Deena Alias Deen Dayal and Others

Vs

Union of India and Others

Lal Chand Misra

Vs

State of U. P.

Hazamohideen and Others

Vs

Union of India and Others

Amar Singh and Another

Vs

State of M. P.

Writ Petitions Nos. 503, 516, 532, 534-35, etc., etc.

(Chandrachud, C.J.)

23.09.1983

JUDGMENT

CHANDRACHUD, C.J. -

1. In this batch of writ petitions, the petitioners were sentenced to death for the offence of murder under Section 302 of the Penal Code. They have nothing in common except that they committed murders and have been sentenced to death. The sentence of death imposed upon them has become final in the sense that the special leave petitions, appeals, review petitions and mercy petitions filed by them have been dismissed some of these more than once. The main question which has been raised by the petitioners in these writ petitions relates to the validity of the mode of execution of death sentence.

2. Section 354(5) of the Code of Criminal Procedure provides that :

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

The petitioners challenge the constitutional validity of this provision on the ground that hanging a convict by rope is a cruel and barbarous method of executing a death sentence, which is violative of Article 21 of the Constitution. That article provides that :

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

3. The validity of death sentence which Section 302 prescribes for the offence of murder was upheld by this Court in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. The ratio of that decision is that the normal sentence for murder is life imprisonment and that the sentence of death can be imposed in a very exceptional class of cases, descried in that judgment as the 'rarest of rare cases'. Which king of cases would precisely fall within that category is in the very nature of things difficult to define and even to describe. But, all the same, a studied attempt was made by this Court in Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] to identify, though not to crystallize, the area of those rarest of rare cases in which death sentence can justifiably be imposed. Shri Garg's criticism of that judgment that it virtually overrules Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] and Jagmohan Singh [Jagmohan Singh v. State of U.P., (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947 : 1973 Cri LJ 370] is wide off the mark. In Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681], the learned Judges have but formulated broad guidelines to assist the courts in deciding the vexed question as to whether the death sentence is at all called for. Evidently, the judgment does not enlarge the scope of the rule in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] by broadening the narrow field of cases which call for the death sentence.

4. But, Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681], is by the way. The validity of the death sentence for the offence of murder having been upheld by this Court after a careful and prolonged discussion, there is no justification for reopening that question, though such a suggestion was made half-heartedly before us, towards the conclusion of the arguments. The question that, in the circumstances mentioned in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]], it is permissible to impose the sentence of death must be treated as concluded and not any longer open to argument. There has to be finality to litigation, criminal as much as civil, if law is not to lose its credibility. No one of course can question that law is a dynamic science, the social utility of which consists in its ability to keep abreast of the emerging trends in social and scientific advance and its willingness to readjust its postulates in order to accommodate those trends. Life is not static. The purpose of law is to serve the needs of life. Therefore law cannot be static. But, that is not to say that judgments rendered by this Court after a full debate should be reconsidered every now and then and their authority doubted or diluted. That would be doing disservice to law since certainty over a reasonably foreseeable period is the hallmark of law.

5. The learned Solicitor-General has raised a preliminary objection to these writ petitions on the ground that the question which is sought to be argued by the petitioners is concluded by the judgment rendered by a Constitution Bench of this Court in Bachan Singh[Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. It is urged that since the question is not res integra, it is not open to the petitioners to

raise it, nor indeed any reason or justification for this Court to entertain it. Learned counsel for the petitioners, led by Shri R. K. Garg, answer this objection by contending that the only question which arose in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] was whether it is constitutionally permissible to prescribe the sentence of death. It is urged on behalf of the petitioners that the question as regards the validity of Section 354(5) of the Code of Criminal Procedure was neither argued in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] nor considered by the Court.

6. The objection taken by the learned Solicitor-General is not without substance but for reasons which we will presently indicate, we do not propose to accept it. At page 196 of the Report (SCC pages 712-713) in Bachan Singh[Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]], the main arguments of the 'Abolitionists' which were, "substantially adopted" by counsel for the petitioners therein are reproduced in clauses (a), (b) and (c). Under clause (c), the argument is reproduced thus : "Execution by whatever means and for whatever offence is cruel, inhuman and degrading punishment", by which is obviously meant 'execution of death sentence'. The argument mentioned in clause (a) to the effect that the death penalty is unconstitutional because it is irreversible is considered at pages 196 and 197 of the Report (SCC page 713). The argument mentioned in clause (b) as to whether death penalty serves any penological purpose at all is considered at page 197 (SCC page 713). Though the argument mentioned in clauses (a) and (b) at page 196 of the Report (SCC pages 712-713) have been specifically considered under separate heads as stated above, the argument mentioned in clause (c) at page 196 (SCC page 713) relating to the execution of death sentence has not been considered under a separate head. The discussion of the argument whether death penalty serves any penological purpose is concluded at the end of the third line on page 222 (SCC page 729). The heading "Regarding (c)" should have appeared in the Report after the said third line and before the fresh paragraph which begins thus (SCC page 729, page 133) : "We will now consider the issue whether the impugned limb of the provision in Section 302, Penal Code, contravenes Article 21 of the Constitution". That this should have been so is clear from the fact that after considering the particular argument at pages 222 and 223 (SCC pages 729-730), justice Sarkaria who spoke for the majority concludes : [SCC para 136, pp. 730-31 : SCC (Cri) pp. 626-27]

Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under Section 302, Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a disregarding punishment which would defile "the dignity of the individual" within the contemplation of the preamble to the Constitution.

7. Bhagwati, J., who dissented from the majority considered the question of the constitutional validity of the death sentence, both from the substantive and the procedural points of view. At page 286 (SCC page 64), the learned Judge says that "the worst time for most of the condemned prisoners would be the last few hours when all certainty is gone and the moment of death is known". After

extracting quotations from Dostoyevsky and Canns which bear upon the execution of death sentence, the learned Judge observes (SCC page 64) : "There can be no stronger words to describe the utter depravity and inhumanity of death sentence". After making this observation Bhagwati, J., proceeds thus : [SCC para 29, pp. 64-65 : SCC (Cri) p. 527]

The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan [Vide David Pannick on Judicial Review of Death Penalty, p. 73], the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain.

Thereafter, the learned judge refers to the description of the method of hanging given by Warden Duffy of San Quentin, a high security prison in America and the description given in 1927 by a surgeon who witnessed a double execution and records his conclusion by saying that the passages extracted by him established beyond doubt that "the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas".

8. This discussion will show that both the majority and the minority in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] considered the question of the validity of the death sentence from the procedural aspect also, with special reference to the method of hanging prescribed by law for executing the death sentence. While upholding the validity of death sentence, the majority did not overlook and, in fact, took into consideration the circumstance that the mode prescribed by the Criminal Procedure Code for executing the death sentence is hanging. On the other hand, while striking down the validity of death sentence Bhagwati, J., was influenced by the consideration that the mode of hanging prescribed by law for executing the death sentence was itself cruel and barbarous.

9. Though this is the true position, the reason why we are not inclined to uphold the preliminary objection taken by the learned Solicitor-General is that the question as regards the constitutional validity of Section 354(5) of the Code of Criminal Procedure was neither raised squarely by the petitioners in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] nor considered directly by the Court. If we may so put it, the question as regards the validity of Section 354(5) of the Code was not directly and substantially in issue in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. The questions which arose for consideration in that case are formulated in the majority judgment at page 169 (SCC page 695) as Questions I and II. The majority referred to the mode of execution of the

death sentence only incidentally. The question whether the particular mode of executing the death sentence prescribed by Section 354(5) of the Code violated the provisions of Article 21 was not considered specifically by the majority as an independent issue. Considering the judgment of Bhagwati, J., also as a whole, it would appear that the principal reason for which the learned Judge struck down the death sentence is its irrevocability, its arbitrariness and its lack of purpose. One of us was a party to the decision in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] and if recollections do not fail so soon and are permissible aids to the understanding of a decision, it would not be right to say right to say that the question as regards the constitutional validity of Section 354(5) of the Code was either directly put in issue in that case or was argued upon or was considered by the Court as an independent reason bearing upon the validity of the death sentence. The question which the petitioners have raised in these writ petitions is important not only from the legal and constitutional point of view but also from the sociological point of view. It will not be proper to side-track that question and refuse to examine it fully because of the incidental consideration which it received in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. Accordingly, we reject the preliminary objection raised by the learned Solicitor-General and proceed to examine the question raised by the petitioners on its own merits, on the basis that the question is still open to argument.

10. The petitioners, who have been sentenced to death for acts of outrageous brutality, have presented their case with an air of injured innocence. Their claim is that no matter what pain and suffering they may have inflicted upon their victims and their families, no pain or suffering whatsoever shall be caused to them while executing the death sentence. It is urged on their behalf by Shri R. K. Garg and the other learned counsel that even if it may be lawful to impose the death sentence in an exceptional class of cases, it is impermissible to execute that sentence even in those cases, since is inhuman and cruel to take human life under any circumstances, even under a decree of a court. That is the fundamental premise of the petitioners' contention. Secondly it is urged that the method prescribed by Section 354(5) of the Code for Executing the death sentence is inhuman, barbarous and degrading and therefore that method cannot be employed for executing the death sentence. It is the constitutional obligation of the State to provide for a humane and dignified mode of executing the death sentence, which will not involve torture or cruelty or any kind. It is urged that if the State fails to discharge that obligation, no death sentence can be executed, howsoever justifiably it may have been imposed. The Code of Criminal Procedure prescribes only one method of executing the death sentence, namely, by hanging and if that method violates the mandate of Article 21, the sentence must remain unexecuted, since the court cannot substitute any other method of execution for the only method prescribed and envisaged by law. Finally, it is argued that the burden is on the State to prove that the method of execution of the death sentence prescribed by Section 354(5) of the Code is a humane and civilized method and that it does not involve pain, cruelty or degradation of any kind. This is so because, the burden to establish that any particular act, challenged as unconstitutional, is just and fair always lies on the State. Therefore, it is not for the petitioners to show that any other method of executing the death sentence would be less painful, cruel or degrading. According to the petitioners, the State must fail if it does not discharge the burden which lies heavily upon it. The petitions cannot be dismissed on the ground that the petitioners have failed to establish that the method prescribed by Section 354(5) involves unnecessary pain, torture or cruelty; or that other methods of executing the death sentence are either

not cruel or painful or are less cruel and painful than the method prescribed by Section 354(5) of the Code. These arguments require careful consideration, uninfluenced by the circumstance that the demand for civilized, humane and painless treatment is made by those who have been found guilty of subjecting their victims to uncivilized and inhuman acts involving great torture and suffering. The retribution involved in the theory 'tooth for tooth' and "eye for an eye" has no place in the scheme of civilized jurisprudence and we cannot turn a deaf ear to the petitioners' claim for justice on the ground that the enormity of their crimes has resulted in grave injustice to the victims of those crimes. We are concerned to ensure due compliance with constitutional mandates, no matter the occasion. If it were not so, smugglers who are detained under the laws of detention shall have to be denied the protection of Article 22 of the Constitution on the ground that they are guilty of acts which sabotage the economy of the country. Justice has to be done dispassionately in accordance with the constitutional attitudes whether it is a murderer or a smuggler who asks for it. Law cannot demand its pound of flesh.

11. At one stage we were inclined to decide the main question argued by the petitioners without considering the rival contentions as to the burden of proof. We thought that whether the burden lies on the petitioners to show that the method prescribed by Section 354(5) of the Code is constitutionally impermissible or whether the burden lies on the State to prove that the particular method is permissible within the framework of the Constitution, we should pronounce upon the legality of that method on the basis of the data which has been placed before us by both the sides. The question of burden of proof ceases to have the same importance when the entire evidence is before the Court, each side having placed before it such material as it considers necessary to support its case. But then, the fact that parties have produced their respective data before that Court does not absolve the Court from considering the question whether, on the basis of the entire material before it, the burden can be said to have been discharged by the party on whom it lies. Besides, counsel engaged themselves into quite some argument over the question of burden of proof and since that question is of importance and arises frequently, it is just as well that we decide it. We propose to decide that question before adverting to the other contentions raised on behalf of the petitioners.

