

CRIME AND CRIMINOLOGY*

SOME LEGAL DEFINITIONS

Legally, a crime is an act made punishable by law. A criminal is one who has committed such a legally forbidden act. Yet there are other criteria which determine whether a person may be dealt with as a criminal.

1. Regardless of his act, he must be of competent age. Under English common law a child under seven could not commit a crime because he was held not capable of feeling a sense of guilt - and so was not responsible. In American states the age of criminal responsibility is fixed by statute or constitutionally considerably above the common law limit. Very young children may of course be dealt with in juvenile courts. They may be punished as well as treated constructively under the fiction that the court acts in *loco parentis* (as a parent would act) and in the best interests of the child.

2. Criminal acts must also be voluntary and engaged in without compulsion. Compulsion as defined by courts must be evident and immediately related to a particular criminal act. Impulsion towards a life of crime may have extended over a long period of time in the form of the influence of parents, associates, or conditions. But such indirect influences of the past, however compelling will not be recognized in court as destroying that voluntary nature of acts which is requisite to criminal behavior.

3. Especially in the case of serious crimes, the criminal must be shown to have had criminal intent: he must have meant to do wrong. Usually criminal intent is tested in terms of his knowledge of right and wrong and of the nature and consequences of his behavior. If it can be shown that a man who killed another did not know that it is wrong to kill or that death may result if one points a loaded gun at another and pulls the trigger, he will be judged irresponsible, being without *mens rea*. Though in the case of some simple crimes, like running a stop light, the question of intent will not be raised, intent must be present to constitute most serious crimes. A wrongful motive need not be shown. A motive is the reason for crime; it is the subjective aspect of the causation of crime. Bigamy is no less a crime when the accused is actuated by religious motives, and euthanasia, the killing at the request of or for the benefit of the killed, is murder. On the other hand, a man who, intending to make hog feed, produced illicit corn whiskey, was held not guilty of crime.

4. Our criminal law also often recognizes degree of intent as necessary to constitute particular crimes. Thus to carry a heavy penalty, an assault may have to be shown to have been perpetrated "maliciously" or "wantonly," or a personal injury to have resulted from negligence.

* Donald R. Taft and Ralph W. England, *Criminology* 3-17 (1964).

5. Finally, to constitute a crime an act must be classed legally as an injury to the state and not merely as a private injury, or tort. In ancient societies many acts now defined as crimes were considered only private injuries to be avenged by the injured party or by his family or friends. But as society became more and more complex, a large number of acts once considered torts became crimes. It is indeed increasingly difficult to discover acts without general social consequences. We still have a vast number of injuries dealt with through private suit under the civil law, in which the court acts as the arbitrator between the contestants and awards damages. Some offenses may be tried either under the civil or the criminal law. We shall later discuss white-collar crimes, which is usually tried under civil procedure but may be tried as crime. In the United States, with its puritanical heritage, there has been a tendency to define as crimes many forms of personal behavior which on the European continent are rarely treated as crimes. That tendency has created the problem of unenforceable law and has set the stage for serious rackets created when satisfactions forbidden by law, such as gambling or prostitution, are nevertheless in wide demand by at least a large minority of the people.

THE SOCIAL VIEWPOINT

From the social point of view, the legal definition of crime may be less important than other considerations. Two aspects of the social view of injuries and crimes may be noted.

1. Injury acts are defined by group mores, either derived from the past or from the more current opinions of the people or of dominant subgroups which set patterns, define the moral code and award status to those who keep the codes and deny it to those who do not. Criminal law has been much influenced by these group definitions of morals but is not synonymous with them. Socially disapproved acts may be looked upon as immoral, sinful, unconventional, or criminal. Tested by the awarding of social status, it is not even clear that acts made punishable at law are held the most serious types of social injuries. Fornication is traditionally an immoral act, but it is punishable as crime in only something like half of the states and actually punished in a very small percentage of cases. On the other hand, the white-collar crimes of businessmen are made punishable as crimes at law, and yet those who indulge in false advertising or gain monopoly advantages over others usually do not lose status in their social groups. As a general label, the term "unconventional" is less damning than the term "criminal." But many a hostess might prefer to invite to her party a man who had a past record for some forms of criminal behavior, rather than one who, though with a clean crime record, nevertheless solves his food indecorously into his mouth. A man without church affiliations may laugh if he be called a sinner, but he who cherishes his membership in an orthodox religious group will cringe when so labeled. Thus, from the societal viewpoint the seriousness of acts is defined by their effects upon social status. When one discovers the seriousness of some noncriminal acts, he gains perspective. He will be less ready to generalize that all criminals are our most dangerous citizens.

2. Secondly, in our traditional criminal law, a criminal is one who in the past committed, generally with evil intentions, an act made punishable by law. From the societal viewpoint we are more concerned to protect society against future acts than to requite the criminal for past acts.

The concern is not with past wickedness but rather with possible future dangerousness. Of course the social definition does not neglect a man's past behavior, since past behavior may suggest his possible future behavior. But socially the future is always the major consideration. From the repeat societal viewpoint the purpose of punishment is not to balance accounts or to take vengeance upon a criminal, but to assure that he will not repeat his crimes. Punishment will be used when it is the only way to prevent repetition or when it will deter others from committing crimes. If future crime can be prevented through constructive treatment without encouraging criminal acts by other, it is both more effective and more socially satisfying than is punishment.

It is a nice question how far a state may shift to this emphasis on the future. Actually every constructive program, such as probation or parole, and every crime prevention program implies some concern over the future. Some states are successfully using paid specialists to estimate, on the basis of past records, the relative possibilities of different types of parolees repeating if they are released. Criminologists are in general agreement on the soundness of the trend toward concern for the future with its emphasis on the individualization of treatment.

Yet, if this trend is to succeed we must also be aware of difficulties, needs and dangers involved. (1) We need increased knowledge of the causes of crime. (2) Criminology is not opposed to punishment per se. When the changes needed in the lives of criminals are known, it does not follow that their lives may be adequately controlled to bring these changes about. John may need a new wife, but where is the lady willing to take the chance? Jack would be a safe risk if he could change his residence from slum to avenue, but the change is too costly. Jim will succeed if he can be employed at a satisfying job and if he is not handed because of his past record, but these needs are not easy to bring about. (3) Too great control over the future of our citizens is inconsistent with democracy and smacks a bit of authoritarianism. Such control has been most complete in totalitarian states. We cannot push men about like pawns on a chessboard without endangering liberties which may be held more precious than the absence of crime. (4) Much of the general public and many influential groups have not yet accepted the validity of concern for the future and the desirability of constructive aid to criminals. The public still relies principally upon deterrent punishment. Moreover, the typical criminal himself accepts the traditional view and defines justice as equal treatment of men for the same acts, rather than in terms of an estimate of their future needs and behavior.

The principle of concern over future dangerousness appears to be sound, and most criminologists are eager to see the difficulties named overcome. To this end, indeterminate sentence laws, which leave the nature of punishment or treatment open, to be determined by administrative authorities after thorough study of each case, are advocated and are already in use. Indeed, the individualization of treatment of criminals has become the earmark of effective effort to protect society against crime. The word "individualization", however, should not be taken as

meaning treatment as an individual, for the use of groups' methods is increasingly proving its value, and the delinquent is seen as very largely a group product.

The social conception of the nature of the criminal implies less concern with his intent as a measure of his wickedness and less search for responsibility. We are, of course, concerned with intent in the sense of the attitude of the criminal. A man who meant to commit a crime may continue to do so as long as his antisocial attitude remains. But intent may be no index of dangerousness. Those who habitually drive recklessly without intending to hit anyone are often more dangerous than men who deliberately and intentionally commit some kinds of crime. Most of the legally insane are not dangerous but pitifully diseased, but some few with delusions of persecution but without antisocial intent are extremely dangerous. Professional killers are rare, but they are clearly greatly to be feared. Typical murderers, however—public opinion to the contrary notwithstanding—are rarely dangerous in the sense of being likely to repeat their acts. Murder usually results from stresses and strains which are not often repeated in the life of one who murders. A robber or a forger, on the other hand, has often lived under social conditions which make change of attitudes and behavior difficult to bring about. That some of our most feared criminals are least often repeaters is borne out by statistics of parole.

Similarly, either the nature of a man's personality or the nature of his social relations may define him as a dangerous person, though he has committed no crime.

NATURE AND SCOPE OF CRIMINOLOGY

The term "criminology" is used both in a general and special sense. In its broadest sense criminology is the study (not yet the complete science) which includes all the subject matter necessary to the understanding and prevention of crime and to the development of law, together with the punishment or treatment of delinquents and criminals. In its narrower sense criminology is simply the study which attempts to explain crime, to find out "how they get that away." If this latter narrower definition is adopted, one must recognize related fields, including penology, concerned with the treatment of adult criminals, crime detection, the treatment of juvenile delinquents, and the prevention of crime. The treatment of delinquency and crime cannot be wholly separated from their explanation, since one of the reasons for crime and for its continuance into adult life is the damage done by ineffective treatment both of juveniles and adults. Ultimately we shall hope to show that both crime and the treatment of crime are parts of dynamic processes of social relations, crime evoking punishment and other reactions and these reactions in turn cooking reactions of criminals as they are deterred, "reformed," or stimulated to further crime.

If any science is to explain any kind of phenomena consistently, these phenomena must be reasonably homogenous. Criminology as a behavioral science or study faces an almost unsolvable difficulty because of the extreme diversity of types of behavior our legislators have seen fit to make punishable as crimes. To mention but a few of these types, does it seem logical that we

should be able to explain in terms of a common theory behavior as diverse as the running of stop lights, the raping of women, robbery, huge racketeering syndicates, treason, murder, and the white-collar crimes of some businessmen? Not all of these crimes express the same attitudes of mind, not even a universal consciously antisocial attitude. Not all are conflict behavior, or exploitative behavior, or either wholly rational or wholly emotional behavior.

Facing this dilemma, criminologists have attempted various solutions. Valuable research has concentrated its attention on particular kinds of crime, such as professional thieving, embezzlement, murder, sex crime and white-collar crime. Cressey has gone further and believes he has arrived at sociologically meaningful subdivisions by isolating types of embezzlement. Cressey's plan would seem to lead us to theories as to the causes of specific crimes, rather than to any general theory of crime.

Other criminologists, such as E. H. Sutherland, have tried to discover processes or relationships which will explain all crime, in spite of its great variety. Thus we have theories of social disorganization and differential association, theories of delayed maturation, theories of economic exploitation, theories of anomie or normlessness, theories of subgroup influence, and so forth.. But we shall find that it seems that not all crime can be explained in terms of any given social process or relationship.

Very many criminologists have given much of the effort to find a single theory explaining crime without having abandoned the effort to discover why men commit crime. Starting with evidence derived from case studies and many other sources, they list factors found in the life processes of criminals. They are able to determine fairly well the interrelationship of these factors in individual cases. They then find particular factors which often repeat themselves in many cases, such, for example, as gang membership, lack of status in constructive groups, tensions in homes, and sense of failure in competition. Discovery of such single repeating factors does not prove them causes of crime, since the meaning of any life experience may be different for one criminal than for another. This is because one factor or experience is, in different cases, combined with different accompanying factors which give the total *gestalt* and meaning which express themselves in criminal behavior. However, it is very significant when we find *clusters of factors* repeating themselves in many cases. The multifactor approach does seem to meet the dilemma of the criminologist in considerable measure. A large proportion of children in our type of society whose fathers have deserted the home, who have lived in city slums, who have experienced a sense of failure in competitive relations, who have lost status in constructive groups and joined juvenile gangs, who have come to believe that everyone has a racket, and whose early misbehavior has not been dealt with effectively either in the home or by schools and other social agencies—a large proportion of such children seem to appear continually in our juvenile courts, and many of them later in our adult courts. The discovery of repeated incidents of such combinations of experiences enables us to develop approximations to theories of crime. Such specific life experiences may often be shown to be by-products of the culture of our society.

THE IMPORTANCE OF CRIMINOLOGY

Interest in the study of criminology is of course partly due to recognition of the costliness of crime already mentioned. Estimates of the cost of crime in the United States some years ago sometimes ran as high as \$18 billion a year. They would probably run substantially higher today. But there seems little value in attempting even to guess at that cost, since the most serious costs cannot be measured in dollars and cents. Moreover, if such an effort were to include an assessment of the cost of white-collar crime and of exploitation not defined as crime but similar in nature, the figure would be enormously increased. The value of personal injuries defies calculation even though it has to be decided by our courts. The psychological cost seen in fear of crime, worry over unguarded property, fear for personal security, the embittering effect of hatred and suspicion of one citizen for another in a society where mutual confidence, respect, and cooperation are so sorely needed—such costs are indeed great and incalculable.

Note should also be taken of sentimental interest in the crime problem. Fear, desire for revenge, a certain fascination, and a morbid interest either in the victim or the perpetrator of crime, such emotions help explain the prominence given to crime in the press and on television programs and even the large registrations in some college courses in criminology. It has been somewhat extravagantly said that morbid interest in crime express unconscious desire to be criminals—a desire to throw off the restraints of civilized existence. It is clear that sentimental interest in crime, whether taking the form of negative hate or positive morbid sympathy, is not what is needed for the objective understanding and prevention of crime, and that its prevalence may be listed as a factor in the causation of crime.

When combined with understanding and a balanced consideration of all the values involved, interest in the criminal is essential to the explanation of crime and to intelligent protection against it. No child enters life as a criminal. The attempt to unravel the processes by which what women call a “perfectly adorable baby” is wrapped and twisted by life’s experiences into the personality of a calculating robber, burglar, kidnapper, or a Hitler, is a fascinating task which enlists the interest and challenges the intelligence of the criminologist.

This interest is enhanced by the discovery of the wide variety of human traits which the criminal possesses and the wide variety of types of which the criminal class is composed. Paradoxical though it sounds, one may hardly even describe criminals as a class as antisocial. Their criminal acts are indeed by definition antisocial, and no one would minimize the seriousness of some of them. Yet their criminal behavior on investigation is often found to be but one aspect of their total behavior. A typical prison population is largely made up of defeated men, overcome with apathy. Uninformed people are often astonished to discover that some prisoners love dogs, are fond of children, or will fight bravely for a cause. One finds, of course, morose and sullen specimens so soured by the consciousness that their behavior is despised, and by absence of genuine friendships, that they seem to be devoid of every human or kindly trait. But such are the exception. The senior writer once knew a forger with 35 years’ experience who had served

eight prison sentences but whom he would have trusted with a loan of \$1,000. Robbers may be generous, murderers kindly, and prostitutes on occasion sympathetic. On the other hand, stress on the humanity of criminals may well be exaggerated. (The fascination of the criminal personality for the student lies rather in the fact that study shows him to be even in his most ugly characteristics a product of life's experiences.) As the student in criminology turns back the pages of such a life, as he would turn back the pages of a book, from the moment of the last terrible crime toward its beginning, sooner or later, if his analysis is complete, he finds an unsoiled page. The satisfaction of thus coming to understand life's failure is one of the fascinating rewards of the criminologist.

There are many types of criminals, but there is no criminal type. The farm hand of low intelligence who stumbles into delinquency literally not knowing how it happened is a common type which rarely "makes" to the newspapers. The young city gangster, who has graduated from a juvenile gang far more naturally than he ever graduated from school, is a type differing radically from the farm hand. The pampered child of the rich, the kidnapper, the drunken sot, the brains of the underworld, the bank robber, the embezzler, the professional killer, the drug addict, the young girl sex delinquent - none of these are true types, because they vary so much within their groups. Moreover, more varied than the types of crime they commit are the roads by which they have entered crime. An understanding of the road to failure is of as great interest as is the story of the road to fame.

The study of criminology is also background for a profession and an opportunity for social service. Unfortunately, the difficult task of remaking character is at times entrusted to untrained political appointees, but not always. Police staffs, lawyers, prosecuting attorneys, judges and jurors, probation officers, parole agents and members of parole boards, wardens and guards, statisticians, detectives, and a growing list of technically trained specialists, including medical men, psychologists, sociologists, social workers, psychiatrist, educators, directors of prison industries, recreational leaders - these and others constitute personnel who need training which includes a knowledge of criminology.

Some would say that the chief value of criminology to the student is not knowledge of crime but a positive or naturalistic philosophy of life to be derived from it. The reader must decide for himself, as he proceeds, first whether that philosophy is true, and secondly whether it makes for human weal or woe. In this context we might mention that there are two extreme philosophies with reference to the explanation of human behavior. At one extreme is the position that human behavior is essentially unpredictable because man is free to choose the course he will pursue. This view conceives of the offender as choosing to be social or antisocial, criminal or noncriminal. Its proponents go through life classifying people in accordance with their behavior as "sheep" or "goats." The line between the two categories is conceived of as easily drawn and basically significant. The explanation of crime in terms of this philosophy is simple, because it is not pushed beyond the fact of bad choices; since the choices have no causes, they exist in their own right and are not products. From this viewpoint the task of preventing crime consists in the

apprehension of the “goats” (criminals) and in showing them that bad choices are costly. From this viewpoint also, justice consists in requiring the doers of bad deeds in proportion to the badness of their acts, and every crime has its just and proportional punishment.

The opposite philosophy is equally concerned over the danger of crime. It implies equal willingness to punish when, and only when, punishment seems the only way to protect society. It conceives of crime and the criminal, however, as products. To the determinist the prevention of crime must always consist in creating conditions which will make for socially useful behavior as surely as different conditions produce crime. To him punishment as a process of balancing accounts with criminal is futile, though pain as a method of influencing behavior is useful when it is the most efficient means of social defense and when the end is worth the cost of punishment. Criminology in conjunction with other sciences of behavior at least tends towards a deterministic position. In so doing it creates many problems, but it also relieves us of the rational basis for praise, blame, hatred, and remorse. If such a philosophy is desirable, it is a chief argument for the study of criminology.

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OF CRIMES AND CRIMINALS : THE DEVELOPMENT OF CRIMINOLOGY IN BRITAIN*

ORIENTATIONS: A HISTORY OF THE PRESENT

I begin with the clear assumption that the phenomenon to be explained is a present-day phenomenon - the modern discipline of criminology - and that my task is to trace its historical conditions of emergence, identify the intellectual resources and traditions upon which it drew, and give some account of the process of its formation and development. This explicit concern to write a history of the present acknowledges that our contemporary problems and practices are quite distinct from those of the past; but equally, it recognizes that our present arrangements were constructed out of materials and situations which existed at earlier points in time. The present is continuous with the past in some respects, and discontinuous in others. It is the historian's job to identify the processes of transmutation which characterize change and, in particular, the generation of those differences which constitute our modernity.

Modern criminology, like any other academic specialism, consists of a body of accredited and systematically transmitted forms of knowledge, approved procedures and techniques of investigation, and a cluster of questions which make up the subject's recognized research agendas. These intellectual materials and activities are loosely organized by means of a 'discipline' - the standard form of academic organization. The discipline establishes and enforces appropriate norms of evidence and argument, evaluates and communicates research findings and other contributions to knowledge, fixes and revises the canon of theoretical and empirical knowledge, supervises the training of students, and distributes professional status and authority among accredited practitioners. These disciplinary functions are carried out, more or less effectively, by means of a variety of institutions - professional journals and associations, institutes and university departments, professional appointments, processes of peer review, letters of recommendation, training courses, textbooks, conferences, funding agencies, and so on - which make up the material infrastructure of the enterprise. One has only to describe these taken-for-granted features explicitly to demonstrate that the modern discipline of criminology is indeed 'modern', and to pose the question of how such an institutional structure came to form itself around an intellectual specialism of this kind.

Modern criminology is a composite, eclectic, multidisciplinary enterprise. The subject is typically located in departments of law, sociology, or social policy - though there are now several independent centres of criminology in British universities - and training in criminology is normally at the postgraduate level, following on a first degree in a more basic field of study. In their research and teaching, criminologists draw upon a variety of other disciplines, most notably sociology, psychology, psychiatry, law, history, and anthropology - indeed, one of the major

* David Garland, *The Oxford Handbook of Criminology*, (2nd ed., 1997)

dynamics of modern criminology is the incessant raiding of other disciplines or ideologies for new ideas with which to pursue (and renew) the criminological project. They also address themselves to a wide range of research topics which somehow or other relate to crime and its control. Major areas of work include research on the incidence and distribution of criminal behaviour, inquiries about the causes or correlates of criminal conduct, clinical studies of individual delinquents and ethnographies of deviant groups, penological studies, victim studies, the monitoring and evaluation of criminal justice agencies, the prediction of future criminal conduct, the study of processes of social reaction, and historical work on changing patterns of crime and control. The list of 'central' topics is long and diverse, and each topic breaks down further into numerous sub-topics and specialisms. When one considers that these substantive areas have been approached using a variety of quantitative and qualitative methods, drawing upon the whole gamut of theoretical perspectives (psychoanalysis, functional-ism, interactionism, ethnomethodology, Marxism, econometrics, systems theory, postmodernism, etc.) and ideological concerns (the implicit welfarism of most twentieth-century criminology, the radicalism of the 1970s, feminism, left realism, etc., etc.) it becomes apparent that modern criminology is highly differentiated in its theoretical, methodological, and empirical concerns.

The very diversity of the modern subject makes the question of its historical emergence and identity seem even more puzzling. How did this vast, eclectic bundle of disparate approaches, theories, and data come to acquire the status of a distinct academic specialism? At one level, the answer to this has already been set out above: the subject derives whatever coherence and unity it has from the exertions of its discipline-forming institutions. The danger of an exploding, unmanageable chaos of concerns is held in check by textbooks and teaching and a pattern of professional judgments which draw the subject together and establish its de facto boundaries. But this response begs a prior question, which is: Why has there emerged a discipline of this kind? What makes it possible and desirable to have a distinctive, specialist discipline of criminology in the first place? It seems to me that an answer to this question can be formulated if one has regard to the basic problem-structures or projects of inquiry which underlie these disparate investigations. My argument is, as suggested above, that criminology is structured around two basic projects - the governmental and the Lombrosian - and that the formation and convergence of these projects can be traced by studying the texts and statements which constitute criminology's historical archive. Criminology, in its modern form and in its historical development, is orientated towards a scientific goal but also towards an institutional field, towards a theoretical project but also towards an administrative task. Whatever fragile unity the discipline achieves emerges from the belief that these two projects are mutually supportive rather than incompatible, that etiological research can be made useful for administrative purposes, and that the findings of operational research further the ends of theoretical inquiry. Occasionally, criminologists lose this faith, and when they do, their arguments cast doubt on the very viability of the discipline.

As with most 'human sciences', criminology has a long past but a short history. Discourse about crime and punishment has existed, in one form or another, since ancient times, but it is only during the last 120 years that there has been a distinctive 'science of criminology', and only in the last fifty or sixty years has there been in Britain an established, independent discipline organized around that intellectual endeavour. My account of the emergence of the modern British discipline will be divided into four parts:

1. a brief discussion of what I will call 'traditional' representations of crime and criminals;
2. an outline of the empirical analyses that were brought to bear upon crime and criminal justice in the eighteenth and nineteenth centuries, and which began the tradition of inquiry which I call the governmental project;
3. an account of the emergence of a positive, specialist 'science of the criminal' - the Lombrosian project - in the nineteenth century, both in continental Europe and in Britain;
4. an account of how these two projects converged in a way and to an extent which facilitated the formation of a criminological discipline in Britain in the middle years of the twentieth century. - This order of exposition implies a certain developmental pattern, and to some extent that seems appropriate. Criminological thought and practice have developed, at least in some respects, in a 'scientific' direction, and the analysis presented here is concerned precisely to chart this evolution and to reconstruct the events and developments which played a role in that transmutation. The chronology of events is constructed in order to show how our particular ways of organizing thought and research have come into existence. But it needs to be emphasized that no overall process of progressive development is being asserted here, and there are no exclusive boundaries neatly separating the thought of one period from the thought of another. Some residues of the 'traditional' ideas to be found in the seventeenth century still circulate today in the form of common-sense and moral argument. Forms of thought and inquiry which flourished in the eighteenth and early nineteenth centuries have been rediscovered in the late twentieth century and adapted to serve contemporary purposes. Conversely, certain ideas and arguments which appeared progressive and persuasive to criminologists at the start of the present century have come to seem pseudo-scientific and faintly absurd.

Criminology's history is not one of steady progress and refinement, although whenever a framework of inquiry has endured for a long enough time, such refinements have taken place. Instead, it is a story of constant reformulation in response to shifting political pressures, changes in institutional and administrative arrangements, intellectual developments occurring in adjacent disciplines, and the changing ideological commitments of its practitioners. The very fact that a basic orientation of the discipline links it to a field of social problems and to administrative efforts to govern that field imparts a certain instability to the subject and constantly transforms its objects of study. As a discipline, criminology is shaped only to a small extent by its own theoretical object and logic of inquiry. Its epistemological threshold is a low one, making it susceptible to pressures and interests generated elsewhere.

TRADITIONAL REPRESENTATIONS OF CRIME

Social rules and the violation of them are an intrinsic aspect of social organization, a part of the human condition. Discourse about crime and criminals - or sin, villainy, roguery, deviance, whatever the local idiom - is thus as old as human civilization itself. Wherever generalized frameworks developed for the representation and explanation of human conduct, whether as myths, cosmologies, theologies, metaphysical systems, or vernacular common sense - they generally entailed propositions about aberrant conduct and how it should be understood. As we have seen, some writers have taken this recurring concern with law-breakers as sufficient license to talk about a 'criminology' which stretches back to the dawn of time. But rather than see such writings as proto-criminologies struggling to achieve a form which we have since perfected, it seems more appropriate to accept that there are a variety of ways in which crime can be problematized and put into discourse, and that 'criminology' is only one version among others. The propositions about crime and criminals which appear in the writings of ancient and medieval philosophers, the theologies of the Church of Rome and the Protestant Reform tradition, the mythico-magical cosmologies of the Middle Ages, and the legal thought of the early modern period were not aspiring criminologies, even though their subject-matter sometimes bears a resemblance to that which criminology seeks to explain. These broad resemblances begin to appear less compelling when one looks in detail at what the discourses involved and their implicit assumptions about the world. Entities such as fate and demons, original sin and human depravity, temptation, lust, and avarice are the products of mental frameworks and forms of life rather different from our own.

The differences between these mentalities and our own can be quite instructive, pointing up some of the peculiarities of our accustomed ways of thinking about crime. It is significant, for example, that the major tradition of Western thought - Christianity, in all its variants - did not separate out the law-breaker as different or abnormal, but instead understood him or her as merely a manifestation of universal human depravity and the fallen, sinful state of all mankind. 'There but for the grace of God go I' is an understanding of things quite alien to much of the criminology that was written in the late nineteenth and early twentieth centuries. In the same way, the explicitly moral and spiritual terms in which the Christian tradition discusses individual wrongdoing, the lack of reference to systematically controlled empirical evidence, the invocation of the Devil, or demons, or divine intervention to account for human action, and the appeal to scriptural authority as proof for propositions are all starkly contrastive reminders of the rather different rules governing modern criminological discourse.

But traditional accounts of crime - Christian and otherwise - are not entirely remote from modern thinking about the subject. Scattered around in the diverse literature of the early modern period, in criminal biographies and broadsheets, accounts of the Renaissance underworld, Tudor rogue pamphlets, Elizabethan dramas and Jacobean city comedies, the Utopia of Thomas More and the novels of Daniel Defoe, one can discover rudimentary versions of the etiological accounts which are used today to narrate the process of becoming deviant. Stories of how the offender fell

in with bad company, became lax in his habits and was sorely tried by temptation, was sickly, or tainted by bad blood, or neglected by unloving parents, became too fond of drink or too idle to work, lost her reputation and found it hard to get employment, was driven to despair by poverty or simply driven to crime by avarice and lust - these seem to provide the well-worn templates from which our modern theories of crime are struck, even if we insist upon a more neutral language with which to tell the tale, and think that a story's plausibility should be borne out by evidence as well as intuition. Indeed, Faller's research (Faller 1987) suggests that what was lacking in these seventeenth- and eighteenth-century accounts was not secular or materialist explanations of the roots of crime, which were present in abundance alongside the spiritual explanations proffered by the church. What was lacking was a developed sense of differential etiology. Crime was seen as an omnipresent temptation to which all humankind was vulnerable, but when it became a question of why some succumbed and others resisted, the explanation trailed off into the unknowable, resorting to fate, or providence, or the will of God. When, in the late nineteenth century, the science of criminology emerged, one of its central concerns would be to address this issue of differentiation and subject it to empirical inquiry.

'Traditional' ways of thinking about crime did not disappear with the coming of the modern, scientific age, though they may nowadays be accorded a different status in the hierarchy of credibility. These older conceptions - based upon experience and ideology rather than systematic empirical inquiry - have not been altogether displaced by scientific criminologies, and we continue to acknowledge the force of moral, religious and 'common-sensical' ways of discussing crime. Expert, research-based knowledge about crime and criminals still competes with views of the subject which are not 'criminological' in their style of reasoning or their use of evidence. Judges, moralists, religious fundamentalists, and populist leader-writers still offer views on criminological subjects which are quite innocent of criminological science. Unlike physics or even economics, which have established a degree of monopoly over the right to speak authoritatively about their subjects, criminology operates in a culture which combines traditional and scientific modes of thought and action. Intuitive, 'instinctive', common-sense views about crime and criminals are still more persuasive to many - including many in positions of power and authority—than are the results of carefully executed empirical research.

THE SCIENTIFIC ANALYSIS OF CRIME IN THE EIGHTEENTH AND EARLY NINETEENTH CENTURIES

In most criminological histories, the true beginnings of modern criminological thought are seen in writings of the eighteenth and early nineteenth centuries. Radzinowicz's monumental *History* (1948) begins in 1750, as does his historical essay on *Ideology and Crime* (1966). Mannheim's earliest 'pioneer' is Beccaria, whose *Of Crimes and Punishments* first appeared in 1764. Even *The New Criminology* (Taylor, Walton, and Young 1973), the radical and immensely influential textbook of the 1970s, begins its account with Beccaria and 'the classical school of

criminology'. There are good grounds for choosing to emphasize the role of these eighteenth-century writings in the formation of criminology, but, as I suggested earlier, the connections are not as straightforward as is usually assumed. I have already argued that the writings of Beccaria, Bentham, and the others did not constitute a criminology. But despite this, they did establish and develop some of the key elements and conditions necessary for the subsequent development of the subject in its modern form. They are quite properly a part of criminology's genealogy, having been a direct source for some of the subject's basic aims and characteristics, as well as having produced a stock of propositions and arguments which would feature prominently in the criminological discourse which developed in the twentieth century.

There are several genealogical strands which link certain eighteenth- and early nineteenth-century writers with the criminology which followed. Most importantly, Enlightenment writers such as Beccaria, Bentham, and Howard wrote secular, materialist analyses, emphasizing the importance of reason and experience and denigrating theological forms of reasoning. They viewed themselves as proceeding in a scientific manner and dealing objectively with an issue which had previously been dominated by irrational, superstitious beliefs and prejudices. Members of the *scuola positiva* would later disparage the 'classical school' for its 'unscientific' reliance upon speculative reasoning rather than observed facts, but this is not how these writers viewed themselves. Indeed, it was the 'classicists' who first established the claim that crime and its control could be studied in a neutral, scientific manner.

Another important connection between the literature of the reformers and the criminology that followed was that the reformers of the late eighteenth and early nineteenth centuries were writing about a set of legal institutions which were becoming (partly through those reformers' efforts) recognizably modern. The institutional concerns which animated the writings of Beccaria, Bentham, Howard, and the rest are, in an important sense, modern concerns— about the systematic arrangement of criminal laws and procedures in order to promote social policy goals; about the sentencing choices of magistrates; about the organization and conduct of professional police; about the design and purposes of prison regimes. The interest of these writers in the psychology of offending, the nature of criminal motivation, the possibilities of deterrence and reform, and the most appropriate way for state institutions to regulate individual conduct, are also questions which were to become quite central to later criminology. These issues gripped the imagination of eighteenth-century thinkers because they lived in a world caught up in the dynamics of modernization. This was the period which saw the emergence of the centralized administrative state, a national economy and a population increasingly subject to governance, an autonomous, secular legal system, the political relations of liberalism, and institutional enclosures like the prison and the asylum with their reformative, disciplinary regimes. The writings of Beccaria, Bentham, and Howard - like those of Benjamin Rush in America - were the first soundings of a modernist discourse about crime. As intellectual responses to the challenge of crime in a newly urbanized market society, they were addressing problems of a novel type, quite unknown in traditional social thought. This new social and institutional environment, modified in

certain ways, also formed the background against which the science of criminology would subsequently emerge, and in that respect there is a broad continuity of reference which makes eighteenth-century discourse 'modern' in a way that earlier writing is not. (Indeed, it is precisely because the reformist discourse of Beccaria et al and the scientific discourse of Lombroso share a common institutional context that they are able to be viewed as 'opposites'. Each one entails a programme for directing the modern field of criminal justice.)

If one widens the lens to look beyond Beccaria and Bentham to some of the other discourses on crime and criminals dating from this period, one can detect other lines of affiliation. Patrick Colquhoun and Henry Fielding, as well as a large number of Parliamentary and private committees of the late eighteenth and early nineteenth centuries, used empirical evidence to situate and measure the extent of various crime problems ('the late increase in robbers', the relation between 'indigence' and crime, 'the alarming increase in juvenile delinquency', the 'police of the metropolis', and so on). As Leon Radzinowicz (1956), and, more recently, Robert Reiner (1988) have pointed out, these inquiries formed part of a wider 'science of police' which flourished in this period, concerned not just with crime or criminals, but with the regulation and maintenance of the whole population in the interest of economy, welfare, and good governance (see also Foucault 1979; Pasquino 1978). John Howard's investigation of the state of the prisons was undertaken as a work of charity and reform, but his methods were doggedly empirical, and his study laid much stress on measurement and systematic observation as a basis for its findings. Howard's work in the 1770s sparked the beginnings of a line of empirical penological inquiry which, from the 1830s onwards, became an increasingly important element in the British criminological tradition.

By the middle years of the nineteenth century this 'scientific' style of reasoning about crime had become a distinctive feature of the emergent culture of amateur social science. The papers delivered by Rawson W. Rawson, Joseph Fletcher, and John Glyde to the Statistical Society of London used judicial statistics and census data to chart the distribution and demography of crime and to match up crime rates with other social indices - just as A. M. Guerry and Adolphe Quetelet had been doing in France and Belgium. On the basis of carefully calculated correlations, they drew conclusions about the moral and social causes which influenced criminal conduct and presented their findings as instances of the new statistical science and its social uses. Henry Mayhew, writing in the middle years of the nineteenth century, was essentially a journalist concerned with 'the social question' and the problem of the poor. But unlike the moralists of a century earlier, his journalism was founded upon an empirical approach, using ethnographic and survey methods as well as life histories and statistical data; and his analyses of London Labour and the London Poor (1861-2) offered a series of empirically supported claims about the patterns and causes of professional crime in the city.

Another line of inquiry which flourished in this period, and whose advocates would later be seen as progenitors of criminology, centred not upon the population and its governance by a well-ordered state, but instead upon individuals and their ability (or lack of ability) to govern

themselves. As early as the 1760s and 1770s, Henry Dagge and Mannasseh Dawes argued that the law's notions of a free-willed offender were often enough fictions in the face of real social and psychological circumstances which limited choice and shaped human conduct, and they drew upon the new materialist psychologies of the time to explain how it was that causal processes could be acknowledged without entirely destroying the belief in man's free will (see Green 1985). Indeed, both Thomas Zeman (1981) and Piers Beirne (1993) have recently shown that Cesare Beccaria's account of human conduct is shaped not by metaphysical assumptions about the freedom of the will, but instead by John Locke's empiricist psychology and the new 'science of man' developed by the thinkers of the Scottish Enlightenment.

During the nineteenth century this reconceptualization of human character and conduct was taken up and developed in the field of medicine, especially psychological medicine. The art of 'physiognomy' - which, it was claimed, enabled its practitioners to judge character and disposition from the features of the face and the external forms of the body - had been known since the seventeenth century, but the essays of J. C. Lavater purported to give a scientific foundation to this useful skill (Lavater 1792). The craniometry and phrenology of F. J. Gal and J. C. Spurzheim made similar claims in the early nineteenth century, this time focusing upon the shape and contours of the human skull as an external index of character. By the 1830s physiognomy and phrenology had lost much of their scientific credibility and had become the obsession of a few enthusiastic publicists, but the quest to uncover the links between physical constitution and psychological character was continued in a different and more important line of research: the new science of psychiatry.

The emergence of a network of private asylums in the eighteenth century led to the development of a new quasi-medical specialism which was at first called alienism and subsequently came to be known as psychological medicine or psychiatry. The writings of asylum managers about their patients - about their conduct, the antecedents of their madness, and the forms of treatment to which they responded - formed the basis for a major tradition of scientific investigation, and one which would subsequently be an important source of crimino-logical data and ideas.

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Attempts to link psychological characteristics to physical constitutions formed an abiding concern of this new discipline, but equally significant for our purposes, is its intense focus upon the insane individual - a focus permitted and encouraged by the long-term confinement of asylum patients under the daily gaze of the alienist (see Porter 1987). The new psychiatry produced a

huge scientific literature concerned with the description of different mental types, case histories and causal analyses of how their madness developed, and detailed accounts of how they responded to various forms of 'moral' and medical treatment. What was developing here was a new kind of empirical psychology, concentrating upon pathological cases and their rational management. And because many of these cases involved criminal conduct (whether of a minor or a serious kind) one of the offshoots of this enterprise was a developing diagnostic and prognostic literature claiming to give a scientific account of certain kinds of individual criminals. Particularly after the Lunacy

Acts of the mid-nineteenth century, when the asylum network was expanded to house the country's poor as well as the well-to-do, the new psychiatric profession had more and more to say about conditions such as 'moral imbecility', 'degeneracy', and 'feeble-mindedness' which were deemed to be prevalent among the populations dealt with by the poor-houses and the prisons. Consequently, when a science of the criminal began to develop in the last decades of the century, there already existed a tradition of work whose concerns ran in parallel with its own and from which it could draw a measure of support and encouragement. Indeed, for about fifty years after the publication of Lombroso's *L'Uomo Delinquente* (1876) the journals of the psychiatric profession were virtually the only ones in Britain which took a serious interest in Lombroso's project.

If one were reviewing all of the ideas and undertakings of the eighteenth and early nineteenth centuries that bore a resemblance to elements which later appeared within the discipline of criminology, there would be other stories to tell. The various forms of charitable and social work with the poor, the societies for the care of discharged convicts, the management of workhouses, inquiries about the causes and extent of inebriety, investigations into the labour market, the employment and treatment of children, education, the housing of the poor, the settlement and boys' club movements, could all be identified as the roots of particular ingredients in the modern criminological mix. But one needs to recall that the ideas and forms of inquiry set out here did not add up to an early form of criminology for the simple reason that they did not 'add up' at all; nor could they until the later emergence of a form of inquiry centred upon the criminal, which drew together these various enterprises under the umbrella of a specialist criminological discipline. In their own time, they were discrete forms of knowledge, undertaken for a variety of different purposes, and forming elements within a variety of different discourses, none of which corresponds exactly with the criminological project that was subsequently formed. Beccaria, for example, developed his arguments about the reform of the criminal law within the broader context of a work on political economy. Colquhoun's writings about crime and police were, for him, one aspect of a treatise on government in which he addressed the changing problems of governance thrown up by the emergence of urbanized market society and the baleful effects of trade and luxury upon the manners of the people. Physiognomists, phrenologists, and psychiatrists were attempting to understand the physical and mental roots of human conduct rather than to develop a particular knowledge of offenders and offending. Like the utilitarian

psychology developed by Bentham, these were attempts to capture the springs of human action in general, not to single out the criminal for special and exclusive attention. None of these discourses was struggling to create a distinctive criminological enterprise, though once such a subject was created, each formed a resource to be drawn upon, usually in a way which wrenched its insights about crime apart from the framework which originally produced them.

Certainly, if one looks back from the perspective of the present, one can glimpse the outlines of the governmental project and the Lombrosian project gradually taking shape in this period. Empirical studies of the police, of prisons, of crime rates and of the deterrent effects of criminal laws—the very stuff of criminology's governmental concerns— are already underway, conducted at first by amateurs but later by state officials utilizing the elementary tools of scientific method. However, these studies were not, at the time, viewed as distinct from other inquiries, into the market, morals, workhouses, or poverty. The broad concern animating all of these studies and more was a concern with governance and the use of empirical data and scientific methods to improve government's grip on the population. Only with the later professionalization and specialization of the various state agencies - and with the invention of 'criminology' - did the study of governance in criminal matters come to be viewed as distinct from the governance of the population in general. Similarly, one can see in the work of the nineteenth-century phrenologists and psychiatrists a concern to understand human conduct in scientific terms, to identify character types, and to trace the etiologies of pathological behaviours. But at this historical moment there was no focus upon the criminal as a special human type and no felt need for a specialism built around this entity. The splitting off of criminological studies, both in the administrative field and in the clinic, was a late nineteenth-century event which significantly changed the organization of subsequent thought and action.

Since the formation of criminology, its practitioners have repeatedly identified what they take to be their 'roots' - the various lines of descent which link their present practice to work done a century and more before. But this is perhaps the wrong way to look at things. A more accurate account might suggest that at the end of the nineteenth century the idea of a specialist criminological science emerged - centred, as it happens, on the figure of the 'criminal type' - and that, after a process of struggle, adaptation, and convergence, this subsequently led to the establishment, in a rather different form, of an independent criminological discipline. Since the discipline was characterized by an eclectic, multidisciplinary concern to pursue the crime problem in all its aspects, the subject is continually expanding to embrace all of the ways in which crime and criminals might be scientifically studied, and in so doing, it has constantly created new predecessors for itself. The connection between eighteenth- and twentieth-century discourse about crime is not a matter of tenacious traditions of thought which have survived continuously for 200 years. Rather, it is a matter of a certain broad similarity between forms of inquiry and institutional arrangements which prevailed in the eighteenth and the twentieth centuries, together with the tendency of the modern discipline to embrace everything that might be scientifically said about crime and criminals. Each time a new element is added to the

criminological armory - be it radical criminology, ecological surveys, or sociological theory—someone sooner or later discovers that eighteenth- and nineteenth-century writers were doing something similar, and that this new approach should therefore be considered a central feature of the criminological tradition, albeit one that was temporarily (and inexplicably) forgotten. But this recurring 'recovery of tradition' is perhaps better understood as a bid for intellectual respectability and disciplinary centrality than as a serious claim about the development of the subject. After all, the crucial requirement of a genealogy is continuity of descent, and it is precisely this continuity which is missing wherever 'traditions' have to be 'rediscovered'.

If this account is accurate, and if criminology is a specific organization of knowledge which first emerged in the late nineteenth century, then the key problem is to try to describe its particularity and to explain the historical transmutation which produced this new form of enterprise. It has to be shown how the project of a specialized science emerged out of some other project or set of projects, and how it marked itself off from what went before. It is to that task that I now turn.

THE EMERGENCE OF A POSITIVE SCIENCE OF THE CRIMINAL

From Criminal Anthropology to the Science of Criminology

The idea of a specialist science of the criminal was born out of the interaction of a specific intellectual endeavour and a certain social context. As is often the case, a transmutation was produced in the history of ideas when a particular set of ideas and inquiries was found to have relevance to a field which had previously been regarded as quite separate. Ironically enough, the scientific work which led Cesare Lombroso to found a specialist 'science of the criminal' - a key ingredient in the formation of the modern discipline of criminology - was not, in fact, criminological in any sense that we would recognize. Lombroso's criminal science grew, somewhat accidentally, out of an anthropological concern to study humanity and its natural varieties, using the methods of anthropometry and craniometry to measure the physical features of human subjects. Influenced by the physical anthropology of Paul Broca and a Darwinian concern with species and their evolution, Lombroso's study of Italian army recruits and asylum and prison inmates was an attempt to identify different racial types and to subject them to scientific scrutiny and categorization (see Gould 1981). By the 1870s, however, the science of 'racial anthropology', like the science of degeneracy developed by Morel, had begun to overlap with potent social concerns, as is shown by its identification of 'types' such as the genius, the epileptoid, and the insane which were patently derived from social policy interests rather than evolutionary processes. Thus, when Lombroso 'discovered' the 'criminal type' he was extending a line of research which was already well established, and actually restating, in a more vivid form, an observation that had already been made by psychiatrists such as Maudsley and prison doctors such as J. Bruce Thomson.

But if Lombroso's 'discovery' was old news, the significance he gave to it was altogether novel. For him, the apparent distinctiveness of the criminal type prompted an idea that no one had imagined before: the idea of a distinctive science of the criminal. His conception of the criminal as a naturally occurring entity - a fact of nature rather than a social or legal product - led Lombroso to the thought of a natural science which would focus upon this entity, trace its characteristics, its stigmata, its abnormalities, and eventually identify the causes which make one person a criminal and another a normal citizen. And the startling thing about this Lombrosian project for the scientific differentiation of the criminal individual was that, despite its dubious scientific credentials, it immediately met with a huge international response. In the twenty years following the appearance of *L'Uomo Delinquenti* in 1876 this strange new science came to form the basis of a major international movement, manifesting itself in an outpouring of texts, the formation of new associations, international congresses, specialist journals, national schools of thought, and interested officials in virtually every European and American state. At the same time, Lombroso himself became something of a household name, featuring in the fiction of Tolstoy, Musil, Bram Stoker, and Conan Doyle as well as in countless journalistic essays and scientific reports.

In the years immediately following the publication of Lombroso's sensational claims a group of talented disciples gathered around him and a journal, *La Scuola Positiva*, was founded to publicize the new research, and its practical implications. But disciples such as Enrico Ferri and Raffaele Garofalo were not content merely to repeat the master's formulations, and even the early work of this Italian school showed a considerable diversity and eclecticism, widening out the analysis to examine the social and legal aspects of criminality as well as its 'anthropological' character. This process of differentiation within the research enterprise was amplified by the formation of rival schools of inquiry, notably the 'French School' which emphasized the sociological and environmental determinants of crime and played down the role of fixed constitutional attributes, and the 'German school' which included the study of criminalistics and the development of new forensic techniques and procedures. A series of highly publicized international congresses, beginning in 1883, aired these disputes at length, with much acrimony on all sides, and resulted in the modification of most of Lombroso's original claims, particularly on the subject of the 'born criminal' and the fatalistic implications this notion was seen to have for the treatment and reform of offenders.

What eventually emerged from this process - especially in the writings of important second-generation figures like Prins, Saleilles, and Von Hamel - was a scientific movement which was much more eclectic and much more 'practical' than the original criminal anthropology had been (see Garland 1985). One indication of the process of revision and modification whereby Lombroso's original formulations were reworked into a more acceptable form was the adoption of the term 'criminology', which came into general use in the 1890s. The term was originally used not as an exact synonym for criminal anthropology but as a neutral generic term which avoided

the partisanship implicit in the original term and others - such as 'criminal sociology', 'criminal biology', and 'criminal psychology' - which competed with it.

This new science of criminology, as it developed in the last decades of the nineteenth century, was characterized by a number of distinctive features. It was an avowedly scientific approach to crime, concerned to develop a 'positive', factual knowledge of offenders, based upon observation, measurement, and inductive reasoning, and rejecting the speculative thinking about human character which had previously informed criminal justice practices. In keeping with its Lombrosian origins, it focused its attentions upon the individual criminal, and in particular upon the characteristics which appeared to mark off criminals as in some way different from normal, law-abiding citizens. It assumed that scientific explanation amounted to causal explanation and therefore set itself the task of identifying the causes of crime, though it should be added that the notion of 'cause' was understood in a wide variety of ways, some of which were more 'determinist' than others, and the kinds of cause identified ranged from innate constitutional defects to more or less contingent social circumstances. Finally, it addressed itself to the investigation of a new, pathological phenomenon - 'criminality' - which it deemed to be the source of criminal behaviour and which, in effect, became the subject's *raison d'être* and the target of its practical proposals.

This concern to produce a differential diagnosis of the individual criminal and the etiology of his or her offending behaviour was in turn linked to a definite programme of practical action, quite at odds with the legal principles which had previously underpinned criminal justice practice. The notion of the offender's free will was attacked as a metaphysical abstraction, as was the concept of legal responsibility. Uniformity of sentencing was viewed as a failure to differentiate between different types of offender, and the principle of proportionate, retrospective punishment was rejected in favour of a flexible system of penal sanctions adapted to the reformability or dangerousness of the specific individual. Criminal justice was to cease being a punitive, reactive system and was to become instead a scientifically informed apparatus for the prevention, treatment, and elimination of criminality. It was to be a system run by criminological experts, concerned to maximize social defence, individual reform, and measures of security rather than to uphold some outdated legalistic conception of justice.

That such a radical programme of research and reform could be developed and become influential is testimony to the extent to which the new criminology resonated with the concerns and preoccupations of the political and cultural milieu in which it emerged. The popularity of Lombroso's work is probably explicable in terms of the extent to which his conception of the criminal type chimed with deep-rooted cultural prejudices and offered scientific respectability to middle class perceptions of 'criminal classes' forming in the growing cities (see Sennett 1977). But the viability of the criminological movement, and the fact that it so quickly became an international phenomenon, are indications that it was a programme of thought and action which successfully meshed with the social politics and institutional practices which were becoming established at the time. The increasing involvement of experts and scientists in the administration

of social problems in the late nineteenth century, and the related development of statistical data as a resource for governing, is one background circumstance. So too is the developing concern on the part of governments, Poor Law administrators, police, and local authorities to classify and differentiate the populations they dealt with, seeking to identify and separate out dangerous elements while shoring up the social attachments of the 'deserving poor' and the 'respectable' working classes. In this specific context, the criminological programme offered certain regulatory and legitimately possibilities which made it attractive to late nineteenth-century governments and administrators.

The regulatory advantages of the new criminology lay in its rejection of the formal egalitarianism that had previously shaped the practices of criminal law and its enforcement. Against the principle that everyone should be treated equally, criminology offered to differentiate between constitutional and accidental criminality, thus identifying the real sources of social danger and marking out the contours of the criminal class in a scientific rather than a moralistic way. Criminology also promised to provide a more extensive and a more effective form of intervention and regulation. Concerned to diagnose an individual's level of dangerousness rather than to judge whether or not he or she had yet broken the law, criminology offered the prospect of a system of control in which official measures need not wait for an offence to occur, or be limited by any principle of proportionality. At the same time, this more interventionist system could also claim to be more humane, in so far as its rationale was the promotion of individual and social welfare and not merely the infliction of retributive punishment (see Garland 1985a; Wiener 1990).

