuffing and for inhuman and humiliating treatment of their colleague, the Delhi lawyers decided to go on strike and the rest is a history too well known to be repeated here. Every day there are numerous instances of police torture, ill-treatment and handcuffing of prisoners and undertrials, but no lawyer has ever raised the voice or protested and here this one incident was enough for the lawyers to go on a nation-wide strike?

RIGHT TO LEGAL AID:

5.15 According to the penal law of our country, a poor individual on pleading guilty to the charge as to the commission of the offence is generally sentenced and awarded punishment as provided under law by our Courts. The experience has shown that it is irony of the fate that operation of legal system does not provide sufficient means by which a poor and illiterate person who has been convicted and sentenced could know what is the infringement of law on his part for which he is convicted or what the law is.

5.16 In our Constitution, there is no specifically enumerated right to legal aid for an accused person. Clause (1) of Article 22 does provide that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice, but according to the interpretation, placed on this provision by the Supreme Court in Janardhan Reddy's case (6) the right to be defended 'by a legal practitioner of his choice' could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State.
5.17 In this case, the American case of Powell v. Alabama 287 U.S. 45 (1932) was cited(7) in which Southerland, J. of the American Supreme Court has observed as under:

"...in a capital case where the defendant is unable to employ counsel, and is incapable of adequately making his own defence because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the Court whether requested or not, to assign a counsel for him as a necessary requisite of due process of law."

Powell's case involved a capital punishment where the accused was unable to employ counsel due to his indigence and, therefore, was incapable adequately of making his own defence and according to the Supreme Court the failure of the trial Court to give reasonable time and opportunity to secure counsel was a clear denial of 'due process'.

5.18 Inspite of the above observation the Supreme Court was reluctant in following the American precedent and it gave opinion as under:

"That the assignment of a counsel in the circumstances mentioned in the passage is highly desirable, cannot be disputed. But the question raised before us is whether in law non-assignment of a counsel would vitiate the trial. It seems to us that in dealing with the point, we cannot rest our judgement wholly on American precedents, which are based on the doctrine of due process of law, which is peculiar to the American Constitution...."(8)

But now since Maneka Gandhi's case there is a shift in the stance taken by the Supreme Court wherein the Court observed that the requirement of compliance with natural justice was implicit in Article 21 and that if any penal law did not lay down the requirement of hearing before affecting him, that would be implied by the Court so that the procedure prescribed by law would
be reasonable and not arbitrary procedure. The procedure which was arbitrary, oppressive or fanciful was no procedure at all, and with this the substance of American 'due process' has been infused in the conservative text of Article 21. Procedural safeguards are the indispensable essence of liberty.

5.19 There is of course Article 39-A introduced in the Constitution in 1976 by 42nd Amendment Act, but this Article merely contains a Directive Principle of State Policy. It enacts a mandate that the State "shall" and not "may" provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

5.20 There is thus an obligation laid down on the State to provide free legal aid, but it is not an obligation enforceable in a Court of law and does not confer in the nature of a fundamental right to the accused to secure free legal assistance. The net effect of this provision would be that the accused can request the Court for adjournment of his case till such time as he is granted legal aid by the State Government under the constitutional mandate. (9)

5.21 But now the Courts have filled up this gap through judicial interpretation of Article 21 in M.H. Hoscot's case (10) The right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. Madhav Hoscot's case is a noteworthy case on personal liberty. The petitioner was a Reader in the Saurashtra University and was found guilty of organising a scheme of making bogus degrees. The Sessions Court had found him guilty of forging a letter to obtain from a Bombay block maker an embossing seal in the name of Karnataka University, Dharwar.
5.22 The Court imposed on him a soft sentence of simple imprisonment till the rising of the Court. Two appeals were made in the High Court, one by the petitioner against his conviction and the other by the State at the naive sentence. The High Court dismissed the appeal against the conviction and in allowance of the State's prayer for enhancement, imposed rigorous imprisonment for three years.

5.23 The special leave petition was against this heavy sentence, but was made well over four years later and by that time the petitioner had already undergone his full term of imprisonment. The petitioner complained that High Court granted a copy of the judgement of 1973 only in 1978, but on further probe it was disclosed that a free copy was immediately sent by the High Court to the Superintendent of the Jail, but was not delivered to him.

5.24 Justice Krishna Iyer brought into sharp focus the constitutional dimensions of the issue arising out of the failure of jail authorities to supply a copy of judgement to Hoscot to enable him to file an appeal. The procedure provided in the Criminal Procedure Code which regulated appeal from the Sessions Court to the High Court was held to be reasonable only if it fulfilled the two requirements.

(1) Service of a copy of the judgement to the prisoner in time to file an appeal.

(2) Provision of free legal services to the prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.

Both the above requirements are State responsibilities under Article 21. Any jailor or official concerned, who withholds the copy of the judgement
thwarts the Court process and violates Article 21 and may also pave the way for holding further imprisonment as illegal.

5.25 Justice Krishna Iyer used the procedure in Article 21 and read it along with Article 39-A and section 304 of Criminal Procedure Code\(^{(11)}\) and invoked the right of free legal aid in the following terms:

"This Article (39-A) is an interpretative tool for Article 21. Partial statutory implementation of the mandate if found in section 304 of Cr. P.C. and in other situations Courts cannot be inert in the face of Article 21 and 39-A"\(^{(12)}\)

Thus the Directive Principle of free legal aid, envisaged in Article 39-A was made part of Article 21, when Justice Krishna Iyer commented:

".....there is implicit in the Court under Article 142 read with Articles 21 and Article 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'. This is necessary incident of the right to appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not Government's charity."\(^{(13)}\)

5.26 The Directive Principles are therefore being raised to the status of fundamental rights with every new judicial pronouncement. Here in this case petitioner was a literate man, if these things can happen to them, then what would be the plight of illiterate and indigent persons. The petitioner was offered legal aid by the Court, but he preferred to argue the case himself. Here we can recollect the observation of Southerland J. in Powell v. Alabama\(^{(14)}\) which is as under:
"The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect."\(^{(15)}\)

The Court no doubt dismissed the Special leave petition in Hoskot but in the event laid down the right to legal aid and the right of appeal in Article 21.

5.27 The legal position in the words of Justice Krishna Iyer is as under:

1. Courts shall forthwith furnish a free transcript of the judgement when sentencing a person to prison term;

2. In the event of such copy being sent to jail authorities for delivery to the prisoner by the appellate revisional or other Court, the official concerned shall, with quick despatch, get it delivered to the sentencee and obtain written acknowledgement thereof from him.

3. Where the prisoner seeks to file an appeal or
revision, every facility for exercise of that right shall be made available by the Jail Administration.

4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence provided the party does not object to that lawyer.

5. The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the Court may equitably fix.

6. These benign prescription operate by force of Article 21 (strengthened by Article 19(1)(d) read with sub-Article (5) from the lowest to the highest Court where deprivation of life and personal liberty is in substantial peril."

5.28 In Hussainara Khatoon's case Justice Bhagwati went a step further, when he warned that:

"It is not only a mandate of equal justice implicit in Article 14 and the right to life and personal liberty conferred by Article 21, but also a constitutional compulsion embodied in Article 39-A and that the State can regard the constitutional mandate only at the pain of getting the trial declared vitiated as contravening Article 21." (17)

5.29 In yet another decision given by the Supreme Court in Khatri's case Justice Bhagwati observed that the State cannot avoid its constitutional obligation to provide free legal services to indigent accused by pleading financial or administrative difficulties. He went a step further and added
that the constitutional obligation does not arise only when the trial commences, but also attaches when the accused is for the first time produced before the Magistrate. It is at that stage that the accused gets his first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody and so the accused needs competent legal advice and representation at that stage. Realising the legal illiteracy of persons ordinarily brought before Criminal Courts, Justice Bhagwati stated in Khatri's case that the scope of the right to free legal aid involves the duty of every Magistrate and Sessions Judge to inform the accused produced before them of their entitlement for free legal services irrespective of the offence charged with. The Court has directed all State Governments to make provision for grant of free legal service to the poor accused persons.

5.30 In yet another case of Rajan Dwivedi, the Supreme Court held that the accused being tried for murder before the Sessions Court, was not entitled to the grant of a writ of mandamus for the enforcement of the Directive Principles embodied in Article 39-A by ordering the Union of India to give financial assistance to him to engage a lawyer of his choice on a scale equivalent to, or commensurate with the fees that were being paid to the counsel engaged by the State. The Court dismissed the petition on the ground that the remedy of the petitioner, if any, lies by way of making an application before the trial Court under section 304(1) of the Criminal Procedure Code and not by a petition under Article 32 of the Constitution. The Court also observed that many a times, it may be difficult for the accused to find sufficient means to engage a lawyer of competence. In such a case, the Court possesses the power to grant free legal aid if the interests of justice so require.

5.31 The right to get legal aid has been held to be an essential aspect
of the procedure established by law, but giving of legal aid does not mean that any counsel can be given to the accused person to defend his case. The procedure which is usually followed is that empanelled lawyers appear in sessions trials and the accused person is unable to get competent professional assistance from them. For engaging a competent lawyer more fee is required to be paid and if the person is poor, he does not get a counsel of his choice. Under such circumstances it is the duty of the State to engage a lawyer whose engagement the accused does not object.

5.32 Then came the well known decision of Justice Bhagwati in Sukh Das's case(20) wherein the Court went to the extreme position of declaring the whole trial invalid because the accused had not the benefit of legal services and the trial Court had not informed him of his right to seek free legal service.