12. It is urged by Shri Jethmalani who appears on behalf of the Government of Karnataka, as also on behalf of the Bar Council of India who were allowed to intervene in these proceedings, that every statute carries with it a strong presumption of constitutionality and a heavy burden lies upon those who challenge that statute to displace that presumption. In support of this submission, the learned counsel relies principally on the decision of a seven Judge Bench of this Court in Madhu Limaye v. Sub-Divisional Magistrate, Monghyr [(1971) 2 SCR 711 : (1970) 3 SCC 746 : AIR 1971 SC 2486 : 1971 Cri LJ 1721], which, he says, was not noticed in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. The learned Attorney-General (the Solicitor-General became the Attorney-General during the hearing of these petitions) also argues that the decisions of this Court have almost uniformly taken the view that the burden to displace the presumption of constitutionality lies on the person who challenges the statute as unconstitutional.

13. Most of the important decision which have a bearing on the question of burden of proof have been noticed in the majority and minority judgments in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. Sarkaria, J., speaking for the majority, has summed up the position thus : [SCC paras 64, 65, p. 710 : SCC (Cri) p. 606]

With regard to onus, no hard and fast rule of universal application in all situations, can be deduced from the decided cases. In some decisions, such as, Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819] and Khyerbari Tea Co. Ltd. v. State of Assam [(1964) 5 SCR 975 : AIR 1964 SC 925] it was laid down by this Court that if the writ petitioner succeeds in showing that the impugned law ex facie abridges or transgresses the rights coming under any of the sub-clauses of clause (1) of Article 19, the onus shifts on the respondent-State to show that the legislation comes within the permissible limits imposed by any of the clauses (2) to (6) as may be applicable to the case, and, also to place material before the court in support of that contention, If the State does nothing in that respect, it is not for the petitioner to prove negatively that it is not covered by any of the permissive clauses.

A contrary trend, however, is discernible in the recent decisions of this Court, which start with the initial presumption in favour of the constitutionality of the statute and throw the burden of rebutting that presumption on the party who challenges its constitutionality on the ground of Article 19.

As an instance of the contrary trend, Sarkaria, J., has cited the judgment of Krishna Iyer, J., in B. Banerjee v. Anita Pan [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146], which reiterates the ratio in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147] to the following effect : [SCC para 66, p. 710 : SCC (Cri) p. 606]

there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; and

that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

Referring to the judgment of this Court in R. M. D. Chamarbaugwala [State of Bombay v. R. M. D. Chamarbaugwala, 1957 SCR 874 : AIR 1957 SC 699 : 1957 SCJ 607] and to the first proposition in Chapter III of Seervai's Constitutional Law of India (page 54, Second Edition, Vol. I; page 118, Third Edition) Krishna Iyer, J. observed : (SCC pp. 173-74, para 9)

..., we have to remember the comity of constitutional instrumentalities and raise the presumption that the Legislature understands and appreciates the needs of the people and is largely aware of the frontiers of and limitations upon its power. Some courts have gone to the extent of holding that there is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; and to doubt the constitutionality of a law is to resolve it in favour of its validity.

Sarkaria, J., has finally referred to the Seven-Judge Bench decision of this Court in Pathumma v. State of Kerala [(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771], in which Fazal Ali, J., speaking for himself, Beg, C.J., Krishna Iyer and Jaswant Singh, JJ., declared the law in the following terms : (SCC p. 9., para 6)

It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people.

The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the Legislature or such other grounds. It is for this reason that the courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same. In the case of Mohd. Hanif Quareshi v. State of Bihar [(1959) SCR 629 : AIR 1958 SC 731 : 1958 SCJ 975] while adverting to this aspect Das, C.J. as he then was, speaking for the Court observed as follows :

> The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

As we have said at the outset, these decisions have been discussed in the majority and minority judgments in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]].

14. The decision of a Bench of seven Judges on which Shri Jethmalani has placed strong reliance is the one reported in Madhu Limaye [(1971) 2 SCR 711 : (1970) 3 SCC 746 : AIR 1971 SC 2486 : 1971 Cri LJ 1721]. The question which arose for consideration in that case was whether the provisions of Section 144 and Chapter VIII of the Code of Criminal Procedure could be said to be in the interests of public order insofar as the right of freedom of speech and expression, the right of assembly, and the right to form associations and unions are concerned and in the interests of the general public in so far as they curtailed the freedom of movement throughout the territory of India. The petitioners and the interveners therein invoked the American doctrine of preferred position for the fundamental rights, particularly the right to freedom of speech and expression. Hidayatullah, C.J., who spoke for six learned Judges (Bhargava, J. dissenting on another point) reviewed the preferred position doctrine and concluded that it did not any longer have the support of the Supreme Court of the United States and therefore, in America, "unreasonableness of the law has to be established". The learned Chief Justice proceeded to say : (SCC p. 752, para 11)

In this Court the preferred-position doctrine has never found ground although vague expressions such as 'the most cherished rights', the inviolable freedoms' sometimes occur. But this is not to say that any one Fundamental Right is superior to the other or that Article 19 contains a hierarchy. Pre-constitution laws are not to be regarded as unconstitutional. We do not start with the presumption that, being a pre-constitution law, the burden is upon the State to establish its validity. All existing laws are continued till this Court declares them to be in conflict with a fundamental right and, therefore, void. The burden must be placed on those who contend that a particular law has become void after the coming into force of the Constitution by reason of Article 13(1), read with any of the guaranteed freedoms.

15. These decisions on the question of burden of proof must be divided into two categories : those which deal with the violation of the equality clause in Article 14 of the Constitution and those others which deal with the violation of the guarantees contained in Article 19. The leading decision on the former category of cases is Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar,

1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147] in which Das, C.J., formulated six principles as emerging out of an analysis of the cases under Article 14. The passage at page 297 of the Report (SCR) (SCC page 72) in which these principles are set out has become a classic and a part of it has already appeared in this judgment as a quotation extracted by Krishna Iyer, J., in B. Banerjee v. Anita Pan [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146]. It may bear repetition to say that according to the learned Chief Justice, "there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles" and that, "it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds". The concluding words of the second of these two principles show that the said principle is limited in its application to cases arising under Article 14. The question of discrimination arises under Article 14 and not under Article 14 and not under Article 19 of the Constitution. Any case, even a locus classicus, is an authority for what it decides. It is permissible to extend the ratio of a decision to cases involving identical situations, factual and legal, but care must be taken to see that this is not done mechanically, that is, without a close examination of the rationale of the decision which is cited as a precedent. Human mind, trained even in the strict discipline of law, is not averse to taking the easy cause of relying on decisions which have become famous and applying their ration to supposedly identical situations. In Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147], the Court was dealing with a challenge to Section 3 of the Commission of Inquiry Act, 1952 and the modification issued by the Central Government under that section appointing a Commission of Inquiry to inquire into and report on the affairs of certain companies. The Act was challenged on the ground that it conferred an arbitrary power on the Government to issue notification appointing Commission of Inquiry, while the notification was challenged on the ground that the petitioners and their companies were arbitrarily singled out for the purpose of hostile and discriminatory treatment and subjected to a harassing and oppressive inquiry. The principles enunciated by the learned Chief Justice on behalf of the Court have to be understood in the context of these facts, the context being that the case before the Court involved consideration limited and germane to the application of Article 14. Apart from certain other questions which are not relevant for our purpose, the entire discussion of the facts and law in that judgment revolves round the provisions of that article. Indeed, Article 14 is the kingpin of the decision in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147]. It is wrong to treat the principles enunciated by the learned Chief Justice as of universal application and, in that process, to apply them to cases arising under other articles of the Constitution, particularly Articles 19 and 21.

16. The principle which underlies Article 14 is that equals must be treated equally, that is to say, that "laws must operate equally on all persons under like circumstances" [Seervai's Constitutional Law of India, Third Edition, p. 296]. Article 14, though apparently absolute in its terms, permits the State to pass a law which makes a classification, so long as the classification is based on intelligible differentia having a real nexus with the object which is sought to be achieved by the law. In the generality of cases under Article 14, the challenge is based on the allegation that the impugned provision is discriminatory since it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly, belong to the same class as the petitioner. It is plain that in matters of this nature, the petitioner has to plead and prove that there are others who are situated similarly as him and that he is singled out and subjected to unfavourable tratemnt. As observed by Shah, J. in Western U.P. Electric Power & Supply Co. Ltd. v. State of U.P. [(1969) 3 SCR 865, 870 : (1969) 1 SCC 817 : AIR 1970 SC 21] : (SCC p. 821, para 7)

Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

Whether there are other persons who are situated similarly as the petitioner is a question of fact. And whether the petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden to establish the existence of these facts rests on the petitioner. To cast the burden of proof in such cases on the State is really to ask it to prove the negative that no other persons are situated similarly as the petitioner and that, the treatment meted out to the petitioner is not hostile.

17. Thus, there is a fundamental distinction between cases arising under Article 14 and those which arise under Articles 19 and 21 of the Constitution. In a challenge based on the violation of Article 19 and 21, the petitioner has undoubtedly to plead that, for example, his right to free speech and expression is violated or that he is deprived of his right to life and personal liberty. But once he shows that, which really is not a part of the "burden of proof", it is for the State to justify the impugned law or action by proving that, for example, the deprivation of petitioner's right to free speech and expression is saved by clause (2) of Article 19 since it is in the nature of a reasonable restriction on that right in the interest of matters mentioned in clause (2), or that, the petitioner has been deprived of his life or personal liberty according to a just, fair and reasonable procedure established by law. In cases arising under Article 19, the burden is never on the petitioner to prove that the restriction is not reasonable or that the restriction is not in the interests of matters mentioned in clause (2). Likewise, in cases arising under Article 21, the burden is never on the petitioner to prove that the procedure prescribed by law which deprives him of his life or personal liberty is unjust, unfair or unreasonable. That is why the ratio of cases which fall under the category of the decision in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147] must be restricted to those arising under Article 14 and cannot be extended to cases arising under Article 19 or Article 21 of the Constitution.

18. Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819] is a typical instance of a case arising under Article 19 of the Constitution. The U.P. Road Transport Act, 1951 which was passed prior to the First Amendment to the Constitution which introduced clause (6) in Article 19, was challenged in that case on the ground that it conflicted with the fundamental right of the petitioner guaranteed under Article 19(1)(g) of the Constitution. Dealing with the question of burden of proof Mukherjea, J., who spoke for the Constitution Bench, stated the position thus :

> With regard to the second point also we do not think that the learned Judges have approached the question from the proper stand point. There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community. (SCR p. 726)

19. When the enactment on the face of it is in violation of a fundamental right guaranteed by Article 19, the petitioner is absolved even of that modicum of an obligation to show that a right guaranteed to him by Article 19 is violated. When the face of the law is not so clear, the petitioner does have to discharge the obligation of proving the fact of deprivation. But that only and nothing more.