Finally, as is by now well documented, the new criminology met with extensive interest and social support because it was closely linked to the new prisons which had, by the late nineteenth century, become a prominent feature of all Western societies. As Michel Foucault (1977) has shown, the disciplinary, reformatory practices of the penitentiary prison acted as a practical 'surface of emergence' for the individualizing, differentiating discourse of criminology. What Lombroso invented was a science of individual differences; but the data and social arrangements necessary for the production of this science, as well as the practical context in which such a knowledge would be practically useful, were already inscribed in the architecture and regimes of the disciplinary prison. In the prison setting, inmates were arranged in individual cells, and subjected to constant, individual surveillance for long periods of time, their behaviour and characteristics being continually monitored in order that disciplinary measures could be adjusted to deal with individual reactions and peculiarities. The systematic and differentiating knowledge of offenders to which this gave rise formed the basis for the new science of criminology, which slowly fed back into the practices of imprisonment, refining the prison's classifications and techniques, and enhancing the authorities' understanding of the individuals that were held in custody (see Garland 1985a). The widespread use of disciplinary imprisonment in late nineteenth-century Europe and America thus provided a ready-made setting through which criminology could emerge and establish itself as a useful form of knowledge. As Sir Evelyn Ruggles-Brise

(1924) put it, la science penitentiaire develops gradually into the science of the discovery of the causes of crime—the science of criminology. Lombroso's project was thus propelled not just by its own scientific logic but by a combination of institutional and cultural dynamics, a set of forces which were to sustain this form of inquiry long after Lombroso's own reputation was utterly destroyed.

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CRIMINOLOGY, CRIMINAL LAW AND CRIMINALIZATION*

THE RELATIONSHIP BETWEEN CRIMINOLOGY, CRIMINAL LAW AND CRIMINAL JUSTICE STUDIES

Within the academy in the United Kingdom, the study of the various social practices associated with 'criminal justice' is currently divided into three main blocks. These blocks are themselves marked by a combination of disciplinary tools and institutional objects. Broadly understood, criminology concerns itself with social and individual antecedents of crime and with the nature of crime as a social phenomenon: its disciplinary resources come mainly from sociology, social theory, psychology, and history. Criminologists raise a variety of questions about patterns of criminality and its social construction, along with their historical, economic, political, and social conditions of existence (see the chapters by Garland, Young, and Rock, this volume). Whilst, as Garland's contribution to this volume suggests, the dynamic social construction of crime gives reason for scepticism about criminology's discreteness as a discipline, it continues to hold a distinctive institutional position in the academy. Criminal law concerns itself with the substantive norms according to which individuals or groups are adjudged guilty or innocent. Contemporary criminal lawyers tend to be concerned not so much with the antecedents or overall patterns of these norms, but rather with their judicial interpretation in particular cases or sets of cases. They are also concerned with the doctrinal framework of 'general principles' within which that interpretive practice and - though more tenuously - legislative development purportedly proceed (Ashworth, 1995; Clarkson and Keating, 1995; Smith and Hogan, 1993; Williams, 1983). The rules of evidence and procedure which have an important bearing on the application and historical development of criminal law tend to find only a small place in criminal law courses, and are often dealt with in specialist, optional courses or relegated to interstitial treatment in criminal justice or legal methods courses. Criminal justice courses, which have a variety of legal historical, sociological, and other foci, deal with institutional aspects of the criminal process such as policing, prosecution, plea bargaining, sentencing, and punishment, and with normative questions about the principles around which a criminal justice system worth the name ought to be organized (Ashworth, 1994; Lacey, 1994). The disciplinary balance of these courses depends on their context; criminal justice courses in law departments are often oriented towards procedural law, whilst those in sociology or criminology departments are more likely to focus on historical, sociological, or political issues. Within degree courses in law, only criminal law is regarded as a 'core' part of the curriculum.

Whilst the organization of research conforms less rigidly to the divisions between criminal law, criminal justice, and criminology, these categories nonetheless bear a close relationship to the different areas of expertise claimed by scholars within the field. This partitioning of the

* Nicola Lacey, *The Oxford Handbook of Criminology* (2nd ed. 1997).

intellectual terrain is, it should be noted, both historically and culturally specific. To Continental European eyes, for example, the Anglo-American separation of criminal law and criminal procedure, and indeed of criminal law and sentencing, appears extraordinary (Cole et al, 1987; Fletcher, 1978). And although a superficially similar tripartite division has characterized the British approach for much of this century, the rationale underlying the three branches of 'criminal science' of the 1920s and 1930s was rather different from that underlying today's division (Radzinowicz and Turner, 1945; Kenny, 1952: chapter 1, Part II).

What, then, is the significance of the contemporary partition between criminology, criminal law, and criminal justice? Even a brief sketch of the prevailing academic division of labour suffices to reveal that it is likely to repress certain important issues. Criminological insights about patterns of 'deviance' pose important questions about the working of criminal justice institutions such as police and courts. The practice of legal interpretation takes place within a particular social context and in relation to criminal laws which are themselves the product of a political process which is surely relevant to their application and enforcement. Practices of punishment take place against the background of prevailing concerns about patterns of criminality, about the vitality of social norms thought to be embodied in criminal law, and about the legitimacy of state power. Furthermore, the construction of the tripartite block itself is a porous one, given that criminal justice practices exist alongside and relate in an intimate, albeit complex way, to a variety of other—political, economic, moral, religious, educational, familial—normative and sanctioning practices (Lacey et al, 1990: chapter 1).

Whilst it would clearly be impossible to address all criminal justice concerns within a single research project or course, there is a real risk that questions which transcend the prevailing boundaries marking off the three areas may be lost from view. For example, the relevance of the political context or of particular features of the criminal process to the development of legal doctrine in a series of appeal cases may be excluded from a criminal law course, whilst criminal justice or criminology courses may ignore the bearing of legal developments upon practices of prosecution and punishment. In short, a legitimate focus on the issues raised both within particular disciplines and in relation to particular institutional practices may serve to obscure broader questions about the assumptions on which those disciplines and practices are based. What are lawyers' implicit ideas about the nature of crime and of offenders? What assumptions do criminologists make about the nature of criminal law? And who, within the prevailing division of intellectual labour, is to study these important matters? Since the discreteness of both subject matter and disciplinary framework is probably most firmly established in relation to criminal law, I now want to focus on this area so as to examine the degree to which its pretensions to autonomy are justified. Of course, many criminal law scholars have concerned themselves with sociology and history and with questions about the criminal process: indeed, this socio-legal leaning has probably been more marked in criminal law than in other fields of legal scholarship over the last forty years (Hall, 1960; Packer, 1967). The objection to socio-legal approaches to criminal law has always been, however, that they underestimate or obscure the specificity of legal techniques

and legal argumentation, reducing legal regulation to the exercise of political or economic power, and assuming Segal decision-making to be explicable in terms of some crude set of personal, economic, or political causes. Furthermore, it may be argued that socio-legal scholars often ask the wrong kinds of questions about criminal law - questions which assume that law is to be judged in terms of its instrumental functions rather than its symbolic dimensions. These problems are probably best exemplified by American legal realism and Chicago-style law and economics, reductive approaches in which legal decision-making is explained, respectively, in terms of judicial actors' policy preferences and their concern to maximize economic efficiency (Farmer, 1995, 1996; Nelken, 1987). In the context of the debate about the proper balance between autonomy and openness in criminal law scholarship, the development over the last fifteen years of 'critical' approaches is worthy of particular attention (for a general review, see Nelken., 1987a; Norrie, 1992). For, as I shall now try to show, they promise to combine a focus on legal specificity without obscuring broader questions about the historical, political, and social conditions under which the apparently discrete and technical practices of modern criminal law flourish.

Early examples of critical criminal law scholarship, notably the work of Mark Kelman (1981), were closely associated with the American 'critical legal studies' movement. The movement embraces a group of scholars who seek to expose the 'politics of law' by means of a close examination of doctrinal principles and categories. Conventional criminal law scholars generally provide a brief resume of the moral/retributive, incapacitative, and deterrent aspects of criminal justice. They go on to give a terse statement of the competing concerns of fairness and social protection, due process, and crime control which are taken to inform the development and implementation of criminal law in liberal societies. From this point on, they take the idea of 'crimes' as given by acts of law-creation. In this way both political and criminological issues are quietly removed from the legal agenda. In contrast, critical criminal lawyers assume that the power and meaning of criminal laws depend on a more complex set of processes and underlying factors than the mere positing of prohibitory norms to be enforced according to a particular procedure. Most obviously, they assume that the influences of political and economic power permeate the practice of doctrinal interpretation. Yet their view here is not the reductive, instrumental one of realism or the Chicago School; rather, critical criminal lawyers argue that judicial practice is shaped by tensions between competing values whose power infuses all social practices, and which cannot be reconciled by either legislative reform or feats of rationalizing interpretation.

The primary aim of early critical criminal law scholarship was to develop an internal or 'Immanent' critique of the doctrinal framework within which different areas of law have been taken to be organized. Taking a close interest in the way in which criminal liability is constructed within legal discourse, critical scholars took as their focus the structure of 'general principles' which are usually taken to underpin criminal law in liberal societies. These included the aspirations of neutrality, objectivity, and determinacy of legal method which are associated with the rule of law, along with liberal ideals about the fair terms under which criminal punishment

may be imposed upon an individual agent (Norrie, 1993). For example, Kelman's work scrutinized the basis of the 'mens rea' doctrine which purports to structure and justify the attribution of criminal responsibility to the free individual via the employment of standards of fault such as intent and recklessness. He showed that 'mens rea' veers in an unprincipled way between 'subjective' standards, in which attributions of responsibility depend on what the defendant actually intended or contemplated, and 'objective' standards, such as negligence, which impute to the defendant the state of mind of the 'reasonable man'. Following from this, Kelman emphasized the fact that criminal law doctrine evinces no consistent commitment to either a free-will or a determinist model of human behaviour (Kelman, 1981).

Furthermore, Kelman and others demonstrated the manipulability and Indeterminacy of the generally accepted doctrinal framework according to which criminal liability is constructed in terms of three elements: 'actus reus' or conduct; 'mens rea' or fault; and defence (or, more accurately, its absence). For example, critical scholars pointed out that the issue of mistake could be conceptualized with equal doctrinal propriety as matter pertaining to the existence of the conduct or fault elements of a crime or to the existence of a defence (Lacey et al., 1990: chapter 1). A person who assaults another person in the mistaken belief that that other person is in the process of committing an assault on a third party could, in other words, be regarded as having a defence, or as lacking the conduct or (in certain circumstances) mental elements of a crime. Since these conceptualizations sometimes affect the outcome of the legal analysis, this entails that doctrinal rules are not as determinate as the conventional theory of legal reasoning assumes. Moreover, critical analysis illustrated the fact that the outcome of legal reasoning is contingent upon factors such as the time frame within which the alleged offence was set. For example, whether or not a person is regarded as negligent, in the sense of having failed to reach a reasonable standard of care or awareness, may well depend on what range of conduct the court is able to examine. What appears an unreasonable lapse judged in itself may look more reasonable if evidence about its history can be admitted. Yet the influence of the framing process is not acknowledged within the doctrinal structure, which accordingly fails to regulate judicial interpretation in the way which is generally supposed.

The critical enterprise here is to hold criminal law up to scrutiny in terms of the standards which it professes to instantiate, and, in doing so, to reveal that, far from consisting in a clear, determinate set of norms, based on a coherent set of 'general principles', it rather exemplifies a contradictory and conflicting set of approaches which are obscured by the superficial coherence and determinacy of legal reasoning. By scrutinizing carefully the form which criminal legal reasoning takes, it becomes possible to reveal that practice as being not so much logical as ideological, and as serving the interests of a variety of powerful groups by representing criminal law as a technical and apolitical sphere of judgement (Norrie, 1993). An important part of this process is the (re)reading of cases, not merely as exercises in formal legal analysis, but also as texts whose rhetorical structure is at least as important as their superficial legal content (Goodrich, 1986). In this kind of reading, critical scholars emphasize the significant symbolic

aspect of the power of criminal law, along with the implicit yet powerful images of wrongdoing and rightful conduct, normal and abnormal subjects, guilt and innocence which legal discourse draws upon and produces (Lacey, 1993).

The early critical focus on the intricacies of doctrinal rationalization and the exposure of conflicts which such rationalization obscures has, however, gradually been supplemented by a further set of questions suggested by the process of immanent critique. If critical criminal law was not to remain a set of observations about the apparent irrationality of legal doctrine, the question of the deeper logics underpinning legal discourse had to be addressed (Norrie, 1993). Hence questions about the broad socio-political conditions under which a particular doctrinal framework arises and 'works', and about the historical conditions of existence of particular doctrinal systems of classification (taken as 'given' within conventional scholarship) have begun to claim the attention of critical criminal law scholars (Norrie, 1993; Lacey, 1997).

This development, which might be conceptualized as 'external' critique, illuminates some important links between critical criminal law scholarship and socio-legal and sociological work on the criminal process. For as critical scholars have sought to understand the deeper political and historical logics underpinning the formal lack of logic of criminal law doctrine, and to grasp precisely how doctrinal ideology serves to obscure apparently obvious political questions about criminal law, new issues have begun to force themselves onto the critical agenda. These include questions about the ways in which a focus on certain portions of substantive criminal law, and a lack of attention to others, serves to perpetuate the myth of coherent 'general principles', and about the ways in which this selectivity relates to prevailing understandings of what constitutes 'real crime', the imperatives of 'law and order' politics and the deeper factors underpinning the governmental and judicial need to represent criminal law as just and as politically 'neutral'. They also include questions about the way in which a certain model of criminal procedure—that of trial by jury—plays a legitimating role which can only be maintained by diverting attention away from the exceptional nature of jury trials and the prevalence of lay justice, diversion from the criminal process and practices such as plea bargaining. Whilst earlier examples of critical criminal law scholarship were primarily concerned with the form of criminal legal reasoning, later examples have begun to examine the substantive patterns of criminal legislation and judicial interpretation, and the relationship between shifts in these frontiers of criminality and the broader social meaning of the practice of criminal justice (Loveland, 1995). Striking examples during the 1980s include the development of criminal law in the area of serious fraud (Weait, 1995) and the debate about homicide doctrine following a number of unsuccessful 'corporate manslaughter' prosecutions consequent upon incidents which would until recently have been regarded as fatal 'accidents' (Wells, 1993, 1995).

The full implications of internal critique, in other words, can only be realized once they are set in the context of a broader set of historical, political, and social questions about the conditions of existence and efficacy of particular doctrinal arrangements. These questions are not legal questions, nor do they detract from the importance of a specifically legal critique. What they do is

to give that critique a far greater significance than it would otherwise have, both by relating it to a wider set of social-theoretic questions and by suggesting links with normative (typically philosophical) thinking about the conditions under which the criminal process might operate in less unjust, undemocratic, and oppressive ways. It is in this sense that critical criminal law scholarship has begun to open up a new agenda for cross-institutional and interdisciplinary study. This agenda, as I shall argue below, may best be understood within the framework of 'criminalization'.

WHAT CAN CRIMINOLOGY BRING TO THE STUDY OF CRIMINAL LAW?

It follows from what has been said in the last section that criminological thinking brings important insights to the study of criminal law. Since the specific practices of both legislation and legal interpretation take place within the context of broader social processes which shape not only the range and definition of criminal laws but also the particular subjects in relation to whom the courts apply their legal techniques, that context is an important factor in understanding the dynamics of legal interpretation. Ideas and principles which are central to criminal law doctrine and its broader accompanying framework, the ideal of the rule of law, begin to take on a different colour once we appreciate, as criminology helps us to do, the partiality and selectivity of their enforcement.

As an overtly coercive state practice within societies which think of themselves as liberal, criminal law confronts a serious challenge of legitimation. It seeks to meet this challenge by making a number of normative claims which relate both to the substance of legal norms and to the process through which they are enforced. In relation to the former, criminal law legitimates itself in two main ways. First, it does so by appealing to the objective, timeless normative status of the standards which it applies. Yet this poses problems of reconciliation with political manipulation of the frontiers of criminality by legislative changes and executive decisions which criminalize hitherto lawful activities or remove criminal sanctions from formerly prohibited conduct. Secondly, criminal law legitimates itself by appealing to the basis of its standards in common, shared understandings or commitments. This is difficult to reconcile with pervasive social conflict in relation to the existence or interpretation of particular criminal norms. Instructive contemporary examples include not only obvious disagreements about the propriety of criminalizing certain forms of sexual behaviour and commercial conduct but also dissensus about the proper standard of fault to be applied in the key offence of homicide (Lacey, 1993).

In relation to procedure and enforcement, criminal law legitimates itself as the fair and even-handed application of rules to subjects conceptualized in terms of their formal capacities for understanding and self-control. Yet how is this claim to be reconciled with the statistics on disparate patterns of enforcement along lines of race or ethnicity, gender, socio-economic status, age, place of residence (see the chapters by Nelken, Sanders, Heidensohn, and Smith in this volume)? Criminal law claims legitimacy by appealing to the detached and even-handed

application of its standards to all who come before it. How is this claim to be reconciled with the pervasiveness of practices such as plea-bargaining, which are driven by the relative power relations of particular actors within the process and by managerialist concerns about the cost-efficient disposal of cases? Criminal law prides itself on its application of a standard of proof beyond reasonable doubt and on its tailoring of liability requirements to the particular individual before the court. How is this to be reconciled with extensive plea-bargaining or with the indeterminacy of 'mens rea' standards? Evidently, these legitimating strategies are heavily dependent on criminal law's capacity to sustain the aura of its separateness from the politics and practicalities of the criminal process. Many principles which are central to the 'common sense' of doctrinal criminal law come to look somewhat fragile as that separateness is eroded by a little knowledge of criminal justice. This realization itself propels the sorts of critical questions discussed above onto the consciousness of the criminal law scholar.

**WHAT CAN CRITICAL CRIMINAL LAW BRING TO THE STUDY OF
CRIMINOLOGY AND CRIMINAL JUSTICE?**

The idea that criminological insight can sharpen the critical perspective of criminal lawyers will probably be accepted by anyone who has chosen to study criminology. The converse idea that criminologists or students of criminal justice ought to concern themselves with criminal law may be less intellectually digestible. For some students of criminology this has to do with a (not entirely unjustified) scepticism about the relative importance of law in determining social practices of labelling and punishment which are seen in broader sociological and political terms. For others it may have to do with a crude understanding of criminal law received from 'black-letter' positivist scholarship. The legal positivist approach views laws as the products of legislative or judicial decision, which operate straightforwardly as rules which are applied in a deductive way to cases coming before the courts. From a criminological perspective, legal positivism entails, once again, that the interesting questions are not legal ones but rather social and political ones having to do with the factors shaping the selection of cases coming before the courts and the influences upon legislative changes in the scope and contours of criminal prohibitions. This, however, is to miss out on the significance of law as an interpretive practice which plays a central role in the legitimation of the state's penal power. I shall suggest, therefore, that at least four aspects of critical criminal law scholarship are likely to generate important insights from a criminological point of view.

First, the critical criminal lawyer's focus on shifting boundaries of criminal law provides one important part of the broader criminal justice jigsaw. Whilst changes in the legislative content of criminal law are themselves highly significant as both political and legal events, the subsequent process of judicial interpretation is what shapes both the meaning and (to some degree) the social efficacy of new criminal laws. Judicial interpretations which, for example, render criminal laws very difficult to enforce will have both knock-on effects for future prosecution policy and

implications for the symbolic meaning of the relevant law. An excellent example here is the law on incitement to racial hatred, whose strict interpretation has arguably rendered it virtually unenforceable and which is regarded by some as a de facto legitimization of racial abuse (Fitzpatrick, 1987). Long-standing aspects of the doctrinal framework of criminal law may facilitate or inhibit the movement of the boundaries of criminality in directions aspired to by political institutions and other groupings. One good example here is the inchoate move towards imposing criminal liability on corporations - a development which continues to be inhibited by the association of the 'mens rea' framework with the mental states of individual human agents (Wells, 1993). Another is the debate about how to administer the law of rape so as more even-handedly to recognize the sexual integrity of rape victims and defendants. This project is hindered by the doctrinal shape of the rape offence. Proof of rape turns on the victim's lack of consent - something which continues to be judged in relation to unduly broad evidence about the victim's (as opposed to the defendant's) sexual or other experience - and on a subjective standard of responsibility. This entails that even a grossly unreasonable mistake about the victim's consent can, in principle, exonerate the defendant - hence giving legal force to the defendant's (as opposed to the victim's) understanding of the encounter. These problems are reinforced by an adversarial court procedure in which the best defence strategy is almost invariably to attack the victim's character (Temkin, 1989; Smart, 1995).

Secondly, the critical criminal lawyer's focus on the specificities of legal reasoning sheds light on the ways in which power at one stage of the criminal process is both exercised and legitimated. Notwithstanding their relative infrequency, trial by jury and criminal appeals play a central role in the legitimation of the entire criminal process. A close appreciation of how these stages work - one which pays attention to the particularities of legal discourse - is therefore of central importance to any integrated understanding of criminal justice. For example, critical scholarship has generated important insights into the ways in which the power of law depends on the capacity of legal discourse to construct itself as generating 'truths' which are impervious to critical scrutiny from other perspectives (Smart, 1989). This in turn sheds light on processes by which other knowledges introduced as evidence in criminal trials - sociological or psychological knowledges, for example - are subtly invalidated or else modified in the course of 'translation' into the terms of legal discourse. A good example here is the slow and partial legal recognition of evidence about the effects of long-term violence in 'domestic' homicide cases. Whilst recent cases have begun to accept such evidence as relevant, its force is inevitably limited by the need to shape it to fit the conceptual straitjackets of legal defences such as provocation, self-defence, and diminished responsibility (Lacey, 1995). For instance, there is a legal requirement that, to qualify as provocation or self-defence, a violent response must follow immediately upon provocative or threatening conduct. This has posed difficulties in several cases in which defendants (most of them women) who have been subject to 'domestic' violence kill their abusers, yet in which there is no immediate relation between the ultimate killing and a particular attack. The result is that defence lawyers have been forced to reconstruct the relevant evidence in psychiatric terms which accord with a diminished responsibility defence which misrepresents the

defendant's position. Such transformations of non-legal knowledges in the legal process have generally been invisible to conventional legal analysis and have received only partial recognition and understanding in socio-legal scholarship.

This is not to imply a reductive, sociological reading of the criminal trial or the criminal appeal: nor is it, conversely, to deny the importance of interpretive questions about the meaning of the rituals and architecture of the trial as a public event. It is rather to assert that the images of subject and society, of guilt and innocence, of responsibility and non-responsibility, of the autonomy and independence of legal power, and of the objectivity and political neutrality of judgment which are produced within legal reasoning are discrete objects of criminal justice knowledge, and objects which can most fully be explicated by critical criminal lawyers. Whilst the ultimate direction of my argument is that these legal specificities have meanings which are systematically obscured by the structure of legal doctrine, these meanings cannot be grasped without a close analysis of those practices themselves, along with their historical development and place within particular professional institutions. Hence the critical criminal lawyer's approach of taking the doctrinal framework seriously in itself, but of simultaneously reading it as a clue to broader political factors, sheds light on matters of central concern to the criminologist. The alleged autonomy or 'closure' of legal reasoning has to be identified, and its *modus operandi* understood, before it can take its place as a phenomenon which may be interpreted within any general attempt to understand the nature of crime and the criminal process.

Thirdly, historical shifts in the patterns of 'general principles' which purportedly structure legal doctrine, and indeed in the degree of insistence on any such structure, are themselves significant from a criminological point of view. For example, the contemporary focus on 'mens rea' as the central doctrinal problem in legitimizing criminal liability is one which emerged only during the nineteenth century and which has reached its current predominance only in the second half of the twentieth century (Lacey, 1997). Before this, the organizing framework for doctrine was focused on the types of conduct proscribed rather than the basis on which individuals could fairly be held responsible for that conduct. The shift relates to a number of social developments of direct relevance to criminalization: a changing conception of the subject as an individual and of his or her relation to the polity and to government (Wiener, 1990); a shifting view of the legitimation problems posed by the criminal justice system (Norrie, 1993); a changing view of the role of criminal law as one form of social ordering among others, the latter driven by significant transformations in the shape and variety of criminal procedure over the last 150 years (Farmer, 1996b: chapter 3). Whilst these developments have been central to the social history of crime, their relationship with changes in the organizing framework of criminal law doctrine have been virtually ignored. Hence a promising avenue of inquiry into the general nature of crime and criminal justice has been closed off by the current organization of disciplines.

Finally, critical criminal law scholarship generates a finely tuned analysis of the shape of particular criminal laws and their interpretation over time. From a criminological or criminal justice point of view, it is all too easy to take 'criminal law' as a unitary, undifferentiated body of

norms which are straightforwardly applied by the courts. Yet a close reading of cases and statutes reveals an enormous diversity among criminal laws: in terms of the style of their drafting; their scope; the construction of their subjects and objects; their assumptions about responsibility; their procedural requirements. Careful micro-level analysis of legal discourse illuminates assumptions about human nature, and about the status of various kinds of conduct, which structure legal reasoning, yet which may not appear on the face of legal arrangements. Good examples are the close feminist readings of criminal laws dealing with sexual offences, and with rape in particular (Temkin, 1989; Lacey et al, 1990: chapter 5; Duncan, 1996; Zedner, 1995), which reveal a troubling set of assumptions about male and female sexuality and about the reliability of female witnesses. Similarly, the readings of criminal law's construction of homosexuality within queer legal theory (Moran, 1996) reveal a situation which is substantially at odds with the (relatively) liberal approach which appears on the surface of criminal laws. In a different field, critical readings of the property offences have generated a wealth of insights about their assumptions about honesty and propriety, their construction of the fragile lines between enterprise and dishonesty, and the ways in which this construction shifts as between different kinds of property offence (Lacey et al, 1990: chapter 6; Hall, 1952). Such analysis of individual criminal laws or areas of criminal law generates an enormous amount of material which can illuminate the broad social meaning of criminalization. It also reveals a multi-directional process in which both legislature and courts are involved in reflecting, interpreting and shaping the social attitudes and norms upon which the efficacy and legitimacy of criminal justice depends.

FROM CRITICAL CRIMINAL LAW TO CRIMINALIZATION

My suggestion, then, is that criminology, broadly understood, and criminal law scholarship of a critical temper are complementary, albeit distinctive, tasks within the general intellectual enterprise of working towards an understanding of the diverse social practices associated with criminal justice. I have argued more fully elsewhere that the term 'criminalization' constitutes an appropriate conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminology, criminal law, and criminal justice studies (Lacey, 1995a; see also Fanner, 1996a). Escaping the notion of crimes as 'given', the idea of criminalization captures the dynamic nature of the field as a set of interlocking practices in which the moments of 'defining' and 'responding to' crime can rarely be completely distinguished. It accommodates the full range of relevant institutions within which those practices take shape and the disciplines which might be brought to bear upon their analysis; it allows the instrumental and symbolic aspects of the field to be addressed, as well as encompassing empirical, interpretive, and normative projects. It embraces questions about offenders and victims, individuals and collectivities, state and society.

Within the framework of criminalization, we may therefore accommodate the relevant practices of a variety of social actors and institutions: citizens, the media, the police, prosecution

agencies, courts, judges and lawyers, social workers, probation officers and those working in the penal and mental health systems, legislators, and key members of the executive. We are also able to acknowledge the relevance of a wide variety of disciplines to the analysis of these institutions: sociology, psychology, political science, economics, legal studies, moral and political philosophy, and anthropology, to name only the most obvious. This we can do without collapsing the study of criminalization into a chaotic mass which escapes rigorous analysis, and without falling prey to fantasies about the possibility of a unitary synthesis of different approaches. Doubtless the study of criminalization is less intellectually tidy than the all-encompassing 'theories of criminal justice' which have been academically fashionable since the 1960s (Hall, 1960; Packer, 1968; Gross, 1979). This seems an eminently worthwhile sacrifice for a field of scholarship which is sufficiently open to identify the intersecting issues which, as I argued earlier, are all too often lost from view in the prevailing division of labour within the field.

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THE ETERNAL QUEST FOR THE CAUSES OF CRIME*

The Dilemma of Causation

The two phases of the crime problem that elicit more discussion, initiate more investigation and research, and call for more community action are the causes of crime and the prevention of crime. Every individual has his own explanation for crime and his own ideas of prevention. Millions of words, making up hundreds, even thousands, of books, monographs, articles, and reports by hundreds of scholars, moralists, reformers, journalists, legislators, and jurists have been published during the past two centuries on the subjects of causation and prevention. Community forums, luncheon clubs, radio and television broadcasts, college and university discussion groups, as well as regional and national conferences, have debated these subjects on innumerable occasions.

What causes a specific individual to break a taboo, a social sanction, or a law has ever been an enigma to society. Crime, as well as immorality, is the backwash of a culture. As Professor Frank Tannenbaum has eloquently expressed it:

Crime is eternal - as eternal as society. So far as we know, human fallibility has manifested itself in all types and forms of human organization. Everywhere some human beings have fallen outside the pattern of permitted conduct. It is best to face the fact that crime cannot be abolished except in a non-existent utopia. Weakness, anger, greed, jealousy - some form of human aberration - has come to the surface everywhere, and human sanctions have vainly beaten against the irrational, the misguided, impulsive, and ill-conditioned. For reasons too subtle and too complex to understand, the ordinary pressures and expectancies that pattern the individual's conduct into conformity break down in given instances. They have always done so: they always will. No way of drawing the scheme of the good life has yet been discovered which will fulfill the needs of all human beings at all times.

Crime is therefore an ever-present condition, even as sickness, disease, and death. It is as perennial as spring and as recurrent as winter. The more complex society becomes, the more difficult it is for the individual and the more frequent the human failures. Multiplication of laws and of sanctions for their observance merely increases the evil. Habituation becomes more difficult in a complex society, and the inner strains grow more obvious.

Beyond Professor Tannenbaum's contention that crime is inevitable in society, the Italian criminologist, Giorgio Florita, is even convinced that like sin, crime is normal in society and it is our sanctions and laws, made by man, that are abnormal. This fascinating, but not necessarily

* Harry Elmer Barner and Negley K. Teeters, *New Horizons in Criminology* 116-119 (3rd ed., 1959)

novel thesis (Durkheim, the French sociologist, held a similar view) cannot be developed here since it is unrealistic in our present stage of social control.

It has been popular to attribute criminal behavior to one cause or factor, or to one set of factors. It is equally popular, especially among the “experts,” to construct a “system” or “frame of reference” that will explain delinquency and crime, suicide, desertion and divorce, or any other form of human pathology. Students in the behavioral sciences are constantly on the alert, hoping to discover the “open sesame” to the riddle of human misconduct. Yet this riddle of crime causation remains to bedevil society. No unilateral theory, however profound, whether it is nurtured and expounded by biologists, psychologists, psychiatrists, or sociologists, can ever hope to answer the question of the totality of criminal behavior.

The traditional approach to causation in this country has been the socio-economic. Yet many countries of the world, notably those on the European continent and in Latin America, have insisted that biological or constitutional factors are more influential in eliciting antisocial behavior. The geographical determinists have espoused weather, the seasons, topography, humidity, and the like to explain why people behave as they do. The psychiatrists, the sociologists, the endocrinologists, the psychologists and the religionists, as well as the racists and the eugenisists, have all attempted to give us the answer. The problem is indeed complex.

It is incumbent on the writers of a textbook on crime to review some of the conventional theories of criminal behavior. In this section we are only following the familiar pattern of setting down the most discussed theories or hypotheses that attempt to explain aberrant behavior that is criminal in degree.

The result may disillusion those who would like to have a “packaged theory”. The writers of this book have no such theory to advance, but will make whatever attempt to synthesize various theories as these may justify.

In treating the causes of crime, it is necessary to bear in mind just what we mean in this connection by “causes.” As set forth in the epigraph to this chapter, we can never be sure that a given set of factors will always produce a crime or a delinquent act. As a result, some writers on criminal behavior state that it is futile to discuss causes at all. This is as untenable as the position of others who write assuredly about causes, as if they were discussing the metered energies in a physical experiment.

As a first step to a better understanding of crime - and its causes - it is well to cease discussing crimes and criminals in any general sense and concentrate solely on individual crime situations and individual criminals. We must build up our knowledge of crime and criminals by studying particular crimes and individual criminals. But such study will have little permanent value unless we discover from it the personal and social situations most likely to produce crime or most favorable to crime. Unless we find what these conditions are, we can do little to reduce and prevent crime. Investigation of an individual prison inmate may help to rehabilitate him but it will

be of no general social importance unless it helps to tell us what personal and social factors encourage antisocial behavior.

Without contending that they will inevitably cause crime, it is apparent that certain conditions are more favorable to crime than others. Bad heredity, physical defect mental imbalance, mental defect, emotional insecurity, a slum environment, poor education, criminal associates, extreme poverty, an environmental stimulation to crime are obviously more favorable to crime than their opposites. It is true that any or all of these unfavorable conditions will not inevitably drive a given person to commit a crime under all circumstances. Conversely, any one or all of the favorable conditions listed above may not be gilt-edge insurance against a person committing a crime. Hidden factors that may tip the scale either way can never be eliminated from specific situations by all the theory in the world.

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CLASSICAL AND POSITIVIST CRIMINOLOGY*

The term "classical" and "positivist" refer to certain ideas and certain people who have been very important in the long history of trying to understand, and trying to do something about, crime.

"Classical" criminology is most often associated with the name of the Italian Cesare Bonesana, Marchese de Beccaria (1738-1794). Beccaria's work was based on a kind of free-will rationalistic hedonism, a philosophical tradition going back many centuries. He proposed a wide range of specific reforms for the criminal justice systems of his time, describing how they could achieve both justice and effectiveness. Beccaria's ideas have become the basis for almost all modern criminal justice systems.

About fifty years after Beccaria wrote, the French scholar Andre-Michel Guerry (1802-1866) and the Belgian scholar Adolphe Quetelet (1796-1874) began to study the social characteristics of political units such as provinces and nations in order to determine what might cause their high or low crime rates. About fifty years after that, the Italian physician Cesare Lombroso (1835-1909) began to study the biological, psychological, and social characteristics of criminals in order to determine the causes of their criminal behavior. Positivist criminology is usually associated with the names of Guerry, Quetelet, and especially Lombroso.

THE SOCIAL AND INTELLECTUAL BACKGROUND OF CLASSICAL CRIMINOLOGY

Classical criminology emerged at a time when the naturalistic approach of the social contract thinkers was challenging the spiritualistic approach that had dominated European thinking for over a thousand years. This broad spiritualistic approach included a spiritual explanation of crime that formed the basis for criminal justice policies in most of Europe. Classical criminology was a protest against those criminal justice policies and against the spiritual explanations of crime on which they were based.

One of the most important sources for these spiritual explanations of crime was found in the theology of St. Thomas Aquinas (1225-1274), who lived 500 years before Beccaria. Aquinas argued that there was a God-given "natural law" that was revealed by observing, through the eyes of faith, people's natural tendency to do good rather than evil. The criminal law was based on and reflected this "natural law." People who commit crime (i.e., violate the criminal law) therefore also commit sin (i.e., violate the natural law). Aquinas held that crime not only harmed victims, but it also harmed criminals because it harmed their essential "humanness"—their natural tendency to do good.

This spiritual explanation of crime, and others like it, formed the basis for the criminal justice policies in Europe at the time. Because crime was identified with sin, the state had the moral authority to use many horrible and gruesome tortures on criminals. That was because the state

* George B. vold, Thomas J. Bernard, Jeffrey B. Sripes, *Classical and Positivist Criminology* (5th ed., 2002),

claimed that it was acting in the place of God when it inflicted these horrible punishments on criminals. For example, Beirne quotes from the sentence that was imposed on Jean Galas in 1762, two years before Beccaria published his little book:

... in a chemise, with head and feet bare, (Galas) will be taken in a cart from the palace prison to the Cathedral. There, kneeling in front of the main door, holding in his hands a torch of yellow wax weighing two pounds, lie must . . . (ask) pardon of God, of the King, and of justice. Then the executioner should take him in the cart to the Place Saint Georges, where upon a scaffold his arms, legs, thighs, and loins will be broken and crushed. Finally, the prisoner should be placed upon a wheel, with his face turned to the sky, alive and in pain, and repent for his said crimes and misdeeds, all the while imploring God for his life, thereby to serve as an example and to instil terror in the wicked.

The extensive religious symbolism in the manner of execution clearly suggests that crime is intertwined with sin, and that in punishing crime, the state is taking the part of God.

Beginning with Thomas Hobbes (1588-1678), "social contract" thinkers substituted naturalistic arguments for the spiritualistic arguments of people -like Aquinas. While Aquinas argued that people naturally do good rather than evil, Hobbes argued that people naturally pursue their own interests without caring about whether they hurt anyone else. This leads to a "war of each against all" in which no one is safe because all people only look out for themselves.

Hobbes then argued that people are rational enough to realize that this situation is not in anyone's interests. So people agree to give up their own selfish behavior as long as everyone else does the same thing at the same time. This is what Hobbes called the "social contract"—something like a peace treaty that everyone signs because they are all exhausted from the war of each against all. But the social contract needs an enforcement mechanism in case some people cheat and begin to pursue their own interests without regard to whether other people get hurt. This is the job of the state. According to Hobbes, everyone who agrees to the social contract also agrees to grant the state the right to use force to maintain the contract.

Other social contract philosophers such as Locke (1632-1704), Montesquieu (1689-1755), Voltaire (1694-1778), and Rousseau (1712-1778) followed Hobbes in constructing philosophies that included a natural and rational basis for explaining crime and the states response to it. These theories differed from each other in many ways, but all were rational and naturalistic approaches to explaining crime and punishment, as opposed to the dominant spiritualistic approach. By the middle of the 1700s, just before Beccaria wrote his book, these naturalistic ideas were well known and widely accepted by the intellectuals of the day, but they did not represent the thinking of the politically powerful groups that ruled the various states in Europe. Those ruling groups still held to the spiritual explanations of crime, so that crime was seen as manifesting the work of the devil. Consequently, the criminal justice systems of the time tended to impose excessive and cruel punishments on criminals.

Beccaria was a protest writer who sought to change these excessive and cruel punishments by applying the rationalist, social contract ideas to crime and criminal justice. His book was well received by intellectuals and some reform-minded rulers who had already accepted the general framework of social contract thinking. Even more important for the book's acceptance, however, was the fact that the American Revolution of 1776 and the French Revolution of 1789 occurred soon after its publication in 1764. These two revolutions were both guided by naturalistic ideas of the social contract philosophers. To these revolutionaries, Beccaria's book represented the latest and best thinking on the subject of crime and criminal justice. They therefore used his ideas as the basis for their new criminal justice systems. From America and France, Beccaria's ideas spread to the rest of the industrialized world.

BECCARIA AND THE CLASSICAL SCHOOL

Cesare Bonesana, Marchese de Beccaria, was an indifferent student who had some interest in mathematics. After completing his formal education, he joined Alessandro Verri, an official of the prison in Milan, and his brother Pietro Verri, an economist, in a group of young men who met regularly to discuss literary and philosophical topics. Beccaria was given an assignment in March 1763 to write an essay on penology, a subject about which he knew nothing. With help from the Verri brothers, the essay was completed in January 1764, and was published under the title *Dei delitti e delle pene* (*On Crimes and Punishments*) in the small town of Livorno in July of that year, when Beccaria was 26 years old.

In common with his contemporary intellectuals, Beccaria protested against the many inconsistencies in government and in the management of public affairs. He therefore proposed various reforms to make criminal justice practice more logical and rational. He objected especially to the capricious and purely personal justice the judges were dispensing and to the severe and barbaric punishments of the time.

The following ten principles summarize Beccaria's ideas about how to make the criminal justice system both just and effective.

1. The role of the legislatures, according to Beccaria, should be both to define crimes and also to define specific punishments for each specific crime. This contrasted with the practice of Beccaria's time when legislatures passed very general laws and left the implementation up to the vast discretion of the judges.

2. The role of judges should be solely to determine guilt—i.e., whether the defendant had committed a crime. Once that determination was made, then the judge should follow the strict letter of the law in determining the punishment. Instead of vast discretion, Beccaria argued that judges should have no discretion whatsoever: "Nothing is more dangerous than the popular axiom that it is necessary to consult the spirit of the laws. It is a dam that has given way to a torrent of opinions, . . ."

3. The seriousness of a crime should be determined solely by the extent of the harm that it inflicts on society. Beccaria argued that other factors were irrelevant in determining seriousness, including the intent of the offender: "Sometimes, with the best intentions, men do the greatest injury to society; at other times, intending the worst for it, they do the greatest good."

4. Punishments should be proportionate to the seriousness of the crime and their purpose should be to deter crime: "It is to the common interest not only that crimes not be committed, but also that they be less frequent in proportion to the harm they cause society. Therefore, the obstacles that deter man from committing crime should be stronger in proportion as they are contrary to the public good, and as the inducements to commit them are stronger." This argument contrasted with the view, illustrated above in the case of Jean Galas that criminal punishments should convey religious symbolism, with the state acting in the place of God.

6. Punishments are unjust when their severity exceeds what is necessary to achieve deterrence: "For punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime; in this excess of evil one should include the certainty of punishment and the loss of the good which the crime might have produced. All beyond this is superfluous and for that reason tyrannical. . . . "

7. Excessive severity not only fails to deter crime but actually increases it: "The severity of punishment of itself emboldens men to commit the very wrongs it is supposed to prevent; they are driven to commit additional crimes to avoid the punishment for a single one. The countries and times most notorious for severity of penalties have always been those in which the bloodiest and most inhumane of deeds were committed, for the same spirit of ferocity that guided the hand of the legislators also ruled that of the parricide and assassin. "

8. Punishments should be prompt: "The more promptly and the more closely punishment follows upon the commission of a crime, the more just and useful will it be. I say more just, because the criminal is thereby spared the useless and cruel torments of uncertainty. ... I have said that the promptness of punishment is more useful because when the length of time that passes between the punishment and the misdeed is less, so much the stronger and more lasting in the human mind is the association of these two ideas, *crime and punishment*. "

9. Punishments should also be certain: "The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men's minds."

10. Ultimately, laws should be structured so as to prevent crime from happening in the first place: "It is better to prevent crimes than to punish them. That is the ultimate end of every good legislation. . . . Do you want to prevent crimes? See to it that the laws are clear and simple and that the entire force of a nation is united in their defense, and that no part of it is employed to destroy them. See to it that the laws favor not so much classes of men as men themselves. See to

it that men fear the laws and fear nothing else. For fear of the laws is salutary, but fatal and fertile for crimes is one mans fear of another."

Beccaria also emphasised that the laws should be published so that the public may know what they are and support their intent and purpose; that torture and secret accusations should be abolished; that capital punishment should be abolished and replaced by imprisonment; that jails be more humane; and that the law should not distinguish between the rich and the poor. Beccaria summarized his ideas in a brief conclusion to his book:

In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws.

Beccaria's ideas were quite radical for his time, so he published his book anonymously and defended himself in the introduction against charges that he was an unbeliever or a revolutionary. In fact, the Roman Catholic Church condemned the book in 1766 because its rationalistic ideas abandoned the spiritualistic frame of reference. The book was placed on the church's *Index of Forbidden Books* where it remained for over two hundred years. But despite Beccaria's fears and some opposition, his ideas were extremely well received by his contemporaries.

Following the French Revolution of 1789, Beccaria's principles were used as the basis for the French Code of 1791. Consistent with his arguments, the judge was only an instrument for applying the law, and the law undertook to prescribe an exact penalty for every crime and every degree of crime. The greatest practical difficulty in applying this code came from ignoring differences in the circumstances of particular situations. The code treated everyone exactly alike, since only the act, not the intent, was considered in determining the punishment. Thus first offenders were treated the same as repeaters, minors were treated the same as adults, insane the same as sane, and so on. The set, impersonal features of this code then became the point of attack for a new school of reformers who complained about the injustice of a rigorous code and championed the need for individualization and discriminating judgment to fit individual circumstances. Ultimately, these reactions resulted in revisions to the code so that judges were able to exercise discretion in considering factors such as age, mental condition, and extenuating circumstances. These practical revisions of classical criminology constitute what is often called the "neoclassical" school.

As such, the neoclassical school represented no particular break with the basic doctrine of human nature that made up the classical tradition throughout Europe at the time. The doctrine continued to be that people possess free will and that they are guided by reason and self-interest. They therefore can be controlled by their fear of punishment: If the pain obtained from punishment exceeds the pleasure obtained from crime, then people will choose not to commit crime. In this form, the neoclassical view is, with minor modifications, "the major model of human behavior held to by agencies of social control in all advanced industrial societies . . ."

THE TRANSITION TO POSITIVIST CRIMINOLOGY

Beccaria's theory changed criminal justice policies, especially in France, and led to the expectation that crime would soon decrease. But there was really no way to find out whether this occurred, since there were no annual crime statistics to measure whether crime was going up or down.

The first annual national crime statistics were published in France in 1827, about sixty years after Beccaria wrote his book. It soon became clear that these crime statistics were astonishingly regular. The rates of crime in general and of particular crimes such as murder and rape remained relatively constant from year to year. In addition, some places in the nation had higher crime rates while others had lower, and these differences remained relatively constant from year to year.

Today, we take such regularity in crime statistics for granted, but at that time, those who held a "free will" theory of crime expected random changes in the number of crimes, especially in the number of unpremeditated crimes such as passion murders. The regularity of crime statistics suggested that Beccaria had been right in his argument that, rather than being entirely the product of free will, crime must be influenced by factors in the larger society. It also supported Beccaria's hope that, by changing those factors, crime might be reduced.

But the new crime statistics also made it clear that crime rates were going up, not down. Earlier local statistics had suggested the same thing. Even more distressing, these statistics suggested that recidivism was going up. People who had received the prompt, proportionate punishments provided by the new French code were committing more new offenses rather than fewer. This suggested that Beccaria had been wrong to argue that changes in punishment policies alone could reduce crime,

The new crime statistics clearly revealed the failure of classical punishment policies, while at the same time suggesting that other social factors might influence the level of crime in society. This gave rise to a new brand of criminology, which eventually became known as positivism. Its goal was to study the causes of crime either in the larger society or in the individual.

CESARE LOMBROSO

Cesare Lombroso (1835-1909) was a physician who became a specialist in psychiatry, and his principal career was as a professor of legal medicine at the University of Turin. His name came into prominence with the publication of his book, *L'uomo delinquente (The Criminal Man)*, in 1876. In that book Lombroso proposed that criminals were biological throwbacks to an earlier evolutionary stage, people more primitive and less highly evolved than their noncriminal counterparts. Lombroso used the term *atavistic* to describe such people. The idea of evolution itself was relatively recent at the time, having first been proposed by Darwin in his book, *On the Origin of Species* (1859). That book had brought about the final break with the spiritualist, free-

will thought of the past. Darwin presented evidence that humans were the same general kind of creatures as the rest of the animals, except that they were more highly-evolved or developed. The ancestors of modern people were less highly evolved and were part of a continuous chain linking humans to the earliest and simplest forms of life. Even the idea that some individuals might be reversions to an earlier evolutionary stage had been originally suggested by Darwin, who had written:

With mankind some of the worst dispositions which occasionally without any assignable cause make their appearance in families, may perhaps be reversions to a savage state, from which we are not removed by many generations.

Lombroso, as a founder of the positive school of criminology is something of an anomaly. Lombroso is known principally for the earliest formulation of his theory of the atavistic criminal. The real basis of the positive school, however, is the search for the causes of criminal behavior. That search is based on the conception of multiple factor causation, in which some of the factors may be biological, others psychological, and still others social.

Lombroso did much by way of documenting the effects of many of these factors. As his thinking changed over the years, he looked more and more to environmental rather than biological factors. This change and growth in his thinking was evidenced by the increases in the number of pages in successive editions of *L'uoino delinquente*. In its first edition in 1876, Lombroso required 252 pages to explain his theory of evolutionary atavism as the cause of crime. Twenty years later, in the fifth edition of his book, he needed over 1,900 pages to include all the items that appeared to be related to crime causation. Those included such things as climate, rainfall, the price of grain, sex and marriage customs, criminal laws, banking practices, national tariff policies, the structure of government, church organization, and the state of religious belief. Lombroso's last book, *Crime, Its Causes and Remedies*, was a summary of his life work specially prepared for American readers. Published in 1911, two years after Lombroso's death, it includes discussions of many factors related to crime causation, of which by far the largest numbers are environmental rather than biological.

Lombroso's later, more mature thought therefore included many factors other than the physical or anthropological. He maintained that there are three major classes of criminals: (1) *born criminals*, to be understood as atavistic reversions to a lower or more primitive evolutionary form of development, and thought to constitute about one third of the total number of offenders; (2) *insane criminals*, i.e., idiots, imbeciles, paranoiacs, sufferers from melancholia, and those afflicted with general paralysis, dementia, alcoholism, epilepsy, or hysteria (strange bedfellows, to be sure); and (3) *criminaloids*, a large general class without special physical characteristics or recognizable mental disorders, but whose mental and emotional makeup are such that under certain circumstances they indulge in vicious and criminal behavior. Lombroso conceded that well over one half of all criminals were "criminaloids," so that they were not "born criminals" or "insane" in the sense that he used those terms.

By the time of Lombroso's death in 1909 it was evident that his theories were too simple and naive. Anthropology abandoned the conception of uniform, linear evolution with humans as the most highly evolved animal (and the English gentleman as the most highly evolved human), whereupon his notion of the atavistic criminal as a less evolved person became quite meaningless. Psychiatry and psychology were already marshaling evidence to show that the relationship between crime and epilepsy, or between crime and insanity, was much more complex and involved than Lombroso assumed.

Despite these criticisms, Lombroso's theory of the atavistic criminal received enormous public attention at the time. As a result, for most of the twentieth century, Lombroso was described in criminology textbooks as the first criminologist to search for the causes of crime and therefore as the founder of positivist criminology.

THE RELATION BETWEEN POSITIVIST AND CLASSICAL THEORIES

Positive criminology might seem opposed to classical criminology, but this is not necessarily the case. Rather, classical theories can be interpreted as implying a theory of human behavior that is quite consistent with positivism. In the past, classical criminologists have assumed that the certainty and severity of criminal punishments could affect criminal behavior, but that other variables in the environment could not. But in his defense of classical criminology, Roshier argues:

In general, there was nothing inherent in Beccaria's intellectual position to preclude a consideration of the socio-economic context of crime, any more than there was to necessitate his sole concentration on deterrence. . . . Indeed, it is an oddity that he seemed to see the criminal justice system as being the only aspect of the environment that influences individual decisions about whether it is worthwhile to commit crime or not.

Classical criminologists therefore could expand their theoretical frame of reference and examine how crime rates are influenced by a wide range of factors outside the criminal justice system, including biological, psychological, and social factors. All these factors could then be described as "causes" of crime. Reflecting this basic position, Beirne argues that the proper place for Beccaria's theory in the history of criminology lies "at the very beginning of the tradition to which it is commonly opposed, namely, positivist criminology."

A similar point can be made about positive criminology. In the past, positivist criminologists have assumed that biological, psychological, and social factors can influence criminal behavior, but that the certainty and severity of criminal punishments could not. But in their defense of positive criminology, Gottfredson and Hirschi argue:

No deterministic explanation of crime can reasonably exclude the variables of the classical model on deterministic grounds. These variables may account for some of the

variation in crime. If so, they have as much claim to inclusion in a "positivistic" model as any other set of variables accounting for the same amount of variation.

Thus, positive criminologists can include the certainty and severity of criminal punishments among the many other factors that might influence criminal behavior.

Positivist and classical criminology therefore are really part of the same enterprise—they both seek to identify the factors that influence the incidence of criminal behavior. The basic controversy between them is empirical rather than theoretical: Which factors have more influence on criminal behavior and which have less?

CONCLUSION

In the chapters that follow, the major theories on the causes of criminal behavior will be examined. Each of these theories suggests that certain factors, either at the individual or the societal level, may have a causal influence on crime. Research has disproven some of the earlier theories, in the sense of finding that the factors to which they point have no causal influence on crime whatsoever. Extensive research has been done on the more recent theories, but there is considerable disagreement about which factors have greater and which have lesser influence on crime.