5.33 The conviction reached without informing the accused that they were entitled to free legal assistance and inquiring from them whether they wanted a lawyer to be provided to them at State cost which resulted in the accused remaining unrepresented by a lawyer in the trial is clearly a violation of the fundamental right of the accused under Article 21 and the trial must be held to be vitiated on account of a fatal constitutional infirmity. The above theme was given expression by Justice Bhagwati in the following words:

"....Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advise in time and
their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self reliant: They cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid, if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail of its purpose. (21)

5.34 In the above paragraph Justice Bhagwati has given a true picture of the conditions prevailing in India, where majority of the people live below poverty line and they are an ignorant lot. For them Justice Bhagwati has stressed the importance of the legal aid and has extended its scope to legal literacy and pre-trial processes. According to him legal aid should not be mere constitutional obligation, in a poor country like ours it is a social imperative and it should be conceived as integral part of our legal system. The contribution made by Justice Bhagwati to social justice and human rights is praise worthy. (22) On legal aid he has given four important decisions and articulated the status of legal aid as a constitutional right of accused person to be read in Article 21 of the Constitution.
5.35 In conclusion it would be appropriate to quote the words of Justice Bhagwati which were made by him in his capacity as the Chairman of Committee for implementing Legal Aid Scheme (CILAS) and which are as under:

"We must constantly remind ourselves that if we do not bring about revolution through law, there may be a revolution against law."\(^{(23)}\)

As if taking heed from what Justice Bhagwati said in the above para, the Legal Services Act was passed by Parliament in the year 1987, which was intended to create a statutory right to Legal Aid. But the Act has not yet been brought into force. The Government should immediately implement the Act so as to mitigate the suffering of poor litigants or else in the words of Justice Bhagwati 'there may be revolution against law.'

RIGHT TO BAIL:

5.36 In violation of the provisions of Article 21 of the Constitution and contrary to the guidelines laid down by the Supreme Court of India for liberal approach in the grant of bail, the Indian Courts at lower level have unfortunately continued to adopt the age-old archaic concept in refusing bail while dealing with liberty of citizens who are innocent in the eyes of law, until proven guilty. Thus when bail is refused, a man is deprived of his personal liberty, which is of too precious a value under our constitutional system, recognised by Articles 19, 21 and 22. After all personal liberty of an accused or convict, which is fundamental in nature can be lawfully eclipsed by a procedure established by law to defeat the first half of Article 21.\(^{(24)}\)

5.37 The function of the Court to grant bail can be compared with a slot machine which delivers the service or goods on insertion of a coin. The grant, refusal or cancellation of bail is a judicial act and has to be
performed with judicial care after giving serious consideration to the interest of all the parties concerned specially the interest of the individual on one hand and the community on the other.

5.38 Ours is a socialist republic with social justice as the main object of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our Constitution that instead of financial surety other relevant considerations should be determinative factors in the grant of bail. The deprivation of liberty for reasons of financial poverty only is an incongruous element in a society raised on the pillars of social justice.

5.39 The procedure for criminal action is controlled by the Code of Criminal Procedure (Cr. P.C.). The Code does not define 'bail'. However, the word 'bail' has been defined in the Law Lexicon as under:

"To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc. the legal power to deliver him." (25)

In Encyclopaedia Britannica the bail is defined as:

"the procedure by which a judge or magistrate sets at liberty one who has been arrested and imprisoned in connection with a legal matter, criminal or civil upon receipt of security to ensure the released prisoner's later appearance in Court for proceedings in the matter." (26)
According to Justice Krishna Iyer:

"There is no definition of bail in Code although offences are classified as bailable and non-bailable. The actual sections which deal with bail...are of blurred semantics. We have to interdict judicial arbitrariness, deprivatory of liberty and ensure fair procedure, which has a creative connotation." (27)

5.40 The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest. How is the purpose met under the present system? (28) The defendant with means can afford to pay for bail. He can afford to buy his freedom. But the poor defendant cannot pay the price. He languishes in jail for weeks, months and perhaps even years before trial:

* He does not stay in the jail because he is guilty,
* He does not stay in the jail because any sentence has been passed,
* He does not stay in the jail because he is any more likely to flee before trial,

but

* He stays in the jail for only one reason and i.e. because he is poor.

5.41 The bail system causes discrimination against the poor, since they would not be able to furnish bail on account of their poverty, while the wealthy persons, otherwise similarly situated, would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of bail fixed by the magistrate is not high for a large majority of those who are brought before Courts in criminal cases, they are so poor that they would find it difficult to furnish bail even for small amount. Our Supreme Court in Moti Ram's case (29) was very much perturbed seeing
the mechanical and conservative approach adopted by the lower Courts in granting bail to the poor mason Moti Ram.

5.42 The Supreme Court in this landmark judgement therefore laid down guidelines for all the Courts of the country for the liberal use of the provisions of the law in granting bail and also drew the attention of legislature to the dire need of change and reform in the present law, which was discriminatory against poor persons and to whom Article 21 of the Constitution is also applicable. The petitioner Moti Ram, a poor mason from Madhya Pradesh pending his appeal in the Supreme Court obtained an order for bail in his favour to the satisfaction of the Chief Judicial Magistrate.

5.43 The Magistrate ordered that a surety of Rs. 10,000 be produced. The Magistrate also demanded sureties from his own district. His brother's surety was refused as he and his estate were in another district. Moti Ram again moved the Supreme Court to modify its earlier order and reduce the amount of surety. It is here that Justice Krishna Iyer showed his outburst in the following words:

"It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs. 10,000. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution enacted by "we the people of India" is meant for the butcher, the baker, and the candle stick maker..... shall we add the bonded labour and the pavement dweller To add insult to the injury the Magistrate has demanded sureties from his own district. What is Malayalees, Kannadiga, Tamil or Telugu to do if arrested for alleged misappropriation or theft or criminal trespass in Baster, Port Blair, Pahalgam or Chandni Chowk? He cannot have sureties owning properties in these
distant places. He may not know anyone there and might have come in a batch or to seek a job or in a morcha. Judicial disruption of Indian unity is surest achieved by such provincial allergies..... Article 14 protects all Indians qua Indians within the territory of India.....Swaraj is made of united stuff. We mandate the magistrate to release the petitioner on his own bond in a sum of Rs. 1,000."(30)

In reaching this decision, the Supreme Court subjected the relevant bail provisions to rigorous analysis and by a process of close legal reasoning succeeded in expanding and liberalising the age-old concept of bail so as to make them more responsive to the needy and the poor.

5.44 The Supreme Court addressed itself to 3 main issues:

(1) Can a person charged with a bailable offence be released on his own bond without sureties?

(2) In case the bail is granted with sureties, what should be the criteria for quantifying the amount of bail?

(3) Can a surety be rejected simply because he or his estate is situated in a different district or state of the country?

5.45 The Supreme Court invited the Supreme Court Bar Association and the citizens for Democracy to give assistance and the Kerala State Federation was permitted to intervene. The Supreme Court considered at length the legal literature both Indian and Anglo-American, and reached the conclusion that bail loosely used is comprehensive enough to cover release on one's own bond with or without sureties. After having an incisive survey of these bail provisions, the Court concluded by saying:

"Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents' rights, we hold that the bail covers
both release on one's own bond with or without surety. When sureties should be demanded and what sum should be insisted on are dependent upon variables." (31)

Court further observed:

"If the indigents are not to be betrayed by law, including bail law, rewriting of many processual laws is an urgent desideratum; and the judiciary will do well to remember that the geographical frontiers of the Central Code cannot be disfigured by cartographic dissection in the name of language or province." (32)

5.46 It is most distressing to find that all the concerned agencies - be it Courts, the police officials, the executive or the legislature have paid no attention to what Supreme Court has laid down in this landmark judgement. The utter disregard and disrespect of the guidelines laid down by the Supreme Court in the liberal approach for the grant of bail by the Courts and the police officials is deplorable. Grant of bail, according to Supreme Court, is a general rule and denial of it is an exception. The law regarding bail cannot be static in a welfare State and it has to reconcile conflicting demand: Firstly the requirement of the society to be shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime and,

Secondly, the fundamental cannon of criminal jurisprudence i.e. the presumption of innocence of an accused till he is found guilty.

5.47 In bail matters it has been observed that the Courts derive some kind of pleasure in arbitrarily refusing bail and sending the person to jail. By the time that person's innocence is established after a long trial, he becomes a hardened criminal. The bail is generally refused by the Courts on the same stereo-typed ground of apprehension of evidence being tampered
with. Besides this, how can the accused person prepare his defence to establish his innocence, while he is detained in a prison.

5.48 It is high time the Magistrates and other officials adopt a right approach towards the grant of bail. The power of arrest has been misused by the officials to the utter detriment of the liberty and dignity of citizen of this country. A practice has evolved in the High Court and Supreme Court that a person who has been sentenced to life imprisonment and whose appeal is pending before a higher Court should not be granted bail, so long as his conviction and sentence are not set aside. But the underlying postulate of this practice is that the appeal of such person should be disposed off within a reasonable time, so that if he is ultimately found to be innocent, he does not have to remain in jail for unduly long period.

5.49 Presently our Courts are overburdened with work. The cases are not disposed off till five or six years elapse and ultimately the accused is acquitted. For no fault of his a person has to remain in jail only because there is no speedy trial. Many a times a person may serve out his full term of imprisonment by the time his appeal is taken up for hearing. A solution has been given by Justice Bhagwati to the above said problem in Kashmira Singh's case. According to him, if the Court is not in a position to dispose of the appeal within a reasonable time, the Court should release the person on bail, unless there are cogent grounds for acting otherwise.

5.50 According to Justice Bhagwati: 

"...would it be just at all for the Court to tell a person: "we have admitted your appeal because we think that you have a prima facie case, but unfortunately we have no time to hear your appeal for quite
In the above para Justice Bhagwati has rightly described the predicament of the Courts. There is a long standing practice that a person who is granted life imprisonment and whose appeal is pending should not be released on bail. But Court has rightly pointed out that a practice which is unjust and unfair would not be continued and in appropriate cases bail can always be granted.

5.51 In a recent case of Shahazad Hasan Khan\(^{(35)}\) our Supreme Court has specifically given the guidelines for refusing bail to an accused person in the following words:

"...No doubt liberty of a citizen must be zealously safeguarded by Court, nonetheless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there being primafacie material, the prosecution is entitled to place correct facts before the Court. Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim, who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case.\(^{(36)}\)

From the above para it can be seen that in matters relating to granting of bail, liberty of the accused person though important, should not be the sole concern of the Court. Along with liberty of the accused, other relevant facts should
also be taken into account before a Court decides to grant the bail.