20. A similar question arose in Khyerbari Tea Co. Ltd. v. State of Assam [(1964) 5 SCR 975 : AIR 1964 SC 925], where The Assam Taxation (on Goods carried by Road or on Inland Water-ways) Act, 1961 was challenged on the ground that it placed unreasonable restrictions on the freedom of trade guaranteed by Article 301 and infringed the provision of Article 19(1)(g) of the Constitution. The Act was upheld by a Constitution Bench of this Court by a majority of 4 to 1. Gajendragadkar, J. who spoke for the majority, relied on the decision in Saghir Ahmad [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819] and said :

> It is true that on several occasions, this Court has generally observed that a presumption of constitutionality arises where a statute is impeached as being unconstitutional, but as has been held in the case of Saghir Ahmad [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819] in regard to the fundamental right under Article 19(1)(g) as soon as the invasion of the right is proved, it is for the State to prove its case that the impugned legislation falls within clause (6) of Article 19. The position may be different when we are dealing with Article 14, because under that Article the initial presumption of constitutionality may have a larger sway inasmuch as it may place the burden on the petitioner to show that the impugned law denied equality before the law, or equal protection of the laws. We may in this connection refer to the observations made by this Court in the case of Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India [(1960) 2 SCR 671, 679 : AIR 1960 SC 554 : 1960 SCJ 611 : 1960 Cri LJ 735]. Another principle which has to be borne in mind in examining the constitutionality of a statute, it was observed, is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. It is significant that all the decisions to which reference is made in support of this statement of the law are decisions under Article 14 of the Constitution. Mr. Setalvad has fairly conceded that in view of the decision of this Court in the case of Saghir Ahmad [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819], it would not be open to him to contend that even after the invasion of the fundamental right of a citizen is proved under Article 19(1)(g), the onus would not shift to the State. In our opinion, the said decision is a clear authority for the proposition that once the invasion of the fundamental right under Article 19(1) is proved, the State must justify its case under clause (6) which is in the nature of an exception to the main provisions contained in Article 19(1). The position with regard to the onus would be the same in dealing with the law passed under Article 304(b). In fact, in the case of such a law, the position is somewhat stronger in favour of the citizen, because the very fact that a law is passed under Article 304(b) means clearly that it purports to restrict the freedom of trade. That being so, we think that as soon as it is shown that the Act invades the right of freedom of trade, it is necessary to enquiry whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in the public interest within the meaning of Article 304(b). This enquiry would be of a similar character in

regard to clause (6) of Article 19. (SCR pp. 1003-4)

21. The observation made by Gajendragadkar, J., in regard to the position arising under Article 304(b) are apposite to cases under Article 21. Article 304(b) provides that, notwithstanding anything in Article 301 or Article 303, the legislature of a State may be law 'impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest". According to the learned Judge, in the case of a law passed under Article 304(b), the position on the question of burden of proof is somewhat stronger in favour of the citizen, because the very fact that the law is passed under that article means clearly that it purports to restrict the freedom of trade. By analogy, the position is also somewhat stronger in favour of the petitioner in cases arising under Article 21, because the very fact that, in defence, a law is relied upon as prescribing a procedure for depriving a person of his life or personal liberty means clearly that the law purports to deprive him of these rights. Therefore, as soon as it is shown that the Act invades a right guaranteed by Article 21, it is necessary to enquire whether the State has proved that the person has been deprived of his life or personal liberty according to procedure established by law, that is to say, by a procedure which is just, fair and reasonable.

22. Another decision in the same category of cases is Mohd. Faruk v. State of Madhya Pradesh [(1970) 1 SCR 156 : (1969) 1 SCC 853 : AIR 1970 SC 93], in which the State Government issued a notification cancelling the confirmation of the municipal bye-laws in so far as they related to the permission to the slaughtering of bulls and bullocks. Dealing with the challenge of the petitioner to the notification on the ground that it infringed his fundamental right under Article 19(1)(g) of the Constitution Shah, J., who spoke for the Constitution Bench, observed : (SCC pp. 856-57, para 8)

When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19(1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State... Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State. (SCR pp. 160-61)

23. This discussion will be incomplete without a close examination of the decisions of this Court in B. Banerjee v. Anita Pan [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146], and Pathumma v. State of Kerala [(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771], which have been referred to by Sarkaria, J., in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] as evidencing a "contrary trend" according to which, even in regard to cases under Article 19, there is an initial presumption in favour of the constitutionality of the statute and the burden of rebutting that presumption lies on the person who asserts that the statute is unconstitutional. In B. Banerjee [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146], a three-Judge Bench of this Court had to consider the question whether sub-section (3-A) which was introduced in Section 13 of the West Bengal Premises Tenancy Act, 1956 was violative of Article 19(1)(f) of the Constitution. By the newly introduced sub-section, the transferee of a property cannot file an eviction suit against his tenant for a period of three years from the date of transfer, on the grounds mentioned in clauses (f) and (ff) of Section 13(1) of the Act. We have already extracted the relevant passage from the judgment of Krishna Iyer, J., who spoke for the Court in that case. The learned Judge said that a presumption had to be raised that the legislature understands and appreciates the needs of the people and that some courts had gone to the extent of holding that because of the presumption of

constitutionality which every statute carries with it, the law will not be declared unconstitutional unless the case is so clear as to be free from doubt. The learned Judge added, citing Seervai, that "to doubt the constitutionality of a law is to resolve it in favour of its validity". With great respect, the judgment in B. Banerjee [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146], overlooks the binding decisions in Saghir Ahmad [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819], Khyerbari Tea Co. [(1964) 5 SCR 975 : AIR 1964 SC 925] and Mohd. Faruk [(1970) 1 SCR 156 : (1969) 1 SCC 853 : AIR 1970 SC 93] which are directly in point. Not only are binding decisions not referred to in the judgment but, in support of the view propounded by the Court, Krishna Iyer, J., had cited the decision in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147] which, as we have stated earlier, must be limited in its application to cases arising under Article 14 of the Constitution. To apply mechanically the decisions under Article 14 to cases arising under Article 19 is to ignore the significant distinction between the nature of the rights conferred by the two articles and their purport and content. B. Banerjee [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146] cannot therefore be regarded as an authority for the proposition contended for by the learned Attorney-General. Evidently, the landlord's contention that a beneficent provision, aimed at the protection of tenants harassed by motivated transfers of properties, was unconstitutional evoked a stern response. That is understandable. But, in the process of highlighting the need for social welfare legislation in the area of landlord-tenant relationship, the distinction between Article 14 and Article 19 insofar as it bears upon the question of burden of proof failed to receive any attention. The Bar too would seem not to have drawn the attention of the Court to that distinction and to the judgments which we have discussed a little earlier.

24. Pathumma [(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771], is a seven-Judge Bench decision on the question whether the restrictions imposed by the Kerala Agriculturists (Debt Relief) Act, 1970 violate Article 19(1)(f) and Article 14. The appellants therein challenged Section 20 of the Act particularly, which entitled agricultural debtors to recover properties sold in execution of decrees passed against them. Fazal Ali, J., who spoke for four out of the seven learned Judges, refers at the outset of the judgment to the "approach which a court has to make and the principles by which it has to be guided in such matters". After stating that the courts must interpret the Constitution : (SCC p. 8, para 5)

against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issued facing the people which the legislature in its wisdom, through beneficial legislation, seeks to solve,

the learned Judge observes that since the legislature is in the best position to understand and appreciate the needs of the people, the courts have recognised that there is "always" a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same. In support of this proposition, the learned Judge relied upon the decision of this Court in Mohd. Hanif Quareshi v. State of Bihar [(1959) SCR 629 : AIR 1958 SC 731 : 1958 SCJ 975], in which Das, C.J., restated the two propositions which were enunciated in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147].

25. We find it difficult to read the observations made by Fazal Ali, J., on behalf of the four learned Judges as an authority on the question of burden of proof in cases arising under Article 19 of the Constitution. It is true that Section 20 of the Kerala Act 1970 was challenged on the ground that it

violates Article 19(1)(f) but it must be emphasised that it was also challenged on the ground that sub-sections (3) and (6) thereof were violative of Article 14. The observations made by the learned Judge and the statement of law contained in his judgment would certainly apply to cases arising under Article 14, for reasons which we have already discussed. It is reasonable to suppose that if, by the use of the word "always", it was intended to lay down ruled as to burden of proof in regard to cases arising under Article 19 also, some reference would have been made by the learned Judge to the Constitution Bench decision in Saghir Ahmad [(1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819], Khyerbari Tea Co. [(1964) 5 SCR 975 : AIR 1964 SC 925] and Mohd. Faruk [(1970) 1 SCR 156 : (1969) 1 SCC 853 : AIR 1970 SC 93]. The fact that these decisions have not been referred to supports the inference that the observations made by the learned Judge at the outset of the judgment are of a general nature, not intended to apply to cases arising under Article 19 of the Constitution. The Court, as we have said, was also dealing with a challenge under Article 14 and the weighty observations made by the learned Judge would apply to the arguments arising under that provision.

26. In support of the principles set out by him, Fazal Ali, J., relied upon the decision of the Constitution Bench of this Court in Mohd. Hanif Quareshi [(1959) SCR 629 : AIR 1958 SC 731 : 1958 SCJ 975]. In that case, laws passed by the States of Bihar, U.P. and Madhya Pradesh, banning the slaughter of certain animals were challenged by the petitioners on the ground that those laws violated the fundamental rights guaranteed to them by Articles 14, 19(1) and 25 of the Constitution. The Court, speaking through Das, C.J., first disposed of the preliminary question raised by Pandit Thakurdas Bhargava that since the impugned Acts were passed in discharge of the obligation laid on the State by the Directive Principle contained in Article 48, no grievance could be made that those laws violated the fundamental rights conferred on the petitioners by Chapter III of the Constitution. The Court rejected the preliminary objection and turned to the second question as to whether the laws passed by the legislatures of the three States violated the provisions of Article 25(1) of the Constitution. After rejecting that contention also, the Court took up for consideration the argument of the petitioners as regards "the denial of the equal protection of the law" to them. The petitioners' argument was that the impugned Acts prejudicially affected only the Muslim Kasais who kill cattle but not others who kill goats and sheep and therefore those Acts were violative of Article 14 of the Constitution. It is while dealing with this contention that the learned Chief Justice made observations which have been extracted by Fazal Ali, J. The observations made by the learned Chief Justice regarding the presumption of constitutionality and the burden being upon the person who attacks it are specifically made in the context of Article 14 as in Ram Krishna Dalmia [Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1959 SCR 279 : AIR 1958 SC 538 : 1959 SCJ 147]. We are therefore of the opinion that the principles stated by Fazal Ali, J. on the question of burden of proof in Pathumma [(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771], may apply to cases arising under Article 14 but not to those arising under Article 19 and 21 of the Constitution. In fact, in Laxmi Khandsari v. State of U.P. [(1981) 3 SCR 92 : (1981) 2 SCC 600 : AIR 1981 SC 873], Fazal Ali, J,., sitting with Kaushal, J., said that "it is no doubt well-established" that when a citizen complains of the violation of a fundamental right conferred by Article 19, the onus is on the State to prove "by acceptable evidence, inevitable consequences or sufficient materials" that the restriction is reasonable.

27. Bhagwati, J., in his dissenting opinion in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] has expressed the view that the observations made by Krishna Iyer, J., in B. Banerjee [(1975) 2 SCR 774 : (1975) 1 SCC 166 : AIR 1975 SC 1146], and by Fazal Ali, J., in Pathumma

[(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771], cannot apply to cases arising under Articles 19 and 21 of the Constitution. We respectfully agree with that view.

