CHAPTER IV

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The constitutionality of capital punishment here means that this punishment is no case violates any of its provisions irrespective of the fact whether it is fundamental right or any other right enshrined in the Indian Constitution. It declares certain fundamental rights of the individual. Some of these can only be claimed by a citizen of India; others apply equally to non-citizens also. A fundamental right as defined in the Constitution differs from a nonfundamental right in one vital respects; a fundamental right (subject to the qualifications defined in the Constitution itself) is inviolable whereas a nonfundamental right possesses no such characteristic. It is inviolable in the sense that no law, ordinance, custom, usage or administrative order can abridge or take away a fundamental right. A law which violates any of the fundamental rights is void, and they are binding on the Legislature as well as the Executive.¹

A declaration of fundamental rights in a Constitution may be of not much avail if there is no adequate machinery for their correct enforcement. In India like the United States this function has been assumed by the Supreme Court. The courts have the power to determine if a fundamental right as guaranteed by the

Constitution has been infringed. To ensure that the fundamental rights are properly protected, the Constitution has conferred power on the Supreme Court. Concurrently with the High Courts, the powers to grant most effective remedies whenever such rights appear to be or as being violated.

Right to Life:

'Right to life' is the most fundamental of all rights given to any living being. Equally it is the most difficult term to define. In an American case of Manna Vs. People of Illinois the U.S. Supreme Court has observed that the term "right to life" cannot be confined only to taking away of life. By the term 'life' means something more than mere animal existence.

The inhibition against its deprivation extends to all those links and faculties by which life is enjoyed. The provision equally prohibits the imputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

In Kharak Singh Vs. State of Utter Pradesh the Supreme Court held that the Article 21 means not merely the right to the continuance of a person's animal existence, but also a right to the possession of his organs- his arms and legs, etc. Our Constitution, though it recognises the 'right to life' however, does not create it through any specific article. Article 21 of

2. 94 U.S. 113.
3. AIR 1963 SC 1295.
4. Constitution of India, Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.
the Constitution does not prohibit capital sentence altogether, the court interferes in the question whether the present vague method of execution is violative of Article 21.

Mr. Justice Krishna Iyer, the Indian representative at the two-day conference called by Amnesty International at Stockholm to discuss the issue, argued against retention of capital punishment on legal, criminological and social grounds. The 'rites' and 'sanction' of law, however subtle, could not justify the taking of a human life. Even the very thought of it smacked of retributive barbarity and 'violent futility'. Also it was devoid of any moral alibi. The international conscience as voiced in the United Nations Declaration of Human Rights also accords the highest recognition to the basic right to live. The law of the land, however justice abiding, had not been successful in suppressing or reducing the commission of grave crimes.5

Such right to life had been recognised much before the Constitution of India came into existence. In the Magna Carta which the King John was forced to sign in 1215, it was demanded that "No man shall be taken or imprisoned, dismissed or outlawed, or exiled, or in any way destroyed, save by the lawful judgement of his peers or by the law of the land". This demand was reiterated in the Petition of Rights, 1628, and since then the observance of this principle has established what is known as the Rule of Law in England. The fifth Amendment to the Constitution of U.S.A. (1791)

declares that "No person shall be... deprived of his life, liberty or property, without due process of law".

The "right to live" substantially is now found almost in every country's Constitution. Its importance thus can be understood from this very fact. The phrase "due process of law" was really used in an American statute in 14th century (28 Edw. III,3) and framers of the American Constitution appear to have borrowed the phrase from there. But the "law of the land" as used in the English Constitution is somewhat different in meaning from "due process of law". The difference between these terms was well explained by Justice Black in chambers Vs. Florida6 as under:

"... A liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed from the popular hatred, and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried... Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty", wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed".

However, the term "established by law" used under Article 21 of our Constitution accepts the English principle of supremacy of the law, in preference to the American judicial review of legisla-

7. Ibid
tion, so far as personal liberty is concerned. Procedure established by law thus means a procedure as prescribed by the legislature.

In Jagmohan Singh Vs. State of Utter Pradesh the appellant pleaded that there was no "procedure established by law" to deprive a person of his right to life. Therefore, the death sentence is unconstitutional. A full Bench of 5 judges comprising Chief Justice S.M.Sikri, A.N.Ray, I.D.Dua, D.S.Palekar and M.H.Beg J. unanimously held:

"So far as we are concerned in this country we do not have, in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the judges of the Supreme Court of America are accustomed to apply "the due process" clause. Indeed what is cruel and unusual may, in conceivable circumstances, be regarded as unreasonable. But when we are confronted with serious problem not a few are found to hold that life imprisonment, especially, as it is understood in U.S.A. is cruel. On the other hand capital punishment cannot be described as unusual because that kind of punishment has been with us from ancient times right up to the present day though the number of offences for which it can be imposed has continuously dwindled. The framers of our Constitution were well aware of the existence of capital punishment as power to grant pardon, reprieve respite or remissions of punishment or to suspend remit or commute the sentence of any person convicted of an offence "in all cases where the sentence is a sentence of death".

It is an indisputable fact that there is nothing in the Constitution of India which expressly holds capital punishment an unconstitutional, though there are certain provisions in the

Constitution which suggest that the Constitutional scheme accepts the possibility of capital punishment. However, there are several provisions in the Constitution such as the Preamble, the Fundamental Rights, and the Directive Principles which can be relied upon for challenging the Constitutionality of capital punishment. The crux of the matter thus is that each one of us has an inherent right to life and none of us can be divested of this precious right. Still there are numerous legal luminaries who argue, that the capital punishment should be retained in the Indian Penal Code and it runs counter to one's right to life.

The court further observed:

"All these provisions clearly go to show that the Constitution makers had recognised the death sentence as a permissible punishment but also made Constitutional provisions for appeal reprieve and the like. But more important than these provisions in the Constitution is Article 21 which provides that no person shall be deprived of his life except according to the procedure established by law. The implication is very clear. Deprivation of life is Constitutionally permissible if done according to the procedure established by law. In the face of these indications of Constitutional postulates it will be very difficult to hold that capital sentence was regarded as so unreasonable or not in the public interest.

For the procedure established by law Justice Iyer observes that no code can rise higher than the Constitution and the Indian Penal Code can survive only if it pays homage to the super lex. The only correct approach is to read into Section 302 of the Indian Penal Code and Section 354(3) Criminal Procedure Code. 10 In Bachan

Singh's case, the court has observed that it cannot be said that this sentencing discretion of imposing a death sentence or life imprisonment with which the court is invested, amounts to delegation of its power of legislation by the Parliament. Therefore, Section 354(3) of the Criminal Procedure Code which lays down the procedure for death penalty does not violate Articles 14, 19 and 21 of the Constitution.

Section 354(3) of the Code of Criminal Procedure, 1973 marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of 10 years) and death penalty is an exception. In this context Section 235(2) is also relevant. Although sub-section (2) of section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that

12. Criminal Procedure Code, Section 354(3)- When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.
13. Supra note 2.
14. Criminal Procedure Code, Section 235(2)- If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provision of Section 360, hear the accused on the question sentence, and then pass sentence on him according to law.
if a request is made in that behalf by either the prosecution or the accused or by both the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence.

The procedure provided in the Criminal Procedure Code, 1973 for imposing capital punishment for murder and some other capital crimes under the penal code cannot by any reckoning, be said to be unfair, unreasonable and unjust.

In *Rajendra Prasad vs. State of Uttar Pradesh*¹⁵ the Supreme Court observed that a person is deprived of his right to life and fundamental freedom when he is hanged to death. His dignity is defiled when his neck is noosed and strangled. What does Section 302 of the Indian Penal Code do by death penalty to the sentence? It finally deprives him of his fundamental rights. Any deprivation of life or liberty through punishment must be validated by Article 21, 14 and 19. The Court further lays down that as regards to Article 21, it guarantees for fair procedure. Article 19 is based on reasonable restrictions of the deprivation of freedom to life and the last Article i.e. 14 gives us assurance of non-arbitrary and civilized punitive treatment. The court clarifies that "in connotation of these and other Articles of Part III the social justice promise of Part IV and the primordial proposition of human dignity set high in the preamble must play

１⁵. Supra note 10.
upon the meaning.\textsuperscript{16}

In Bachan Singh Vs. State of Punjab\textsuperscript{17}, Article 21 expanded and read for interpretative purposes clearly brings out the implication, that the founding fathers recognised the right of the state to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications, also, in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code.\textsuperscript{18}

Under the successive Criminal Procedure Codes which have been in force for about 110 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, because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same Constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would denigrate or defile "the dignity of the individual" within the contemplation of the preamble to the Constitution. On parity of reasoning, it cannot be said that

\textsuperscript{16} Ibid, p.930.
\textsuperscript{17} Supra note 11.
\textsuperscript{18} Ibid, p.900.
death penalty for the offence of murder violates the basic structure of the Constitution.