5.52 In yet another well known case of Hussainara Khatoon\(^{(37)}\) our Supreme Court has read the right to bail in Article 21 of our Constitution. It was pointed out in this case that our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention mainly because of unsatisfactory bail system. If the Court is satisfied after taking into account, on the basis of information placed before it, that the accused has his roots in the community which would deter him from fleeing the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community.
2. his employment status, history and his financial condition,
3. his family ties and relationships,
4. his reputation, character and monetary condition,
5. his prior criminal record including any record of prior release on recognizance or on bail,
6. the identity of responsible members of the community who would vouch for his reliability,
7. the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these facts are relevant to the risk of non-appearance, and
8. any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

5.53 The Supreme Court laid down these principles and ordered the release of a number of under-trial prisoners who were in jail for long years on their personal bond without insisting on monetary obligation. Thus from this case onwards the right to bail can be read into Article 21 of the Constitution.
ght to speedy trial:

The Supreme Court in the same decision of Hussainara Khatoon pointed out that right to speedy trial, right to legal aid, though not a specifically enumerated fundamental right in the Constitution as it is in the United States, is implicit in the broad sweep and content of Article 21 because procedure can be reasonable, fair and just which denies speedy trial and legal aid to the accused.

From the facts disclosed in Hussainara the duration of imprisonment of the undertrials (in Bihar Jail) without trial ranged from ten years to a maximum imprisonment prescribed for offences they are charged with. In addition to persons charged with offences, there were also destitute men and women, who were victims of crime and kept in jail by way of 'protective custody', or they were required for the purpose of giving evidence. No information was made available as to how many times and how many of these persons were produced before the Magistrate under section 167 of the Criminal Procedure Code. Shocked by these disclosures, Justice Bhagwati tried to identify the shortcomings in the administration of criminal justice responsible for this outrage. He found that an unsatisfactory bail system and delays in Courts had strated the undertrials quest for justice. 38)

Mantoo Majumdar v. State of Bihar 39 is another case on undertrials. Justice Bhagwati who wrote the opinions of the Court in Hussainara cases, not associated with the Bench that decided this case. Justice Krishna Prasad who delivered the opinion of the Court did not even refer to Justice Bhagwati's opinion in Hussainara though the issues involved were identical. Justice Pathak, who was a party to Hussainara and also in Mantoo Majumdar,
did not find it necessary to recall the law laid down in the former case. But Mantoo Majumdar, simply echoes Justice Bhagwati's opinion in Hussainara cases without, of course, citing them.

3.57 In this case Justice Krishna Iyer found that the two petitioners had spent seven years in jail without trial. He found further that the Government of Bihar was unwilling to furnish the facts sought by the Court and insensitive to the plight of the undertrials rotting in jails for long years. He found that even Magistrates "have bidden farewell to their primary obligation, perhaps fatigued by overwork and uninterested in the freedom of others". He said that under section 167 Criminal Procedure Code: "The Magistrate concerned have been mechanically authorising repeated detentions unconscious of the provisions which obligated them to monitor the proceedings which warrant such detention." He drew attention to the failure of the police to investigate promptly and the prison staff to find out how long these undertrials should languish in jail. In the fact of this failure of the limbs of law and justice, the Judge wondered like any of us: 'If the salt hath lost its savour, wherewith shall it be salted?' He ordered the release of the two petitioners on their own bonds and without sureties.

3.58 In Nimeon Sangma v. Home Secretary, Government of Meghalaya the Supreme court directed release on personal bond of the two petitioners. It called for further particulars of large number of undertrials from the Government and regretted that the Criminal Procedure Code should be so openly flouted. In response to the undertaking by the counsel that the State will comply with the Court's directions, the Court ordered immediate release of all undertrials who have been held in custody for a period of over six months without trial having been commenced or without charges being laid.
It made exception in regard to those apprehended for offences under sections 302 and 395 of the Indian Penal Code. In these cases chargesheets must be laid within two months and where chargesheets have been laid, the Court directed the completion of the trial within six months.

5.59 Sangma was decided at the time when three decisions in Hussainara were already rendered. Two of the three Judges who participated in Hussainara's case (Justice Koshal and Pathak) and Justice Krishna Iyer must have followed them with interest and yet there is no reference to Hussainara holdings in Sangma. The Court did not even affirm indirectly the right to expeditious trial, nor even a right to legal services. Firstly, it proceeds on the concession given by counsel for the State, secondly, all it has to say is that the State Government may take "a policy decision with a view to ensure that accused persons, too indigent to set in motion the judicial process, do not suffer incarceration silently". The Government is asked to "pay homage to the Constitution and the Code".

5.60 The Supreme Court in Kadra Pahadiya's case(41) found that Hussainara had not brought about any improvement and that many prisoners were still languishing in jail awaiting trial. It pointed out that Hussainara had held that speedy trial was a fundamental right implicit in the rights enshrined in Article 21 and at the instance of the accused, who was denied this right, the Court could give instructions to the State Governments and to other appropriate authorities to secure this right to the accused. The Court thus tried to ensure institutional improvement in order to make speedy trial a meaningful living reality.

5.61 This case also arose out of a letter written by a social scientist
to the Supreme Court, alleging that Kadra Pahadiya and three other tribal boys, aged between 7 and 11 years, were thrown in jail about eight years back and were kept in leg irons, the Court found that if these allegations were true, there was violation of Article 21, prison regulation and I.L.O. Convention. The respondents informed that these boys were released after they were acquitted in a trial denied to them for eight years.

5.62 Salim Khan’s case (42) shows that in Uttar Pradesh too, undertrials face trials and tribulations. The Court found in this case that the petitioner was in jail since November, 1978 awaiting trial. The counsel for the respondent alleged that there were serious charges against the petitioner, but when directed by the Court to produce a single case in which chargesheet was submitted against the petitioner, he was unable to do so. On the contrary the counsel informed the Court that in some cases the petitioners had been tried and acquitted. The Court, therefore, ordered his release on a personal bond of Rs. 500/- deploring the Government’s cavalier attitude towards the petitioners’ freedom.

5.63 In Veena Sethi’s case (43) a letter written to Justice Bhagwati by the Free Legal Aid Committee, Hazaribagh brought to light facts too shocking for words. Out of 16 prisoners, who were of unsound mind at the time when they were admitted into prison, 14 were there for two to three decades. Some of them had regained sanity but not freedom. Six of the prisoners, who had not regained sanity, were in prison for over 25 years as the only mental hospital in Bihar was overcrowded. Court disapproved the practice of keeping mentally sick persons in jail as jail was not the place for treating the mentally sick. Out of two persons released from jail, one had spent 35 years and other 29 years in jail. The cases of remaining eight are also
One of them had spent in all 37 years in jail before Court ordered his release, quashing the charge that he had attempted to commit suicide in a fit of insanity. He had regained sanity but not freedom in 1966. Another prisoner had become sane in 1961 but he too was in prison till 1982.

5.64 In Sant Bir’s case the Court declared the detention of a prisoner as criminal lunatic illegal. He had become perfectly sane and fit for discharge and yet had been kept under detention for over 15 years without any justification. Justice Bhagwati ordered the release of the petitioner with the stricture that the disrespect shown to the dignity of the individual so nobly enshrined in our Constitution by forgetting about a person sent to jail and the detention of the petitioner in jail for 16 years without the authority of law should be a matter of shame for the society as well as the administration of justice.

5.65 In State of Maharashtra v. Champalal our Supreme Court went beyond Hussainara Khatoon’s case. As pointed out in Hussainara Khatoon’s case, the right to speedy trial is not an expressly guaranteed Constitutional right in India, but is implicit in the right to a fair trial which has been held, to be part of the right to life and liberty guaranteed by Article 21. The right to speedy trial does not mean only the right to reasonably expeditious trial. It is no longer enough to demonstrate that trial has taken 10, 15 or 20 years. It has to be further demonstrated that delay has caused prejudice to the accused person. Many a times the delay may have been caused because of the conduct of the accused, whereas it may be due to slow motion tactics of the prosecution where the delay has been caused not because of the accused, but because of other reasons his right to reasonably expeditious trial is violated.

5.66 In Champalal’s case Justice Chinnappa Reddy observed that in the
United States where the right is explicitly guaranteed by the Sixth Amendment, the denial of speedy trial entitles the accused to the dismissal of the indictment or the vacation of the sentence and for this reliance was placed on American precedent in Strunk v. United States.\(^{(47)}\) In Champalal's case the Court was willing to read this right under Article 21 of the Constitution, because the speedy trial is the essence of justice. But from the facts of the case the Court found that accused himself was responsible for a fair part of the delay and therefore no relief was given to him.

\(3.67\) In this case Hussainara's ruling has been stretched further. In Hussainara the law was laid down for the benefit of undertrial prisoners, who were poverty-striken and illiterate persons whereas here in this case a wealthy person who could afford to pay the lawyer's fee was before the Court. The interpretation given by the learned Court is commendable but it should not become a weapon in the hands of wealthy criminals to get out of the clutches of law. To substantiate the point an American case may be cited here.

\(3.68\) In one of the American cases, an accused by name of Jimmy Lee Gray was able to delay his death sentence for more than seven years. He had his case reviewed 82 times by 26 judges. He was found guilty of killing a three years old girl in 1976 (this was the second murder which he had committed) and was executed in 1983. When the Supreme Court rejected Gray's last minute bid to avoid the gas chamber, Chief Justice Burger wrote:

"This case illustrates a recent pattern of calculated efforts to frustrate valid judgements after painstaking judicial review over a number of years, at some point there must be a finality." (104 S.Ct. 2111).\(^{(48)}\)

Thus from the above case it can be seen that criminals themselves apply the delaying tactics and then make the plea before the Court of delayed
in the hope of getting the conviction quashed or of commuting the sentence. only after carefully going through the facts of cases the Court should grant the right to speedy trial.

In the case of Surya Narain Singh v. State of Bihar\(^{(49)}\) a full Bench of the Patna High Court\(^{(50)}\) gave a decision for quashing the charges against the petitioner on the ground of violation of right to speedy trial. The delay in the trial of capital offence was of 14 years and the end was still not in sight. The delay was not caused by the default of the accused petitioners and no exceptional reasons were there which can warrant the extension of a trial for 14 years and the hovering of a sentence of death over the petitioners for nearly a decade and a half.

