Maru Ram

Vs

Union of India and Others

And

Bhimwa Ram and Others

Vs

Union of India and Others

And

Shanker and Others

Vs

Union of India and Others

And

Krishna and Others

Vs

Union of India and Others

And

Raghubir Singh

Vs

Union of India and Others

And

Rampuja Singh

Vs

Union of India and Others

And

Nirbhai Singh

Vs

Union of India and Others

And

Balkrishan Gupta

Vs

Union of India and Others

And

Veny Singh

Vs

Union of India and Others

And

Babulal Gautam

Vs

Union of India and Others

And

Om Prakash

Vs

Union of India and Others

And

Nagebhushanam Patnaik

Vs

Union of India and Others

And

Raghunath Singh

Vs

Union of India and Others

And

Jagir Singh

Vs

State of Punjab

And

Ajit Singh

Vs

State of Punjab

And

Munshi Ram and Another

Vs

Union of India and Others

And

Faqir Singh

Vs

Union of India and Others

And

Janardhan and Others

Vs

Union of India and Others

And

Sunder Ram and Others

Vs

Union of India and Others

And

Harmat Ali and Others

Vs

Union of India and Others

And

Govinda Gowda and Others

Vs

Union of India and Others

And

Mahadeo and Others

Vs

State of U.P.

And

Kalua and Others

Vs

State of U.P.

And

Rampal and Others

Vs

Union of India and Others

And

Bant Singh and Others

Vs

Union of India and Others

Writ Petitions Nos. 865 of 1979; 641, 409, 783, 695, 690, 747, 4346; 147 of 1979 and 1860, 2389, 4115, 1365, 457, 869, 4311-12, 813, 2505, 1659, 3784-94, 2602-10, 4376-91, 4392-95, 4404 & 1177 of 1980

(CJI Y. V. Candrachud, Syed M. Fazal Ali, A. D. Koshal, V. R. Krishna Iyer, P. N. Bhagwati, JJ)

11.11.1980

JUDGMENT

V. R. KRISHNA IYER, J. -

1. A procession of 'life convicts', well over two thousand strong, with more joining the march even as the arguments were on, has vicariously mobbed this Court, through their learned counsel, carrying constitutional missiles in hand and demanding liberty beyond the bars. They challenge the vires of Section 433-A of the Criminal Procedure Code (Procedure Code, for short) which compels 'caging' of two classes of prisoners, at least for fourteen eternal infernal years, regardless of the benign remissions and compassionate concessions sanctioned by prison law and human justice. Their despair is best expressed in the bitter lines of Oscar Wilde : (The Ballad of Reading Goal)

I know not whether Laws be right, Or whether Laws be wrong, All that we know who lie in gaol Is that the wall is strong; And that each day is like a year, A year whose days are long.

But broken hearts cannot break prison walls. Since prisons are built with stones of law, the key to liberation too is in law's custody. So, counsel have piled up long and learned arguments punctured with evocative rhetoric. But judges themselves are prisoners of the law and are not free to free a prisoner save through the open sesame of justice according to law. Even so, there is a strange message for judges too in the rebellious words of Gandhiji's quasi-guru David Thoreau : (Henry David Thoreau : SLAVERY IN MASSACHUSETTS, 1854)

The law will never make men free; it is men who have got to make the law free. They are the lovers of law and order who observe the law when the government breaks it.

The case of the petitioners is that Parliament has broken the law of the Constitution by enacting Section 433-A.

2. Now, the concrete question and the back-up facts. All the petitioners belong to one or other of two categories. They are either sentenced by court to imprisonment for life in cases where the conviction is for offences carrying death penalty as a graver alternative or are persons whom the court has actually sentenced to death which has since been commuted by the appropriate Governments under Section 433(a) of the Procedure Code to life imprisonment. The common factor binding together these two categories of 'lifers' (if we may use this vogue word, for brevity) is obvious. The offences are so serious that the Penal Code has prescribed 'death' as an alternative punishment although, in actual fact, judicial compassion or executive clemency has averted the lethal blow - but at a price, viz., prison tenancy for life.

3. Before the enactment of Section 433-A in 1978 these 'lifers' were treated, in the matter of remissions and release from jail, like others sentenced to life terms for lesser offences which do not carry death penalty as an either/or possibility. There are around 40 offences which carry a maximum sentence of life imprisonment without the extreme penalty of death as an alternative. The rules of remission and release were common for all prisoners, and most States had rules under the Prisons Act, 1894 or some had separate Acts providing for shortening of sentences or variants thereof, which enabled the life sentencee, regardless of the offence which cast him into the prison, to get his exist visa long before the full span of his even life and run out - often by about eight to ten or twelve years, sometimes even earlier. Then came, in 1978, despite the strident peals of human rights of that time, a parliamentary amendment to the Procedure Code and Section 433-A was sternly woven, with virtual consensus, into the punitive fabric obligating the actual detention in prison for full fourteen years as a mandatory minimum in the two classes of cases where the court could have punished the offender with death but did not, or where the court did punish the culprit with death

but he survived through commutation to life imprisonment granted under Section 433(a) of the Procedure Code. All the lifers lugged into these two categories - and they form the bulk of life convicts in our prisons - suddenly found themselves legally robbed of their human longing to be set free under the remission scheme. This poignant shock is at he back of the rain of writ petitions under Article 32; and the despondent prisoners have showered arguments against the privative provision (Section 433-A) as constitutional anathema and penological atavism, incompetent for Parliament and violative of fundamental rights and reformatory goals. The single issue, which has proliferated into many at the hands of a plurality or advocates, is whether Section 433-A is void for unconstitutionality and, alternatively, whether the said harsh provision admits of interpretative liberality which enlarges the oasis of early release and narrows down the compulsive territory of 14-year jail term. Lord Denning, in the first Hamlyn Lectures and Sir Norman Anderson in the next before last of the series, emphasised : (Alfred Cohn and Roy Udolf : The Criminal Justice System and its Psychology, Van Nostrand Reinhold Co. New York, pp. 298-99)

... the fundamental principle in our courts that where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail.

Of course, most of the petitioners belong to 'the poorest, the lowliest and the lost'. For those who listlessly languish waiting for their date with Freedom, the human hope of going home holds the lamp of life burning and a blanket ban against release before a brutal span of full 14 years, even if their habilitation be ever so complete and convincing, benumbs the very process of restoration which is cardinal to the rationale of penal servitude. Indeterminate sentences for the same reason, have been criticised since they have -

led to a system of sentencing which has worked substantial hardship and injustice on countless inmates. Indeterminate sentences generally are much longer and more costly than fixed sentences and create additional emotional strain on both the inmate and his family, who are left to wonder when they will be freed. (Alfred Cohn and Roy Udolf : The Criminal Justice System and its Psychology, Van Nostrand Reinhold Co. New York, pp. 298-99)

The imprisoned poet, Oscar Wilde, wrote that courts must know when adjudicating the arbitrariness of long-term minima implacably imposed in the name of social defence : (The Ballad of Reading Gaol)

Something was dead in each of us, And what was dead was Hope.

* * *##

The vilest deeds like poison weeds Bloom well in prison air : It is only what is good in Man That wastes and withers there : Pale anguish keeps the heavy gate, And the Warder is Despair.

These generalities only serve as a backdrop to the consideration of the multi-pronged attack on the vires of Section 433-A. For judicial diagnosis, we must read it whole before dissecting into parts :

> 433-A. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where the sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had

served at least fourteen years of imprisonment.

Piecemeal understanding, like a little learning, may prove to be a dangerous thing. To get a hang of the whole subject-matter we must read Section 432 and Section 433 too.

432. (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 :

> 433. 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;
>
> (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.

4. The sections above quoted relate to remission and commutation of sentences. There were similar provisions in the earlier Code corresponding to Sections 432 and 433 (Sections 401 and 402 of the 1898 Code), but Section 433-A is altogether new. 'Ay, there's the rub'. It is obvious that Section 432 clothes the appropriate Government with the power to remit the whole or part of any sentence. The mechanics for exercising this power and the conditions subject to which the power is to be exercised are also imprinted in the section. This is a wide power which, in the absence of Section 433-A, extends to remission of the entire life sentence if government chooses so to do. A liberal or promiscuous use of the power of remission under Section 433(a) may mean that many a murderer or other offender who could have been given death sentence by the court but has been actually awarded only life sentence may legally bolt away the very next morning, the very next year, after a decade or at any other time the appropriate Government is in a mood to remit his sentence. Bizarre freaks of remissions - such, for instance, as the impertinent happenstance of a Home Minister's 'hallowed' presence on an official visit to the prison resulting in remissions of sentences - have been brought to our notice, making us stagger at the thought that even high constitutional powers are devalued in practice by those 'dressed in a little brief authority' thereby encouraging the fallacious impression that functionaries of our Republic are reincarnated quasi-maharajas of medieval vintage ! We will deal with it a little later under Article 161 of the Constitution but mention it here to prove what, perhaps, provoked Parliament to enact Section 433-A. In many States, we are told, lifers falling within the twin tainted categories routinely earned remissions under the extant rules resulting in their release in the matter of a few years. The penological sense of Parliament was apparently outraged by such extreme abbreviations of life sentences where the offence was grave as might have invited even death penalty. The same situation prevailed in regard to those who had actually been subjected to death penalty but, thanks to Section 433(a), had a commuted sentence of life imprisonment. Taking cognizance of such utter punitive laxity in these two graver classes of cases, the Joint Committee, which went into the Indian Penal Code (Amendment) Bill, suggested that a long enough minimum sentence should be suffered by both classes of lifers. The draconian

provision (as some counsel have described it) was the product of the Joint Committee's proposal to add a proviso to Section 57 of the Penal Code. Its appropriate place was in the Procedure Code and so Section 433-A was enacted when the Criminal Procedure Code was amended. It was a punitive prescription made to parliamentary measure which prohibited premature release before the lifer suffered actual incarceration for 14 years. No opposition to this clause was voiced in Parliament (Sixth Lok Sabha) so far as our attention was drawn, although that was, vocally speaking, a period of high tide of human rights (1978).

5. The Objects and Reasons throw light on the 'why' of this new provision :

The Code of Criminal Procedure, 1973 came into force on the 1st day of April, 1974. The working of the new Code has been carefully watched and in the light of the experience, it has been found necessary to make a few changes for removing certain difficulties and doubts. The notes on clauses explain in brief the reasons for the amendments.

The notes on clauses gives the further explanation :

> Clause 33. - Section 432 contains provision relating to powers of the appropriate Government to suspend or remit sentences. The Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, had suggested the insertion of a proviso to Section 57 of the Indian Penal Code to the effect that a person who has been sentenced to death and whose death sentence has been commuted into that of life imprisonment and persons who have be sentenced to life imprisonment for a capital offence should undergo actual imprisonment of 14 years in jail. Since this particular matter relates more appropriately to the Criminal Procedure Code, a new section is being inserted to cover the proviso inserted by the Joint Committee (Bill No. 92 of 1978, Gazette of India, Extra., Part II, Section 2, p. 651).

This takes us to the Joint Committee's recommendation on Section 57 of the Penal Code that being the inspiration for Clause 33. For the sake of completeness, we may quote that recommendation :

> Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection attention of the Committee was brought to the aspect that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The Committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment.

6. Shortly put, the parliamentary committee concerned with the amendments to the Penal Code was seriously upset by the gross reductions and remissions resulting in premature releases of life sentences for capital offences. This proposal was transposed into the Criminal Procedure Code (Amendment) Bill in Clause 33 and eventuated in the incarnation of Section 433-A with none in Parliament shedding a human rights tear, although before us several counsel have turned truly eloquent, even indignant, in the name of human rights. Of course, parliamentary taciturnity does not preclude forensic examination about legislative competency. Nor does it relieve this Court, as sentinel on the qui vive, from defending fundamental rights against legislative aggression, if any flagrant excess were clearly made out.