28. The seven-Judge Bench decision in Madhu Limaye [(1971) 2 SCR 711 : (1970) 3 SCC 746 : AIR 1971 SC 2486 : 1971 Cri LJ 1721], on which Shri Jethmalani relies, involved a challenge to Section 144 and Chapter VIII of the Code of Criminal Procedure on the ground that those provisions violated clauses (a), (b). (c) and (d) of Article 19 of the Constitution. We have already extracted the passage from the judgment delivered in that case by Hidayatullah, C.J., on which the learned counsel relies. That passage shows that the Court was considering the argument advanced by the petitioners that the preferred-position doctrine, which was said to be in vogue in America, was applicable in India. The argument was that, according to that doctrine, any law restricting the freedom of speech and expression, religion or assembly must be taken on its face to be invalid till it was proved to be valid. Holding that the doctrine did not have the support of even the American Supreme Court any longer and that the unreasonableness of the law had to be established, the learned Chief Justice observed : "We do not start with the presumption that being a pre-Constitution law, the burden is upon the State to establish its validity." Therefore, according to the learned Chief Justice, "the burden must be placed on those who contend that the particular law has become void after coming into force of the Constitution by reason of Article 13(1) read with any of the guaranteed freedoms". These observations may at first blush seem to support Shri Jethmalani's contention but, as we have stated earlier, it is wrong to extend the observations made in one context to an entirely different context. The question which was considered in Madhu Limaye [(1971) 2 SCR 711 : (1970) 3 SCC 746 : AIR 1971 SC 2486 : 1971 Cri LJ 1721] was whether certain provisions of the Code of Criminal Procedure, which is a pre-Constitution law, are violative of the Constitution. The contention was that the Code of Criminal Procedure is a pre-Constitution law and therefore the State must justify the constitutionality of that law. That argument was rejected with the observation that "we cannot start with the presumption that a pre-Constitution law is unconstitutional and therefore the burden lies upon the State to establish its validity". The specific observation on the question of burden to the effect that the burden lies on those who challenge the constitutionality of a law, is also made expressly in regard to the provisions of Article 13(1) of the Constitution which provides that the laws which were in force before the commencement of the Constitution shall, insofar as they are inconsistent with the provisions of Part III, be void to the extent of such inconsistency. Shri Jethmalani is right that Madhu Limaye [(1971) 2 SCR 711 : (1970) 3 SCC 746 : AIR 1971 SC 2486 : 1971 Cri LJ 1721] was not noticed in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]], but we are unable to accept his contention that the decision is an authority for the proposition that the same rule of burden of proof must apply to all constitutional challenges, whether under Article 14, 19 or 21 of the Constitution.

29. We must hark back to Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] with which we began the discussion of the question as regards the burden of proof. Sarkaria, J. observed in the majority judgment that "with regard to the onus, no hard and fast rule of universal application in all situations could be deduced from the decided cases". We have made a modest attempt to show that cases arising under Article 14 are governed by a rule as to burden of proof which is different from the rule which applies to cases arising under Articles 19 and 21 of the Constitution. In that sense, it is true to say that there is no hard and fast rule of universal application which can be applied alike to all situations. We have also dealt with the two decisions in B. Banerjee [(1975) 2 SCR 774 : (1975)

1 SCC 166 : AIR 1975 SC 1146], and Pathumma [(1978) 2 SCR 537 : (1978) 2 SCC 1 : AIR 1978 SC 771] which the Court had evidently in mind when it spoke of a "contrary trend" which was discernible in the later decisions of the Court. After referring to the Indian and the American cases bearing on the subject, the majority recorded its conclusion by saying that "the State has discharged its burden" to establish that death penalty serves as a deterrent, by producing the necessary data. We are referring to this aspect of the decision in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] in order to show that the judgment of the majority proceeded on the basis that the burden of proving the constitutionality of Section 302 was on the State and that the State had successfully discharged that burden. Thus, Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] is an authority for the proposition that in cases arising under Article 21 of the Constitution, or if it appears that a person is being deprived of his life or has been deprived of his personal liberty, the burden rests on the State to establish the constitutional validity of the impugned law.

30. That disposes of the question of burden of proof. In the light of this discussion, we must proceed to examine the question whether the State has discharged the burden of proving that the provisions of Sections 354(5) of the Code of Criminal Procedure are in conformity with the mandate of Article 21. Consistently with the conclusion which we have recorded on the question of burden of proof, we must hold that the burden does not lie on the petitions to prove that the procedure prescribed by the aforesaid provision for taking life is unjust, unfair or unreasonable. The impugned statute, on the face of it, provides for a procedure for extinguishing life. Therefore, not even the initial obligation to show the fact of deprivation of life or liberty rests on the petitioners. The State must establish that the procedure prescribed by Section 354(5) of the Code for executing the death sentence is just, fair and reasonable. That burden includes the obligation to prove that the said procedure is not harsh, cruel or degrading.

31. Has the State discharged this heavy onus ? We have already set out the grounds on which the petitioners challenge the constitutionality of Section 354(5) of the Code of Criminal Procedure which provides that "when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead". Stated briefly, the contention of the petitioners is that Section 354(5) of the Code is bad because :

> 1. It is impermissible to take human life even under the decree of court since it is inhuman to take life under any circumstances;
>
> 2. By reason of the provision contained in Article 21, it is impermissible to cause pain or suffering of any kind whatsoever in the execution of any sentence, much more while executing a death sentence;
>
> 3. The method of hanging prescribed by Section 354(5) for executing the death sentence is barbarous, inhuman and degrading; and
>
> 4. It is the constitutional obligation of the State to provide for a humane and dignified method for executing the death sentence, which does not involve torture of any kind. If the method prescribed be Section 354(5) does not meet this requirement, no death sentence can be executed since, no other method for executing that sentence

is prescribed by or is permissible under the law.

32. These arguments are answered by the learned Attorney-General by contending that a sentence lawfully imposed by a court can and has to be executed, though by causing the least pain and suffering any by avoiding torture or degradation of any kind; that the method prescribed by Section 354(5) for executing the death sentence is a humane and dignified method which involves the least amount of pain and cruelty; that no other method or executing the death sentence is quicker of less painful; that Article 21 does not postulate that no pain or suffering whatsoever shall be caused in the execution of a sentence lawfully imposed by a court, including the sentence of death; and that, since the method of hanging prescribed by Section 354(5) does not suffer from any constitutional infirmity, the question of the Court substituting that method by any other method does not arise for consideration.

33. While supporting these arguments of the Attorney-General, Shri Ram Jethmalani added that unless, on the face of it, the method prescribed by law for executing a sentence is revolting to the conscience, the courts must surrender their discretion to the legislative judgment when the challenge to the constitutionality of the law is based on considerations which the Court is not equipped to evaluate by manageable judicial standards. According to the learned counsel, the Court's evaluation of the method of hanging prescribed by law shall have to be inevitably subjective, almost to the point of being legislative in character, which must be avoided at all costs. The legislature has recognised means at its command for self-education like the Law Commissions, the expression of public opinion, the result of scientific investigations, the sociological advance and, last but not the least, the unfettered freedom available to the legislators to discuss matters of moment on the floor of the House and to keep them under constant scrutiny. "Hands off the Hanging" is the sum and substance of Shri Jethmalani's argument.

34. New dimensions were added to these arguments by the other learned counsel. For example, Shri Salman Khurshid advocated that instead of putting out life for ever by executing the death sentence, persons sentenced to death should be deprived of their eyesight by blinding them so that, if and when they are reformed, they could be given back their sight by transplantation or by whatever method medicine may discover for restoring the eyesight. In the meanwhile, says counsel, justice shall have been done.

35. First, as to Shri Jethmalani's argument that we should leave to the legislative wisdom the question as to how best the death sentence should be executed and that we should not project our subjective views into the decision of that question. We find it impossible to accept this argument. Matters of policy are certainly for the legislature to consider and therefore, by what mode or method the death sentence should be executed, is for the legislature to decide. As stated in Gregg v. Georgia [49 LEd 2d 859 : 428 US 153 : 96 S Ct 2621 (1976)], in a democratic society legislatures, not courts, are constituted to respond to the moral values of the people. But the function of the legislature ends with providing what it considers to be the best method of executing the death sentence. Where the function of the legislature ends, the function of the judiciary begins. It is for the courts to decide upon the constitutionality of the method prescribed by the legislature for implementing or executing a sentence. Whether that method conforms to the dictates of the Constitution is a matter not only subject to judicial review but it constitutes a legitimate part of the judicial function. As Judges, we cannot abdicate the obligation imposed upon us by the Constitution and throw our hands in despair with the consolation that after all, the chosen representatives of the people have willed that hanging is the best method of executing the death sentence. We respect the judgment of the people's representatives to the extent, but only to the extent, that as a matter of

policy they considered that the method of hanging provided by Section 354(5) of the Code is the least objectionable method for executing the death sentence. But, what the policy judgment of the legislature leaves outstanding for the Court's consideration is the question whether the particular method prescribed by law for executing the death sentence is in consonance with the Constitution. This latter question is manifestly for the courts to decide. The decision of that question inevitably involves a value judgment based upon a comparative evaluation of alternate methods for executing the death sentence but, more than any such comparative evaluation, our plain and primary duty is to examine whether, even if the method selected by the legislature is the least objectionable, it is still open to the objection that it involves undue torture, degradation and cruelty as, for example, by causing more pain than is strictly necessary or by bringing about a lingering death or because the particular method is liable, frequently, to fail in its mechanism. Our task will end with pointing out why, if at all, the method at present provided by law is contrary to the mandate of the Constitution, even if it be less objectionable that any other commonly accepted method of executing the death sentence. We will not legislate by directing that since, if at all, the provision contained in Section 354(5) is unconstitutional, the death sentence imposed upon the petitioners shall be executed by the method of electrocution or gas-chamber or lethal injection or shooting or guillotine and the like. Nor can we direct, as canvassed by Shri Khurshid, that the petitioners be temporarily blinded. That would be legislating. To pronounce upon the constitutionality of a law is not legislating, even if such pronouncement involves the consideration of the evolving standards of the society. 'Cruelty' and 'torture' are not static concepts. That is why, the chopping off of limbs which was not considered cruel centuries ago or, is not considered cruel in some other parts of the world today, is impossible to conceive as a punishment by applying the contemporary standards of the Indian society. What might not have been regarded as degrading or inhuman in days bygone may be revolting to the new sensitivities which emerge as civilization advances. The impact and influence of the awareness of such sensitivities on the decision of the law's validity is an inseparable constituent of the judicial function.

36. This Court is not a third chamber of the legislature. It has no such extra-territorial ambitions and it does not aspire to do the job of 'out-riders', to use an expression of Lord Devlin. It is simply the highest court of law and justice in a country governed by a written Constitution, which, it is its primary and exclusive function to interpret. The care which we must take is that while interpreting the laws and the Constitution, we ought not to be swayed by passing passions or by populist sentiments. We must do our duty by the Constitution, unaffected by extraneous considerations and guided solely by the obligation to be fair and just, almost to a fault.

37. The State seeks to discharge its burden by relying upon the Reports of Commissions which are based on results of scientific investigation into the mechanics of the hanging process, the opinions of text-book writers, the predilections of sociologists, the proclivities of reformers and, of course, juristic exposition of the complex issue "to hang or not to hang". To some of these we must now turn.

38. In the year 1949 the Government of United Kingdom appointed a Commission to report upon the various facets of the capital punishment. The Commission submitted its report in September 1953 after extensive research into the questions referred to it and after interviewing experts, visiting jails and examining the merits and demerits of hanging as a method for executing the death sentence. Chapter 13 of the Royal Commission's Report deals with the "Methods of Execution". In paragraph 700 of that chapter the Commission records that it heard evidence on the existing method of hanging from various witnesses, including Prison Commissioners and prison officials, one Mr. A. Pierepoint, "the most experienced executioner in this country", and under-sheriffs responsible for

execution in London and Lancashire. The Commission inspected execution chambers in England and Scotland and was given demonstrations of the procedure at an execution. They also received evidence about executions in the United States by means of electrocution and lethal gas. During their visit to the United States, they took the opportunity of inspecting the electric chair in two prisons. Lastly, they questioned medical witnesses about possible new methods of execution.