The fact that there are no conclusive answers to the question of the causes of crime does not mean that criminology is unscientific. It is precisely because criminology theories are scientific, in the sense that they assert relationships between classes of observable phenomena, that they can be tested with research at all. Nonscientific explanations of crime, such as spiritual explanations, cannot be tested with research because they include phenomena that are not observable.

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A SOCIOLOGICAL THEORY OF CRIMINAL BEHAVIOR^{*}

THE PROBLEM FOR CRIMINOLOGICAL THEORY

If criminology is to be scientific, the heterogeneous collection multiple factors known to be associated with crime and criminality must be organized and integrated by means of explanatory theory which has the same characteristics as the scientific theory in other fields of study. That is, the conditions which are said to cause crime should be present when crime is present, and they should be absent when crime is absent. Such a theory or body of theory would stimulate, simplify, and give direction to criminological research, and it would provide a framework for understanding the significance of much of the knowledge acquired about crime and criminality in the past. Furthermore, it would be useful in minimizing crime rates, provided it could be “applied” in much the same way that the engineer “applies” the scientific theories of the physicist.

There are two complementary procedures which may be used to put order into criminological knowledge. The first is logical abstraction. Blacks, males, urban dwellers, and young adults all have comparatively high crime rates. What do they have in common that results in these high crime rates? Research studies have shown that criminal behavior is associated, in greater or lesser degree, with such social and personal pathologies as poverty, bad housing, slum-residence, lack of recreational facilities, inadequate and demoralized families, mental retardation, emotional instability, and other traits and conditions. What do these conditions have in common which apparently produces excessive criminality? Research studies have also demonstrated that many persons with those pathological traits and conditions do not commit crimes and that person in the upper socio-economic class frequently violate the law, although they are not in poverty, do not lack recreational facilities, and are not mentally retarded or emotionally unstable. Obviously, it is not the conditions or traits themselves which cause and they also are sometimes absent when criminality does occur. A generalization about crime and criminal behavior can be reached by logically abstracting the conditions and processes which are common to the rich and the poor, the males and the females, the blacks and the whites, the urban and the rural-dwellers, the young adults and the old adults, and the emotionally stable and the emotionally unstable who commit crimes.

In developing such generalizations criminal behavior must be precisely defined and carefully distinguished from noncriminal behavior. Criminal behavior is human behavior, and has much in common with noncriminal behavior. An explanation of criminal behavior should be consistent with a general theory of other human behavior, but the conditions and process said to produce crime and criminality should be specific. Many things which are necessary for behavior are not important to criminality. Respiration, for instance, is necessary for any behavior, but the

^{*} Edwin H. Sutherland and Donald R. Cressey, *Criminology* 77 (10th ed., 1978).

respiratory process cannot be used in an explanation of criminal behavior, for it does not differentiate criminal behavior from noncriminal behavior.

The second procedure for putting order into criminological knowledge is differentiation of levels of analysis. The explanation or generalization must be limited, largely in terms of chronology, and in this way held at a particular level. For example, when renaissance physicists stated the law of falling bodies, they were not concerned with the reasons why a body began to fall except as this might affect the initial momentum. Galileo did not study the "traits" of falling objects themselves, as Aristotle might have done. Instead, he noted the relationship of the body to its environment while it was falling freely or rolling down an inclined plane, and it made no difference to his generalization whether a body began to fall because it was dropped from the hand of an experimenter or because it rolled off the ledge of a bridge due to vibration caused by a passing vehicle. Also, a round object would roll off the bridge more readily than a square object, but this fact was not significant for the law of falling bodies. Such facts were considered as existing on a different level of explanation and were irrelevant to the problem of explaining the behavior of falling bodies.

Much of the confusion regarding crime and criminal behavior stems from a failure to define and held constant the level at which they are explained. By analogy, many criminologists and others concerned with understanding and defining crime would attribute some degree of causal power to the "roundness" of the object in the above illustration. However, consideration of time sequences among the conditions associated with crime and criminality may lead to simplicity of statement. In the heterogeneous of collection of factors associated with crime and criminal behavior, one factor often occurs prior to another (in much the way that "roundness" occurs prior to "vibration," and "vibration" occurs prior to "rolling off a bridge"), but a theoretical statement can be made without referring to those early factors. By holding the analysis at one level, the early factors are combined with or differentiated from later factors or conditions, thus reducing the number of variables which must be considered in a theory.

A motion picture made several years ago showed two boys engaged in a minor theft, they ran when they were discovered; one boy had longer legs, escaped, and became a priest; the other had shorter legs, was caught, committed to a reformatory, and became a gangster. In this comparison, the boy who became a criminal was differentiated from the one who did not become a criminal by the length of his legs. But "length of legs" need not be considered in a criminological theory because it is obvious that this condition does not determine criminality and has no necessary relation to criminality. In the illustration, the deferential in the length of the boys' legs apparently was significant to subsequent criminality or noncriminality only to the degree that it determined the subsequent experiences and associations of the two boys. It is in these experiences and associations, then, that the mechanisms and processes which are important to criminality or noncriminality are to be found.

TWO TYPES OF EXPLANATIONS OF CRIMINAL BEHAVIOR

Scientific explanations of criminal behavior may be stated either in terms of the processes which are operating at the moment of the occurrence of crime or in terms of the processes operating in the earlier history of the criminal. In the first case, the explanation may be called “mechanistic,” “situational,” or “dynamic”; in the second, “historical” or “developmental”. Both types of explanation are desirable. The mechanistic type of explanation has been favored by physical and biological scientists, and it probably could be the more efficient type of explanation of criminal behavior. As Gibbons said:

In many cases, criminality may be a response to nothing more temporal than the provocations and attractions bound up in the immediate circumstances. It may be that, in some kinds of lawbreaking, understanding of the behavior may require detailed attention to the concatenation of events immediately preceding it. Little or nothing may be added to this understanding from a close scrutiny of the early development of the person.

However, criminological explanations of the mechanistic type have thus far been notably unsuccessful, perhaps largely because they have been formulated in connection with an attempt to isolate personal and social pathologies among criminals. Work from this point of view has, at least, resulted in the conclusion that the immediate determinants of criminal behavior lie in the person-situation complex.

The objective situation is important to criminality largely to the extent that it provides an opportunity for a criminal act. A thief may steal from a fruit stand when the owner is not in sight but refrain when the owner is in sight, a bank burglar may attack a bank which is poorly protected but refrain from attacking a well-protected bank. A corporation which manufactures automobiles seldom violates the pure food and drug law, but a meat-packing corporation might violate these laws with great frequency. But in another sense, a psychological or sociological sense, the situation is not exclusive of the person, for the situation which is important is the situation as defined by the person who is involved. That is, some persons define a situation in which a fruit-stand owner is out of sight as a “crime-committing” situation, while others do not so define it. Furthermore, the events in the person-situation complex at the time a crime occurs cannot be separated from the prior life experiences of the criminal. This means that the situation is defined by the person in terms of the inclinations and abilities which he or she has acquired. For example, while a person could define a situation in such a manner that criminal behavior would be the inevitable result, past experiences would, for the most part, determine the way in which he or she defined the situation. An explanation of criminal behavior made in terms of these past experiences is a historical or developmental explanation.

The following paragraphs state such a developmental theory of criminal behavior on the assumption that a criminal act occurs when a situation appropriate for it, as defined by the person, is present. The theory should be regarded as tentative, and it should be tested by the factual information presented in the later chapters and by all other factual information and theories which are applicable.

DEVELOPMENTAL EXPLANATION OF CRIMINAL BEHAVIOR

The following statements refer to the process by which a particular person comes to engage in criminal behavior:

1. Criminal behavior is learned. Negatively, this means that criminal behavior is not inherited, as such; also, the person who is not already trained in crime does not invent criminal behavior, just as a person does not make mechanical inventions unless he has had training in mechanics.

2. Criminal behavior is learned in interaction with other persons in a process of communication. This communication is verbal in many respects but includes also "the communication of gestures."

3. The principal part of the learning of criminal behavior occurs within intimate personal groups. Negatively, this means that the impersonal agencies of communication, such as movies and newspapers, play a relatively unimportant part in the genesis of criminal behavior.

4. When criminal behavior is learned, the learning includes 9a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple: 9b) the specific direction of motives, drives, rationalizations, and attitudes.

5. The specific direction of motives and drives is learned from definitions of the legal codes as favorable or unfavorable. In some societies as individual is surrounded by person who invariably define the legal codes as rules to be observed, while in others he is surrounded by person whose definitions are favorable to the violation of the legal codes. In our American society these definitions are almost always mixed, with the consequence that we have culture conflict in relations to the legal codes.

6. A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law. This is the principle of differential association. It refers to both criminal and anticriminal associations and has to do with counteracting forces. When person become criminal, they do so because of contacts with criminal patterns and also because of isolation from anticriminal patterns. Any person inevitably assimilates the surrounding culture unless other patterns are in conflict; a southerner does not pronounce r because other southerners do not pronounce r. Negatively, this proposition of differential association means that associations which are neutral so far as crime is concerned have little or no effect on the genies of criminal behavior. Much of the experience of a person is neutral in this sense, for instance, learning to brush one's teeth. This behavior has no negative or positive effect on criminal behavior except as it may be related to associations which are concerned with the legal codes. This neutral behavior is important especially as an occupier of the time of a child so that he or she is not in contract with criminal behavior during the time the child is so engaged in the neutral behavior.

7. Differential association may vary in frequency, duration, priority, and intensity. This means that associations with criminal behavior and also associations with anticriminal behavior vary in those respects. Frequency and duration as modalities of associations are obvious and need no explanation. Priority is assumed to be important in the sense that lawful behavior developed in early childhood may persist throughout life, and also that delinquent behavior developed in early childhood may persist throughout life. This tendency, however, has not been adequately demonstrated, and priority seems to be important principally through its selective influence. Intensity is not precisely defined, but it has to do with such things as the prestige of the source of a criminal or anticriminal pattern and with emotional reactions related to the associations. In a precise description of the criminal behavior of a person, these modalities would be rated in quantitative form and a mathematical ratio would be reached. A formula in this sense has not been developed, and the development of such a formula would be extremely difficult.

8. The Process of learning criminal behavior by association with criminal and anticriminal patterns involves all of the mechanisms that are involved in any other learning. Negatively, this means that the learning of criminal behavior is not restricted to the Process of imitation. A person who is seduced, for instance, learns criminal behavior by association, but this process would not ordinarily be described as imitation.

9. While criminal behavior is an expression of general needs and values, it is not explained by those general needs and values, since noncriminal behavior is an expression of the same needs and values. Thieves generally steal in order to secure money, but likewise honest laborers work in order to secure money. The attempts by many scholars to explain criminal behavior by general drives and values, such as the happiness principle, striving for social status, the money motive, or frustration, have been, and must continue to be, futile, since they explain lawful behavior as completely as they explain criminal behavior. They are similar to respiration, which is necessary for any behavior, but which does not differentiate criminal from noncriminal behavior.

It is not necessary, at this level of explanation, to explain why persons have the associations they have; this certainly involves a complex of many things. In an area where the delinquency rate is high, a boy who is sociable, gregarious, active, and athletic is very likely to come in contact with the other boys in the neighborhood, learn delinquent behavior patterns from them, and become a criminal; in the same neighborhood the psychopathic boy who is isolated, introverted, and inert may remain at home, not become acquainted with the other boys in the neighborhood, and not become delinquent. In another situation, the sociable, athletic, aggressive boy may become a member of a scout troop and not become involved in delinquent behavior. The person's associations are determined in a general context of social organization. A child is ordinarily reared in a family; the place of residence of the family is determined largely by family income; and the delinquency rate is in many respects related to the rental value of the houses. Many other aspects of social organization affect the associations of person.

The preceding explanation of criminal behavior purports to explain the criminal and noncriminal behavior of individual persons. As indicated earlier, it is possible to state

sociological theories of criminal behavior which explain the criminality of a community, nation, or other group. The problem, when thus stated, is to account for variations in crime rates, which involves a comparison of the crime rates of various groups or the crime rates of a particular group at different times. The explanation of a crime rate must be consistent with the explanation of the criminal behavior of the person, since the crime rate is a summary statement of the number of person in the group who commit crimes and the frequency with which they commit crimes. One of the best explanations of crime rates from this point of view is that a high crime rate is due to social disorganization. The term social disorganization is not entirely satisfactory, and it seems preferable to substitute for it the term differential social organization. The postulate on which this theory is based, regardless of the name, is that crime is rooted in the social organization and is an expression of that social organization. A group may be organized for criminal behavior or organized against criminal behavior. Most communities are organized for both criminal and anticriminal behavior, and, in that sense the crime rate is an expression of the differential group organization. Differential group organization as an explanation of variations in crime rates is consistent with the differential association theory of the processes by which persons become criminals.

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ANOMIE, STRAIN AND JUVENILE SUBCULTURE*

ANOMIE AND CRIMINALITY

Chambers Twentieth Century Dictionary defines 'anomie' as: 'a condition of hopelessness caused by a breakdown of rules of conduct, and loss of belief and sense of purpose in society or in an individual.' In criminological terms it is normally used to depict a state of lawlessness or normlessness.

Durkheim

The term was first used last century as an explanation of human behaviour by the French sociologist and criminologist Emile Durkheim. Much of his theory is derived from his work on suicide, rather than on general criminality, but his published ideas have had a lasting effect upon criminological writing. Durkheim describes how societies begin in simple forms of interaction and are held together by solidarity and likenesses. In such societies, the members have similar aims and roles. These generally homogeneous societies he called mechanical. The growth of societies, together with technical and economic advances, makes the interrelationships more complicated and diverse. When this happens the functions and positions of individuals in societies will vary and each person's work becomes more specialised. Members of society also become more interdependent. Durkheim called these organic societies. He viewed these changes in society as being natural and unavoidable, leading to greater happiness for individuals because they would be released to enjoy goods produced by others. This transformation in most societies is a gradual occurrence leading to a healthy society. No one society is wholly mechanical nor wholly organic. In even the most primitive societies there is some division of labour, and in the most complex there is some uniformity. Every society therefore exhibits elements from each of his categories.

In both types of society law plays an important role. In mechanical societies, its main function is to enforce the uniformity and the *status quo*. In organic societies, its main function is to integrate the diverse parts of the society and ensure that they co-exist without problems. Partly due to the different functions of law in the different societies, crime also plays a different part.

Durkheim recognised that there was criminality in all societies. He saw crime as a normal occurrence, and said that it is impossible to have a society totally devoid of crime. All societies generate some rules and provide sanctions in case these are broken. This would clearly not be necessary unless the activities so prohibited were 'natural' and likely to occur. Therefore, crime is a necessary feature of every society and, provided it does not exceed certain levels, the society is healthy. Durkheim argues that crime originates in society and is a fundamental condition of social

* Katherine S. Williams, *Textbook on Criminology* 343-367 (3rd ed., 1997).

organisation; therefore no social organisation can be without crime. He claimed that the best examples of healthy levels of criminality were to be found in simple, mechanical societies.

An unhealthy level of criminality is more likely to arise in an organic society, and to be the result of the law being inadequate to regulate the interactions of the various parts of that society. The incomplete integration gives rise to anomie, one of the results of which is excessive or unhealthy levels of criminality. He used a number of examples, most of which arise from an unbalanced division of labour. These can largely be fitted into three categories. The first was a combination of financial and industrial conflict. The second was rigid and unnatural class divisions, such that the oppressed may rebel. The third and final situation he mentions is where there is an abnormal division of labour, such that workers become alienated from their jobs and become disinterested in them.

In each of these three examples, before anomie can be said to exist the major factor which needs to be present is a financial or industrial crisis - this may be a depression as experienced in the 1930s, or it may arise from a time of unrealistic and precarious prosperity, or from an overly fast industrial growth. For later writers, anomie could exist without the prior need for such an upheaval. But for Durkheim upheavals were necessary. For him anomie was the result of a lack of societal norms or regulations over people's desires and aspirations. 'No living being can be happy or even exist unless his needs are sufficiently proportioned to his means'. The only way he saw of regulating or controlling the insatiable desires of humans was by public opinion or morality persuading individuals that what they have is all they morally deserve. A healthy society is therefore one in which the upper and lower limits of the acceptable and reasonable expectations of workers or members of each social class are carefully defined and enforced. He recognised that these societal rules and norms would change over time as economic standards changed. A slow and progressive shift would ease such adjustments, but abrupt or violent economic disasters, or sudden growth of power and wealth, disturb the factors of control and produce anomie. When societal norms are overthrown, there may be resistance to new limitations, and so new norms take a long time to develop. It is at such times that suicide and homicide rates rise. To sum up: Durkheim viewed anomie as a state of lawlessness existing at times of abrupt social change, and affecting in particular the state of 'normlessness' which exists when the insatiable desires of humans are no longer controlled by society.

Durkheim's ideas have, to an extent, been attacked by some writers who claim that crime rates did not increase over the period of the French revolution or during the industrial revolution, periods depicted by Durkheim as being in a state of upheaval and anomie. The discrepancy in the figures arose because Durkheim based his theories on rates of suicide, which he found to be increasing, and assumed that crime rates were similarly affected. Sainsbury (1955) also found that suicide was related to social disorganisation, but crime was not. However, Durkheim's main thesis was that crime is associated with breakdown of social norms and rules giving rise to an absence of social control. There are two elements to this: the first is the breakdown of regulations, rules and informal limits, undermining confidence in the social structure; the second is that this

structural problem leads to psychological feelings of isolation. The overall disorder and disorganisation, social and personal, shifts behaviour in the direction of crime. There may still be substance in this.

Merton

After Durkheim, the most famous criminological writer on anomie is the American Robert K. Merton. He drew on Durkheim's ideas to try to explain the crime problem in the United States of America. Instead of centering problems of anomie on the insatiable desires of human beings, he explains them as something which may exist when desires and needs, though limited, still go beyond what could be satisfied in socially acceptable ways. This is very close to Durkheim's idea of anomie in that it would suggest that to prevent an anomic situation arising, carefully structured norms must be enforced. The difference is that, for Durkheim, the moral norms to be upheld or enforced regulate the individual's desires, whereas for Merton, they would regulate and control the individual's willingness to use unacceptable ways to achieve those desires. Merton therefore argues that society will not be anomic if its members only use legitimate means of advancement, even if their desires are totally unrestricted; it is the relationship between desires and the means of achieving those desires which is fundamental [Merton (1949)]. This link between desires and means has led to his theory being called a strain theory; one in which everyone is pressured to succeed, but those who are unable or least likely to succeed by legitimate means are under most strain to use illegitimate or illegal opportunities.

Durkheim said the individual's desires are derived from within the person; in Merton's view the desires of individuals are largely defined by society. Each culture and society has different elements which it considers worth striving for. In America and much of the Western world, this is wealth and, through wealth, material possessions. Wealth is encouraged far beyond its own usefulness, and great wealth is equated with personal value and worth. Those who lack money are looked down on, even if they may have other characteristics which might be given greater worth in other societies. Furthermore, Merton argues that Western cultures, and the American culture in particular far from limiting desires actually encourages everyone to seek absolute wealth. Everyone is told that further enrichment is possible and that they should all strive towards it. If they do not, they are considered lazy and of less worth (Durkheim would have considered that this alone renders the culture anomic).

Merton maintains that the healthy society lays down accepted means of achieving the ends or goals. In Western cultures, the means of achieving those ends are supposed to be through hard and honest toil, not through theft and fraud. However, the latter means may well be more efficient. If society is to remain healthy, therefore, it is important that participating in the accepted means carries some reward. Merton argued that if society laid sufficient emphasis on conformity (e.g., via systems of reward for conformity or acknowledging any sacrifices made) then it would remain healthy. The philosophy behind this thesis might well be: 'It's not whether you win that matters, it's how you play the game'. However, if the emphasis is on reaching certain goals with no control of the way in which that is achieved, then society would be anomic. He accepted that

this unhealthy attitude is prevalent in America, and embodied in commonplace attitudes such as: 'It's winning that matters, not how you play the game'. The 'American Dream' centres on wealth. How that goal is reached has become unimportant, so that the person who achieves wealth through unacceptable or dubious means is still rewarded with prestige, power and social status. Merton said that in such a society the regulatory norms are so undermined that many people either withdraw their support for the rules or withhold their support and live by expediency (i.e., using whatever means, whether legal or not, are most likely to achieve their goals).

Merton applied his ideas to provide an explanation of the pattern of crime as revealed by the official US statistics. Those figures, like those for England and Wales, show a marked discrepancy in criminality between the various strata of society. Each of them show a heavy criminal rate among the lower or working class of society, and a low rate among the upper, moneyed or powerful classes. Whether or not Merton simply accepted the correctness of the official statistics is debatable, but he did accept that there was more crime committed by the lower classes than any other sector of society. It was this discrepancy that he sought to explain.

His original study indicated a large amount of crime throughout American society, and his basic theory was then constructed to fit the statistics and the distribution of crime. Consequently, he argued that only part of American society was anomic, or at least that the anomic nature of that society only caused criminality to arise in one well-defined stratum, namely the lower class. Criminality arose, not necessarily because of discrepancies between the goals and the approved means of achieving those goals, but because all the members of that society were led to believe that there was equality of opportunity. In practice, there were sharp constraints on such purported equality. The consequent feelings of unfairness could lead to criminality. Since the lower classes suffered most from educational and occupational discrimination, they were least likely to attain the 'American Dream' through the legitimate opportunity structures. It was these people who were most likely to escape from low paid and boring jobs by engaging in criminal activities. He argues that anomie becomes the differential application of opportunity rather than an application of social controls or norms; it is a strain theory. Frustration with the system, or possible economic necessity, gives rise to strain and drives these people to resort to criminality.

Merton's theory is sometimes known as the 'means-end theory' of deviance. It involves an assessment both of desired goals and of structural means. He used their interaction to describe five types of social activity or reaction by individuals to the society in which they live. The first is conformity. In this reactive state, individuals accept both societal goals and society's means of achieving those goals, even when they cannot or clearly will not achieve them. In Merton's view it is because most people fall into this category that society remains basically stable and most people are not criminal. Merton's stress on this aspect probably arose out of his general acceptance of the official statistics. However, there is in fact more criminality committed by a much wider population base than officially recorded. The 'conformity' category is much smaller than envisaged by Merton and, even in stable communities; it may actually be a minority.

Nonetheless conformity to goals and means, even if it places individuals in a very unpleasant and undesirable position in society, is very common behaviour.

The other four types of behaviour are all categorised by Merton as deviant, although each covers a very different type of reaction. Of these, the first is called 'innovation', and comprises the individuals who accept social goals but reject the legitimate means of achieving them in favour of more effective but officially prescribed means. It is into this category that he fits most of the individuals who are included in the criminal statistics. Therefore, he sees innovation as most common among the lower class Americans because they are stigmatised because of their low skill, low pay and greater vulnerability to unemployment. The frustrations generated by this may give rise to crime as a means whereby higher status (i.e., wealth) can be reached more quickly. This reaction would be most likely to give rise to crimes against property, such as theft and burglary, or possibly to organised crime where the sole end is financial gain.

The second of Merton's deviant reactions, he calls 'ritualism'. In this category the goals are abandoned but the means are almost compulsively adhered to. This encompasses many lower-middle-class Americans who abandoned any dreams of bettering their lot in life but still stick rigidly to the rules of society. It is questionable whether this is actually a deviant state; it certainly does not involve any criminality. Merton suggested that, because the society sets the goals, lack of desire to fulfil those is itself deviant because it denies part of the culture.

The third deviant reaction he labels 'retreatism', whereby an individual rejects both goals and the means of achieving them. Merton felt that these people did not really belong to the society in which they lived. In this category he included the vagrant or tramp, alcoholics and drug addicts. It might also include racial or religious minorities, particularly if they are severely disadvantaged. All these people might well reject society's goals and the means of achieving them but feel no desire to fight for few ones. Their deviance is negative. The vagrant might well commit public nuisance offences. Alcoholics and drug addicts may commit offences while under the influences of such substances, and might also be driven to commit offences (usually property offences) in order to obtain those substances. The members of minority racial and religious backgrounds might also simply retreat and become introspective, committing no crime in so doing, but not really contributing to society. This behaviour might be viewed as unsociable but clearly cannot be considered deviant in a criminal sense.

Merton then includes 'rebellion' as the last of the reactions resulting in anomie. In this category again both goals and means of achieving them are rejected, but rebellion also includes a desire to substitute new goals in place of the conventional ones. What is involved is a conscious rejection of accepted goals, often combined with a cause or an ideal for which to fight. Their deviance has a positive end which is often pursued by negative means. In this category are the street gang members, the terrorist and/or freedom fighter. The rebellious reaction often involves destructive crimes, such as wilful damage to property and crimes of public disorder. It may even include murder, terrorist offences and any crime designed to attack the basis of the culture.

These five possible reactions of individuals to their society are not mutually exclusive. People may react differently at different times in their lives or in different spheres of their lives (such as at work, or within the family or peer group). For example, a person at work may be a true achiever and hard and dedicated worker who fit into the non-deviant and non-criminal role of conformity. In private, that same individual may use drugs, fitting into a retreatist and necessarily criminal response; and in the public sphere he or she may fight for a political ideal different from that presently existing, and involving a rebellious response which may or may not include criminality, depending on the behaviour chosen to express this political ideal.

Merton stated that his theory of anomie, or 'strain theory' as it is sometimes called, is only intended to explain certain types of criminality, particularly street criminality. This, to an extent, explains why he centres on crimes committed by the lower classes and crimes which may exhibit a lack of opportunity.

More fundamentally, Merton claims that American society, with its concentration on personal wealth and achievement at any cost, generates crime because citizens are encouraged to want and expect a lot but the societal structures necessary to deliver it do not exist. Recently a large part of this thesis has been given renewed attention in the work of Messner and Rosenfeld (1994), who argue that crime (in America) results from the culture of prioritising wealth, which is heavily supported by State institutions which give power to the economy. The cultural pull is the same as that marked out by Merton, but the structural analysis is rather different. For Messner and Rosenfeld, the State structure and social institutions (family, health and education) are designed to give strength to the economy. The American people are socialised to back these structures as supports for the economy - so education is not prized as an end in itself, for learning or personal development, but merely as a means to better paid employment. The culture and institutions centre on money and set values which support the free market. This encourages people to use the most efficient means available to them to attain the desired goals: the opportunities offered in the market economy are accepted by most as the approved and legal way of achieving this; but for some the most efficient means may be criminal. There is a wide range of criminal activities, from crude street crime such as robbery (often armed robbery) to more innovative forms such as insider dealing to defraud the stock market. Messner and Rosenfeld argue that other societies which are less focused on purely monetary values suffer less crime. However, Britain in the 1980s and 1990s has been moving towards a similar priority for market values: if their theory is correct, it does not bode well for British crime rates in the near future.

The policy implications of these approaches are largely outside the purview of the criminal justice system. They require wider political objectives - to provide greater educational and job training opportunities; to build up the possibilities for people to obtain jobs with good wages and reasonable hours; to encourage cultural deals which focus on community and respect for humanity; and to ensure that more weight is given to the obligations of citizenship (so far as this involves respect for others) - being considered alongside individual freedom and rights.

Durkheim and Merton did not see things in entirely the same light. The former places heavy emphasis upon a condition of 'normlessness' arising out of abrupt change; the latter sees anomie as an endemic condition. Merton says this can exist at any time in any society, as long as the factors mentioned above exist. A society can be basically stable while part, even a large part, of it is anomic.

Durkheim and Merton each document a slightly different idea of anomie. This can be problematic when other authors use the term unless the person using the word makes its meaning perfectly clear. There are two main differences. The first is the more fundamental. Durkheim states that the desires of individuals are natural and fixed, the level of criminal behaviour and of anomie is decided by the efficiency with which these desires are restrained, and that they are most likely to crumble and generate crime in periods of rapid change. Merton, on the other hand, says that society, not the individual, sets the desires and goals, and that same society also sets the acceptable means of achieving the ends. If rewards are only bestowed for obtaining the ends, the restraining means become weakened, encouraging the use of unacceptable and illegal means.

The second, and more practical difference, is that Durkheim talks about a whole society being anomic. Merton would consider that the condition only affects certain parts of the society (i.e., those parts which appear in the official crime statistics), and generally speaking those parts are drawn from the lower classes. Merton in effect focuses on the availability of legitimate opportunities to achieve wealth. These opportunities exist for the higher classes, but not for the lower classes. The absence of such opportunities gives rise to strain and therefore criminality in the lower classes.

Some now refer to Merton's theory as a strain theory rather than anomie. This is because of his assertion that the motivation to commit crime arises when the legitimate means of achieving success are unavailable. The pressure to succeed exists, but the means are absent. The conflict or strain drives the individual towards a criminal way of achieving the success. This type of pressure is depicted again in subcultural theories. It can be seen as similar to, or closely related to, ideas of relative deprivation.

Most recently, anomie has been used as an explanation for the increase in crime during times of unemployment and recession. This last possibility fulfils Durkheim's need for a major upheaval before anomie can exist. Its effects are reinforced if the moral norms promoting acceptance of the rules of society appear to be missing. Some see this absence in the way the mass media, particularly TV, churn out the ideal of a materialistic existence as the norm to which all right-thinking members of society should aspire, even though few will ever achieve such a financial 'nirvana' through legitimate means. For Durkheim, these two factors would make the society anomic and so cause criminality to increase. Obviously, not all members of society will become deviant: some may resign themselves to a less comfortable existence; some may achieve the dream, or alternatively see their chances of doing so as very high, rendering criminality unnecessary. But for others the problem of anomie might be resolved by a resort to criminal conduct.

Merton concentrates more on the opportunity structures. He argues that even in a recession, people are told that there are opportunities and that they are fairly administered. These messages clash with the experience of many, especially the unemployed who have little realistic chance of achieving financial or occupational success. Many will accept their lot, or simply give up any dreams of attaining more than they already have; but there will be others who become sufficiently disillusioned and frustrated for criminality to provide both a release and an achievement. This is especially likely if they view their failure as a fault of the unfair operation of the system, rather than a reflection of their own ability. Although Merton saw this phenomenon as confined to the lower classes, there is no compelling reason why this should be the case. Each corporate body has a goal, usually financial, to achieve (i.e., high and ever-increasing profit). In times of recession, it is more difficult to achieve these goals, and the pressure to use unacceptable and criminal means is much stronger. The more the company, the firm or its executives are pressurised by the recession, the more compelling the temptation to offend by such things as tax evasion, VAT fraud, and cost-cutting in relation to health and safety.

Recently, themes such as those found in anomie have been appearing in the theories of Left Realists and in links between crime and modernisation, but the core is that there is a problem with the interplay between civilisation and modernity. The assumption is that as civilisation develops the external controls on people's actions become more sophisticated and diverse. Alongside this, people develop internal psychological controls or inhibitions to take into account the more complex standards of acceptable behaviour. Personal conduct as it affects others is thus presumed to have generally improved as civilisation progresses. This supposedly is seen in a general reduction in violence between about 1500 (the late medieval period) and the mid-twentieth century. It is then asserted that, unfortunately, that trend has regressed since the middle of this century, as exemplified both in wars and such brutality as experienced in Germany in the 1930s, or in the former Yugoslavia in the 1980s and 1990s. Ideas of modernity, on the other hand, centre on disruption caused by industry, social upheavals and economic upheavals to explain how controls both internal and external, designed to prevent criminal activities may break down. The result is the increase in criminality, especially property crimes, in more modern cultures. Both the assumptions and the empirical basis for these sweeping assertions are questionable: they are presented here as one of the ways in which anomie might be used by present theorists to explain crime trends.

It can be seen that anomie, whether in the form defined by Durkheim or in that used by Merton, can have an effect upon the criminality of the State. Each approach explains why some people may be motivated to commit a crime. The theory of anomie therefore can be another useful tool of explanation and prediction for the criminologist.

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DURKHEIM, ANOMIE, AND MODERNIZATION*

The preceding chapter concluded that economic inequality may be associated with crime. In contrast Emile Durkheim viewed inequality as a natural and inevitable human condition that is not associated with social maladies such as crime unless there is also a breakdown of social norms or rules. Durkheim called such a breakdown *anomie* and argued that it had occurred in his own society as a result of the rapid social changes accompanying the modernization process. Like Lombroso's theories, written approximately twenty years earlier, Durkheim's theories were in part a reaction to the classical assumptions that humans were free and rational in a contractual society. But where Lombroso had focused on the determinants of human behavior within the individual, Durkheim focused on society and its organization and development.

Durkheim's theories are complex, but his influence on criminology has been great. The present chapter examines his theories and discusses them in the context of later research on the relationship between crime and modernization. But Durkheim's ideas also appear in several later chapters. In the 1920s a group of Chicago sociologists used his theories, among others, as the basis for an extensive research project linking juvenile delinquency to rapid social changes in urban areas. In 1938 Robert K. Merton revised Durkheim's conception of *anomie* and applied it directly to American society. This and other similar theories are now known as *strain* theories of crime and delinquency. In 1969 Travis Hirschi returned to Durkheim's original conception of *anomie* and used it as the basis for his *control* theory of delinquency. Finally, Durkheim's view of "crime as normal" is the basis for social reaction views of the law-enactment process.

EMILE DURKHEIM

Emile Durkheim (1858-1917) has been called "one of the best known and one of the least understood major social thinkers."¹ Presenting his thought is no easy task, since "the controversies which surround this thought bear upon essential points, not details." For this reason it is best to approach his work by first considering the political and intellectual climate in which it evolved.

The nineteenth century in France was an age of great turmoil generated by the wake of the French Revolution of 1789 and by the rapid industrialization of French society. Speaking of these two :

"Revolutions," Nisbet has pointed out that "In terms of immediacy and massiveness of impact on human thought and values, it is impossible to find revolutions of comparable magnitude anywhere in human history." The writings of the day were filled with a "burning sense of society's sudden, convulsive turn from a path it had followed for millennia" and a "profound intuition of the disappearance of historic values—and with them, age-old securities, as well as age-old tyrannies and inequalities—and the coming of

new powers, new insecurities, and new tyrannies that would be worse than anything previously known unless drastic measures were taken . . ."

Sociology had been developed by Auguste Comte in the first half of the century largely in response to the effects of these two revolutions; it was part of a more general effort to construct a rational society out of the ruins of the traditional one. Sociologists saw themselves providing a rational, scientific analysis of the monumental social changes that were occurring, in order to "mastermind the political course of 'social regeneration.'" This regeneration would consist primarily of the reestablishment of social solidarity, which appeared to have substantially disintegrated in French society.

Emile Durkheim was born in a small French town on the German border, one year after the death of Comte. After completing his studies in Paris he spent several years teaching philosophy at various secondary schools in the French provinces near Paris. He then spent a year in Germany, where he studied social science and its relation to ethics under the famed experimental psychologist Wilhelm Wundt. Durkheim's publication of two articles as a result of these studies led to the creation of a special position for him at the University of Bordeaux, where in 1887 he taught the first French university course in sociology. In 1892 Durkheim received the first doctor's degree in sociology awarded by the University of Paris, and ten years later he returned to a position at the university, where he dominated sociology until his death in 1917.

Durkheim's analysis of the processes of social change involved in industrialization is presented in his first major work, *De la division du travail social (The Division of Labor in Society)*, written as his doctoral thesis and published in 1893. In it he describes these processes as part of the development from the more primitive "mechanical" form of society into the more advanced "organic" form. In the mechanical form each social group in society is relatively isolated from all other social groups, and is basically self-sufficient. Within these social groups individuals live largely under identical circumstances, do identical work, and hold identical values. There is little division of labor, with only a few persons in the clan or village having specialized functions. Thus there is little need for individual talents, and the solidarity of the society is based on the uniformity of its members.

Contrasted with this is the organic society, in which the different segments of society depend on each other in a highly organized division of labor. Social solidarity is no longer based on the uniformity of the individuals, but on the diversity of the functions of the parts of the society. Durkheim saw all societies as being in some stage of progression between the mechanical and the organic structures, with no society being totally one or the other. Even the most primitive societies could be seen to have some forms of division of labor, and even the most advanced societies would require some degree of uniformity of its members.

Law plays an essential role in maintaining the social solidarity of each of these two types of societies, but in very different ways. In the mechanical society law functions to enforce the uniformity of the members of the social group, and thus is oriented toward repressing any

deviation from the norms of the time. In the organic society, on the other hand, law functions to regulate the interactions of the various parts of society and provides restitution in cases of wrongful transactions. Because law plays such different roles in the two types of societies, crime appears in very different forms. Durkheim argued that to the extent a society remains mechanical, crime is "normal" in the sense that a society without crime would be pathologically overcontrolled. As the society develops toward the organic form, it is possible for a pathological state, which he called anomie, to occur, and such a state would produce a variety of social maladies, including crime. Durkheim developed his concept of "crime as normal" in his second major work, *The Rules of the Sociological Method*, published in 1895, only two years after *The Division of Labor*; he went on to develop anomie in his most famous work, *Suicide*, published in 1897.

CRIME AS NORMAL IN MECHANICAL SOCIETIES

Mechanical societies are characterized by the uniformity of the lives, work, and beliefs of their members. All the uniformity that exists in a society, that is, the "totality of social likenesses," Durkheim called the *collective conscience*. Since all societies demand at least some degree of uniformity from their members (in that none are totally organic), the collective conscience may be found in every culture. In every society, however, there will always be a degree of diversity in that there will be many individual differences among its members. As Durkheim said, "There cannot be a society in which the individuals do not differ more or less from the collective type."

To the extent that a particular society is mechanical, its solidarity will come from the pressure for uniformity exerted against this diversity. Such pressure is exerted in varying degrees and in varying forms. In its strongest form it will consist of criminal sanctions. In weaker forms, however, the pressure may consist of designating certain behaviors or beliefs as morally reprehensible or merely in bad taste.

If I do not submit to the conventions of society, if in my dress I do not conform to the customs observed in my country and my class, the ridicule I provoke, the social isolation in which I am kept, produce, although in attenuated form, the same effects as a punishment in the strict sense of the word. The constraint is nonetheless efficacious for being indirect.

Durkheim argued that "society cannot be formed without our being required to make perpetual and costly sacrifices." Those sacrifices, embodied in the demands of the collective conscience, are the price of membership in society, and fulfilling the demands gives the individual members a sense of collective identity, which is an important source of social solidarity. But, more important, these demands are constructed so that it is inevitable that a certain number of people will not fulfill them. The number must be large enough to constitute an identifiable group, but not so large as to include a substantial portion of the society. This enables

the large mass of the people, all of whom fulfill the demands of the collective conscience, to feel a sense of moral superiority, identifying themselves as good and righteous, and opposing themselves to the morally inferior transgressors who fail to fulfill these demands. It is this sense of superiority, of goodness and righteousness, which Durkheim saw as the primary source of the social solidarity. Thus criminals play an important role in the maintenance of the social solidarity, since they are among the group of those identified by society as inferior, which allows the rest of society to feel superior.

The punishment of criminals also plays a role in the maintenance of the social solidarity. When the dictates of the collective conscience are violated, society responds with repressive sanctions not so much for retribution or deterrence, but because without them those who are making the "perpetual and costly sacrifices" would become severely demoralized. For example, when a person who has committed a serious crime is released with only a slap on the wrist, the average, law-abiding citizens may become terribly upset. They may feel they are playing the game by the rules, and so everyone else should too. The punishment of the criminal is necessary to maintain the allegiance of average citizens to the social structure. Without it average citizens may lose their overall commitment to the society and their willingness to make the sacrifices necessary for it. But beyond this, the punishment of criminals also acts as a visible, societal expression of the inferiority and blameworthiness of the criminal group. This reinforces the sense of superiority and righteousness found in the mass of the people, and thus strengthens the solidarity of the society.

Crime itself is normal in society because there is no clearly marked dividing line between behaviors considered criminal and those considered morally reprehensible or merely in bad taste. If there is a decrease in behaviors designated as criminal, then there may be a tendency to move behaviors previously designated as morally reprehensible into the criminal category. For example, not every type of unfair transfer of property is considered stealing. But if there is a decrease in the traditional forms of burglary and robbery, there then may be an associated increase in the tendency to define various forms of white-collar deception as crime. These behaviors may always have been considered morally reprehensible, and in that sense they violated the collective conscience. They were not, however, considered crimes. Society moves them into the crime category because criminal sanctions are the strongest tool available to maintain social solidarity.

Since the institution of punishment serves an essential function, it will be necessary in any society.

Imagine a society of saints, a perfect cloister of exemplary individuals. Crimes, properly so called, will there be unknown; but faults which appear venial to the layman will create there the same scandal that the ordinary offense does in ordinary consciousnesses. If, then, this society has the power to judge and punish, it will define these acts as criminal and will treat them as such. For the same reason, the perfect and

upright man judges his smallest failings with a severity that the majority reserve for acts more truly in the nature of an offense.

Thus a society without crime is impossible. If all the behaviors that are presently defined as criminal no longer occurred, new behaviors would be placed in the crime category. Crime, then, is inevitable because there is an inevitable diversity of behavior in society. The solidarity of the society is generated by exerting pressure for conformity against this diversity, and some of this pressure will inevitably take the form of criminal sanctions.

Let us make no mistake. To classify crime among the phenomena of normal sociology is not merely to say that it is an inevitable, although regrettable, phenomenon, due to the incorrigible wickedness of men; it is to affirm that it is a factor in public health, an integral part of all societies.

The abnormal or pathological state of society would be one in which there was no crime. A society that had no crime would be one in which the constraints of the collective conscience were so rigid that no one could oppose them. In this type of situation crime would be eliminated, but so would the possibility of progressive social change. Social change is usually introduced by opposing the constraints of the collective conscience, and those who do so are frequently declared to be criminals, Thus Socrates and Jesus were declared criminals, as were Mahatma Gandhi and George Washington. The leaders of the union movement in the 1920s and 1930s were criminalized, as were the leaders of the civil rights movement of the 1960s. If the demands of the collective conscience had been so rigidly enforced that no crime could exist, then these movements would have been impossible also.

Thus crime is the price society pays for the possibility of progress. As Durkheim wrote,

To make progress, individual originality must be able to express itself. In order that the originality of the idealist whose dreams transcend his century may find expression, it is necessary that the originality of the criminal, who is below the level of his time, shall also be possible. One does not occur without the other.

In a similar way individual growth cannot occur in a child unless it is possible for that child to misbehave. The child is punished for misbehavior, and no one wants the child to misbehave. But a child who never did anything wrong would be pathologically overcontrolled. Eliminating the misbehavior would also eliminate the possibility of independent growth. In this sense the child's misbehavior is the price that must be paid for the possibility of personal development. Durkheim concluded:

From this point of view, the fundamental facts of criminality present themselves to us in an entirely new light. Contrary to current ideas, the criminal no longer seems a totally unsociable being, a sort of parasitic element, a strange and unassimilable body, introduced into the midst of society. On the contrary, he plays a definite role in social life. Crime, for its part, must no longer be conceived as an evil that cannot be too much suppressed. There is no occasion for self-congratulation when the crime rate drops

noticeably below the average level, for we may be certain that this apparent progress is associated with some social disorder.

ANOMIE AS A PATHOLOGICAL STATE IN ORGANIC SOCIETIES

To the extent that a society is mechanical, it derives its solidarity from pressure for conformity against the diversity of its members. The criminalizing of some behaviors is a normal and necessary part of this pressure. But to the extent that a society is organic, the function of law is to regulate the interactions of the various parts of the whole. If this regulation is inadequate, there can result a variety of social maladies, including crime. Durkheim called the state of inadequate regulation anomie.

Durkheim first introduced this concept in *The Division of Labor in Society*, where he argued that the industrialization of French society, with its resulting division of labor, had destroyed the traditional solidarity based on uniformity. But this industrialization had been so rapid that the society had not yet been able to evolve sufficient mechanisms to regulate its transactions. Periodic cycles of overproduction followed by economic slowdown indicated that the relations between producers and consumers were ineffectively regulated. Strikes and labor violence indicated that the relations between workers and employers were unresolved. The alienation of the individual worker and the sense that the division of labor was turning people into mere "cogs in the wheel" indicated that the relation of the individual to work was inadequately defined.

Durkheim expanded and generalized his notion of anomie four years later with the publication of his most famous work, *Le Suicide*. In it he statistically analyzed data that showed that the suicide rate tends to increase sharply both in periods of economic decline and economic growth. Whereas suicide in a time of economic decline might be easily understood, the key question is why suicide would increase in a time of prosperity. Durkheim proposed that society functions to regulate not only the economic interactions of its various components, but also how the individual perceives his own needs. Durkheim's theory of anomie has been used as the basis for later explanations of crime and a variety of other deviant behaviors.

The theory began with a comparison of animal and human nature. In animals, Durkheim argued, the physical body naturally limits appetites. Thus, animals with full stomachs and safe warm places to sleep will feel quite satisfied. But humans have active imaginations that allow them to feel dissatisfied even when their physical needs are met. In humans, satisfying some wants and needs tends to awaken new wants and needs, so that "the more one has, the more one wants.

Thus, where an animal's physicality puts natural limits on its appetites, human appetites are naturally unlimited.

The only mechanism that can limit human appetites, according to Durkheim, is human society. Societies create moral rules about what people in various-social positions can reasonably expect to acquire:

As a matter of fact, at every moment of history there is a dim perception, in the moral consciousness of societies, of the respective value of different social services, the relative reward *due* each, and the consequent degree of comfort appropriate to the average to workers in each occupation. Under this pressure, each in his sphere vaguely realizes the extreme limit set to his ambitions and aspires to nothing beyond Thus, an end and goal are set to the passions. .

There are various situations in which these societal rules may weaken or even break down, but Durkheim focused on situations of rapid social change, including those in which the society goes into an economic recession or depression:

In the case of economic disasters, indeed, something like a declassification occurs which suddenly casts certain individuals into a lower state than their previous one. Then they must reduce their requirements, restrain their needs, learn greater self-control. ... So they are not adjusted to the condition forced on them, and its very prospect is intolerable..

Durkheim used this experience to explain the high rates of suicide during times of economic downturns. More importantly, he argued that something similar happened in times of rapid economic expansion:

It is the same if the source of the crisis is an abrupt growth of power and wealth. Then, truly, as the conditions of life are changed, the standard according to which needs were regulated can no longer remain the same..... The scale is upset; but a new scale cannot be immediately improvised. Time is required for the public conscience to reclassify men and things. So long as the social forces thus freed have not regained equilibrium, their respective values are unknown and so all regulation is lacking for a time. . . .

He then made the surprising argument that anomie (or the deregulation of appetites) would be worse in times of prosperity than in times of depression, since prosperity stimulates the appetites just at the time when the restraints on those appetites have broken down:

With increased prosperity desires increase. At the very moment when traditional rules have lost their authority, the richer prize offered these appetites stimulates them and makes them more exigent and impatient of control. The state of de-regulation or anomy is thus further heightened by passions being less disciplined, precisely when they need more disciplining.

Durkheim went on to argue that French society, over the previous 100 years, had deliberately destroyed the traditional sources of regulation for human appetites. Religion had almost

completely lost its influence over both workers and employers. Traditional occupational groups, such as the guilds, had been destroyed. Government adhered to a policy of laissez-faire, or noninterference, in business activities. As a result human appetites were no longer curbed. This freedom of appetites was the driving force behind the French industrial revolution, but it also created a chronic state of anomie, with its attendant high rate of suicide.

ASSESSING DURKHEIM'S THEORY OF CRIME

Durkheim presented his theory of crime in the context of an overall theory of modernization - the progression of societies from the mechanical to the organic form. One of the problems with assessing his theory is that he predicted that different things would happen at different times. Specifically he argued that: (1) the punishment of crime would remain fairly stable in mechanical societies, independent of changes in the extent of criminal behavior; (2) as those societies made the transition to organic societies in the process of modernization, a greater variety of behaviors would be tolerated, punishments would become less violent as their purpose changed from repression to restitution, and there would be a vast expansion of "functional" law to regulate the interactions of the emerging organic society; and (3) in organic societies, the extent of criminal behavior would increase during periods of rapid social change. Each of these ideas has generated additional theories and research in more recent times.

Erikson reformulated Durkheim's theory about the stability of punishment in mechanical societies, based on a study of the Puritan colony in seventeenth-century Massachusetts. This society had a relatively constant level of punishment throughout the century despite three "crime waves" attributed to Antinomians, Quakers, and witches. Erikson concluded: "When a community calibrates its control machinery to handle a certain volume of deviant behavior it tends to adjust its ... legal . . . definitions of the problem in such a way that this volume is realized."

Blumstein and his colleagues attempted to demonstrate a similar process in modern societies. They examined imprisonment rates in the United States from 1924 to 1974, 'in Canada from 1880 to 1959, and in Norway from 1880 to 1964, arguing that these rates remained stable over the time periods and that the stability was maintained by adjusting the types of behaviors that resulted in imprisonment. Later studies either failed to find a similar effect or have criticized the research methods of studies that do find an effect. More recently, the explosion of incarceration in the United States associated with the "get tough" era has clearly demonstrated that punishment in the United States is no longer "stable," if it ever was. For example, before 1970, the imprisonment rate in the United States had generally remained somewhere around 100 prisoners for every 100,000 people in the population, whether crime rates were high or low. Since then, however, the imprisonment rate has been steadily rising and by 2000 it was 478 prisoners for every 100,000 people in the population.

Durkheim's theory, however, does not predict that punishment levels in modern industrialized societies will remain constant, since those cannot be considered mechanical societies. The Puritan colony in Massachusetts can reasonably be considered such a society, so that Erikson's study supports Durkheim's theory while the others neither support nor challenge it. On the other hand, Erikson's interpretation has been challenged by Chambliss, who suggests that "his conclusion is hardly supported by the data he presents." Erikson, following Durkheim, had described the three crime waves as being generated by the need to establish the moral boundaries of the community. Chambliss pointed out that each of these crime waves occurred when the power and authority of the ruling groups were threatened. He concluded:

Deviance was indeed created for the consequences it had. But the consequences were not "to establish moral boundaries"; rather, they aided those in power to maintain their position. . . . Erikson gives no evidence that any of these crime waves actually increased social solidarity except through the elimination of alternative centers of authority or power.

Durkheim made three arguments about crime during the process of transition from mechanical to organic societies: A greater variety of behaviors would be tolerated, punishments would become less violent as their purpose changed from repression to restitution, and there would be a vast expansion of "functional" law to regulate the interactions of the emerging organic society. Wolfgang has stated that contemporary American society illustrates Durkheim's first argument about the increasing tolerance for diversity in more advanced societies: "My major point is that we are currently experiencing in American culture, and perhaps in Western society in general, an expansion of acceptability of deviance and a corresponding contraction of what we define as crime." A similar argument has been made more recently by conservative commentators, who argue that Western societies are losing all their morals,

With respect to Durkheim's second argument, Spitzer found that more developed societies were characterized by severe punishments, while simple societies were characterized by lenient punishments, which is the opposite of what Durkheim predicted. Spitzer's findings are consistent with several studies which have found that rural areas in Western societies before modernization were characterized by fairly high levels of violence, and also by a considerable degree of tolerance for it. It was only after modernization, with the concentration of populations in anonymous cities, that societies began to punish violence consistently and severely. Durkheim may have derived his idea from the fact that punishments in European societies were becoming much less severe at the time, due to the reforms introduced by Beccaria and other classical theorists. But the extremely harsh punishments that had been imposed prior to those reforms were not associated with simple, undeveloped societies, but rather with absolute monarchies. Those types of punishments were not found in earlier, simpler societies."