7. We have to examine the legislative history of Sections 432 and 433 and study the heritage of Articles 72 and 161 of Constitution. But this we will undertake at the appropriate stage. Before proceeding further, we may briefly formulate the contentions which have been urged by wave after wave of counsel. The principal challenge has been based upon an alleged violation of Articles 72 and 161 by the enactment of Section 433-A. Sarvashri Nand Lal, R. K. Garg, Mridul, Tarkunde and Dr. Singhvi, among others have argued this point with repetitive vehemence and feeling for personal freedom. The bar is the bastion. Indeed, Shri Garg was shocked that we were not 'shocked' by such long incarceration being made a statutory condition for release of a 'lifer' guilty of murder and was flabbergasted at even a faint suggestion that the President or the Governor might exercise his power of commutation guided, inter alia, by the parliamentary pointer expressed in Section 433-A. The next contention voiced with convincing vigour by Shri Tarkunde was that Section 433-A violated Article 14 being wholly arbitrary and irrational. Shri Mridul, with persuasive flavour, stressed that Section 433-A lacked legislative competency under the Lists and must be struck down for the additional reason of contravention of Article 20(1) of the Constitution and backed his plea with American authorities. Shri Kakkar made an independent contribution, apart from endorsement of the earlier submissions by other counsel. The main thrust of his argument, which was ingeniously appealing, was that the various provisions for remissions under the Prison Rules and other legislations had their full operation notwithstanding Section 433-A, thanks to the savings provision in Section 5 of the Procedure Code.

8. Dr. Singhvi, who brought up the rear, belatedly but eruditely strengthened the arguments of those who had gone before him by reference to the abortive history of the amendment of Section 302, IPC and the necessity of having to read down the text of Section 433-A in the context of the story of its birth. Apart from the legislative vicissitudes in the light of which he wanted us to interpret Section 433-A restrictively, Dr. Singhvi treated us to the provisions of the Irish Constitution and international human rights norms by way of contrast and desired us to give effect to the rules of remission at least as directives for the exercise of the high prerogative powers under Articles 72 and 161 of the Constitution. Others who appeared in the many writ petitions made supplementary submissions numerically strong but lacking legal muscles, some of which we will refer to in passing. One of the lifers, having been an advocate by profession, chose to appear in person and made brief submissions in interpretation which did not impress us.

9. The Union of India, represented by the learned Solicitor-General, has repudiated the infirmities imputed to Section 433-A. We must appreciatively mention that he did tersely meet point by point, with persuasive precision, juristic nicety, case-law erudition and fair concession. His submissions have helped us see the issues in perspective and focus attention on fundamentals without being side-tracked by frills and frippery.

10. There has been much overlapping inevitable in plural orality but the impressive array of arguments on a seemingly small point does credit to the expansive potential of the forensic cosmos but brings despair when we contemplate the utter chaos in court having regard to the total litigation crying for justice. A new modus vivendi is as imperative as it is urgent if the kismet of the court system must survive the challenge - 'to be or not to be'!

11. A preliminary observation may be merited since much argument has been made on the duty of this Court to uphold human rights. Counsel for the petitioners, who now rightly toll the knell of prisoners' reformative freedom, have not shown us any criticism in the Press - the Fourth Estate - or by any member or Party in Parliament or outside, about this allegedly obnoxious provision repelling rules of remission and legislations for shortening sentences, the high tide of human rights

notwithstanding. Judge Learned Hand's famous warning about liberty lying in the bosoms of the people comes to mind. Court comes last; where is the first ?

12. Issues of liberty are healthy politics and those sincerely committed to human rights must come to the support of poor prisoners who have no vote nor voice and may perhaps be neglected by human rights vocalists with electoral appetites. It is a little strange that when no dissent is raised in Press or Parliament and a legislation has gone through with ease there should be omnibus demand in court as a last refuge for release of prisoners detained under a permanent legislation, forgetting the functional limitations of judicial power.

13. Nevertheless, we will cover the entire spectrum of submissions including those based upon fundamental freedoms because courts cannot abdicate constitutional obligations even if Parliament be pachydermic and politicians indifferent. (With great respect, ordinarily they are not.) Indeed, we must go further, on account of our accountability to the Constitution and the country and clarify that where constitutional liberties are imperilled judges cannot be non-aligned. But we must remind counsel that where counterfeit constitutional claims are pressed with forensic fervour courts do not readily oblige by consenting to be stampeded. Justice is made of sterner stuff, though its core is like 'the gentle rain from heavens' being interlaced with mercy. We may now proceed to deal with the principal arguments and logically we must dispose of the question of legislative competency of Parliament to enact a minimum period of detention in prison.

14. We may safely assume that, but for the bar of Section 432-A, the rules of remission and short-sentencing legislation would, in all probability, result in orders of release by government of the thousands of petitioners before us. Thus, it is of central importance to decide whether Parliament has no legislative competence to enact the impugned provision.

15. We dismiss the contention of competency as of little substance. It is trite law that the Lists in the Seventh Schedule broadly delineate the rubrics of legislation and must be interpreted liberally. Article 246(2) gives power to Parliament to make laws with respect to any of the matters enumerated in List III. Entries 1 and 2 in List III (especially Entry 2) are abundantly comprehensive to cover legislation such as is contained in Section 433-A, which merely enacts a rider, as it were, to Sections 432 and 433(a). We cannot read into it a legislation on the topic of 'prisons and prisoners'. On the other hand it sets a lower limit to the execution of the punishment provided by the Penal Code and is appropriately placed in the Chapter on Execution and Sentences in the Procedure Code. Once we accept the irrefutable position that the execution, remission and commutation of sentences primarily fall, as in the earlier Code (Criminal Procedure Code, 1898), within the present Procedure Code (Chapter XXXII), we may rightly assign Section 433-A to Entry 2 in List II as a cognate provision integral to remission and commutation, as it sets limits to the power conferred by the preceding two sections. This limited proscription as a proviso to the earlier prescription relates to execution of sentence, not conditions in prison or regulation of prisoner's life. The distinction between prisons and prisoners on the one hand and sentences and their execution, remission and commutation on the other, is fine but real. To bastardize Section 433-A as outside the legitimacy of Entry 2 in List III is to breach all canons of constitutional interpretation of legislative lists. Parliament has competency.

16. Let us assume for a moment that the laws of remission and short-sentencing are enacted under Entry 4 of List II. In that event, the States' competency to enact cannot be challenged. After all, even in prison-prisoner legislation, there may be beneficent provisions to promote the habilitative potential and reduce warder-prisoner friction by stick-cum-carrot strategies. Offer of remission

paroles, supervised releases, opportunities for self-improvement by family contracts, time in community work centres and even meditational centres, can properly belong to prison legislation. Rewards by remissions, like punishments by privations are permissible under Entry 4 of List II. Indeed, progressive rehabilitatory prison laws which have a dynamic correctional orientation and reformatory destination, including meaningful intermissions and humane remissions, is on the Indian agenda of unfulfilled legislation. Apart from these futurological measures, we have here an existing Central law, viz. the Prisons Act, 1894 which in Section 59(27) expressly sanctions rules for premature release. Even so, the power of the State is subject to Article 246(1) and (2) and so parliamentary legislation prevails over State legislation. Moreover, Article 254 resolves the conflict in favour of parliamentary legislation. If a State intends to legislate under Entry 2 of List III such law can prevail in that State as against a parliamentary legislation only if presidential assent has been obtained in terms of Article 254(2). In the present case there is hardly any doubt that Section 433-A must hold its sway over any State legislation even regarding 'Prisons and Prisoners' if its provisions are repugnant to the Central law. We may read the remission schemes not as upsetting sentences but as merely providing rewards and remissions for in-prison good conduct and the like. If the sentence is life imprisonment remissions, as such, cannot help as Godse (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) has laid down. If the sentence is for a fixed term, remissions may help but Section 433-A does not come in the way, Thus, no incompatibility between section 433-A and remission provisions exists.

17. This indubitable constitutional position drove counsel to seek refuge in the limited nature of the non-obstante clause in Section 433-A and the savings provision in Section 5 of the Procedure Code itself. The contention was that Section 433-A allowed free play for the rules of remission and short-sentencing legislation. The narrow scope of the non-obstante clause was the basis of this argument. It excluded the operation of Section 432 only and thereby implicitly sanctioned the operational survival of remission rules made by the various States. This argument hardly appeals to reason because it fails to square with the command of the substantive text and virtually stultifies the imperative part of the section.

18. In the province of interpretation, industry and dexterity of counsel can support any meaning, what with lexical plurality, case-law prodigality and profusion of canons to support any position. We had better base ourselves on the plain purpose and obvious sense of the statute which is a sure semantic navigatory before turning to erudite alternatives. Oliver Wendel Holmes has wisely said : "It is sometimes more important to emphasize the obvious than to elucidate the obscure." Another sage counsel is Frankfurter's three-fold advice : (H. Friendly : BONCHMARKS 202 (1967)) (1) Read the statute : (2) read the statute; (3) read the statute !

19. If we read Section 433-A and emphasize the obvious, it easily discloses the dividing line between sense and non-sense. The fasciculus of clauses (Sections 432, 433 and 433-A), read as a package, makes it clear that while the Code does confer wide powers of remission and commutation of sentences it emphatically intends to carve out an extreme category from the broad generosity of such executive power. The non-obstante clause, in terms, excludes Section 432 and the whole mandate of the rest of the section necessarily subjects the operation of Section 433(a) to a serious restriction. This embargo directs that commutation in such cases shall not reduce the actual duration of imprisonment below 14 years. Whether that section suffers from any fatal constitutional infirmity is another matter but it does declare emphatically an imperative intent to keep imprisoned for at least 14 years those who fall within the sinister categories spelt out in the operative part of Section 433-A. The argument is that the non-obstante clause covers only Section 432 and significantly omits the common phraseology 'or any other law in force' and, therefore, all other provisions of law which

reduce or remit the length of the incarceration prevail over Section 433-A. In particular, the Prison Rules and local short-sentencing laws will diminish the length of prison tenancy of all the lifers, despite the command of Section 433-A. Why ? Because the non-obstante clause is limited in nature and excludes only Section 432. The Prisons Act, 1894, is 'existing law' saved by Article 366(10) and Article 372(1). Section 59 of that Act vests rule-making power in States. Specifically Section 59(5) refers to rules regulating "the award of marks and the shortening of sentences". Clearly, therefore, the States have the power to make rules on remission systems and many States have, for long, made and worked such rules. They are intra vires, since even new legislations on remissions and rewards are good under Entry 4 of List II. These vintage schemes do not vanish with the enactment of the Constitution but suffer a partial eclipse if they conflict with and become repugnant to a Central law like the Procedure Code. If Section 433-A, by sheer repugnancy, forces a permanent holiday on the prison remission laws of the States vis-a-vis certain classes of 'lifers', the former must prevail in situations of irreconciliability. Assuming that Rules under the Prison Act are valid and cannot be dismissed as State law, a harmonious reading of Section 433-A and the Prison Rules must be the way out. Otherwise, the later law must prevail or implied repeal may be inferred. We may not be compelled to explore these ramifications here since the Remission Rules can peacefully coexist with Section 433-A once we grasp the ratio in Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) and Rabha case (Sarat Chandra Rabha v. Khagendranath Nath, (1961) 2 SCR 133 : AIR 1961 SC 334).

20. We cannot agree with counsel that the non-obstante provision impliedly sustains. It is elementary that a non-obstante tail should not wag a statutory dog (see for similar idea, THE INTERPRETATION AND APPLICATION OF STATUTES BY Reed Dickerson, p. 10). This Court has held, way back in 1952 in Aswini Kumar Ghose (Aswini Kumar Ghosh v. Arabinda Bose, 1953 SCR 1 : AIR 1952 SC 369) that a non-obstante clause cannot whittle down the wide import of the principal part. The enacting part is clear and the non-obstante clause cannot cut down its scope.