Further, Article 6, clause (1) and (2) of the International Covenant on Civil and Political Rights to which India acceded in 1979, do not abolish or prohibit the imposition of death penalty secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ipso facto legislation.

Thus, the requirements of these clauses are substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of our Constitution. India's commitment therefore does not go beyond what is provided in the Constitution the Indian Penal Code and the Criminal Procedure Code. The Penal Code prescribes death penalty as an alternative punishment only for heinous crimes which are not more than seven in number. Section 354(3) of the Criminal Procedure Code, 1973 in keeping with the spirit of the International Covenant, has further restricted the area of death penalty. India's penal laws, including the impugned provisions and their applications, are thus entirely in accordance with its international commitment.

The Constitutional attack reached a high water mark in this case. The death penalty was challenged on Articles 21, 19 and 14 of the Constitution. Justice Sarkaria speaking for himself and other judges delivered a majority judgement and opined that Article
21 if interpreted in accordance with principles as laid down in Maneka Gandhi case\textsuperscript{19} would read as under:

"No person shall be deprived of his life and personal liberty except according to fair, just and reasonable procedure established by valid law. In the converse positive form, the expanded Article will read as below: A person may be deprived of his life or personal liberty in accordance with fair, just reasonable procedure established by a valid law"\textsuperscript{20}.

In Maneka Gandhi Vs. Union of India\textsuperscript{21} a seven-Judge-Bench of Supreme Court had given a new interpretative dimension to the provisions of Articles 21, 19 and 14 and their inter-relationship. According to this new interpretation, every law of preventive detention both in its procedural and substantive aspect must pass a test of all the three Articles. But this argument founded on the expansive interpretation of these Articles was not available when Jagmohan's case was decided. Further, India had since acceded to the International Covenant of Civil and Political Rights adopted by the General Assembly of the United Nations and which came into force on December 16, 1976 by virtue of which, India and the other 47 countries who were party to it stood committed to a policy for abolition of 'death penalty'.

However, Krishna Iyer, J., in his separate concurrent opinion, was prepared to go the whole way in extending the guarantee in Article 21 not only to 'procedure' as being fair

\textsuperscript{19} AIR 1978 SC 597.  
\textsuperscript{20} Supra note 11 p.930.  
\textsuperscript{21} Supra note 19.
and just, but also to 'law' as being 'reasonable'; it meant in a way reading 'procedure established by law' as almost amounting to 'due process of law' in the American Sense.²²

Regarding this in Bachan Singh case²³ the majority held:

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

(b) While considering the question of sentence to be imposed for the offence of murder under Section 303 Indian Penal Code. The Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds but not otherwise, that the offence is of an exceptionally heinous character, and constitutes on account of its design manner of execution, a source of grave danger to society at large, the court may impose the death sentence.

The court however, rejected by majority, Justice Bhagwati's dissent challenging the validity of Section 302 of the Indian Penal Code.

On study of the case we find that there arose the following two major questions for settling the Constitutional validity, namely (1) whether death penalty provided for the offence of murder in Section 302 of the Indian Penal Code is unconstitutional? (2) If the answer to the foregoing question be in the negative, it would lead to another question: whether the sentencing provided in Section 354(3) of the Criminal Procedure Code, 1973 (2 of 1974) is

²³ Supra note 11, p.905.
unconstitutional on the ground that it invests the court with unguided and unbridled discretion and allows death sentence to be arbitrary or freakishly imposed on a person found guilty of murder or any other capital offence, punishable under the Indian Penal Code with death, or in the alternative, with imprisonment for life?

Justice Sarkaria speaking for the majority decision replied these questions very subtly as below. As regards the answer to question (i) the following arguments were put before the court:

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

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

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

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

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

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

As regards the Constitutional Validity of Section 302 Justice Sarkaria replied that according to the retentionists this is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theoretically, the court said, such errors of judgement
cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. However, in India, ample safeguards have been provided by law and the Constitution which almost eliminates the chances of an innocent person being convicted and executed for a capital offence.

So far as (b) is concerned death penalty does not serve any penological purpose. The court held that several judicial decisions recognised the deterrent value of death penalty. In Paras Ram Vs. State of Punjab, the case of sacrifice of a four year old son by a fanatic father, it was observed by V.R. Krishna Iyer, J, that secular India must administer shock therapy to such antisocial piety, when the manifestation is in terms of inhuman and criminal violence. In Jagmohan's case, it was observed that prevalence of diabolical murders speak for the inevitability of death penalty not only by way of deterrence but also as a token of emphatic disapproval of the society. In Ediga Anamma Vs. State of Andhra Pradesh, the court recognised that deterrence through the treat of death may still be a promising strategy in some frightful areas of murderous crime. In Shiva Mohan Singh Vs. State (Delhi Administration), the deterrent effect of death penalty was reiterated. In Charles Sobraj Vs. Superintendent, Central Jail, Tihar, New Delhi, the court observed that deterrence

25. Supra note 8.
27. (1977)3 SCR 172.
28. (1979)1 SCR 512.
was one of the vital considerations of punishment. In Trop vs. Dulles, Brammam, J. of the Supreme Court of the United States, observed that "among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution". In Furman vs. Georgia, Stewart, J, had taken the view that death penalty serves a deterrent as well as retributive purpose. In Gregg vs. Georgia, Stewart, J, reiterated his views.

Sir James Fitzames Stephen, who was concerned with the drafting of the Indian Penal Code, observed that "no other punishment deters men so effectively from committing crimes as the punishment of death". Even Manchese De Cesare Bonesana Beccaria did concede in his Treatise Dei Delitti a della Pana (1764) that capital punishment would be justified in two instances, firstly, if an execution would prevent a revolution against popularly established Government; and secondly, if an execution was the only way to deter others from committing a crime. Thersten Sellin, in the last part of his book Capital Punishment, observed that "in the last analysis, the only utilitarian argument that has to be given attention is one that defends capital punishment as being a uniquely powerful means of protecting the community".

**Indiscrimination In Discretion:**

Article 14 of the Constitution guarantees to every person

the right not to be denied equality before the law or the equal protection of the laws. The first expression "equality before law", is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. No person is above the law. "Equal protection of the laws" is a corollary of the first expression. It means that equal protection shall be secured to all persons within the territory of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. It has been said that "the equal protection of the law" is a pledge of a protectional guarantee of equal law.33

Equality before law or equal protection of laws means that no person shall be discriminated against unless the discrimination is required to achieve equality. Capital sentence is generally challenged constitutionally invalid on the ground of either the law itself or the procedure laid down for implementing that law claiming it to be unconstitutional under Articles 21, 14 and 19.

The discretion given to the Judges for imposing punishment of either imprisonment for life or death penalty does not show any class legislation because the discretion is without any favouratism and discrimination. As regards the death penalty court has to show special reasons for awarding the death sentence. So no question for unconstitutionality on the ground of Article 14 arises.

33. Shukla, V.N.,op.cit.,p.29.
In Jagmohan's case, the Constitution Bench held:

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

In India, Constitutionality of death penalty has been challenged a number of times, mainly, in pursuance of Article 21, 14 and 19. In Budhan's case, Judicial discretion was challenged. Justice S.R. Das rejected the challenge. He quoted Chief Justice Stone in Snowden Vs. Hughes.

The Judicial decision must necessarily depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to be a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.

In Rajendra Prasad Vs. State of Uttar Pradesh, Justice Krishna Iyer held that punishment by deprivation of life and liberty must be validated by Article 21, 14 and 19. The second is based on reasonableness of the deprivation of freedom to live and exercise the seven liberties. Here Honourable Justice points

34. Supra note 8.
35. AIR 1955 SC 191.
37. Supra note 10.
out that the punishment must be reasonable. The reasonableness depends on the facts and circumstances of a particular case. All cases cannot be put on the same line. If discretion is taken away from the Judges it will again be unconstitutional.\textsuperscript{39}

In \textit{Jagmohan's case},\textsuperscript{40} the court has held that if the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime it will be impossible to say that there would hardly be any discrimination since facts and circumstances of one case can hardly be the same as those of another.

Crime and penal policy have to obey the set out above and we may gain Constitutional light on the choice of 'life' or 'death' as appropriate punishment. Article 14 surely ensures that neither principled sentence of death, nor arbitrary or indignant capital penalty, shall be imposed. Equal protection emanates from equal principles in exercise of discretion. In other words the constraint of consistency and the mandate against unreasonable disregard of material circumstances are implicit lest discretion should attract the acrid epigram of judicial caprice.

Moreover the dignity of the individual shall not be desecrated by infliction of atrocious death sentence merely because

\begin{footnotes}
39. Supra, Chap.II, Note 64.
40. Supra Note 2.,p.948.
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there is a murder proved although crying circumstances demand the lesser penalty. To exemplify: supposing a boy of fifteen being incited by his elder brothers goes with them to chase a murderer of their father and after hours of search confronts the villain and vivisects him in blood-thirsty bestiality. Do you hang the boy, blind to his dignity and tenderness intertwined?