Chief Justice Sandhawalia summarised the conclusions in the following words:

"It is held -

(1) that on principle and consistent precedent capital crime punishable with death is equally well within the majestic sweep of the constitutional right to speedy public trial guaranteed by Article 21 of our Constitution,

(2) that it can now be authoritatively held that a broad time frame for the original trials of offences including capital ones punishable with death can well be spelt out by precedent,

(3) that a callous and inordinately prolonged delay of ten years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reasons) in the investigation and original trials of pending cases within our State for capital offences punishable with death would plainly
violate the constitutional guarantee of a speedy public trial under Art. 21, 

(4) that in accord with Sheela Barse's case (AIR 1980 SC 1773), a callous and inordinately protracted delay of five years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reasons) in the investigation and original trial for capital offences registered hereafter within our State would plainly attract the constitutional guarantee of a speedy public trial under Article 21, and,

(5) that the aforesaid rules of presumptive prejudice are rebuttable by the prosecution by showing that the delay was wholly or substantially contributed to by the default of the accused or was otherwise justifiable because of extraordinary or exceptional reasons."

After the decision was given in the above case, the Patna High Court decided yet another case on the right to speedy trial in Anurag Baitha v. State of Bihar(52) where the Court has gone a step further and fixed the time limit of one year within which the substantive appeals on capital charges pending in the High court should be heard. If there is a delay beyond this period, the accused is entitled to be released on bail. But the general rule if one year made by the Court will not apply to certain horrendous capital crimes mentioned below -

1) Multiple and mass murders on caste and tribal considerations.
2) Dacoity coupled with murder.
3) Rape with murder.
4) Bride Burning.
5) Terrorist Crime.
6) Daylight bank robbery, abduction for ransom followed by murder, indiscriminate use of Fire arms and bombs in murders disturbing public orders.

The above observation was made by Chief Justice Sandhawalia and Justice N.P. Singh whereas minority view was given by Justice S.H.S. Abidi. According to the minority view fixing of despotic period of one year for the hearing of substantive appeal in capital cases without any basis or criteria, without looking to the conditions of Court and the alarming decrease in the number of Courts, will be to naught the considerations at the time of refusing suspension of sentence and grant of bail. Fixing the period of one year in those cases in which the conscience is not shocking and denying the period of one year to those in cases in which conscience of society is shocked. According to the learned Judge the society consists of not only of the criminals alone but innocent and law abiding and law fearing people, whose interest is also to be safeguarded side by side the interest of the criminals who have been convicted in accordance with law.

From the observations made above, it can be seen that fixing a period of one year for deciding substantive appeals in criminal cases is not proper. The same yardstick cannot be applied to all cases. No two cases are similar in nature and each case is to be decided on its merits. Some cases may be completed within a short span, whereas other cases of similar nature may take longer time. The fixing of time limit is also not in accord with the common experience of time normally consumed by the litigative process. Even our courts are over burdened with work where they are trying to dispose of the old matters first. Under such circumstances fixing of time limit will hamper the smooth working of the Courts. Under the stress and
It is manifest from Maneka to Hussainara that the Supreme Court has turned itself into a continuing constitutional convention breathing new vigour into personal liberty, bringing into focus new dimensions of right to equality, emphasising the unity of fundamental rights, and weaving around the specific right some new rights relevant to the contemporaneous socio-political scene. After the decision of Hussainara some critics say that the Courts have taken over the administration of prisons and are assuming the role of super administrators. These critics forget the judicial activism by Court in this field has been the result of either of complete inaction or reluctance to respond to gross deprivation of fundamental rights of prisoners by prison officials, legislators and members of the executive.

There is after all a special judicial obligation to protect the rights of prisoners many of whom languish in jail for no better reason than the fact that Judges do not have time to dispose of these cases expeditiously. The Magistrates and Judges would do well to remember that every day's adjournment in the case of an undertrial who is not on bail means continuing the torture and degradation to which the prisoner is subjected.

In criminal matters there should be no adjournment as a general rule and especially not on the ground of convenience of lawyers. Judges must be strict in these matters even if that makes them unpopular with the Bar. The vital role of the Press in this field cannot be over emphasised. If a truth of publicity which is given to the bickerings and infighting among leaders of the ruling party, is given to the open and continual violation of
human rights of the undertrials the press would indeed render a distinctive service. What is required is publicity not sporadic but sustained. The real strength of our constitutional guarantee of "right to life and personal liberty" can be measured by the protection they afford to our weaker members. By denying them to some, they may cease to have any meaning for us at all.

5.77 Thus from all the above observations, we can come to this conclusion that right to life includes the right to live with human dignity. It is implicit in Article 21 and accords protection against torture, cruel, inhuman or degrading treatment. With this formulation of Article 21, the Supreme Court developed a new fundamental rights jurisprudence.

RIGHT TO LIFE AND DEATH PENALTY

5.78 Death penalty in the light of the discussion made in the Chapter IV where 'Suicide' is discussed and the interpretation of death as antithetic to 'life' is yet another complex enigma in the dimensions of liberty emanating from Article 21. For some time section 302 was able to focus the attention of people at large and, therefore, all the necessary aspects of it have been analytically discussed thoroughly to reach the depth of Article 21.

5.79 No other aspect of justice has roused so much controversy as the death penalty for certain degree of crime. On the one hand the Government of India holds the view that time is not ripe to abolish death penalty, whereas on the other, India as a member of the International Community was a participating delegate at the international conference that made the Stockholm Declaration on 11th December, 1977 that India has also accepted the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force on 23rd March, 1966 and to
which some 47 countries, including India are a party. This being the position in certain quarters, it is stressed, that India stands committed to the abolition of death penalty. It is contended that the Constitutional validity and interpretation of the impugned limb of section 302 of the Indian Penal Code and the sentencing procedure for capital cases provided in section 354(3) of the Code of Criminal Procedure, 1973 must be considered in the light of Stockholm Declaration and the International Covenant.

5.80 The European Convention on Human Rights came into force on 1st September, 1953 and 18 countries had signed this Convention on 4th November, 1950. India acceded to the Resolution of the Convention on 17th March, 1979. The International Covenant on Civil and Political Rights interalia provides in Article 6:

i) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

ii) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crimes....."

Clauses (1) and (2) of Article 6 do not abolish or prohibit the imposition of death penalty in all circumstances. All they say is - death penalty shall not be arbitrarily inflicted and it shall be imposed for most serious crimes in accordance with a law, which shall not be an ex-post facto legislation. India's commitment therefore does not go beyond what is provided in Constitution, in the Penal Code and the Criminal Procedure Code. India's penal laws are entirely in accord with its international commitment.
The human race inherits a past, lives in the present and thinks of the future. While living in the present he wants to create something for the future, but at the same time he has also to live with what he inherits from the past. During its evolutionary phase, in the infancy of civilized living the human race popularly subscribed to the notion of "an eye for an eye", or "a life for a life". In a system of this kind of social justice, a member killed in a family used to be avenged by other members, and this used to go on. In monarchical system a killer was invariably ordered to be killed, only the forms of administering death differed. As we started thinking ourselves as more civilized, we adorned the whole process of a capital punishment by mincing words and following circuitous path and so on. In substance we went on killing through capital punishment any intentional or wilful killing.

Almost a decade after the second World War the human race has increasingly become aware of its incapacity to take "life for life", with an array of tough questions - practical, moral, religious, metaphysical and such other considerations. The very idea of capital punishment is very intriguing and baffling even to great minds, as no simple widely acceptable solution can be found. Because of its complex nature, the problem itself is very intricate; and to add to the complexity, our confused approach depending on the instinctive views of eminent personalities become still further difficult.

For example in the very famous case of Rajendra Prasad v. State of Uttar Pradesh the accused person who had committed murder for the second time after being released from the jail is awarded life imprisonment of not death penalty. According to Justice Krishna Iyer, the murder was result of a family feud and as such he was not a menace to the society.
Hon'ble Judge put the blame on the jail authorities who could not reform the murderer while he was in jail. The accused was awarded life imprisonment and was directed to be given a mental moral healing courses through suitable work, acceptable meditational techniques and psychotherapeutic drills to regain his humanity and dignity. According to him it is illegal to award capital punishment without considering the correctional possibilities inside prison.

3.84 In Kunjukunju case (57) the accused infatuated by the charm of a village girl committed a deliberate and a cold blooded murder in which he killed his wife and 2 kids. Justice Krishna Iyer commuted the death sentence to life imprisonment. According to him, a course of anti-aphrodisiac treatment or willing castration is a better recipe for this hypersexed human than out right death sentence. This is again a needless rhetoric, applied to embellish a simple matter to make it round about and complicated. In any case of killing, generally two types of sentences are possible - Death Penalty or Life Imprisonment. The accused has acted like a monster who killed his wife and did not spare his two minor children. If the death sentence was not to be awarded in a case like this, what type of offence will call for Death Penalty?

3.85 In still one more case that of Sheo Shankar Dubey's case (58) we meet with a similar blurred thinking in the judgement. In this case the appellant, on being angrily dissatisfied with a family partition, stabbed to death three members of the other branch of the family. He chased and killed, excited by the perverted sense of injustice at the partition. The genesis of the crime shows a family feud. He was not a murderer born but made by a passion of family quarrel. According to Justice Krishna Iyer he could be saved for society with correctional techniques and directed into repentance like the
Social defence against murderers is best insured in the short run by caging them but in the long run, the real run, by transformation through reorientation of the inner man by many methods including neuro-techniques of which we have a rich legacy. If the prison system will talk the native language, we have the yogic treasure to experiment with on high-strung, high risk murder merchants. Neuro-science stands on the threshold of astounding discoveries. Yoga in its many forms seems to hold splendid answers. Meditational technology as a tool of criminology is a nascent ancient methodology. The State must experiment. It is cheaper to hang than to heal, but Indian life - any human life is too dear to be swung dead save in extreme circumstances."(59)

To allow the appellants to escape with the lesser punishment after they had committed such intentional, cold blooded, deliberate and brutal murders will deprive law of its effectiveness and result in travesty of justice. (60)

5.86 In all the above cases Supreme Court considered the question as to the circumstances under which the sentence of death can be given for murder. Justice Krishna Iyer delivered the majority judgement, purporting to lay down guide lines and circumstances under which alone, capital punishment could be given, if the law permitting capital punishment was not to violate Articles 14, 19, and 21. Short question before the Court was: What are the circumstances under which an accused should be sentenced to death for murder? Instead of deciding this short question, Justice Krishna Iyer has tried to inject his personal views and theories for judging the reasonableness of law.
Section 302 of the Indian Penal Code provides:

"Whoever commits murder shall be punished with death or imprisonment for life....."