39. In paragraph 703 of the Report the Commission notes that public opinion was disturbed by evidence that the task of hanging was sometimes bungled. In 1885 a condemned murderer had to be reprieved after three unsuccessful attempts had been made to hang him. There were also other untoward occurrences : Occasionally, a man might be given too short a drop and die slowly of strangulation, or too long a drop and be decapitated. A Committee was therefore appointed in U.K. in 1886 to report on the best way of ensuring "that all executions may be carried out in a becoming manner without risk of failure or miscarriage in any respect". This Committee made recommendations about the length of drop, improvements in the apparatus and preliminary tests and precautions which were designed to ensure speedy and painless death by dislocation of the vertebrae without decapitation. The improved system of hanging now in vogue came into being as a result of the recommendations of this Committee. The Home Office informed the Commission that "There is no record during the present century of any failure or mishap in connection with an execution, and, as now carried out, execution by hanging can be regarded as speedy and certain".

40. In paragraph 704 of the Report, the Commission says that it was "on the score of humanity" that execution by hanging was defended by witness after witness. The Prison Officers held the system of hanging to be as humane as circumstances permit, while the Prison Medical Officers said "We cannot conceive any other method which would be more humane, efficient or expeditious than judicial hanging". The Prison Chaplains called it "simple, humane and expeditious". The British Medical Association told the Commission that "hanging is probably as speedy and certain as any other method that could be adopted". The Royal Medico-Psychological Association, after stating that the method of execution ought to be "certain, humane, simple, instantaneous and expeditious", said : "On the information available to the Association, the method of hanging fulfils these criteria more satisfactorily than any other so far proposed or in practice." A knowledgeable witness told the Commission that the method of hanging was "certain, painless, simple, humane and expeditious".

41. In paragraph 705 of the Report, the Commission refers to the interesting development that the method of execution whose special merit was originally thought to be that it was peculiarly degrading and therefore deterrent, was defended before it on the ground that it was uniquely humane. The reason for this surprising inversion is that as a result of the recommendations made by the Committee which was appointed in 1886, "a method originally barbarous... has been successfully humanised".

42. In paragraph 708, the Commission proceeds to examine the question whether there is any seemly and practicable method of execution which is as painless as hanging or even more speedy, or which, even though it may have no advantage over hanging in those respects, is free from the degrading associations of that method. If capital punishment were being introduced for the first time, the Commission considered it unlikely that hanging would be chosen as a method for executing the death sentence. The Commission, however, found that no useful purpose would be served by making experiments unless the necessity was urgent or the utility evident. And this applied with special force to a subject which was highly charged emotionally and was exceptionally controversial.

43. In paragraph 709, the Commission refers to five methods of execution of the death sentence which were then in vogue in the different parts of the world. Electrocution was in vogue in 23 States of U.S.A.; guillotine in France and Belgium; hanging in England, Scotland, the Commonwealth countries and 10 States of U.S.A.; and lethal gas in 8 States of U.S.A. Shooting was in vogue in the State of Utah in America which allowed a choice between hanging and shooting. Besides, shooting was used in almost every country as a method of execution of persons sentenced to death for offences against the Military Code.

44. Rejecting guillotine and shooting as methods for executing the death sentence for the reason that the former produces mutilation and the latter is inefficient, uncertain and unacceptable as a standard method of civil executions, the Commission examined the mechanics of hanging in paragraphs 711 to 716 of its Report. Paragraph 714, which is relevant for our purpose, shown that a valuable memorandum was submitted to the Commission by the Coroner for the Northern District of London, at whose instance may post-mortem examinations following upon hanging were made by the late Sir Bernard Spilsbury, a distinguished man of medicine who had figured as a witness in many important trials, and other highly qualified pathologists. The Coroner, Mr. Bentley Purchase, had access to the records of such post-mortem examinations. The memorandum showed that the effective cause of death in 58 executions at two prisons was "fracture, dislocation of cervical vertebrae with laceration or crushing of the cord" and that any such dislocation causes immediate unconsciousness, there being no chance of later recovery of consciousness since breathing is no longer possible. The beating of the heart thereafter for any time up to 20 minutes is a purely automatic function. In the words of the Coroner : "I have no doubt of the efficacy and immediate and painless finality of the present method of judicial execution".

45. After examining the mechanics of the methods of electrocution and lethal gas in paragraphs 717 to 722, the Commission considers the question as to whether electrocution or lethal gas was preferable to hanging on considerations of "humanity, certainty and decency".

46. The Commission observes in paragraph 724 that the requirements of humanity are essentially two : (1) That the preliminaries to the acts of execution should be as quick and as simple as possible, and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension, and (2) that the act of execution should produce immediate unconsciousness passing quickly into death. Paragraph 725 contains a comparative table showing the length of time taken by the preliminaries in electrocution, lethal gas and hanging. On the basis of that comparative analysis, the Commission records its conclusion in paragraph 726 that, there was 'no room for doubt' that in the matter of time taken by the preliminaries, hanging was superior to either electrocution or lethal gas. In all the three methods the prisoner had to be restrained in some way or the other prior to the execution but, in electrocution the execution is proceeded by shaving and handcuffing while, in lethal gas the prisoner has to be stripped of his clothes, except a pair of shorts, in order that pockets of gas may not persist in the clothes. In addition, a stethoscope head has to be strapped to the chest under the lethal gas method.

47. On the question of "certainty", the Commission observes on paragraph 729 of its Report that the equipment required for hanging is simpler than that which is required for electrocution or execution by lethal gas. The lethal chamber is a complicated piece of mechanism while the electric chair depends for its efficacy upon the supply of electricity which is usually taken from commercial sources. In fact, in the United States, executions by electrocutions were occasionally delayed by failure of the power. The Commission recorded its conclusion by saying that neither electrocution not lethal chamber had any advantage over hanging, insofar as the requirement of "certainty" is

concerned.

48. In paragraph 732, the Commission deals with the third aspect, namely, "decency" in execution of the death sentence. It says that while considering this aspect it had kept two things in mind : Firstly, the obligation obviously rests on every civilised State to conduct its judicial executions with decorum, and, secondly, that judicial execution should be performed without brutality, that it should avoid gross physical violence and should not mutilate or distort the body. The Commission records its conclusion by saying that insofar as the requirement of decency is concerned, the other two methods have an advantage over hanging though, all the three methods were now used with all the decency possible in the circumstances.

49. The Commission records its final conclusion in paragraph 734 of the Report by saying that after weighing all the factors carefully and bearing in mind that the onus of proof was on the advocates of change, it could not recommend that either electrocution or gas chamber should replace hanging as a method of judicial execution : In the matter of humanity and certainty, the advantage lay with the system of hanging, in regard to one aspect of the requirement of decency the other two methods were preferable. But, according to the Commission, that advantage could not be regarded as enough to turn the scale.

50. The counter-affidavit filed on behalf of the Government of India by Shri P. S. Ananthanarayanan, Under Secretary, Ministry of Home Affairs, shows that the Director General of Health Services, who is the highest adviser to the Government of India in these and allied matters, was consulted on the question whether the system of hanging which is prevalent in India for executing the death sentence should be changed. The D.G.H.S. advised as follows :

Subject : Mode of ending the life of a convict sentenced to death.

Continuation this Directorate u.o. No. 31-204, 55-MI, dated April 10, 1956, on the above subject.

This Directorate has consulted the Administrative Medical Officers, Chemical Examiners, other criminologists and experts, etc., on the subject and the views expressed by them fall into the following groups :

> #(1) Those who consider the present method ofhanging being the best .. Number 15(2) Those favouring electrocution .. Number 17(3) Those favouring medication, etc. .. Number 3##

Even though electrocution has been advocated as a desirable method by a considerable number of those consulted, it is not a method without its drawbacks in that death is stated in this case not to be always instantaneous or even painless and that this method involves the setting up of a considerable mechanical outfit. From the replies received from various sources, we also find that those who can speak with the authority of experience and knowledge have spoken with conviction regarding judicial hanging, properly carried out, as being the quickest and least painful method. This is also the view of the Serologist and Chemical Examiner to the Government of India, Calcutta and the majority view of the Central Medico-Legal Advisory Committee. We are inclined to agree with this view and do not recommend any change in the present method of execution by judicial hanging in the present state of scientific knowledge.

Paragraph 16 of the counter-affidavit says that the D.G.H.S. held to the same view as recently as in February 1982.

51. The 35th Report of the Law Commission of India on Capital Punishment, dated September 30, 1967 deals with "Execution of Sentences" in Chapter XV. The Commission observes in paragraph 1097 of the Report that though hanging continued to be the most prevalent method for executing the death sentence, the course of events showed that it was being slowly abandoned. Thus, while in 1930, 17 States in U.S.A. used to employ that method, only 6 retained it in 1967. Again, while it was in force in Yugoslavia before 1950, it was replaced by the firing squad in that year.

52. In paragraph 1098, the Law Commission deals briefly with the Report of the Royal Commission of England while in paragraph 1099, it discusses the Report of the Canadian Committee on the same subject. It would appear from what the Law Commission has stated in this paragraph that the Canadian Committee considered four different methods of execution, namely, hanging, electrocution, gas-chamber and lethal injection. The last mentioned method was believed to ensure instantaneous and painless death, but it could only be accomplished by an intravenous injection requiring skill, and the Canadian Committee considered that it would not be reasonable to expect a medical doctor to perform a task so repugnant to the traditions of the medical profession. Moreover, an intravenous injection could not be administered unless the condemned person was entirely acquiescent. The Canadian Committee appears to have noted that hangings in Canada were not conducted with the same degree of precision as in U.K., as a result of which it was difficult to know how the death was caused and whether the loss of consciousness had supervened instantaneously. Holding on the basis of the evidence before it that hanging was regarded generally as an obsolete, if not a barbarous method, the Committee recommended that hanging should be replaced by electrocution.

53. In paragraphs 1101 to 1148 (pages 339 to 345), the Law Commission of India extracts the views which were expressed before it as to the ideal method for executing the death sentence. Noting in paragraph 1149 that there was a considerable body of opinion which would like hanging to be replaced by something "more humane and more painless", the Commission says in paragraph 1150 that to a certain extent the matter was one of medical opinion. The general view expressed before the Commission was that a method which is certain, humane, quick and decent should be adopted for executing the death sentence. The society owed it to itself that the agony at the exact point of execution should be kept to the minimum. But the Commission felt that it was difficult to express any positive opinion as to which of the three methods - hanging, electrocution and gas-chamber - satisfied these tests most, particularly when electrocution and gas-chamber were untried in India. In paragraph 1151, the Commission records its conclusion by saying :

We do not therefore recommend a change in the law on this point.

In other words, the recommendation of the Commission was that death sentence should be executed by the method of hanging prescribed in Section 354(5) of the Criminal Procedure Code, since there were no circumstances justifying its substitution by any other method and since, no other method was shown to be more satisfactory.

54. In February 1978, Dr. Hira Singh, Prison Adviser to the National Institute of Social Defence, submitted his opinion to the Ministry of Home Affairs, Government of India, as follows :

In ancient days the execution of death sentence was often attended by cruel forms of torture and suffering inflicted on the offender. With the passage of time, however, the methods of execution have undergone various changes. The old practices such as beheading, drowning, stoning, impaling, precipitation from a height, etc., have been gradually replaced in all civilised countries by new

methods of hanging, electrocution, gas-chamber and shooting. These changes have occurred mainly on the premise that death penalty means simply the deprivation of life and as such should be made as quicker and less painful as possible. The old methods were considered inhuman.