Equality must not be taken to mean flat uniformity. The element of flexibility and choice in the process of adjudicating is precisely what justice requires in many cases. Flexibility permits more compassionate and more sensitive responses to differences which ought to be counted in applying legal norms, but which get buried in the gross and round off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows individualization of law and permits justice at times to be handmade instead of mass-produced.

Justice Bhagwati in Bachan Singh's case, reiterates that Section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Article 14 and 21 of the Constitution since it does not provide any legislative guideline as to when life should be permitted to be extinguished

41. Supra note 11.
by imposition of death sentence.

But Justice Iyer in **Rajendra Prasad's case**, 42 observed:

"... we search for guidelines within Section 302 Indian Penal Code read with Section 354, Criminal Procedure Code, and find that ordinarily, for murder a lifeterm is appropriate save where special reasons are found for resorting to total extinction of the right to life and farewell to fundamental rights. Public order and social security must demand it. That is to say the sacrifice of a life is sanctioned only if otherwise public interest, social defence and public order would be smashed irrevocably. Social justice is rooted in spiritual justice and regards individual dignity and human divinity with sensitivity. So, such extraordinary grounds alone constitutionally qualify as 'special reasons' as leave no option to the court but to execute the offender if the state and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, howsoever gruesome the killing or pathetic the situation unless the inherent testimony crossing from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a blood-thirsty tiger, he has to quit his terrestrial tendency. Exceptional circumstances, 43 beyond easy visualisation, are needed to fill this bill."

The death is considered to be an adieu to fundamental rights. Restrictions on fundamental rights are permissible if they are reasonable. While sentencing you can not be arbitrary since what is arbitrary is per se unequal. You can also not be unusually cruel for that spells arbitrariness and violate Article 14. Justice Douglas has rightly pointed out that there is an increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual punishment". He further remarked that penalty should be considered unusually imposed if it is

42. Supra note 10.
43. Idem.
administered arbitrarily or discriminatorily". 44

In Maneka Gandhi's case, 45 the Supreme Court quoted E.F. Royappa Vs. State of Tamil Nadu 46 that "from a positivistic point of view, equality is antithesis to arbitrariness. In fact equality and arbitrariness are born enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch".

For the last decade judiciary in India has been suo moto tending towards minimising the imposition of death penalty. The continued efforts for limiting discretion is clear indication for achieving this goal. In Bechan Singh's case 47, Sarkeria speaking for himself and on behalf of Justice Chandrachud C.J., A.C. Gupta, N.L. Untwale J. for restricting death penalty used the expression "Rarest of rare". Here he meant that death sentence should not be inflicted frequently but it could be imposed only in very rare cases. However, the court quoted to elucidate, as to what kind of murders could qualify as "rarest of the rare". This challenge was to confront the court later in Machhi Singh Vs. State of Punjab 48. Justice Thakkar speaking for the court was impelled to attempt a definition of the "rarest of the rare" case. He very lucidly and elaborately outlined the following five guidelines under which the sentence of death might be necessary.

44. Supra note 30.
45. Supra note 19, p.624.
46. AIR 1974 SC 555.
47. Supra note 11.
(i) Manner of Commission of murder— that is where the victim is roasted alive in the house, or subjected to inhuman torture or cruelty to bring about death, or the body of the victim is cut into pieces or dismembered in a fiendish manner.

(ii) Motive— which evinces depravity and meanness, e.g. a hired assassin, a cold-blood murder to inherit property, or gain control over property of a ward, or a murder committed for betrayal of the motherland.

(iii) Anti-social or socially abhorrent nature of the crime where a scheduled caste or minority community person is murdered in circumstances which arouse social wrath; or 'bride burning' or 'dowry death' or murder is committed in order to remarry for extracting dowry or to marry again out of infatuation.

(iv) Magnitude of the crime— that is multiple murders, say of all or almost all members of a family or a large number of persons of a particular caste, community or locality.

(v) Personality of the victim of murder— that is an innocent child, a helpless woman or a person rendered helpless by old age or infirmity, when the victim is a public figure generally loved and respected for services rendered by him and murder is committed for political or similar ends besides personal reasons.

These are apparently the judicially evolved guidelines which are to assist the courts in determining sentence.

Thus the discretion to choose between "death and life imprisonment" has not been exercised with pragmatism that it calls for. The discretion should not be allowed to become arbitrary particularly in the area of capital punishment, which may violate the Constitutional guarantee of equality under Article 14 of the Constitution. There are cases where the sentence has been reduced to life imprisonment based on very unscientific reasoning, and cases are not spares where commutation is refused though the accused deserves such mitigation of sentence.
However, it is unfortunate that presently there are no penological guidelines in the statute for preferring the lesser sentence under section 302 of the Indian Penal Code, it being left to ad-hoc forensic impression to decide for life or for death. Every one of us has his own philosophy of law and life, moulded and conditioned by his own assessment of the performance and potential of law and garnered experience of life. In an English case of *State Vs. Cummins* Lord Candon who is considered to be the most learned, fairest and purest English judge observed:

"... that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon Constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature can be liable".

In *Rajendra Prasad's case* Justice Iyer has analysed the different factors which have prevailed with the judges from time to time in awarding or refusing to award death penalty and shown how some factors have weighed with one judge, some with another, some with a third and so on, resulting in chaotic arbitrariness in the imposition of death penalty. In this connection he observed:

"Law must be honest to itself. It is not true that some judges count the number of fatal wounds, the nature of the weapon used, others count the corpses or the degree of horror and yet others look into the age or sex of the offender and even the lapse of time between the trial courts...

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50. (1865) 36 M 263.
51. Ibid, at p.278.
award of death sentence and the final disposal of the appeal. With same judges, motives, provocations, primary or constructive guilt mental disturbance and old feuds the savagery of the murderous movement of the plan which has preceded the killing, the social milieu the submitted calculous stranger still a good sentence of death by the trial court is sometimes upset by the Supreme Court because of Law's delays." 52

Recently Section 303 53 of the Indian Penal Code, 1860 was declared unconstitutional on the very ground that there is no discretion of the court in awarding penalty to the life convict. In 1983 a full Bench of the Supreme Court judges disposed of seven cases by a common judgement. Unanimously in Mithu Vs. State of Punjab. 54 The court held that Section 303 is violative of Article 14 and 21 of the Constitution and should be struck down. Section 303 Indian Penal Code has the provision of law which had made the penalty of death compulsory. It had left no discretion with the judge. All the offenders cannot be put on the same footing. It is arbitrary and infringing all rights available under the Constitution and therefore unequal.

The last part of Section 307 of the Indian Penal Code prescribed that when the offence of attempt to murder is committed by a person under sentence of imprisonment for life, he 'may' if hurt is caused, be punishable with death. This part would have had the same effect as Section 303 of the Indian Penal Code as if

52. Supra note 10.
53. Supra, chap. II note 64.
54. (i) Ibid
   (ii) Mithu Vs. Union of India
   (iii) Surjeet Singh Vs. State of Punjab
   (iv) Surjeet Singh Vs. Union of India
   (v) Munawar Harun Shah Vs. State of Maharashtra
   (vi) Javed Ahmed Abdul Hamid Pawal Vs. State of Maharashtra
   (vii) Karnail Singh Vs. State of Punjab.
it had left no discretion with the judge. The use of the word 'may' in Section 307 does not make it mandatory instead renders the discretion with the judge.\textsuperscript{55}

Striking down Section 303 of the Indian Penal Code and holding it invalid and unconstitutional on the ground that the section excludes judicial discretion, Justice Chandrachud observed:

"The scales of justice are removed from the hands of judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irretrievable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised, arbitrary and oppressive Section 303 is such a law and it must go the way of all bad laws."\textsuperscript{56}

In Rajendra Prasad's\textsuperscript{57} case Justice Iyer opined that granting discretion to a judge to make choice between death sentence and life imprisonment on "special reasons" under Section 354(3) of the Indian Penal Code, 1973, would be violating Article 14 of the Constitution which condemns arbitrariness. He further said that such stark brevity leaves deadly discretion but beams little legislative light how the court shall handle the sentence or why the lesser penalty shall be preferred. This facultative fluidity of the provision reposes trust in the court to select. He concluded that the capital punishment would not be justified unless it

\textsuperscript{55} See Bhagwan Dux Singh Vs. State of U.P., 1984 Cr.L.J. 928.  
\textsuperscript{56} Supra p.484 Chap.II Note 64.  
\textsuperscript{57} Supra Note 10, p.924.
was shown that the criminal was dangerous to the society. He in a very metaphoric language explains the use of discretion as under:

"... And 'discretionary' navigation in an unchartered sea is a hazardous undertaking unless recognised and recognisable principles, rational and Constitutional, are crystallised as 'interstellar legislation' by the highest court. The flame of life cannot flicker uncertain; and so Section 302 Indian Penal Code must be invested with pragmatic concreteness that inhibits ad hominem responses of individual Judges and is in penal conformance with Constitutional norms and world conscience within the dichotomous frame work of Section 302 Indian Penal Code upheld in Jagmohan Singh Vs. State of Uttar Pradesh (AIR 1973 SC 947) we have to evolve working rules of punishment bearing the markings of enlightened flexibility and societal sensibility. Hazy law, where human life hangs in the balance injects an agonising consciousness that judicial error may prove to be 'crime' beyond 'punishment'. And history bears testimony to reversal of court verdict by discovery of time". 58

In Ediga Annamma, 59 this court did set down some working formulae where by a synthesis could be reached as between death sentence and life imprisonment. Notwithstanding the catalogue of grounds warranting death sentence as an exceptional measure, 'life' being the rule, the judicial decisions have been differing (and dithering) at various levels, with the result the need for a thorough reexamination has been forced on us by counsel on both sides.