Therefore, section 302 of the I.P.C. gives the Court a discretion as to the punishment to be imposed for an offence of murder, and the Criminal Procedure Code provides how a judge should exercise his discretion. Initially it was section 367 of the Code of Criminal Procedure, which provided that, sentence of death was a rule and reasons had to be given for not awarding it. But later in 1973 an amendment was made in the Code of Criminal Procedure and by section 354(3) the imprisonment for life was made a rule and death sentence an exception to be awarded for "special reasons". The expression "special reasons" in section 354(3) Criminal Procedure Code seems to have made, Justice Krishna Iyer State his own views on capital punishment. The only consideration for inflicting this punishment was not the nature of the crime, but the concern for the criminal and unless it was shown that he was a risk to survival of society capital punishment would not be justified.

Justice Sen gave dissenting judgement. He gave a careful analysis of the issues involved and different views taken on punishment in general and capital punishment in particular. According to him after the judgement in Jagmohan Singh's case, (61) it was not open for the Court to go into the constitutionality of death sentence. It was also not open for the Court to say that except for the cases mentioned by Justice Krishna Iyer, infliction of capital punishment would be violative of Articles 14, 19 and 21.

In Jagmohan Singh's case, this Court had rejected the contention that capital punishment for an offence of murder punishable under section 302 infringes Article 19 in as much as it could not be said that such punishment
was unreasonable or not required in public interest. It further held that
section 302 was not violative of Article 14 as it did not suffer from the
vice of excessive delegation of legislative functions. It could not be said
that section 302 confers uncontrolled and unguided discretion to the judges.
The Court further held that section 302 did not contravene Article 21 in so far as
the trial was held as per the provisions of the Criminal Procedure Code,
1973 and Indian Evidence Act, 1872 which were undoubtedly part of the procedure
established by law. According to Justice Sen, this question stood concluded
by the decision of five Judges in Jagmohan Singh's case.

5.90 Justice Sen held that it was constitutionally and legally impermissible
while hearing a special leave petition on a question of sentence to restructure
the Indian Penal Code and the Criminal Procedure Code so as to limit the
scope of the sentence of death provided by section 302 of the Indian Penal
Code for the offence of murder. Nor was it possible to construe the expression
"special reasons" occuring in section 354 (3) of Criminal Procedure Code
by a process of judicial interpretation so as to virtually abolish death sentence.
He held that in all the three cases, the sentence of death was properly imposed
and guide-lines given by Justice Krishna Iyer would render the death penalty
practically a dead letter. One of the observations made by Justice Krishna
Iyer deserves a special mention here. Referring to a pending amendment
of section 302 of Indian Penal Code in Lok Sabha he said:

"...half-fulfilling both, the humanist quintessence
of the Constitution and, may be, the creed of the
father of the Nation, Gandhiji long ago wrote in
Harijan : "God Alone Can Take Life Because He Alone
Gives it." (62)

5.91 In capital punishment cases, it is the 'law' which takes away life (of
course that of the Criminal) without having power to restore it. This argument
is not at all convincing. The basic function of law is to protect the society
from crime and criminals. In a democracy the enactment of any law reflects
the will of the people. The will to protect the society is reflected by the
laws enacted. To this extent, enactment of the law, prescribing capital
punishment, is reflected as a will of the people. Hence the Courts while
awarding the capital punishment are doing no wrong because their function
is to remain within the framework of the laws enacted and deal with the
criminals as per penalty or remedy prescribed thereunder.

5.92 The argument that "since we cannot give life, we cannot take life"
is misleading and superfluous. It is we, the mankind who by our talent
and technology give life to persons bitten by snakes or those who have consumed
poisons, by giving antidotes and so on and thus we do give life. Through
the institution of marriage the society is engaged, in creating "life". After
creating "life" it is further engaged by the order it sets up, in protecting
and preserving life. It devotes itself to technological inventions and discoveries
by which it can protect life against natural disasters to further preserve and
perpetuate it.

5.93 Hence mankind is not only confining itself to the problem of life
being taken away by human agencies, but it has vigorously applied itself
to adopt measures by which taking away of life either by Nature or by disease
is also halted. Capital punishment, therefore, can be likened to a measure
adopted in the technology of law to eliminate those causes, or germs, which
are injurious to "life". The mankind therefore aims at preventing destruction
of the society through the forces of "Criminals" and the only way to do it
is through the process of capital punishment.
Just as a "criminal" has a right to live, similarly the person, who murdered by the "criminal" had also his right to live, which was denied to him by the "criminal" through his act of murder. Hence the "criminal" has indulged basically in doing an act which he himself cannot remedy. The same question can be asked of the "criminal" that since he could not give life, what right he had to take it away? And in a situation when he has done so, how the society should deal with him? How the deceased i.e. the person murdered should deal with him. The person who had died is no longer able to get any retributive justice, but while he was living, as a unit of the society, he reflected his will in the laws enacted that they should take away life of the person who indulges in the act of taking away of his own or somebody's life.

5.95 Hence law as such on its own and by itself is not taking away life by awarding capital punishment. Law on the other hand becomes a mere representative of the deceased and acts as an agent, under the authority of the deceased, to see that the person responsible to take away life is punished in the same manner as if, if he were alive, he would have resorted to a due process of law to get redressal against the person who has aggrieved him. Due to this reason it is wrong to surmise that our Courts or our laws by themselves take away life. They merely carry out the process of justice and award prescribed punishment.

5.96 This the deceased secures posthumously, as any other benefits of rites and rituals, he gets after his death, which is again in accordance with the social codes. As to the social laws, the murdererv till he was not possessed of "criminal tendencies, and till he was a "common citizen" was himself a consenter or a positive voter to the laws evolved by his country and thereby
grants himself becomes a party to his own death. Here again law or our Courts can carry out his wishes, which may be interpreted as if the citizen himself, declaring: 'So long as I remain a "common citizen" I should not be subjected to any adverse process of law, but if in the event, I resort to life of crime, I should myself be given the same punishment as we have jointly, unitedly and by consensus enacted under our laws'.

5.97 Therefore, this deep concept evolved by the mankind is not unfair or unjust and any objection to capital punishment based on the argument that "since we cannot give life, we cannot take the life, even of a criminal", is inept and not justified. Now let us try to understand what we mean by the term "criminal". A person who violates the prescribed, prevalent and accepted codes of social conduct is a "criminal". For an ethical citizen, who respects social conduct, all the benefits and privileges of law are made available.

5.98 In the exercise of justice, the dictum that a person is not guilty until proven so, beyond a reasonable doubt the person is treated all through the due process of law as an innocent "common citizen", accused of having committed a crime. His status as a "criminal" from that of a "common citizen", he begets only after the judgement of the court. During the trial he gets all the benefits of law as a "common citizen", but once proven guilty, he forfeits automatically all the rights, which are normally available to a citizen. Hence the question of taking away life of a "criminal" and that of "common citizen" vastly differs to which due consideration should be given.

5.99 In Bachan Singh's case(63) Justice Sarkaria gave judgement for the majority and overruled Rajendra Prasad's case on the question of
granting death penalty. Justice Sarkaria said that Article 21 expanded in accordance with Maneka Gandhi's case would read:

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

or to put it positively,

"A person may be deprived of his life or personal liberty in accordance with a fair, just and reasonable procedure established by valid law." (64)

The Court denied that death penalty violated Article 21. There are several indications in the Constitution which shows that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. The mention in the legislative list, power of the Governor and the President to suspend, commute or remit death sentence and the right of the appeal to the Supreme Court under Article 134 shows that death penalty and its execution cannot be regarded as unreasonable cruel and unusual punishment. Nor can it be said to defile "the dignity of the individual" within the Preamble of the Constitution.

5.100 Justice Sarkaria added:

"Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under section 302, Penal Code, either per se or because of the execution by hanging, constitutes an unreasonable cruel or unusual punishment......it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution." (65)

In Rajendra Prasad, the majority said:
"It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course..." (66)

But the majority in Bachan Singh's case observed that while it may be conceded that a murder which directly threatens or has an extreme potentiality to harm or endanger the security of the State and society, public order and the interests of the general public may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible.

5.101 Justice Sarkaria also considered whether guidelines could be laid down for awarding the sentence of death for murder and observed that as pointed out in Jagmohan Singh's case standardisation in the sense of laying down standards was well nigh impossible. Standardisation of the sentencing process which left little room for judicial discretion to take into account of variations of culpability within "single offence category" ceased to be judicial. The only guidelines that the learned Judge felt necessary to recommend in that case was that the Judges should not be blood thirsty and that the scope and concept of mitigating factors in the area of death penalty, must receive a liberal and expansive construction by the Court.

5.102 The proposition laid down in Jagmohan Singh's case and specially with reference to section 354 (3) of the Criminal Procedure Code were recasted by the majority opinion as under:

"(a) The normal rule is that the offence of murder shall be punished with sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special
for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence. (67)

The Court concluded that:

"...that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." (8)

5.103 Therefore the change made in the Criminal Procedure Code is not violative of Articles 14 and 21 of the Constitution. Another question which was considered by majority judgement was whether the death penalty serve any penological purpose? To answer this question Justice Sarkaria referred to judgements (69) of the Supreme Court, where the deterrent value of the death penalty had been recognised. Justice Sarkaria observed:

"We may add whether or not death penalty in actual practice acts as a deterrent cannot be statistically proved either way, .....Even retribution in the sense of society's reprobation for the worst of crimes i.e. murder is not an altogether outmoded concept." (70)

He quoted Justice Stewart's view in Furman v. Georgia's case as follows:
"...When people begin to believe that organised society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown the seeds of anarchy—of self-help, vigilant justice and lynch law." (71)

104 Justice Sarkaria summed up by saying that the question whether or not death penalty served any penological purpose was a difficult, complex and intractable issue and for testing the constitutionality of the provisions of the death penalty in section 302, on the ground of reasonableness in the light of Articles 19 and 21, it was not necessary to express any opinion, one way or the other.