21. The learned Solicitor-General reinforced the conclusion by pointing out that the whole exercise of Section 433-A, as the notes on clauses revealed, was aimed at excluding the impact of Prison Remissions which led to unduly early release of graver 'lifers'. Parliament knew the 'vice', had before it the State remission systems and sought to nullify their effect in a certain class of cases by use of mandatory language. To read down Section 433-A to give overriding effect to the Remission Rules of the State would render the purposeful exercise a ludicrous futility. If 'Laws suffer from the disease of Language', (Reed Dickerson : THE INTERPRETATION AND APPLICATION OF STATUES, p. 13) courts must cure the patient, not kill him. We have no hesitation to hold that notwithstanding the 'notwithstanding ....' in Section 433-A, the Remission Rules and like provisions stand excluded so far as 'lifers' punished for capital offences are concerned.

22. The learned Solicitor-General explained why the draftsman was content with mentioning only Section 432 in the non-obstante clause. The scheme of Section 432, read with the court's pronouncement in Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736), furnishes the clue. We will briefly indicate the argument and later expatiate on the implications of Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) as it has an important bearing on our decision.

23. Sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code, going by Entry 2 in List III of the Seventh Schedule. Keeping aside the constitutional powers under Articles 72 and

161 which are 'untouchable' and 'unapproachable' for any legislature, let us examine the law of sentencing, remission and release. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under Sections 432/433 or Articles 72/161. And if the latter power under the Constitution is not invoked, the only source of salvation is the play of power under Sections 432 and 433(a) so far as a 'lifer' is concerned. No release by reduction or remission of sentence is possible under the corpus juris as it stands, in any other way. The legislative power of the State under Entry 4 of List II, even if it be stretched to snapping of point, can deal only with Prisons and Prisoners, never with truncation of judicial sentences. Remissions by way of reward or otherwise cannot cut down the sentence as such and cannot, let it be unmistakably understood, grant Final exist passport for the prisoner except by government action under Section 432(1). The topic of Prisons and Prisoners does not cover release by way of reduction of the sentence itself. That belongs to criminal procedure in Entry 2 of List III although when the sentence is for a fixed term and remission plus the period undergone equal that term the prisoner may win his freedom. Any amount of remission to result in manumission requires action under Section 432 (1), read with the Remission Rules. That is why Parliament, tracing the single source of remission of sentence to Section 432, blocked it by the non-obstante clause. No remission, however long, can set the prisoner free at the instance of the State, before the judicial sentence has run out, save by action under the constitutional power or under Section 432. So read, the inference is inevitable, even if the contrary argument be ingenious, that Section 433-A achieves what it wants - arrest the release of certain classes of 'lifers' before a certain period, by blocking Section 432. Articles 72 and 161 are, of course, excluded from this discussion as being beyond any legislative power to curb or confine.

24. We are loathe to loading this judgment with citations but limit it to two leading authorities in this part of the case. Two fundamental principles in sentencing jurisprudence have to be grasped in the context of the Indian corpus juris. The first is that sentencing is a judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the executive cannot alter the sentence itself. In Rabha case ((1961) 2 SCR 133, 137-38), a Constitution Bench of this Court illumined this branch of law. What is the jural consequence of a remission of sentence ?

In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional Court would have of reducing the sentence passed by the trial Court and substituting in its place the reduced sentenced adjudged by the appellate or revisional Court. This distinction is well brought out in the following passage from Weater's CONSTITUTIONAL LAW on the effect of reprieves and pardons vis-a-vis the judgment passed by the court imposing punishment, at p. 176, para 134 :

> A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable', observed Justice Sutherland, 'To render a judgment is a judicial function. To carry the

> judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment.

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched.

The relevance of this juristic distinction is that remission cannot detract from the quantum or quality of sentence or its direct and side-effects except to the extent of entitling the prisoner to premature freedom if the deduction following upon the remission has that arithmetic effect.

25. Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736). Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 57, IPC. On the basis of the a rule which did make that equation, Godse sought his release through a writ petition under Article 32 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so that prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Articles 72 and 161 of the Constitution. Godse (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) is authority for the proposition that a sentence of imprisonment for life is one of 'imprisonment for the whole of the remaining period of the convicted person's natural life'. The legal position has been set out in the context of remissions in life sentence cases thus : ((1961) 3 SCR 440, 447)

Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions - ordinary, special and State - and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate Government to remit the

sentence under Section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.

26. In Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736), Subba Rao, J., also drew the conceptual lines of 'remission', 'sentence' and 'life sentence'. 'Remission' limited in time, helps computation but does not ipso jure operate as release of the prisoner. But when the sentence awarded by the judge is for a fixed term the effect of remissions may be to scale down the term to be endured and reduce it to nil, while leaving the factum and quantum of the sentence intact. That is the ratio of Rabha (Sarat Chandra Rabha v. Khagendranath Nath, (1961) 2 SCR 133 : AIR 1961 SC 334). Here, again, if the sentence is to run until life lasts, remissions, quantified in time, cannot reach a point of zero. This is the ratio of Godse (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736). The inevitable conclusion is that since in Section 433-A we deal only with life sentences, remissions lead nowhere and cannot entitle a prisoner to release. In this view, the remission rules do not militate against Section 433-A and the forensic fate of Godse (who was later released by the State) who had stockpiled huge remissions without acquiring a right so suffered and further an order of release is made either under Section 432 or Articles 772/161 of the Constitution.

27. The next submission urged to show that Section 433-A is bad is based on Article 20(1) of the Constitution. It is a rule of ancient English vintage that ex post facto infliction of heavier penalties than prevailed at the time of commission of the offence is obnoxious. It has incarnated as Article 20(1) in our Constitution. The short question is whether the inflexible insistence on 14 years as a minimum term for release retroactively enlarges the punishment. Another argument addressed to reach the same conclusion is that if at the time of the commission of the offence a certain benign scheme of remissions ruled, the penalty to which he would then have been subjected was not the punishment stated in the Penal Code but that sentence reduced or softened by the remission scheme or short-sentencing provision. On this basis, the lifers would ordinarily have been released well before 14 years which is the harsh but mandatory minimum prescribed by Section 433-A. This indirectly casts a heavier punishment than governed the crime when it was committed.

28. Neither argument has force. The first one fails because Section 302, IPC (or other like offence) fixes the sentence to be life imprisonment. 14 years' duration is never heavier than life term. The second submission fails because a remission, in the case of life imprisonment, ripens into a reduction of sentence of the entire balance only when a final release order is made. Godse (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) is too emphatic and unmincing to admit of a different conclusion. The haunting distance of death which is the terminus ad quem of life imprisonment makes deduction based on remission indefinite enough not to fix the date with certitude. Thus, even if remissions are given full faith and credit, the date of release may not come to pass unless all the unexpired, uncertain balance is remitted by a government order under Section 432. If this is not done, the prisoner will continue in custody. We assume here that the on constitutional power is kept sheathed.

29. Let us assume for the sake of argument that remissions have been earned by the prisoner. In Murphy v. Commonwealth (172 Mass 264), referred to by Cooley and cited before us (infra), it has been held that earned remissions may not be taken away by subsequent legislation. Maybe, direct

effect of such a privative measure may well cast a heavier penalty. We need not investigate this position here.

30. A possible confusion, creeps into this discussion by equating life imprisonment with 20 years' imprisonment. Reliance is placed for the purpose on Section 55, IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736), is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totalled up to 20 years, still the State Government may or may not release the prisoner and until such a release order remi__tting the remaining part of the life sentence is passed, the prisoner cannot claim his liberty. The reason is that life sentence is nothing less than lifelong imprisonment. Moreover, the penalty then and now is the same - life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433-A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14-years jail life once we realise the truism that a life sentence is a sentence for a whole life (see Sambha Ji Krishna Ji v. State of Maharashtra (AIR 1974 SC 147 : (1974) 1 SCC 196 : 1974 SCC (Cri) 102) and State of M.P. v. Ratan Singh (1976 Supp SCR 552 : (1976) 3 SCC 470 : 1976 SCC (Cri) 428). 31. Maybe, a difference may exist in cases of fixed term sentence. Cooley lends support : (COOLEY'S CONSTITUTIONAL LIMITATIONS, Vol I, 8th Edn., p. 544) Privilege existing at time of commission of offence (e.g. privilege of earning a shortening of sentence by good behaviour) cannot be taken away by subsequent statute. 32. The next submission, pressed by Shri Kakkar with great plausibility is that Section 5 of the Procure Code saves all remissions, short-sentencing schemes as special and local laws and, therefore, they must prevail over the Code including Section 433-A. Section 5 runs thus :

> Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special from of procedure prescribed, by any other law for the time being in force.

33. The anatomy of this savings section is simple, yet subtle. Broadly speaking, there are three components to be separated. Firstly, the Procedure Code generally governs matter covered by it. Secondly, if a special or local law exists covering the same area, this latter law will be saved and will prevail. The short-sentencing measures and remission schemes promulgated by the various States are special and local laws and must override. Now comes the third component which may be clinching. If there is a specific provision to the contrary, then that will override the special or local law. Is Section 433-A a specific law contra ? If so, that will be the last word and will hold even against the special or local law.

34. Three rulings were cited by the learned Solicitor-General to make out that Section 433-A is a specific law. A Bombay case (Biram Sardar v. Emperor, AIR 1941 Bom 146 : 42 Cri LJ 519), he frankly stated, takes a contrary but scrappy view. The judicial Committee in Pakala Narayana Swami v. King Emperor (1939 IA 66 : AIR 1939 PC 47 : 40 Cri LJ 364) inconclusively considered what is a specific law, in a similar setting. Two later cases of Lahore (a Full Bench of five Judges) (Hakam Khuda Yar v. Emperor, AIR 1940 Lah 129 : 41 Cri LJ 591) and of Allahabad (a Bench of three Judges) (Baldeo v. Emperor, AIR 1940 All 263 : 41 Cri LJ 627 : 1940 ALJ 241) discussed almost an identical issue and held that some provisions of the Procedure Code were specific sections to the contrary and would repel any special law on the subject.

35. Section 1(2) of the Criminal Procedure Code, 1898, is the previous incarnation of Section 5 of the Present Code and contains virtually the same phraseology. The expression 'specific provision to the contrary' in the Code of 1898 was considered in the two Full Bench decisions (supra). The setting in which the issue was raised was precisely similar and the meaning of 'specific provision to the contrary' was considered by Young, C.J., in the Lahore case where the learned Judge observed : (AIR 1940 Lah 129, 133)

The word 'specific' is defined in Murray's Oxford Dictionary as 'precise or exact in respect of fulfilment, conditions or terms; definite explicit'.