But where life and death are at stake, in consistencies which are understandable may not be acceptable. The hard evidence

58. Idem
59. Supra note 26.
of the accompanying "Kit of cases" compels the conclusion that in contemporary India, Mr. Justice Douglas argument in Furman Vs. Georgia, (1972, 408 US 238) is correct: that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment; and that therefore— in Indian Constitutional terms and in spite of Jagmohan Singh Vs. State of Uttar Pradesh, (AIR 1973 SC 947)— the retention of such a system necessarily violates Article 14's guarantee of "equality before the law". 60

Justice Iyer in this very case crystallises the positive indicators against death sentences under Indian Law currently. Where the murderer is too young or too old the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting impact may in special case, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive (i.e. combining the "murder" provision with the "unlawful assembly" provision), ... as again (if) the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life even life where a just

60. Idem
cause or real suspicion of wife's infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use the horrid features of the crime and hapless, helpless state of the victim, and the like, attract the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society.

A legal policy on life or death cannot be left for adhoc mood or individual predilection and so we have sought to objec-tify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.61

Reasonableness of Capital Punishment:

Although the word "reasonableness" has no where been defined under the Constitution but our judges have always tried to explain it since the very enforcement of the Constitution. The test of reasonableness has to be applied to each individual, statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. With the reservations that no absolute definition of the expression reasonableness is possible, we may here summaries some of the principles62 that the Supreme Court has affirmed in ascertaining the reasonableness of restrictions on the exercise of the rights

secured under Article 19 of the Constitution.

(i) Reasonableness demands proper balancing.
(ii) Reasonableness must be in both substantive and procedural part of the law.
(iii) Reasonableness should be on objective concept.
(iv) Reasonableness should be seen in restrictions and not in law.
(v) Reasonableness includes total prohibition.
(vi) Reasonableness in American due process.
(vii) Reasonableness and the Directive Principles of State Policy.

As regards (i) the limitation upon a person in the enjoyment of a right it should not be arbitrary or of an excessive nature.

Regarding reasonableness in both substantive and procedural part of law, the court is too see the nature of restriction and the procedure prescribed by the statute for enforcing the restriction on the individual freedom. Reasonableness must be based on objective concept. It means that reasonableness must be determined in an objective manner and from the standpoint of the interest of general public and not from the point of view of the person upon whom the restrictions are imposed.

Regarding restriction it includes cases of prohibition and the state can establish a law, purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction.63 The restriction imposed 'in carrying

63. See, Narendra Kumar Vs. Union of India, AIR 1960 SC 430.
out the Directive Principles of State Policy laid down in the fourth part of the Constitution is a point in favour of reasonableness of restrictions.64

Then the word reasonableness coincide with the judging of "due process" used in the American Constitution. Even Constitution framers deliberately avoided the use of the expression "due process". The test of reasonableness has to be considered in each case in the light of the right taken away for the purpose of the restriction.

In Rajendra Prasad case, the court observed that- Article 19 is a lighthouse with seven lamps of liberty throwing luminous indications of when and when only the basic freedoms enshrined therein can be utterly extinguished. The judge who sits to decide between death penalty and life sentence must ask himself: Is it 'reasonably' necessary to extinguish his freedom of speech, of assembly and association, of free movement, by putting out finally the very flame of life? It is Constitutionally permissible to swing a criminal out of corporeal existence only if the security of state and society, public order and the interests of the general public compel for that course as provided in Article 19(2) to (6). They are the special reasons which section 354(3) speak of. Reasonableness as envisaged in Article 19 has a relative connotation dependent on a variety of variables- cultural, social economic and otherwise. We feel it necessary to state here that

64. Mohammed Hanif Qureshi Vs. State of Bihar, AIR 1958 SC 731, at p.739.
what is reasonable at a given time or in a given country or in a given situation of cases may not be the same on other occasions or in other cultural climate. Indeed that is the unspoken but inescapable command of our Constitutional system.

The counsel appearing on behalf of the appellant raised the question of Constitutional impermissibility of the death sentence for murder. In the first place he contended that the death sentence puts an end to all fundamental rights guaranteed under clauses (a) to (g). Sub clause (1) of the Article 13, therefore, with regard to Capital sentence is unreasonable and not in the interest of general public. Secondly, he contended that the discretion invested in the judges to impose death sentence is not based on any standard or policy required by the legislature for imposing capital punishment in preference to imprisonment for life. In his submission this was a stark abdication of essential legislative function, and, therefore, section 302 of the Indian Penal Code is violated by the vice of excessive delegation of essential legislative function.

It was submitted that freedom to live is basic to all the seven freedoms and since the enjoyment of these freedoms is impossible without conceding freedom to live, the latter cannot be denied by any law unless such law is reasonable and is required in public interest. It was, therefore, contended that unless it was shown that the sentence of death for murder passed is the test of reasonableness and general public interest it would not be a valid law.
In Jagmohan's case the court discussed the case of *Furman vs. Georgia*\(^65\) in detail where the learned judges by a majority of 5 to 4 set aside the sentences of death with which they were concerned. It was only Brennan and Marshal, J.J. who were prepared to outlaw capital punishment on the ground that it was an anachronism degrading to human dignity and unnecessary in modern life. The other three judges namely Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice White who formed the majority along with Brennan and Marshall J.J. did not take the view that the Eighth Amendment prohibited capital punishment for all crimes and under all circumstances Mr. Justice Douglas indeed held that death penalty contravened the Eighth Amendment but his judgement is not capable of being read as requiring the final abolition of capital punishment. The minority of four judges namely Burger, C.J., Blackmun, Powell and Rehnquist JJ. held that death penalty did not contravene the Eight Amendment. At the end of the judgement Justice Douglas made it clear that he was not considering in that case whether mandatory death penalty would be Constitutional if it was enforced even handedly and in a non-discriminatory manner. It is, thus, concluded that although the death sentence in that case was set aside by a majority (three out of five judges) they did not consider it necessary to outlaw capital punishment on the social and moral considerations which prevailed upon the other two judges namely Brennan and Marshall JJ. In short, even when the

\(^{65}\) Supra note 30.
court was presented with a wealth of evidence compiled by sociologists and research workers in refutation of the necessity of retaining capital punishment only two judges out of nine could be persuaded to hold that capital punishment *per se* is Constitutionally impermissible.

The policy of law in India has been, as regards most crimes, to fix a maximum penalty which is intended only for the worst cases and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach, or recede from the maximum limit. The exercise of this discretion is a matter of prudence and not of law but an appeal lies by the leave of the court of Criminal Appeal against any sentence not fixed by law, and if leave is given, that can be altered by that court.

Absence of discretion with regard to the sentence raised strong criticism in England because it was recognised, as was done in many other countries that death penalty was not the only appropriate punishment for murder. A Royal Commission was thereupon appointed in 1949 to consider and report whether liability under the Criminal Law in Great Britain to suffer capital punishment for murder should be limited or modified and if so to what extent and by what means. The Report was published in 1953. The Commission found it impossible to improve the existing position either by redefining murder or by dividing it into degrees.
Alike western countries in India also there was a great uprour and movement over the abolition and retention of the capital sentence. In pursuance of the western approach a bill to abolish in 1931 an abolition bill was put before the legislative Assembly by Sri Gaya Prasad but motion about capital punishment introduced in the Lok Sabha in 1956. It was rejected in November 23, 1956. Similarly a resolution for the abolition of capital punishment was introduced in R.S. in 1958 but the same was withdrawn after debate. Later in 1961 a similar resolution was again moved in the Rajya Sabha, but negatived by a voice vote.

The question was then referred to the Law Commission of India (comprising Judges and Jurists). They submitted their report in 1967. The Law Commission of India come to the conclusion that having regard to the conditions in India, we could not risk the experiment of abolishing capital punishment. Capital punishment said this expert body, should be retained in the present state of the country.