Third, Durkheim predicted a great expansion in functional law as modern societies attempt to regulate all their new functions. In his case study of four cities from 1800 to the present, Gurr found "a veritable explosion of laws and administrative codes designed to regulate day-to-day

interactions, in domains as dissimilar as trade, public demeanor, and traffic." While some of this was generated by "the functional necessity of regulating the increased traffic and commercial activities of growing cities," as Durkheim had argued, Gurr also found that a great deal of other legislation was passed defining and proscribing new lands of offenses against morality and against "collective behavior" such as riots and protests. Gurr argued that the new offenses against morality arose primarily from the effort to apply middle-class values to all social groups, while the offenses against collective behavior arose from efforts of the elite groups to maintain their power.

Finally, Durkheim argued that the source of high crime rates in organic societies lay in normlessness or anomie generated by the rapid social changes associated with modernization. Durkheim's theory of anomie led to the later ecological, strain, and control theories of crime, so that the assessment of this argument must, to a certain extent, await the presentation of those theories in Chapters 7, 8, and 1.0. But those theories do not directly link the breakdown of social norms to the processes of modernization, as did Durkheim's theory. Durkheim's theory of anomie is therefore assessed here in the context of his theory of modernization.

Durkheim attributed the high rates of crime and other forms of deviance in his own society to the normlessness generated by the French and Industrial revolutions. One very basic criticism of this argument is that crime in France was not rising at the time. Lodhi and Tilly conclude that between 1831 and 1931 the incidence of theft and robbery declined in France, citing a massive decline in the statistics for serious property crime during that period. The statistics for violent crime remained approximately stable over the same period, with some tendency toward a decline. Durkheim had formulated his theory of anomie in the context of a study of suicide rates, not crime rates. Having done so, he simply presumed that crime was also increasing, although he nowhere presented data to support his conclusion. McDonald argues that the statistics showing decreases in crime rates were available to Durkheim, as well as to other prominent criminologists of the time who also presumed that crime rates were increasing, but that none of them took any notice: "Marxists of that time were no more willing to admit that social and economic conditions were improving than Durkheimians that industrialization and urbanization did not inevitably lead to higher crime."

Recent research has led to a generally accepted conclusion that economic development is associated with increases in property crime but with decreases in violent crime." For example, Neuman and Berger reviewed seventeen cross-national crime studies and concluded that urbanism and industrialization are both associated with increased property crime, but neither was associated with increases in violent crime. In addition, they found no support for the argument that the increases in property crime were caused by the change from traditional to modern values. All of this is inconsistent with Durkheim's basic argument.

Neuman and Berger therefore question the continued dominance of Durkheim's theory in explaining the link between modernization and crime. They suggest that much more attention be paid to the role of economic inequality in this process, as opposed to Durkheim's emphasis on the

breakdown of traditional values, They point out that the relationship between economic inequality and homicide is "the most consistent finding in the literature" and suggest that criminologists examine the large literature on the relation between inequality and economic development. The basic finding of this literature is that in developing nations, foreign investment by multinational corporations and dependency on exports of raw material slow long-term economic growth and increase economic inequality. The economic inequality, then, increases both criminal behavior and the criminalization of that behavior by criminal justice agencies. This is particularly true in moderately repressive, as opposed to highly repressive or democratic regimes. The authors conclude that "future studies should examine the relationship that exists between multinational penetration, inequality, and type of regime."

A study by Bennett also challenged Durkheim's theory as the explanation of the linkage between crime and modernization. Durkheim had argued that crime is caused by rapid social change. If that is true, Bennett reasoned, then: (1) the rate of increase in crime would be directly proportional to the rate of growth in the society; (2) both theft and homicide should increase during periods of rapid growth; and (3) the level of development itself (i.e., whether the country is underdeveloped or advanced) should not affect crime rates as long as the country is not rapidly changing. Using data from fifty-two nations from 1960 to 1984, Bennett then showed that the rate of growth does not significantly affect either homicide or theft, and that the level of development itself, independent of the rate of growth, significantly affects theft offenses but not homicides. Bennett concludes: "These findings refute the Durkheimian hypotheses."

CONCLUSION

Durkheim's influence has been extremely broad in criminology and sociology. His primary impact is that he focused attention on the role that social forces play in determining human conduct at a time when the dominant thinking held either that people were free in choosing courses of action or that behavior was determined by inner forces of biology and psychology. Although the focus on social forces is now the dominant view used to explain crime, it was considered quite radical at the time.

There is now considerable evidence that the basic patterns of crime found in the modern world can only be explained by a theory that focuses on modernization as a fundamental factor. Shelley reviewed studies of crime and modernization and found that the same changes in crime patterns that occurred first in Western Europe have reoccurred in Eastern European socialist nations and in the emerging nations of Asia, Africa, and Latin America as they have undergone modernization. She concluded: "The evidence suggests that only the changes accompanying the developmental process are great enough to explain the enormous changes that have occurred in international crime patterns in the last two centuries."

Many of the changes that have accompanied the modernization process, however, are not those predicted by Durkheim's theory. Pre-modern societies were characterized by high levels of

violent crime, in contrast to Durkheim's arguments about their stability. There appears to have been a long-term decline in violent crime over the last several hundred years as the process of modernization has occurred, something that Durkheim's theory does not predict. Short-term increases in that long-term decline occurred in the early stages of urbanization and industrialization, but those short-term increases seem to have been associated with the retention, not the breakdown, of rural culture. Gurr argues that other sources of short-term increases in violent crime rates include wars and growths in the size of the youth population.

Modernization does appear to be associated with higher property crime rates, but the increased property crime does not appear to be caused by the breakdown of moral values associated with rapid social change. Rather, it probably involves societal changes that result in more opportunities to commit property crime. For example, when people own more property that is both valuable and portable, and when they frequently are away from their property and cannot personally guard it, then property crime is likely to increase.

On the other hand, Durkheim's basic argument was that modernization is linked to crime through the breakdown of social norms and rules - that is, he associated crime with the absence of social controls. It may be that Durkheim's argument itself is correct but that Durkheim was wrong in assuming that pre-modern societies had strong social control and little crime. It now seems likely that they had little social control and a great deal of violent crime. The long-term decline in violent crime may then be explained by the continuously increasing level of social controls associated with increasing modernization.

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Ragbir v. State of Haryana

AIR 1981 SC 2037

BAHARUL ISLAM, J. :- 1. The question for consideration in this appeal by special leave is whether a person under 16 years of age and accused of an offence under Section 302, Penal Code can get the benefit of the Haryana Children Act, 1974 (hereinafter 'the Act'). The undisputed facts are that the appellant along with three others was convicted of the offence of murder and sentenced to imprisonment for life by the Sessions Judge. The appeal was dismissed by the High Court. The appellant then filed an application for special leave to appeal under Article 136 of the Constitution. Leave was granted confined to the question of the applicability of the Act to his case. It is also not disputed that the appellant was less than 16 years at the time he first appeared before the trial Court. He was thus a 'child' within the meaning of that term under Clause (d) of Section 2 of the Act.

2. Mr. Prem Malhotra, learned Counsel appearing for the appellant, submitted that in view of Section 5 of Criminal P.C. 1973 (hereinafter called 'the Code'), the appellant would get the benefit of the Act; while on the other hand, Mr. Bhagat appearing for the State, relying on Section 27 of the Code submitted that an offence punishable with death or imprisonment for life would not be triable under the Act.

3. There is a decision of this Court on the point in the case of *Rohtas v. State of Haryana* [1979 AIR 1839] that held the trial of a child under the provisions of the Act was not barred. In that case, however, it appears, Section 27 of the Code was not brought to the notice of the Court. In that view of the matter, the Bench consisting of two members including one of us (Baharul Islam, J.) before whom this appeal came up for bearing referred it to a larger Bench, in order to avoid possible conflict of decisions. This is how this appeal came up for hearing before Bench consisting of three members.

4. Mr. Malhotra submits that Section 5 of the Code leaves special and local laws unaffected by the provisions of the Code and that, therefore, the Act remains wholly intact. On the other hand, Mr. Bhagat's submission is that all offences are triable under the Act by reason of the provision of Section 27 of the Code so long as they fall within the category of offences "not punishable with death or imprisonment for life.

5. In the Act, 'child' has been defined as meaning a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. 'Delinquent child' has been defined as meaning a child who has been found to have committed an offence.

Apart from procedural differences in the Act and the Code, for the trial of a child for murder the outstanding difference is that the trial of the child under the Code may end in the sentence of death or imprisonment for life while a child cannot be sentenced to death or imprisonment for life under the Act. In order to better appreciate the differences, it is necessary to refer to some of the salient provisions of the Act.

Sub-section (1) of Section 4 provides for the Constitution of children's court. It provides that notwithstanding anything contained in the CrPC, 1898 (hereinafter the 'old Code'), the State Government may constitute one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such Court in relation to delinquent children under the Act. Sub-section (3) of Section 5 provides that a person may be appointed as a member of the Board or as a Magistrate in the children's Court only where he has in the opinion of the State Government, knowledge of child psychology and child welfare. Sub-section (1) of Section 6 of the Act provides that where a Board or a children's Court has been constituted for any area, such Board or Court shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in the Act, have power to deal exclusively with all proceedings under the Act relating to neglected children or delinquent children, as the case may be. Section 8 provides for establishment of children's homes, Section 9 for Special Schools, Section 10 for Observation Homes and Section 11 for the establishment of After-care Organisations. Section 17 provides for the bail and custody of delinquent children. It provides that a child accused of any non-bailable offence, notwithstanding anything contained in the old Code or in any other law for the time in force be released on bail with or without surety unless such release defeats the purpose of the Act. Section 19 provides that the children's Court shall hold an inquiry against the child charged with an offence in accordance with the provisions of Section 37 of the Act and may, subject to the provisions of the Act, make such order in relation to the child as it deems fit. Section 20, inter alia, provides that where a children's Court is satisfied on inquiry that a child has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the children's Court may, if it thinks fit, -

(a) allow the child to go home after advice or admonition;

(b) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian, or other fit person on his executing a bond with or without surety as the Court may require for the good behaviour and well-being of the child for any period not exceeding three years; and

(c) make an order directing the child to be sent to a special school.

Section 21 is important. It prohibits passing of certain orders against delinquent children. It provides, inter alia, that notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment or committed to prison in default of payment of fine or in default of furnishing security. Section 23 bars the joint trial of a delinquent child with any other person who is not a child. Sub-section (2) of Section 23 enjoins separation of trials of a delinquent child and a person who is not a child, when they are sent up in the same case.

Sub-section (1) of Section 65 which is important is in the following terms :-

The Reformatory Schools Act, 1897 (Central Act 8 of 1897), and Sections 29-B and 399 of the CrPC, 1898 (Central Act 5 of 1898), shall cease to apply to any area in which this Act has been brought into force.

Section 29-B of the old Code is equivalent to Section 27 of the Code. Section 399 of the old Code provided for confinement of the delinquent children in reformatories after conviction instead of sending them to prison.

6. It may be mentioned that there are similar provisions in the Central Children Act, 1960 (Act LX of 1960) which is applicable to the Union Territories only. Section 22 of this Act is in pari materia with Section 21 of the Haryana Children Act. A perusal of the above and other provisions of the Act and those of the Central Children Act shows that the procedure for trial, conviction and sentence under the Children Acts are simple, humane and by Courts manned with persons with knowledge of child psychology and child welfare; but not so under the Criminal P.Cs. of 1898 and 1973. The intention of the State Legislature of Haryana and of the Parliament in enacting the Children Acts was to make provisions for trial of delinquent children and dealing with them in accordance with such procedures, so that the delinquent children do not come in contact with accused persons who are not children and but are hardened criminals. The purpose undoubtedly was to reclaim delinquent children and rehabilitate them in such a way that they become useful citizens later in life.

7. It may be mentioned at this stage that the Act came into force on March 1, 1974 while the Criminal P. C., 1973 came into force on April 1, 1974. If there be any conflict between any provisions of the Act and the Code, in view of Article 254(1) of the Constitution, the provision of the Act repugnant to any provision of the Code will be void to the extent of repugnancy.

8. It was not the contention of Mr. Bhagat appearing for the State that the Act was bad for lack of legislative competence of the State Assembly or for any other reason. The sheet-anchor of his submission was Section 27 of the Code of 1973.

9. Let us now set out the relevant provisions of the Criminal P.C., 1973 with which we are directly concerned.

Section 4 reads :

(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating inquiring into, trying or otherwise dealing with such offences.

Section 5 reads :

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

Section 27 reads :

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

Putting emphasis on the expressions, "in the absence of any specific provisions to the contrary", occurring in Section 5, Mr. Bhagat submits that Section 27 is the specific provision to the contrary and as such this provision shall affect the Haryana Children Act which is a local law for the time being in force. We are unable to accept the submission. As it has been pointed out above, the purpose of the Haryana Legislature as well as of the Parliament in enacting the Haryana Children Act and the Central Children Act (Act LX of 1960) respectively was to give separate treatment to delinquent children in trial, conviction and punishment for offences including offences punishable with death or imprisonment for life. In our opinion, Section 27 is not 'a specific provision to the contrary' within the meaning of Section 5 of the Code; the intention of the Parliament was not to exclude the trial of delinquent children for offences punishable with death or imprisonment for life, inasmuch as Section 27 does not contain any expression to the effect "notwithstanding anything contained in any Children Act passed by any State Legislature". Parliament certainly was not unaware of the existence of the Haryana Children Act coming into force a month earlier or the Central Children Act coming into force nearly fourteen years earlier. What Section 27 contemplates is that a child under the age of 16 years may be tried by a Chief Judicial Magistrate or any Court specially empowered under the Children Act, 1960. It is an enabling provision, and, in our opinion, has not affected the Haryana Children Act in the trial of delinquent children for offences punishable with death or imprisonment for life.

10. Criminal Procedure appears in Item 2 of the Concurrent List of the Seventh Schedule of the Constitution. One of the circumstances under which repugnancy between the law made by the State and the law made by the Parliament may result is whether the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable. In the case in hand as we have shown that the relevant provisions of the Code and the Act can coexist. Their spheres of operation are different.

11. Mr. Bhagat in support of his contention has relied on a Full Bench decision of the Madhya Pradesh High Court reported in 1978 Cri LJ 585. The Full Bench of three judges considered the jurisdiction of the Madhya Pradesh Bal Adhiniyam, 1970 (15 of 1970) to try a Juvenile offender for offences punishable with death or imprisonment for life. There was a difference of opinion. The view of the majority was that the juvenile Courts constituted under the Madhya Pradesh Bal Adhiniyam has exclusive jurisdiction to try a delinquent child (a person under 16 years of age) for all offences except those punishable with death or imprisonment for life even after the commencement of the CrPC, 1973 (Act 2 of 1974), while the minority view of Verma J. was to the contrary. With respect, the majority view is erroneous. Verma J. has observed as follows (at p. 590) :-

The only question before us is whether the provisions of the new Code have brought about any change in this position. There can be no doubt that if there is an irreconcilable conflict between the provisions of the new Code and those of the Bal Adhiniyam, then the new Code being the later Central enactment it will supersede Bal Adhiniyam, the earlier State enactment to the extent of repugnancy by virtue of Clause (1) of Article 254 of the Constitution. The real question, therefore, is whether there is any such repugnancy between the two enactments so as to attract Article 254. It is equally clear that in case there is no such repugnancy and the relevant provisions of the two enactments are capable of co-existence, then Article 254 would not be attracted, and the provisions of the Bal Adhiniyam conferring exclusive jurisdiction on the Juvenile Courts to try all offences including those punishable with life imprisonment or death would continue to operate. Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the new Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. It is in this light that the question has to be examined with a view to determine whether there is any such irreconcilable conflict so as to attract Article 254 of the Constitution. This is the real question for decision.

He has held (at p. 594):

Applying the tests indicated by the settled principles, I have no hesitation in holding that there is no real conflict between the provisions of the new Code, particularly Section 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the new Code clearly save any special or local law like the Bal Adhiniyam and Section 27 of the new Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in Section 5 of the new Code. There being thus no conflict or repugnancy, the question of Article 254 of the Constitution being attracted does not arise.

With respect, Verma J. has expressed the correct opinion.

12. As a result of the foregoing discussions, we allow the appeal, set aside the conviction and sentences imposed upon the appellant and quash the entire trial of the appellant. We direct that the appellant shall be dealt with in accordance with the provisions of the Haryana Children Act.

13. It is a pity that the point urged before us was not urged in any of the Courts below.

* * * * *

Sanjay Suri v. Delhi Administration

AIR 1988 SC 414

RANGANATH MISRA, J. :- These two applications under Article 32 of the Constitution are in the nature of a public interest litigation. A news reporter and a trainee sub-editor have moved this Court for appropriate directions to the Delhi Administration and the authorities of the Central Jail at Tihar, pointing out features of maladministration within the jail relating to juvenile undertrial prisoners. During the pendency of the proceedings, the Court made several orders with reference to juvenile prisoners and undertrials. On 28th October, 1983 this Court directed:

When these writ petitions came up for hearing before us we had certain hesitation in entertaining them because another petition was pending in the High Court of Delhi in regard to juvenile prisoners in Tihar Jail where some directions had been given by the High Court and we were anxious to avoid a parallel investigation particularly since in matters of this kind it is desirable that the High Courts should be activated. But since no inquiry into the conditions prevailing in the Tihar Jail, in so far as prisoners in the juvenile ward are concerned, had been ordered and what was ordered was only a limited inquiry relating to medical examination of 7 juvenile prisoners who were directed to be produced in court, we thought that we would be failing in our constitutional duty if we do not take judicial action and direct the District Judge to visit Tihar Jail for making inquiry into the conditions prevailing in the Tihar Jail in so far as the prisoners in the juvenile ward are concerned. We decided to entrust this task to the District Judge because he is even otherwise visitor at the Tihar Jail and we thought it would be better to send an officer who is ultimately responsible for ensuring proper conditions in the Tihar Jail rather than entrust this work to an outside organisation or agency. We are glad that we made this order because the Report made by the District Judge discloses a shocking state of affairs in so far as juvenile prisoners are concerned. The District Judge has interviewed some of the juvenile prisoners in regard to whom he learnt, as a result of the inquiry made by him, that they had been subjected to sexual assault by the adult prisoners. The juvenile prisoners who made statements before the District Judge have expressed apprehension that they might get into difficulties and be victimised if their names are disclosed and the District Judge has also suggested in his Report that either the names should not be disclosed or if the names of these juvenile prisoners are disclosed, adequate protection should be granted to them. We do not think it would be right not to disclose the names of these juvenile prisoners while supplying copies of the Report of the District Judge to the advocates of the parties but we do think it necessary to provide adequate protection to them. We would, therefore, direct that the following undertrial juvenile prisoners, namely...shall be released immediately in the course of the day on their executing a bond of Rs. 500 each before the superintendent of Tihar Jail. There are also three convicted juvenile prisoners in the Tihar Jail, namely...who have given statements to the District Judge. They should be released forthwith on parole for a period of one month on their executing a bond for Rs. 500 each before the Superintendent of Tihar Jail that they will surrender themselves to the jail authorities on the

expiration of the period of one month .The release of these three convicted juvenile prisoners on parole will also be done in the course of the day. We may make it clear that we are making this order for release of the aforementioned juvenile prisoners- undertrial as well as convicted-only with a view to protecting them and we are, at the present moment, not passing upon the correctness or otherwise of the statements made by them.

The learned Additional Solicitor General on behalf of the respondents states that Munshi Rajinder Singh alias Raju will be forthwith transferred from the Tihar Jail and that in any other jail to which he is transferred, it will be ensured that he does not have anything to do at all with juvenile prisoners. This transfer shall also be carried out forthwith. Meanwhile, the Superintendent of Tihar Jail will take steps to ensure that Munshi Rajinder Singh alias Raju is not allowed any access to the juvenile ward and is also not allowed to come into contact in any manner what-soever with the prisoners in the juvenile ward and this will be the personal responsibility of the Superintendent of Tihar Jail. So far as the warder Onkar Singh (who has also been referred to in the report of the District Judge) is concerned, the learned Additional Solicitor General appearing on behalf of the respondents states that immediate steps will be taken to place him under suspension and in the meanwhile, he will not be allowed to go inside the premises of Tihar Jail. The Superintendent of Tihar Jail will also ensure that no juvenile prisoner is directed to go to the cell of any adult prisoner or prisoners or to do any work for them including cooking or cleaning.

On the 31st October, 1983, the Court made a further order to the following effect:

... The learned Counsel for the respondents will intimate to the Court as to which of the 131 juvenile prisoners confined in Tihar Jail whose names are mentioned in the Chart handed over by the learned Additional Solicitor General appearing on behalf of the respondents are to be released on bail, having regard to the nature of the offences alleged to have been committed by them and other relevant circumstances which have already been set out by this Court in Hussainara Khatoon's case. We would also like to know as what is the procedure being followed by the Courts of Metropolitan Magistrates in Delhi when a young accused is produced before them for the purpose of ascertaining whether he is a child or not within the meaning of the Children's Act and if he is not a child and is sent to judicial custody then what is the procedure being followed by the Superintendent of the Tihar Jail for determining whether he is juvenile within the meaning of Jail Manual where a juvenile is defined as a prisoner who has not attained the age of 18 years. We are anxious to ensure that no child within the meaning of the Children's Act is sent to the jail because otherwise the whole object of the Children's Act of protecting the child from bad influence of jail life would be defeated. It is also a matter of anxiety for us to see that juveniles between the age of 16 to 18 years who are put in custody in the jail are being kept in separate ward and are allowed to intermingle with adult prisoners because that would also expose them to mal-influences which may prevent their proper rehabilitation....

Several other interlocutory orders and directions were given and the Sessions Judge was requested to visit the jail on more than one occasion under order of the Court. He made very useful reports. As a result of these exercises taken during the pendency of the writ petitions, one substantial achievement has been that Tihar Jail no more accommodates juvenile delinquents and their jail has been separated. On account of the repeated directions from this Court the jail administration has now been obliged to undertake erection of a separate jail as an additional place for housing juvenile prisoners and undertrials and the construction is coming up, as reported. On account of the exposure, the Jail administration has been obliged to place the administration of the jail in the hands of a superior officer.

4. We had called upon counsel for the parties to furnish their suggestion for improvement of the jail administration and pursuant to this direction counsel for the petitioners has given certain suggestions on two instalments. Learned Additional Solicitor General has also joined her in making certain suggestions in that regard. Before we refer to them we think it appropriate to emphasise that those who are incharge of the jail administration from bottom to top must develop the proper approach to deal with the prisoners and undertrials. It is true that a considerable number of hardened prisoners live in the jail and those who have a longer term of sentence to suffer stay on for quite a part of their life behind the prison bars. Longer stay at one place brings in familiarity and familiarity generates a number of human reactions. There is no provision in the jail manuals and, perhaps it is difficult as a rule to adopt, that the long-term prisoners should keep on shifting from jail to jail. Whatever may have been the philosophy of punishment in the past, today the prison house is looked upon as a reformatory and the years spent in the jail should be with a view to providing rehabilitation to the prisoner after the sentence is over. That would not be possible over-night and, therefore, cannot be deferred to materialise on the date of release. The wrong side has to be given up and the virtuous way of living has to be acquired. Both are difficult processes. Therefore, the prison house, in case the true purpose is to be achieved, has to provide the proper atmosphere, leadership, environment, situations and circumstances for the regeneration. Members of the staff of the jail from bottom to top (we have purposely not said top to bottom) must be made cognizant of this responsibility and that awareness must be reflected in their conduct. Judicial notice can be taken of prevailing conditions in our jails and what we have stated above is still Utopian. But if a change has to be brought about it has to start from somewhere and Tihar Jail, in our opinion, is probably most suited for that purpose being located at the seat of the national capital and being under the direct management of the Union of India (through, of course, the Delhi Administration). This can be the institution to set the move in motion.

6. It is time to turn to brass facts. We have come across cases where the warrant, be it for the undertrial or the prisoner, when sent by the court does not indicate the age of the prisoner authorised to be detained in the jail. This is a very wrong practice and is obviously in breach of the direction issued by this Court. We call upon every Magistrate or trial Judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained. Judicial mind must be applied in cases where there

is doubt about the age-not necessarily by a trial- and every warrant must specify the age of the person to be detained. We call upon the authorities in the jails throughout India not to accept any warrant of detention as a valid one unless the age of the detenu is shown therein. By this order of ours, we make it clear that it shall be open to the jail authorities to refuse to honour a warrant if the age of the person remanded to jail custody is not indicated. It would be lawful for such officers to refer back the warrant to the issuing court for ractifying the defect before it is honoured. Since it will create problems in keeping the undertrial or the prisoner during the intervening period, the judicial officer should realise his responsibility in accepting this direction and giving full effect to it. In exceptional cases, when the warrant is referred back for rectification, the person covered by the warrant may be kept at the most for a week pending rectification and taking responsibility of the situation. On the basis of the age indicated in the warrant, it shall be the obligation of the jail authorities to find out, so far as Delhi is concerned, whether the prisoner covered by the warrant should be detained in the Tihar Jail or in the Juvenile Jail.

7. Though the place of stay has now been segregated, there is possibility of contact between the hardened criminals and the juvenile delinquents if there is no proper segregation in assignment of work. We direct that due care shall be taken to ensure that the juvenile delinquents are not assigned work in the same area where regular prisoners are made to work. Care should be taken to ensure that there is no scope for their meeting and having contacts.

9. The Visitors' Board should consist of cross sections of society; people with good background, social activists, people connected with the news media, lady social workers, jurists, retired public officers from the Judiciary as also the Executive. The Sessions Judge should be given an acknowledged position as a visitor and his visits should not routine ones. Full care should be taken by him to have a real picture of the defects in the administration qua the resident prisoners and undertrials.

10. Over-crowding in jails is a regular feature. As against a sanctioned capacity of 2,023, on the average 4,000 prisoners are lodged in the Tihar Jail. We hope and trust that this aspect will be kept in view, though from a practical point over-crowding may to a reasonable aspect, have to be tolerated. We hope with the commissioning of the new jail, pressure in this regard to some extent would be reduced.

11. The writ petitions are disposed of with these directions. There would be no order for costs.

12. We place on record our appreciation of the services rendered by the petitioners by bringing the matter before the Court.

* * * * *

Pratap Singh v. State of Jharkhand

2005 (1) SCALE 763

S.B. SINHA, J:- Juvenile Justice Act in its present form has been enacted in discharge of the obligation of our country to follow the United National Standard Minimum Rules for the Administration of Juvenile Justice, 1985 also known as Beijing Rules (the Rules).

Part I of the said Rules provides for the general principles which are said to be of fundamental perspectives referring to comprehensive social policy in general and aiming at promoting juvenile welfare to the greatest possible extent, which would minimize the necessity of intervention by the juvenile justice system and, in turn, will reduce the harm that was caused by any intervention. The important role that a constructive social policy for juvenile is to play has been pointed out in Rules 1.1 to 1.13 inter alia in the matter of prevention of juvenile crime and delinquency. Rule 1.4 defines juvenile justice as an integral part of the national development process of each country, within a comprehensive framework of social justice from all juveniles, and, thus, at the same time, contributing to the protection of the young and maintenance of a peaceful order in the society. While Rule 1.6 refers to the necessity of the juvenile justice system being systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services including their methods, approaches and attitudes, Rule 1.5 seeks to take account of existing conditions in Member States which would cause the manner of implementation of particular rules necessarily to be different from the manner adopted in other States. Rule 2.1 provides for application of the rules without distinction of any kind. Rule 2.2 provides for the definitions which are as follows:

"(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

(b) An offence is any behaviour (act or omission) that is punishable by law under the respective legal systems;

(c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence."

Rule 2.3 inter alia provides for making a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

"(a) To meet the varying needs of juvenile offenders, while protecting their basic rights;

(b) To meet the needs of society;

(c) To implement the following rules thoroughly and fairly."

The age of a juvenile is to be determined by the Member Countries having regard to its legal system, thus fully respecting the economic, social political, cultural and legal systems. This has made a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18

years or above. Rule 3 provides for extension of the Rules covering (a) status offences; (b) juvenile welfare and care proceedings and (c) proceedings dealing with young adult offenders, depending of course on each given age limit. Rule 4 provides that the minimum age of criminal responsibility should not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity. Rule 5 provides that the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence. Rule 6 provides for scope of discretion. Rule 7.1 provides for the rights of juvenile which is as under:

"Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings."

Rule 8 provides for the protection of privacy. Rule 9 provides that the said rules shall not be interpreted as precluding the application of the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations and other human rights instruments and standards recognized by the international community that relate to the care and protection of the young. Rule 27 also provides for application of the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations.

Part II of the said Rules provides for investigation and prosecution, diversion, specialization within the police, detention pending trial. Rule 13 reads as under:

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical that they may require in view of their age, sex and personality."

Part III provides for adjudication and disposition in terms whereof competent authorities prescribed were competent to adjudicate. Rule 15 provides for legal counsel, parents and guardians. Rule 16 provides for Social Inquiry Reports. Rule 16.1 reads as under:

"In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority."

Rule 17 provides for guiding principles in adjudication and disposition which reads as under:

"17.1 The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

17.3 Juveniles shall not be subject to corporal punishment.

17.4 The competent authority shall have the power to discontinue the proceedings at any time."

It has been pointed out that the main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

(a) Rehabilitation versus just result;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.

OBJECTS OF JUVENILE JUSTICE LEGISLATION

The purpose of the Juvenile Justice Legislation is to provide succour to the children who were being incarcerated along with adults and were subjected to various abuses. It would be in the fitness of things that appreciation of the very object and purpose of the legislation is seen with a clear understanding which sought to bring relief to juvenile delinquents.

The problem of Juvenile Justice is, no doubt, one of tragic human interest so much so in fact that it is not confined to this country alone but cuts across national boundaries. In 1966 at the second United Nations Congress on the Prevention of Crime and Treatment of Offenders at London this issue was discussed and several therapeutic recommendations were adopted. To bring the operations of the juvenile justice system in the country in conformity with the UN Standard Minimum Rule for the Administration of juvenile justice, the Juvenile Justice Act came into existence in 1986. A review of the working of the then existing Acts both State and Parliamentary would indicate that much greater attention was found necessary to be given to children who may be found in situations of social maladjustment, delinquency or neglect. The justice system as available for adults could not be considered suitable for being applied to juvenile. There is also need for larger involvement of informal system and community based welfare agencies in the case, protection, treatment, development and rehabilitation of such juveniles.

The provisions of the Juvenile Justice Act, 1986 (hereinafter referred to as "the 1986 Act") and the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (hereinafter referred to as "the 2000 Act") are required to be construed having regard to the aforementioned Minimum Standards as the same are specifically referred to therein.

The Juvenile Justice Act, 1986 is aimed at achieving the following objects:

(i) To lay down a uniform legal frame-work for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts;

(ii) To provide for a specialized approach towards the prevention and treatment of juvenile delinquency in its full range in keeping with the development needs of the child found in any situation of social maladjustment;

(iii) To spell out the machinery and infrastructure required for the case, protection, treatment, developments and rehabilitations of various categories of children coming within the purview of the Juvenile Justice system. This is proposed to be achieved by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles;

(iv) To establish norms and standard for the administration of juvenile justice in terms of investigation and prosecution, adjudication and disposition and case, treatment and rehabilitation;

(v) To develop appropriate linkages and coordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or society maladjusted children and to specifically define the areas of their responsibilities and roles;

(vi) To constitute special offences in relation to juveniles and provide for punishment therefor;

(vii) To bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The various provisions of the 1986 Act provide for a scheme of uniform juvenile justice system in the country so that a juvenile may not have to be lodged in jail or police lock-up as well as for prevention and treatment of juvenile delinquency for care, protection etc. Section 3

provides that where an inquiry has been initiated against a juvenile even, during the course of such inquiry a juvenile ceased to be such, then, notwithstanding anything contained therein or any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such persons as if such person had continued to be a juvenile. Chapter II of the Act speaks of competent authorities and institutions for juveniles such as Juvenile Welfare Boards, Juvenile Courts, Juvenile Homes, special homes, observation homes and aftercare organisations. Chapter III makes provision for neglected juveniles. Section 17 makes provision for uncontrollable juveniles. Chapter IV deals with delinquent juveniles. Sections 18 to 26 provide for bail and custody of juveniles, accused of a bailable or non-bailable offence, the manner of dealing with them and the orders that may be passed regarding or against delinquent juveniles. Proceedings as laid down in Chapter VIII of the Code of Criminal Procedure are not competent against a juvenile. A juvenile and a person who is not a juvenile cannot be jointly tried. No disqualification attaches to conviction of a juvenile for any offence under any law. Special provisions are contained in Section 26 as regard the proceedings in respect of juveniles pending in any court on the date of the coming into force of the Act. Chapter V (Sections 27 to 40) lay down the procedure of competent authorities generally under the Act and appeals and revisions from orders of such authorities. Chapter VI (Sections 41 to 45) provides for special offences in respect of juveniles. Chapter VII (Sections 46 to 63) contains miscellaneous provisions.

Section 32 of the 1986 Act mandates the competent authority to hold enquiry as to the age of the delinquent brought before it.

The 1986 Act has been repealed and replaced by the 2000 Act. The 2000 Act has brought about certain changes vis-a-vis the 1986 Act. It has obliterated the distinction between a male juvenile and female juvenile. In contrast with the definition of delinquent juvenile in the 1986 Act who was found guilty of commission of an offence, a juvenile in conflict with law is defined in the 2000 Act to mean a person who is of below 18 years of age and is alleged to have committed an offence. Section 3 provides for continuation of inquiry in respect of juvenile who has ceased to be a juvenile.

By reason of the aforementioned provisions a legal fiction has been created to treat a juvenile who has ceased to be a juvenile as a person as if he had continued to be a juvenile. Chapter II provides for constitution of Juvenile Justice Board. Its power had been outlined in Section 6. Section 7 mandates that a Magistrate before whom a juvenile is produced must without any delay record his opinion, and if it is found that a person brought before him is a juvenile, he shall record the same and forward him with the record of the proceeding to the competent authority having jurisdiction over the proceeding. Sections 8 and 9 provide for observation homes and special homes. Section 10 provides that on apprehension of a juvenile in conflict with law; he shall be placed under the charge of a special juvenile police unit or the designated police officer who shall immediately report the matter to a member of the Board. Section 12 provides for bail. In no circumstances, a person who appears to be juvenile is to be placed in a police lock-up. He is to be kept in an observation home in the prescribed manner until he can be brought before the court.

Sub-section (3) of Section 12 mandates the Board to make an order sending a juvenile to the observation home instead of committing him to prison. Section 14 provides for holding of an inquiry by the Board regarding a juvenile within a period of four months. Section 15 provides for an order that may be passed regarding juvenile, clause (g) of sub-section (1) whereof reads, thus:

"15. Order that may be passed regarding juvenile (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit, -

(g) make an order directing the juvenile to be sent to a special home

(i) in the case of juvenile, over seventeen years but less than eighteen years of age for a period of not less than two years;

(ii) in case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

Section 16 mandates that no juvenile shall be sentenced to death or life imprisonment or committed to prison in default of payment of fine or in default of furnishing security. Sections 20 and 64 which are relevant for our purpose read as under:

"20. Special provision in respect of pending cases - Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

64. Juveniles in conflict with law undergoing sentence at commencement of this Act - In any area in which this Act is brought into force, the State Government or the local authority may direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government or the local authority thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of section 16 of this Act."

Sections 4 to 28 occur in Chapter II which deal with juvenile in conflict with law and Section 64 occurs in Chapter V dealing with miscellaneous provisions. It is interesting to note that all the

provisions occurring in Chapter II or Section 20 do not use the expression juvenile in conflict with law whereas Section 64 specifically uses that expression.

Section 20 of the Act permits continuation of proceedings of a juvenile court in any area on the date on which the Act came into force by providing "it shall record such finding and instead of passing any sentence in respect of that juvenile, shall forward him to the board which shall pass orders in respect of that juvenile in accordance with the provision of this Act as if it has been satisfied on inquiry under this Act that juvenile had committed the offence".

Section 68 provides for rule making power of the State Government. No State unfortunately has framed any rule in exercise thereof. The Central Government, however, in purported exercise of its power under Section 70 of the Act published the principles which are fundamental to the development of strategies, interpretation and implementation of the Act of 2000 and the model rules which the State Governments are required to frame. Rule 61 of the said Model Rule is as under:

"61. Temporary application of model rules. It is hereby declared that until the new rules are framed by the State Government concerned under section 68 of the Act, these rules shall mutatis mutandis apply in that State."

Rule 62 deals with pending cases and sub-rule (3) thereof reads as under:

"It is hereby clarified that such benefits shall be made available not only to those accused, who was juvenile or a child at the time of commission of an offence but also to those who ceased to be a juvenile or a child during the pendency of any enquiry of trial."

The legislation relating to juvenile justice should be construed as a step for resolution of the problem of the juvenile justice which was one of tragic human interest which cuts across national boundaries. The said Act has not only to be read in terms of the Rules but also the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the protection of juveniles.

The Juvenile Justice Act specially refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventions although may not be a part of our municipal law, the same can be referred to and followed by the courts having regard to the fact that India is a party to the said treaties. A right to a speedy trial is not a new right. It is embedded in our Constitution in terms of Articles 14 and 21 thereof. The international treaties recognize the same. It is now trite that any violation of human rights would be looked down upon. Some provisions of the international law although may not be a part of our municipal law but the courts are not hesitant in referring thereto so as to find new rights in the context of the Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of international law. Constitution is a source of, and not an exercise of, legislative power. The principles of International Law whenever applicable operate as a statutory implication but the Legislature in the instant case held it bound thereby and, thus, did not legislate in disregard of the constitutional provisions or the international law as also in the

context of Articles 20 and 21 of the Constitution of India. The law has to be understood, therefore, in accordance with the international law. Part III of our Constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning to the statute is required to be assigned having regard to the Constitutional as well as International Law operating in the field. (See *Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I* [(2004) 9 SCC 512])

In *Regina (Daly) v. Secretary of State for the Home Department* [(2001) 2 AC 532], Lord Stein observed that in the law context is everything in the following terms:

"28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasized in Mahmood, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything."

Constitution of India and the Juvenile Justice Legislations must necessarily be understood in the context of present day's scenario and having regard to the international treaties and conventions. Our Constitution takes note of the institutions of the world community which had been created. Some legal instruments that have declared the human rights and fundamental freedoms of humanity had been adopted but over the time even new rights had been found in several countries, as for example, South Africa, Canada, Germany, New Zealand, United Kingdom and United States. New ideas had occupied the human mind as regard protection of Human Rights. (See *Hamdi v. Rumsfeld* [(2004) 72 USLW 4607], *Russel v. Bush* [(2004) 72 USLW 4596] and *Rumsfeld v. Padila* [(2004) 72 USLW 4584]).

Now, the Constitution speaks not only "to the people of India who made it and accepted it for their governance but also to the international community as the basic law of the Indian nation which is a member of that community". Inevitably, its meaning is influenced by the legal context in which it must operate.

The legal instruments that have declared legal rights and fundamental freedoms, founded in the nations of human dignity and Charter of United Nations were not known earlier which is manifest today. [Charter of the United Nations, signed at San Fransisco on 26.6.1945. Preamble]. Political, social and economic development can throw light on the meaning of Constitution.

In *Lawrence*, Kennedy J., for the Supreme Court, after references to international human rights law, concluded:

"Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume of have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

The questions, therefore, in our opinion, should be determined having regard to the aforementioned principles.

In terms of Rule 20.1 of the Rules we may notice that some statutes, as for example, the Family Court Act of some States of U.S.A. contains provisions establishing time limitations governing each stage of juvenile proceedings, the purpose whereof is to assure swift and certain adjudication at all phases of the proceeding. (See *In re Frank C* [70 N.Y.2d 408])

A similar issue was examined by the Supreme Court of California in *Alfredo v. Superior Court* [849 P.2d 1330 (Cal. 1993)] wherein a juvenile sought habeus corpus to obtain release. The court held that the Fourth Amendment provides the authority for the promptness required for a juvenile hearing. It was further held that a minor must be released upon expiration of the statutory time limit for detention due to the juvenile's interest in freedom from institutional restrains. The court implied that the time allowed to have the hearing shall stand extended once the juvenile is released, and that dismissal is not the only necessary remedy.

In *Robinson v. Texas* [707 S.W.2d 47], the Texas Court of Appeals held that in calculating the time for a speedy trial continuances should not be included. In that case, the court found that continuances based on reset forms signed by appellant's attorney were excludable from the statutory time limits for a speedy trial.

In *Illinois v. Stufflebean* [392 N.E. 2d 414], the Appellate Court of Illinois held that the remedy for detention of a juvenile beyond the statutory limit was immediate release, not dismissal. In *Stufflebean*, the court denied a probationer's request for dismissal based on incarceration exceeding statutory limits.

The questions which arise for consideration in this reference are:

(i) What would be reckoning date in determining the age of offender, viz., date when produced in a Court, as has been held by this Court in *Arnit Das v. State of Bihar* [(2000) 5 SCC 488] or the date on which the offence was committed as has been held in *Umesh Chandra v. State of Rajasthan* [(1982) 2 SCC 202].

(ii) Whether the 2000 Act will be applicable in cases which were pending before the enforcement thereof.

We have noticed hereinbefore that the decisions in *Umesh Chandra* and *Arnit Das* are in conflict with each other. Whereas in *Umesh Chandra*, a clear finding has been recorded by this

Court that the relevant date for applicability of the Act is the date on which the offence takes place; in *Arnit Das*, Lahoti, J. (as the learned Chief Justice then was) speaking for a Division Bench held that Section 8(a) of the Act and the Scheme as also the phraseology employed by the Parliament in drafting the Act suggests that the relevant date for finding out the age of juvenile is the date when he is produced before the Board. It was observed that indisputably the definition of juvenile or any other provisions contained in the Act does not specifically provide the date for reference to which a crime has to be determined so as to find out whether he is or she is a juvenile or not.

In support of the view taken in *Arnit Das*, the learned Additional Solicitor General appearing for the Respondent submitted that the Act aims at protection of a juvenile in the sense that he is to be kept in the protective custody and dealt with separately by not sending him to prison or police lock-up which is possible to be directed only when a juvenile is arrested or produced in court and not prior thereto. Similarly, on conviction, he cannot be sentenced and may be directed to be housed in a protective home and, thus, the relevant date would be the one on which the delinquent juvenile is produced before the Board.

This argument cannot be accepted for more than one reason. The said Act is not only a beneficent legislation, but also a remedial one. The Act aims at grant of care, protection and rehabilitation of a juvenile vis-a-vis the adult criminals. Having regard to Rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice, it must also be borne in mind that the moral and psychological components of criminal responsibility was also one of the factors in defining a juvenile. The first objective, therefore, is the promotion of the well-being of the juvenile and the second objective bring about the principle of proportionality whereby and whereunder the proportionality of the reaction to the circumstances of both the offender and the offence including the victim should be safeguarded. In essence, Rule 5 calls for no less and no more than a fair reaction in any given case of juvenile delinquency and crime. The meaning of the expression 'Juvenile' used in a statute by reason of its very nature has to be assigned with reference to a definite date. The term 'Juvenile' must be given a definite connotation. A person cannot be a juvenile for one purpose and an adult for other purpose. It was, having regard to the constitutional and statutory scheme, not necessary for the Parliament to specifically state that the age of juvenile must be determined as on the date of commission of the offence. The same is in-built in the statutory scheme. The statute must be construed having regard to the Scheme and the ordinary state of affairs and consequences flowing therefrom. The modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility, that is, whether a child, by virtue of his or her individual discernment and understanding can be held responsible for essentially anti-social behaviour.

In construing a penal statute, the object of the law must be clearly borne in mind. The importance of time-bound investigation and a trial in relation to an offence allegedly committed by a juvenile is explicit as has been dealt with in some details hereinbefore. While making investigation it is expected that the accused would be arrested forthwith. He, upon his arrest; if he

appears to be a juvenile, cannot be kept in police custody and may be released on bail. If he is not released on bail by the arresting authority, he has to be produced before the competent Court or Board. Once he appears to be juvenile, the competent court and/ or board may pass an appropriate order upon releasing him for bail or send him to a protective custody. An inquiry for the purpose of determination of age of the juvenile need not be resorted to if the person produced is admitted to be a juvenile. An inquiry would be necessary only if a dispute is raised in that behalf. A decision thence is required to be taken by the competent court and /or board having regard to the status of the accused as to whether he is to be released on bail or sent to a protective custody or remanded to police or judicial custody. For the said purpose what is necessary would be to find out as to whether on the date of commission of the offence he was a juvenile or not as otherwise the purpose for which the Act was enacted would be defeated. The provisions of the said Act, as indicated hereinbefore, clearly postulate that the necessary steps in the proceedings are required to be taken not only for the purpose of adopting a special procedure at the initial stage but also for the intermediary and final stage of the proceedings. If the person concerned is a juvenile, he cannot be tried along with other adult accused. His trial must be held by the Board separately. Having regard to Rule 20.1 of the Rules his case is required to be determined, without any unnecessary delay. In the trial, the right of the juvenile as regard his privacy must be protected. He is entitled to be represented by a legal adviser and for free legal aid, if he applies therefor. His parents and/or guardian are also entitled to participate in the proceedings. The Court would be entitled to take into consideration the Social Inquiry Reports wherein the background and the circumstances in which the juvenile was living and the condition in which the offence had been created may be properly investigated so as to facilitate juvenile adjudication of the case by the competent authority. At all stages, the Court/Board is required to pass an appropriate order expeditiously. Right of a juvenile to get his case disposed of expeditiously is a statutory as also a constitutional right.

Even at the final stage, viz., after he is found to be guilty of commission of an offence, he must be dealt with differently vis-a-vis adult prisoners. Only because his age is to be determined in a case of dispute by the competent court or the board in terms of Section 26 of the Act, the same would not mean that the relevant date therefor would be the one on which he is produced before the Board. If such an argument is accepted, the same would result in absurdity as, in a given case, it would be open to the police authorities not to produce him before the Board before he ceases to be juvenile. If he is produced after he ceases to be juvenile, it may not be necessary for the Board to send him in the protective custody or release him on bail as a result whereof he would be sent to the judicial or police custody which would defeat the very purpose for which the Act had been enacted. Law cannot be applied in an uncertain position. Furthermore, the right to have a fair trial strictly in terms of the Act which would include procedural safeguard is a fundamental right of the juvenile. A proceeding against a juvenile must conform to the provisions of the Act.

In *Dilip Saha v. State of West Bengal* [AIR 1978 Cal. 529] a Full Bench of the Calcutta High Court in arriving at the conclusion that the date of reckoning shall be the one on which the offence has been committed referred to Article 20 of Constitution of India in the following terms:

"22. If we interpret S. 28 to mean that it prohibits a joint trial of a child and an adult only when the child is a 'child' at the time of trial, that interpretation would go against the provisions of Art. 20(1) of the Constitution which prescribes that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

We, with respect, agree with the said observation. The statute, it is well known, must be construed in such a manner so as to make it effective and operative on the principle of *Ut res magis valeat quam pereat*. The courts lean strongly against any constructions which tend to reduce a statute to a futility. When two meanings, one making the statute absolutely vague, wholly intractable and absolutely meaningless and the other leading to certainty and meaningful are given, in such an event the latter should be followed. (See *Tinsukhia Electric Supply Co. Ltd. v. State of Assam* [(1989) 3 SCC 709], *Andhra Bank v. B. Satyanarayana* [(2004) 2 SCC 657] and *Indian Handicrafts Emporium v. Union of India* [(2003) 7 SCC 589]).

The submission of the learned Addl. Solicitor General that this Court in *Umesh Chandra* has wrongly applied the test of imputing mens rea in holding that Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age cannot be said to be mature as in the case of adult, may have some substance but the said statement of law must be read and understood in the context of Rule 4.1 of the Rules. So read, the Act would be understood in its proper perspective.

The question raised in paragraph 17 of *Arnit Das* is not apposite. A hypothetical question would only lead to a hypothetical answer. The court in an appropriate case is not powerless to pass an order as is contemplated under the statute if the situation so demands but only because a person is produced before the Court after he attains majority either on his own volition or by reason of machinations adopted by the investigating agency, the same would not be determinative of the fact that the said person is to be differently dealt with. Law favours strict adherence of the procedures subject to just exceptions. The Court in *Arnit Das* observed:

"16 The Preamble speaks for the Act making provisions for the things post-delinquency. Several expressions employed in the Statement of Objects and Reasons vocally support this view. The Act aims at laying down a uniform juvenile justice system in the country avoiding lodging in jail or police lock-up of the child; and providing for prevention and treatment of juvenile delinquency, for care, protection, etc. post-juvenility. In short the field sought to be covered by the Act is not the one which had led

to juvenile delinquency but the field when a juvenile having committed a delinquency is placed for being taken care of post- delinquency."

With great respect, we cannot agree to the said statement of law. It is incorrect to say that the preamble speaks of the things of post-delinquency only. The Act not only refers to the obligations of the country to re-enact the existing law relating to juveniles bearing in the mind, the standards prescribed in various conventions but also all other international instruments. It states that the said Act was enacted inter alia to consolidate and amend the law relating to juveniles. Once the law relates to delinquent juveniles or juveniles in conflict with law, the same would mean both pre and post-delinquency.

The definition of 'Juvenile' under the 1986 Act, of course refers to a person who has been found to have committed offence but the same has been clarified in the 2000 Act. The provisions of 1986 Act, as noticed hereinbefore, sought to protect not only those juveniles who have been found to have committed an offence but also those who had been charged therefor. In terms of Section 3 of the 1986 Act as well as 2000 Act when an enquiry has been initiated even if the juvenile has ceased to be so as he has crossed the age of 16 and 18 as the case may be, the same must be continued in respect of such person as if he had continued to be a juvenile. Section 3 of the 1986 Act therefore cannot be given effect to if it is held that the same only applied to post delinquency of the juvenile.

The field covered by the Act includes a situation leading to juvenile delinquency vis-a-vis commission of an offence. In such an event he is to be provided the post delinquency care and for the said purpose the date when delinquency took place would be the relevant date. It must, therefore, be held that the relevant date for determining the age of the juvenile would be one on which the offence has been committed and not when he is produced in court.

The salient features of the Act of 2000 may be noticed at the outset. Section 1(3) of the Act of 2000 states that it would come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. The Central Government had issued an appropriate notification in terms whereof; 1.4.2001 has been specified as the 'appointed date' from which the provisions of the said Act will come into force. The Act, thus, is prospective in its operation. However, the Act of 2000 has repealed the Act of 1986. It has obliterated the distinction between juvenile of different sex by reason whereof, a male juvenile would also be juvenile if he has not crossed the age of 18.

A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes 'juvenile' within the purview of the Act of 2000 must be answered having regard to the object and purport thereof. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the Act of 2000 takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but

instead of passing any sentence in relation to the juvenile, he would be forwarded to the Board which shall pass orders in accordance with the provisions of the Act as if he has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well-known must be given its full effect although it has its limitations. (See *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.* [(2003) 2 SCC 111] *ITW Signode India Ltd. v. Collector of Central Excise* [2003 (9) SCALE 720] and *Ashok Leyland Ltd. v. State of Tamil Nadu*, [(2004) 3 SCC 1])

The effect of the expression "as if" has recently been considered in *M/s Maruti Udyog Ltd. v. Ram Lal* (C.A. No.2946 of 2002 disposed of on 25.1.2005).

Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose. The Act provides for beneficent consequences and, thus, it is required to be construed liberally.

We are not oblivious of the proposition that a beneficent legislation should not be construed so liberally so as to bring within its fore a person who does not answer the statutory scheme. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd. Baroda* [(2004) 5 SCC 385]).

However, as would appear from the provisions of the Act of 2000 that the Scheme of the 2000 Act is such that such a construction is possible. The same would also be evident from Section 64 which deals with a case where a person has been undergoing a sentence but if he is a juvenile within the meaning of the 2000 Act having not crossed the age of 18, the provisions thereof would apply as if he had been ordered by the Board to be sent to a special home or the institution, as the case may be.

Section 20 of the Act of 2000 would, therefore, be applicable when a person is below the age of 18 years as on 1.4.2001. For the purpose of attracting Section 20 of the Act, it must be established that: (i) on the date of coming into force the proceedings in which the petitioner was accused was pending; and (ii) on that day he was below the age of 18 years. For the purpose of the said Act, both the aforementioned conditions are required to be fulfilled. By reason of the provisions of the said Act of 2000, the protection granted to a juvenile has only been extended but such extension is not absolute but only a limited one. It would apply strictly when the conditions precedent therefor as contained in Section 20 or Section 64 is fulfilled. The said provisions repeatedly refer to the words 'juvenile' or 'delinquent juveniles' specifically. This appears to be the object of the Act and for ascertaining the true intent of the Parliament, the rule of purposive construction must be adopted. The purpose of the Act would stand defeated if a child continues to be in the company of an adult. Thus, the Act of 2000 intends to give the protection only to a juvenile within the meaning of the said Act and not an adult. In other words, although it would apply to a person who is still a juvenile having not attained the age of 18 years but shall not apply to a person who has already attained the age of 18 years on the date of coming into force thereof

or who had not attained the age of 18 years on the date of commission of the offence but has since ceased to be a juvenile.

The embargo of giving a retrospective effect to a statute arises only when it takes away vested right of a person. By reasons of Section 20 of the Act no vested right in a person has been taken away, but thereby only an additional protection has been provided to a juvenile.

In *Rattan Lal v. State of Punjab* [(1964) 7 SCR 676], this Court has held:

"Under Art. 20 of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. But an ex post facto law which only mollifies the rigour of a criminal law does not fall within the said prohibition. If a particular law makes a provision to that effect, though retrospective in operation, it will be valid. The question whether such a law is retrospective and if so, to what extent depends upon the interpretation of a particular statute, having regard to the well settled rules of construction."

Referring to Maxwell on Interpretation of Statutes, Subba Rao, J.(as His Lordship then was) opined:

"This is not a case where an act, which was not an offence before the Act, is made an offence under the Act; nor is this a case where under the Act a punishment higher than that obtaining for an offence before the Act is imposed. This is an instance where neither the ingredients of the offence nor the limits of the sentence are disturbed, but a provision is made to help the reformation of an accused through the agency of the court. Even so the statute affects an offence committed before it was extended to the area in question. It is, therefore, a post facto law and has retrospective operation. In considering the scope of such a provision we must adopt the rule of beneficial construction as enunciated by the modern trend of judicial opinion without doing violence to the provisions of the relevant section."

Yet again in *Basheer alias N.P. Basheer v. State of Kerala* [(2004) 3 SCC 609], this Court held :

"If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, we find that the amendments (at least the ones rationalizing the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity, they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution."

Section 6(1) and Section 8 of the Human Rights Act, 1998 of United Kingdom also provide for expeditious disposal of cases. The effect of non-fulfillment of requirement that the a criminal charge be heard within a reasonable time came up for consideration recently before the House of

Lords in *Attorney General's Reference* [(2004) 2 AC 72] wherein it was held that the remedy as regard breach of reasonable time guarantee would depend upon the fact involved in each case. While holding such a right exists in an accused, it was observed:

"This reasoning depends, as I have said, on categorizing the within a reasonable time obligation as referring to a characteristic of the hearing or determination just as are the fair, "public", "independent", "impartial" and "tribunal established by law" requirements. It is this categorization which I suggest is fundamentally wrong. A within a reasonable time obligation relates to a quality of the performance, not to the attributes of the service or article here the hearing or determination to be provided by the person under the obligation. This may all sound over-sophisticated but it can be simply demonstrated both as a matter of the ordinary use of language and by reference to basic principles of the law of obligations."

In India such a right of expeditious disposal is contained in Article 21 of the Constitution, the relevance whereof for the purpose of interpretation of the Act cannot be minimized.

In *Zile Singh v. State of Haryana* [JT 2004 (8) SC 589], Lahoti, CJ, opined that rule against retrospectivity cannot be applied to legislations which are explanatory and declaratory in nature. (See also *R. (on the application of Uttley) v. Secretary of State for the Home Department* [(2004) 4 All ER 1]) Yet again in *Dayal Singh v. State of Rajasthan* [JT 2004 (Supp.1) SC 37], this Court upon referring *Rattan Lal* held:

"11. The decision approves of the principle that ex post facto law which only modifies the rigour of the criminal law, though retrospective in operation will be valid.

After enunciating this principle the court interpreted section 11 of the Probation of Offenders Act and came to the conclusion that on a true interpretation of the provision the High Court had jurisdiction to exercise the power at the appellate stage, and this power was not confined to a case where the trial court could have made that order. The phraseology of the section was wide enough to enable the appellate court or the High Court when the case came before it, to make such an order. We, therefore, do not find that *Rattan Lal* made a departure from the well settled principle that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than with which he might have been inflicted under the law in force at the time of the commission of the offence. This Court only laid down the principle that an ex post facto law which only mollifies the rigour of a criminal law did not fall within the said prohibition, and if a particular law made a provision to that effect, though retrospective in operation, it will be valid."

Interpretation of a statute depends upon the text and context thereof and having regard to the object with which the same was made.

The aforementioned provision of the 2000 Act is furthermore a remedial statute. (See discussions of G.P. Singh's *Principles of Statutory Interpretation*, Ninth Edition, 2004, page 733) They are, thus, required to be given liberal construction.

A remedial statute applied in a pending proceeding would not mean that thereby a retrospective effect and retroactive operation is being given thereto.

We do not intend to say that no other view is possible. But in a case of this nature where an additional protection had been granted pursuant to or in furtherance of the international treaties and keeping in view of the experience which had been gathered by the Parliament after coming into force of the 1986 Act, we think that it should be read in such a fashion so that the extended benefit can be granted even to the juvenile under the 2000 Act. Furthermore, sub-section (2) of Section 69 provides that all proceedings shall be deemed to have been held under the new Act. This is also suggestive of the fact that the new Act would, to the aforementioned extent, apply to a pending proceeding which was initiated under the 1986 Act.

We, however, do not agree that the model rules have been framed in terms of the provisions of the Act so as to attract the principles that rules validly framed are to be treated as part of the Act. It is one thing that the rules validly framed are to be treated as part of the Act as has been held in *Chief Forest Conservator (Wildlife) v. Nisar Khan* [(2003) 4 SCC 595] and *National Insurance Co. Ltd. v. Swaran Singh* [(2004) 3 SCC 297] but the said principle has no application herein as in terms of the provisions of the said Act, the Central Government does not have any authority to make any rules. In absence of any rule making power it cannot refer to the omnibus clause of power to remove difficulty in as much as it has not been stated that framing of any model rule is permissible if a difficulty arises in giving effect to the provision of the Act. The Central Government is a statutory functionary. Its functions are circumscribed by Section 70 of the Act only. It has not been authorized to make any rule. Such rule making power has been entrusted only to the State. The Central Government has, thus, no say in the matter nor can it exercise such power by resorting to its power 'to remove difficulties'. Rule making power is a separate power which has got nothing to do with the power to remove difficulty. By reason of the power to remove difficulty or doubt, the Central Government has not been conferred with any legislative power. The power to remove doubt or difficulty although is a statutory power but the same is not akin to a legislative power and, thus, thereby the provisions of the Act cannot be altered. (See *M/s Jalan Trading Co. Private Ltd. v. Mill Mazdoor Sabha* [AIR 1967 SC 691])

The age of the delinquent juvenile, therefore, cannot be determined in terms of the model rules 62. Any law mandating the court to take into consideration certain documents over others in determining an issue, must be provided for only by law. Only a validly made law can take away the power of the court to appreciate evidence for the purpose of determination of such a question in the light of Section 35 of the Indian Evidence Act. It cannot be done by the Central

Government in exercise of the executive power. (See *Union of India v. Naveen Jindal* [(2004) 2 SCC 510] and *State of U.P. v. Johri Mal* [(2004) 4 SCC 714])

In *Birad Mal Singhvi v. Anand Purohit* [AIR 1988 SC 1796], this Court held:

"...To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded..."

In *Sushil Kumar v. Rakesh Kumar* [(2003) 8 SCC 673], this Court as regard determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed :

"32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence the question of the onus of proof becomes academic [See *Union of India v. Sugauli Sugar Works (P) Ltd.* [(1976) 3 SCC 32] and *Cox and Kings (Agents) Ltd. v. Workmen* [(1977) 2 SCC 705]. Furthermore, an admission on the part of a party to theis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

This Court therein followed, inter alia, *Birad Mal Singhvi v. Anand Purohit* [AIR 1988 SC 1796] and several other decisions. The Court, therefore, must determine the age of the appellant herein keeping in view our aforementioned findings that the relevant date for reckoning the age of the juvenile would be the date of occurrence and not the date on which he was produced before the Board.

The upshot of the aforementioned discussions is :

- (i) In terms of the 1986 Act, the age of the offender must be reckoned from the date when the alleged offence was committed;
- (ii) The 2002 Act will have a limited application in the cases pending under the 1986 Act;
- (iii) The model rules framed by the Central Government having no legal force cannot be given effect to.

(iv) The court, thus, would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of Section 35 of the Indian Evidence Act.

Subject to the aforementioned, I, with respect, agree with the conclusions arrived at by Brother Sema, J.

* * * * *

Sudesh Kumar v. State of Uttarakhand

(2008) 3 SCC 111

P.P. NAOLEKAR, J. - 2. The appellant was convicted by the judgment and order dated 26-7-1985 passed by the Additional District and Sessions Judge, Dehradun, along with another accused person, under Section 392 read with Section 34 of the Penal Code, 1860 (IPC) and sentenced to undergo five years' rigorous imprisonment and further to pay a fine of Rs 5000 and in default of payment of fine to undergo further rigorous imprisonment for six months. The appellant was further convicted under Section 25 of the Arms Act and sentenced to undergo rigorous imprisonment for one year. In appeal preferred by the appellant, the High Court has confirmed the order of conviction and sentence by its order dated 9-7-2007.

3. The case of the prosecution in brief is that one Jagdish Prasad was wholesale beedi merchant and carried on his business in the name and style of M/s Madrasee Basant Beedi in Vikasnagar, District Dehradun. Jagdish Prasad used to go to collect his dues from the retailers on every 15th day. On 7-3-1981, he went to Purola, Badkot for realisation of his dues. Along with other persons, he was travelling in the car which was being driven by the driver Gyanendra Singh. While returning to Vikasnagar from Purola, they had stopped at the curve of Katta Pather and alighted from the car. Four miscreants came on scooter and parked the said scooter in front of the motor car. Two miscreants were armed with revolvers and the remaining two had khukhris with them. All of them surrounded Jagdish Prasad and ordered him to hand over money bag to them. They also threatened him to shoot and kill him if he made any protest. Jagdish Prasad quietly handed over the money bag containing about Rs 25,000. He also gave his wrist watch and a golden ring. Another occupant of the car was compelled to give cash of Rs. 230 and the driver gave cash of Rs.600 to them. One person sitting in the car was forced to give his three wrist watches. The miscreants snatched away the keys of the car from its driver. One of the miscreants ran away on the scooter along with the money bag, while the remaining three boarded the car and fled away. On appreciation of the evidence brought on record, the Additional District and Sessions Judge found the accused persons guilty and imposed the punishment which was confirmed by the High Court as mentioned hereinabove. The appellant-accused Sudesh Kumar has preferred this appeal against the order of conviction and sentence.

4. Shri K.T.S. Tulsi, learned Senior Counsel appearing for the appellant has submitted only one point that the accused at the time of the commission of the crime was below 21 years of age which is apparent from the statement recorded under Section 313 CrPC of the accused wherein age of the accused was given by the accused as 20 years and from the transfer certificate, filed along with special leave petition, issued by the Principal, Sanatan Dharma Junior High School, Dehradun, which shows that the appellant was born on 28-6-1962. It is, therefore, submitted that it is clearly established that the appellant-accused on the date of the offence i.e. 7-3-1981, was below 21 years of age and as such was entitled to consideration and benefit under Section 6 of the Probation of Offenders Act, 1958 (hereinafter referred to as "the Act" for convenience).

5. On the other hand, it is urged by Shri Jatinder Kumar Bhatia, learned counsel for the State that the accused having not raised the question of his age either before the trial court or before the High Court, and in the absence of any reliable material, could not ask for consideration of his case and benefit under Section 6 of the Act. It is further submitted that it is the date on which the sentence is passed which shall be the relevant date for applicability of Section 6 of the Act.

6. The question involved in this case is of interpretation of Section 6 of the Act. It would, therefore, be appropriate to reproduce Section 6 which reads as under:

“6. Restrictions on imprisonment of offenders under twenty-one years of age.—(1)

When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and other information available to it relating to the character and physical and mental conditions of the offender.”

7. While interpreting Section 6 of the Act, a 3-Judge Bench of this Court in *Daulat Ram v. State of Haryana* [(1995) 1 SCC 349] has said that the object of Section 6 of the Act, broadly speaking, is to see that young offenders are not sent to jail for the commission of less serious offences mentioned therein because of grave risk to their attitude to life to which they are likely to be exposed as a result of their close association with the hardened and habitual criminals who may happen to be the inmates of the jail. The Court laid down that Section 6 places restrictions on the court's power to sentence a person under 21 years of age for the commission of crimes mentioned therein unless the court is satisfied that it is not desirable to deal with the offender under Sections 3 and 4 of the Act. The court is also required to record reasons for passing sentence of imprisonment on such offender.

8. In another case in *Satyabhan Kishore v. State of Bihar* [AIR 1972 SC 1554] this Court (a 3-Judge Bench) reiterated the principle laid down by the Court in *Daulat Ram* case and Shelat, J. speaking for the Court held that Section 6 lays down an injunction as distinguished from discretion under Sections 3 and 4 not to impose a sentence of imprisonment on an offender, unless reasons are recorded.

9. From the aforesaid judgments, it is apparent that while imposing a sentence on an accused who is below 21 years of age and who is found guilty of having committed an offence punishable with imprisonment which is not the imprisonment for life, the court shall not sentence him to

imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and the character of the offender it is not desirable to deal with him under Section 3 or Section 4 of the Act. It further mandates that if the court wants to impose a sentence of imprisonment on the offender who is below 21 years of age it shall record its reasons for doing so. Thus, the court imposing a sentence of imprisonment on an accused who is below 21 years of age would record reasons as to why it does not find it desirable to deal with him under Section 3 or Section 4 of the Act.

10. It can be noticed that the question of the offender being of 21 years or below on the date of the commission of offence or on the date of imposition of sentence of imprisonment was not dealt with in the abovementioned cases.

11. The learned counsel for the appellant has relied upon a 2-Judge Bench judgment of this Court in *Masarullah v. State of Tamil Nadu* [AIR 1983 SC 654], wherein this Court held as under:

“6. In case of an offender under the age of 21 years on the date of commission of the offence, the court is expected ordinarily to give benefit of the provisions of the Act and there is an embargo on the power of the court to award sentence unless the court considers otherwise, ‘having regard to the circumstances of the case including nature of the offence and the character of the offender’, and reasons for awarding sentence have to be recorded. Considerations relevant to the adjudication of this aspect are, circumstances of the case, nature of the offence and character of the offender. It is, therefore, necessary to keep in view the aforementioned three aspects while deciding whether the appellant should be granted the benefit of the provisions of the Act.”

12. It appears that in *Masarullah* case the Court did not notice a 4-Judge Bench judgment delivered by Ayyangar, J. in *Ramji Missar v. State of Bihar* [AIR 1963 SC 1088] wherein this Court has noticed argument before the High Court that the Sessions Judge erred in not applying the provisions of Section 6 of the Act to the accused. The High Court repelled the contention holding that although the accused might have been under 21 years of age on the date of the offence, he was not a person under 21 years of age on the date when the Sessions Judge found him guilty and sentenced him to a term of imprisonment, and held that the crucial date on which the age had to be determined being not the date of offence but the date on which as a result of a finding of guilty sentence had to be passed against the accused. In the factual matrix of that case, this Court held as under: (*Ramji Missar* case)

“6. Taking first the case of *Ramji*, the elder brother, we entirely agree with the High Court in their construction of Section 6. The question of the age of the person is relevant not for the purpose of determining his guilt but only for the purpose of the punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison.

The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of Section 6(1) should be that when the court is dealing with the offender, that being the point of time when the court has to choose between the two alternatives which the Act in supersession of the normal penal law vests in it viz. sentence the offender to imprisonment or to apply to him the provisions of Section 6(1) of the Act.”

The court further said:

“19. We shall now proceed to consider one question which was mooted before us in regard to the crucial date for reckoning the age where an appellate court modifies the judgment of the trial Judge, when Section 6 becomes applicable to a person only on the decision of an appellate or a Revisional Court. Is the age of the offender to be reckoned as at the date of the judgment of the trial Judge or is it the date when the accused is, for the first time, in a position to claim the benefit of Section 6. We consider that on the terms of the section, on grounds of logic as well as on the theory that the order passed by an appellate court is the correct order which the trial court should have passed, the crucial date must be that upon which the trial court had to deal with the offender.”

From the judgment of the Court, it is apparent that the date of the judgment of the trial court would be the crucial date for consideration of the age of the accused while applying Section 6 of the Act.

13. Faced with the 4-Judge judgment of this Court in *Ramji Missar* the learned Senior Counsel for the appellant contended that while considering the *pari materia* provisions under the Juvenile Justice Act, 1986, a Constitution Bench of this Court in *Pratap Singh v. State of Jharkhand* [2005 (1) SCALE 763] has held that reckoning date for determining the age of a juvenile is the date of the commission of the offence and not the date when he is produced before the competent authority or in the court and, therefore, the provisions of Section 6 of the Act should be construed in the same light, and the age of the accused for applying Section 6 of the Act has to be the date on which the offence was committed.

14. While interpreting the provisions of the Juvenile Justice Act, 1986 (“the 1986 Act”) and the Juvenile Justice (Care and Protection of Children) Act, 2000 (“the 2000 Act”), this Court has observed that these Acts provide for the care, protection, treatment, development and rehabilitation of juveniles. The Acts being benevolent legislations, such interpretation must be given which would advance the cause of the legislations i.e. to give benefit to juveniles.

15. Section 2(l) of the 2000 Act defines “juvenile in conflict with law” as meaning a juvenile who is alleged to have committed an offence. The definition of “delinquent juvenile” in the 1986 Act is referable to an offence said to have been committed by him. It is the date of offence that he was (*sic in*) conflict with law. When a juvenile is produced before the competent authority and/or

court, he has not committed an offence on that date, but he was brought before the authority for the alleged offence which he has been found guilty to have committed. Therefore, what was implicit in the 1986 Act has been made explicit in the 2000 Act. Sinha, J. in his concurring judgment said that having regard to the constitutional and statutory scheme it was not necessary for Parliament to specifically state that the age of juvenile must be determined as on the date of commission of the offence and the same is inbuilt in the statutory scheme.

16. From the aforesaid, it is apparent that while determining the age of a juvenile the court has interpreted the provision for giving benefit to a juvenile who has committed an offence and was in conflict with law. The offence having been committed, he came in conflict with law on the date of commission of the offence which is relevant for determining the age for giving protection under the 1986 Act and the 2000 Act.

17. It can be noticed from *Ramji Missar* case and *Pratap Singh* case that the object and purpose of the Probation of Offenders Act, 1958 for applying the relevant provisions to the accused are different and cannot be said in pari materia with the Juvenile Justice Act, 1986 and the Juvenile Justice (Care and Protection of Children) Act, 2000. The court would not construe a section of a statute with reference to that of another statute unless the latter is in pari materia with the former. Therefore, a decision made on a provision of a different statute will be of no relevance unless underlying objects of the two statutes are in pari materia. The decision interpreting various provisions of one statute will not have the binding force while interpreting the provisions of another statute.

18. Section 6 of the Act has been construed by a 4-Judge Bench of this Court in *Ramji Missar* case and that will have the binding force while interpreting the same section in same statute and the decision of the Constitution Bench interpreting provisions of the 1986 Act and the 2000 Act would not be held to be a decision on interpretation of Section 6 of the Act. Section 6 of the Act would apply to the accused who is under 21 years of age on the date of imposition of punishment by the trial court and not on the date of commission of the offence. If on the date of the order of conviction and sentence by the trial court the accused is below 21 years of age the provisions of Section 6 of the Act applies in full force.

19. That being the case, even if the date of birth of the accused is held to be 28-6-1962 as alleged by him in the petition, on the date of delivery of judgment of conviction and sentence on 26-7-1985 by the Additional District and Sessions Judge he was more than 21 years of age and thus was not entitled to the benefit under Section 6 of the Act.

20. That apart, the question of applicability of the Act has been raised for the first time while filing the special leave petition. The accused has not claimed benefit under Section 6 of the Act during the trial before the Additional District and Sessions Judge or before the High Court. Only material which was placed before the Sessions Judge or the High Court is the statement recorded of the appellant-accused under Section 313 CrPC wherein the age of the accused was given as 20 years. In the similar circumstances, in *Yaduraj Singh v. State of U.P.* [(1976) 4 SCC 310] this Court held as under

“2. The learned counsel appearing for the appellants argues that on August 30, 1969 when the incident took place, Appellants 3 and 4 were less than 21 years of age and, therefore, they ought to have been given the benefit of the Probation of Offenders Act. This contention was neither taken in the Sessions Court nor in the High Court. True, that this Court has taken the view that in appropriate cases such a contention may be entertained by this Court for the first time. But the difficulty in accepting the submission of the learned counsel is that there is no credible evidence on the record showing that Appellants 3 and 4 were less than 21 years of age when the offence was committed. Counsel says that those two accused had given their ages in their statements under Section 342 of the Code of Criminal Procedure, and if the trial Judge doubted the correctness thereof, he could have had the two accused medically examined in order to ascertain their age. This seems to us a difficult burden for any trial Judge to undertake. The age given by the two accused in their statements had no special significance in the absence of a proper plea under the Probation of Offenders Act.”

21. For the aforesaid reasons, the appeal being devoid of any merit, is dismissed.

C.K. THAKKER, J. (*concurring*) - I have had the benefit of going through the judgment prepared by my learned Brother. I am in agreement with him that the appeal deserves to be dismissed. I, however, decide the appeal on the second ground that on the facts and in the circumstances of the case, the appellant has failed to make out a ground that he was less than 21 years of age at the time of commission of offence.

23. As observed by my learned Brother, the accused had not claimed benefit of Section 6 of the Probation of Offenders Act, 1958 either before the trial court or before the High Court. My learned Brother has also referred to *Yaduraj Singh v. State of U.P.* wherein this Court did not allow a new plea as to age of the accused to be raised for the first time in this Court.

24. In *Sushil Kumar Mehrotra v. State of U.P.* [(1984) 3 SCC 123] a similar plea was raised for the first time by the appellant-accused in this Court against his conviction for an offence punishable under Section 302 read with Section 34 and Section 394 of the Penal Code (IPC). It was held that the contention of the accused that he was 15½ years of age at the time of occurrence was “a complete afterthought” and refused to grant the benefit on that basis.

25. It is, no doubt, true that the provision is beneficial and benevolent in nature and no “technical” objection should be raised that such plea was not taken before the courts below [*Gopinath Ghosh v. State of W.B.*, AIR 1984 SC 237]). But in my opinion, there must be credible and trustworthy evidence in support of such plea. In the present case, a certificate in the form of “scholar record and transfer certificate” is annexed wherein the date of birth of the appellant was shown as 28-6-1962. The certificate was not on record either before the trial court or before the High Court. From the “true copy”, it is clear that it is purported to have been issued by the Principal only on 10-2-2007. Thus, it cannot be said that there is “credible evidence” or

“trustworthy material” that the appellant was less than 21 years of age at the time of commission of offence. In my considered opinion, such question cannot be permitted to be raised for the first time in this Court and I am in agreement with my learned Brother on that point.

26. Since the appeal can be decided on this ground, I refrain from expressing any opinion on the question dealt with and decided by my learned Brother on interpretation of Section 6 of the Act.

27. The appeal is accordingly dismissed.

* * * * *

SENTENCING*

Sentencing amounts to the use of state coercion against a person for committing an offence. The sanction may take the form of some deprivation, restriction, or positive obligation. Deprivations and obligations are fairly widespread in social contexts – e.g. duties to pay taxes, to complete various forms, etc. But when imposed as a sentence, there is the added element of condemnation, labeling, or censure of the offender. In view of the direct personal and indirect social effects this can have, it calls for justification.

Much writing about the relations of sentencing has focused on one or more particular justifications. In order to unravel punishment as a social institution, however and to understand the tensions inherent in and given ‘system’ there is benefit in identifying the main thrusts of the several approaches. Among the issues to be considered are the behavioural and the political premises of each approach, its empirical claims, and its practical influence.

Desert of Retributive Theories

Retributive theories of punishment have a long history, including the writings of Kant and Hegel. In their modern guise as the desert approach, they came to prominence in the 1970s, to some extent propelled by the alleged excesses and failure of rehabilitative ideas (Bottoms and Preston 1980). Punishment is justified as the natural or appropriate response to crime, a fundamental intuitive claim, and its quantum should be proportionate to the degree of wrongdoing. The justification for the institution of punishment also incorporates the consequentialist element of needing to deter crime: without the institution, anarchy might well ensue (for a variety of modern writings, see von Hirsch 1976, 1986, 1990a; Duff 1986). The behavioural premise of desert is that individuals are responsible and predominately rational decision-makers. The political premise is that all individuals are entitled to equal respect and dignity: an offender does not forfeit all rights on conviction, and has a right not to be punished disproportionately to the crime committed.

Proportionality is the key concept in desert theory. Cardinal proportionality requires that the overall level of the penalty scale should not be out of proportion to the gravity of the conduct: five years imprisonment for shoplifting would clearly breach that principle, but beyond such extreme cases there is much room for debate. Social conventions and cultural traditions tend to determine what levels of sanction are thought appropriate in a particular national or historical context (cf. Downes 1988 on the Netherlands and England; Graham 1990 on Germany), Ordinal proportionality concerns the ranking of the relative seriousness of different offences. In practice, much depends here on the evaluation of conduct, especially by sentencers, and on social assumptions about traditional or ‘real’ crime (e.g. street crime) compared with new types of offence (e.g. city fraud, pollution). In theory, ordinal proportionality requires the creation of a scale of values which can be used to assess the gravity of each type of offence: other relevant

* Andrew Ashworth, “Sentencing” in Mike Maquire, Rod Morgan and Robert Reiner (eds.), *The Oxford handbook of Criminology* (2nd ed., 1994).

factors, such as culpability, aggravation, and mitigation, must then be assimilated into the scale. This task, which is vital to any theory in which proportionality plays a part, is continuing (e.g. von Hirsch and Jareborg 1991; Ashworth 1992: ch.4).

Deterrence Theories

Deterrence theories regard the prevention of further offences through a deterrent strategy as the rationale of punishing. As an exercise of state power, sentencing can be justified only by its consequences. The quantum of the sentence depends on the type of deterrent theory. There is little modern literature on individual deterrence, which sees the deterrence of further offences by the particular offender as the measure of punishment. A first offender may require little or no punishment. A recidivist might be thought to require an escalation of penalties. The seriousness of the offence becomes less important than the prevention of repetition. Traces of this approach can certainly be detected in modern sentencing practice, and some critics of desert theory claim that in taking (limited) account of prior record it incorporates a covert deterrent element (for discussion see Ashworth 1992a: ch 6.2).

More attention has been devoted to general deterrence, which involves calculating the penalty on the basis of what might be expected to deter others from committing a similar offence. Major utilitarian writers such as Bentham (1789; and cf. Walker 1991) and economic theorists such as Posner (1985) develop the notion of setting penalties at levels sufficient to outweigh the likely benefit of offending. The behavioural premise is that of responsible and predominantly rational, calculating individuals. The political premise is that the greatest good of the greatest number represents the supreme value, and that the individual counts only for one: it may therefore be justifiable to punish one person severely in order to deter others effectively. Satisfactory empirical evidence of the effect of deterrent sentencing on individual behaviour is difficult to obtain. The conditions must be such that non-offending can safely be ascribed to the deterrent effect of the legal penalty rather than to any of the other myriad influences on people's conduct, such as the perceived risk of detection, the opinions, of significant others, etc. (Beyleveld 1980; cf. Walker 1991). Few research findings meet that criterion, and those that do provide support for general deterrent sentencing in only a few types of situation (see Zimring and Hawkins 1973; Beyleveld 1979; Riley 1985; Harding 1990).

Rehabilitative Sentencing

Sentencing aimed at the reformation of the offender's character has a lengthy history, being evident in the early days of probation and of Borstal institutions. The rationale here is to prevent further offending by the individual through the strategy of rehabilitation, which may involve individual case-work, therapy, counseling, intervention in the family, etc. Still a leading rationale in many European countries, it reaches its zenith in the United States in the 1960s and then declined spectacularly in the 1970s. Research by Martinson was widely represented as demonstrating that treatment programmes usually failed, swamping the more qualified judgment in an English survey by Brody and a subsequent clarification or retraction by Martinson himself

(Martinson et al. 1974; Brody 1975; Martinson 1979). In terms of effectiveness, the true position is probably (as with deterrence) that certain rehabilitative programmes are likely to work for some types of offender in some circumstances. A humanitarian desire to provide help for those with obvious behavioural problems has ensured that various treatment programmes continue to be developed, and some authors have called for the rehabilitation of rehabilitative theory (see Cullen and Gilbert 1982; Hudson 1987; and discussion by von Hirsch and Ashworth 1992a: ch.1).

Its behavioural premise is that some or many criminal offences are to a significant extent determined by social pressures, psychological difficulties, or other problems which impinge on individuals. The links with positivist criminology are strong. The political premise is that offenders are seen as unable to cope and in need of help from experts, and therefore (perhaps) as less than fully responsible individuals. The rehabilitative approach indicates that sentences should be tailored to the needs of the particular offenders, and places no limits on the extent of the intervention. It lays emphasis on the processes of diagnosis and treatment by trained professionals. In practical terms the pre-sentence report, formerly the social inquiry report, is an essential element in the pursuit of this approach.

Incapacitate Sentencing

The incapacitative approach is to identify offenders or groups of offenders who are likely to do such serious harm in the future that special protective measures should be taken against them. Programmes of selective incapacitation have focused on groups of recidivists (cf. Greenwood 1982; Blumstein et al. 1986), but in England the emphasis has been upon identifying individuals who are predicted to be likely to commit serious harm in the future. The discretionary sentence of life imprisonment has been used increasingly for this purpose, and the Criminal Justice Act 1991 authorizes 'public protection' sentences for violent and sexual offenders who are considered likely to do serious harm.

There is no behavioural premise for the incapacitative approach: it looks chiefly to the protection of potential victims, and can apply whether the offender is a rational calculator or is driven by pressures. The political premise is often presented as utilitarian, justifying incapacitation by reference to the greater aggregate benefit, but even a sentencing rationale which emphasizes the continuing rights of a person who has offended must deal with the possibility that those may conflict with the rights of a (potential) future victim. Some of these issues were examined in the Floud report, which also found that predictions of 'dangerousness' tended to be wrong more often than not (Floud and Young 1981; for different analyses cf. Bottoms and Brownsword 1982; Wood 1988). This repeatedly confirmed fallibility of predictive judgments (see also Brody and Tarling 1981; Monahan 1981) calls into question the justification for any lengthening of sentences on grounds of public protection, and yet the political pressure to have some form(s) of incapacitative sentence available to the courts has been felt in most countries. If this is the reality of penal politics, then there is surely a strong case for procedural safeguards to

ensure that the predictive judgments are open to thorough challenge. The provisions of the Criminal Justice Act 1991 are inadequate in this respect (see further Ashworth 1992a: 163-7).

Restorative and Reparative Theories

These are not theories of punishment. Rather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centered (see e.g. Wright 1991), although in some versions they encompass the notion of reparation to the community for the effects of crime. They envisage less resort to custody, with onerous community-based sanctions requiring offenders to work order to compensate victims, and also contemplating support and counseling for offenders to reintegrate them into the community. Such theories therefore tend to act on a behavioural premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notions of just punishment on behalf of the state.

Legal systems based on a restorative rationale are rote, but the increasing tendency to insert victim-orientated measures such as compensation orders into sentencing systems structured to impose punishment provides a fine example of Garland's observation that 'institutions are the scenes of particular conflicts as well as being means to a variety of ends, so it is no surprise to find that each particular institution combines a number of often incompatible objectives, and organizes the relations of often antagonistic interest groups' (1990: 282).

Social Theories

There has been a resurgence of writings which emphasize the social and political context of sentencing (for selected readings see von Hirsch and Ashworth 1992a, esp. ch. 7). Important in this respect are Garland's analysis of the theoretical underpinnings of historical trends in punishment (Garland 1990) and Hundon's argument in favour of a shift towards a more supportive social policy as the principal response to the problem of crime (Hudson 1987). Those who have been influenced by H.L.A. Hart's distinction between the general justifying aim of punishment (in his view, utilitarian or deterrent) and the principles of distribution of punishment (in his view, retribution or desert) (Hart 1968, esp., ch. 1) should consider the challenge to this dichotomy in Lacey's work. She argues that both these issues raise questions of individual autonomy and of collective welfare and that, rather than denying it, we should address this conflict and strive to ensure that neither value is sacrificed entirely at either state (Lacey 1988). In developing this view she explores the political value involved in state punishment and argues for a clearer view of the social function of punishing.

The political philosophy underlying the work of Braithwaite and Pettit is what they term republicanism, at the heart of which lies the concept of dominion (Braithwaite and Pettit 1990; for a critique see von Hirsch and Ashworth 1992b). Its essence is liberty, not in the sense of simple

freedom from constraint by others, but more in the form of a status of guaranteed protection from certain kinds of interference. This leads them to propose that punishments should increase the dominion of victims with the least loss of dominion to the offenders punished. Since dominion lays emphasis on reassuring citizens about the prospect of liberty, it might require preventative sentences based on deterrence or incapacitation. They refer to unspecified limits on severity, but not lower limits, and their view is that the censuring function of the criminal justice system can and should so far as possible be fulfilled by means other than punishment. There is thus no recognition of an individual's right not to be punished more than is proportionate to the seriousness of the crime: all depends on what will advance overall dominion, which might happen to be more or less in any individual case than the 'deserved' punishment.

Appraising the Rationales

In formal terms, the English sentencing system now contains an approximate hierarchy of rationales. According to the Criminal Justice Act 1991, desert is the primary rationale, except in the relatively rare cases where the conditions for imposing an incapacitative sentence are met. Deterrence may not be used to justify a disproportionately severe sentence. Rehabilitative considerations become important when choosing among community orders of a similar severity, and also serve as a justification for probation orders and supervision after early release from custody. Compensation orders appear to have priority over fines and not over custody. This legal framework is hardly conflict-free, but it establishes a grater degree of certainty than existed in the previous 'cafeteria-style' system in which sentencers usually had wide choices of approach.

In practical and in theoretical terms however, the position is less clear-cut. Since punishment is a social institution, this means that discussions ought to take account of its relation to other social institutions, and the relationship of sentencing to other aspects of the criminal justice system. It also means that, in practice, the form and content of punishment in a given society are likely to reflect a historical mixture of political and social events and influences. The above summary of several rationales, necessarily brief and omitting much of their richness, has referred to the behavioural and the political bases of each one. Criminologists have also tended to evaluate the approaches in terms of their effectiveness, and doubts were expressed earlier about the efficacy of strategies of individual deterrence, general deterrence, rehabilitation, and incapacitation. In respect of the last two it may be possible to refine techniques for identifying suitable targets, but it is also important to note that the object of discussion is marginal preventative effects. Thus a sentencing system based on desert is likely to deter and incapacitate to a certain degree, and so the proponents of deterrent or incapacitative theories must seek to justify the search for extra increments of prevention, by reference to evidence of likely success and the type of measure which must be adopted in order to achieve that success. It is there that concrete evidence is wanting. (For a relatively optimistic view, see Walker 1985: chs. 7, 22).

Even if there were satisfactory evidence of efficacy, however, there remain issues about the rights involved in punishment – notably, those of victims and of offenders. The victim's right to

receive compensation from the offender is surely undoubted, but in what circumstances should it give way to the offender's interest in not being utterly impoverished for months or years to come? There is controversy about whether or not victims should be able to express an opinion on sentence to the court, but this surely overlooks the point that sentencing is a state function which should be determined by public policy rather than private preference. What rights should be accorded to offenders? Deterrence theory seems to regard individual offenders as mere units in the overall calculation; incapacitative theory may recognize a general right not to be punished more than is proportionate to the offence, but overrides this in situations which may be more or less well defined; and rehabilitative theory has often failed to recognize any such general right, since it has been invoked in support of indeterminate sentence. It may therefore be seen as a strength of desert theory that it limits punishment to what is proportionate, and proposes criteria for determining proportionality (e.g. von Hirsch and Jareborg 1991). Similar limits on state power out of respect for the rights of the offender are proposed in the republicanism of Braithwaite and Pettit (1991) and the communitarianism of Lacey (1988), although neither book works out the detailed implications.

The choice of one or more rationales for punishment may not dictate the level of punitiveness in a given country, especially in view of the sparse evidence on deterrent and rehabilitative efficacy. It has sometimes been argued that desert theory leads to harsh penalties, but there is no such connection (cf. Hudson 1987; von Hirsch 1990b). California has harsh penalties, whereas Finland and Sweden have relatively low levels of punitiveness, and yet all regard desert as the primary rationale. Much depends on the political climate and on the attitudes of key actors, but reductions in punitiveness may be better achieved through specific principles of restraint in the use of custody or even prison capacity constraints than through the promotion of a general rationale

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CAPITAL PUNISHMENT : RECENT DECISIONS ON SENTENCING UNDER THE CRIMINAL PROCEDURE CODE, 1973*

Discretion in the matter of imposition of death penalty

In *Lehna* [(2002) 3 SCC 76] the Supreme Court noticed the changes that the Criminal Procedure Code (Cr. PC) has undergone in the last three decades clearly indicating that Parliament is taking note of the contemporary criminological thought and the movement from deterrence to reformation. There is a definite swing discernible in the code in favour of life imprisonment and against death penalty consistent with the changing criminological thought.

Prior to the amendment of section 367(5) of the old code by the Criminal Procedure Code (Amendment) Act, 1955, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not awarded had to be stated in the judgment. The matter was left, after the aforementioned amendment, to the discretion of the court. The court had, however, to take into account all the circumstances, and state its reasons for whichever of the two sentences it imposed in its discretion. The formal rule that the normal punishment for murder was death no longer held good and it was now within the discretion of the court to award either of the two sentences envisaged in section 302. The amendment of section 367(5) of the old code did not affect the law regulating punishment under IPC. This amendment relates to the procedure only. The courts were no longer required now to elaborate the reasons for not awarding the death penalty. But they could not depart from sound judicial consideration preferring the lesser punishment.

Further change in the criminological thought in favour of reformation is discernible in the 1973 Code wherein death sentence is ordinarily ruled out and can only be imposed for special reasons as provided in section 354(3) of the new code. The theory of reform and rehabilitation in preference to imposing severe punishment is also discernible in section 361 which is a new provision in the code and makes it mandatory for the court to record special reasons for not releasing an offender on probation envisaged in section 360 of the code. These are some indications by the legislature that reformation and rehabilitation of offenders and not mere deterrence are now amongst the foremost objects of the administration of criminal justice in our country. Sections 354(3) and 361 in the new code have become part of the law as a result of emergent position of acceptance by the legislature of the aforesaid new advances and the trends in criminology.

It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other relevant circumstances and the tractability of the offender to reform must necessarily play the most prominent role in deciding the sentence to be

* Bushan Tilak Kaul, "Criminal Law", XXXVIII *Annual Survey of Indian Law* 181-226, 195-20 (2002).

awarded to the offender. The special reasons required under these provisions have to be relatable to these factors.

The emerging trends in criminology reflected in the successive legislative amendments in the code have also been the subject matter of discussion in a number of judicial decisions especially in *Ediga Anamma, Bachan Singh and Machhi Singh*. In *Lehna*, the Supreme Court observed that criminal justice deals with complex human problems and diverse human beings. A judge has to balance the personality of the offender with the circumstances, situations and the reaction and choose the appropriate sentence to be imposed. The court after surveying its earlier decision and the legislative policy held that life imprisonment is the rule and death sentence an exception. Death sentence is to be imposed in rarest of rare cases when the collective conscience of the county is so shocked, that it will expect the holders of judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In the words of the court the community may entertain such sentiment in the following circumstances.

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

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

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

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

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

The court observed that if upon taking an overall global view of the circumstances in the light of the aforementioned propositions and taking into account the answers to the questions posed by way of the test for the rarest of the rare cases, the circumstances of the case are such that death is warranted, the court would proceed to do so. While awarding adequate sentence the courts have to be cognizant of the fact that a convict hovers between life and death when the question of gravity of offence and award of adequate sentence comes for consideration.

Further, an award of punishment in a civilized society wedded to rule of law is the outcome of deliberations in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity to meet the accusations by

establishing his innocence. It is the outcome of deliberations and the screening of the material by the judge who is the informed man that leads to the determination of the lis. The principal of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Ordinarily some significant discretion is left to the judge in deciding the question of sentence to be awarded in each case which is presumably done to permit sentence that reflect more subtle considerations of culpability that are raised by the special facts of each case. The court observed:

Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the terrific results of his crime. Inevitably these considerations cause departure from a just desert as a basis of punishment and create cases of apparent injustice that are serious and widespread.

The court opined that proportion between crime punishment is a goal respected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences.

Coming to the facts in *Lehna* the court found that the genesis of dispute between the accused and the other members of the family was land. The accused seemed to have taken exception to his father taking away the land from him for which he considered his brother and sister-in-law to be responsible. The accused was responsible for causing death of his brother, sister-in-law and another relation. The court took into account the medical evidence showing that the accused had also sustained serious injuries in the thrashing that he got from villagers after he had attacked the victims and the fact that the medical evidence indicated that it was the mental condition of the accused which had led him to assault his relations which could not be lost sight of. The same may not be relevant to judge culpability, but it certainly is a factor while considering the question of sentence. There was no evidence of any diabolic planning to commit the crime, though cruel was the act. The act of the father taking away the land from the accused had deprived him of earning, the means of his livelihood exhibiting his displeasure and his resentment. The frequency of quarrels indicated lack of any sinister planning to take away lives of the deceased. In this peculiar background the court held that death sentence was not proper and sentenced the accused to imprisonment for life which it thought was more appropriate.

In *Ruli Ram*, the court deprecated the recent trends where political battles are increasingly being fought with bullets rather than the ballots resulting in loss of innocent lives who have no role to play therein. In this case close relations of the deceased who were two boys aged 10 and 12 lost their lives allegedly on account of one such battle. The two accused were responsible for taking their lives. It seems that the accused wanted the family members of these two boys to vote for a particular candidate but on their refusal to do so the accused/appellants took their revenge by throwing the deceased boys into a pond. The two accused were put on trial under section 302 IPC. The trial court convicted them under section 304 part-II IPC. The high court on appeal by the state convicted the accused under section 302. The court held that the plea of the counsel for the state that section 304 part-II applies only when exceptions to section 300 cover a case was misconceived. The court found that the conclusion reached by the trial court appeared to be sound. It agreed with the trial court's findings that the intention of the accused was not to murder the boys but to create some disturbance at the police station in order to divert the attention of the crowd collected, so that booth capturing could be facilitated. The court found it an important feature of the case that no injuries were caused to the deceased before they were thrown into the pond and that there was no attempt to even strangle them. However, the court held that the accused/appellants could be attributed with the knowledge that the nature and proper consequence of their acts was likely to cause death. The High court had not indicated any basis to hold that the case was covered by section 302 IPC except for a casual observation that the murders were committed intentionally because the relatives of the deceased did not agree to vote in favour of the accused/appellants candidate. This could not be the basis for arriving at such conclusion leading to the inevitable result that the proper provision to be applied was not section 304 part-II IPC. On the question of sentence, the court found that it was a fit case where accused had been rightly sentenced by the trial court with the maximum sentence under section 304 part-II for following reasons:

- (1) The victims of the crime were not even voters but became victims of political differences of elders.
- (2) Political rivalry and differences cannot extend to taking away the lives of others. Criminalisation of politics is a hot topic causing concern.
- (3) In a democracy, the path to power cannot be allowed to have dead bodies littered over it. It cannot be a case of capturing power (beginning with booth capturing) at any cost. This trend is dangerous and has to be curbed.
- (4) In a case linked with political battles, stringent punishment is desirable without exception. Choice to vote for a candidate cannot be suppressed by intimidation. That would be against the spirit of democracy.
- (5) The punishment has to be always proportionate to the crime.
- (6) Punishment serves a purpose inasmuch as it acts as a deterrent for those who have the propensity to take the law into their own hands.
- (7) The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of

criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished.

Keeping in view the aforesaid considerations, the court held that the sentence of ten years rigorous imprisonment awarded by the trial court was quite appropriate.

In *Ezil, v. State of Tamil Nadu* [(2002) 5 SCC 189] the court has held that a grave act of depravity, to kill an innocent person only for the purpose of enriching themselves with the fortunes brought by the deceased, who unaware of their diabolical scheme got lured into their company for a safe travel, deserves to be dealt with an iron hand. The imposition of ten years rigorous imprisonment for the offence of robbery under section 392 IPC and rigorous imprisonment for life for the offence of murder under section 302 IPC could not be considered to be either harsh or so grossly disproportionate as to shock the conscience of the court.

In *Ram, Anup Singh, v. State of Bihar* [(2002) 6 SCC 868] the court was dealing with a case in which the accused killed all the members of the family and the act of the appellants was in the words of the Supreme Court “certainly inhuman, cruel and dastardly act”. The Supreme Court still examined the correctness of the sentence of death ordered by the trial court under section 302 IPC which had been affirmed by the High court. The court on examination of the records of the case opined that there was no evidence to suggest that the appellants are a menace to the society considering their past records which did not show their ever having indulged in such behaviour in the past or having resorted to violence and committed any offence whatsoever. They appeared to belong to middle class farmer family for whom land was of great value and they could not see an outsider even if it is the son-in-law belonging to another family being gifted property by their relations. The court found that there was nothing to suggest that they may repeat such barbarism in future so that they could constitute a continuing threat to the society. Though the crime committed by them was heinous and brutal, yet in the opinion of the court, it did not fall in the category of the rarest of the rare cases. The court was of the opinion that it had no reason to believe that the appellants could not be reformed or rehabilitated and that they were likely to continue their criminal acts of violence as would constitute a continuing threat to the society. The court set aside the sentence of death, as according to it, it was not warranted in this case. The court instead sentenced them to rigorous imprisonment for life with a condition that they shall not be released before completing the actual term of 20 years including the period already undergone by them.

In *Vajja Srinivasu, v. State of A.P.* [(2002) 9 SCC 620] the court has held that the disability that the provisions of the Probation of Offenders Act, 1965 are inapplicable to the offence under NDPS Act cannot preclude the accused from pleading that lesser sentence be awarded particularly in view of the age factor of the accused. The court in this case after examining all aspects and fact situation reduced the sentence from rigorous imprisonment of five years to only one year in view of the fact that the accused was aged only 21 years.

WHAT IS PROBATION? *

SUMMARY OF HISTORICAL DEVELOPMENT OF PROBATION

Some authorities trace the roots of probation to the middle ages when such devices as the benefit of clergy and the law of sanctuary made it possible either to avoid or at least to postpone punishment. It is more likely that there was not any continuous linear development of probation, although one can point to various forerunners such as the judicial reprieve, by which the court suspended the imposition or execution of a sentence, and the practice of releasing an offender on his own recognizance. Consequently, probation was probably more directly an outgrowth of the different methods in England and America for suspending sentence.

Under the common law the courts of England had for many years bound over petty offenders to sureties or released them on their own recognizance even without sureties. Such practices were also common in some of the American colonies, especially Massachusetts, which in 1836 recognized by law the releasing of minor offenders with sureties. In 1869 this same state also authorized the placement, after investigation, of youthful offenders in private homes under the supervision of an agent of the state.

Credit for the first use of the term probation goes to John Augustus, a Boston shoemaker, who apparently became interested in befriending violators of the law, bailed many of them out of jail, and provided them with sympathetic supervision. This was as early as 1841. It was not until 1878, however, that the first probation law was passed, Massachusetts again taking the lead. In that year the mayor of Boston was given the power to appoint probation officers, and only two years later, in 1880, the law was extended to apply to other communities within the state. Then in 1891 Massachusetts passed a second law, which required the extension of probation to the criminal courts. By 1900, though, only five states - Massachusetts, Missouri, Rhode Island, New Jersey, and Vermont - recognized probation legally. By 1933 all states except Wyoming had juvenile probation laws, and all but thirteen states had adult probation laws. This latter group had been cut to five states by 1950: Mississippi, Nevada, New Mexico, Oklahoma, and South Dakota.

The variety of legislation governing probation in the United States may have stemmed (1) from the Supreme Court's denial in the *Killits* case that there existed any inherent judicial power to suspend sentence or any other process in the administration of the criminal code and (2) from the different points of view which developed concerning the practice of probation. The result, in the United States at any rate, has been to give to the courts a fairly wide discretion in the use of probation.

It remains to be said that with the creation of the Cook County Juvenile Court in 1899, probation as a principle and as a practice received great momentum. Great hopes have since been pinned upon it.

* Lewis Diana, "What is probation?" in Robert M. Carter & Leslie T. Wilkins (eds.), *Probation and Parole: Selected Readings* (1970)

DEFINITIONS OF PROBATION

Probation as a Legal Disposition Only

One point of view sees probation simply as a suspension of sentence by the court. Since sentence is not imposed, the offender remains in the community until the length of the sentence has expired, unless, of course, in the meantime he has engaged in any conduct that would warrant carrying out the sentence. This system leaves everything to the probationer and makes of probation a simple policing procedure. Therefore, it implies two things to the probationer, another chance, and the threat of punishment should he fail to improve-his behavior.

In point of time this view has been expressed by authors, mostly with a legal background, writing in the first decade of the twentieth century. I have found no references to it after 1908 when Judge McKenzie Cleland put it this way: probation is a plan "of suspending over offenders the maximum sentence permitted by law" and of allowing them "to determine by their subsequent conduct whether they should lose or retain their liberty . . . with the full knowledge that further delinquency meant . . . severe punishment."