36. In a similar situation, the same words fell for decision in the Allahabad case where Braund, J., discussed the meaning of 'specific provision' in greater detail and observed : (AIR 1940 All 263, 269)

I have, I confess, entertained some doubt as to what exactly the words 'specific provision' mean. I think first, that they must denote something different from the words 'express provision'. For a provision of a statute to be an 'express' provision affecting another statute or part of it, it would have, I think, to refer in so many words to the other statute or to the relevant portion of it and also to the effect intended to be produced on it. Failing this, it could hardly be said to be 'express' ..... But the word 'specific' denotes, to my mind, something less exacting than the word 'express'. It means, I think, a provision which 'specifies' that some 'special law' is to be 'affected' by that particular provision. A dictionary meaning of the verb 'to specify' as given in MURRAY'S NEW ENGLISH DICTIONARY, is 'to mention, speak of or name (something) definitely or explicitly; to set down or state categorically or particularly ....' and a meaning of the adjective 'specific' in the same dictionary is 'precise .... definite, explicit .... exactly named or indicated, or capable of being so, precise, particular'. What I think the words 'specific provision' really mean therefore is that the particular provision of the Criminal Procedure Code must, in order to 'affect' the 'special .... law', clearly indicate, in itself and not merely by implication to be drawn from the statute generally, that the 'special law' in question is to be affected without necessarily referring to that 'special law' or the effect on it intended to be produced in express terms. Lord Hatherley in (1898) 3 AC 933 at p. 938 (Thomas Challoner v. Henry W. F. Bolikow, (1878) 3 AC 933) has defined the word 'specific' in common parlance of language as meaning 'distinct from general'.... It would, no doubt, be possible to multiply illustrations of analogous uses of the words 'specify' and 'specific'. But this is I think sufficient to show that, while requiring something less than what is 'express', they nevertheless require something which is plain, certain and intelligible and not merely a matter of inference or implication to be drawn from the statute generally. That, to my mind, is what is meant by the word 'specific' in Section 1(2), Criminal PC ....

37. In an English case (Re Net Book Agreement, 1957, (1962) 3 All ER 751 (RPC)) Buckley, J., has interpreted the word 'specific' to mean explicit and definable. While Indian usage of English words often loses the Atlantic flavour and Indian judges owe their fidelity to Indian meaning of foreign words and phrases, here East and West meet and 'specific' is specific enough to avoid being vague and general. Fowler regards this word related to the central notion of species as distinguished from genus and says that it is 'often resorted to by those who have no clear idea of their meaning but hold it to diffuse an air of educated precision'. (FOWLER'S MODERN ENGLISH USAGE, 2nd edn., p. 574) Stroud (STROUD'S JUDICIAL DICTIONARY, Vol. 4, 3rd end., p. 2836) says 'specifically ....' means 'as such'. Black (BLACK'S LAW DICTIONARY, 4th edn., p. 1571) gives among other things, the following meaning for 'specific' : definite, explicit; of an exact or particular nature ..... particular; precise. While legalese and English are sometimes enemies we have to go by judicialese

which is the draftsman's lexical guide.

38. The contrary view in the Biram case (Biram Sardar v. Emperor, AIR 1941 Bom 146 : 42 Cri LJ 519) is more assertive than explanatory, and ipse dixit, even if judicial, do not validate themselves. We are inclined to agree with the opinion expressed in the Lahore and Allahabad cases. (Hakam Khuda Yar v. emperor, AIR 1940 Lah 129 : 41 Cri LJ 591)-(Baldeo v. Emperor, AIR 1940 All 263 : 41 Cri LJ 627 : 1940 ALJ 241) A thing is specific if it is explicit. It need not be express. The antithesis is between 'specific' and 'indefinite' or 'omnibus' and between 'implied' and 'express'. What is precise, exact, definite and explicit, is specific. Sometimes, what is specific may also be special but yet they are distinct in semantics. From this angel, the Criminal Procedure Code is a general Code. The remission rules are special laws but Section 433-A is a specific, explicit, definite provision dealing with a particular situation or narrow class of cases, as distinguished from the general run of cases covered by Section 432, CrPC. Section 433-A picks out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it explicitly to a particularised treatment. It follows that Section 433-A applies in preference to any special or local law because Section 5 expressly declares that specific provisions, if any, to the contrary will prevail over any special or local law. We have said enough to make the point that 'specific' is specific enough and even though 'special' to 'specific' is near allied and 'thin partition do their bounds divide' the two are different. Section 433-A escapes the exclusion of Section 5.

39. The state is now set for considering the contention that Section 433-A violates Article 14 for two reasons. It arbitrarily ignores the unequal, yet vital, variations of crimes and criminals so relevant to punishment in our age of penological enlightenment and subjects them equally to a terrible term of 14 years in jail as a mandatory minimum. Treating unequals equally is anathema for Article 14. Secondly, the section inflicts, with anti-reformative inhumanity and Procrustean cruelty, a prolonged minimum of 14 years' servitude on every lifer arbitrarily, disregarding the audit report on progressive healing registered by some as against others. The capricious insistence on continued detention of a prisoner long after he has been fully resocialised is a penological overkill, purposeless torture and constitutional blunder. These two interwined arguments cannot be appreciated without investigating the rational penal policy of our system and the brutal impertinence of rigorous incarceration beyond the point of habilitation, what with Mahatma Gandhi's therapeutic approach to criminals and Maneka Gandhi's (Maneka Gandhi v. Union of India, (1978) 1 SCC 248) accent on fairness in privative processes where personal liberty is involved.

40. The larger issues of sentencing legitimacy and constitutionality have been examined by this Court in the past and throws us well into a different level of criminal justice. Of course, finer propositions need a sublime perception for fuller appreciation as the learned Judges of this Court have invariably shown. Here, the proposition is - Mr. Tarkunde and Mr. Garg, et al, have pressed this to excess - the primary purpose of prison sentence is hospital setting and psychic healing, not traumatic suffering, curative course, not retributive force, presented these days as a sophisticated variant called public denunciation. This submission excludes other punitive objectives such as deterrence through example of prolonged pain and retribution through condign infliction. A penological screening is fundamental to sentencing jurisprudence but, for our present pursuit, the only relevant point is whether rehabilitation is such a high component of punishment as to render arbitrary, irrational and therefore, unconstitutional, any punitive technique which slurs over prisoner reformation. We feel that correctional strategy is integral to social defence which is the final justification for punishment of the criminal. And since personal injury can never psychically heal, it is obdurate obscurantism for any legislative criminologists to reject the potential for prisoner resocialisation from the calculus of reformative remission and timely release. The compulsive span

of 14 years in custody, whether the man within the 'lifer' has become an angel by turning a new leaf or remains a savage, thanks to jail regimen and jailor relations, sounds insensitive. Karuna, daya, prema and manavata are concepts of spiritualised humanism secularly implict in our constitutional preamble. Alienation of our justice system from our cultural quintessence, thanks to the hangover of the colonial past, may be the pathological root of the brute penology which confuses between crime and criminal. Torturing the latter to terminate the former is not promotional of human dignity and fair legal process. Be that as it may, this Court in Sunil Batra (Sunil Batra (I) v. Delhi Administration, (1978) 4 SCC 494, 566, 567 : 1979 SCC (Cri) 155, 227, 228), has observed : [SCC pp. 566 & 567 : SCC (Cri) pp. 227 & 228, paras 203 & 207]

The winds of change must blow into our carcers and self-expression and self-respect and self-realization creatively substituted for the dehumanising remedies and 'wild life' techniques still current in the jail armoury. A few prison villains - they exist - shall not make martyrs of the humane many; and even from these few, trust slowly begets trust. Sarvodaya and antyodaya have criminological dimensions which our social justice awareness must apprehend and actualize. I justify this observation by reference to the noble but inchoate experiment (or unnoticed epic) whereby Shri Jai Prakash Narain redemptively brought murderously dangerous dacoits of Chambal Valley into prison to turn a responsible page in their life in and out of jail. The rehabilitative follow-up was, perhaps, a flop.

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Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in the Raj past, need reorientation; prison houses and practices, a hangover of the die-hard retributive ethos, need reconstruction; prisoners, these noiseless, voiceless human heaps cry for therapeutic technology; and prison justice, after long jurisprudential gestation, must now be re-born through judicial midwifery, if need be.

Again : (Ibid., SCC pp. 579-80 : SCC (Cri) 240-41) [SCC pp. 579-80 : SCC (Cri) pp. 240-41, para 244]

We share the concern and anxiety of our learned brother Krishna Iyer, J. for reorientation of the outlook towards prisoners and the need to take early and effective steps for prison reforms. Jail Manuals are largely a hangover of the past, still retaining anachronistic provisions like whipping and the ban of the use of the Gandhi cap. Barbaric treatment of a prisoner from the point of view of his rehabilitation and acceptance and retention in the mainstream of social life, becomes counter-productive in the long run.

The Model Jail Manual, prepared by the Indian Prison echelons plus a leading criminologist, Dr. Panakkal, back in 1970, has stated, right at the outset, in its Guiding Principles :

> Social reconstruction and rehabilitation as objectives of punishment attain paramount importance in a Welfare State. The supreme aim of punishment shall be the protection of society, through the rehabilitation of the offender .....

Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking away from him the right of self-determination. Therefore, the prison system should not, except as incidental to justifiable segregation or maintenance of discipline, aggravate the suffering inherent in such a situation.

The institution should be a centre of correctional treatment, where major emphasis shall be given on the re-education and reformation of the offender. The impacts of institutional environment and treatment shall aim at producing constructive changes in the offender, as would be having profound and lasting effects on his habits, attitudes, approaches and on his total value schemes of life.

One of the subjects dealt within the Manual is 'release planning'. We need not tarry long to tell the truth that every sinner has a future, given the social chance, and every prisoner a finer chapter as a free person, given the creative culturing of his psychic being. The measure of this process is not the mechanical turn of the annual calendar fourteen times over, but the man-making methodology of the correctional campus, together with individual response. It follows that an inflexible 14-year term for lifers under Section 433-A eschews chances of human change and puts all the penal eggs in the linear cellular basket. Maybe, the failure of prisons (this is the title of a recent book by a competent criminologist) has not occurred to Parliament when it enacted Section 433-A or the Gandhian gospel has, by 1978, lost its living impact on the parliamentary majority in the field of prison reform. We cannot speculate on these imponderables and must do our batting from within the textual crease.

41. Surely, arbitrary penal legislation will suffer a lethal blow under Article 14. But the main point here is whether Section 433-A harbours this extreme vice of arbitrariness or irrationality. We must remember that Parliament as legislative instrumentality, with the representative of the people contributing their wisdom to its decisions, has title to an initial presumption of constitutionality. Unless one reaches far beyond unwisdom to absurdity, irrationality, colourability and the like, the court must keep its hand off.

42. A judicial journey to the penological beginning reveals that social defence is the objective. The triple purposes of sentencing are retribution, draped sometimes as a public denunciation, deterrence, another scary variant, with a Pavlovian touch, and, in our era of human rights, rehabilitation, founded on man's essential divinity and ultimate retrievability by raising the level of consciousness of the criminal and society. We may avoid, for the nonce, theories like 'society prepares the crime, the criminal commits it'; or that 'crime is the product of social excess' or that 'poverty is the mother of crime'.

43. Judicial pronouncement are authentic guidance and so a few citations may serve our purpose. In Sobraj (Charles Sobraj v. Supdt., Central Jail, Tihar, (1978) 4 SCC 104, 109 : 1978 SCC (Cri) 542, 547), this Court observed : [SCC p. 109 : SCC (Cri) p. 547, paras 9-10]

..... It is now well settled, as a stream of rulings of courts proves, that deterrence, both specific and general, rehabilitation and institutional security are vital considerations. Compassion wherever possible and cruelty only where inevitable, is the art of correctional confinement. When prison policy advances such a valid goal, the court will not intervene officiously.

The overall attitude was incorporated as a standard by the American National Advisory Commission on Crime, Justice Standards and Goals : ("To solve the Age-old Problem of Crime"; Roger 109; Lanphear, J.D. p. 19)

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In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must

be viewed in the light of less drastic means for achieving the same basic purpose.

Earlier, this Court in Hiralal Mallick case (Hiralal mallick v. State of Bihar, (1977) 4 SCC 44, 49 : 1977 SCC (Cri) 538, 543) stated : [SCC p. 49 : SCC (Cri) p. 543, para 13]

The dignity and divinity, the self-worth and creative potential of every individual is a higher value of the Indian people; ...