In Rajendra Prasad's case the majority view was that it is Constitutionally permissible to swing a criminal out of corporeal existence only if the security of the state of society, public order and the interests of the general public compel that course as provided in Articles 19(2) to 19(6) of the Constitution. The Supreme Court while dealing with this passages in Bachan Singh's

66. Supra note 10.
67. Supra note 11.
case remarked that our objection is only to the word 'only' while it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of state and society, public order and 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 the imposition of death penalty on murderers who don't fall within this narrow category is constitutionally impermissible.68

Further in Jagmohan Singh's case the court was agreed with the observations that "standardisation" of the sentencing process is well nigh impossible. In this case the court has held that this sentencing discretion is to be exercised judiciously on well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. "By well-recognised principles" the court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.

The legislative changes since Jagmohan's case do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible

68. Ibid, p.944.
69. Supra note 8.
from Section 354(3) and 235(2), namely: (1) the extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. 70

In Jagmohan Singh's case the court has held that if a murder is diabolically conceived and cruelly executed, it would justify the imposition of the death penalty on the murderer.

In Rajendra Prasad's case the court quoted the 42nd Report on Revision of Indian Penal Code, 1972 in reference to the "aggravating circumstances" laid down under its Section 302, in which the accused should be punished with death sentence. However the court observed that it would prefer not to fetter the judicial discretion by attempting to make an exhaustive enumeration one way or the other. 71

70. Ibid
71. Section 302 under 42nd Report of Law Commission revised I.P.C. 1972 (passed by Rajya Sabha): (1) Whoever commits murder shall save as otherwise provided in sub-section (2), be punished with imprisonment for life and shall also be liable to fine. (2) Whoever commits murder shall-
(a) if the murder has been committed after previous planning and involves extreme brutality; or
(b) if the murder involves exceptional depravity; or
(c) if the murder is of a member of any of the armed forces of the union or of a member of any police force or of any public servant and was committed-
(i) while such member or public servant was on duty, or
(ii) in consequence of anything done or attempted to be done by such member of public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

Contd...
The court however agreed in Bachan's case that the following are "undoubtedly relevant circumstances and must be given great weight in the determination of sentence".

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused, if the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The state shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the face of facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

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

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

The court further observed that the provision of death penalty as an alternative punishment for murder in Section 302 of the Indian Penal Code is not unreasonable and it is in the public interest. Therefore, it cannot be held that the impugned provision in Section 302 violates either the letter or the ethos of Article 19 Contd...

(d) if the murder is of a person who had acted in the lawful discharge of this duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance under section 37 or section 129 of the said code; or

(e) if the murder has been committed by him, while under sentence of imprisonment for life, and such sentence has become final, be punished with death or imprisonment for life, and shall also be liable to fine.

Contd...
of the Constitution. 72

The Penal Code particularly those of its provisions which cannot be justified on the grounds of reasonableness in reference to any of the specified heads such as "public order" in clauses (2), (3) and (4) is not a law imposing restrictions on any of the rights conferred by Article 19(1). There are several offences under the Penal Code, such as theft, cheating, ordinary assault, which do not violate or affect 'public order' but only specific individuals as distinguished from the public at large. It is by now settled that 'public order' means even tempo of the life of the community. That being so, even all murders do not disturb or affect 'public order'. Some murders may be of purely private significance and the injury or harm resulting therefrom affects only specific individuals, and, consequently, such murders may not be covered by 'public order' within the contemplation of clauses (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say that punishment of such murderers is not specified as a head in clauses (2) to (4) on which restriction on the rights mentioned in clause (1) of the Article may be justified.

Contd...

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

72. Supra note 11, pp.899-902.
The real distinction between the areas of 'law and order' and 'public orders' lies not merely in the nature or quality of the act, but in the degree and extent. Violent crimes similar in nature, but committed in different contexts and circumstances might cause different reactions. A murder committed in a given circumstance may cause only a slight tremor, the wave length of which does not extend beyond the parameters of law and order. Another murder committed in a different context and circumstances may unleash a tidal wave of such intensity, gravity and magnitude, that its impact throws out of gear the even flow of life. Nonetheless, the fact remains that for such murders which do not affect "public order", even the provision for life imprisonment in Section 302, Indian Penal Code, as an alternative punishment would not be justifiable under clauses (2), (3) and (4) as a reasonable restriction in the interest of 'public order'. Such a construction must, therefore, be avoided. Thus construed, Article 19 will be attracted only to such laws, the provisions of which are capable of being tested under clauses (2) to (5) of Article 19.

Assuming arguendo, that the provisions of the Penal Code, particularly those providing death penalty as an alternative punishment for murder, have to satisfy the requirements of reasonableness and public interest under Article 19. The onus of satisfying the requirements under Article 19 lies on the person challenging the validity.\textsuperscript{73} There is initial presumption in favour

\textsuperscript{73} Idem
of the Constitutionality of statute and throws the burden of rebutting that presumption on the party who challenges its Constitutionality on the ground of Article 19. Behind the view that there is a presumption of Constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy making.

Whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the inner most recess of their minds. Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one.

To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the Constitutionality of the impugned provisions as to
death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Article 19 and 21 of the Constitution, it is not necessary to express any categorical opinion, one way or the other, as to which of the two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose.

If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in the Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty.

If death penalty is still a recognised legal sanction for murder or, some types of murder in most civilised countries of the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent
Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for presentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and were presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. Therefore, it can be concluded that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.
Pardon etc. Under Indian Constitution:

Under Articles 72\textsuperscript{74} and 161\textsuperscript{75} of the Constitution the President of India and the Governor of a State have been given powers to grant pardon, reprieve, respite or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. In the former case it may concern (a) all cases where the punishment or sentences is by a court martial,\textsuperscript{76} (b) all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; and (c) all cases where the sentence is a sentence of death. However, in the case of the

\begin{itemize}
\item[74.] The Constitution of India, Article 72: The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—
\begin{enumerate}
\item[(a)] in all cases where the punishment or sentence is by a court martial;
\item[(b)] in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
\item[(c)] in all cases where the sentence is a sentence of death.
\end{enumerate}
\item[(2)] Nothing in sub clause (a) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a state under any law for the time being in force.
\item[(3)] Nothing in sub clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a state under any law for the time being in force.
\end{itemize}

\begin{itemize}
\item[75.] Ibid, Article 161: The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends.
\item[76.] See, Section 177, Air Force Act, 1950 and Section 179 of the Army Act, 1950.
\end{itemize}
Governor of a State it extends against any law relating to a matter to which the executive power of the state lies.

Because, it is a residuary sovereign power, the President or the Governor does not exhaust his power under Article 72 or 161 (as the case may be) after rejecting one petition for pardon, commutation or the like. There is nothing to debar him from reconsidering the relevant circumstances such as the change in world opinion against capital punishment.77 The effect of pardon and amnesty is to absolve the person not only from the penal consequences of the offence but also from civil disqualifications, such as loss of office following his conviction,78 But a suspension or remission of the sentence can not have the latter effect.79 A pardon not only removes the punishment but, in contemplation of law places the offender in the same position as if he had never committed the offence. It is in fact, an act of grace. It cannot be demanded as a matter of right. The effect of pardon is set out in the following words by Field, J.

"A pardon releases both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is an innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, if granted after conviction, it removes the penalties and disabilities,

and restores to him all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. This granting of pardons is an executive act and not a judicial act, it follows therefore that the exercise of this power would not in any way alter the judgement of the court quo judgement, and that the exercise of such right would not in any way interfere with the course of justice and that the courts are due to adjudicate upon the guilt or otherwise of the concerned person. It carries with it the lesser powers, for the President can also grant the following:

(i) reprieves, i.e., a temporary suspension of the punishment fixed by law;
(ii) respite, i.e., postponement to the future the execution of a sentence;
(iii) commutation, i.e., changing a punishment to any other different from that originally proposed; and
(iv) remission, i.e., reducing the amount of punishment without changing the character of the punishment.

The executive has been invested with these powers on a account of very important reason which has been explained by the Chief Justice in an American case of Ex parte Grossman as mentioned below:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerable of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in

FO. Ex Parte Garland, 1873, 18 Ed. 366 (quoted in the Constitution of India by V.N. Shukla.
81. 367 US 83.
popular governments, as well as monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgement. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whosoever has to make use of it he must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer of the nation with confidence that he will not abuse it.\textsuperscript{82}

The appellant in \textit{Sarat Chandra Radha Vs. Khagendranath}, \textsuperscript{83} was sentenced to three years imprisonment but the Assam Government remitted the punishment to that already undergone which came to about 16 months.\textsuperscript{84} The question for determination was: Is the appellant disqualified from being a candidate at the election? The Supreme Court pointed out that the legal effect of the judicial reduction of a sentence and the executive remission of that sentence are quite different in their nature. Had the court in exercise of its appellate or revisional jurisdiction reduced the sentence passed by the trial court so as to be less than two years, the appellant would not have been disqualified for being a candidate under the Act.