105 Justice Bhagwati in his judgment (72) said:

"I must express my profound regret at the long delay in delivering this judgement but the reason is that there was considerable mass of material which had to be collected from various sources and then examined and analysed and this took a large amount of time." (73)

This judicial research, extending over two years, after majority judgement is unheard of and it would be impermissible as all the material relied upon by the Hon'ble Judge was not before the Court.

06 He held section 302 of the Indian Penal Code ultra vires of Articles 19 and 21 in so far as it provided for death penalty. According to him, death penalty as provided under section 302 of the Penal Code read with section 3(3) of the Criminal Procedure Code does not subserve any legitimate purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory.
of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment, it cannot have any legitimate place in an enlightened philosophy of punishment. Death penalty has no rational nexus with any legitimate penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution.

5.107 According to minority judgement, there being no legislative policy or principle to guide the Court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. The exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the judges constituting the Bench. The infliction of death penalty is influenced by the composition of the Bench even in cases governed by section 354 (3) of the Criminal Procedure Code. This is clearly violative of Articles 14 and 21.

5.108 The Court also held that where a law authorises deprivation of the right to life, the reasonableness, fairness and justness of the procedure prescribed by it for such deprivation must be established by the State. The State must place the necessary material on record for the purpose of discharging the burden to prove that death penalty is not arbitrary and unreasonable and does serve a legitimate social purpose or otherwise imposition of death penalty under section 302 of the Indian Penal Code read with section 354 (3) of the Criminal Procedure Code would have to be struck down as violative of Article 21 of the Constitution. According to Justice Bhagwati, death penalty is irrevocable it cannot be recalled. If a person is sentenced to imprisonment, even if it be for life and subsequently, it is found that he was innocent and was wrongly convicted, he can be set free. But that is not possible where
a person has been wrongly convicted and sentenced to death. This is a hollow argument casting doubt on the very judicial process and its basis.

5.109 Under such circumstances it is the system of administration of justice, which needs reformation and not the system of penalty. The errors of judgement cannot absolutely be eliminated from any system specially the one which is devised and worked by human beings. This is apparent from saying that to err is human. However, such human error can be eliminated by providing for adequate checks and safeguards. The criticism levelled by this researcher is obvious from two case laws discussed herein below. The learned Judges who are human beings have taken stands and pronounced law which can well be described as human errors apparent on the face of the pronouncements.

5.110 In Harbans Singh v. State of Uttar Pradesh(74) Harbans Singh and two other accused Jeeta Singh and Kashmira Singh were convicted in a multiple murder case and sentenced to death by a common judgement. Regretfully, each one has eventually met with a different fate. One of those three persons Jeeta Singh, who did not file any Review Petition or Writ Petition in this Court, was executed on 6th October, 1981. The other person, Kashmira Singh succeeded in having his death sentence commuted into life imprisonment. The petitioner was to be executed on the same day on which Jeeta Singh was executed but fortunately he filed this writ petition on which the Court passed an order staying execution of his death sentence. According to the majority, no distinction at all can be made between the part played by Kashmira Singh and the petitioner since Kashmira Singh's death sentence was commuted by this Court, it would be unjust to confirm the death sentence imposed upon the petitioner. That will involve the Court as well as the authorities concerned in the violation of rudimentary norms governing the administration
of justice.

5.111 In the first place as the facts of the case stand the President had turned down the mercy petition and the Court had no business to interfere. In the second place the Court ought to have made consideration of the co-accused and extended the benefit of commutation of the death sentence to him. To crown this lapse further, the Jail Superintendent also did not fulfil his duty. The Court in the event invoked its inherent power and jurisdiction for dealing with extra ordinary situation in the larger interest of administration of justice and commuted the death sentence of the petitioner to life imprisonment.

5.112 The Court gave the direction that prior to the actual execution of any death sentence, the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any co-accused of the prisoner who is due to be hanged, has been commuted. If it has been commuted, the Superintendent should apprise the superior authorities of the matter, who, in turn, must take prompt steps for bringing the matter to the notice of the Court concerned.

5.113 In yet another case decided by our Supreme Court in Jora and another v. State of Madhya Pradesh which was a case of murder under section 302 of the I.P.C. - a peculiar finding was given by the Court. According to section 302 I.P.C. a person who has committed murder should be given death sentence or in the alternative life imprisonment. In this case even though a person is found guilty of committing murder, just because he is 76 years old and was not guilty of any overt act of strangulating the deceased his sentence is reduced to 19 months, which he has already undergone. Under
what provision of the Indian Penal Code or Criminal Procedure Code the Court has reduced the sentence could not be known from the judgement. For the persons convicted of murder, life imprisonment is the rule and death sentence an exception.

5.114 In several states of India, there are in force, special enactments, according to which a 'child', i.e. a person who at the date of murder was less than 16 years of age, cannot be tried, convicted and sentenced to death or given imprisonment for life for murder, nor dealt with according to the same Criminal Procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children. But no such provision has been made in respect of senile offenders and yet the Court dwells at length on the age of the offender to justify a lenient judgement. Can such justifications be tenable in the administration of justice based on absolute impartiality, equality and fairness?

5.115 To understand the problem of capital punishment, we must consider quite a number of factors. The established forms of the taking away a human life are:

(i) **POLITICAL MURDERS**: Political murders are mainly wilful and planned assasinations. Even wars can be included in this category.

(ii) **NEUROTIC AND PSYCHOLOGICAL MURDERS**: These are greatest in number. A person imbalanced in mind indulges in psychotic crimes, which mainly relates to a disorder in the psychological state of the person. Even emotional imbalance falling under this category of psychological murders has a very wide range to cover. In this, anger, jealousy, greed, disappointment in love, avarice and so on can be classified. Yet another classification is that in which religious beliefs, fanaticism, superstitions etc. are involved.
(iii) ECONOMIC MURDERS: In the class of economic murders either dire poverty or immense wealth are the two responsible factors. We can include in this category murderers who indulge in nefarious activities solely for personal, monetary or property gain.

(iv) MURDERS DUE TO FAILURE OF THE SYSTEM OF LAW: In the category of legal murders many-a-times due to some technicalities a guilty person goes scot free or he escapes from the clutches of law to commit repetitive crimes. The capital punishment as a deterrent against social crimes and violation of human rights is not without a serious significance. In Nations where there is dire poverty, superstitions and illiteracy the capital punishment must remain on the statute. In other countries where considerable advancement has taken place, the capital punishment should still remain as a deterrent but its exercise can be made discretionary. (76)

5.116 Those who advocate the banishment for death penalty argue in terms of Human Rights, we mostly think in terms of the right of the accused to continue living, even after his guilt is established, but we do not think of the right of a person to live which is taken away from him by his killing. In such circumstances, are we doing justice to the Criminal or to the person killed by him? Whatever sympathy the Court can have should be reserved for the victims of the crime rather than perpetrators.

HANGING BY ROPE IN THE LIGHT OF ARTICLE 21:

5.117 To hang or not to hang had been the issue not only before the Supreme Court, but before the entire nation. In Deena Dayal case (77), the Supreme Court had settled the question of hanging by rope. It upheld the constitutional validity of hanging by rope as a method of executing the death sentence and
reiterated the constitutionality of capital punishment.

5.118 Chief Justice Y.V. Chandrachud, presiding over a three Judge Bench held that the process of hanging did not directly, indirectly or incidentally involve torture, brutality, barbarity, humiliation or degradation of any kind. Nor did the provision contained in section 354 (5) of the Criminal Procedure Code violate Article 21 of the Constitution. Section 354 (5) provides that:

"When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead."

The Court observed that none of the other methods such as electric chair, gas chamber, lethal injection or shooting has any distinct or demonstrable advantage over the system of hanging.

5.119 Rejecting the argument that it is inhuman to kill under any circumstances, even under a Court judgement, Chief Justice Chandrachud said that imposition of death sentence would become an exercise in futility, if the contention were accepted. If it is lawful to impose the sentence of death in appropriate cases, it would be lawful to execute that sentence in an appropriate manner.

5.120 Two fold considerations are to be kept in mind in the area of sentencing SUBSTANTIALLY, the sentence has to meet the Constitutional prescription contained in Articles 14 and 21. PROCEDURALLY, the method by which the sentence is required by law to be executed has to meet the mandate of Article 21. The mandate of Article 21 is not that death sentence shall not be executed but that it shall not be executed in cruel, barbarous or degrading manner.
5.121 Painless punishment was a contradiction in terms for the day when life becomes extinct, some physical pain would be implicit in the very process of the ebbing out of life. The decision of the Court was on 43 writ petition and one appeal. While dismissing all the petitions the Court also vacated the stay on executions in all cases except in the case of Deena, a condemned prisoner in Meerut Jail.

5.122 Deena alias Deen Dayal's case was the first to be admitted for hearing. Deena had challenged the sentence imposed on him on the ground of age since he was over 70 years old and had also challenged the mode of hanging. Following his case, there had been a spate of petitions challenging the mode of hanging. While the Supreme Court had declined to issue a general stay all over the country, the Judges had been staying hanging in all the cases coming up before them.

5.123 When hearing had opened in the case, Chief Justice had observed that he had stayed the hanging in the case of Deena only on the ground of age and not on the question of the mode of hanging. While adjudicating on the onus of burden of proof the Court held that as soon as it is shown that the Criminal Procedure Code invades a right guaranteed by Article 21, it is necessary to enquire whether the standings proved that the person has been deprived of his life or personal liberty, according to procedure that is just, fair and reasonable.

5.124 However, while agreeing with this, Justice Mukherjee in a brief note said that he would, at present, not express his opinion on whether in all such cases, the State had a further initial burden to prove that the procedure by law was just, fair and reasonable. The Court rejected the argument that
it is inhuman to kill under any circumstances, including a judgement of the Court. It said:

"If the larger interests of the community, as opposed to the interests of an individual, require that the death sentence should be imposed in an exceptional class of cases, the same societal interest justify the execution of the sentence...."\(^{(78)}\)

The Court also rejected a preliminary objection raised by the Union of India that the Bachan Singh case had already resolved the issue. It said that Judges in that case had only incidentally touched upon the method of hanging and this was not directly argued or considered by the Court.