Again in Mohammad Giasuddin (Mohammad Giasuddin v. State of A.P., (1977) 3 SCC 287, 290 : 1977 SCC (Cri) 496, 500), a Bench belighted in the penological basics : [SCC p. 290 : SCC (Cri) p. 500, para 9]

It is thus plain that crime is a pathological aberration, that the criminal can ordinarily be redeemed, that the State has to rehabilitate rather than avenge. The sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturisation. Therefore the focus of interest in penology is the individual, and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defense. We, therefore, consider a therapeutic, rather than an 'in terrorem' outlook, should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. In the words of George Bernard Shaw : 'If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries.'

44. We emphasise here that remission schemes offer healthy motivation for better behaviour, inner improvement and development of social fibre. While eccentricities of remission reducing a murderer's life term to short spells of 2 or 3 years in custody may scandalise penologists, such fear may not flabbergast any sociologist if by sheer good behaviour, educational striving and correctional success, a prisoner earns remission enough for release after serving 7 or 8 years.

45. It makes us blush to jettison Gandhiji and genuflect before Hammurabi, abandon reformatory humanity and become addicted to the 'eye for an eye' barbarity. Said Churchill : (Sentencing and Probation - Published by National College of the State Judiciary, Reno, Nevada, USA, p. 68)

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.

The mood and temper of our Constitution certify that arbitrary cruelty to the prisoner and negative attitude to reformation of the individual are obnoxious. Even the recent ruling in Bachan Singh (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580) on the vires of death penalty upholds this high stance.

46. Basic to the submission of counsel for the petitioners is the humane assumption that the object of sentencing is not deterrent torture simpliciter but mainly the rehabilitation of the prisoner. Human dignity, emphasised in the preamble, compassion, implicit in the prescription of fair procedure in Article 21, and the irrationality of arbitrary incarceratory brutality violative of Article 14 invest the demand for a reformatory component in jail regimen with the status of a constitutional requirement. We need not prolong the judgment by substantiation of this proposition because the learned Solicitor-General, with sweet reasonableness and due regard to the precedents of this Court, has not disputed that reform of the prisoner is one of the major purposes of punishment.

47. The sequiter is irresistible. Any provision that wholly or substantially discards the relevancy of restoration of the man mired by criminality is irrational. How is Section 433-A affected by this vice ? The argument is that 14 years in prison is an inordinate spell which is not only an unrewarding torment but a negation of reformation - indeed, the promotion of embittered hostility to society and hardening of brutality counter-productive of hopeful humanization.

48. The argument pressed before us is that Section 433-A does injustice to the imperative of reformation of the prisoner. Had his in-prison good behaviour been rewarded by reasonable remissions linked to improved social responsibility, nurtured by familial contacts and liberal parole, cultured by predictable, premature release, the purpose of habilitation would have been served. If law - Section 433-A in this case - rudely refuses to consider the subsequent conduct of the prisoner and forces all convicts, good, bad and indifferent, to serve a fixed and arbitrary minimum it is an angry flat untouched by the proven criteria of reform. Surely, an avant garde penologist or T.M. oriented jurist would regard enlightened sentencing as abbreviated life behind bars coupled with rehabilitatory exposure inside and outside. Maybe, he may even criticise the draconian duration, blindly running beyond 14 years, as penological illiteracy. Criminologists concentrate on the activisation of the creative intelligence of the culprit by various procedures and by his release from jail at a cut-off point when the jural-neural tests of mental-moral normalcy, otherwise called Rehabilitation Indices, are satisfied. To violate these research results and to be addicted to a 14-year prison term is a penal superstition without any rational support and, therefore, is arbitrary. Why not 20 years ? Or a whole life ? No material, scientific, cultural or other has been placed for our consumption by the State indicating that if a murderer does not spend at least 14 endless years inside jail he will be a social menace when released. Sadism and impressionism even if it incarnates as legislation, cannot meet the social science content of Articles 14 and 21 which are part of the suprema lex.

49. While the light of this logic is not lost on us and the non-institutional alternatives to prison as the healing hope of humane habilitation are worthy of exploration, we are in the province of constitutionality where the criteria are different.

50. We have no doubt that reform of the prisoner, as a social defence strategy, is high on the agenda of Indian penal policy reform. The question is whether a 14-year term as a mandatory minimum, is so extremist and arbitrary as to become unconstitutional, even assuming the rehabilitatory recipe to be on our penological pharmacopeia. We cannot go that far as judges, whatever our personal dispositions may incline us were we legislators.

51. Two broad grounds to negative this extreme position strike us, Deterrence, as one valid punitive component has been accepted in Sunil Batra ((1978) 4 SCC 494, 579 : 1979 SCC (Cri) 155, 240) by a five-Judge Bench (see Desai, J., supra). So, a measure of minimum incarceration of 14 years for the gravest class of crimes like murder cannot be considered shocking, having regard to the escalation of horrendous crime in the country and the fact that this Court has upheld even death penalty (limited though to 'the rarest of rare cases'). (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580) The time has not, perhaps, arrived to exclude deterrence and even public denunciation altogether. Secondly, even for correctional therapy, a long 'hospitalisation' in prison may sometimes be needed. To change a man's mind distorted by many baleful events, many primitive pressures, many evil companions and many environmental pollutions, may not be an instant magic but a slow process - assuming that correctional strategies are awarely available in prisons, 'a consummation devoutly to be wished' but notoriously, rather victoriously, absent.

52. We agree that many studies by criminologists, high-powered commissions and court pronouncements have brought home the truth of the lie; once a murderer always a murderer and, therefore, early release will spell a hell of manslaughter. Social scientists must accept Robert Ingersoll's tart remark : 'In the history of the world, the man who is ahead has always been called a heretic'. We, as judges, have no power to legislate but only to invigilate. In the current state of things and those of society we have to content ourselves with the though that, personal opinions apart, a very long term in prison for a murderer cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and as so blatantly barbarous as to be irrational enough to be struck down as ultra vires. Even the submission that no penal alibi justifies a prisoner being kept walled off from the good earth if, by his conduct, attainments and proven normalisation, he has become fit to be a free citizen, cannot spell unconstitutionality. And the uniform infliction of a 14-year minimum on the transformed and the unkempt is an unkind disregard for redemption inside prison. Even so, to overcome the constitutional hurdle much more material, research results and specialist reports, are needed. How to assert who has become wholly habilitated and who not, unless you rely on the Rehabilitation Index ? (Freedom Behind bars - Criminology and Consciousness, Series I, 1979, Maharshi European Reasearch University Press Publication, p. 73) Currently, we have theories, and experiments awaiting social scientists' certificates of certitude.

53. For instance, deep relaxation recipes and meditational techniques, researched with scientific tools, well known and sophisticated experiments, neurological and psychological, claim to have achieved a breakthrough and have put across to the scientific world a Rehabilitation Index. This complex of tests, reference to which, culled from a publication titled Criminology and Consciousness, Series I (developed by the Maharshi European Research University according to scientifically established standard measures of successful rehabilitation), has credentials enough to be taken cognisance of in some Indian prisons. There are sceptics and scepticism is good because it 'is the chastity of the intellect'. But to dogmatic disbelievers one may only say with John Dewey : 'Every great advance in science has issued from a new audacity of imagination.' But courts, when assaying constitutionality, have to wait till the Establishment accepts it in some measure. So, we are not now in position to assert, as court, that at least a 14-year term for a murderer is arbitrary, unusually cruel and unconstitutional. We hold against violation of Article 14. Another argument based on Article 14 may also be briefly dealt with, although we are not carried away by it. In terms, Section 433-A applies only to two classes of life imprisonment.

The true content of the provision is that in the two specific categories specified in Section 433-A the prisoner shall actually suffer the minimum jail tenure set in it. There are around forty-one other offences, including attempt to murder, homicide not amounting to murder, grievous hurt, dacoity and breach of trust, where life sentence is the maximum. But the framers of the Penal Code have classified maximum sentences principally on the basis of gravity of the crime. By that token, where a terrible crime has been committed the Penal Code has prescribed death penalty as the maximum. The attack on its constitutionality has recently been repulsed by this Court. (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580) The main mass of cases where life imprisonment is actually inflicted by the courts belongs to the 'either/or' category where the court has the responsible discretion to impose death penalty or life imprisonment and actually awards only life imprisonment. Even in cases where the court sentences a convict to death the appropriate Government often by virtue of Section 433(a) reduces the lethal rigour to life term. These classes of cases are categorised separately by Section 433-A. When the crime is so serious as to invite death penalty as a possible sentence, Parliament, in its wisdom, takes the view that ameliorative judicial award or statutory commutation by the executive should not devalue the sternness of the sentence to

be equated with the life sentence awarded for the obviously less serious clauses of offences where the law itself has fixed a maximum of only life imprisonment, not death penalty as a harsher alternative. The logic is lucid although its wisdom, in the light of penological thought, is open to doubt. We have earlier stated the parameters of judicial restraint and, as at present advised, we are not satisfied that the classification is based on an irrational differentia unrelated to the punitive end of social defence. Suffice it to say here, the classification, if due respect to Parliament's choice is give, cannot be castigated as one capricious enough to attract the lethal consequence of Article 14. Law and Life deal in relatives, not absolutes. No material, apart from humane hunches, has been placed by counsel whose focus has been legal, not social science-oriented, to show that prolonged jail life reaches a point of no return and is unreasonable. On the materials now before us, we do not strike down Section 433-A on the score of capricious classification. Some day, when human sciences have advanced far beyond and non-institutional alternative have fully developed, parliamentary faith in the 14-year therapy may well change or be challenged as unscientific credulity and superstitious cruelty. But that is a far-away day and futurology is not a forensic speciality. The womb of tomorrow may hold, like Krishna to Kamsa, lethal omen to the faith of today. We rest content with Bertrand Russel's words of scepticism : (Unpopular Essays : Philosophy and Politics)

The essence of the liberal outlook lies not in what opinions are held, but in how they are held : instead of being held dogmatically they are held tentatively, and with a consciousness that new evidence may at any moment lead to their abandonment. This is the way opinions are held in science, as opposed to the way in which they are held in theology.

54. The major submissions which deserve high consideration may now be taken up. They are three and important in their outcome in the prisoners' freedom from behind bars. The first turns on the 'prospectivity' (loosely so called) or otherwise of Section 433-A. We have already held that Article 20(1) is not violated but the present point is whether, on a correct construction, those who have been convicted prior to the coming into force of Section 433-A are bound by the mandatory limit. If such convicts are out of its coils their cases must be considered under the remission schemes and 'short-sentencing' laws. The second plea, revolves round 'pardon jurisprudence', if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A therein. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, the exercise of this plenary power cannot be left to the fancy, frolic or frown of government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. On this basis, we will have to scrutinise and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but to train the wide and beneficent power to remit life sentences without the hardship of fourteen fettered years.