In \textit{K.M. Nanavati Vs. State of Bombay}, \textsuperscript{85} it has been held that the power to suspend a sentence by the Governor under Article 161 is subject to the rules made by the Supreme Court in respect of cases which are pending before it in appeal. In that case, the Governor had in exercise of the power under Article 161, suspended

\textsuperscript{82} Ibid
\textsuperscript{83} AIR 1961, SC 334.
\textsuperscript{84} Representation of Peoples Act, 1951 Section 7(b).
\textsuperscript{85} AIR 1961, SC 112.
the sentence passed against Nanavati pending the disposal of the appeal in the Supreme Court. The order of the Governor was held Constitutionally invalid since it conflicted with the rules made by the Supreme Court under Article 145 in regard to criminal appeals.

In Kuljeet Singh Vs. Lt.Governor of Delhi, a very important question came up for consideration of the Supreme Court regarding the scope of the pardoning powers of the President under Article 72(1). The petitioners found guilty of murdering two innocent children were awarded death sentence by the Session's Court which was confirmed by the High Court. Their Special Leave petition under Article 136 against the judgement of the High Court was dismissed by the Supreme Court. Therefore they presented a mercy petition under Article 72 to the President for granting pardon, which was rejected by the President without assigning any reason. The petitioners contended that the power of President under Article 72 to grant pardon etc. especially in case of a death sentence is a power coupled with duty which must be exercised fairly and reasonably.

The court said that the court did not know whether the Government of India has formulated any uniform standard or guideline by which the exercise of the Constitutional power under Article 72 is intended to be or was in fact guided. By a general stay

86. AIR 1981, SC 774.
order the court stayed the execution of all those convicts whose mercy petitions against the death sentence were rejected by the President of India or the Government of a State.

However, on January, 1982 the court vacated the general stay order issued on November 7 and ordered the execution of Billa and Ranga on the ground that this was not the appropriate case in which the question of laying down the guidelines would arise declaring that the exercise of the President's power to commute the death sentence would have to be examined as each case warrants. The court held that even the most liberal use of this power could not have persuaded the President to impose anything less than a sentence of death in the present case and more so in view of the considerations mentioned by the court in its judgement while confirming the death sentence on Ranga and Billa. By ruling that the exercise of the President's power under Article 72 will be examined on the facts and circumstances of each case the court has retained the power of judicial review even on a matter which has been vested by the Constitution solely in the executive. This would make the exercise of the pardoning power a matter of further litigation as it has been demonstrated in the present case.

In Sher Singh Vs. State of Punjab, 87 while dispensing of a writ petition for the commutation of death sentence into life imprisonment on the ground of inordinate delay the Court took an

87. Supra note 49.
opportunity to impress upon the Central and State Governments that the mercy petitions filed under Article 72 and 161 of the Constitution or under Section 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously.

Chandrachud C.J. said "A self imposed rule should be followed by the executive authorities vigorously, that every such petition shall be disposed of within a period of three months from the date when it is received. Long delay in the disposal of these petitions are a serious hurdle in the disposition of justice and indeed, such delay tends to shake the confidence of the people in the very system of justice". The court cited several instances and one of such cases was a mercy petition under Article 161 pending before the Governor of Jammu and Kashmir for the last eight years.

Recently the pardoning power of the President has again been challenged in Kehar Singh Vs. Union of India,\(^8\) where on 22nd January, 1986 Kehar Singh was convicted of an offence under Section 120-B read with Section 302 of Indian Penal Code in connection with the assassination of Smt. Indira Gandhi, then Prime Minister of India on 31st October, 1984 and was sentenced to death by the learned Addl. Session Judge, New Delhi. His appeal was dismissed by the High Court of Delhi and his subsequent appeal by special leave to the Supreme Court was dismissed on 3rd August, 1988. A review petition filed thereafter by Kehar Singh was dismissed on 7th September, 1988 and later a

\(^8\) AIR 1989 SC 653.
writ petition was also dismissed by the court.

On 14th October, 1988 his son, Rajinder Singh, presented a petition to the President of India for the grant of pardon to Kehar Singh under Article 72 of the Constitution. In that petition reference was made to the evidence on record of the criminal case and it was sought to be established that Kehar Singh was innocent and the verdict of the court was erroneous. It was, therefore, urged that it was a case fit for the exercise of elemency.

The petition was again rejected by the President under Article 72. Rajinder Singh again moved the court through Special Leave Petition under Article 32 of the Constitution. The court decided to entertain the petition and ordered that the execution of Kehar Singh should not be carried out meanwhile.

In this petition, the first question was whether there was any justification for the view that when exercising his power under Article 72, the President was precluded from entering into the merits of a case decided finally by that court.

The court in this case observed that the Constitution of India, in keeping with the modern Constitutional practice, is a Constitutive document, fundamental to the governance of the country, whereby, the people of India have provided a Constitutional and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrus-

89. See Supra note 74.
ted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order.

The court further observed that to any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the Courts to Article 21. These twin attributes enjoy fundamental ascendency over all other attributes of the political and social order. Consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation or threat of deprivation of personal liberty by the action of the state is regarded seriously in most civilised societies and recourse, either under express Constitutional provision or through legislative enactment is provided to the judicial organ.

But the fallibility of human judgement being uneriable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the state.

The power to pardon is a part of the Constitutional scheme and that it should be so treated also in the Indian Republic. It
has been reposed by the people through the Constitution in the Head of the State, and enjoys high status.

The court further held that the order of the President cannot be subjected to judicial review on its merit except within certain limitations. The power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in asking reasons for the President's order. The courts are the Constitutional instrumentalities to go into the scope of Article 72 but cannot analyse the exercise of the power under Article 72 on its merits.

The court also refused to reconsider the Constitutional validity of the death penalty and held that it is bound by the law laid down in Bachan Singh Case. The attention of the court was drawn to the circumstance that only six sections 120-B, 121, 132, 302, 307 and 396 of the Indian Penal Code enable the imposition of the sentence of death. Besides, the doctrine continues to hold the view that the benefit of reasonable doubt should be given to the accused, and that under the present criminal law the imposition of death sentence is an exception (for which special reasons must be given) rather than a rule. The statistics disclose that only 29 persons were hanged whereas 85,000 murders were committed during the period, 1974-1978. In addition to the above Articles 21 and 134 of the Constitution specifically contemplate the existence of a death penalty.

90. Supra note 11.
91. Ibid.
The President and the Governor of the State are exonerated from any liability, civil or criminal for any act done in discharge of their duties. Article 361\textsuperscript{92} of the Constitution gives personal immunity to them from any legal action against their official acts including proceedings for contempt of court. This means that no court can compel the President or the Governor to exercise any power or perform any duty nor can a court compel him to forbear from exercising his power or performing his duties. He is not amenable to the writs or directions issued by any court.

\textsuperscript{92} Constitution of India, Article 361(1): The President, or the Governor of a State shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties;

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61.

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor... of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action thereof, the name, description and place residence of the party by whom such proceedings are to be instituted and the relief which he claims.
No writ can be issued by any court to the President of India. This protection is available not only for acts of the President, which are done by him in exercise of his function, but also for acts 'purporting to be done' by the President in exercise of his powers. The full implication of this expression was brought out by the High Court of Madhya Bharat when it laid down that the expression is of wide scope and even though the act done is outside or in contravention of the Constitution, it would be within the protection of Article 361(1) if it is one purported to be done under the Constitution.  

The power under both the Articles extends to all offences. But the Governor would be competent to exercise the power under Article 161 only if the offence in question relates to a law "to which the executive power of the State extends". Hence the Governor cannot suspend, remit or commute a sentence for an offence under Section 489A to Section 489D of the Indian Penal Code.