According to the study on capital punishment published by the United Nations in 1962, hanging remains the most frequent method of execution in various countries including United Kingdom and generally throughout the Commonwealth. In the United States it is no doubt losing ground in favour of electrocution and lethal gas. The modern method of hanging differs from its traditional form as it involves an abrupt and immediate severance of the cervical vertebrae. The whole process is carried out with care and skill so as to avoid any bungling and untoward incident. The State Jail Manuals contain elaborate instruction on the arrangement for execution, inspection of gallows, testing of equipment and the manner of execution.

The Prison Advise thereafter sets out guidelines contained in the Model Prison Manual which have to be followed while executing the death sentence by the method of hanging. In paragraph 3 of his opinion he says that the chances of a mishap in the electrocution process cannot be eliminated altogether and that in the United States, there have been occasions when the current failed to reach the chair when the switch was engaged. After describing the procedure which is adopted in the methods of electrocution, gas-chamber and shooting, he says that there are cases on record where executions by shooting were bungled by nervous firing squads. Dr. Hira Singh concludes :

> The question of introducing electric chair in place of hanging as a mode of execution may be examined from the administrative as well as humanitarian viewpoints. It is often argued that death by hanging takes lesser time to execute than the other modes, though it may not be invariably true. In any case electric chair has in no way proved to be more efficient in reducing pain or suffering inflicted on the offender. In hanging the body is liable to be disfigured but in electrocution also the leg is sometimes slightly burnt. Above all electrocution involves much costlier equipment and operational preciseness than hanging. In views of such considerations there seems to be no particular advantage in switching over to the electric chair in the execution of death sentence even if such a system may outwardly look to be more sophisticated.

The opinion of the Prison Adviser is at Annexure V to the counter-affidavit of Shri P. S. Ananthanarayanan.

55. We had allowed one Dr. Chandrakant of the All-India Institute of Medical Sciences, New Delhi, to intervene in these proceedings. We may, with some advantage, refer to his written submissions. Dr. Chandrakant did his M.B.B.S. in 1970 and was in the Army Medical Corps for a period of file years. He holds a Diploma in Oto-rhino-Laryngology and the degree of M.D. in Forensic Medicine and Toxicology. It appears that he has also done a three-years degree course of LL. B. from the Allahabad University. He is presently working as a Lecturer in the Department of Forensic Medicine of the Institute, in which capacity he is required to conduct medico-legal autopsies. He claims that he has conducted approximately 1100 medico-legal autopsies uptil now. According to him, hanging is the best method for executing the death sentence since by that method, death ensues instantaneously due to a combination of shock, asphyxia and crushing of spinal medulla. He says that there are misconceived notions about judicial hanging due to improvised and faulty mechanism of the process involved in suicidal hangings and due to lack of knowledge of the anatomical structure of the neck and human body. Dr. Chandrakant describes the human anatomy and says that in hanging, whenever there is injury to medulla, to pons or medulla oblongata, all the three vital

centres called as "tripod of life" are affected which causes instantaneous death. Dr. Chandrakant has given a brief description of about 15 different methods which have been followed at one time or the other for executing the death sentence.

56. In a book called Hanging through the ages (History of Capital Punishment) by George R. Scott (Torchstream Books, London), the entire history of the technique of hanging has been traced. The author says at page 211 that the introduction of an improved technique of hanging has served to expedite the process of hanging, giving less pain to the prisoner and that, "the long drop" and other improvements have achieved a great deal though, despite everything that has been done, accidents are inevitable.

57. In Kenny's Outlines of Criminal Law (19th Ed. 1966) edited by J.W. Cecil Turner, it is stated at page 618, footnote 5 that : "Hanging does not operate now through suffocation, but by a 'long drop', invented by Prof. Haughton of Dublin, which dislocates the vertebrae and is calculated to produce an instantaneous and painless death".

58. In New Horizons in Criminology by Harry Elmer Barnes and Negley K. Teeters (3rd Ed. 1966), it is stated :

> Society has resorted to many different methods in executing criminals and other allegedly dangerous persons. Drowning, stoning to death, burning at the stake and beheading have all been used in the past. Of all the modern methods of administering the death penalty, hanging has been the most widely used. We read of hangings in the earliest historic literature and throughout the world even today it is still the most widely used.

59. In a publication called Capital Punishment under the auspices of the United Nations, Department of Economic and Social Affairs, New York, 1962, it is stated in paragraph 57 of the chapter called 'The Execution' that in earlier times, a great variety of methods of execution was known to the law, the carrying out of a sentence of death being sometimes attended by 'cruel forms of torture' intended in certain cases to aggravate the suffering. The publication says :

On grounds of humanity and of the respect due to the human person the modern law has in general dropped these practices. The death penalty means, nowadays, simply the deprivation of life. The differences which today exist regarding the methods of carrying out the death sentence are attributable to the efforts made to render death quicker and less painful.

The same paragraph mentions that hanging has generally been abandoned in the United States. According to the issue oft 'Time' magazine dated January 24, 1983, only four States of America still prescribe hanging as a method for executing the death sentence. Paragraph 59 of the U.N. publication ways that "Hanging remains the most frequent method in use". It lists over 25 countries of the world in which the method of hanging is used for executing the death sentence.

60. In so far as the judicial exposition of this subject is concerned, attention may be drawn to the latest decision of this Court in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment] in which the majority said that under the successive Criminal Procedure Codes which have been in force in India for about 100 years, the sentence of death is to be carried out by the method of hanging. The

founding fathers of the Constitution, some of whom were distinguished jurists (in the proper sense of that term), cannot be assumed to be ignorant of the provision contained Section 354(5) of the Code. And, despite the fact that the death sentence has to be carried out by the mode prescribed in that section, they recognised the existence and validity of that sentence. The majority accepted the proposition that by reason of the provision contained in Article 21, no person can be deprived of his life or personal liberty except in accordance with fair, just and reasonable procedure established by law. Applying that postulate, it observed that the framers of the Constitution did not consider that either the death sentence or the traditional mode of its execution prescribed by Section 354(5) of the Code was a degrading punishment which would defile the dignity of the individual within the contemplation of the Constitution. These observations are significant, with the caveat that the question as regards the validity of Section 354(5) of the Code was not directly in issue in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment].

61. This then is the data on which reliance is or can be placed by the Union of India for discharging the burden which rests upon it for proving that the method of hanging prescribed by Section 354(5) of the Code does not violate the guarantee contained in Article 21 of the Constitution.

62. Though it must be conceded that the various learned counsel for the petitioners led by Shri R. K. Garg and Dr. N. M. Ghatate have argued their respective cases with great fervour, industry and tenacity, the writ petitions furnish no data or reasons whatsoever as to why the method of hanging is violative of Article 21. Mostly, the prayer clauses of the petitions simply contain a request that the system of hanging should be declared to be violative of Articles 14, 19 and 21 of the Constitution. Articles 14 and 19 were hardly even mentioned in the arguments on the main point and, rightly so. The arguments advanced in regard to the violation of Article 21 went far beyond the scope of the averments in the writ petitions but that is not unprecedented in this Court. Moreover, in a matter involving the question of life and death, technicalities cannot be allowed to defeat justice. We could have asked the petitioners to amend their petitions but rather than doing so, we decided to hear a full-dressed argument on the validity of Section 354(5) of the Code, regardless of the paucity of pleadings, especially since the writ petitions do not involve any challenge under Article 14 of the Constitution. We have heard the petitioners' counsel at length on every conceivable aspect of the question involved in these petitions. We have proceeded to this judgment, on a careful consideration of the diverse submissions made before us.

63. Dr. Ghatate, who began the arguments on behalf of the petitioners, contended that the method of hanging involves pain, degradation and suffering wherefor, that method violates Article 21 and cannot be used for executing the death sentence. In support of this argument, he drew our attention to certain passages in the dissenting judgment of Bhagwati, J., in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]]. At page 285 of the Report (SCC page 63), the learned Judge has extracted a passage from a decision of the California Supreme Court in which it is said that, "Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture". In the absence of citation, we are unable to trace the decision or to see the context in which the California Supreme Court made the particular observation. We do not know who these "Penologists and medical experts" are and where they have expressed agreed opinions attributed to them. It is not even clear whether the California Court was dealing with the validity of death penalty or with the methods of executing

that penalty and, if the latter, whether it has condemned every method of execution and not the method of hanging only. The purport of the passage seems to indicate that the question under inquiry was that death sentence is a 'cruel and unusual punishment'. As we have shown, the expert evidence before the Royal Commission of U.K. was quite to the contrary, especially in regard to the improved technique of hanging which came into operation after the recommendations of the Committee appointed in 1886 were implemented.

64. At page 287 of the Report (SCC page 65), Bhagwati, J., has made certain observations which also Dr. Ghatate has pressed into service. We have already extracted those observations while dealing with the preliminary of the learned Solicitor-General. The sum and substance of the particular passage is that "hanging is undoubtedly accompanied by intense physical torture and pain". In support of this conclusion, the learned Judge quotes Warden Duffy of San Quentin, a high security prison in U.S.A., who has described with particularity the procedure which obtains at the hangings of prisoners. After extracting a statement of Warden Duffy at page 288 (SCC page 65), the learned Judge say : "If the drop is too short, there will be a slow and agonising death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made." Our difficulty again is the absence of citation of the descriptive passage which appears at page 288 of the Report (SCC page 65). We do not know where, and in which year, Warden Duffy gave the particular description of the hanging process. The process described by him is apparently similar to the one which is now regarded as outmoded and is no longer in use. Besides, Warden Duffy was a stern opponent of the capital punishment. In a series of articles under the caption "San Quentin is my Home" which appeared in the Saturday Evening Post, March 25-May 13, 1950, he denounced the capital sentence by pointing out, inter alia, how every known method of executing that sentence is fraught with pain and suffering. We will have occasion to call attention to what he has to say about the gas-chamber too. But evidence before us shows that the mechanics of the method of hanging has undergone significant improvement over the years and if the expression is not inapt in the context, hanging has been almost perfected into a science. The chances of a mishap are minimal now though, the chances of an accident can never be eliminated totally. If that could be done, the word "accident" will not appear in the dictionary of wise men. In regard to the improvements effected in the method of hanging, we will only draw attention to the findings of the Royal Commission and the opinion expressed by other experts to which we have already referred.

65. Finally, Dr. Ghatate relies upon an account given in 1927 by a Surgeon who witnessed a double execution, which has been extracted in judgment of Bhagwati, J., at page 288 of the Report (SCC page 65). It appears from the Surgeon's account that 'one of the supposed corpses' gave a gasp which the Surgeon was, very naturally, horrified to hear. Two bodies not completely dead were then raised to the scaffold again. In his account the Surgeon has stated that though dislocation of the neck is the ideal aimed at in hanging, that had proved rather an exception in his own post-mortem findings which showed that in the majority of instances, the cause of death was strangulation and asphyxia. Relying on this account Bhagwati, J., concludes : "These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas." With great respect, our difficulty is the same as in regard to the two earlier passages extracted by the learned Judge, one from the California Supreme Court judgment and the other from Warden Duffy. We do not know who the Surgeon is and from where the quotation is extracted. Besides, as we have repeatedly said, there has been a significant improvement in the mechanism of hanging. Old experiences are not to be discarded out of hand but they cannot be applied to new situations without

a critical examination of their relevance to those situations. Otherwise, technical sciences, particularly the medical science, shall have made their remarkable advance in vain.

66. We have given our anxious and respectful consideration to the passages extracted and the observations made by our learned Brother Bhagwati. The fact that these are contained in a minority judgment is no justification for ignoring them. In a matter as socially sensitive as this, it is improper to overlook the opposing point of view, whether it is expressed in a minority judgment or elsewhere.