55. Now to the first point. It is trite law that civilised criminal jurisprudence interdicts retroactive impost of heavier suffering by a later law. Ordinarily, a criminal legislation must be so interpreted as to speak futuristically. We do not mean to enter the area of Article 20(1) which has already been dealt with. What we mean to do is so to read the predicate used in Section 433-A as to yield a natural result, a humane consequence, a just infliction. While there is not vested right for any convict who has received a judicial sentence to contend that the penalty should be softened and that the law which compels the penalty to be carried out in full cannot apply to him, it is the function of the court to adopt a liberal construction when dealing with a criminal statute in the ordinary course of things. This humanely inspired canon, not applicable to certain terribly anti-social categories may legitimately be applied to Section 433-A. (The sound rationale is that expectations of convicted

citizens of regaining freedom on existing legal practices should not be frustrated by subsequent legislation or practice unless the language is beyond doubt). Liberally in ascertaining the sense may ordinarily err on the side of liberty where the quantum of deprivation of freedom is in issue. In short, the benefit of doubt, other things being equal, must go to the citizen in penal statute. With this prefatory caution, we may read the section : 'Where a sentence of imprisonment for life is imposed on conviction of a person .... such person shall not be released from prison unless he had served at least fourteen years of imprisonment'. Strict conformity to tense applied by a precision grammarian may fault the draftsman for using the past-perfect tense. That apart, the plain meaning of this clause is that 'is' means 'is' and, therefore, if a person is sentenced to imprisonment for life after Section 433-A comes into force, such sentence shall not be released before the 14-year condition set out therein is fulfilled. More precisely, any person who has been convicted before Section 433-A comes into force goes out of the pale of the provision and will enjoy such benefits as accrued to him before Section 433-A entered Chapter XXXII. The other clause in the provision suggests the application of the mandatory minimum to cases of commutation which have already been perfected, and reads : "Where a sentence of death .... has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment." The draftsman, apparently, is not a grammarian. He uses the tenses without being finical. We are satisfied that even this latter clause merely means that if a sentence of death has been commuted after this section comes into force, such person shall not be released until the condition therein is complied with. 'Is' and 'has' are not words which are weighed in the scales of grammar nicely enough in this Section and, therefore, over-stress on the present tense and the present-perfect tense may not be a clear indication. The general rule bearing on ordinary penal statutes in their construction must govern this case. In another situation, interpreting the import of "has been sentenced" this Court held that "the language of the clause is neutral" regarding prospectivity. (Boucher Pierre Andre v. Supdt., Central Jail, Tihar, (1975) 1 SCC 192, 195 : 1975 SCC (Cri) 70, 73) It inevitably follows that every person who has been convicted by the sentencing court before December 18, 1978, shall be entitled to the benefits accruing to him from the remission scheme or short-sentencing project as if Section 433-A did not stand in his way. The section uses the word 'conviction' of a person and, in the context, it must mean 'conviction' by the sentencing court; for that first quantified his deprivation of personal liberty.

56. We are mindful of one anomaly and must provide for its elimination. If the trial Court acquits and the higher Court convicts and it so happens that the acquittal is before Section 433-A came into force and the conviction after it, could it be that the convicted person would be denied the benefit of prospectivity and consequential non-application of Section 433-A merely because he had the bad luck to be initially acquitted ? We think not. When a person is convicted in appeal, it follows that the appellate Court has exercised its power in the place of the original court and the guilt, conviction and sentence must be substituted for and shall have retroactive effect from the date of judgment of the trial Court. The appellate conviction must relate back to the date of the trial Court's verdict and substitute it. In this view, even if the appellate Court reverses an earlier acquittal rendered before Section 433-A came into force but allows the appeal and convicts the accused, after Section 433-A came into force, such persons will also be entitled to the benefit of the remission system prevailing prior to Section 433-A on the basis we have explained. An appeal is a continuation of an appellate judgment as a replacement of the original judgment. (Boucher Pierre Andre v. Supdt., Central Jail, Tihar, (1975) 1 SCC 192, 195 : 1975 SCC (Cri) 70, 73)

57. We now move on to the second contention which deals with the power of remission under the Constitution and the fruits of its exercise vis-a-vis Section 433-A. Nobody has a case - indeed can be heard to contend - that Articles 72 and 161 must yield to Section 433-A. Cooley has rightly

indicated that 'where the pardoning power is vested exclusively in the top executive any law which restricts the power is unconstitutional'. Rules to facilitate the exercise of the power stand on a different footing. (COOLEY'S CONSTITUTIONAL LIMITATIONS, Vol. 1, 4th edn., p. 218) The Constitution is the suprema lex and any legislation, even by Parliament, must bow before it. It is not necessary to delve into the details of these two articles; nor even to trace the antiquity of the royal prerogative which has transmigrated into India through the various Westminster statutes, eventually to blossom as the power of pardon vested in the President or the Governor substantially in overlapping measure and concurrently exercisable.

58. The present provisions (Sections 432 and 433) have verbal verisimilitude and close kinship with the earlier Code of 1898 (Sections 401 and 402). Likewise, the constitutional provisions of today were found even in the Government of India Act, 1935. Of course, in English constitutional law, the sovereign, acting through the Home Secretary, exercises the prerogative of mercy. While the content of the power is the same even under our Constitution, its source and strength and, therefore, its functional features and accountability are different. We will examine this aspect a little later. Suffice it to say that Article 72 and 161 are traceable to Section 295 of the Government of India Act, 1935. The Central Law Commission has made certain observations based on Rabha case (Sarat Chandra Rabha v. Khagendranath Nath, (1961) 2 SCR 133 : AIR 1961 SC 334) to the effect that the effect of granting pardon is not to interfere with the judicial sentence but to truncate its execution. There is no dispute regarding this branch of pardon jurisprudence. What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(a) suffers eclipse. Since Sections 432 and 433(a) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(a) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submission of counsel in this behalf.

59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is 'untouchable' and 'unapproachable' and cannot suffer the vicissitudes of simple legislative processes. Therefore, Article 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.

61. Are we back to square one ? Has Parliament indulged in legislative futility with a formal victory but a real defeat ? The answer is 'yes' and 'no'. Why 'yes' ? Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advice and act under Article 161, the Governor being bound by that advice. The action of commutation and

release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to cotrovert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in Shamsher Singh case (Shamsher Singh v. State of Punjab, (1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L&S) 550). So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the power under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-a-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.

62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.

63. The jurisprudence of constitutionally canalised power as spelt out in the second proposition also did not meet with serious resistance from the learned Solicitor-General and, if we may say so rightly. Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism. In the International Airport Authority case (R. D. Shetty v. International Airport Authority, (1979) 3 SCC 489, 511-12) this Court stated : (SCC pp. 511-12, paras 20-21)

The rule inhibiting arbitrary action by government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well settled as a result of the decisions of this Court in E. P. Royappa v. State of Tamil Nadu ((1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165) and Maneka Gandhi v. Union of India (Maneka Gandhi v. Union of India, (1978) 1 SCC 248) that Article 14 strikes at arbitrariness in State action

and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory; it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law.

Mathew, J. in V. Punnen Thomas v. State of Kerala (AIR 1969 Ker 81 : 1968 Ker LJ 619 : 1968 Ker LT 800) observed :

> The government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the government is still the government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

If we except again from the Airport Authority case : ((1979) 3 SCC 489, 504, 505) (SCC pp. 504 & 505 paras 10 & 11)

Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his THE LAW OF CONSTITUTION or the definition given by Hayek in his ROAD TO SERFDOM AND CONSTITUTION OF LIBERTY or the exposition set forth by Harry Jones in his THE RULE OF LAW AND THE WELFARE STATE, there is as pointed out by Mathew, J., in his article on The Welfare State, Rule of Law and Natural Justice in DEMOCRACY, EQUALITY AND FREEDOM (Upendra Baxi, Ed. : Eastern Book Co., Lucknow (1978), p. 28) "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any off its officers should possess arbitrary power over the interests of the individual. Ever action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and it bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

..... The discretion of the government has been held to be not unlimited in that the government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on The New Property in 73 Yale Law Journal 733, "that government action be based on standards that are not arbitrary or unauthorised". The government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The government is still the government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

It is the pride of our constitutional order that all power, whatever its sources, must, in its exercise, anathematise arbitrariness and obey standards and guide-lines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guide-lines should govern the exercise

even of presidential power.

64. Speaking generally, Lord Acton's dictum deserves attention : (Letter to Mandell (later, Bishop) Creighton, April 5, 1887 HISTORICAL ESSAYS AND STUDIES, 1907)

I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases.

Likewise, Edmund Burke, the great British statement gave correct counsel when he said : (REFLECTIONS ON THE REVOLUTION IN FRANCE 7019)

All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author and Founder of society.

65. Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise. For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive. We make these observations because it has been brought to our notice that a certain Home Minister's visit to a Central Jail was considered so auspicious an omen that all the prisoners in the jail were given substantial remissions solely for this reason. Strangely enough, this propitious circumstance was discovered an year later and remission order was issued long after the Minister graced the penitentiary. The actual order passed on July 18, 1978 by the Haryana Government reads thus : (No. 41/8/78-JJ (5) dated : Chandigarh, July 28, 1978)

In exercise of the powers conferred under Article 161, the Constitution of India, the Governor of Haryana grants special remissions on the same scale and terms as mentioned in Government of India, Ministry of Home Affairs Letter No. U. 13034/59/77 dated June 10, 1977 to prisoners who happened to be confined in Central Jail, Tihar, New Delhi on May 29, 1977, at the time of the visit of Home Minister, Government of India, to said Jail and who have been convicted by the Civil Courts of Criminal Jurisdiction in Haryana State.

> # A. Banerjee Secretary to Government of Haryana Jails DepartmentDated : Chandigarh, July 18, 1978.##

Push this logic a little further and the absurdity will be obvious. No constitutional power can be vulgarised by personal vanity of men in authority. Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Articles 72/161 may ordinarily be exercised and a refusal may be wrong-headed. If, on the other hand, a brutal murderer, bloodthirsty in his massacre, has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power of is a close relation of a political high-up. The court, if to finds frequent misuse of this power may

have to investigate the discrimination. The proper thing to do, if government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty.

66. Once we accept the basic thesis that the public power vested on a high pedestal has to be exercised justly the situation becomes simpler. The principal considerations will turn upon social good by remission or release. Here, we come back to the purpose of imprisonment and the point of counter-productivity by further prolongation of incarceration. But when is this critical point reached ? Bitter verse burns better into us this die-hard error : (The Ballad of Reading Goal)

This too I know - and wise it were If each could know the same - That every prison that men build Is built with bricks of shame, And bound with bars lest Christ should see How men their brothers maim.

President Carter when he was Governor of Georgia, addressing a Bar Association, said :

> In our prisons, which in the past have been a disgrace to Georgia, we've tried to make substantive changes in the quality of those who administer them and to put a new realm of understanding and hope and compassion into the administration of that portion of the system of justice. 95 per cent of those who are presently incarcerated in prisons will be returned to be our neighbors, and now the thrust of the entire program, as initiated under Ellis MacDougall and now continued under Dr. Ault, is to try to discern in the soul of each convicted and sentenced person redeeming features that can be enhanced. We plan a career for that person to be pursued while he is in prison. I believe that the early data that we have on recidivism rates indicate the efficacy of what we've done.

67. All these go to prove that the length of imprisonment is not regenerative of the goodness within and may be proof of the reverse - a calamity which may be averted by exercise of power under Article 161, especially when the circumstances show good behaviour, industrious conduct, social responsibility and humane responses which are usually reflected in the marks accumulated in the shape of remission. In short, the rules of remission may be effective guide-lines of a recommendatory nature, helpful to government to release the prisoner by remitting the remaining term.

68. The failure of imprisonment as a crime control tool and the search for non-institutional alternatives in a free milieu, gain poignant pertinence while considering the mechanical exclusion of individualised punishment by Section 433-A, conjuring up the cruel magic of 14 years behind bars - where 'each day is like a year, a year whose days are long' - as a solvent of the psychic crisis which is crimeogenic factor, blinking at the blunt fact that at least after a spell the penitentiary remedy aggravates the recidivist malady. In the FAILURE OF PUNISHMENT (a 1979 publication) the authors start off with the statement : (THE FAILURE OF IMPRISONMENT Roman Tomasic and Ian Dobinson - An Australian Perspective. Law in Society No. 3, George Allen and Unwin, p. 1)

The failure of imprisonment has been one of the most noticeable features of the current crisis in criminal justice system in advance industrial or post-industrial societies such as Australia, Britain,

Canada and the United States. One justification after another advanced in favour of the use of imprisonment has been shown to be misconceived. At best, prisons are able to provide a form of crude retribution to those unfortunate to be apprehended. At worst, prisons are brutalising, cannot be shown to rehabilitate or deter offenders and are detrimental to the re-entry of offenders into society. Furthermore, the heavy reliance upon prisons, particularly maximum security institutions with their emphasis upon costly security procedures, has led to an inordinate drain upon the orerall resources devoted to the criminal justice area.