96. Indian Penal Code Section 489A: Counterfeiting currency notes or bank notes—whenever counterfeints, or knowingly performs or part of the process of counterfeiting any currency note or bank note shall be... Ibid Section 489D:
Using as genuine forged or counterfeit currency notes or bank notes—whenever sells to, or buys or receives from, any other person or otherwise traffics in or uses as genuine any forged or counterfeit note or bank note knowing or having reason to believe the same to be forged or counterfeit, shall be...
Ibid Section 489C. Possession of forged or counterfeit currency notes or bank notes: whoever has in his possession any forged or counterfeit currency note or bank note knowing of having reason to believe the same to be forged or counterfeit and intending to use the same as genuine of that it may be used as genuine, shall be... Contd...
because the subject matter of currency and bank notes is within
the executive (union) jurisdiction under entries 36 and 93 of
List-I of the 7th schedule, Powers of the Governor extend to
pardon ing offences against law enacted by the State legislature
in matters of List-II, Schedule 7 and Criminal law including all
matters following under the Indian Penal Code and Criminal Proce-
dure Code at the commencement of the Constitution under Entry 1
and 2 of the List-III of 7th schedule. The President and the
Governor of the state thus enjoy powers to pardoning offences in
matters falling under this concurrent list. Thus, Article 72

Ibid, Section 489D. Making or possessing instruments or
materials for forgoing or counterfeiting currency notes or
bank notes— whoever makes or performs any part of the making,
or buys or sells or disposes of, or has in his possession any
machinery, instrument or material for the purposes of being
used, or knowing or having reason to believe that it is inten-
ded to be used, for forging or counterfeiting any currency note
or bank note, shall be...
Ibid, Section 489E. Making or using documents resembling
currency note or bank notes— (1) Whoever makes, or causes to
be made, or uses for any purpose whatever, or delivers to any
person any document purporting to be, or in any way resembling,
or so nearly resembling as to be calculated to deceive, any
currency note or bank note shall be...
(2) If any person whose name appears on a document the making
of which is an offence under sub section (1), refuses, without
lawful excuse, to disclose to a police officer on being so
required the name and address of the person by whom it was
printed or otherwise made, shall be...
(3) where the name of any appears on any document in respect
of which any person is charged with an offence under sub sec-
tion (1), or on any other document used or distributed in
connection with that document, it may, until the contrary is
proved, be presumed that the person caused the document to be
made.

97. Constitution of India, Seventh Schedule, List 1 : Entry 36
currency, coi nge and legal tender; foreign exchange.
Ibid, Entry 93 : offences against laws with respect to any of
the matters in this list.
98. Constitution of India, List III, 7th Schedule Entry 1: Crimi-
nal Law, including all matters included in the Indian Penal
Code at the commencement of this Constitution but excluding

Contd...
and Article 161 of the Constitution prevail over the penal code wherever death sentence has been provided and over the procedural law where death penalty is executed.

Pardon etc. Under Criminal Law:

Section 54 of the Indian Penal Code, 186099 empowers the "appropriate Government"100 to commute the sentence of death for any other punishment provided by this code. In 1923 by the Criminal Procedure Code Amending Act XVIII, a subjection has been added to section 402 in Criminal Procedure Code, 1898 (now sections 433 and 432 under Criminal Procedure Code, 1973) that "Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code". This amendment shows that the power given by this section is not restricted by section 402 of the Criminal Procedure Code 1898. Under section 433 of the Criminal Procedure

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offences against law which with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

Ibid, Entry 2 : Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

99. Indian Penal Code, 1860, Section 54 : Commutation of sentence of Death: In every case in which sentence of death shall have been passed the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this code.

100. The expression "appropriate Government" means

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not); is for an offence against any law relating to a matter to which the executive power of the state extends, the Government of the State within which the offender is sentenced.
Code, 1973 the appropriate Government may, without the consent of the person sentenced commute a sentence of death for any other punishment provided by the Indian Penal Code, 1860.  

The principle of commutation of sentence has been well explained by the framers of the Code in the following words:

"It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed but which must often be unknown, to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote provinces of the Empire, in which convict settlements are established and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government is only competent to decide".

Thus the appropriate Government is empowered to grant pardon, remission and commutation to all judicial sentences provided that in commutation, they are empowered to commute any one of the sentences enumerated in clauses (a) to (d) of Section 433 of the

101. Criminal Procedure Code, Section 433. Power to commute sentence: The appropriate Government may without the consent of the person sentenced commute—
(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860).
(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;
(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;
(d) a sentence of simple imprisonment, for fine.

Criminal Procedure Code, 1973\textsuperscript{103} to any other sentence discussed therewith. A sentence of death can be commuted for any other punishment provided by the Indian Penal Code.\textsuperscript{104}

Section 416 of the Criminal Procedure Code, 1973\textsuperscript{105} is another section which empowers the High Court to commute the sentence of death awarded to a pregnant woman, if it thinks fit, to life imprisonment. This provision was made in the old Criminal Procedure Code, 1898 by the Criminal Law Amending Act, 1923.

Section 432\textsuperscript{106} of the Criminal Procedure Code, 1973 envisages the power of the appropriate Government to suspend or remit the sentence provided in the Indian Penal Code, 1860.

\begin{footnotes}
\item[103] Supra note 101.
\item[104] Supra note 101 (a).
\item[105] Criminal Procedure Code, Section 416: Postponement of capital sentence on pregnant women: If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, any may, if it thinks fit, commute the sentence to imprisonment for life.
\item[106] Section 432 Power to suspend or remit sentence: (1) when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
\item[(2)] whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding judge of the court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of a certified copy of the record of the trial or of such record thereof as exists.
\item[(3)] If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if
\end{footnotes}
By the Criminal Procedure Code (Amendment) Act, 1978 the Parliament inserted Section 433A in the Criminal Procedure Code, 1973 which made a full 14 year term of imprisonment mandatory for two classes of prisoners sentenced to life imprisonment (i) those who could also be punished to death, and (ii) those who were sentenced to death but whose sentence was commuted to life imprisonment under Section 433 of the Criminal Procedure Code, 1973.

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at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.
(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in Jail, and—

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the Jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in Jail;

(6) The provisions of the above sub sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.
(7) In this section and in Section 433, the expression "appropriate Government" means—

(a) in cases where the sentence is for an offence against, or the order referred to in sub section.

(b) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government.

(c) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

107. Supra note 101 (a).
In Maru Ram Vs. Union of India, it was contended that by the introduction of Section 433A, Section 432 which empowers the government to suspend the execution of a sentence or remit the whole or any part of it, is excluded for a certain class of lifers and Section 433A, which empowers the government to commute a sentence of death for any other punishment, suffers eclipse. It was argued that since Section 432 and 433A are statutory provisions and modus operandi of the Constitutional power under Article 72 and 161, Section 433 would be ineffective because it detracts from operation sections 432 and 433A which are the Legislative surrogates, as it were, of the power of pardon under the Constitution. It was held that although power under Article 72 and 161 and that under Sections 432 and 433A may be similar, but they are not the same or identical. The two powers differ in their source, substance and strength. Thus Section 433A cannot be invalidated as indirectly violative of Article 72 and 161 which cannot suffer the vicissitudes of simple legislative process.

Section 354 of the Criminal Procedure Code, 1973 incorporates the provisions contained in Section 367 (except those incorporated in the preceding section) and Section 368. In fact Section 354(3) is mandatory in character and the Judge is bound to write the special reasons in his judgement if he awards death penalty. The Law Commission in its Report on the Capital Punishment expressed the following view in the matter:

110. Infra note.
111. Supra note 12.
"... a considerable body of opinion which is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be a good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt. It would also provide good material at the time when a recommendation for mercy is to be made by the court, or a petition for mercy is considered. Again, it would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death), or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life)".

The Law Commission's Report on the Code recommending the amendment also observed:

"In this connection, it may be noted that there are certain offences for which the penal code prescribes the punishment as death or in the alternative, life imprisonment or imprisonment for a term of years. Therefore, the amendment recommended should cover these cases also".

The Joint Committee of Parliament however modified the recommendation so as to requiring "Special reasons" for death sentence and reasons for other sentences. It observed:

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

Regarding suspension or postponement of execution of death sentence there are three main provisions under the Criminal Procedure Code, 1973. Section 415 of the Code,112 deals with the

112. Criminal Procedure Code, Section 415 : Postponement of execution of sentence of death in case of appeal to Supreme Court: (1) where a person is sentenced to death by the High Court and Contd...
postponement of the sentence of death in case of appeal to Supreme Court, Section 416 of the Code provides postponement of death sentence on a pregnant woman. In both the cases postponement of capital punishment is mandatory to the High Court. However, Under Section 367 of the Code of 1973 if the High Court directs for a further enquiry to be made or additional evidence to be taken where the case of death penalty has been referred by the District and Sessions Court for its confirmation, it can postpone the confirmation of the capital punishment. Moreover, High Court is empowered to confirm or annul conviction.

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an appeal from its judgement lies to the Supreme Court under sub clause (a) or sub clause (b) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or, if an appeal is preferred within that period, until such appeal is disposed of.

(2) where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under Article 132 or under sub clause (c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired.

(3) where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such as it considers sufficient to enable him to present such petition.

113. Supra note 105.

114. Ibid, Section 366, sentence of death to be submitted by court of session: (1) when the court of session passes sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

(2) The court passing the sentence shall commit the convicted persons to Jail custody under a warrant.

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Social Justice and Capital Punishment:

In a welfare state like India it is one of the paramount duties of the State to secure a social order for the promotion of welfare of its people. Part IV of our Constitution embodies certain directives which it shall be the duty of the states to follow both in the matters of administration as well as making of laws. The directives under the Constitution possess two characteristics namely, (1) they are, not enforceable in any court and therefore, if a directive is infringed, no remedy is available to the aggrieved party by judicial proceedings; and (2) they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making

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Criminal Procedure Code, 1973, Section 367: Power to direct further enquiring to be made or additional evidence to be taken: (1) If when such proceedings are submitted the High Court thinks that a further enquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such enquiry or take such evidence itself, or direct it to be made or taken by the court of session.