Probation as a Measure of Leniency

In a review of the literature I found but one author who took this approach to probation. However, it probably best represents the general lay point of view, as well as that of most probationers. This fact presents a basic problem to professional personnel, who view probation as a form of treatment. Many offenders, however, especially among juveniles, feel their acts are unfortunate slips, and while possibly inexplicable, they are, in the final analysis, choices between right and wrong, choices which the offenders feel capable of controlling. Consequently, in their own minds they are not sick persons or necessarily even the products of undesirable environments and so certainly in no need of treatment.

Probation as a Punitive Measure

This again represents a view which has found little acceptance in the literature, especially during the last fifty years. I discovered only one writer who made punishment the dominant note in his theory of probation. According to Alniy, probation must be presented to the probationer as a form of punishment, one which permits him to escape commitment and its stigma but one which also makes other demands. If these demands are not met, then the probationer can expect to receive the same type of punishment as other offenders. The assumption underlying such a view is that it is the certainty of punishment which deters.

Probation as an Administrative Process

It is likely that the earlier ideas of reform and rehabilitation attached to probation came about as a reaction to the various abuses associated with the imprisonment of children. As a result, a great deal of sentiment was tied to the concept of probation in its beginnings. This sentiment, together with the goal of reform or rehabilitation, formed the nucleus of the conception of probation as an administrative process. Essentially what probation consists of under this conception is the execution of concrete measures aimed at helping the offender stay out of further trouble. The ultimate goal of complete rehabilitation in this approach, however, was something which was more hoped for than worked for. In this respect it is a fairly negative approach consisting mainly of things done for the offender in the hope that they will somehow deter him from a further career in crime. Thus, arranging for medical treatment, making appointments for the administration of tests, effecting school transfers, seeking employment for the offender, checking on his activities, and so on constitute the major content of probation under this viewpoint.

Slightly more than thirty percent of the authors writing in this field have seen the administrative process as the major framework of probation. Most of these, however, date from 1902 to 1920. Since 1935, only two writers have espoused this concept. This fact may indicate the close identification of the correctional field with social work, which was largely administrative in the earlier years. Later, changing concepts and techniques in social work quickly found their way into child welfare and juvenile court probation services. The newer approaches represented by casework and its psychoanalytic foundations have not found unanimous approval, however.

Thus, Dr. Philipp Parsons of the Department of Sociology, University of Oregon, has stated:

"In the rehabilitation field ... research and administration become the all important factors. Research consists in getting the facts of a given situation, and administration consists in devising programs adapted to the facts and in carrying out these programs by whatever techniques the conditions may make practical. . . .

... changing conditions, economic, political, and social, have shifted the major emphasis in remedial work from individuals and families to groups and conditions. Training for remedial work, therefore, must be built upon a base of research, organization, and administration rather than upon the case work which was the foundation of social work training in the past generation,

... rehabilitating convicted persons in connection with a scientific system of penology ... is primarily an administrative job and also primarily a job for men."

The process of probation which follows an administrative pattern is illustrated in an article by Jessie Keys. Writing in *World's Work* in 1909, Miss Keys stated that the search for ultimate causes is not the least important work of the juvenile court. These causes were usually felt to be

parental neglect or parental vice or both. To illustrate she cited the case of a boy who had a mania for stealing pocket knives:

"His father and paternal grandfather had been master mechanics. After his father died his mother led an irregular life and neglected the boy. His hereditary instincts came to the surface. Since his mother refused to help him gratify his desire for mechanics, he undertook to gratify it in any way he could."

Unlike modern casework, no attempt was made during the boy's probation to help him "verbalize" and express his feelings and so come to a personal solution based on the untapped resources of his deeper personality. Instead: "We went to his mother and she awoke to her responsibility. We talked to the boy firmly and found him willing to work. Finally, we found a position for him."

The probation process not only included finding work for the boy but also included telling the mother how to keep her house clean and giving her other directives. It literally forced the boy into a certain mold, by the use of pressure, and sometimes intimidation, to do what he was told was right. Thus the probation officer attempted to produce what was not ordinarily a part of the boy's pattern of behavior.

In 1910 Maude E. Miner, Secretary of the New York Probation Association, reported that probation for the convicted girl consisted of a process of character building through discipline and correction. These were applied by obtaining employment for the girl, visiting her home, getting the cooperation of her parents, providing needed medical care, and bringing her into contact with beneficial influences such as churches and clubs.

In 1911 the Illinois law on adult probation provided that certain categories of first offenders could be placed on probation. The court was obliged to impose certain conditions designed both to protect the community and to give the probationers some "sensible practical aid." These conditions included paying court costs, supplying bond, supporting dependents, and making regular reports to the probation officer. Obviously, under such circumstances probation could be little else than administrative.

From a figure well known in corrections, C. L. Chute:

"The probation officer must investigate all offenders and must keep himself informed concerning their conduct and condition. He must report on each case at least once every month to the court and must use all suitable methods not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvement in their conduct and condition."

Or

"The probation officer helps a man to get and keep a job, finds him wholesome amusement, looks after his leisure hours and generally backs him up to playing a man's part in the world much as the special war agencies kept up the morale of the army."

The supposed therapeutic effects of administrative techniques are illustrated in an article by Platt:

"Get a boy into a good club, give him duties and see what happens—interest, pride, loyalty, ambition, cooperation, social teamwork, social sense, all will probably soon follow."

In 1919 no less an authority than the sub-committee of the National Conference of Social Work summed up this point of view by reporting that the office of the probation officer is administrative. It may have its authority beyond the court but accountability to the court is, in the final analysis, the foundation of probation service.

Probation as Social Casework Treatment

Reinemann has defined probation as follows:

"Legally, in the case of an adult offender, probation is the suspension of sentence during a period of freedom, on condition of good behavior. In the case of a delinquent child, the juvenile court uses probation as a form of *case disposition* which allows the child to live at liberty in his own home or in the custody of a suitable person, be it a relative, a friend of the family, or a foster home, under supervision of an agent of the court and upon such conditions as the court determines. *Socially, probation is a form of treatment* administered by probation officers on a case work basis." (Emphasis added.)

The dichotomy between adult and juvenile probation seemingly is disappearing. In any event definitions of probation as a legal disposition are rarely found in current literature. On the contrary, the bulk of the literature—between eighty-five and ninety percent of it since 1940—views probation as some form of treatment, more often than not as casework treatment.

Casework and its foster parent, psychiatry, have had extensive influence in the juvenile court movement. This influence is illustrated by the broad scope of many of our juvenile court laws, by the shunting aside, in the rising tide of a clinical ideology, of legal precedents in favor of loose and informal procedures, by the indeterminate sentence, by the emphasis on the total situation of an offender, by the absorption with emotional problems, and by the prevailing adherence to a psychoanalytic theory of causation.

The point of view which identifies probation with casework treatment is difficult to analyze. It cannot be presented as a consistent or well-defined approach and appears, rather, to represent an attitude or state of mind in lieu of a technique or substantive theory. In any event the literature presenting probation as casework treatment generally defines probation as the *application* of casework principles and techniques in dealing with the offender. But what is casework?

Taber describes it this way:

"Case work ... may be defined as a process of attempting to understand the needs, impulses and actions of an individual and of helping him to recognize these in a

way that is satisfying to himself and yet in accord with the demands of social living. ". . . treatment cannot be forced upon another person. ... To help another person we must accept him as he is with an honest respect for his capacity as well as regard for his need to solve his own problem with whatever help the worker can give him. The case worker is concerned with assisting the individual to realize his own capacities to the fullest extent, as well as to orient him to the resources existing within his environment which will provide a satisfying outlet. In short, change to be effective depends upon the individual's willingness to help himself.... He must be assisted in finding his own way at his own pace. . . .

"Every phase of behavior has a different meaning for each individual, and treatment if it is to be effective must be differentiated according to the individual's need. ... There are no formulas which we can readily apply ... but we can sharply define in a warm but objective manner the alternatives which confront a delinquent in order that he may redirect his behavior if he has the strength and will to do so."

Most concepts of casework also include assumptions concerning the nature and causes of delinquent behavior:

"Delinquent behavior and other forms of conflict are generally compensating substitutes for experiences and impulses which the individual fears to recognize and dares not express. The tension resulting creates frustration and fear. Whether or not the release takes the form of a criminal act is purely fortuitous and is dependent upon the attitudes and tensions operating at the time. . . ."

"If we accept the fact that the probation officer's work concerns itself with helping the man under supervision to bring to conscious expression his underlying emotional conflicts and thus rid those deep-seated unknown drives of their tension and potency, and if we recognize that the probationer's moral decisions must be his own, not the probation officer's, then is the generic problem of interpretation with which the probation officer is faced any different from that which must be met by the case worker?"

Miss Genevieve Gabower, formerly Director of Social Work in the Juvenile Court, Washington, D.C., refers to casework in this way:

"The worker sees a need for giving service in the case of a child where either the solicitude or the indifference of the parents, or a combination of extremes of the two operates as a barrier to his growth and development. He can be of service by developing and maintaining a relationship of continuing interest and acceptance and thus assisting in establishing stability. Case work ... through this kind of relationship . . . may operate as a medium through which the youth can find that he has ability to conform to community standards."

In other words, from Miss Gabower's point of view, the relationship which by some is described as casework is here presented only as an instrument of casework. But what casework is, is still not explained.

One thing is certain, however: the casework point of view represents a shift in emphasis from the social conditions of behavior to individual behavior itself, especially such behavior as can be approached from the standpoint of the "dynamics" of psychoanalytic mechanisms. The shift has been from a social to a clinical frame of reference. Crime and delinquency are acts containing social implications, but it is chiefly the individual personality which interests the caseworker. Thus, Miss Louise McGuire, also one-time Director of Social Work in the Juvenile Court, Washington, D.C., states: "Back of the overt acts are the motives. These latter are our concern and the basis of case work treatment."

Miss McGuire's article represents an attempt to delineate casework into three phases: (1) social inquiry into the total situation of the client; (2) social diagnosis, that is, inquiry into the relationships and attitudes of the client; and (3) social casework treatment. In this last phase there are three objectives: (1) to induce right notions of conduct (responsible behavior) in the client; (2) to induce motives which will assure loyalty to good norms of conduct; and (3) to develop the client's latent abilities.

To achieve these objectives casework treatment is divided into two sections: mechanistic devices and deep therapy. The former consist in the utilization of the resources of community agencies. The latter, deep therapy, refers to the process of changing the attitudes of the probationer, giving him insight through interpretation.

This essentially clinical approach is supported by most other writers outside the academic disciplines of criminology and sociology. Hagerty, for example, has said, "We offer as our major premise that solution of the crime problem involves chiefly the study and personality treatment of the individual offender " He goes on to define casework as an aid in the restoration of self-support and self-respect in the "client."

More recently Hyman S. Lippman, Director of the Amherst H. Wilder Child Guidance Clinic, St. Paul, Minnesota, has declared that casework on the part of the probation officer is the essential ingredient in his "treatment" of delinquency. While not defining casework, Lippman does specify *relationship* as the major contribution of a probation officer and the interview as his main tool. The unconscious conflicts of the neurotic delinquent of course, "are deeply imbedded, and can *only* be brought to light by the psychiatrist trained in psychoanalytic techniques."(Emphasis added.)

David Crystal, Executive Director, Jewish Social Service Bureau, Rochester, N.Y., sees probation as a treatment process of the entire family. But the process is curiously enough still described in clinical terms as the focus of casework is:

1. How does the probation officer help the probationer accept the conditions of his current reality?

2. How does and can the family relate to the probationer in terms of the new experience?

(a) Can they express honestly their feelings of guilt, of anticipated reprisal, of uncertainty about the impact this will have on their future lives?

(b) Will they require special help from a worker other than the probation officer, in a different kind of agency in the community? Can they now or later accept the need for help?

(c) Is the total responsibility for change to be lodged exclusively on the offender, or can the family see change as a reaction not to one but multiple causes and that they too are part of the change, externally and internally, by their physical presence and concrete offering of shelter and food and job and by the attitude with which these visible and tangible things about the family are given?

Henry J. Palmieri, Director of Social Services of the Juvenile Court of the District of Columbia, declares probation is a casework service and a method of treatment which "is no longer an ideal" but "a reality." However, he defines neither casework nor treatment but assumes their identity with probation.

Glover outlines four basic principles of treatment without, however, specifying how they are affected: (1) treatment based on consent of the offender; (2) treatment planned for the individual; (3) treatment planned around the offender's own situation; and (4) treatment planned to redirect the offender's emotions.

The strong clinical orientation of casework seeking to induce proper motives, to aid in the achievement of insight and self-respect, and to change attitudes of the offender may be worthwhile and desirable. But the aims and the orientation do not define the process of casework. *How* is insight produced? *How* are interpretations given? *How* are attitudes changed? *How* is relationship established? The answers to these questions are rarely mentioned in the literature, and casework continues to be defined in broad and general terms as, for example, "an art in which knowledge of the science of human relations and skill in relationship are used to mobilize capacities in the individual and resources in the community appropriate for better adjustment between the client and all or any part of his total environment."

One of the most recent and well-known texts defines casework as follows: "Social casework is a process used by certain human welfare agencies to help individuals to cope more effectively with their problems in social functioning."

The elements, then, which are said to comprise the principles of casework invariably stamp it as a clinical process for the most part. It is often stated, for example, that casework implies that the probation officer has a respect for individual differences and that he should have not only a natural desire to serve others but also an understanding of the processes that develop personalities. The probation officer accepts and the client then may show "movement" because for the first time he is seen able to talk freely and naturally to another person about himself and how he feels. The worker understands and conveys that understanding to the "client," thereby relieving the "client's" anxieties and stimulating a more constructive outlook.

Biestek explains a casework relationship on the basis of seven needs of the client. "The caseworker is sensitive to, understands, and appropriately responds to these needs" and "the client is somehow aware of the caseworker's sensitivity, understanding, and response." The seven needs of the client embody corresponding principles:

The need of the client

1. To be treated as an individual.
2. To express feelings.
3. To get sympathetic response to problems.
4. To be recognized as a person of worth.
5. Not to be judged.
6. To make his own choices and decisions.
7. To keep secrets about self.

The name of the principle

1. Individualization.
2. Purposeful expression of feelings.
3. Controlled emotional involvement.
4. Acceptance.
5. Nonjudgmental attitude.
6. Client self-determination.
7. Confidentiality.

Casework thus attempts to formalize, standardize, and professionalize the display and exercise of warmth, sympathy, respect, and understanding, all of which are considered to be basic elements in therapeutic treatment of the individual. In probation, also, any punitive quality in the process has been removed, and the goal has become not merely the elimination of the probationer's anti-social conduct but, whenever possible, the improvement of his personality and the achievement of a more nearly perfect total adjustment. What probation is, therefore, must include the means by which those goals are realized. This casework usually does by simply stating casework *as* the means or process. There have been attempts at clarification, but the field defies synthesis.

Miss Witmer has pointed out that:

"... social work is a very specific system of organized activities based on a body of values and technical rules which are becoming increasingly well-formulated ... it has a definite function to perform. It is not a vague, indeterminate method of doing good or promoting welfare, or even of helping people out of trouble, indistinguishable from psychiatry at one end and uplift work at the other. ..."

".. . social case work centers around helping individuals with the difficulties they encounter in a particular group relationship. . . ."

Miss Witmer also suggests that while probation presently involves the use of casework, it is mainly executive and diagnostic, centering on changes in the environment of the offender. Such casework "lacks the sharpness of focus and precision of method which perception of specific function has given to case work in other fields." But in my experience, at least, this "sharpness of focus and precision of method" of casework in other fields is more an attribute of casework in the literature than of casework in the field. What is specific and precise in any other agency is not mentioned. It appears that it is the field or area of operation of these other agencies that is more or less precise and not necessarily their techniques.

Miss Witmer denies the similarity of casework and psychiatry or therapy but nevertheless states its aims in therapeutic terms: "Modern case work works with the client rather than on his behalf since the sources of difficulty are supposedly known only to the "client." However, the caseworker assumes the existence of underlying or unconscious conflicts and so is practically committed to a psychotherapeutic point of view. Where this is denied, superficial distinctions are usually drawn between casework and therapy, such as the fact that in therapy it is the "client" himself who seeks the therapist or that in therapy one delves more deeply into the unconscious and there is a more intense emotional involvement of "client" and therapist. There is convincing evidence, however, that points to the emergence of casework, and certainly of psychiatric social work, as another therapeutic profession.

In conclusion, probation as casework concentrates not so much on crime and delinquency as on criminals and delinquents, and not so much on criminals and delinquents as on criminals and delinquents with emotional problems. In general, as Sutherland has pointed out, casework in probation follows psychiatric conceptions in that insight by the probationer into the reasons for his behavior is the chief goal of treatment. A person with such insight is felt to be unlikely to repeat his delinquent activities. The primary method consists of intensive interviews through which the probation officer not only comes to understand the probationer but the probationer, to understand himself. An identification with the probation officer then helps the offender emulate his behavior until finally the point is reached where the probationer becomes independent of this identification and can carry on normal and socially acceptable behavior on his own.

Probation as a Combination of Casework and Administration

This point of view regarding probation does not, as it might suggest, constitute a catch-all for those approaches which do not fit the categories discussed thus far. From this standpoint probation is represented both by casework functions and by administrative or executive procedures. Where casework is paramount, administrative functions are supplementary. Where administrative duties are indicated as the primary plan of approach, casework skills and techniques, however defined, must be utilized in the performance of those duties. In other words, some cases may be felt to require intensive interviews more than anything else. But in the course of most cases there are, practically without exception, other things to be done as well: arranging a transfer of schools, scheduling medical and other appointments, and so on. Other cases may be felt to call for mainly administrative functions, such as those just mentioned, plus limited and superficial contacts with the probationers. But in performing those functions and in making those contacts, a casework approach must be applied. In this respect the utilization of casework techniques is usually manifested in the attitude taken toward the probationer.

Murphy illustrates this school of thought:

"Probation officers have another task, that of controlling, guiding and rehabilitating probationers. Here they are called upon to make accurate personality diagnoses and plan

comprehensively to improve the probationers' environment and economic life, to adjust delicate family problems, find employment, provide for necessary medical treatment and health assistance, determine recreational needs and social needs, stimulate spiritual and moral improvement. ... Patterns of behavior can be changed only when attitudes, loyalties and group relationships can be altered or recreated."

In summary, then, this point of view sees probation as the simultaneous application of casework and administrative functions, but in specific cases it is more one than the other. Whichever is paramount in any particular case, the other is complementary. About twenty percent of the literature reviewed supports this approach to probation.

WHAT IS PROBATION?

With the exception of the first three categories (Segal, punitive, merciful), all views emphasize the treatment aspects of probation. In the literature reviewed only five percent of the writers thought of probation wholly as a legal disposition or as a measure of either punishment or leniency. In fact, in the literature of the past thirty years such views receive no mention at all. Therefore, notions of probation as either casework or administration, or a combination of the two, are prominent. These leading approaches overlap considerably so that their differentiation consists almost solely in their respective points of emphasis. Thus, all three would agree that probation is a legal disposition and that probation is not to be thought of as mere leniency or as mere punishment; but in the first instance, it is viewed as basically case-work treatment; in the second, administrative supervision; and in the third, both of these. Each, however, contains elements of the other. So in all cases probation is seen as a social as well as a legal process, as a method of supervision and guidance in which all available community resources are used and as a which should aim at the total adjustment of the offender. The casework approach overshadows the rest by far, so that in phrasing a composite definition derived from the literature it should receive its obvious prominence.

As culled from the professional literature, then, probation may be thought of as the application of modern, scientific casework to specially selected offenders who are placed by the courts under the personal supervision of a probation officer, sometimes under conditional suspension of punishment, and given treatment aimed at their complete and permanent social rehabilitation.

Probation in Reality

What is depicted in the literature does not often represent a very real or accurate representation of what exists in reality. The result of abject worship at the holy shrine of psychoanalysis has not been the development of scientifically validated techniques for the treatment of offenders on probation. In fact, few probation officers, either in the literature or in the field, give a clear and specific description of what they mean by treatment, casework or other-

wise. Probation officers, whether trained in schools of social work or not, frequently express the opinion that just about anything that is done in the way of investigation of cases, bringing into play any of the skills one may have acquired in training or by his experiences, comes under the heading of casework treatment. This would include any service, advice, counseling, or surveillance.

Undoubtedly part of the difficulty lies in the fact that the field of social work seems to have no well-defined and consistent theory which it can call its own. Casework can mean anything from "working with an offender" to helping a "client" to "grow" or to achieve insight, helping him to help himself, a form of therapy, or a "method which recognizes the individual's inner capacity as to the key to his adjustment, and the necessity of his participating in the process of rehabilitation."

How these things are accomplished, however, is rarely specified except in terms of an administrative process. So the probation officer will be told, ideally, that he must have a plan of treatment, that his attitude toward the offender must be non-punitive, and that he will try to "win the confidence" of the probationer and overcome the resistance of parents, or of husband or wife, as the case may be. The constructive kind of relationship that the probation officer thus aims for apparently is to be gained through frequent and periodic contacts at the office of the probation officer or at the offender's home or even school, in the case of a juvenile. In addition, the probation officer will be acquainted with most, if not all, of the resources of the community and will hold frequent conferences with the offender's employer, school principal, teacher, or school social worker and refer the offender to any one of a number of other agencies which might help him on his road to readjustment.

It is interesting, then, to compare such a description of probation as casework treatment with what probation officers actually do. At the Juvenile Court of Allegheny County in Pittsburgh, Pennsylvania, it was found that more than half the probation officers did active work with only thirty to forty percent of their caseload. Even if telephone conversations and correspondence with an offender, members of his family, and others are counted as contacts, sixty-four percent of the staff had fewer than six contacts with a child over a period of one year. As a matter of fact more than half the probation officers considered that the most important part of their work consisted of their contacts with a child and others during the investigation period prior to the hearing.

Half of the probation officers reported they did no planning on any of their cases, one-fourth indicated that they approached from five to ten percent of their caseload with a plan in mind, and the remaining fourth said this was true in forty to fifty percent of their cases. Thirty-five percent of the probation staff felt that many of the children under their supervision at any one time could probably get along without any probation service at all, and ninety-five percent felt that some of the children under their supervision could adjust without it.

It is fairly certain that most probation, however it may be conceived in the literature or in the field, still amounts to little more than administrative supervision. But in order to compare the

views of the professional personnel represented in the literature with the views of those whose work actually determines what is probation, I asked twenty of the most experienced probation officers from eight courts, including officers both trained and not trained in schools of social work, to write me their answers to the following questions:

1. How would you define probation? Generally speaking, of what does it consist in practice?
2. Is casework an essential part of probation? If so, how would you define casework?
3. What are the aims of probation?
4. What do you believe probation should be ideally?

The following are the verbatim-replies to question (1) which I received:

1. Probation is a kind of status the child obtains as a result of the court hearing.
2. Probation is a suspended sentence to begin with, as a basis for providing supervision. In practice it is a continuation of a suspended case, to see if the child does all right. There is no intention of doing anything, though most probation officers won't admit it. Probation is putting a threat over the head of a child. Authority puts weight back of probation. You can see this with our success with neglected and delinquent cases which other agencies have given up. We're the policemen back of the agencies.
3. What it simmers down to is police work. There is no planning, but giving supervision to prevent violations or repetition of delinquent behavior.
4. Probation is an instrument of the court. The child is under the jurisdiction of the court. There are certain areas in which he is expected to function in a certain way. This consists of periodic reports made by the youngster or his family to the probation officer, or the probation officer's contacts with the family and the child, or any collateral contacts, the purpose of the contacts being to determine the child's ability to adjust in the community and to offer additional assistance in a supportive way to help the child adjust.
5. Probation is to help instil in a boy enough confidence in himself to make an adjustment in society, with the knowledge that he can always call on the probation officer for information and advice when needed.
6. Probation consists of the contacts which a probation officer has with a boy after the court hearing. It is also supervision to see how the boy adjusts in the home and the community. Through probation we try to select what boys have to abide by and to explain to them the negative and the positive sides of a situation, explaining limitations and *the* need to face them.
7. Probation means that the court feels that whatever a child has done he can adjust at home under the supervision of his parents. We look the parents and the home over and decide whether they can handle the supervision. The probation officer merely gives support to that supervision, like a doctor who prescribes. He isn't going to go to your home and make you take the medicine, but if he feels the patient needs to go to the hospital, he goes.
8. Probation is comparable to commitment; that is, it is handled through a court order. But it is not leniency. Probation can be as severe as commitment. Probation is not only law but also a mutual relationship in which we are trying to get children to accept limits.

9. Probation is a period of time during which a child is expected to realize he has made a mistake and that he must be careful to avoid repetition while he is on probation. This realization may or may not be with the help of the probation officer.

10. Probation is using the material brought out by investigation, the causes as well as the effects of antisocial or asocial behavior on the part of delinquents brought to the court. It is taking that and trying to determine from it the particular mores or standards that have been operating in the growing period of the delinquent and trying to arrive at standards or mores which will fit that child and his family and be satisfactory to society, and using all these in a plan thought best in terms of adjustment.

Probation is not something which comes after the court hearing. When a child becomes known to us, he is thought of as being on probation. There is no reason to wait for the hearing. We try to work with a child as soon as we get him. Finally, probation can only be successful if the basic family make-up is considered. What caused a child to be delinquent must be changed.

11. Primarily we are a court of rehabilitation when it comes to the delinquent. When we put a child on probation we are saying to him, "You have run afoul of the rules of society and this is the court's offer to you to try to prove you can live in society without continuing that type of behavior. It is not only probation on the part of the child but also on the part of the parents, because adult behavior often lies behind a child's behavior. The child has to show he no longer needs supervision other than his own family.

12. Probation has a Latin derivation and means the act or process of giving a chance or trial. It is comparable to repairing damage done to an automobile. You repair it and give it another trial rather than let it run in its poor condition.

13. Probation is the period after a child has been brought to the court's attention as a result of a behavior problem. During this period there is an opportunity to see whether, with the help of the worker, his attitudes and activities can be reorganized so that he can make a better adjustment and conduct himself in a more acceptable manner.

It is a two-way thing. It is not just a period. The child must have someone interested in him, to guide him. Interviews with him may be of a general nature or be related to his specific behavior.

14. Probation is working with a child and his family on the problems presented at the court hearing. For the worker it is almost the role of confidant and adviser.

15. Probation is a helping service to a person with a problem. The problem itself may be adjusted or the person is helped to make an adjustment to the problem. Probation is also a means of keeping in touch with a person in order to prevent further difficulty.

16. Probation has its legal aspects. But it is also helping a child adjust to society and its requirements, which is the chief aim of probation. It should be a constructive experience.

17. Probation is helping a child fit into the school, home and community, fitting him into their standards.

18. In practice probation consists in meeting emergencies as they arise instead of routine treatment, which time doesn't allow.

19. When a child comes to the court and a problem is presented, you are not putting him on probation for punishment but to find causes and remedies. Probation means not only working with a child but also considering all the surrounding factors.

20. Probation is helping the individual to adjust. You utilize your own skills and the community resources within the scope and functions of the agency.

Only one of the above statements mentions the idea that punishment is even an aspect of probation, and the concept of leniency is omitted by all twenty probation officers, though it is implied by some. Four offer a partly legal definition, while none specifically presents the view that probation is essentially either an administrative process or a combination of administrative and casework. Partly this may be attributed to the fact that most personnel in the field probably do not express themselves in the same way as do professional authors who are not primarily workers but administrators and teachers. In this respect perhaps the most significant thing of all is the fact that, although certain cliches appear, in not one definition is casework itself mentioned. Yet in reply to the second question, "Is casework an essential part of probation?", fourteen probation officers gave an unqualified *yes*. Five of the others felt casework was essential to probation but limited time precluded its use. Only one answered *no*.

Definitions of casework itself were even more general and vague than the definitions of probation. The explanation which was offered most contained such phrases as "helping people to help themselves," "helping a person make an adjustment," "changing a person's attitudes," "establishing a mutual relationship," "working with a person," and "the ability to work with people." Sixteen of the twenty responses fell into such a classification. Two probation officers felt probation is casework and that the definition of casework is about the same as the definition of probation. The remaining two expressed the opinion that almost anything that is done in the way of investigation of cases can be thought of as casework.

Obviously there is no consensus or standardization of opinion concerning probation among these twenty experienced workers, nor have they any clear conception of what casework is. I suspect such a situation is general.

When the aims of probation were considered, half the probation officers said the "total adjustment" of the offender was the chief goal. Five believed "complete rehabilitation" was the end pursued, and four thought that adjustment with respect to the particular problem presented was the purpose of probation. Only one officer stated that supervision alone was the real aim of probation. If the two terms "total adjustment" and "complete rehabilitation" are considered synonymous for all practical purposes, then fifteen of the twenty probation officers concurred on this, the highest goal of probation.

With respect to what probation should be thirteen probation officers felt probation should consist of casework treatment. The remaining seven believed casework is not a general process and therefore should be applied only to those cases which indicate a need for that type of

treatment. (Yet in answer to the second question all but one believed casework is essential to probation.)

It may well be that few correctional personnel are really aware of whatever techniques they use, and it is very highly probable that only a small percentage of the total are qualified caseworkers. It is also highly probable, and certainly seems to be the case from this writer's experience, that the image that many probation officers have of themselves is a picture of a warm and understanding though objective person, a kind of watered-down or embryonic clinician. In any event the influence of a clinical, casework ideology, along with its confused and contradictory elements, has been pervasive. Convention papers, the literature and supervisors are filled with this ideology, so that it is constantly before the probation officer. It is no more than could be expected, then, if the probation officer feels that whatever he does and however he does it, it is treatment.

CONCLUSION

A review of the literature reveals the predominance of the view that probation is a process of casework treatment, and this point of view seems to be shared by probation personnel in the field. However, casework is usually described in general, vague and nebulous language characterized by an abundance of cliches and a lack of clarity and specificity.

Seen from an operational point of view probation appears to be quite different from its ideal, casework conceptions. Probation varies from rare instances of intensive individual treatment, however defined, to simply non-commitment.

Actually, then, probation may be defined as a legal disposition which allows the offender his usual freedom during a period in which he is expected to refrain from unlawful behavior. Operationally, probation is primarily a process of verifying the behavior of an offender (1) through periodic reports of the offender and members of his family to the probation officer and (2) by the incidence or absence of adverse reports from the police and other agencies. Secondly, probation is a process of guiding and directing the behavior of an offender by means of intensive interviewing utilizing ill-defined casework techniques.

Finally, it can be said that probation in practice is a gesture toward conformity to the school of thought which combines administrative and casework procedures. For the most part, however, probation remains an administrative function with the statement Healy and Bronner made thirty-four years ago still quite accurate: "probation is a term that gives no clue to what is done by way of treatment."

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Bishnu Deo Shaw v. State of West Bengal

AIR 1979 SC 964

CHINNAPPA REDDY, J. :- 1. "The murderer has killed. It is wrong to kill. Let us kill the murderer". That was how a Mr. Bonsall of Manchester (quoted by Arthur Koestler in his 'Drinkers of Infinity'), in a letter to the Press, neatly summed up the paradox and the pathology of the Death Penalty. The unsoundness of the rationale of the demand of death for murder has been discussed and exposed by my brother Krishna Iyer, J., in a recent pronouncement in ***Rajendra Prasad v. State of Uttar Pradesh*** [(1979) 3 SCC 646]. I would like to add an appendix to what has been said there.

2. The dilemma of the Judge in every murder case, "Death or life imprisonment for the murderer?" is the question with which we are faced in this appeal. The very nature of the penalty of death appears to make it imperative that at every suitable opportunity life imprisonment should be preferred to the death penalty. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And, it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity" per Stewart J., in ***Furman v. Georgia*** [33 Lawyers Edn. 2nd Series 346]. "Death is irrevocable, life imprisonment is not. Death, of course, makes rehabilitation impossible, life imprisonment does not" (per Marshall, J., in ***Furman v. Georgia***).

3. Theories of punishment, there are many reformatory, preventive, retributive, denunciatory and deterrent. Let us examine which cap fits capital punishment. The reformatory theory is irrelevant where death is the punishment since life and not death can reform. The preventive theory is unimportant where the choice is between death and life imprisonment as in India.

4. The retributive theory is incongruous in an era of enlightenment. It is inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the persons punished. It is, however, necessary to clear a common misunderstanding that the retributive theory justifies the death penalty. According to the retributivist society has the right and the duty to vindicate the wrong done to it and it must impose a punishment which fits the crime. It does not mean returning of evil for evil but the righting of a wrong. It implies the imposition of a just but no more than a just penalty and automatically rules out excessive punishment and, therefore, capital punishment. According to a modern exponent of the retributive theory of justice "capital punishment...is without foundation in a theory of just punishment. Indeed one could go further and assert that capital punishment is antithetical to the purposes and principles of punitive sanctions in the law. Requit, when properly understood in terms of a concept of just law, undoubtedly does have a legitimate role in punishment. However, neither requital nor punishment in general is a returning of evil for evil, and, therefore, I see no support for the demand that a murder (or an act of treason, or some other serious offence) be paid for with a life". The Biblical injunction 'an eye for an eye and a tooth for a tooth' is often quoted as if it

was a command to do retributive justice. It was not. Jewish history shows that it was meant to be merciful and set limits to harsh punishments which were imposed earlier including the death penalty for blasphemy, Sabbath breaking, adultery, false prophecy, cursing, striking a parent etc. And, as one abolitionist reminds us, who, one may ask, remembers the voice of the other Jew : "Whoever shall smite on thy right cheek, turn to him the other also?".

5. The denunciatory theory of punishment is only a different shade of the retributive theory but from a sternly moral plane. Lord Denning advanced the view before the Royal Commission on Capital Punishment : "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely the death penalty"...."The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not". The implication of this statement is that the death penalty is necessary not because the preservation of society requires it but because society demands it. Despite the high moral tone and phrase, the denunciatory theory, as propounded, is nothing but an echo of the retributive theory as explained by Stephen who had said earlier : "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite". The denunciatory theory is as inadequate as the retributive theory since it does not justify punishment by its results. As Prof. Hart points out the idea that we may punish offenders not to prevent harm or suffering or even the repetition of the offence but simply as a means of emphatically expressing our condemnation, is uncomfortably close to human sacrifice as an expression of righteousness. And, the question remains : "Why should denunciation take the form of punishment".

6. The deterrent theory may now be considered. It is important to notice here that the question is not whether the penalty of death has deterrent effect on potential murderers but whether it deters more effectively than other penalties say, a sentence of imprisonment for a long term? Is Capital Punishment the most desirable and the most effective instrument for protecting the community from violent crime? What is the evidence that it has a uniquely deterrent force compared with the alternative of protracted imprisonment? If the death penalty really and appreciably decreases murder, if there is equally no effective substitute and if its incidents are not injurious to society, we may well support the death penalty. But all studies made on the subject, as I will presently point out, appear to have led to the conclusion that the death penalty is inconsequential as a deterrent.

7. Sir James Fitz James Stephen, a great Victorian Judge and a vigorous exponent of the deterrent theory said in his Essay on Capital Punishment:

"This is one of those propositions which it is difficult to prove simply because they are in themselves more obvious than any proof can make them. It is possible to display

ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results.... No one goes to certain inevitable death except by compulsion. Put the matter the other way, was there ever yet a criminal who when sentenced to death and brought out to die would refuse the offer of a commutation of a sentence for a severest secondary punishment? Surely not. Why is this? It can only be because 'all that a man has will be given for his life. In any secondary punishment however terrible, there is hope; but death is death; its terrors cannot be described more forcibly".

8. Stephen's statement was admittedly a dogmatic assertion since he himself stated that it was a proposition difficult to prove though according to him, self evident. The great fallacy in the argument of Stephen has been pointed out by several criminologists. Stephen makes no distinction between a threat of certain and imminent punishment which faces the convicted murderer and the threat of a different problematic punishment which may or may not influence a potential murderer. Murder may be unpremeditated, under the stress of some disturbing emotion or it may be premeditated, after planning and deliberation. Where the murder is premeditated any thought of possibility of punishment is blurred by emotion and the penalty of death can no more deter than any other penalty. Where murder is premeditated the offender disregards the risk of punishment because he thinks there is no chance of detection. What weighs with him is the uncertainty of detection and consequent punishment rather than the nature of the punishment. The Advisory Council on the Treatment of Offenders appointed by the Government of Great Britain stated in their report in 1960 "We were impressed by the argument that the greatest deterrent to crime is not the fear of punishment, but the certainty of detection".

9. Prof. Hart countered Stephen's argument with these observations: 'This (Stephen's) estimate of the paramount place in human motivation of the fear of death reads impressively but surely contains a *suggestio falsi* and once this is detected its cogency as an argument in favour of the death penalty for murder vanishes for there is really no parallel between the situation of a convicted murderer over the alternative of life imprisonment in the shadow of the gallows and the situation of the murderer contemplating his crime. The certainty of death is one thing, perhaps for normal people nothing can be compared with it. But the existence of the death penalty does not mean for the murderer certainty of death now. It means not very high probability of death in the future. And, futurity and uncertainty, the hope of an escape, rational or irrational fastly diminishes the difference between death and imprisonment as deterrent, and may diminish to vanishing point.... The way in which the convicted murderer may view the immediate prospect of the gallows after he has been caught must be a poor guide to the effect of this prospect upon him when he is contemplating committing his crime".

10. A hundred and fifty years ago a study was made by the Joint Select Committee appointed by the General Assembly of Connecticut and they reported "Your Committee do not hesitate to express their firm belief that a well devised system of imprisonment, one which should render the

punishment certain and perpetual would be far more effectual to restrain from crime than punishment of death".

11. One of the most comprehensive enquiries ever undertaken on the subject was that made by the Royal Commission on Capital Punishment. The Commission Visited several countries of Europe and the United States, addressed questionnaires to many other countries in search of information and examined celebrated experts and jurists. The Commission's conclusions are of significance. They said : "There is no clear evidence in any of the figures we have examined that the abolition of Capital Punishment has led to an increase in the homicide rate, or that its reintroduction to a fall...prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment and there is some evidence (though no convincing statistical evidence) that this is in fact so. But its effect does not operate universally or uniformly and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in just perspective and not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty".

12. Prof. Thorsten Sellin who made a serious and thorough study of the entire subject in the United States on behalf of the American Law Institute stated his conclusion : "Any one who carefully examines the above data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rate of capital crime. It has failed as a deterrent".

13. In 1962 statistics were compiled and a report was prepared at the instance of the United Nations Economic and Social Council on the question of Capital Punishment, the laws and practices relating thereto and the effects of capital punishment and the abolition thereof on the rate of criminality. According to the report all the information available appeared to confirm that neither total abolition of the death penalty nor its partial abolition in regard to certain crimes only had been followed by any notable rise in the incidence of crime which was previously punishable with death.

14. Late Prime Minister Bhandarnaika of Sri Lanka suspended the death penalty in 1956. A Commission of Inquiry on Capital Punishment was appointed and it reported "If the experience of the many countries which have suspended or abolished capital punishment is taken into account there is in our view, cogent evidence of the unlikelihood of this 'hidden protection'... It is, therefore, our view that the statistics of homicide in Ceylon when related to the social changes since the suspension of the death penalty in Ceylon and when related to the experience of other countries tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that in deciding on the question of reintroduction or abolition of the capital punishment reintroduction cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative of protracted imprisonment". It is a tragic irony that Prime Minister Bhandarnaika who suspended the Capital Punishment in Ceylon was murdered by a fanatic and in the panic that ensued death penalty was reintroduced in Ceylon.

15. In the United States of America several studies have been made but 'the results simply have been inconclusive'. The majority Judges of the United States Supreme Court who upheld the constitutionality of the death penalty in the State of Georgia in *Gregg v. Georgia* [49 L. Edn. 2nd 859] were compelled to observe "Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence supporting or refuting this view". In the same case the minority Judges Brennan, J., and Marshall, J., were convinced that 'capital punishment was not necessary as a deterrent to crime in our society'.

16. In India no systematic study of the problem whether the death penalty is a greater deterrent to murder than the penalty of life imprisonment has yet been undertaken. A few years ago I made a little research into the matter and studied the statistics relating to capital crime in several districts of Andhra Pradesh from 1935 to 1970. The pattern was most erratic but it can be boldly asserted that the figures do not justify a conclusion that the death penalty has been a deterrent, but, then, the figures do not also lead inevitably to the conclusion that the death penalty has not been deterrent. One of the complicating factors is the discretion given to Judges to inflict death penalty or imprisonment for life (about which more later) which destroys the utility of any study based on statistics. The most reasonable conclusion is that there is no positive indication that the death penalty has been deterrent. In other words, the efficacy of the death penalty as a deterrent is unproven.

17. "The death penalty, rather than deterring murder, actually deters the proper administration of criminal justice". There is the absolute finality and irrevocability of the death penalty. Human justice can never be infallible. The most conscientious judge is no proof against sad mistakes. Every criminal lawyer of experience will admit that cases are not unknown where innocent persons have been hanged in India and elsewhere. And, it is not the only way the death penalty strikes at the administration of criminal justice. Some Judges and Juries have an abhorrence of the death penalty that they would rather find a guilty person not guilty than send even a guilty person to the gallows. The refusal of Juries to convict persons of murder because of the death penalty is a well known phenomenon throughout the world. A perusal of some of the judgments of the Superior Courts in India dealing with cases where Trial Courts have imposed sentences of death reveals the same reluctance to convict because the result would otherwise be to confirm the sentence of death. Thus a guilty person is prevented from conviction by a possibility that a death penalty may otherwise be the result.

18. That is not all. There is yet a more 'grievous injury' which the death penalty inflicts on the administration of Criminal Justice. It rejects reformation and rehabilitation of offenders as among the most important objectives of Criminal Justice, though the conscience of the World Community speaking through the voices of the Legislature of several countries of the world has accepted reformation and rehabilitation as among the basic purposes of Criminal Justice. Death penalty is the brooding giant in the path of reform and treatment of Crime and Criminals,

'inevitably sabotaging any social or institutional programme to reformation'. It is the 'fifth column' in the administration of criminal justice.

19. There is also the compelling class complexion of the death penalty. A tragic by product of social and economic deprivation is that the "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. So, the burden of capital punishment falls more frequently upon the ignorant, the impoverished and the underprivileged. In the words of Marshall, J., "Their impotence leaves them victims of a sanction that the wealthier, better represented, just-as guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status-quo because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate and we have today's situation". As a matter of historical interest it may be mentioned here that when in 1956, in Great Britain, the House of Commons adopted a resolution "That this House believes that the death penalty for murder no longer accords with the needs or the true interests of a civilised society, and calls on Her Majesty's Government to introduce forthwith legislation for its abolition or for its suspension for an experimental period", and the death penalty Abolition Bill was introduced, 'from the hills and forests of darkest Britain they came : the halt, the lame, the deaf, the obscure, the senile and the forgotten-the hereditary peers of England, united in their determination to use their medieval powers to retain a medieval institution', and the bill was torpedoed by the House of Lords. Capital Punishment was however abolished in Great Britain in 1966.

20. There is finally the question whether the death penalty conforms to the current standards of 'decency'. Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty. Brennan, J., observed in *Furman v. Georgia* [22 L. Edn. 2nd 346]. "In comparison to all other punishments today...the deliberate extinguishment of human life by the State is uniquely degrading to human dignity...death for whatever crime and under all circumstances is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity...as executed person has indeed lost the right to have rights". Senor Tejera of Uruguay in the debate in the United Nations said "A death penalty is an anachronism in the twentieth Century and it is significant that no one in the committee has defended it. It is the duty of the United Nations to promote progress and to protect man from the prejudices and barbarity surviving from the past".

21. In a large number of countries in the world where the murder rate is higher than in India, the death penalty has been abolished. In most Latin American countries, in Argentina, Brazil, Columbia, Costa Rica, Ecuador, Mexico, Panama, Peru and Uruguay, Venezuela, in European countries, in Austria, Belgium, Denmark, Germany, Italy, Netherlands, Norway, Sweden, and Switzerland, in Iceland, in Israel, in many Australian States and in many of the States in the United States of America, death sentence has been abolished.

22. It is in the light of the right to life as a basic concept of human dignity, in the context of the unproven efficacy of the death penalty as a deterrent and in the background of modern theories of criminology based upon progress in the fields of science, medicine, psychiatry and sociology and in the setting of the march of the movement for abolition of Capital Punishment, that Judges in India are required to decide which sentence to impose in a case of murder, death or imprisonment for life?

23. Judges in India have the discretion to impose or not to impose the death penalty. It is one of the great burdens which Judges in this country have to carry. In the past, the reasons which weighed in the matter of awarding or not awarding the sentence of death varied widely and there was certainly room for complaint that there was an unequal application of the law in the matter of imposition of the sentence of death. The varying outlook on the part of Judges was well brought out a few years ago by two decisions of the Andhra Pradesh High Court. In the first case, while confirming the conviction of certain "Naxalites" for murder, the judges set aside the sentence of death and awarded life imprisonment instead. That the murder was not for any personal motive but was in pursuit of some mistaken ideology was the reason which weighed with the judges for substituting the sentence of life imprisonment for the sentence of death. Within a few months this view was subjected to severe criticism by two other Judges, who, in the second case confirmed the sentence of death. Realising that discretion, even judicial, must proceed along perceptive lines, but, conscious, all the same, that such discretion cannot be reduced to formulae or put into pigeon-holes, this Court has been at great pains ever since *Ediga Annamma* to point the path along which to proceed. In the latest pronouncement of this Court in *Rajendra Prasad v. State of Uttar Pradesh* several relevant principles have been enunciated to guide the exercise of discretion in making the choice between the penalties of death and life-imprisonment. I express my agreement with the elucidation of the principles in *Rajendra Prasad v. State of Uttar Pradesh*.

24. Section 302 Indian Penal Code prescribes death or life-imprisonment as the penalty for murder. While so, the CrPC instructs the Court as to its application. The changes which the Code has undergone in the last 25 years clearly indicate that Parliament is taking note of contemporary criminological thought and movement. Prior to 1955, Section 367(5) of the CrPC 1898 insisted upon the Court stating its reasons if the sentence of death was not imposed in a case of murder. The result was that it was thought that in the absence of extenuating circumstances, which were to be stated by the Court, the ordinary penalty for murder was death. In 1955, Sub-section (5) of Section 367 was deleted and the deletion was interpreted, at any rate by some Courts, to mean that the sentence of life imprisonment was the normal sentence for murder and the sentence of death could be imposed only if there were aggravating circumstances. In the CrPC of 1973, there is a further swing towards life imprisonment. Section 354(3) of the new Code now provides:

When the conviction is for an offence punishable with death or, in the alternative imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the Special reasons for such sentence.

So, the discretion to impose the sentence of death or life-imprisonment is not so wide, after all. Section 354(3) has narrowed the discretion. Death Sentence is ordinarily ruled out and can only be imposed for 'Special reasons'. Judges are left with the task of discovering 'Special reasons'.

25. Let us first examine if the CrPC gives any clue leading to the discovery of 'Special reasons'.

26. Apart from Section 354(3) there is another provision in the Code which also uses the significant expression 'special reasons'. It is Section 361. Section 360 of the 1973 code re-enacts, in substance, Section 562 of the 1898 Code and provides for the release on probation of good conduct or after admonition any person not under twenty one years of age who is convicted of an offence punishable with time only or with imprisonment for a term of seven years or less, or any person under twenty one years of age or any women who is convicted of an offence not punishable with death or imprisonment of life, if no previous offence is proved against the offender, and if it appears to the Court, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct or after admonition. If the Court refrains from dealing with an offender under Section 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training, or rehabilitation of youthful offenders, where the Court could have done so, Section 361, which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment the 'special reasons' for not doing so. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever it is possible to do so and, to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the Legislature that reformation and rehabilitation of offenders, and not mere deterrence, are now among the foremost objects of the administration of criminal Justice in our country. Section 361 and Section 354(3) have both entered the Statute Book at the same time and they are part of the emerging picture of acceptance by the Indian Parliament of the new trends in criminology. We will not, therefore, be wrong in assuming that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors.

27. Criminal justice is not a computer machine. It deals with complex human problems and diverse human beings. It deals with persons who are otherwise like the rest of us, who work and play, who laugh and mourn, who love and hate, who yearn for affection and approval, as all of us do, who think, learn and forget. Like the rest of us they too are the creatures of circumstance. Heredity, environment, home neighbourhood, upbringing, school, friends, associates, even casual

acquaintances, the books that one reads, newspapers, radio and TV, the economics of the household, the opportunities provided by circumstances and the calamities resulting therefrom, the success and failure of one's undertakings, the affairs of the heart, ambitions and frustrations, the ideas and ideologies of the time, these and several other ordinary and extra-ordinary incidents of life contribute to a person's personality and influence his conduct. Differently shaped and differently circumstanced individuals react differently in given situations. A Judge has to balance the personality of the offender with the circumstance, the situations and the reactions and choose the appropriate sentence to be imposed. A judge must try to answer a myriad questions such as was the offence committed without premeditation or was it after due deliberation? What was the motive for the crime? Was it for gain? Was it the outcome of a village feud? Was it the result of a petty, drunken, street brawl, or a domestic bickering between a hapless husband and a helpless wife? Was it due to sexual jealousy? Was the murder committed under some stress, emotional or otherwise? What is the background of the offender? What is his social and economic status? What is the level of his education or intelligence? Do his actions betray a particularly callous indifference towards the welfare of society or, on the other hand, do they show a great concern for humanity and are in fact inspired by some concern? Is the offender so perpetually and constitutionally at war with society that there is no hope of ever reclaiming him from being a menace to society? Or is he a person who is patently amenable to reform? Well, may one exclaim with Prof. Vrij "What audacity is involved in these three tasks : to interpret life, explain an act, predict the latest inclination of a human mind."

28. 'Special reasons', we may, therefore say, are reasons which are special with reference to the offender, with reference to constitutional and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of Criminology and connected sciences. Special reasons are those which lead inevitably to the conclusion that the offender is beyond redemption, having due regard to his personality and proclivity, to the legislative policy of reformation of the offender and to the advances made in the methods of treatment etc. I will not attempt to catalogue any 'Special reasons'. I have said enough and perhaps more than what I intended to indicate what according to me should be the approach to the question. Whatever I have said is but to supplement what my brother Krishna Iyer has already said in *Rajendra Prasad v. State of Uttar Pradesh* [(1979) 3 SCC 646].

29. Coming to the case before us, our brothers Jaswant Singh and Kailasam, JJ., ordered 'notice confined to the question of sentence only.' At the last hearing we granted special leave to appeal on the question of sentence. The appellant was convicted by the learned Additional Sessions' Judge, Alipore, for the murder of his son and sentenced to death. The High Court of Calcutta confirmed the conviction and sentence. The reason given by the learned Sessions Judge for giving the sentence of death was that the murder was 'cruel and brutal' and that the facts show the 'grim determination' of the accused to kill the deceased. The Sessions Judge made no reference to the motive of the accused for the commission of the murder. The High Court while confirming the sentence observed that the accused had previously murdered his wife, suspecting

her infidelity and suspecting that the deceased in the present case was not his own son, that the sentence of imprisonment imposed on him for the murder of his wife had no sobering affect and that he had murdered his own son without any mercy or remorse and that he, therefore, deserved no mercy. We do not think that either the Sessions Judge or the High Court made the right approach to the question. The Sessions Judge was wrong in imposing the sentence of death without even a reference to the reason why the appellant committed the murder. The observation of the High Court that the appellant deserved no mercy because he showed no mercy smacks very much of punishment by way of retribution. We have examined the facts of the case. We find some vague evidence to the effect that the appellant suspected that the deceased was not his own son and that he used to get angry with the deceased for not obeying him. There is also vague evidence that he had killed the mother of the deceased and had suffered sentence of imprisonment for that offence. From the vague evidence that is available we gather that the appellant was a moody person who had for years been brooding over the suspected infidelity of his wife and the injustice of having a son foisted on him. We do not think that the mere use of adjectives like 'cruel and brutal' supplies the special reasons contemplated by Section 354(3) Criminal Procedure Code. In the light of the principles enunciated in *Rajendra Prasad v. State of Uttar Pradesh* [(1979) 3 SCC 646] and in the light of what we have said earlier, we do not think that there are any 'special reasons' justifying the imposition of the death penalty. We accordingly allow the appeal as regards sentence, set aside the sentence of death and impose in its place the sentence of life imprisonment.