Likewise, in many current research publications the thesis is the same. Unless a tidal wave of transformation takes place George Ellis will be proved right : (Inside Folsom Prison, An ETC Publication, pp. 24-25)

There are many questions regarding our prison systems and their rehabilitative quality. Observers from inside the walls find prisons to be a melting pot of tension and anxiety. Tension and anxiety are the result of a variety of abnormal conditions. Prisons, including the so-called model prisons, rob a man of his individual identity and dignity.

Contrary to popular opinion, all convicts are not rock-hard, individuals lacking sufficient emotional balance. They are people with fears and aspirations like everyone else. Generally, they don't want to fight with or kill their neighbour any more than the man on the street. They want to live in peace and return to their loved ones as soon as possible. They are not a different breed of human beings or a distinct type of mentality. They are persons who have made mistakes. This point is made not to solicit pity but to bring attention to the fact that any individual could be caught in a similar web and find himself inside a pit such as Folsom Prison.

69. The rule of law, under our constitutional order, transforms all public power into responsible, responsive, regulated exercise informed by high purposes and geared to people's welfare. But the wisdom and experience of the past have found expression in remission rules and short-sentencing laws. No new discovery by Parliament in 1978 about the futility or folly of these special and local experiences, spread over several decades, is discernible. No High-power committee report, no expert body's recommendations, no escalation in recidivism attributable to remissions and releases, have been brought to our notice. Impressionistic reaction to some cases of premature release of murderers, without even a follow-up study of the later life of these quondam convicts, has been made. We find the rise of enlightenment in penological alternatives to closed prisons as the current trend and failure of imprisonment as the universal lament. We, heart-warmingly, observe experiments in open jails, filled by lifers, liberal paroles and probations, generosity of juvenile justice and licensed release or freedom under leash - ala The U.P. Prisoners' Release on Probation Act, 1938. We cannot view without gloom the reversion to the sadistic superstition that the longer a life convict is kept in a cage of surer will be his redemption. It is our considered view that, beyond an optimum point of, say, eight years - we mean no fixed formula - prison detention benumbs and makes nervous wreck or unmitigated brute of a prisoner. If animal farms are not reformatories, the remission rules and short-sentencing schemes are a humanising wheel of compassion and reduction of psychic tension. We have no hesitation to reject the notion that Articles 72/161 should remain uncanalised. We have to direct the provisional acceptance of the remission and short-sentencing schemes as good guide-lines for exercise of pardon power - a jurisdiction meant to be used as often and as systematically as possible and not to be abused, much as the temptation so to do may press upon the pen of power.

70. The learned Solicitor-General is right that these Rules are plainly made under the Prisons Act

and not under the constitutional power. The former fail under the pressure of Section 433-A. But that, by no means, precludes the States from adopting as working rules the same remission schemes which seem to us to be fairly reasonable. After all, the government cannot meticulously study each prisoner and the present praxis of marks, until a more advanced and expertly advised scheme is evolved, may work. Section 433-A cannot forbid this method because it is immunised by Article 161. We strongly suggest that, without break, the same rules and schemes of remission be continued as a transmigration of soul into Article 161, as it were, and benefits extended to all who fall within their benign orbit - save, of course, in special cases which may require other relevant considerations. The wide power of executive clemency cannot be bound down even by self-created rules.

71. One point remains to be clarified. The U.P. Prisoners' Release on Probation Act, 1938, a welcome measure, what with population pressure on prisons and burden on the public exchequer, will survive Section 433-A for two reasons. Firstly, government may resort to the statutory scheme, not qua law but as guide-line. Secondly, and more importantly, the expression 'prison' and 'imprisonment' must receive a wider connotation and include any place notified as such for detention purposes. 'Stone walls and iron bars do not a prison make'; nor are 'stone walls and iron bars' a sine qua non to make a jail. Open jails are capital instances. Any life under the control of the State, whether within the high-walled world or not, may be a prison if the law regards it as such. House detentions, for example. Palaces, where Gandhiji was detained, were prisons. Restraint on freedom under the prison law is the test. Licensed release where instant recapture is sanctioned by the law, and, likewise, parole, where the parole is no free agent, and other categories under the invisible fetters of the prison law may legitimately be regarded as imprisonment. This point is necessary to be cleared even for computation of 14 years under Section 433-A. Section 432, 433 and 433-A read together, lead to the inference we have drawn and liberal though guarded, use of this Act may do good. Prison reform, much bruited about though, is more visible on the skin than in the soul and needs a deeper stirring of consciousness than tantrums, threats and legalised third degree, if the authentic voice of the Father of the Nation be our guide. To chain the man is not to change him; the error is obvious - a human is more than a simian. Our reasoning upholds Section 433-A of the Procedure Code but upbraids the abandonment of the healing hope of remissions and release betimes. To legislate belongs to another branch but where justice is the subject the court must speak. There was some argument that Section 433-A is understood to be a ban on parole. Very wrong. The section does not obligate continuous fourteen years in jail and so parole is permissible. We go further to say that our Prison Administration should liberalise parole to prevent pent-up tension and sex perversion which are popular currency in many a penitentiary (see Sethna : SOCIETY AND THE CRIMINAL, Tripathi publications, 4th edn., p. 296)

72. We conclude by formulating our findings :

> (1) We repulse all the thrusts on the vires of Section 433-A. Maybe, penologically the prolonged term prescribed by the section is supererogative. If we had our druthers we would have negatived the need for a fourteen-year gestation for reformation. But ours is to construe, not construct, to decode, not to make a code.
>
> (2) We affirm the current supremacy of Section 433-A over the Remission Rules and short-sentencing statutes made by the various States.
>
> (3) We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow, in life sentence cases, only on government making in order en masse or individually, in that behalf.

(4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

(5) We negate the plea that Section 433-A contravenes Article 20(1) of the Constitution.

(6) We follow Godse case (Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by government.

(7) We declare that Section 433-A, in both its limits (i.e. both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years' actual imprisonment will not operate against those whose cases were decided by the trial Court before December 18, 1978 then Section 433-A came into force. All 'Lifers' whose conviction by the court of fist instance was entered prior to that date are entitled to consideration by government for release on the strength of earned remissions although a release can take place only if government makes an order to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President of Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the government, Central or State, guides itself by the self-same rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking - a desirable step, in our view - the present remission and release schemes may usefully be taken as guide-lines under Articles 72/161 and orders for release passed. We cannot fault the government, if in some intractably savage delinquents, Section 433-A is itself treated as a guide-line for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current

Remission Rules should not survive until replaced by a more wholesome scheme.

(11) The U.P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules will enjoy similar efficacy.

(12) In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives.

(13) We have declared the law all right, but law-in-action fulfils itself not by declaration alone and needs the wings of communication to the target community. So, the further direction goes from this Court that the last decretal part is translated and kept prominently in each ward and the whole judgment, in the language of the State, made available to the inmates in the jail library.

(14) Section 433-A does not forbid parole or other release within the 14-year span. So to interpret the section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty.

73. The length of this judgment (like the length of Section 433-A, CrPC) could have been obviated but the principles and pragmatics enmeshed in the mass of cases which are but masks for human travails warrant fuller examination even of peripherals. Moreover, Chief Justice Earl Warren's admonition makes us scrutinise the basics, undeterred by length :

Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other. Our system faces no theoretical dilemma but a single continuous problem : how to apply to ever-charging conditions the never-changing principles of freedom. (Fortune, November 1955)

A Final Thought

74. Fidelity to the debate at the bar persuades us to remove a misapprehension. Some argument was made that a minimum sentence of 14 years' imprisonment was merited because the victim of the murder must be remembered and all soft justice scuttled to such heinous offenders. We are afraid there is a confusion about fundamentals in mixing up victimology with penology to warrant retributive severity by the back-door. If crime claims a victim criminology must include victimology as a major component of its concerns. Indeed, when a murder or other grievous offence is committed the dependants or other aggrieved persons must receive reparation and the social responsibility of the criminal to restore the loss or heal the injury is part of the punitive exercise. But the length of the prison term is no reparation to the crippled or bereaved and is futility compounded with cruelty. 'Can storied urn or animated bust call to its mansion the fleeting breath ?' Equally emphatically, given perspicacity and freedom from sadism, can flogging the killer or burning his limbs or torturing his psychic being bring balm to the soul of the dead by any process of thanatology or make good the terrible loss caused by the homicide ? Victimology, a burgeoning

branch of humane criminal justice, must find fulfilment, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted, not by giving more pain to the offender but by lessening the loss of the forlorn. The State itself may have its strategy of alleviating hardships of victims as part of Article 41. So we do not think that the mandatory minimum in Section 433-A can be linked up with the distress of the dependants.

75. We dismiss the writ petitions vis-a-vis the challenge to Section 433-A but allow them to the extent above indicated. The war is not lost even if a battle be lost. Justice must win. The authorities concerned will carefully implement the directives given in this judgment. Since personal liberty is at stake urgent action is the desideratum.

FAZAL ALI, J.

(concurring) - While I concur with the judgment proposed by brother Krishna Iyer, J., I would like to express my own views on certain important features of the case and on the nature and character of the reformative aspect of penology as adumbrated by brother Krishna Iyer, J.

77. The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. It is true that there appears to be modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in Jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentence and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realises the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.

78. The process of reasoning that even in spite of death sentence murders have not stopped is devoid of force because, in the first place, we cannot gauge, measure or collect figures or statistics as to what would have happened if capital punishment was abolished or sentence of long imprisonment was reduced. Secondly, various criminals react to various circumstances in different ways and it is difficult to foresee the impact of a particular circumstance on their criminal behaviour. The process of reformation of criminals with an unascertained record would entail a great risk as a sizable number of criminals instead of being reformed may be encouraged to commit offences after offences and become a serious and horrendous hazard to the society.

79. The question, therefore, is - should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible.

80. Section 433-A has advisedly been enacted to apply to a very small sphere and includes within its ambit only offences under Sections 121, 132, 302, 303, 396, etc., of the Indian Penal Code, that is to say, only those offences where death or life imprisonment are the penalties but instead of death life imprisonment is given or where a sentence of death is commuted to that of life imprisonment.

81. The problem of penology is not one which admits of an easy solution. The argument as to what benefit can be achieved by detaining a prisoner for fourteen years is really begging the question because a detention for such a long term in confinement however comfortable it is, is by itself sufficient to deter every criminal or offender from committing offences so as to incur the punishment of confinement for a good part of his life. The effect of such a punishment is to be judged not from a purely ethical point of view but from an angle of vision which is practical and pragmatic.

82. Crime has rightly been described as an act of warfare against the community touching new depths of lawlessness. The object of imposing deterrent sentences is three-fold :

> (1) to protect the community against callous criminals for a long time,
>
> (2) to administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow, and
>
> (3) to deter criminals who are forced to undergo long-term imprisonment from repeating their criminal acts in future. Even from the point of view of reformative form of punishment "prolonged and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when he responds to the treatment and can be regarded as safe" (Sir Leon Radzinowicz : THE GROWTH OF CRIME) for the society.

83. Explaining the material and practical advantages of long-term imprisonment, Sir Leon Radzinowicz in his book THE GROWTH OF CRIME aptly observes as follows :

Long imprisonment could be regarded as the neat response to all three requirements : it would put the miscreants behind bars for a long time; it would demonstrate that the game was not worth the candle for others. (p. 195)

84. The author gives examples in support of his views thus :

> Two English police officers were sentenced to seven years' imprisonment for accepting bribes and conspiring to pervert the courts of justice, two others for hounding a vagrant. In Turkey a similar sentence was passed upon a writer for translating and publishing the works of Marx and Engels. In Russia the manager of a mechanical repair shop was sentenced to death for theft of State property. In the Philippines a Chinese businessman was condemned to public execution by firing squad for trafficking in drugs. In Nigeria something like eighty people suffered the same fate within a year or two for armed robbery.