5.125 The Court said that burden did not lie with the petitioners to prove that the procedure prescribed for taking away the life was unjust, unfair or unreasonable, it was for the State to do so. In its opinion, the Court felt that the State had discharged its burden to prove that the system of hanging did not violate Article 21.\(^{(79)}\) Comparing it with electrocution, lethal gas, shooting or lethal injection as methods of execution of death sentence, the Court said the system of hanging was quick and simple and free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension.

5.126 The chance of an accident could safely be excluded, the method was a quick and certain means of executing the sentence, and it eliminated the possibility of lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and death follows as a result of the dislocation of cervical vertebrae. The process of hanging was, the Court said consistent with the obligation of the State to ensure that the process of execution was conducted with decency and decorum without involving
degradation or brutality of any kind.

5.127 In summary, the Court was satisfied that hanging was constitutional and that it was competent to decide the validity of the capital punishment. The argument that it was inhuman to kill a fellow-being under any circumstances was naturally rejected by the Court as it was an ethical and not a legal question. In doing so, the Court had probably anticipated a very crucial question - Should not moral considerations or the dictates of conscience override legal or technical provisions? Truly an agonising question. But the Court had answered it. It said:

"As Judges, we ought not to assume that we are endowed with a divine insight into the needs of society. On the contrary we should heed the warning given by Justice Frankfurter: 'As history amply proves, that the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements'. (1949) 3354 and 538 American Sash Door Co.'s case."[80]

To put it in plain words, a judge, even when he is privately convinced that hanging is immoral, must not interpret the Constitution and the laws according to that conviction. Law and individual opinion must remain two different things. Capital punishment, it must, however, be admitted is a great issue, an issue that is related to human civilisation and conscience and transcends the ever changing laws of the land.

5.128 Our Supreme Court after holding that hanging by rope is not unconstitutional went on to decide another case in which execution of the death sentence by public hanging was challenged.[81] In this case an order was made by Rajasthan High Court in which guilty persons had committed gruesome and barbaric offence with the result that High Court gave orders for public hanging.
But as there was no provision in the Jail Manual for public hanging the High Court gave direction for the second time that if no amendment is made in the Rules by the state Government, then guilty persons should not be hanged publicly.

5.129 In this case, only the question of public hanging was in issue and the case was not decided on merit. The Court categorically stated that public hanging is violative of Article 21 of the Constitution and even for heinous crimes such barbaric punishment can never be given. The Supreme Court made the following important observations:

"We would like to make it clear that the execution of death sentence by public hanging would be a barbaric practice clearly violative of Article 21 of the Constitution and we are glad to note that the Jail Manual of no State in the country makes provision for execution of death sentence by public hanging which, we have no doubt, is a revolting spectacle harking back to earlier centuries.....The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution. It is undoubtedly true that the crime for which the accused have been found to be guilty.....is barbaric and a disgrace and shame on any civilised society which no society should tolerate, but a barbaric crime does not have to be visited with barbaric penalty such as public hanging. We would wholly and unconditionally delete the direction given by the High Court in regard to the execution of the death sentence by public hanging."(82)
PROLONGED INCARCERATION OF A PRISONER UNDER SENTENCE OF DEATH
VIS-A-VIS PERSONAL LIBERTY:

5.130 In T.V. Vatheeswaran's case the Supreme Court has tried to extend
the human rights concept and permitted commutation of death sentence into
life imprisonment, if the period between the death sentence and its execution
exceeds more than two years. But the said decision was overruled by a Bench
of three Judges just after about a week's time in Sher Singh's case. The
Supreme Court differed and said that no hard and fast rule can be laid down and
the petitioner must prove that it will be unjust, unfair and harsh to execute
him.

5.131 In Vatheeswaran's case Justice Chinnappa Reddy observed:
"...Prolonged detention to await the execution
of a sentence of death is unjust, unfair and unreasona­
able procedure and the only way to undo the wrong
is to quash the sentence of death."(85)

He further observed that delay exceeding two years in the execution of a
sentence of death should be considered sufficient to entitle a person under
sentence of death to invoke Article 21 of the Constitution and demand the
questioning of the sentence of death. In this way the Court made it fundamental
right of the convict to demand the questioning of the death sentence in case
of long delay. It also stated that the above mentioned period of two years
would include the time necessary for appeal from the sentence of death and
consideration of mercy petition of the person so sentenced. The fact that
the accused himself was responsible for causing delay in filing appeal would
not alter the dehumanising character of delay.

5.132 In Sher Singh's case, Chief Justice Chandrachud agreed with the
first part of the judgement in Vatheeswarans case and observed:
"It is logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events made its execution harsh, unjust and unfair. Article 21 stands like a sentinel over human misery degradation and oppression." (86)

But expressing his disagreement from second part of the judgement of Vatheeswaran, Chief Justice Chandrachud expressed the opinion that there was no hard and fast rule that in every case of long delay in the execution of a death sentence, the sentence must be substituted by that of life imprisonment.

5.133 Further three important points were highlighted by Chief Justice in support of his disagreement. Firstly, he said that the disposal of cases in High Courts and Supreme Court showed that four or five years elapsed between the imposition of death sentence and the disposal of the final appeal in the Supreme Court and no priority was given by the Government of India to disposal of mercy petitions. Therefore the fixation of time limit of two years did not accord with the common experience of time normally consumed by the litigative process and the proceedings before the Government.

5.134 Secondly, the delay in execution of a death sentence might have been caused by the person under that sentence himself having filed a series of untenable writ and review petitions against the final judgement of the Supreme Court, thus the two years rule laid down in Vatheeswaran's case would become handy tool for defeating justice.

5.135 Thirdly, apart from delay, the sentenced person must be able to show that owing to the circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation of crime
was such as likely to lead to repetition of crime, if the death sentence is vacated.

5.136 In yet another case of Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra the same question was raised by a Bench of two Judges of the Supreme Court. The accused petitioner who was a young man of 22 years of age was convicted for murder and sentenced to death. His conduct and behaviour in jail which was evident from the report of jail authorities was to the effect that there was nothing adverse against him during the period of his incarceration. He appeared to be genuinely repentant and he desired to atone for the grievous wrong that had been done by him. The repentance and desire appeared to be sincere. The sentence of death was hanging over his head for two years and nine months. The Division Bench after taking an over-all view of the case came to the conclusion that the accused petitioner was entitled to invoke Article 21 and accordingly substituted the sentence of death by that of imprisonment for life.

SECTION 303 OF THE INDIAN PENAL CODE INCONGRUOUS TO ARTICLE 21:

5.137 In Mithu v. State of Punjab a five Judge Constitutional Bench of the Supreme Court struck down as 'unconstitutional' and 'void' section 303 of the Indian Penal Code which stipulates that a life convict committing murder would be sentenced to death. The judgement came up under the umbrella of Article 21 postulating reasonable and fair procedure and law. It is redundant with various aspects of a fair procedure and fair opportunity for justice; without this fairness neither right to life, nor personal liberty can sustain their existence.

5.138 The Indian Penal Code (I.P.C.) naturally belonged to the antiquated
theory of 1860 and our Constitution belonging to the humanists group of 1949 and a decade later was pitied against the penological theories of the ancient era. Naturally a marriage between the two was inevitable and the theory of death as a penalty "in rarest of rare cases" was its offspring through Bachan Singh v. State of Punjab.

5.139 The Judges in Mithu's case observed that there are 51 sections of the Indian Penal Code which provided for life imprisonment for different offences and section 303 being a mandatory provision all life convicts (whatever their offences may be) who commit murder are required to be sentenced to death. The framers of the Penal Code had only one kind of case in their mind and, that is, the commission of murder of a jail official by a life convict and section 303 was enacted in order to prevent assaults by the indigenous breed upon the white officers.

5.140 The Court observed that provision contained in section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution since the procedure by which section 303 authorises the deprivation of life is unfair and unjust and section is unconstitutional.

5.141 In section 302 the Court has option to impose either of the two alternative sentences subject to the rule that the normal punishment for murder is life imprisonment and that it is important to hear the accused on the question of sentence, but section 303 provides for a mandatory sentence of death and therefore neither section 354 (3) nor section 235 (2) of Criminal Procedure Code can possibly come into play. If the Court has no option but to impose the death sentence, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for
imposing the sentence of death. The Judges held that deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.

5.142 The first issue which was considered by the Court was whether there is any valid basis for classifying persons who commit murders while they are under the sentence of life imprisonment (in jails or outside) as distinguished from those who commit murders whilst they are not under the sentence of life imprisonment, for the purpose of making the sentence of death obligatory in the case of the former and optional in the case of latter?

5.143 A standardised mandatory sentence, that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. There appears to be no reason why in the case of a person whose case falls under section 303, factors like the age and sex of the offender, the provocation received by the offender and the motive of the crime should be excluded from consideration on the question of sentence.

5.144 The Judges have held that there are no valid justifying grounds for distinguishing a forger undergoing a sentence of life imprisonment and in another case a murderer undergoing life imprisonment. Many times there is nothing in common between such offences previously committed and subsequent offence of murder.

5.145 The profound influence of the new trends in judicial activism centering around Article 21 becomes apparent here but the profundity seems to have
assumed an exaggerated obsession whereas Article 21 may be the strongest force in our Constitution to safeguard liberties, it is nevertheless important to keep the edifice on strong foundation of mature thinking and microscopic analysis.

5.146 The point is that in the case of a forger or any other such offender the existence of criminal tendencies becomes established and therefore any further criminal act indulged in by him should be viewed seriously. It was exactly the contemplation of section 303 of the Indian Penal Code in awarding the death penalty to such criminals.

5.147 In the case of an ordinary person, committing murder, he is by legal theory presumed to be innocent until proved guilty. On his being proven guilty the existence of criminal tendency becomes established for the first time and therefore any latitude in judgement on the hope of reformation becomes acceptable, but not so in the former case where the offence is repetitive and undeterred even by an earlier sentence which by no norms can be taken as light. Various Acts are strewn with numerous mandatory provisions which are really essential for proper administration of law and order.