67. Bhagwati. J., says in the last passage (SCC page 65) extracted by us from his judgment that the method of hanging is perhaps regarded by some as more humane than electrocution or the application of lethal gas. Dr. Ghatate has his own point of view. He contends that electrocution is the quickest and the simplest method of executing the death sentence, in which there is no scope for failure of the apparatus. He has two alternative submissions to make : one, failing electrocution, administration of lethal injection should be adopted as a method for executing the death sentence and, two, failing lethal injunction, shooting by a firing squad should be resorted to. We assume that the learned counsel has obtained his client's instructions on the use of these alternative methods, particularly shooting.

68. Truly, we are not concerned to determine the merits and demerits of these alternative methods of execution which are canvassed by the learned counsel and some of which are in vogue in some other parts of the world. If the method prescribed by Section 354(5) of the Code is violative of Article, 21, the matter must rest there because, as contended by Dr. Ghatate himself, the Court cannot substitute any other method of execution for the method prescribed by law and which alone is permissible under the law. However, an understanding of the process involved in the competing methods used for executing the death sentences and their comparative assessment is not altogether pointless. If it can be demonstrated clearly that some other method has a real and definite advantage over the method of hanging, the question will naturally arise as to why the State does not adopt that method. An arbitrary rejection of a method proved to be simpler, quicker and more humane than hanging may not answer the constitutional prescription.

69. The Royal Commission mentions in paragraph 717 of its Report that during their visit to America, they inspected the electric chairs in the Sing Sing Prison, New York and the District of Columbia Jail, Washington, and that they received evidence about the use of the electric chair in other States. The Commission has given the following account of the method of electrocution based primarily on the information obtained by them in Washington :

> The execution takes place at 10 a.m. At midnight on the proceeding night the condemned man is taken from the condemned cell block to a cell adjoining the electrocution chamber. About 5.30 a.m., the top of his head and the calf of one leg are shaved to afford direct contact with the electrodes. (The prisoner is usually handcuffed during this operation to prevent him from seizing the razor.) At 7.15 a.m., the death warrant is read to him and about 10 o'clock he is taken to the electrocution chamber.... Three officers straps the condemned man to the chair, tying him around the waist, legs and wrists. A mask is placed over his face and the electrodes are attached to his head and legs. As soon as this operation is completed (about two minutes after he has left the cell), the signal is given and the switch is pulled by the electrician; the current is left on for two minutes, during which there is alternation of two or more different voltages. When it is switched off, the body slumps forward in the chair. The prisoner does not make any sound when the current

> is turned on, and unconsciousness is apparently instantaneous. He is not, however, pronounced dead for some minutes after the current is disconnected. The leg is sometimes slightly burned, but the body is not otherwise marked or mutilated.

In paragraph 718, the Commission says :

> No case of mishap was recorded in Washington, but it seems that in some other States there have been occasions when the current failed to reach the chair when the switch was engaged. Some States install an emergency generator in order that an execution may not be delayed by failure of the commercial power.

70. Lest it be thought that the Report of the Royal Commission, having been given 30 years back, the description of the process of electrocution contained therein may not apply to the modern conditions, we may draw attention to the cover story on the death penalty which appeared in the issue of 'Time' magazine, dated January 24, 1983. The write-up, which is predominantly in favour of abolition of the death sentence, contains a vivid description of the methods of electrocution, gas-chamber and lethal injection which are used in some of the States in America. The cover story, "An Eye for an eye", gives the following description of electrocution at page 12 of the issue :

> The chair is botled to the floor near the back of a 12 ft. by 18 ft. room. You sit on a seat of cracked rubber secured by rows of copper tacks. Your ankles are strapped into half-moon-shaped foot cuffs lined with canvas. A 2-in-wide greasy leather belt with 28 buckle holes and worn grooves where it has been pulled very tight many times is secured around your waist just above the hips. A cool metal cone encircles your head. You are now only moments away from death.

But you still have a few seconds left. Time becomes stretched to the outermost limits. To your right you see the mahogany floor divider that separates four brown church-type pews from the rest of the room, they look odd in this beige Zen-like chamber. There is another door at the back through which the witnesses arrive and sit in the pews. You stare up at two groups of fluorescent lights on the ceiling. They are on. The paint on the ceiling is peeling.

You fit in neat and snug. Behind the chair's back leg on your right is a cable wrapped in gray tape. It will sluice the electrical current to three other wires : two going to each of your feet, and the third to the cone on top of your head. The room is very quiet. During your brief walk here, you looked over your shoulder and saw early morning light creeping over the Berkshire Hills. Then into this silent tomb.

The air vent above your head in the ceiling begins to him. This means the executioner has turned on the fan to suck up the smell of burning flesh. There is little time left. On your right you can see the waist-high, one-way mirror in the wall. Behind the mirror is the executioner, standing before a gray marble control panel with gauges, switches and a foot-long lever of wood and metal at hip level.

The executioner will pull this lever four times. Each time 2,000 volts will course through your body, making your eyeballs first bulge, then burst, and then broiling your brains....

Electrocution was first introduced in the New York State prison at Auburn on August 6, 1890. The initial victim was one William Kemmler whose challenge to the validity of the method of electrocution as a cruel and unusual punishment was rejected by the U.S. Supreme Court [In re Kemmler, 136 US 436 (1890)]. Though this method is now advocated as a humanitarian move, in

reality, its original introduction appears to have been the result of the effort of an electrical company to market its products [So stated by Nicol Tesla in the New York World, November 17, 1929].

71. Though it is generally believed that death by electrocution is entirely painless, a distinguished French scientist, L.G.V. Rota, disputes this contention. Labelling this method of executing the death sentence as a form of torture, Rota contends that a condemned victim may be alive for several minutes after the current has passed through his body without a physician being certain whether death has actually occurred or not. He adds that some persons have greater physiological resistance to the electric current that others, and that, no matter how weak the person, death cannot supervene instantly. Another attack on the pain of death in electrocution was made by Nicola Tesla, the electrical wizard [See "New Horizons in Criminology" by Harry Barnes & Negley Teeters (3rd Ed., 1966, pp. 308-309)]. The opposite view is expressed by Robert G. Elliott in 'Agent of Death' (New York : Dutton, 1940). Robert Elliott, one-time executioner for several eastern States, who officiated at 387 executions maintains that electrocution is painless.

72. Power seldom fails in countries like America, U.S.S.R., and Japan. Even then, the failure of electrical energy supplied by commercial undertakings has been considered in America as an impediment in the use of the electric chair. With frequent failures of electrical power in our country, the electric chair will become an instrument of torture. One can well imagine the consequences of the use of the electric chair in the city of Calcutta or, for the matter of that, in the capital of Delhi. For technical reasons, even the Supreme Court complex is not spared from frequent load-shedding during working hours. Lawyers, litigants and Judges have now trained themselves to suffer the inconvenience arising from failure of electricity. But, is would be most unfair to expect a prisoner condemned to death to get into the electric chair twice or thrice, for the reason that the electric current failed during the process of electrocution. It is not our intention to blame anyone for the power crisis because it would seem that it is partly due to natural causes and is not man-made. But facts are facts and facts must be faced.

73. Execution by lethal gas is discussed by the Royal Commission in paragraphs 719 to 722 of its Report. The Commission says in paragraph 719 that they did not inspect any lethal gas chamber during their visit to America, but they were supplied with written evidence about execution by lethal gas. They also had the advantage of hearing evidence from one Mr. Philip Allen, the then Deputy Chairman of the Prison Commission and of receiving a report from the English neurologist, Dr. Macdonald Critchley, both of whom had inspected the lethal chamber at St. Quentin Prison, California, of which the famous Clinton Duffy was a warden. In paragraph 720 of the Report, the Royal Commission says : "The lethal chamber is very elaborate in comparison with the apparatus needed for other methods of execution. It is expensive to install and requires a complicated series of operations to produce the gas and to dispose of it afterwards". The description of the gas-chamber method given by the Royal Commission is like this :

The chamber is required to be hermetically sealed to prevent leakage of cyanide gas, the doors leading to the chamber are required to be connected with an electrically controlled panel, the prisoner's arms, legs and abdomen are tied to the chair with leather straps, a pound of sodium cyanide pellets is placed in a trap in the seat of the chair and three pints of sulphuric acid and six pints of water mixed in a lead container are placed in a position to receive the cyanide pellets. A rubber hose is connected to the head of a stethoscope which is strapped to the prisoner's chest. The entire clothing of the prisoner is removed except for shorts. Finally, a leather mask covers the prisoner's face. After the prisoner is pronounced dead, Ammonia gas is forced into the chamber until the indicators within the chamber show that all cyanide gas has been neutralised. The

Ammonia gas is then removed by a specially constructed exhaust fan.

Paragraph 721 of the Royal Commission's Report shows that the length of time taken by this method of execution is about 45 minutes. In paragraph 722 the Commission says that when this method was first employed, it was thought that the gas had a suffocating effect which would cause acute distress, if not actual pain, before the prisoner became unconscious. According to the Commission, it seems to be now generally agreed that unconsciousness ensues very rapidly in the gas-chamber method.

74. Clinton Duffy, warden of San Quentin Prison, California, says that the operation of the gas-chamber execution includes "funnels, rubber gloves, graduates, towels, soap, pliers, scissors, fuses and a mop : in addition, sodium cyanide eggs, sulphuric acid, distilled water, and ammonia" [From his series of articles, "San Quentin Is My Home", Saturday Evening Post, March 25-May 13, 1950. This series was later published in book form as "The San Quentin Story" (New York) : Doubleday, 1950].

75. Coming to the method of shooting by a firing squad, we have already extracted an opinion which shows that there are chances of bungling in that method. But a more serious objection to which this method is open is that is it the favourite pastime of military regimes which trample upon human rights with impunity. They shoot their citizens for sport. Shooting is an uncivilised method of extinguishing life and it is enough to say in order to reject it that the particular method is most recklessly and wantonly used for liquidating opposition and smothering dissent in countries which do not respect the rule of law. Lastly, murders by shooting are becoming a serious menace to law and order in our country. Shooting by the State in order to kill for executing the order of a Court of law will unwittingly confer respectability on the 'shoot to kill' tactics which are alarmingly growing in proportion.

76. What remains now to consider is the system of lethal injection. The Royal Commission has discussed that method in paragraphs 735 to 749 of its Report. Lethal injection is by and large an untried method. But that is not its most serious defect. The injection is required to be administered intravenously, which is a delicate and skilled operation. The Prison Medical Officers who were interviewed by the Royal Commission doubted whether the system of lethal injection was more humane than hanging (see paragraph 739 of the Report). The British Medical Association told the Commission that no medical practitioner should be asked to take part in bringing about the death of a convicted murderer and that the Association would be most strongly opposed to any proposal to introduce a method of execution which would require the services of a medical practitioner, either in carrying out the actual process of killing or in instructing others in the technique of that process. The Commission expressed its conclusion is paragraph 749 by saying that it could not recommend that, in the present circumstances, lethal injection should be substituted for hanging since they were not satisfied that executions carried out by the administration of lethal injections would bring about death more quickly, painlessly and decently in all cases. The Commission, however, recommended, unanimously and emphatically, that the question should be periodically examined, specially in the light of the progress made in the science of anasthetics.