KRISHNA IYER, J.

30. I have had the advantage of reading the Judgment of my learned brother, Shri Justice Chinnappa Reddy. I wholly agree with his reasoning and conclusion. Indeed, the ratio of *Rajendra Prasad v. State of Uttar Pradesh* [(1979) 3 SCC 646] if applied to the present case, as it must be, leads to the conclusion that death sentence cannot be awarded in the circumstances of the present case. Counsel for the State, if I recollect alright, did state that in view of the criteria laid down in *Rajendra Prasad* case the State did not propose to file any written submissions against commutation to life imprisonment. I concur with my learned brother and direct that the appeal, confined to sentence, be allowed and the alternative of life imprisonment imposed.

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Bachan Singh v. State of Punjab

AIR 1980 SC 898

Y.V. CHANDRACHUD, C.J. :- 1. This reference to the Constitution Bench raises a question in regard to the constitutional validity of death penalty for murder provided in Section 302, Penal Code, and the sentencing procedure embodied in Sub-section (3) of Section 354 of the CrPC, 1973.

2. The reference has arisen in these circumstances: Bachan Singh, appellant in Criminal Appeal No. 273 of 1979, was tried and convicted and sentenced to death under Section 302, Indian Penal Code for the murders of Desa Singh, Durga Bai and Veeran Bai by the Sessions Judge. The High Court confirmed his death sentence and dismissed his appeal.

3. Bachan Singh's appeal by special leave, came up for hearing before a Bench of this Court (consisting of Sarkaria and Kailasam, JJ.). The only question for consideration in the appeal was, whether the facts found by the courts below would be "special reasons" for awarding, the death sentence as required under Section 354(3) of the CrPC, 1973.

4. Shri H. K. Puri, appearing as amicus curiae on behalf of the appellant, Bachan Singh, in Criminal Appeal No. 273 of 1979, contended that in view of the ratio of ***Rajendra Prasad v. State of U. P.*** [(1979) 3 SCR 646], the courts below were not competent to impose the extreme penalty of death on the appellant. It was submitted that neither the circumstance that the appellant was previously convicted for murder and committed these murders after he had served out the life sentence in the earlier case, nor the fact that these three murders were extremely heinous and inhuman, constitutes a "special reason" for imposing the death sentence within the meaning of Section 354(3) of the CrPC, 1974. Reliance for this argument was placed on ***Rajendra Prasad*** which, according to the counsel, was on facts very similar, if not identical, to that case.

5. Kailasam, J. was of opinion that the majority view in ***Rajendra Prasad*** taken by V.R. Krishna Iyer, J., who spoke for himself and D.A. Desai, J., was contrary to the judgment of the Constitution Bench in ***Jagmohan Singh v. State of Uttar Pradesh*** [(1973) 2 SCR 541], inter alia, on these aspects:

(i) In ***Rajendra Prasad***, V.R. Krishna Iyer, J. observed:

The main focus of our judgment is on this poignant gap in 'human rights jurisprudence' within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy charged with compassion, an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the rights of individual justice, interest with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19 and 21.

6. According to Kailasam, J., the challenge to the award of the death sentence as violative of Articles 14, 19 and 21, was repelled by the Constitution Bench in *Jagmohan* case.

(ii) In *Jagmohan* case, the Constitution Bench held:

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

In *Rajendra Prasad*, the majority decision characterised the above observations in *Jagmohan* as "incidental observations without concentration on the sentencing criteria", and said that they are not the ratio of the decision, adding "Judgments are not Bible for every line to be venerated".

(iii) In *Rajendra Prasad*, the plurality observed:

It is constitutionally permissible to swing a criminal out of corporal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6). This view again, according to Kailsam, J., is inconsistent with the law laid down by the Constitution Bench in *Jagmohan*, wherein it was held that deprivation of life is constitutionally permissible if that is done according to "procedure established by law".

(iv) In *Rajendra Prasad*, the majority has further opined:

The only correct approach is to read into Section 302, I. P. C. and Section 354(3), Criminal P. C., the human rights and humane trends in the Constitution. So examined, the right to life and the fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled.

7. Against the above, Kailasam, J. commented : The only change after the Constitution Bench delivered its judgment is the introduction of Section 354(3) which requires special reasons to be given if the court is to award the death sentence. If without the restriction of stating sufficient reasons death sentence could be constitutionally awarded under the I. P. C. and Criminal P. C. as it stood before the amendment, it is difficult to perceive how by requiring special reasons to be given the amended section would be unconstitutional unless the "sentencing sector is made restrictive and least vagarious".

(v) In *Rajendra Prasad*, the majority has held that: "such extraordinary grounds alone constitutionally qualify as special reasons as leave no option to the court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing or pathetic the situation, unless the inherent testimony oozing from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man

were now or later to be at large. If he is an irredeemable murderer, like a bloodthirsty tiger, he has to emit his terrestrial tenancy".

8. According to Kailasam, J., what it extracted above, runs directly counter to and cannot be reconciled with the following observations in *Jagmohan* case:

But some (murders) at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country, society is liable to be rocked to its very foundation. Such murders cannot be simply washed away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval by the society.... A very responsible body (Law Commission) has come to the conclusion after considering all the relevant factors. On the conclusions thus offered to us, it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest.

(vi) Kailasam, J. was further of the opinion that it is equally beyond the functions of a court to evolve "working rules for imposition of death sentence bearing the markings of enlightened flexibility and social sensibility" or to make law "by cross-fertilisation from sociology, history, cultural anthropology and current national perils and developmental goals and, above all, constitutional currents". This function, in his view, belongs only to Parliament. The Court must administer the law as it stands.

(vii) The learned Judge has further expressed that the view taken by V.R. Krishna Iyer, J. in *Rajendra Prasad* that "special reasons" necessary for imposing death penalty must relate not to the crime as such, but to the criminal is not warranted by the law as it stands today.

9. Without expressing his own opinion on the various questions raised in that case including the one with regard to the scope, amplification and application of Section 354(3) of the CrPC, 1973, Sarkaria, J., in agreement with Kailasam, J., directed the records of the case to be submitted to the Hon'ble the Chief Justice, for constituting a large Bench to resolve the doubts, difficulties and inconsistencies pointed out by Kailasam, J.

10. In the meanwhile, several persons convicted of murders and sentenced to death, filed writ petitions (namely, Writ Petitions 564, 165, 179, 434, 89, 754, 756 and 976 of 1979) under Article 32 of the Constitution directly challenging the constitutional validity of the death penalty provided in Section 302 of the Indian Penal Code for the offence of murder, and the sentencing procedure provided in Section 354(3) of the CrPC, 1974. That is how, the matter has now come up before this larger Bench of five Judges.

11. At the outset, Shri R. K. Garg submitted with some vehemence and persistence, that *Jagmohan* case needs reconsideration by a larger Bench if not by the Full Court. Reconsideration of *Jagmohan*, according to the learned Counsel, is necessitated because of subsequent events and changes in law. Firstly, it is pointed out that when *Jagmohan* was decided in 1972, the then extant CrPC, 1898 left the choice between death and life imprisonment as punishment for murder

entirely to the discretion of the Court. This position has since undergone a complete change and under Section 354(3) of the CrPC, 1973, death sentence has ceased to be the normal penalty for murder. Secondly, it is argued, the seven-Judge decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 2 SCR 621] has given a new interpretative dimension of the provisions of Articles 21, 19 and 14 and their inter-relationship, and according to this new interpretation every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three Articles. It is stressed that an argument founded on this expansive interpretation of these Articles was not available when *Jagmohan* was decided. Thirdly, it is submitted that India has since acceded to the International Covenant of Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force on December 16, 1976. By virtue of this Covenant, India and other 47 countries who are a party to it, stand committed to a policy for abolition of the 'death penalty'.

17. The principal questions that fall to be considered in this case are:

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

(ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Sec, 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

18. We will first take up Question No. (I) relating to the constitutional validity of Section 302, Penal Code.

Question No. (I):

19. Before dealing with the contentions canvassed, it will be useful to have a short survey of the legislative history of the provisions of the Penal Code which permit the imposition of death penalty for certain offences.

20. The Indian Penal Code was drafted by the First Indian Law Commission presided over by Mr. Macaulay. The draft underwent further revision at the hands of well-known jurists, like Sir Barnes Peacock, and was completed in 1850. The Indian Penal Code was passed by the then Legislature on October 6, 1860 and was enacted as Act No. XLV of 1860.

21. Section 33 of the Penal Code enumerates punishments to which offenders are liable under the provisions of this Code. Clause Firstly of the section mentions 'Death' at one of such punishments. Regarding 'death' as a punishment, the authors of the Code say: "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed." Accordingly, under the Code, death is the punishment that must be awarded for murder by a person under sentence of

imprisonment for life (Sec. 303). This apart, the Penal Code prescribed 'death' as an alternative punishment to which the offenders may be sentenced, for the following seven offences:

- (1) Waging war against the Government of India. (S. 121)
- (2) Abetting mutiny actually committed (S. 132)
- (3) Giving or fabricating false evidence upon which an innocent person suffers death. (S. 194)
- (4) Murder which may be punished with death or life imprisonment (S. 302)
- (5) Abetment of suicide of a minor or insane, or intoxicated person. (S. 305)
- (6) Dacoity accompanied with murder. (S. 396)
- (7) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused. (S. 307)

22. In the instant cases, the impugned provision of the Indian Penal Code is Section 302...

23. The first contention of Shri Garg is that the provision of death penalty in Section 302, Penal Code offends Article 19 of the Constitution. It is submitted that the right to live is basic to the enjoyment of all the six freedoms guaranteed in Clauses (a) to (e) and (g) of Article 19(1) of the Constitution and death penalty puts an end to all these freedoms; that since death penalty serves no social purpose and its value as a deterrent remains unproven and it defiles the dignity of the individual so solemnly vouchsafed in the Preamble of the Constitution, its imposition must be regarded as an 'unreasonable restriction' amounting to total prohibition, on the six freedoms guaranteed in Article 19(1).

25. Broadly speaking, Article 19 is intended to protect the rights to the freedoms specifically enumerated in the six Sub-clauses of Clause (1) against State action, other than in the legitimate exercise of its power to regulate these rights in the public interest relating to heads specified in Clauses (2) to (6). The six fundamental freedoms guaranteed under Article 19(1) are not absolute rights. Firstly, they are subject to inherent restraints stemming from the reciprocal obligation of one member of a civil society to so use his rights as not to infringe or injure similar rights of another. This is on the principle *sic uteri tuo ut alienum non laedas*. Secondly, under Cls. (2) to (6) these rights have been expressly made subject to the power of the State to impose reasonable restrictions, which may even extend to prohibition, on the exercise of those rights.

26. The power, if properly exercised, is itself a safe-guard of the freedoms guaranteed in Clause (1). The conferment of this power is founded on the fundamental truth that uncontrolled liberty entirely freed from restraint, degenerates into a license, leading to anarchy and chaos; that libertine pursuit of liberty, absolutely free, and free for all, may mean liberticide for all. "Liberty has, therefore," as Justice Patanjali Sastri put it, "to be limited in order to be effectively possessed".

27. It is important to note that whereas Article 21 expressly deals with the right to life and personal liberty, Article 19 does not. The right to life is not one of the rights mentioned in Article 19(1).

28. The first point under Question (1) to be considered is whether Article 19 is at all applicable for judging the validity of the impugned provision in Section 302, Penal Code.

29. As rightly pointed out by Shri Soli Sorabji, the condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises, must be within the purview and protection of Article 19(1). Thus considered, can any one say that he has a legal right of fundamental freedom under Article 19(1) to practise the profession of a hired assassin or to form associations or unions or engage in a conspiracy with the object of committing murders or dacoities? The argument that the provisions of the Penal Code, prescribing death sentence as an alternative penalty for murder have to be tested on the ground of Article 19, appears to proceed on the fallacy that the freedoms guaranteed by Article 19(1) are absolute freedoms and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition. Speaking for the Constitution Bench, S. R. Das, C. J. repelled this contention, in these terms:

On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, or house-breaking, or selling obscene pictures, or trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstance be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words.

31. It was contended on behalf of A.K. Gopalan that since the preventive detention order results in the detention of the detenu in a cell, his rights specified in Clauses (a) to (e) and (g) of Article 19(1) have been infringed.

32. Kania, C. J. rejected this argument, inter alia, on these grounds:

(i) Argument would have been equally applicable to a case of punitive detention, and its acceptance would lead to absurd results. "In spite of the saving Clauses (2) to (6), permitting abridgement of the rights connected with each other, punitive detention under several sections of the Penal Code, e. g. for theft, cheating, forgery and even ordinary assault, will be illegal, (because the reasonable restrictions in the interest of "public order" mentioned in Cls. (2) to (4) of the Article would not cover these offences and many other crimes under the Penal Code which injure specific individuals and do not affect the community or the public at large). Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution.

41. Indeed, the reasoning, explicit or implicit, in the judgments of Kania, C. J., Patanjali Sastri and S. R. Das JJ. that such a construction which treats every section of the Indian Penal Code as a law imposing 'restriction' on the rights in Article 19(1), will lead to absurdity is

unassailable. There are several offences under the Penal Code, such as theft, cheating, ordinary assault, which do not violate or affect 'public order,' but only 'law and order'. These offences injure only specific individuals as distinguished from the public at large. It is by now settled that 'public order' means 'even tempo of the life of the community'. That being so, even as murders do not disturb or affect 'public order'. Some murders may be of purely private significance and the injury or harm resulting therefrom affects only specific individuals, and, consequently, such murders may not be covered by "public order" within the contemplation of Clauses (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say that punishment of such murderers is not in the general public interest.

60. From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under

Does the impugned law, in its pith and substance, whatever may be its form, and object, deal with any of the fundamental rights conferred by Article 19(1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1) is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights ?

The mere fact that impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But if the impact of the law on any of the rights under Clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity,

61. Now, let us apply this test to the provisions of the Penal Code, in question. Section 299 defines 'culpable homicide' and Section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of course, say that the object of penal laws is generally such as not to involve any violation of the rights conferred by Article 19(1) ..after the decision of this Court in the Bank Nationalisation case.... But the point of the matter is that, in pith and substance, penal laws do not deal with the subject matter of rights enshrined in Article 19(1). That again is not enough for the purpose of deciding upon the applicability of Article 19 because as the test formulated by us above shows, even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19(1) shall have been attracted. It would then become necessary to test the validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, we are of the opinion that the deprivation of freedom consequent upon an

order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution.

62. This is particularly true of crimes inherently vicious and pernicious, which under the English Common Law were classified as crimes mala in se as distinguished from crimes mala prohibita. Crimes mala in se embrace acts immoral or wrong in themselves, such as, murder, rape, arson, burglary, larceny (robbery and dacoity;) while crimes mala prohibita embrace things prohibited by statute as infringing on others' rights, though no moral turpitude attaches to such crimes. Such acts constitute crimes only because they are so prohibited....

63. Assuming arguendo, that the provisions of the Penal Code, particularly those providing death penalty as an alternative punishment for murder, have to satisfy the requirements of reasonableness and public interest under Article 19 the golden strand of which according to the ratios of *Maneka Gandhi* runs through the basic structure of Article 21 also- the further questions to be determined, in this connection, will be: On whom will the onus of satisfying the requirements under Article 19, lie ? Will such onus lie on the State or the person challenging its validity? And what will be the nature of the onus ?

64. 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 Uttar Pradesh* [(1955) 1 SCR 707] and *Khyerbari Tea Co. v. State of Assam* [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.

65. 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.

67. Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. "The job of a

Judge is judging and not law-making" In Lord Devlin's words: "Judges are the keepers of the law and the keepers of these boundaries cannot, also, be among outriders".

71. In the instant case, the State has discharged its burden primarily by producing for the perusal of the Court, the 35th Report of the Law Commission. 1967. and the judgments of this Court in *Jagmohan Singh* and in several subsequent cases, in which it has been recognised that death penalty serves as a deterrent. It is, therefore, for the petitioners to prove and establish that the death sentence for murder is so outmoded, unusual or excessive as to be devoid of any rational nexus with the purpose and object of the legislation.

72. The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, published and submitted its 36th Report in 1967 to the Government. After examining, a wealth of evidential material and considering the arguments for and against its retention, that high-powered Body summed up its conclusions at page 354 of its Report, as follows:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.

It is difficult to rule out the validity of the strength behind many of the arguments for abolition nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

73. This Report was, also, considered by the Constitution Bench of this Court in *Jagmohan*. It was the main piece of evidence on the basis of which the challenge to the constitutional validity of Section 302 of the Penal Code, on the ground of its being violative of Article 19, was repelled. Parliament must be presumed to have considered these views of the Law Commission and the judgment of this Court in *Jagmohan*, and must also have been aware of the principles crystallised by judicial precedents in the matter of sentencing when it took up revision of the CrPC in 1972-73. and inserted in it, Section 354(3) which indicates that death penalty can be awarded in exceptional cases for murder and for some other offences under the Penal Code for special reasons to be recorded.

74. Death penalty has been the subject of an age-old debate between Abolitionists and Retentionists, although recently the controversy has come in sharp focus. Both the groups are

deeply anchored in their antagonistic views. Both firmly and sincerely believe in the righteousness of their respective stands, with overtones of sentiment and emotion. Both the camps can claim among them eminent thinkers, penologists, sociologists, Jurists, Judges, legislators, administrators and law enforcement officials.

75. The chief arguments of the Abolitionists, which have been substantially adopted by the learned Counsel for the petitioners, are as under:

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

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

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

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

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

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

76. It is proposed to deal with these arguments, as far as possible, in their serial order.

Regarding (a): It is true that death penalty is irrevocable and a few instances, can be cited, including some from England of persons who after their conviction and execution for murder, were discovered to be innocent. But this, according to the Retentionists is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theoretically, such errors of judgment cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. We will presently see, while dealing with the procedural aspect of the problem, that in India, ample safeguards have been provided by law and the Constitution which almost eliminate, the chances of an innocent person being convicted and executed for a capital offence.

Regarding (b): Whether death penalty serves any penological purpose.

77. Firstly, in most of the countries in the world, including India, a very large segment of the population, including notable penologists, judges, jurists, legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serve as a deterrent, and a greater deterrent than life imprisonment. We will set out very briefly, by way of sample, opinions of some of these distinguished persons.

98. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows: "In our view capital punishment does act as a deterrent. We have already discussed in

detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of Capital punishment is a matter of doubt.

(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it".

Views of the British Royal Commission:

99. The British Royal Commission, after making an exhaustive study of the issue of capital punishment and its deterrent value, in their Report (1949-53), concluded:

The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible.

100. We may add that whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved either way, because statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind. Retribution in the sense of reprobation - whether a totally rejected concept of punishment:

101. Even retribution in the sense of society's reprobation for the worst of crimes, i. e., murder, is not an altogether outmoded concept. This view is held by many distinguished sociologists, jurists and judges.

104. Retribution and deterrence are not two divergent ends of capital punishment They are convergent goals which ultimately merge into one. How these ends of punishment coalesce into one was described by the Law Commission of India, that:

The retributive object of capital punishment has been the subject-matter of sharp attack at the hands of the abolitionists. We appreciate that many persons would regard the instinct of revenge as barbarous. How far it should form part of the penal philosophy in modern times will always remain a matter of controversy. No useful purpose will be served by a discussion as to whether the instinct of retribution is or is not commendable. The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct. The feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence. (Para 265 (18), 35th Report)

131. India also, as the statistics furnished by the respondent (Union of India) show, is afflicted by a rising rate of violent crime, particularly murder, armed robbery and dacoity etc., and this has been the cause of much public concern. All attempts made by individual members to move Bills in the Parliament for abolition or restriction of the area of death penalty have ended in failure. At least four of such unsuccessful attempts were made after India won Independence, in 1949, 1958, 1961 and 1978. It may be noted that the last of these attempts was only to restrict the death penalty to a few types of murders specified in the Bill. Though it was passed by the Rajya Sabha after being recast, it has not been passed by Lok Sabha.

132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports

of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the CrPC, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19.

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.

134. Before dealing with the contentions canvassed on the point, it will be proper to notice briefly the principles which should inform the interpretation of Art 21.

136. Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the Founding Fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications, also, in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in Concurrent List - of the Seventh Schedule specifically refer to the Indian Penal Code and the CrPC as in force at the commencement of the Constitution. Article 72(1)(c) specifically invests the President with power to suspend, remit or commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, inter alia, the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial Court 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 degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.

137. Before we pass on the main Question No. II, we may dispose of another contention canvassed by Dr. L. M. Singhvi.

138. It is pointed out that India, as a member of the International Community, was a participating delegate at the international conference that made the Stockholm Declaration on December 11, 1977, that India has also accepted the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force on March 23, 1966, and to which some 47 countries, including India, are a party. This being the position, it is stressed, India stands committed to the abolition of the death penalty. It is contended that the constitutional validity and interpretation of the impugned limb of Section 302, Penal Code, and the sentencing procedure for capital cases provided in Section 354(3) of the CrPC, 1973, must be considered in the light of the aforesaid Stockholm Declaration and the International Covenant, which represent the evolving attitudes and standards of decency in a maturing world.

141. For all the foregoing reasons, we would answer the first main question in the negative. This takes us to Question No. II. Question No. II.

142. Are the provisions of Section 354(3) of the CrPC, 1973 unconstitutional? That is the question. The constitutional validity of Section 354(3) is assailed on these grounds:

- (i) (a). Section 354(3) of the CrPC, 1973, delegates to the Court the duty to legislate in the field of 'special reasons' for choosing between life and death, and
- (b) permits imposition of death penalty in an arbitrary and whimsical manner inasmuch as it does not lay down any rational principles or criteria for invoking this extreme sanction. (Reliance has been placed on *Furman v. Georgia*.)

(ii) If Section 354(3) is to be saved from the vice of unconstitutionality, the Court should so interpret it and define its scope that the imposition of death penalty comes to be restricted only to those types of grave murders and capital offences which imperil the very existence and security of the State. (Reliance for this argument has been placed on *Rajendra Prasad* case.)

143. As against this, the learned Solicitor-General submits that the policy of the law in the matter of imposition of death sentence is writ large and clear in Section 354(3), namely, that life imprisonment is the rule and death sentence an exception; that the correct approach should be to apply this policy to the relevant facts of the particular case, bearing on the question of sentence, and to find out if there are any exceptional reasons justifying imposition of the death penalty, as a departure from the normal rule.

144. It is submitted that conferment of such sentencing discretion on the courts, to be exercised judicially, in no sense, amounts to delegation of the legislative powers by Parliament.

147. Under the CrPC, 1898, as it stood before its amendment by Act No. 26 of 1955, even for the seven offences mentioned earlier, which are punishable in the alternative with death, the normal sentence was the death sentence, and if the Court wanted to depart from this rule, it had to give reasons for doing so. This requirement was embodied in Sub-section (5) of Section 367, which, as it then stood, was as follows: "If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."

148. The Law Commission in its 35th Report (Vol. I), made the following comments on this provision:

(A) considerable body of opinion is in favour of a provision requiring the Court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt.... It would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death) or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life)" In deference to this recommendation, Section 66 of the CrPC (Amendment) Act, 1955 (XXVI of 1955) deleted old Sub-section (5) of Section 367 with effect from January 1, 1956, and thereafter, for such capital offences, it was left to the Court, on the facts of each case, to pass, in its discretion, for reasons to be recorded, the sentence of death or the lesser sentence. This led to some difference of opinion whether, even after the Amendment of 1955, in case of murder the normal punishment was death or imprisonment for life; (See A.I.R. Commentaries on the CrPC, Vol. 3, page 565, by D. V. Chitale and S. Appu Rao). Overruling its earlier decision, the Bombay High Court in the *State v. Vali Mohammad* [AIR 1969 Bom 294 (299) (FB)], held that death is not a normal penalty for murder. As against this, the Division Bench of the Madras High Court in *Valuchami Thevar*, [AIR 1965 Mad 48] held that death was the normal punishment where there were no extenuating circumstances. The third set of cases held that both the sentences were normal but the discretion as regards sentence was to be exercised in the light of facts and circumstances of the case.

149. This view appears to be in accord with the decision of this Court in *Iman Ali v. State of Assam* [(1968) 3 SCR 610]. In that case, there was a clear finding by the Court of Session which had been upheld by the High Court, that each of the two appellants therein, committed a cold-blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by them. Those persons were shot and killed even though they had not tried to put up any resistance. It was held by this Court (speaking through Bhargava, J.) that in these circumstances where the murders were committed in cold-blood with the sole object of committing dacoity, the Sessions Judge had not exercised his discretion judicially in not imposing the death sentence, and the High Court was justified in enhancing the sentence of the appellants from life imprisonment to death.

150. *Jagmohan Singh* case, which we shall notice presently in further detail, proceeds on the hypothesis that even after the deletion of Sub-section (5) of Section 367 in the Code of 1898, both the alternative sentences provided in Section 302, Penal code are normal punishment for murder,

and the choice of either sentence rest, in the discretion of the Court which is to be exercised judicially, after taking into account all the relevant circumstances of the case.

151. Section 354(3) of the CrPC, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report, stated the object and reason of making this change, as follows:

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

Accordingly, Sub-section (3) of Section 354 of the current Code provides:

When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence.

152. In the context, we may also notice Section 235(2) of the Code of 1973, because it makes not only explicit, what according to the decision in *Jagmohan* case was implicit in the scheme of the Code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provision of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

161. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in *Jagmohan* case. These propositions may be summed up as under:

(i) The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefore, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment. With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to *McGantha v. California* [(1971) 402 US

183)]. (b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in *Furman v. Georgia* decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un-guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an un-guided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v) (a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the Court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. When counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, "the Court is principally concerned with the facts and circumstances, whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the Cr. P. C. The trial does not come to an end until all the relevant facts are proved and the counsels on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), Cr. P. C. purport

to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not un-constitutional under Article 21.

162. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in *Jagmohan* case. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv) (a) which postulates, that according to the then extant CrPC both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to impose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only the extreme cases.

165. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in *Jagmohan*, shall have to be recast and may be stated as below:

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

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

166. The soundness or application of the other propositions in *Jagmohan*. and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary, these changes reinforce the reasons given in *Jagmohan*, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354(3) given a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion.

Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder - a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

167. The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, re-affirm the view taken by this Court in *Jagmohan*, and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution.

168. Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders.

171. As pointed out in *Jagmohan*. such "standardisation" is well-nigh impossible.

172. Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crimes are only to be measured by the Injury done to society'. But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done for risked) by the act and degree of the actor's culpability". But how is the degree of that culpability to be measured ? Can any thermometer be devised to measure its degree ? This is very baffling, difficult and intricate problem.

173. Secondly, criminal cases do not fall into set-behavioristic patterns. Even within a single-category offence there are Infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its

peculiar combinations of events and its unique configuration of facts. "Simply in terms of blame-worthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated". (Messinger and Bittner) This is particularly true of murder. "There is probably no offence' observed Sir Ernest Gowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this Court in *Jagmohan* by citing the instance of the Model Penal Code which was presented to the American Supreme Court in *Me Goutha*.

174. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of Procrustean cruelty.

175. Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the Court would not by over-leaping its bounds rush to do what Parliament, in its wisdom, warily did not do.

176. We must leave unto the legislature, the things that are Legislature's. "The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits." As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted. judicial "made-to-order standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people. In *Furman*, the Hon'ble Judges claimed to articulate the contemporary standards of morality among the American people. But speaking through public

referenda, Gallup polls and the state legislatures, the American people sharply rebuffed them. We must draw a lesson from the same.

195. In *Jagmohan*, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since *Jagmohan* - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

196. We will first notice some of the aggravating circumstances which in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold blooded murder has always been regarded as one of an aggravated kind. In *Jagmohan*, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in *Ediga Anamma*, in these terms:

The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.

198. It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the CrPC, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In *Paras Ram* case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In *Rajendra Prasad*, however, the majority (of 2:1) has completely reversed the view that had been taken in *Ediga Anamma* regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special

reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the 'man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia*, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality;
or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other,

202. In *Rajendra Prasad*, the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)." Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and society,

public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its 'ethos'; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302, Penal Code, fully apply to the case of Section 354(3), CrPC, also. The same criticism applies to the view taken in *Bishnu Deo Shaw v. State of West Bengal*[1979) 3 SCC 714] which follows the dictum in *Rajendra Prasad* .

203. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

204. Dr. Chitaley has suggested these mitigating factors:

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

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

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

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

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

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

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

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

205. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme

youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a 'child' that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

206. According to some Indian decisions, the post-murder remorse, penitence or reentence by the murderer is not a factor which may induce the Court to pass the lesser penalty (e. g. *Mominuddin Sardar* [AIR 1935 Cal 591]). But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of Messinger and Bittner (*ibid*), which are in point.

207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since there are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

208. For all the foregoing reasons, we reject the challenge to the constitutionality of the impugned provisions contained in Sections 302 Penal Code and 354(3) of the CrPC, 1973.

209. The writ petitions and the connected petitions can now be heard and disposed of, on their individual merits, in the light of the broad guidelines and principles enunciated in this judgment.

BHAGWATI, J. (*Minority*) - 210. I have had the advantage of reading the careful judgment prepared by my learned brother Sarkaria. but I find myself unable to agree with the conclusions reached by him. I am of the view that Section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being

violative of Articles 14 and 21 of the Constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.

211. I would therefore strike down Section 302 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life. I shall give my reasons for this view on the day on which the Court reopens after the summer vacation.

ORDER

212. In accordance with the majority opinion the challenge to the constitutionality of Section 302 of the Penal Code in so far as it provides for the death sentence as also the challenge to the constitutionality of Section 354(3) of the CrPC, 1973 fails and is rejected.

213. The Writ Petitions and other connected matters may now be placed for hearing, in the usual course, before the Division Bench for consideration of the individual cases on merits, in the light of the principles enunciated in the majority judgment.

* * * * *

Machhi Singh v. State of Punjab

AIR 1983 SC 957

M.P. THAKKAR, J. :- 1. Protagonists of the "an eye for an eye" philosophy demand "death-for-death". The 'Humanists' on the other hand press for the other extreme viz., "death-in-no-case". A synthesis has emerged in *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684] wherein the "rarest-of-rare-case" formula for imposing death sentence in a murder case has been evolved by this Court. Identification of the guidelines spelled out in 'Bachan Singh' in order to determine whether or not death sentence should be imposed is one of the problems engaging our attention, to which we will address ourselves in due course.

2. A feud between two families has resulted in tragic consequences. Seventeen lives were lost in the course of a series of five incidents which occurred in quick succession in five different villages, situated in the vicinity of each other in Punjab, on a night one would like to forget but cannot forget, the night between August 12 and August 13, 1977. The seventeen persons who lost their lives and the three who sustained injuries included men, women and children related to one Amar Singh and his sister Piaro Bai.

3. In this connection one Machhi Singh and his eleven companions, close relatives and associates were prosecuted in five sessions cases, each pertaining to the concerned village in which the killings took place. Machhi Singh was the common accused at each trial. The composition of his co-accused differed number wise and identity-wise from trial to trial. At the conclusion of the series of trials the accused found guilty were convicted under appropriate provisions. Four of them were awarded death sentence, whereas sentence of imprisonment for life was imposed on nine of them. They were also convicted for different offences and appropriate punishment was inflicted on each of them in that behalf. The order of conviction and sentence gave rise to five murder references and fourteen appeals by the convicts before the High Court of Punjab and Haryana. The High Court heard every individual appeal separately, but disposed of the group of appeals by a common Judgment for the sake of convenience. The present group of appeals is directed against the aforesaid judgment rendered by the High Court. We will treat each of the appeals compartmentally, and separately, on its own merits, on the basis of the evidence recorded at the trial in each sessions case giving rise to the respective appeal. But for the sake of convenience we will dispose of the appeals by this common judgment. In order to avoid confusion, the occurrence in each village will be adverted to in the same manner in which the High Court has done viz., Crime No. I, IIA, IIB, III, IV and V.

Motive :

4. The aspect regarding motive has been discussed exhaustively in the third paragraph of the elaborate judgment rendered by the High Court. We need not set out this aspect at length or examine it in depth. This aspect need not therefore be adverted to in the context of each crime

over and over again so as to avoid avoidable repetition. Suffice it to say that reprisal was the motive for the commission of the crime.

Common Criticism :

5. The most serious criticism pressed into service by learned Counsel for the appellants in each of the appeals is common. Instead of dealing with the identical criticism, in the identical manner, repeatedly, in the context of each matter, we propose to deal with it at this juncture. The criticism is this. It was a dark night. Electricity had not yet reached the concerned village at the material time. In each crime the appreciation of evidence regarding identification has to be made in the context of the fact-situation that a lighted lantern was hanging in the court-yard where the victims were sleeping on the cots. The light shed by the lantern cannot be considered to be sufficient enough (such is the argument) to enable the eye witnesses to identify the culprits. This argument has been rightly rebuffed by the Sessions Court and the High Court, on the ground that villagers living in villages where electricity has not reached as yet, get accustomed to seeing things in the light shed by the lantern. Their eyesight gets conditioned and becomes accustomed to the situation. Their powers of seeing are therefore not diminished by the circumstance that the incident is witnessed in the light shed by the lantern and not electric light. Moreover, identification did not pose any serious problem as the accused were known to the witnesses. In fact they were embroiled in a long standing family feud. As the culprits had not covered their faces to conceal their identity, it was not difficult to identify them from their facial features, build gait etc. Light shed by the lantern was enough to enable the witnesses to identify the culprits under the circumstances.

6. The concurrent finding of fact recorded, by the Sessions Court and the High Court in this behalf does not, therefore, call for interference at the hands of this Court on this score.

Appellant Machhi Singh :

10. As far as Machhi Singh is concerned the finding of guilt recorded by the Session Court and affirmed by the High Court rests on the testimony of two eye witnesses viz., P.W. Amar Singh and his 10 year old daughter P.W. Mohindo. Evidence has also been adduced to establish that one of the rifles used in the course of the murderous assault had been issued to Machhi Singh in his capacity as an officer of Punjab Homeguards. The evidence of the ballistic expert establishes that the said rifle had been recently used and some of the empty cartridges found from the scene of the occurrence were fired from this rifle This evidence is further corroborated by the evidence pertaining to the recovery of the rifle at the instance of appellant Machhi Singh which has been accepted by the Sessions Court and the High Court.

11. Learned Counsel for the appellant contended that the evidence of the two eye witnesses namely, P.W. Amar Singh and P.W. Mohindo was not such as could be implicitly relied upon, and the rest of the evidence was neither sufficient, nor satisfactory enough, to bring home the guilt to appellant Machhi Singh.

Death Sentence

31. Having dealt with the appeals on merits from the stand-point of proof of guilt and validity or otherwise of the order of conviction, we now come face to face with the problem indicated when the curtain was lifted, namely, the application of the rarest-of-rare-case rule to the facts of individual cases in the context of the relevant guidelines. Some reflections on the question of death penalty may appropriately be made before we tackle the said question in the perspective of the present group of appeals.

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare case) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I Manner of Commission of Murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for Commission of murder

34. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the muderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for betrayal of the motherland.

III Anti Social or Socially abhorrent nature of the crime

(a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry-deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of Crime

35. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of Victim af murder

36. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

37. In this background the guidelines indicated in ***Bachan Singh*** case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from ***Bachan Singh*** case :

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balancesheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

38. In order to apply these guidelines inter-alia the following questions may be asked and answered :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

39. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

40. In the present group of appeals we are now concerned with the death sentence imposed on appellants (i) Machhi Singh (ii) Kashmir Singh; (iii) Jagir Singh by the Sessions Court as confirmed by the High Court,

Machhi Singh :

41. The High Court in its extremely well considered judgment has assigned the following reasons for imposing death penalty on appellant Machhi Singh in the context of each of the six crimes. We can do no better than to quote the said reasons in the very words employed by the High Court in the context of each crime :

Crime No. 1 (Crl. Appeal No. 78-79/81, Common)

Machhi Singh killed Biban Bai and Jagtar Singh whereas Mohinder Singh killed Balwant Singh and Gurcharan Singh which has attracted on them death penalty. Now the circumstances of the case do reveal that it was a cold-blooded murder and the victims were helpless and undefended. And what was their fault, except that they were the immediate family of Amar Singh. The offence committed was of an exceptionally depraved and heinous character. The manner of its execution and its design would put it at the level of extreme atrocity and cruelty. The deceased woman and her children had offered no offence to Machhi Singh and Mohinder Singh.

Allauddin Mian v. State of Bihar

AIR 1989 SC 1456

AHMADI, A.M. (J), NATRAJAN, S. (J) :- Briefly stated the prosecution case is that on the afternoon of 25th July, 1985 around 4.30 p.m. when PW 6 Baharan Mian was sitting at the entrance of his house, the aforesaid six accused persons came from the west armed with deadly weapons; accused Nos. 1 and 2 were carrying 'farsas', accused Nos. 3 and 4 were armed with spears (bhalas) and accused Nos. 5 and 6 were armed with sticks (Lathis). On seeing them PW 6 got up and went to the 'osra' (verandah) of his house. Accused No. 3 began to untie the buffalo tethered in front of the house while the other accused persons showered abuses on PW 6, to which the latter objected. Thereupon, accused Nos. 4 and 6 shouted 'Sale ko jan se mar do'. Immediately thereafter, accused Nos. 1 and 2 moved menacingly towards PW 6. The two infants Sahana Khatoon and Chand Tara were then playing in the 'dalan' outside the western room. On seeing accused Nos. 1 and 2 approaching him full armed with farsas PW 6 apprehended trouble and ran into the adjoining room to arm himself with a spear. His wife, PW 5 Laila Khatun, who was in the room, however, prevented him from going out for fear that he may be done to death by the accused persons. Realising that PW 6 has entered the inner room and was prevented by his wife from coming out, accused No. 1 gave farsa blows on the head, abdomen and left thumb of Sahana Khatoon causing serious injuries. Accused No. 2 gave one farsa blow on the head of infant Chand Tara. The neighbors PW 2 Ful Mohammad Mian, PW 3 Ali Asgar, PW 4 Vidya Giri and others, namely, Jalaluddin Ahmad, Sadik Mian, Ram Chandra Prasad, Bhikhari Mian, etc. intervened, pacified the assailants and sent them away. After the assailants had left the scene of occurrence the two injured girls were removed to the city dispensary where the First Information Report of PW 6 was recorded at about 6.45 p.m. Unfortunately, Sahana Khatoon died shortly after she was admitted to the dispensary. Her younger sister Chand Tara succumbed to her injuries on 23rd August, 1985.

Having come to the conclusion that Allauddin Mian and Keyambuddin Mian are guilty of murder, the next question is what punishment should be awarded to them, namely, whether extinction of life or incarceration for life. Section 302, IPC casts a heavy duty on the Court to choose between death and imprisonment for life. When the Court is called upon to choose between the convicts cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence. In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of Subsection (3) of Section 354 of the Code of Criminal Procedure, 1973 ("the Code") which reads as under:

"When the conviction for an offence is punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence."

This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty, "special reasons" for such sentence shall be stated in the judgment. When the law casts a duty on the Judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the 'special reasons clause' in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be. Basing his submission on what is described as the humanitarian ideology or the rehabilitarian philosophy, Mr. Garg submitted that any law which permits the supreme right to life being sacrificed for the failure of the State to establish a social order in which such crimes are not committed must be struck down as offending Articles 14, 19 and 21 of the Constitution. While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the 'special reasons clause' should be a sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the Judge, would not award the death sentence. It may be stated that if a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence. In all such cases the law casts an obligation on the Judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bridge burning, it may be necessary for the Courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. In the face of this statutory provision which is consistent with Article 21 of the Constitution which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, we are unable to countenance counsel's extreme submission of death in case. The submission that the death penalty violates Articles 14, 19 and 21 of the Constitution was negated by this Court in *Bachan Singh v. State of Punjab* [(1980) 2 SC 684]. Mr. Garg,

however, submitted that the said decision needs re-consideration as the learned Judges constituting the majority did not have the benefit of the views of Bhagwati, J. who ruled to the contrary. We are not impressed by this submission for the simple reason that the reasons which prevailed with Bhagwati, J., could not have been unknown to the learned Judges constituting the majority.

Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The requirement of hearing the accused is intended to satisfy the 'rule of natural justice'. It is a fundamental requirement of fairplay that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr. Garg was, therefore, justified in making a grievance that the Trial Court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31st March, 1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating

circumstances, etc., before the Court, the Court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fairplay must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned Trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty.

Apart from what we have said earlier, we may now proceed to consider whether the imposition of death penalty on the two accused persons found guilty of murder is justified. The Trial Court has dealt with the question of sentence in paragraphs 42 to 44 of its judgment. The reason which weighed with the Trial Court is: it is one of the gravest cases of extreme culpability in which two innocent and helpless babies were butchered in a barbarous manner. After taking note of the mitigating circumstances that both the offenders were married young men with children, the Trial Court found that since the murders were committed without provocation and in cold blood there, was no room for leniency as the crime was so abhorrent that it shocked the conscience of the court. The High Court while maintaining the conviction of the said two accused persons proceeded to deal with the question of sentence thus:

"The conviction of Allauddin Mian and Keyamuddin Mian having been upheld the question is whether the reference should be accepted and the sentence of death against them be upheld. In my view Allauddin Mian and Keyamuddin Mian have shown extreme mental depravity in causing serious fatal injuries to helpless girls of the age of 7/8 years and 7 months. In my view, therefore, this murder can be characterised as rarest of the rare cases. The extreme mental depravity exhibited by Allauddin Mian and Keyamuddin Mian impels me to uphold the sentence imposed on Allauddin Mian and Keyamuddin Mian by the learned Additional Sessions Judge."

It will be seen from the above, that the courts below were considerably moved by the fact that the victims were innocent and helpless infants who had not provided any provocation for

the ruthless manner in which they were killed. No one can deny the fact that the murders were ghastly. However, in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in *Bachan Singh* case, be reserved for 'the rarest of rare' cases which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose (i) punitive (ii) deterrent and (iii) protective. That is why this Court in *Bachan Singh's* case observed that when the question of choice of sentence is under consideration the Court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. In the subsequent decision of *Machhi Singh v. State of Punjab*, [(1983) 3 SCC 470] this Court, after culling out the guidelines laid down in *Bachan Singh's* case, observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence. In the present case, unfortunately the material for choice of sentence is scanty. The motive for the crime is obscure, the one stated, namely, the quarrel between two infants of both sides, does not seem to be correct. The killings were not for gain. The charge shows that the target was PW 6, the father, and not the two infants. The killing of the two infants was not in the contemplation of any of the accused. Both the girls were the victims of the offenders' ire resulting from frustration at the escape of their target. There is nothing uncommon about the crime as to make the case an exceptional one. The mere fact that infants are killed, without more, is not sufficient to bring the case within the category of 'the rarest of rare' cases.

In *Bachan Singh* case the question of laying down standards for categorising cases in which the death penalty could be imposed was considered and it was felt that it would be desirable to indicate the broad guidelines consistent with section 354(3) of the Code without attempting to formulate rigid standards. That was because it was felt that standardisation of the sentencing process would leave little room for judicial discretion to take account of variations in culpability even within the same category of cases. After referring to the aggravating circumstances (Para 202) and the mitigating circumstances (Para 206) pointed out by counsel, the Court observed that while 'these, were relevant factors it would not be desirable to fetter judicial discretion. It pointed out that these factors were not exhaustive and cautioned: 'courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and human concern' consistent with Section 354(3) of the Code. In the subsequent decision in *Machhi Singh* case, the Court tried to indicate the type of cases which may fall within the exceptional class without attempting to introduce rigidity. It would not be fair to read the decision

as an attempt to fetter judicial discretion. Even in cases of the type indicated in that case, circumstances may vary, which would necessitate a different approach.

For example, the circumstances of this case show that the offenders had killed the two girls not because of any hatred for them or to accomplish their objective but out of frustration and anger at having lost their target. Unfortunately as the trial Judge did not give time to the convicts to reflect on the question of sentence, the chance, however remote, of the true motive for the crime surfacing was lost. The antecedents of the accused, their socioeconomic conditions, the impact of their crime on the community etc., have not come on record. The absence of these particulars makes the choice of punishment difficult. In view of what we have observed earlier and having regard to the circumstances in which the murders took place, we think the extreme punishment of death is not warranted.

In the result both the appeals are partly allowed. The conviction of accused Nos. 1 and 2 under all the heads is confirmed but their sentence of death for killing Shahna Khatoon and Chand Tara, respectively, is converted to imprisonment for life. So far as accused Nos. 3 to 6 are concerned, their conviction and sentence under Section 326 149, I.P.C. is set aside; however, their conviction and sentence under the other heads is maintained. Their bail bonds will stand cancelled if they have already served out their sentences; otherwise they will surrender to their bail and serve out the remaining sentence. The appeals will stand disposed of accordingly.

* * * * *

Lehna v. State of Haryana

(2002) 3 SCC 76

ARIJIT PASAYAT, J. :- 1. Lehna (hereinafter referred to as accused) was awarded "Sentence of Death" by the learned Sessions Judge, Sonapat which has been confirmed by the Punjab & Haryana High Court. Accusations against him were that he took away the lives of his mother, brother and sister-in-law. It was also alleged that he caused injury on his father Suraj Mal (PW-6) and nephew Chand (PW-7). He was tried for allegedly committing offences punishable under Sections 302, 458 and 324 of the Indian Penal Code 1860 (in short 'IPC'), was found guilty and accordingly convicted. Corresponding sentences imposed were sentence of death, 4 years and 6 months respectively. The sentences were directed to run concurrently.

2. Prosecution version sans unnecessary details is as follows:

Suraj Mal (PW-6) had two sons i.e. the accused and Jai Bhagwan (hereinafter referred to the deceased by that name) and a Younger brother Dariya Singh. The accused and deceased-Jai Bhagwan were residing separately. Suraj Mal (PW-6) owned 10 acres of land and had given 2 acres to the accused for the purpose of cultivation. But the accused who was a person of bad habits and a drunkard wasted time in useless pursuits and did not pay any attention to cultivation. He tried to alienate the land that was given to him by his father. This led to rethinking by Suraj Mal (PW-6), who took back the land. This led to serious disputes among the members of the family and there were frequent quarrels. On August 5, 1998, deceased and his wife, Saroj were sleeping on the roof of the house. Suraj Mal (PW-6), his wife Manbhari, their grandsons Chand (PW-7) and Wazir were sleeping in the courtyard. After mid-night Suraj Mal (PW-6) heard a noise from the roof of the house and he switched on the electric light. Chand, Wazir and Manbhari woke up and they rushed up stairs and found the accused armed with a Gandasa inflicting blows on both deceased - Saroj and Jai Bhagwan. After causing injuries to these two, the accused turned towards Suraj Mal (PW- 6) and others; but they ran down the stairs screaming in fear. The accused followed them and after pushing Manbhari to the ground inflicted blows on her neck and when PW-6 and PW-7 tried to intervene, he also inflicted blows on both of them. Then he ran away from the spot. PW-6 found that his wife had already succumbed to her injuries. So was the case with his son and daughter-in-law. Next morning, report was lodged at the police station and investigation was undertaken. On completion of investigation, charge-sheet was placed and the accused was charged for offences punishable under Sections 302/458/324 of the IPC. The accused pleaded innocence. The Trial Court relied on the evidence of PW-6 and PW-7 who were injured eye-witnesses and found the accused guilty of the aforesaid offences. After hearing on the question of sentence, he awarded death sentence as noted above. The matter was submitted to the Punjab & Haryana High Court for confirmation of the death sentence in terms of Section 366 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The High Court held that the judgment suffered from no infirmity to warrant any interference. Accordingly, the

reference was accepted and the appeal filed by the accused against the conviction and sentence was dismissed.

3. In support of the appeal before this Court, learned Counsel submitted that both the Trial Court and the High Court ignored a very significant fact that the evidence on which prosecution rested, its version was that of relatives. There was admitted hostility, rendering the same suspect. The injuries which were of serious nature on the accused were not explained. That added to vulnerability of prosecution version. Finally, it was submitted that this is not a case which belonged to the category of "rarest of rare" to warrant death sentence. The non application of mind according to the learned Counsel is evident from the fact that accused has been treated to be a trespasser in his own house, for holding him guilty of offence punishable under Section 458 of IPC. There is no discussion whatsoever as to how ingredients of that Section are present.

4. In reply, learned counsel for the State of Haryana submitted that there is no prohibition on conviction being not possible on the evidence of relatives. Additionally, mere non-explanation of injuries, if any, on the accused cannot be a ground for disbelieving prosecution version. The brutal nature of the assaults which resulted in loss of three valuable lives is evident from the nature of injuries noticed on postmortem and on examination of the injured witnesses. In essence, submission was to the effect that no interference is called for in this appeal.

5. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

6. In *Dalip Singh v. The State of Punjab* [AIR 1953 SC 364] it has been laid down as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last person to screen the real culprit and falsely implicate an innocent person. It is true, when feeling run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts".

7. The above decision has since been followed in *Guli Chand. v. State of Rajasthan* [(1974) 3 SCC 698] in which *Vadivelu Thevar v. The State of Madras* [AIR 1957 SC 614] was also relied upon.

8. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh* case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose J., it was observed:-

" We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - '*Rameshwar v. State of Rajasthan*[AIR 1952 SC 54]. We find however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel".

9. Again in *Masalti v. The State of Uttar Pradesh* [AIR 1965 SC 202] this Court observed:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

10. To the same effect is the decision in *State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh* [(1974) 3 SCC 277].

11. Presence of PWs 6 and 7 at the site of occurrence is natural. They were inmates of the house, and therefore no suspicion as suggested by the accused, regarding their presence can be entertained. Merely because there was some hostility between accused and PWs 6 and 7, it is unbelievable that they would shield the actual culprits to falsely implicate the accused. Their testimony has not been shaken in spite of incisive cross-examination. On the contrary, its credibility has been enhanced because of their acceptance of the fact regarding assault on the accused. The plea that deceased Jai Bhagwan and Suraj Mal (PW-6) had many enemies because of their questionable credentials, and they may be the real assailants is too shallow to warrant acceptance.

12. Considering the legal position as analysed above, there is no force in the plea that evidence of PWs 6 and 7 is liable to be discarded merely because they were relatives of the deceased persons.