All these sentences had, of course, their elements of deterrence and retribution. But they have in common another element, what has been called denunciation, a powerful reassertion of assertion of the values attacked. (p. 197)

85. But, at the same time, it cannot be gainsaid that a sentence out of proportion of the crime is extremely repugnant to the social sentiments of a civilized society. This aspect of the matter is fully taken care of by Section 433-A when it confines its application only to those categories of offences which are heinous and amount to a callous outrage on humanity. Sir Leon Radzinowicz referring to

this aspect of the matter observes thus : (Sir Leon Radzinowicz : THE GROWTH OF CRIME)

Maximum penalties, upper limits to the punishment a judge may impose for various kinds of crime, are essential to any system which upholds the rule of law. Objections arise only when these penalties are illogical, inconsistent, at odds with people's sense of justice .....

Thus the problem with maximum penalties is not whether they should be laid down but whether they can be made reasonably proportionate to people's assessment of the comparative gravity of crimes, and a consistent guide to sentencers rather than an additional factor in discrepancies. (p. 216)

86. Similarly, the same author in Volume II of his book CRIME AND JUSTICE observes as follows :

> The solution to which most recent efforts have come is that the legislative function is best discharged by the creation of a small number of distinct sentencing categories ..... And it can also serve to emphasize the futility of close line-drawing in an area where precision - to the extent that it can be achieved at all - must come from the efforts of those in a position to know and to judge the particular offender. (p. 332)

The existence of a distinct number of sentencing categories and a list of the offences within each should be of great aid, in other words, in assuring consistency of treatment for present offenses and in determining the appropriate sentence levels for new offenses. (p. 340)

87. This is exactly what Section 433-A of the Code of Criminal Procedure seeks to achieve by carving out a small and special field within which alone the statutory provision operate.

88. While I agree that the deterrent form of punishment may not be a most suitable or ideal form of punishment yet the fact remains that the deterrent punishment prevents occurrence of offences by -

> (i) making it impossible or difficult for an offender to break the law again,
>
> (ii) by deterring not only the offenders but also others from committing offences, and
>
> (iii) punishment or for that matter a punishment in the form of a long-term imprisonment may be a means to changing a person's character or personality so that out of some motivation or reasons of a personal or general nature, the offender might obey the law.

Ted Honderich in his book PUNISHMENT while dealing with the deterrent form of punishment observes as follows :

> It is also to be noticed that the conditions have other consequences as well. Penalties must be sufficiently severe to deter effectively.

Bentham has also pointed out that a penalty may be justified when the distress it causes to the offenders and others is not greater than the distress that will result if he and others undeterred, offended in the future. Ted Honderich after highlighting various aspects of the deterrent form of punishment concludes as follows :

> There are classes of offenders who are not deterred by the prospect of punishment, it cannot be acceptable that a society should attempt to prevent all offences by punishment alone .... In anticipation of the discussion to come of compromise theories of punishment, we can say that punishment may be justified by being both economically deterrent and also deserved.

89. I am not at all against the reformative form of punishment on principle, which in fact is the prime need of the hour, but this matter has been thoroughly considered by Graeme Newman in his book THE PUNISHMENT RESPONSE and where he has rightly pointed out that before the reformative form of punishment can succeed people must be properly educated and realise the futility of committing crimes. The author observes as below :

> In sum, I have suggested that order was created by a criminal act, that order cannot exist without a structured inequality. Order and authority must be maintained by punishment, otherwise there would be even more revolutions and wars than we have had throughout history.
>
> # * * *##

People in criminal justice know only too well that the best intentioned reforms often turn out to have unfortunate results.

> # * * *##

Thus, for example, in the area of criminal sentencing, a popular area at present, practical moves to reform should be based soundly on the historical precedents of criminal law and not on grand schemes that will sweep all of what we have out the door. There have been many examples of grand schemes that looked great on paper, but by the time they had been transformed into legislation were utterly unrecognizable. It seems to follow from this that sentencing reform should not be achieved by new legislation, but by a close analysis and extrapolation from the already existing practice and theory of criminal law.

90. Having regard to these circumstances I am clearly of the opinion that Section 433-A is actually a social piece of legislation which by one stroke seeks to prevent dangerous criminals from repeating offences and on the other protects the society from harm and distress caused to innocent persons.

91. Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offence, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580). In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of

remissions has committed repeated offences. The mere fact that a long-terms sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty for ever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a on-sided concept, nor does Article 21 of the Constitution contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals.

92. For these reasons, I am clearly of the opinion that in cases where Section 433-A applies, no question of reduction of sentence arises at all unless the President of India or the Governor choose to exercise their wide powers under Article 72 or Article 161 of the Constitution which also have to be exercised according to sound legal principles as adumbrated by brother Krishna Iyer, J. I therefore, think that any reduction or modification in the deterrent punishment would far from reforming the criminal be counter-productive.

93. Thus, on a consideration of the circumstances, mentioned above, the conclusion is inescapable that Parliament by enacting Section 433-A has rejected the reformative character of punishment, in respect of offences contemplated by it, for the time being in view of the prevailing conditions in our country. It is well settled that the legislature understands the needs and requirements of its people much better than the courts because the Parliament consists of the elected representatives of the people and if the Parliament decides to enact a legislation for the benefit of the people, such a legislation must be meaningfully construed and given effect to so as to subserve the purpose for which it is meant.

94. Doubtless, the President of India under Article 72 and the State Government under Article 161 have absolute and unfettered powers to grant pardon, reprieves, remissions, etc. This power can neither be altered, modified nor interfered with by any statutory provision. But, the fact remains that higher the power, the more cautious would be its exercise. This is particularly so because the present enactment has been passed by the Parliament on being sponsored by the Central Government itself.

It is, therefore, manifest that while exercising the powers under the aforesaid articles of the Constitution neither the President, who acts on the advice of the Council of Ministers, nor the State Government is likely to overlook the object, spirit and philosophy of Section 433-A so as to create a conflict between the legislative intent and the executive power. It cannot be doubted as a proposition of law that where a power is vested in a very high authority it must be presumed that the said authority would act properly and carefully after an objective consideration of all the aspects of the matter.

95. So viewed, I am unable to find any real inconsistency between Section 433-A and Articles 72 and 161 of the Constitution of India as contended by the petitioners. I also hold that all the grounds on which the constitutional validity of Section 433-A has been challenged must fail. I dismiss the petitions with the modification that Section 433-A would apply only prospectively as pointed out by brother Krishna Iyer, J.

Koshal, J. (partly dissenting) - On a perusal of the judgment prepared by my learned brother, Krishna Iyer, J., I agree respectfully with findings (2) to (11), (13) and (14) enumerated by him in its concluding part as also with the first sentence occurring in finding (1), but regret that I am unable to endorse all the views expressed by him on the reformative aspect of penology, especially those forming the basis of finding (1) minus the first sentence and of finding (12). In relation to those views, while concurring generally with the note prepared by my learned brother, Fazal Ali, J., I am appending a very short note of my own.

96. That the four main objects which punishment of an offender by the State if intended to achieve are deterrence, prevention, retribution and reformation is well recognised and does not appear to be open to dissent. In its deterrent phase, punishment is calculated to act as a warning to others against indulgence in the anti-social act for which it is visited. It acts as a preventive because the incarceration of the offender, while it lasts, makes it impossible for him to repeat the offending act. His transformation into a law-abiding citizen of course another object of penal legislation but so is retribution which is also described as a symbol of social condemnation and a vindication of the law. The question on which a divergence of opinion has been expressed at the bar is the emphasis which the legislature is expected to place on each of the said four objects. It has been contended on behalf of the petitioners that the main object of every punishment must be reformation of the offender and that the other objects above-mentioned must be relegated to the background and be brought into play only incidentally, if at all. I have serious disagreement with this proposition and that for three reasons.

97. In the first place, there is no evidence that all or most of the criminals who are punished are amenable to reformation. It is true that in recent years an opinion has been strongly expressed in favour of reformation being the dominant object of punishment but then an opposite opinion has not been lacking in expression. Champions of the former view cry from housetops that punishment must have as its target the crime and not the criminal (sic). Others, however, have been equally vocal in bringing into focus the mischief flowing from what the criminal has done to his victim and those near and dear to him and have insisted on greater attention being paid to victimology and therefore to the retributive aspect of punishment. They assert :

Neither reformers nor psychologists have, by and large, succeeded in reducing recidivism by the convicted criminals. Neither harshness nor laxity has succeeded in discouraging repeaters .... Criminality is not a disease admitting of cure through quick social therapy ..... (Essay on Crime, Containment and Jails by Shri Tek Chand, retired Judge of the Punjab High Court and Chairman of

the Haryana Jail Reforms Commission)

The matter has been the subject of social debate and, so far as one can judge will continue to remain at that level in the foreseeable future.

98. Secondly, the question as to which of the various objects of punishment should be the basis of a penal provision has, in the very nature of things, to be left to the legislature and it is not for the courts to say which of them shall be given priority, preponderance or predominance. It may well in fact be that a punitive law may be intended to achieve only one of the four objects but that is something which must be decided by the legislature in its own wisdom. An offence calculated to thwart the security of the State may be considered so serious as to demand the death penalty and nothing else, both as a preventive and a deterrent, and without regard to retribution and reformation. On the other hand, offences involving moral turpitude may call for reformation as the chief objective to be achieved by the legislature. In a third case all the four objects may have to be borne in mind in choosing the punishment. As it is, the choice must be that of the legislature and not that of the courts and it is not for the latter to advice the legislature which particular object shall be kept in focus in a particular situation. Nor is it open to the courts to be persuaded by their own ideas about the propriety of a particular purpose being achieved by a piece of penal legislation, while judging its constitutionality. A contrary proposition would mean the stepping of the judiciary into the field of the legislature which, I need hardly say, in not permissible. It is thus outside the scope of the inquiry undertaken by this Court into the vires of the provisions contained in Section 433-A to find out the extent to which the object of reformation is sought to be achieved thereby, the opinions of great thinkers, jurists, politicians and saints (as to what the basis of a penal provision should be) notwithstanding.

99. The third reason flows from a careful study of the penal law prevalent in the country, especially that contained in the Indian Penal Code which brings out clearly that the severity of each punishment sanctioned by the law is directly proportional to the seriousness of the offence for which it is awarded. This, to my mind, is strongly indicative of reformation not being the foremost object sought to be achieved by the penal provisions adopted by the legislature. A person who has committed murder in the heat of passion may not repeat his act at all later in life and the reformation process in his case need not be time-consuming. On the other hand, a thief may take long to shed the propensity to deprive others of their good money. If the reformative aspect of punishment were to be given priority and predominance in every case the murderer may deserve, in a given set of circumstances, no more than a six months' period in incarceration while a thief may have to be trained into better ways of life from the social point of view over a long period, and the death penalty, the vires of which has been recently upheld by a majority of four in a five-Judge Bench of this Court in Bachan Singh v. State of Punjab (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580), would have to be exterminated from Indian criminal law. The argument based on the object of reformation having to be in the forefront of the legislative purposes behind punishment must, therefore, be held to be fallacious.

100. I conclude that the contents of Section 433-A of the Code of Criminal Procedure (or, for that matter any other penal provision) cannot be attacked on the ground that they are hit by Article 14 of the Constitution inasmuch as they are arbitrary or irrational because they ignore the reformative aspect of punishment.

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