77. We may lastly refer to the affidavit filed by one Dr. N. P. Singh who was allowed to intervene on behalf of the National Association of Critical Care Medicine (India), New Delhi. He says in his affidavit that society has come to realise that death by hanging is not a merciful and pleasant way of putting a patient to a terminal end : "As members of the medical profession and the Association, we feel that a patient may be put to sleep by any sleep-inducing injection (barbiturates) and

subsequently, the above mentioned electrocution and gas-chamber methods may be applied as the patient's sense would have been dulled by the drug injection." This system certainly has the merit of naivete and novelty but, on the face of it, the system is impracticable and would appear to involve complications and torture to an uncommon degree. We may in this behalf draw attention to an article "The Death penalty : Moral Argument and Capricious Practice" by Andrew Rutherford, a senior Lecturer in Law at the Southampton University, which appeared in 'The Listener' of July 7, 1983, published by the British Broadcasting Corporation. In that article, the writer refers to an incident to the effect that in 1982 December, a prisoner was put to death in Texas by means of an injection of sodium pentothol. The incident led the American Medical Association to declare : "The use of a lethal injection as a means of terminating the life of a convict is not the practice of medicine." The writer proceeds to say that there is not likely to be any great enthusiasm for the method of electrocution as well, since in April 1983, it took three 30-seconds shots of 1900 volts before a man in Alabama was pronounced dead.

78. It is clear from this narrative that neither electrocution, nor lethal gas, not shooting, nor even the lethal injection has any distinct or demonstrable advantage over the system of hanging. Therefore, it is impossible to record the conclusion with any degree of certainty that the method of hanging should be replaced by any of these methods.

79. But, for due compliance with the mandate of Article 21, it is not enough to find that none of the other methods of execution has a real advantage over the method of hanging. The other methods may have some of the vices of being impracticable, complicated, show and uncertain. That is only one side of the picture because, the circumstance that the other methods are not feasible does not establish of its own force that the method of hanging is free from blame. The weakness of defence cannot establish the plaintiff's case. In other words, though hanging may not suffer in comparison with the other methods, what we must determine is whether, hanging as a method of executing the death sentence, considered in isolation, that is to say, without comparison with the other methods, offends against the canons of Article 21.

80. There is a responsible body of scientific and legal opinion which we have discussed, which holds the view that hanging by rope is not a cruel mode of executing the death sentence. That system is in operation is large part of the civilised world. That was the only method of executing the death sentence which was known to the Constituent Assembly and yet it did not express any disapproval of that method, though it touched upon the question of death sentence while dealing with the President's power of pardon under Article 72(1)(c) of the Constitution.

81. Having given our most anxious consideration to the central point of inquiry, we have come to the conclusion that, on the basis of the material to which we have referred extensively, the State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by Section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the Constitution. The material before us shows that the system of hanging which is now in vogue consists of a mechanism which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension. The chances of an accident during the cause of hanging can safely be excluded. The method is a quick and certain means of executing the extreme penalty of law. It eliminates the possibility of a lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system of hanging, as now used, avoids to the full extent the chances of strangulation which results on account of too short a drop or of decapitation

which results on account of too long a drop. The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind.

82. At the moment of final impact when life becomes extinct, some physical pain would be implicit in the very process of the ebbing out of life. But, the act of hanging causes the least pain imaginable on account of the fact that death supervenes instantaneously. 'Imaginable', because in the very nature of things, there are no survivors who can give first-hand evidence of the pain involved in the execution of a death sentence. Dead men tell no tales. The question as regards the factor of pain has therefore to be judged on the basis of scientific investigations and by applying the test of reason. The conclusion that the system of hanging is as painless as is possible in the circumstances, that it causes no greater pain than any other known method of executing the death sentence and that it involves no barbarity, torture or degradation is based on reason, supported by expert evidence and the findings of modern medicine.

83. On the question of pain involved in a punishment, the concern of law has to be to ensure that the various steps which are attendant upon or incidental to the execution of any sentence, more so the death sentence, do not constitute punishments by themselves. If a prisoner is sentenced to death, it is lawful to execute that punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Humaneness is the hallmark of civilised laws. Therefore, torture, brutality, barbarity, humiliation and degradation of any kind is impermissible in the execution of any sentence. The process of hanging does not involve any of these, directly, indirectly or incidentally.

84. Accordingly, we hold that the method prescribed by Section 354(5) of the Code of Criminal Procedure for executing the death sentence does not violate the provision contained in Article 21 of the Constitution.

85. There is one point which still remains to be considered and that is the point made by Shri R. K. Garg. He contends that it is inhuman to kill under any circumstances, even under a judgment of a Court and, therefore, no death sentence can be executed at all by means fair or foul. The fact that the method prescribed by law for executing the death sentence is humane makes no difference for, according to him, Article 21 imposes a total prohibition on the taking of human life, which would include the execution of death sentence. It is impossible to accept this contention. The argument, in truth and substance, is aimed at the validity of the death sentence itself and, indeed, much of what Shri Garg said is directed at showing the invalidity of Section 302 of the Penal Code rather than the invalidity of Section 354(5) of the Code of Criminal Procedure. We are unable to appreciate how it is unlawful, in the abstract and in the absolute, to execute a lawful order. If it is lawful to impose the sentence of death in appropriate cases, it would be lawful to execute that sentence in an appropriate manner. Article 21, undoubtedly, has as much relevance on the passing of a sentence, as on the manner of executing it. Therefore, a two-fold consideration has to be kept in mind in the area of sentencing. Substantively, the sentence has to meet the constitutional prescription contained, especially, in Articles 14 and 21. Procedurally, the method by which the sentence is required by law to be executed has to meet the mandate of Article 21. The mandate of Article 21 is not that the death sentence shall not be executed but that it shall not be executed in a cruel, barbarous or degrading manner.

86. If we were to accept the argument of Shri Garg, the imposition of death sentence would become

an exercise in futility : pass the sentence of death if you may but, it shall not be executed in any manner, under any circumstances. A Constitution so carefully conceived as ours cannot be construed to produce such a startling result. Indeed, the argument, if carried to its logical conclusion will make it impossible to execute any sentence whatsoever, particularly of imprisonment, because every sentence of imprisonment necessarily involves pain and suffering to a lessor or greater degree. Painless punishment is a contradiction in terms.

87. The constraints of Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]] deserve to be preserved but that means that it is only a rare degree of malevolence which invites and justifies the imposition of death sentence. Granting that the sentence of death is constitutionally valid, not even the sophisticated sensitivities can justly demand that those upon whom the extreme penalty of law is imposed because of the magnitude of their crime, should not be made to suffer the execution of that sentence, unaccompanied by torture or degradation of any kind. If the larger interest of the community as opposed to the interests of an individual require that the death sentence should be imposed in an exceptional class of cases, the same societal interests would justify the execution of that sentence, though in strict conformity with the requirements of Article 21.

88. Though Article 21 was the focal point of this case, almost everyone of the learned counsel appearing on behalf of the petitioners drew inspiration from the Eighth Amendment to the United States Constitution which provides that "Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted".

89. The prohibition against cruel and unusual punishments dates back to the Magna Carta though it found recognition in the English Law by its adoption in the English Declaration of Rights in 1688. The purpose of this enactment was to check the barbarous punishments which were common during the regime of the Stuarts, like pillory, disembowelling, decapitation and drawing and quartering. As a result of the English reform movement which was started in the seventeenth century by the European humanists, these punishments gradually fell into disrepute. The fundamental principle underlying the prohibition against cruel and unusual punishments was incorporated into the Bill of Rights in 1791.

90. The early development of law in America shows that the prohibition against cruel and unusual punishments concerned itself with unusual cruelty only, the emphasis being upon "unnecessary cruelty and pain". In Kemmler [In re Kemmler, 136 US 436 (1890)], death by electrocution was held not necessarily cruel. In O'Neil v. Vermont [144 US 323, 339-40 (1892)] Justice Field, in his dissenting opinion, enlarged the concept of unusual punishment to cover penalties "which shook the sense of justice". In Trop v. Dulles [356 US 86, 101, 124-27 : 2 LEd 2d 630 : 78 S Ct 590 (1958)], a sharply divided Court held that divesture of citizenship was constitutionally forbidden. Chief Justice Warren, speaking for three Justice, observed that the content of the Eighth Amendment was not static and that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society". According to the learned Chief Justice, the Eighth Amendment whose "basic concept is nothing less than the dignity of man", ensures "the principle of civilized treatment". After the decision in Trop [356 US 86, 101, 124-27 : 2 LEd 2d 630 : 78 S Ct 590 (1958)], the American Supreme Court has formulated a sophisticated definition of the Eighth Amendment clause in a series of important cases called the "18 Key Cases". A resume of those cases can be found in Substantive Criminal Law by Prof. M. Cherif Bassiouni (Ed. 1978, pp. 44-45). It shows that even a second electrocution after the failure of the first attempt, provided it is not an

intentional effort to inflict unnecessary suffering, was held not violative of the Eighth Amendment [Louisiana ex rel. Francis v. Resweber, 329 US 459 : 91 LEd 422 : 67 S Ct 374 (1947)]. It was observed in that case that

the cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. No one can deny that some suffering and anguish is bound to result to the condemned man at the time of execution of his death sentence. But it is not wholly inappropriate to observe that having had the opportunity to avoid that suffering and anguish, he chose the path of risking it in favour of earning some other benefit. His minimal suffering is real, but so we believe was the suffering of his victims and even so will be the suffering of the victims of those other criminals who believe that they can commit crimes of great atrocity with relative impunity.

It is this 'relative impunity' which attracts the rule in Bachan Singh [Bachan Singh v. State of Punjab, (1983) 1 SCR 145 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636 [majority judgment], (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325 [minority judgment]].

91. Though the Eighth Amendment has thus a dynamic content which has been evolved over the years as public moral perceptions changed from time to time, several concurring opinions show that, in America, capital punishment is not considered to be violative of the Eighth Amendment ['Death Penalties' by Raoul Berger (Harvard University Press, Ed., 1982, p. 112]. In the words of Chief Justice Earl Warren, "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty". What the Eighth Amendment prohibits is "something inhuman and barbarous and something more than the mere extinguishment of life". The suffering necessarily involved in the execution of death sentence is not banned by the Eighth Amendment though the cruel form of execution is.

92. No sustenance can therefore be derived from the Eighth Amendment to the argument that either the death sentence or the method of executing that sentence by hanging is violative of Article 21 on the ground that death sentence is barbarous or that the method of hanging is cruel, inhuman or degrading. Hanging as a mode of execution is not relentless in its severity. As Judge we ought not to assume that we are endowed with a divine insight into the needs of a society. On the contrary, we should heed the warning given by Justice Frankfurter : "As history amply proves, the judiciary is prone to misconceive the public good by confounding private nations with constitutional requirements [American Sash & Door Co. case, 335 US 538, 556 (1949)]."

93. For these reason the challenge to the constitutionality of Section 354(5) of the Code of Criminal Procedure fails and the writ petitions are dismissed. Orders whereby the executions of death sentences were stayed are hereby vacated except in W.P. (Crl.) No. 503 of 1983 which will be listed on September 27, 1983, for being heard on merits. SLP (Crl.) No. 196 of 1983 is dismissed.

SABYASACHI MUKHARJI, J.

(concurring) - I respectfully agree with the conclusions of my learned brother, the Chief Justice. I would like, however, to state that in the judgment, my learned brother has observed : (SCC p. 664, para 21)

Therefore, as soon as it is shown that the Act invades a right guaranteed by Article 21, it is

necessary to enquire whether the State has proved that the person has been deprived of his life or personal liberty according to procedure established by law, that it to say, by a procedure which is just, fair and reasonable.

I respectfully agree that as soon as it is shown that a Statute or Act in question invades a right guaranteed by Article 21, it is necessary to enquire whether the State has proved that the person has been deprived of his life or personal liberty according to procedure established by law. I, however, respectfully at present would not express my opinion whether in all such cases, the State has a further initial burden to prove that the procedure established by law is just, fair and reasonable. With this observation, I respectfully agree with all the other conclusions and observations made by my brother, the learned Chief Justice.

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