(2) Such enquiry shall not be made nor shall such evidence be taken in the presence of jurors and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such enquiry and the evidence shall be certified in such court.

Criminal Procedure Code, 1973, Section 368: Power of High Court to confirm sentence or annul conviction. In any case submitted under Section 366, the High Court,

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person: Contd...
laws. 115

The most important aspect which the Directive Principles of State Policy in our Constitution convey is that our Constitution has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of the Constitution. 116

The preamble of a Constitution normally contains the political moral and religious values which the Constitution is intended to promote. The Preamble to the Constitution of India has been adopted after a long discussion so that it may embody the fundamentals underlying the structure of the Constitution. Preamble in fact, contains in a nutshell its ideals and its aspirations. 117 It is never an operative part of the Constitution. It indicates only the general purposes for which the people ordained and established the Constitution. 118

Social justice which the Preamble and Directive Principles of State Policy under part IV highlight as paramount in the governance of the country, also has a role to mould the sentence.

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

But what is social justice? Articles 38\textsuperscript{119} and 39\textsuperscript{120}, 39A\textsuperscript{121} and 43\textsuperscript{122} provide for certain provisions to the State to do social justice to its people. According to Article 38 the State is under duty to promote justice social, economic and political and do Justice Gajendragadkar in State of Mysore Vs. Workers of Gold Mines said that social and economic justice have been given pride of place in our Constitution and one of the directive principles of State Policy enshrined in Article 38. Article 39 specifically

\begin{quote}
\textbf{119. Constitution of India Article 38:} State to secure a social order for the promotion of welfare of the people—(1) The State strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
\end{quote}

\begin{quote}
\textbf{120. Ibid, Article 39:} Certain principles of policy to be followed by the State. The State shall in particular direct its policy towards securing (a) that the citizen, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunity and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
\end{quote}

\begin{quote}
\textbf{121. Ibid, Article 39A:} Equal justice and free legal aid—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall in particular, provides 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.
\end{quote}

\begin{quote}
\textbf{122. Ibid, Article 43:} Living wage, etc. for workers—The State
requires the State to ensure for its people adequate means of livelihood, fair distribution of wealth, equal pay for equal work and protection of children and labour. Article 39A imposes a duty on the State that it shall promote justice on the basis of equal opportunities and provide free legal aid to ensure that for securing justice no citizen is denied by reason of economic or other disabilities.

Article 43 further enunciates that the State shall endeavour to secure work a living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. For all workers, agricultural, industrial and otherwise by suitable Legislation. Speaking for social justice in relation to Capital Punishment justice Iyer in Rajendra Prasad's case held:

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

"The searching question the judge must put to himself is: what then is so extraordinarily reasonable as to validate the wiping out of life itself and with it the great rights which are inherent in him in the totality of facts, the circle being drawn with ample relevancy".

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shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

123. Supra note 10.
Balkrishna Iyer, J., however, in *Sridharan Motor Service, Attur Vs. Industrial Tribunal Madras*, observed:

"Concepts of social justice have varied with age and clime. What would have appeared to be indubitable social justice to a Norman or Saxon in the days of William the Conqueror will not be recognised as such in England today. What may appear to be incontrovertible social justice to a resident of Quebec may wear a different aspect to a resident of Peking. It could be possible for Confusius, Manu, Hammrabi and Solomon to inect together at a conference table. I doubt whether they would be able to evolve an agreed formu-lse as to what constitutes social justice, which is a very controversial field... In countries with democratic forms of government public opinion and the law act and react on each other. We may add that in a developing country in the area of crime and punishment, social justice is to be rationally measured by social defence and geared to developmental goals."

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

In *Muir Mills Co.Ltd. Vs. Suti Mills Mazdoor Union, Kanpur*, Mr. Iseacs, the learned counsel for the respondent, attempted to give a definition in the following terms:

"Social justice connotes the balance of adjustments of the various interests concerned in the social and economic structure of the State in order to promote harmony upon an ethical and economic basis".

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124. *(1959) 1 Lab LJ 380 (Mad).*
125. *(1955) SC A321 (330-31).*
Justice Bhagwati, however, remarked that without embarking upon a discussion as to the exact connotation of the expression "social justice" we may only observe that the concept of social justice does not emanate from the fanciful notions of any particular adjudicator but must be founded on a more solid foundation.

Social justice turns on cultural and situational context.

In a Delhi conference against death penalty Lok Nayak Jai Prakash Narain pleaded for its abolition:

"To my mind it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental conditions sufficiently improved to become useful citizens. In a minority of cases this may not be possible.

They may be kept in prison houses till they die a natural death. This may cast a heavier economic burden on society than hanging. But I have no doubt that a humane treatment even of a murderer will enhance man's dignity and make society more human".

Andrie Sakharov in a message to the Stockholm Conference on abolition of death penalty organised by Amnesty International last year put the point more bluntly: 126

"I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of a society. A state in the person of its functionaries who like all people are inclined to making superficial conclusions, who like all people are subject to influences, connections, prejudices and egocentric motivations for their behaviour takes upon itself the right to the most terrible and

irreversible act the deprivation of life. Such a state cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the country is true—that savagery begets only savagery—I am convicted that society as a whole and each of its members individually not just the person who comes before the courts bears a responsibility for the occurrence of a crime... I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Blood thirsty and calculated revenge with no temporary insenity on the part of the judges and therefore shameful and disgusting".

Tolstoy wrote an article "I cannot be silent" protesting against the death sentence, in which he said: 127

"Twelve of those by whose labour we live, the very men whom we have depraved and are still depraving by every means in our power from the poison of vodka to the terrible falsehood of a creed, we impose on them with all our might but do not ourselves believe in twelve of those men strangled with cords by those whom they feed and clothe and house and who have depraved and still continue to deprave them. Twelve husbands, fathers and sons, from among those upon whose kindness, industry, and simplicity alone rests the whole of Russian life are seized, imprisoned, and shackled. Then their hands are tied behind their backs lest they should seize the ropes by which they are to be hung and they are led to the gallows".

Victor Hugo's words are not rapid sentimentalism:

"He shall look upon crime as a disease, evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold. Reason is on our side, feeling is on our side and experience is on our side". 128

Gandhi wrote:

"Destruction of individuals can never be a virtuous act. The evil doers cannot be done to death. Today there is a

128. Supra note 10,p.934.
movement a foot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease."

Quotations from noble minds are not for decoration but for adaptation within the framework of the law. This Gandhian concept was put to the test without effects calamitous in the Chambal dacoits. 130

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

Criminologists have reached near consensus that death penalty for murder is a judicial futility as a deterrent and is a vulgar barbarity if fruitless. And reformationists have made a headway so much that, about 80 countries have given up the capital sentence. England had 200 offences which carried death sentences and boys and girls were hanged publically for stealing spoons and the like. To day stealing persists but death penalty has disappeared. The impotence of death sentence as a deterrent is brought out with characteristic wit by Dr. Johnson, who according to Boswell, noted pickpockets plying trade in a crowd, assembled to see one of their numbers executed. There is no moral

129. Idem
130. Article by Dr. L. H. Hiranandani in illustrated weekly India, dated 29th August, 1976.
defence against the application of Justitia dulcore misericordiae temperate (Justice tempered by mercy. Literally by sweetness of compassion) even in the name of deterrence.

There was another fallout from Rajendra Prasad’s\(^\text{131}\) case. Two Judges doubted the correctness of Jagmohan Singh’s\(^\text{132}\) decision on the Constitutional question: was not the death penalty arbitrary and discriminatory, they queried? Well, whenever the decision of a larger Bench is doubted by a smaller Bench. Litigants are quick to see the green light. An application was filed for reconsidering the decision in Jagmohan Singh’s case and taking a fresh look at the Constitutional validity of capital punishment and it was granted.

The Supreme Court has a complex problem to solve: in dispensing social justice legislation of today, said O.W. Holmes, "is to meet the social needs of yesterday" with the law legging behind social opinion and social needs, the Supreme Court has to content itself with such interpretation of existing laws, as would best meet the social needs. To bridge completely the gulf between the existing law and the existing needs is a difficult and almost an impossible task for the judiciary.\(^\text{133}\) By keeping its view on social justice flexible and progressive, the Supreme Court has laid the foundation (of a system) of 'social engineering' which may, in ultimate working, eliminate social friction and secure the joys of life for all.

\(^{131}\) Supra note 10.
\(^{132}\) Supra note 8.
\(^{133}\) Banerjee, B.N. : Natural Justice And Social Justice Before the Supreme Court (1960) 93.