5.148 By a precedent like this our Court has now opened avenues for countless challenges to such mandatory provisions and the net effect will be crowded Courts, lame administration and disorderly society. Law by its very nature has to be mandatory and if it ceases to be mandatory it becomes ambiguous. The mandatory nature of law enters only at a stage when the guilt becomes established but in the process of establishing guilt full opportunity is available to the defendant so we cannot say that any legal deprivation is caused to the guilty. The judgement though considering Article 21, omits to reckon
its spirit.

5.149 How far a sentence of life imprisonment acts as a psychological deterrent? How it can help in creating human dignity? Even with death penalty as a sentence, cold blooded murders are taking place in society. A convict undergoing life imprisonment is a depressed and dejected person with long stretch of time span to be endured in confinement. Psychologically he becomes frustrated and desperate. In a few months, he gets over whatever feelings of remorse his conscience may have stirred and he becomes resigned to his fate. Such convicts are more sensitive to provocative situations, immune and thick skinned to considerations of personal existence and survival. For him, even after transportation for life, life does not hold any rosy prospects.

5.150 On the contrary, while serving the sentence he has more time to brood over his lot pessimistically and imagine what possibilities he would confront on his emergence from the prison cell? A scoffing society treating him as a pariah, a callous and insensitive family, already rehabilitated in life and accustomed to his absence and on the whole a greatly changed social vista, with new problems of beginning life. With this mental state, a life convict can become a fit case for causing a repeat murder and voluntary death. It gives rise to an aggressive suicidal tendency.

5.151 In conclusion it can be inferred that it is not necessary always that the Supreme Court and for that matter even the High Court should always strike down any law. These superior Courts should also adopt the procedure of issuing direction to the Central Government to reframe those laws which may be ultra vires of Part-III of the Constitution so that the legislative purpose is kept alive. Whereas it is important that there should be no laws
and procedures to imperil fundamental rights, it is equally important to recognise that without law the procedures, liberty and other fundamental rights cannot be safeguarded.

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NOTES. Chapter Five

5. Id. at p. 1542.
(A Bench of Five Judges was constituted - Fazal Ali, Mohajan, B.K. Mukherjee, S.R. Das and Chandrasekhara Aiyer JJ.)
7. Id. at p. 221.
8. Ibid.
9. The duty of the Court in relation to the Directive Principles of State Policy came to be emphasised in Kesavanand Bharati v. Union of India (AIR 1973 SC 1461), case in which it was laid down that there is no disharmony between the Directives and Fundamental Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of the welfare state, which is envisaged in the Preamble. The Courts therefore have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonise the social objective underlying the Directives with the individual rights.
Also see: State of Maryana v. Dorshana Devi. AIR 1979 SC 855.
11. Sec. 304(1) of Cr. P.C.: Where in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
12. Supra Note 10 at p. 1556.
13. Ibid.
14. 287 US 65 (1932)
15. Id. at p. 69.
17. Id. at p. 1381.
21. Id. at pp. 993-994.
Also see: Kirpal Singh Chhabro, Legal Aid in Criminal Proceedings, 22 JILI (1980) p. 371.
A Kenneth Pye, Recent Development In Legal Aid in America 9 JILI (1967) on p. 153.
G.O. Koppell, Legal Aid in India, 8 JILI (1966) p. 236.
24. Please see the following cases:


26. 2 Encyclopaedia Britanica 1046 (1968)


28. Please see :

29. Supra Note 27.

30. Id at p. 1600.

31. Ibid.

32. Id, at p. 1601.


   Also see : Anurog Baitha v. State of Bihar (F.B.), AIR 1987 Pat. 274.

34. Id. at p. 2149.


36. Id. at p. 691.


38. For further details please see :
   Justice P.N. Bhagwati, Human Rights In the Criminal Justice System, Vol. 27 (1985) JILI 1

   For critical commentary please see :


40. AIR 1979 SC 1518.


45. AIR 1981 SC 1675


46. See Supra Note 37.

47. (1973) 37 Law Ed. 2 d 56.


49. AIR 1987 Pat. 219.

50. The Full Bench was constituted of C.J. Sandhawalia, Shamsul Hasan and Ram Nandan Prasad.

51. Supra Note 69 at p. 234.

52. AIR 1987 Pat 274 (F.B.)

53. Also see :
   Sheela Borse v. Union of India. AIR 1986 SC 1773.

54. Please see the cases decided under the head - Prolonged Incarceration of A Prisoner Under Sentence of Death vis-a-vis Personal Liberty.

55. In the course of time the concept of death penalty has attracted the attention of
Academicians, lawyers and judiciary and vast literature has gathered around it. For further details please see:

6. A.R. Blackshield, Capital Punishment in India. 21 JILI (1979) 137.

59. Id. at p. 944.
60. Please see the comments on the above three cases given by eminent Advocate Hardoyal Hardy, entitled 'Death Penalty - A Twist In the Rope'. The noteworthy observation is as under:

"Luckily Krishna Iyer, J. despite his sense of humanism, is not on 'abolitionist'. In Ediga Anamma (1974) 4 SCC 443 and Bishan Das (1975) 3 SCC 700, he clearly accepted the view that where the crime is cruel and inhuman, a death sentence may be called for. The learned Judge in this judgement wants the death penalty to be inflicted in the case of three categories of criminals, namely, (1) for white collar offences, (2) for anti-social offences and (3) for exterminating a person who is a menace to the society, that is a 'hardened murderer'. Our penal laws do not provide for a death sentence for either white collar crimes or anti-social offences. But the remedy again lies with Parliament and not with Courts.

If Hon'ble Mr. Justice Krishna Iyer could feel, as he said in the cases of Ediga Anamma and Bishan Das that where the crime is cruel and inhuman, a death sentence may be called for, then one does not feel persuaded how he and his brother Judge (Desai J.) could award a lighter sentence in the three cases mentioned above."

Hardoyal Hardy, Death Penalty - A Twist In the Rope. Vol. XIX Nos. 1 - 4 (1979) 122. Also see : Paras Ram v. Punjab (unreported)
62. Supra Note 56 at p. 927.
64. Id at p. 930.
65. Ibid.
66. Id. at pp. 943-944.
67. Id. at p. 936.
68. Id. at p. 945.

What kind of cases would precisely fall within that category is in the very nature of things difficult to define and even to describe, but in Machhi Singh v. State of Punjab (1983) 3 SCC 470 an attempt was made by the Supreme Court (Thekkker J. for himself, Fozal Ali and Vardarajan, JJ) to identify, though not to crystallize, the area of those 'rarest of rare cases' in which death sentence can justifiably be imposed.

Cases decided by U.S. Supreme Court:

Furman v. Georgia (1972) 408 U.S. 238, 33 L. Ed. 2 d. 346.
McCaughia v. California 28 L. Ed. 2 d. 711.

70. See supra Note 63 at p. 923.
71. Id. at p. 923.
72. Bachan Singh v. State of Punjab. AIR 1982 SC 1325 (Justice Bhagwati had reserved his judgement (minority) till the reopening of the Court, but the judgement was not delivered till 1982).
73. Id. at p. 1391.
74. AIR 1982 SC 849.
77. Deena Doyal v. Union of India. AIR 1983 SC 1155. Three Judge Bench was constituted: C.J. Chandrachud, Justice R.S. Pathak and Justice Subyasachi Mukherjee.
78. Id. at p. 1187.
79. On the point of burden of proof eminent jurist Seervai feels that the judgement in Deena's case is erroneous. See H.M. Seervai, Constitutional Law of India (Third Ed.) Supplement on p. 415.
80. See Supra Note 77 on p. 1188.
82. Id. at p. 468.
83. T.V. Vatheswaran v. State of Tamil Nadu, AIR 1983 SC 361. Also see :


Death sentence not commuted by the Court "having regard to the magnitude, the gruesome nature of the offence and manner of perpetrating them", even though a period of five years had elapsed. The petitioners themselves were responsible for the delay.


Death sentence was commuted to life imprisonment.


Also see the following cases in which the petitioner had asked for commutation of death sentence into life imprisonment because of inordinate delay in execution of death sentence:


In this case only several months delay was considered as inordinate delay and was said to be sufficient in itself for commutation of death sentence, but in the end the Court refused to commute the sentence saying that it must be done by the executive.


In V. Rodrick v. State of West Bengal. AIR 1971 SC 1584 the delay of five years was held to be extremely excessive delay and the Court commuted the death sentence into life imprisonment.

In Neti Sreeramulu v. State of Andhra Pradesh (1974) 3 SCC 314 the Court analysed the facts to see as to who was responsible for the delay. The Court held that delay was caused by the respondent State and the appellent was not responsible for the delay and therefore death sentence was commuted to life imprisonment.

Also see the following cases:


An Author in an Article entitled 'Delay in execution of Death Sentence' has briefly analysed all the above mentioned cases and has given guidelines, which Judges must follow in commuting or not commuting the death sentence into life imprisonment on the ground of inordinate delay and which are as follows:

1. Delay should be counted neither from the date of the occurrence of the offence, nor from the date when death sentence was first imposed by the Sessions Court, but from the date when it is finally declared by the Supreme Court after disposing of appeal.

2. Even in case of delay in execution of death sentence, after the sentence is finally declared by the Supreme Court, it must be analysed as to who was responsible for delay - the State or the convict himself. Sometimes, it is the convict who files writ and review petitions repeatedly against the final judgement of the Supreme Court and causes delay in the execution.

3. The mitigating factor of delay should not be taken as supervening factor but it should be studied relatively. In cases of brutal and gruesome murder or when the offender is professional murderer and is a danger to society, the mitigating factor should not be applied.

4. The State must be asked to explain the delay and the convict must be asked to prove how the execution of death sentence would be harsh, unjust and unfair.

5. Judiciary should itself analyse the delay and take the decision whether death sentence should be commuted or not, it should not shift the responsibility on the executive.


85. See Supra Note 83 at p. 366.
86. See Supra Note 84 at p. 470.
87. AIR 1985 SC 231.
88. AIR 1983 SC 473.
89. Chief Justice Chandrachud, for himself, Justice Murtaza Fazal Ali, Justice Tulzapurkar, and Justice Varadarajan and Justice 0. Chinnappa Reddy delivered a separate concurring judgement.
90. See Supra Note 63.

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