13. As rightly submitted by the learned Counsel for the accused - appellant, there is no finding recorded by the Courts below as to how ingredients of the offence punishable under Section 458 IPC exist. That being the position, conviction for the said offence is set aside and consequentially, the sentence. In view of the unimpeached evidence of the injured witnesses of PW-6 and PW-7, the conviction for offence punishable under Section 324 IPC does not require any interference.

14. The other question of vital importance is whether death sentence is the appropriate one. Section 302, IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the Court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for 'special reasons', as provided in Section 354(3). There is another provision in the Code which also uses the significant expression 'Special reason'. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562, of the Criminal Procedure Code, 1898 (in short 'old Code'). Section 361 which is a new provision in the Code makes it mandatory for the Court to record 'special reasons' for not applying the provisions of Section 360. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever, it is possible to do so and to state 'special reasons' if it does not do so. In the context of Section 360, the 'special reasons' contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the Legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the Statute Book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

15. It should be borne in mind that before the amendment of Section 367(50, old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (XXVI of 1955) which came into force on January 1, 1956, on a conviction for an offence punishable with death, if the Court sentenced the

accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the amendment of Section 367(5) of old Code by Act XXVI of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the Court. The Court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. Therefore, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the Court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5), of the old Code does not affect the law regulating punishment under the IPC. This amendment relates to procedure and now Courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

16. Section 354(3) of the Code, marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1st April, 1974, accordingly to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence 'special reasons' are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in Code that the juridical decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood.

17. This Court in *Ediga Anamma v. State of Andhra Pradesh* [(1974) 4 SCC 443] has observed

"Let us crystallize the positive indicators against death sentence under Indian Law currently. Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanely opt for life, even like where a just cause or real suspicion of wifely infidelity

pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life".

18. In *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684] it has been observed that "a real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed". A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered, (a) is there something uncommon about the crime which renders sentence of imprisonment for the life inadequate and calls for a death sentence?; and (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

19. Another decision which illuminatingly deals with the question of death sentence is *Machhi Singh v. State of Punjab* [(1983) 3SCC 470].

20. In *Machhi Singh* and *Bachan Singh* cases, the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

21. In *Machhi Singh* case, it was observed:-

"The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:-

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

22. The following guidelines which emerge from *Bachan Singh* case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:-

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:-

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

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

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

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

24. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

25. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that

takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the Court-room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

26. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment should not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

27. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation and sometimes even the traffic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

28. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies; but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

29. As the background facts go to show the genesis of dispute between the accused and the other members of his family was land. Accused seems to have taken exception to his father taking away the land from him. As the evidence indicates, he considered his brother, sister-in-law to be responsible for the same. It is also in evidence that 2-3 days before the occurrence, there was a bitter quarrel between the accused and other members of his family. Evidence of PW-7 is to the effect that there used to be constant quarrel between PW-6, deceased Jai Bhagwan, deceased

Saroj on one hand and the accused on the other, over ancestral land. It is also in evidence that the deceased Jai Bhagwan was not of moral character and PW-6 had forcibly occupied the land of temple for which villagers had set on fire a piece of their house. Though injuries on accused person do not per se affect prosecution version if reliable; when not explained it assumes importance if they are serious in nature. The fact that the injuries were sustained in the present case by the accused is not disputed. In fact, PW-7 has admitted that PW-6 had given a thorough thrashing to the accused in the court-yard after assaults on the three accused persons. As the medical evidence indicates, the injuries sustained by the accused were of very serious nature. It is true three lives have been lost. But at the same time, the mental condition of the accused which led to the assault cannot be lost sight of. The same may not be relevant to judge culpability. But is certainly a factor while considering question of sentence. There is no evidence of any diabolic planning to commit the crime, though cruel was the act. Deprived of his livelihood on account of the land being taken away, the accused was, as the evidence shows, exhibiting his displeasure, his resentment. Frequency of the quarrels indicates lack of any sinister planning to take away lives of the deceased. The factual scenario gives impressions of impulsive act and not planned assaults. In the peculiar background, death sentence would not be proper. A sentence of imprisonment for life will be more appropriate. The sentence is accordingly modified, while confirming the conviction for offence punishable under Section 302 IPC.

30. Appeal is allowed to the extent indicated above. We record our appreciation for the assistance rendered by Mr. Vishal Malik who was appointed as amicus curiae.

* * * * *

Abdul Qayum v. The State of Bihar

AIR 1972 SC 214

P. JAGANMOHAN REDDY, J. :- 1. This Appeal is by Special Leave against the Judgment of the Patna High Court exercising its Revisional jurisdiction by which the benefit of the provisions of the Probation of Offenders Act, 1958 (Act No. 20 of 1958) (hereinafter called 'the Act') was denied to the Appellant Qayum. The Appellant was convicted under Section 379 of the Indian Penal Code and sentenced to rigorous imprisonment for six months. The prosecution case was that on the Vijayadashmi day in 1964, Jagdish Kumar Sinha alongwith his friends had gone to Mahalla Pathar Ki Masjid to see the procession. He had in the pocket of his pant a purse containing Rs. 56/- in currency notes. At about 1.30 a.m. when he got down from the Rikshaw and went to the pan shop to purchase pan and cigarette he discovered when he wanted to pay the price of the pan and cigarette that somebody had picked his pocket and his purse was gone. He raised a hue and cry and seeing that two boys were running, he and his friends chased them. They succeeded with the help of the members of the public in catching the Appellant who had immediately passed the money from the purse to his associate Shamim who however escaped. Both Shamim and the Appellant were convicted. It appears that before the Sub Divisional Magistrate a joint petition of the owner of the purse Jagdish Kumar Sinha and the Appellant for permission to compound the offence was filed under Section 345(2) of the Indian Penal Code, but it is said no order seems to have been passed on it and the Appellant was convicted as aforesaid. As we have not been able to ascertain the truth or otherwise of this fact we do not express any view thereon. There is no doubt that at the time of the alleged occurrence the Appellant was said to be only 16 years of age and at the time of his conviction he would be about 18 years of age. Before the sentence was passed on him it was prayed that under Section 6 of the Act he be released on probation and that no sentence should be passed against him. The Trial Court called for a Report from the Probation Officer in respect of both the Appellant and accused Shamim. The Probation Officer recommended that the Appellant should be given the benefit under the Act which recommendation however was rejected for reasons recorded by it and he was sentenced to six months rigorous imprisonment as aforesaid. The reasons given by the Trial Court for not giving the benefit to the Appellant are as under :-

In spite of his recommendations I do not feel inclined to extend the benefit of the provisions of the Probation of Offenders Act to accused Qayum. Apparently he is an associate of accused Shamim who is a hardened criminal and a person of doubtful character. Incidents of pick-pocketing are very rampant in this subdivision and it was just a stray chance that accused Qayum was caught in this case. Having regard to these facts and the nature of offence and the circumstances in which accused Qayum was caught, he does not deserve the benefit of Section 4 of the Act.

2. The Appeal filed against the conviction and sentence however was dismissed and his prayer for giving him the benefit under the Act was also rejected. Thereafter he filed a Revision

Petition against his conviction and sentence in the High Court of Patna where, as appears from the Judgment of that Court, the only point that was urged on behalf of the Appellant was that on the date when the revision came on for hearing the Appellant was below 20 years and the benefit of the provisions of the Act should have been given to him. The High Court after referring to the reasons given by the Trial Court said that the Probation Officer had not made any recommendations for granting benefit under the Act to the other accused Shamim, in as much as he was a hardened criminal and a habitual pick pocket and therefore rejected the Revision Petition as in its opinion the Trial Court was justified in not granting the benefit under the Act because of "the association of the petitioner with such a hardened criminal and a pick pocket...."

3. In our view neither the Trial Court, the Appellate Court, nor the High Court applied their mind to the requirement of the provision of the Act. As pointed out by this Court in *Rattan Lal v. The State of Punjab* [AIR 1965 SC 444], "The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him". The provisions of the Act must therefore be viewed in the light of this laudable reformatory object which the legislature was seeking to achieve by enacting the legislation. The Act differentiated offenders below 21 years of age who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. It is only in the case of offenders who are below the age of 21 years and guilty of lesser offences than those punishable with death and life imprisonment that an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Section 3 and Section 4. It is also provided in Sub-section 2 of Section 6 that the Court shall for the purposes of satisfying itself whether it should give the offender the benefit referred to in Sub-section (1), call for and consider a report from a Probation Officer along with any other information available to it relating to the character, physical and mental condition of the offender.

4. It may be noted that Section 3 empowers the Court to release an offender after admonition where he has been found guilty of having committed an offence under Sections 379, 380, 381, 404, 420 or any offence punishable with imprisonment of not more than two years or fine or both either under the Indian Penal Code or under any other law and that there is no previous conviction proved against him; while Section 4 empowers it to release an offender on probation of good character where it considers it expedient to do so instead of sentencing him at once to any punishment. In *Rattan Lal* case a question had arisen as to whether Section 11(2) of the Act circumscribes the jurisdiction of an Appellate Court to make an order under the Act only in a case where the Trial Court could have made that order, and consequently in an appeal against an order of the High Court passed in exercise of its revisional jurisdiction, this Court could pass such an order. It was held that the phraseology used therein was wide enough to enable the Appellate Court or the High Court to make such an order and that it was purposely made comprehensive as the Act was made to implement a social reform, as such either it could do so itself or direct the

High Court to do so. In either case the provisions of Section 6 of the Act have to be complied with.

5. In this case it is true that the Trial Court, the Appellate Court as well as the High Court did consider the question of giving the benefit to the Appellant under Section 6 but in our view they have completely misdirected themselves to the essential requirements of that provision. The Probation Officer's report nowhere indicates that the accused is 'an associate of accused Shamim'. The High Court thought apparently he is an associate of Shamim. Even if Shamim was a hardened criminal as it appears from the Probation Officer's report dealing with that accused there was no warrant for inferring that the Appellant was his associate. A reference to the report of the Probation Officer dated 7-8-65 would show that the accused was approximately 18 years of age and was physically and mentally normal. Though he was illiterate he had a vocational aptitude for tailoring and was working in the Bihar Tailoring Works. He was interested towards his work as a tailor and behaves properly with his father and brothers and has normal association with friends. Unfortunately he lost his mother when he was 10 years old and his family history disclosed according to the report that he comes from a poor family and though he has no landed property he has a house of his own to live in. Both his father and his elder brother are employed. The attitude of the family towards the offender appellant was one of sympathy and affection and the father exercised reasonable control over him. The report of the neighbours is also in his favour. In the end the Probation Officer expressed the view that there is no report against the character of the offender, no previous conviction has been proved against him prior to this case and in the circumstances mentioned by him the release on probation may be a suitable method to deal with him. He therefore recommended that he be released on probation by getting his father to execute a suitable security. This report in our view does not justify the conclusion that the appellant is either a hardened criminal or is associated with hardened criminals for denying him the benefit of the provisions of the Act. To sentence him to imprisonment would itself achieve the object of associating him with hardened criminals which association the Courts thought was a good ground for denying him the benefit of being released on probation. We have no doubt that if he is released on probation of good conduct there is hope of his being reclaimed and afforded the opportunity to live a normal life of a law abiding citizen. In this view the Appeal is allowed and the sentence is set aside with the direction that he be released under Section 4 of the Act on his entering into a bond, with his father as a surety in the sum of Rs. 500/- to appear and receive sentence by the Trial Court whenever called upon to do so within a period of one year and during that time to keep the peace and be of good behaviour. The Trial Court is directed to take a bond from the Appellant and a surety bond from the Appellant's father as aforesaid. His bail bond will enure till then and will be deemed to be cancelled after the directions are carried out.

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Dalbir Singh v. State of Haryana

(2000) 5 SCC 82

THOMAS, J. - When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

2. A man who drove a stage-carriage knocked down a cyclist who succumbed to his injuries. The said driver was convicted of the offence relating to rash or negligent driving and was sentenced to a term of imprisonment. His appeal and revision were dismissed by the Sessions Court and the High Court respectively. He has now come up with the special leave petition. Leave is granted.

3. After hearing learned counsel for the appellant we did not feel the necessity to wait for the arguments on behalf of the respondent State. So we did not issue notice to the State.

4. The appellant was driving a bus which belonged to Haryana Roadways. It was on 4-7-1994 at 6.15 p.m. that the cyclist was knocked down in front of the main gate of the Board of School Education at Bhiwani. The cyclist was just going out of the Office of the Board where he was working. The bus, after hitting him down, dragged him for some distance. He was crushed to death. The driver was convicted under Section 279 and Section 304-A IPC and was sentenced to imprisonment for three months and one year respectively under the above two counts. He made a twofold plea in the trial court. One was that he was not the person who drove the vehicle. The other was that the accident happened due to the negligence of the cyclist. Both the pleas were repelled by the trial court and the Sessions Court. On the positive side both the said courts found that the incident happened within the town area whereat offices are situated and hence the need to be greatly circumspect while driving motor vehicles was not adhered to by the appellant and such carelessness resulted in the instantaneous death of a young man who was crushed under the wheels of the vehicle. The revision filed by the appellant before the High Court was dismissed in limine.

5. Learned counsel pleaded for invocation of the benevolent provision of the Probation of Offenders Act, 1958 (“the PO Act”).

6. As a precedent learned counsel cited the decision of this Court in *Aitha Chander Rao v. State of A.P.* [(1981) Supp. SCC 17]. But we may point out that the two-Judge Bench, which extended the benefit of Section 4 of the PO Act to the accused in that case, made it clear that such a course was resorted to “having regard to the peculiar circumstances of this case”. None of the peculiar circumstances has been specified in the decision except that the negligence on the part of the driver in that case was only contributory. The said decision, therefore, cannot be treated as an

authority to support the contention that the court should, as a normal rule, invoke the provisions of the PO Act when the accused is convicted of the offence under Section 304-A IPC in causing death of human beings by rash or negligent driving.

7. The conditions for applying Section 4 of the PO Act have been delineated in the commencing portion of the provision in the following words:

“When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct....”

8. Parliament made it clear that only if the court forms the opinion that it is expedient to release him on probation for his good conduct regard being had to the circumstances of the case. One of the circumstances which cannot be sidelined in forming the said opinion is “the nature of the offence”.

9. Thus Parliament has left it to the court to decide when and how the court should form such opinion. It provided sufficient indication that releasing the convicted person on probation of good conduct must appear to the court to be expedient. The word “expedient” had been thoughtfully employed by Parliament in the section so as to mean it as “apt and suitable to the end in view”. In *Black’s Law Dictionary* the word expedient is defined as “suitable and appropriate for accomplishment of a specified object” besides the other meaning referred to earlier. In *State of Gujarat v. Jamnadas G. Pabri* [AIR 1974 SC 2233] a three-Judge Bench of this Court has considered the word “expedient”. Learned Judges have observed in para 21 thus:

“Again, the word ‘expedient’ used in this provisions, has several shades of meaning. In one dictionary sense, ‘expedient’ (adj.) means ‘apt and suitable to the end in view’, ‘practical and efficient’; ‘politic’; ‘profitable’; ‘advisable’, ‘fit, proper and suitable to the circumstances of the case’. In another shade, it means a device ‘characterised by mere utility rather than principle, conducive to special advantage rather than to what is universally right’ (see *Webster’s New International Dictionary*).”

10. It was then held that the court must construe the said word in keeping with the context and object of the provision in its widest amplitude. Here the word “expedient” is used in Section 4 of the PO Act in the context of casting a duty on the court to take into account “the circumstances of the case including the nature of the offence...”. This means Section 4 can be resorted to when the court considers the circumstances of the case, particularly the nature of the offence, and the court forms its opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on probation of good conduct.

11. Courts must bear in mind that when any plea is made based on Section 4 of the PO Act for application to a convicted person under Section 304-A IPC, that road accidents have proliferated to an alarming extent and the toll is galloping day by day in India, and that no

solution is in sight nor suggested by any quarter to bring them down. When this Court lamented two decades ago that “more people die of road accidents than by most diseases, so much so the Indian highways are among the top killers of the country”, the saturation of accidents toll was not even half of what it is today. So V.R. Krishna Iyer, J., has suggested in the said decision thus:

“Rashness and negligence are relative concepts, not absolute abstractions. In our current conditions, the law under Section 304-A IPC and under the rubric of negligence, must have due regard to the fatal frequency of rash driving of heavy duty vehicles and of speeding menaces.”

12. In *State of Karnataka v. Krishna* [(2000) 4 SCC 75] this Court did not allow a sentence of fine, imposed on a driver who was convicted under Section 304-A IPC to remain in force although the High Court too had confirmed the said sentence when an accused was convicted of the offence of driving a bus callously and causing the death of a human being. In that case this Court enhanced the sentence to rigorous imprisonment for six months besides imposing a fine.

13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles.

14. Thus, bestowing our serious consideration on the arguments addressed by the learned counsel for the appellant we express our inability to lean towards the benevolent provision in Section 4 of the PO Act. The appeal is accordingly dismissed.

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M.C.D. v. State of Delhi

(2005) 4 SCC 605

ASHOK BHAN AND A.R. LAKSHMANAN JJ. - 2. The Municipal Corporation of Delhi, aggrieved against the judgment and final order dated 26-3-2004 passed by the High Court of Delhi in Criminal Revision Petition No. 185 of 2004 by which order the High Court gave the benefit of probation under Section 4 of the Probation of Offenders Act, 1958 (hereinafter referred to as "the POB Act") to the second respondent Gurcharan Singh but maintained the conviction, preferred the above appeal.

3. The brief facts leading to the filing of the above appeal are as under:

One Mr M.K. Verma (PW 4), Junior Engineer, Civil Line Zone, visited 189, Prem Gali, Punja Sharif, Mori Gate where he found unauthorised construction going on at the first floor of the said plot. FIR was prepared on the report of Mr M.K. Verma who forwarded the FIR before the Zonal Engineer, who ordered to issue notice under Sections 343/344 of the Delhi Municipal Corporation Act, 1957 (for short "the DMC Act"). Subsequently, the second respondent along with Kuldeep Singh were prosecuted for commission of offences under Sections 332 and 461 of the DMC Act before the Designated Municipal Court.

4. The trial court, after the conclusion of the trial, convicted the second respondent under Sections 332 and 461 of the DMC Act and sentenced him to six months' simple imprisonment and imposed a fine of Rs5000 (Annexure P-1).

5. Aggrieved by that order, the second respondent-accused filed an appeal before the Sessions Court, Delhi. The said court by an order and judgment dated 23-3-2004 dismissed the appeal by holding that there was no infirmity in the order passed by the trial court (Annexure P-2).

6. Against the judgment and order dated 23-3-2004, the accused filed Criminal Revision Petition No. 185 of 2004 before the High Court of Delhi. At the time of arguments, the advocate for the accused submitted before the High Court that the accused did not wish to challenge the conviction on merits and stated it a fit case of the accused to be admitted to the benefit of the POB Act on the ground that the accused faced trial for 12 years in the lower courts and remained in jail for three days.

7. The High Court vide its order dated 26-3-2004 held that the accused suffered the agony of trial lasting for 12 years. Besides that he has already undergone some period in custody. The High Court also observed that there is no allegation that the petitioner-accused is a previous convict and it further held that the accused deserved the benefit of probation under Section 4 of the POB Act and while maintaining the conviction of the respondent-accused, the sentence of imprisonment and fine as awarded to him was set aside.

8. The appellant, aggrieved by the judgment of the High Court, preferred the above appeal by way of special leave petition before this Court.

9. We have perused the entire pleadings, orders and judgments passed by the lower courts and also of the High Court, the other annexures, in particular, Annexures P-1 and P-2, and records annexed to this appeal and also heard the arguments of Mr Ashwani Kumar, learned Senior Counsel appearing for the appellant, Mr Vikas Sharma, learned counsel appearing for Respondent 1 and Mr Jaspal Singh, learned Senior Counsel appearing for the second respondent.

10. Learned Senior Counsel appearing for the appellant submitted that the High Court, before extending the benefit of the POB Act to the accused did not call for a report from the authorities to check upon the conduct of the accused-respondent as per Section 4(2) of the POB Act and that the appellant MCD was also not given time to file their counter-affidavit on the question of sentence. He further submitted that the High Court while passing the impugned order and judgment did not take into consideration that the accused-respondent had been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. In the said case, the accused-respondent was convicted under Sections 332/461 of the DMC Act and sentenced to six months' simple imprisonment with a fine of Rs 5000.

11. Learned Senior Counsel appearing for the appellant further submitted that there was no good reason for letting the respondent off by granting to him the said benefit of the POB Act, particularly keeping in view the large-scale irregularity and unauthorised constructions carried on by the builders in Delhi despite strict direction of the municipal authorities and courts passing various orders from time to time against the unauthorised constructions. It was further submitted that the High Court should not have waived off the payment of fine amount by the accused-respondent and that the High Court ought to have taken into consideration that the respondent has been in jail for only three days and had not put in substantial period in custody.

12. It was further submitted by learned Senior Counsel appearing for the appellant that the court shall not direct release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond. It was also contended that before making any order under Section 4(1) of the POB Act, the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case which the High Court has miserably failed to do so. Therefore, learned Senior Counsel appearing for the appellant, prayed that order dated 26-3-2004 in CrI. Rev. Pet. No. 185 of 2004 be set aside and appropriate orders be passed in this appeal.

13. Learned Senior Counsel appearing for the contesting respondent submitted that the order of the High Court does not require any reconsideration by this Court and that the High Court while extending the benefit of the POB Act had clearly recorded in the order that the counsel for the State of Delhi is not averse to the grant of benefit of probation to the answering respondent and, therefore, the requirement under Section 4(2) of the POB Act has been waived off by the

State and that the High Court took into consideration the fact that the answering respondent has faced the agony of trial for over 12 years and has also undergone some period in custody and while maintaining the conviction of the answering respondent, the benefit of probation was extended to him. It was, therefore, submitted that the High Court passed the said order in the presence of the counsel of all the parties.

14. Learned Senior Counsel appearing for the second respondent submitted that in ST No. 202 of 1997, a judgment was given by the Metropolitan Magistrate on 10-9-2002 and the respondent filed an Appeal No. 374 of 2002 before the Court of Session, Patiala House, New Delhi challenging the said order of conviction and in that appeal, the Court of Additional Sessions Judge, Patiala House, suspended the sentence during the pendency of the appeal upon furnishing a personal bond for a sum of Rs 25,000 with one surety of the like amount to the satisfaction of the trial court. It was, therefore, submitted that the sentence/imprisonment awarded by the Metropolitan Magistrate has been suspended under Section 389 of the Criminal Procedure Code by the Court of Additional Sessions Judge, Delhi in view of the pendency of the appeal against the order of conviction, is a continuation of proceedings and therefore, there is no conviction against the answering respondent so long as the same is not decided by the Court of Session. It was also submitted that the requirement of calling of a report from the probation officer under Section 4(2) of the POB Act has been waived off by the counsel for the State of Delhi and that the counsel for MCD also did not raise any objection before the High Court. It was further contended that the respondent has not contested the revision in the High Court on merits and confined his submission to the benefit of Section 4 of the POB Act being extended to him. Therefore, there is no occasion for the High Court to go into the issue of extent of constructions being raised by the answering respondent. He further contended that the trial court has committed serious error in exercising jurisdiction while not granting the benefit of probation to the answering respondent and the order of the trial court was, therefore, rightly and justifiably modified by the High Court.

15. Concluding his arguments, he submitted that the respondent has been released after compliance with the order passed by the High Court by furnishing the bond of good conduct and security to the satisfaction of the Additional Court of Metropolitan Magistrate, Delhi and there is no report of any misconduct or breach of the bond of good conduct by the answering respondent since the date of the order of the High Court, therefore, the order of the High Court is not liable to be interfered with.

16. In the above background, two questions of law arise for consideration by this Court:

“1. Whether the High Court was correct in extending the benefit of the Probation of Offenders Act, 1958 to the accused-respondent without calling for a report from the authorities relating to the conduct of the respondent as per Section 4 of the Act.

2. Whether the High Court was correct in passing the impugned judgment in view of the fact that the respondent has been convicted in another Criminal Case No. 202 of 1997 by the trial court, New Delhi.”

17. Before proceeding further, it would be beneficial to reproduce Section 4 of the Probation of Offenders Act, 1958 which is extracted below for ready reference:

“4. Power of court to release certain offenders on probation of good conduct.—(1)

When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.”

18. It is the specific case of the appellant herein that the High Court has not afforded to the appellant an opportunity to file counter-affidavit. The appellant would have filed the orders passed by the criminal courts convicting the respondent herein had an opportunity been given to the appellant. The High Court while passing the impugned order and judgment did not take into consideration that the accused-respondent has been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. In the said case, the accused has been convicted under Sections 332/461 of the DMC Act and sentenced to six months' simple imprisonment with fine of Rs 5000. In our view, there was no good reason for letting the respondent off by granting to him the said benefit of the POB Act particularly, keeping in view the large-scale irregularity and unauthorised constructions carried on by the builders in Delhi despite strict direction of the municipal authorities and despite the courts passing various orders from time to time against the unauthorised construction. The High Court also failed to take into consideration that the respondent has been in jail for three days and had not put in substantial period in custody. The High Court vide its order impugned in this appeal has observed that there is no allegation that the respondent is a previous convict. In fact, as could be seen from the annexures filed along with this appeal, the respondent has been convicted for offence under Sections 332 and 461 of the DMC Act.

19. The trial court heard the respondent on sentence also and passed the following order:

“Convict in person with counsel.

Heard on sentence.

It is contended that he is first offender. He is not a previous convict nor habitual offender. He has faced trial since 1991. He is aged about 57 years. He is not doing any business due to his bad health.

Considering the above facts and circumstances, and gravity of the nature of the offence i.e. extent of construction raised by the accused for commercial (*sic* purposes) as 11 shops at ground floor and 11 shops at first floor, I am not inclined to release the accused/convict on probation. Hence request declined.

In the interest of justice, sentence of six months' SI, with fine of Rs 5000, ID one-month SI is imposed upon the convict for offence under Sections 332/461, DMC Act. Fine deposited. Convict remained for sentence."

20. The Additional Sessions Judge, New Delhi also in Civil Appeal No. 7 of 2002 (Annexure P-2) dismissed the appeal as there is no infirmity in the order of the trial court and upheld the conviction order passed by the trial court on the point of sentence. The appellate court held that no interference is required in the order passed by the trial court regarding point of sentence. Since the appellant MCD was not given any opportunity by the High Court to file conduct report of the respondent, the order impugned in this appeal is liable to be set aside.

21. This apart, the respondent did not also disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. Thus, the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. In our opinion, he would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the court and he can be summarily thrown out at any stage of the litigation. In the instant case, non-production of the order and even non-mentioning of the conviction and sentence in Criminal Case No. 202 of 1997 tantamounts to playing fraud on the Court. A litigant who approaches the court is bound to produce all documents which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. The second respondent, in our opinion, was not justified in suppressing the material fact that he was convicted by the Magistrate on an earlier occasion. Since the second respondent deliberately suppressed the crucial and important fact, we disapprove strongly and particularly, the conduct of the second respondent and by reason of such conduct, the second respondent disentitled himself from getting any relief or assistance from this Court. We, however, part with this case with a heavy heart expressing our strong disapproval of the conduct and behaviour but direct that the second respondent to pay a sum of Rs 10,000 by way of cost to the appellant herein.

22. We have already reproduced Section 4 of the POB Act. It applied to all kinds of offenders whether under or above 21 years of age. This section is intended to attempt possible reformation

of an offender instead of inflicting on him the normal punishment of his crime. The only limitation imposed by Section 6 is that in the first instance an offender under twenty-one years of age, will not be sentenced to imprisonment. While extending benefit of this case, the discretion of the court has to be exercised having regard to the circumstances in which the crime was committed, the age, character and antecedents of the offender. Such exercise of discretion needs a sense of responsibility. The offender can only be released on probation of good conduct under this section when the court forms an opinion, having considered the circumstances of the case, the nature of the offence and the character of the offender, that in a particular case, the offender should be released on probation of good conduct. The section itself is clear that before applying the section, the Magistrate should carefully take into consideration the attendant circumstances. The second respondent is a previous convict as per the records placed before us. Such a previous convict cannot be released in view of Section 4 of the POB Act. The Court is bound to call for a report as per Section 4 of the POB Act but the High Court has failed to do so although the Court is not bound by the report of the probation officer but it must call for such a report before the case comes to its conclusion. The word "shall" in sub-section (2) of Section 4 is mandatory and the consideration of the report of the probation officer is a condition precedent to the release of the accused and a release without such a report would, therefore, be illegal.

23. In the case of *Ram Singh v. State of Haryana* [(1971) 3 SCC 914] a Bench of two Judges of this Court in para 16 of the judgment observed as under:

"16. Counsel for the appellants invoked the application of the Probation of Offenders Act. Sections 4 and 6 of the Act indicate the procedure requiring the court to call for a report from the probation officer and consideration of the report and any other information available relating to the character and physical and mental condition of the offender. These facts are of primary importance before the court can pass an order under the Probation of Offenders Act."

24. In the case of *R. Mahalingam v. G. Padmavathi* [(1979) Cr. L.J. (NOC) 20(Mad.)] the Court observed as under: [Cri LJ (NOC) pp. 8-9]

"If any report is filed by the probation officer, the court is bound to consider it. Obtaining such a report of the probation officer is mandatory since sub-section (1) of Section 4 says that the court shall consider the report of the probation officer. Words 'if any' do not mean that the court need not call for a report from the probation officer. The words 'if any' would only cover a case where notwithstanding such requisition, the probation officer for one reason or other has not submitted a report. Before deciding to act under Section 4(1), it is mandatory on the part of the court to call for a report from the probation officer and if such a report is received, it is mandatory on the part of the court to consider the report. But if for one reason or the other such a report is not forthcoming, the court has to decide the matter on other materials available to it.

In the instant case, the Magistrate passed order releasing the accused on probation without taking into consideration their character. Held, the requirement of Section 4(1) was not fulfilled and therefore the case remanded.”

25. Since the High Court has disposed of the criminal revision without giving an opportunity of filing counter-affidavit to the counsel for MCD and that the respondent did not disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another Criminal Case No. 202 of 1997, the judgment impugned in this appeal cannot be allowed to stand. We, therefore, have no hesitation in setting aside the order impugned and remit the matter to the High Court for fresh disposal strictly in accordance with law.

26. The appeal is, accordingly, allowed with costs of Rs. 10,000 to be paid by the second respondent to the appellant.

* * * * *

Chhanni v. State of U.P.

(2006) 5 SCC 396

ARIJIT PASAYAT, J. - 2. The appellant calls in question legality of the order passed by a learned Single Judge of the Allahabad High Court, Lucknow Bench, Lucknow by which three appeals were disposed of rejecting the prayer made for modification of the judgment. Criminal Appeal No. 492 of 1981 was filed by the State of U.P. against the present appellant who had filed Criminal Appeal No. 276 of 1981. Criminal Appeal No. 541 of 1983 was filed by the State of U.P. against four other persons who had faced trial before the learned IInd Additional Sessions Judge, Unnao who directed acquittal of Mohan Lal, Bhagwati, Girish and Vinod Kumar who were the respondents in Criminal Appeal No. 541 of 1983 before the High Court. Appellant Chhanni was convicted for the offences punishable under Sections 304 Part II, 323/149 and 147 of the Penal Code, 1860 (in short "IPC"). He was sentenced to five years' RI on the first count and six months' RI and a fine of Rs . 250 on the second count and one year's RI on the third count. The High Court dismissed the appeal filed by the State against the acquittal of Mohan Lal and three others and the appeal for enhancement of sentences. So far as the appeal filed by the present appellant is concerned, the same was partly allowed. His conviction under Section 304 Part II IPC and the sentence thereunder was set aside, but he was convicted under Section 323 IPC and sentenced to undergo one year's RI. His conviction under Section 323 read with Section 149 IPC for causing simple hurt to Raja Ram was altered to one under Section 323 IPC but the sentence was maintained for such conviction. His conviction under Section 147 IPC was set aside.

3. An application was filed by the appellant before the High Court which was numbered as Criminal Miscellaneous Application No. 469 of 2006 for modification of the judgment and order dated 25-8-2004. Prayer was that he should be directed to be released on probation under Section 4 of the Probation of Offenders Act, 1958 (in short "the Probation Act") or in the alternative under Section 360 of the Code of Criminal Procedure, 1973 (in short "the Code"). The High Court noted that there was no provision for permitting modification of an order and in fact the plea which was pressed into service was not urged before the High Court when the criminal appeal was heard. Accordingly, the application was rejected.

4. Learned counsel for the appellant submitted that when the matter was called before the High Court, the appellant's counsel was not present. But considering the fact that the appeal was pending for more than a decade, the High Court heard the learned counsel for the State and passed a judgment the modification of which was sought for. Because of genuine difficulties the appellant's counsel could not be present. In any event the High Court had set aside the conviction in terms of Section 304 Part II IPC.

5. There is no appearance on behalf of the State of U.P. in spite of notice.

6. Where the provisions of the Probation Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, that gave birth to the Probation Act and the Code wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code to apply one of the other beneficial provisions; be it Section 360 of the Code or the provisions of the Probation Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the Probation Act are further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said section shall affect the provisions of the Probation Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

7. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for probation officers in assisting the courts in relation to supervision and other matters while the Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to coexist at the same time in the same area. Such coexistence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

8. Enforcement of the Probation Act in some particular area excludes the applicability of the provisions of Sections 360 and 361 of the Code in that area.

9. The High Court is justified in its view that there is no provision for modification of the judgment. But considering the peculiar circumstances we direct the High Court to consider the application under the Probation Act or Section 360 of the Code, as the case may be, so far as the appellant is concerned and pass the appropriate order within three months from the receipt of this order. We make it clear that we have not expressed any opinion as regards the merits.

10. The appeal is allowed.

* * * * *

FEMALE CRIMINALITY AND VICTIMITY IN INDIAN CONTEXT : WOMEN AND CRIME *

Indian society has witnessed great discrimination for the women. It is a well known fact that certain families in India did not like the daughters to be added to their families. The daughters were killed immediately after their birth by dashing their heads with force against the stones or rocks. That system has gone but still there are examples when for the family it is a great occasion for a son's birth not for a daughter's. These days an alarming factor has emerged of pre-natal sex determinations and consequent termination if the child in the womb is not of the sex as desired by the parents. The concept of male-child dominating the society is so deep rooted that in certain families the boys are provided better facilities than the girls despite the fact that the daughters may prove to be more faithful and loving to their parents and families.

The sati system whereby the woman was to burn herself on the funeral pyre of her husband was a great drawback in Indian society, sometimes the women were even forced to burn themselves as sati. After the burning of the woman, she was given all praise posthumously and sometimes the temples were raised as a mark of glorification. The *sati* system was discouraged and in course of time it has almost gone from Indian society but still some cases are heard. The Parliament took a strong exception to sati system and its glorification. Despite the general provisions in Indian Penal Code to punish the attempt to suicide or the abetment to suicide, a special law was enacted in 1987, viz. The Commission of Sati (Prevention) Act, 1987. Many causes responsible for sati system can be given but one main cause appears to be a male dominated society, the women being not free to live with the same honour and dignity as during the life-time of their husbands, the system of sati operated for females but never heard for males.

Much has been said in the previous chapter regarding the sex crimes. The present discussion is confined to cruelty against the women and dowry death. Under the Constitution of India, there is a fundamental duty of every citizen to renounce practice derogatory to the women. Mere declaration of a fundamental duty in the Constitution without transformation of thinking in the people is of no effect. The cruelty to the women is in practice practically at all levels in the society whether they are rich, middle-class or poor housewives. It is otherwise that sometimes women are also seen practising cruelty to their husbands and the families/members of their husbands. Cruelty by either of the spouses is a ground of divorce under Hindu Marriage Act, 1955 and also under the Special Marriage Act, 1954. Cruelty is also a crime. A new Chapter XX-A was inserted in the Indian Penal Code by the Criminal Law (Second) Amendment Act, 1983 with a single Section 498A declaring cruelty to a woman by her husband or the relative of husband as a crime. The section is in the following terms:

* S.S. Srivastava, *Criminology and Criminal Administration* 89-99 (2nd ed., 2002).

“Section 498-A. Husband or relative of husband of a woman subjecting her to cruelty—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation - For the purpose of this section “Cruelty” means -

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the women where such harassment is with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand”.

The word ‘cruelty’ may be open to wide interpretation. It has been held by the Bombay High Court that the institution of vexatious legal proceedings by the husband coupled with the misuse of the court machinery and process through the execution of search warrants is humiliating and torturous to the wife and a cruelty under Section 498A. *Smt. Madhuri Mukund Chitnis v. Mukund Martand Chitnis* [1992 Cr LJ 111 (Bom)].

By the same amendment Section 113A was added in the Indian Evidence Act, 1872 raising the presumption as to abetment of suicide by a married woman. This section provides, “When the question is whether the commission of suicide by a woman has been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or lby such relative of her husband.” The explanation to the section gives the same meaning to the ‘cruelty’ as in Section 498A of Indian Penal Code. The amendment also incorporated a new Section 174 and 176 of the Code as a procedural necessity in the relevant matter.

Dowry death

Dowry death is an alarming factor in the crimes against women. The more society is advancing, the more greed and materialistic attitude is infiltrating in every strata. The marriages which were once settled on the norm of heredity characteristics and virtues are no more the same. Dowry was prevalent in ancient time also but it was only a present to the bride from the side of her family and relatives. The present which was a symbol of love and affection has been taken over by the coercive demand of husband and his family from the family of the wife. How much a bride brings with her is a social standard of the marriage. This avarice of the husband and in-laws often results in cruelty to the bride. The mental and physical tortures are often reported if she fails to bring sufficient dowry or if she fails to supply through her parents the demand of her husband’s family. In certain cases, it is also possible that the women may not be able to tolerate the mental

agony due to behavioural attitude of the husband or other members of his family and many commit suicide by self-immolation or by taking a poisonous substance and the parents anguish may result in the case being reported as dowry death. The dowry, despite being publicly deprecated, is increasing day by day ; it is a social curse and exploitation of the womanhood.

The encouragement of the dowry is by the girls also who wish to live comfortably after the marriage at the cost of their parents. Sometimes we hear and read the news of parents committing suicide due to their failure in settling the marriages of thier daughters. To curb the evil of dowry, the Parliament enacted in 1961 the Dowry Prohibition Act. One of the methods by which the problem was sought to be tackled prior to this enactment was by conferment of improved property rights on women by Hindu Succession Act, 1956 but it was felt that a law making the practice of dowry punishable and at the same time ensuring that any dowry if given would ensure for the benefit of the bride would go a long way in building the public opinion for the eradication of the evil. On a persistent demand of the law on this point both in and outside the Parliament, the law was enacted. The Act does not make it an offence if the present is given in the form of clothes, ornaments etc, being customary at marriage if the value thereof is not excessive so that the law may be workable. Dowry is defined in the Act as any property or valuable security given or agreed to be given either directly or indirectly—(a) by one party to a marriage to the other party to the marriage; or (b) by the parents of either party to the marriage or any other person, at or before or after the marriage in connection with the marriage of the said parties but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies. Giving or taking of dowry or the abetment thereof is an offence punishable with imprisonment for a term of not less than six months but it may extend to two years and with fine which may extend to ten thousand rupees or the amount of the value of such dowry whichever is more. The Court may for adequate and special reasons, impose a sentence of imprisonment for a term of less than six months. The presents given to the bride at the time of a marriage to the bridegroom (without any demand having been made in that behalf) and these presents entered in a list maintained in accordance with rule made under the Act is not an offence. If the presents are made by or on behalf of the bride or any person related to bride, it is necessary that such presents are of customary nature and their value is not excessive having regard to the financial status by whom, or on whose behalf such presents are given.

To demand dowry either directly or indirectly from the parents or other relatives or guardian of a bride or bridegroom is an offence. An agreement for giving or taking dowry is void. If the dowry is received by any person other than the woman in connection with those marriages it is given, it shall be transferred to that woman or her heirs and pending such transfer, that person shall hold it in trust for the benefit of the woman or her heirs. Failure to do so is an offence. The offences under the Act shall be bailable and non-compoundable. To the offences under the Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply as if they are cognizable offences for the purposes of investigation of such offences and the purposes of matters other than matters referred to in Section 42 of the Code and the arrest of a person without a

warrant or without an order of a Magistrate. No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act. No Court shall take cognizance of an offence under this Act except upon its own knowledge or a police report of the facts which constitute such offence, or a complaint by the person aggrieved by the offence or a parent or other relative of such person, or by any recognised welfare institution or organisation. A Metropolitan Magistrate or a Judicial Magistrate of the first class may pass any sentence authorised by this Act on any person convicted of any offence under this under this Act.

By an amendment of Indian Penal code in 1986 a new Section 304-B was added which is in the following terms:

“Section 304-B. Dowry Death -(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called ‘dowry death’ and such husband or relative shall be deemed to have caused death.

Explanation—For the purpose of this sub-section, dowry shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

It is important to note here that the judicial attitude towards dowry death is very strict. Thus in case of a dowry death, the Supreme Court observed that ‘whenever such cases come before the Court and the offence is brought home to the accused beyond reasonable doubt, it is the duty of the Court to deal with it in most severe and strict manner and award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such anti-social crimes’ (*Kailash Kaur v. State of Punjab* [AIR 1987 SC 1368]).

In *Pawan Kumar v. State of Haryana* [1998 Cr LJ 1144 (SC)] after days of marriage, the demanded of scooter and fridge was made by the husband’s family-members and when it was not met it led to the repetitive taunts and maltreatment of the deceased wife. The evidence on record showed that within a few days after the marriage, the deceased was tortured, maltreated and harassed for not bringing the aforesaid articles in the marriage. The deceased died to burn injuries as she committed suicide by setting herself on fire. The argument for defence inter alia, was that there was neither any demand of dowry nor was there any agreement at the time of marriage which is an essential ingredient to constitute an offence under dowry death in terms of definitions of ‘dowry’ as given under Section 2 of the Dowry Prohibition Act, 1961 hence no offence under Section 304-B, the evidence has to be within the scope of criminal jurisprudence to prove guilt beyond all reasonable doubt. There was evidence that within four days of her marriage; the deceased came back to her mother and told her mother that her parent-in-law and husband were subjecting her to taunts for not bringing scooter and refrigerator as dowry at the time of marriage. On being pacified by her mother, she came back to the house of her in-laws but two months after

she again came back and told her mother that her husband and in-laws were continuously taunting her, maltreating her and calling her ugly for not bringing the aforesaid goods in dowry. Even after giving birth to a son, she continued to make the same complaint regarding maltreatment etc, to her by the accused persons. The deceased used to tell these things to her father also who expressed his inability to meet the demand and sent her back after consoling her. According to the counsel for the appellant this evidence referred to expression of desire for fridge and scooter but not demand of dowry. It was held by the Supreme Court that the demands could not be said to be in connection with marriage. The case, therefore, fell under Section 2 of Dowry Prohibition Act, 1961 and Sections 304-B, 306 and 498-A of Indian Penal Code. There was positive evidence that soon before death of deceased, her husband had subjected her to cruelty. He was therefore sentenced of the offences under the aforesaid sections but the evidence against the parents-in-law were of general nature, therefore, they were acquitted. Regarding the duty of the Court in cases of crimes of bride-burning and dowry-death, in a two Judge Bench judgement, Justice A.P. Misra observed:

“For more than a century, in spite of tall words of respect for women, there has been an onslaught on their liberties through ‘bride-burning’ and ‘dowry-deaths’. This has caused anxiety to the legislators, judiciary and law enforcing agencies, who have attempted to resurrect them from this social choke. There has been service of legislations in this regard, without much effect. This led to the passing of Dowry Prohibition Act, 1961. In spite of stringent legislations, such persons are still indulging in these unlawful activities, not because of any shortcoming in law but under the protective principle of criminal jurisprudence of benefit of doubt. Often, innocent persons are also trapped or brought in with ulterior motives. This places an arduous duty on the Court to separate such individuals from the offenders. Hence, the Courts have to deal such cases with circumvention, sift through the evidence with caution, scrutinise the circumstances with utmost care.”

According to a news report, crime against women has more than doubled in the past one decade which has reached alarming proportions. A crime against fair sex is committed every six minutes, the rape of a woman in every 47 minutes, kidnapping and abduction every 44 minutes and then the cruelty by her husband or relatives. There are nearly 17 dowry deaths every day. In 1993, the total number of crimes against women was reported to be 82,818. All India average of crime rate is 9.1 per lakh. Pondichery is the most risk prone State with 760 cases and an index of 91.6. Delhi with an elite force is second with 3,482 cases with an index of 37.3. Uttar Pradesh which tops the crime against women shows the highest number of cases registered as 14,048 but is placed a slow risk State. In Maharashtra, Madhya Pradesh, Andhra Pradesh and Rajasthan the crime against women are reported to be 13,913; 11,378; 8,335 and 7,160 respectively in 1993. The rapes have increased about 400 per cent in the past two decades. In 1974, 2,962 rape cases were reported whereas in 1993, the rape cases are reported to be 11,117. Similarly, kidnapping and abduction have increased nearly 30 percent from 9,980 to 11,759 in this period.

The atrocities against the women are more in rural areas due to illiteracy and further, most of the women being unaware of their rights. The beating of a young widow by her in-laws and then parading her nude in a village in Madhya Pradesh, a tribal woman and her alleged paramour being brutally assaulted and then stripped publicly in a village in Maharashtra, a Dalit girl being lifted from her house and allegedly raped by a sitting M.L.A. in Bihar, a grandson of a Chief Minister molesting a foreign tourist are some of the news illustrating the atrocities against women. According to Chairman of National Commission for Women, more stringent punishment should be prescribed to check the atrocities against women. The need for a national family policy to guide legislative bodies, different ministries, departments, government organisations and infrastructure at the State, district and village level was emphasised. The Commission has limited powers; the expert committee of the Commission has urged the Government to give more teeth to take strong measures to curb atrocities. The Commission receives the highest number of complaints of dowry harassment followed by torture and cruelty of women by husband and in-laws. The police generally remain a mute spectator and the political parties do not waste their precious time on these matters of outrage of modesty and self-respect unless the incident occurs in an opposition-ruled State. The Delhi Police in 1986 opened a cell on Crime Against Women to put a curb on atrocities against women. According to this cell, the increase of crimes is really due to better reportage. The cell concentrates more on family disputes relating to dowry, divorce and harassment in the family. The atrocities in public places are not given any importance. Judiciary being not well equipped to deal the cases of atrocities on women, the need is to create Special Mahila Courts. The first State in the country is Andhra Pradesh which created Mahila Court to deal exclusive cases relating to women. Delhi High Court also created a Mahila Court on November 1, 1994. Since in the Mahila Courts, the Judge, Staff-members and Public prosecutors are all females, the victim feels at ease to express the incident and the judge who is also a lady understands the problem in a better way. The cases are decided within six months.

Amnesty International has drawn the attention of the government regarding human rights violations against women which are rampant because they are partly hidden. Women are invisible victims of 1990s. The human rights of the women should be protected by the Government. Women are victims in their country, society and culture. Government ignores human rights violations against women. They are often raped by their own police and soldiers. Proliferation of armed conflict devastates lives of the women in many quarters of the globe. The women without taking any part in conflicts are being murdered, raped and mutilated. Most casualties of the war are women and children. Women are also subjected to sexual assaults.

According to Amnesty International, more than 40% of married women in India are tortured by their husbands for silly reasons. They are “kicked, slapped or sexually abused for reasons such as their husband’s dissatisfaction with their cooking or cleaning, jealousy or other motives.” According to United States official reports, “a woman is battered every 15 seconds and 700,000 are raped each year. In Egypt 35% women reported being beaten by their husbands. In a news report on the torture of women worldwide - broken bodies, shattered minds - The Amnesty said,

“torture is fed by a global culture which denies women equal rights with men, and which legitimises violence against women.” “The perpetrators are agents of the State and armed groups, but most often they are members of their own family, community or employers. For many women their home is place of terror.” “State have a duty under international law to prohibit and prevent torture and to respond to instances of torture in all circumstances”. “However, all too often, far from providing adequate protection to women, governments have connived in these abuses, have covered them up, have acquiesced in them and have allowed them to continue unchecked.”

The reports quoted a world bank figure and said that at least 20% of the women have been physically or sexually assaulted. Many domestic servants who are foreign nationals are ill-treated by their employers but they fail to get redress due to their immigration status. The “Honour Crimes” of torture and killing are committed in the countries like Pakistan, Iraq, Jordan and Turkey. A girl or woman of any is considered to bring shame on the family for a thing which may range from a mere chatting to sexual relations not being marital. The women are subjected to sale, forced labour and sexual exploitations. Trafficking in human beings is the third largest source of organised crime at global level drug and arms trafficking.

Crime Figures

The crimes against women are increasing : From 1978 to 1993, 1, 78,000 female foetus were aborted. Total recorded crimes the women yearwise are as follows:

(i) 1992 — 79037 (ii) 1991 — 74093 (iii) 1090 — 68317

Thus between 1990 and 1992, the offences against the women increased by 16.2%.

The mental and physical torture during this period increased by 46.8%.

The eve-teasing increased by 24.7%. The rape increased by 16.7%.

The rapes are recorded at the average rate of 35 per day and other tortures 220 per day.

Dowry deaths recorded in 1992 —5,000 the highest number is in Uttar Pradesh.

Dowry Deaths

In 2000 the dowry deaths reported in U.P. were 2059 which was 40% of the total number of such deaths reported across the country. Bihar stood next to Uttar Pradesh where dowry deaths as reported were 1021 during this period. In 1998, the dowry deaths in Uttar Pradesh were reported to be 2229 whereas in 1999, the number of such deaths came down to 1902. Not only dowry deaths cases but dowry harassment cases also increased. In 1999, the cases of dowry harassment were reported 4769 but in 2000 such cases were reported to be 4724.

In 1992, out of the total offences against the women in the country: 16.3% in Uttar Pradesh; 15.7% in Madhya Pradesh; 15.1% in Maharashtra; 9% in Rajasthan; 8.1% in Andhra Pradesh and 5.4% in Gujarat have bene reported.

In the Union Territories, the highest number of crimes recorded against women is in Delhi. In 1992, the figure was of 3,680 cases. Most of the crimes against women are of sexual abuse, torture, abduction and rape, etc.

According to a report, the women raped in India in 1994 are more than 11,000. Out of which in Madhya Pradesh and Uttar Pradesh about 5,000 (Uttar Pradesh—2,021, Madhya Pradesh—2,8000) and in Rajasthan, Bihar and Andhra Pradesh are 4,000. In 1993, 1,754 women were raped in Uttar Pradesh and 2,486 in Madhya Pradesh. In 1994, the women who were molested in India were 22,000 out of which 2,891 in Uttar Pradesh and 3,000 in Maharashtra.

Crime by women

As human beings, women are also subjected to inherent weakness of greed, motive and other factors generating the criminal mentality. The professional easy virtues' women are seen to abet the males to the sexual urge, it is otherwise that the number of such women may be scanty.

The offence of adultery as is defined in Indian Penal Code is sexual intercourse by a man with the wife of another. The woman is not punishable even as an abettor. The woman is not only an accomplice but the equal participator in the very act. The time has changed now, the women have advanced enough in the society and they must be made as much criminally liable as the men.

Sometimes the women commit the crimes because they are under heavy strains due to maladjustment with the husband's family. They make attempt on their own lives or they may do other criminal acts in the heat of anger and anguish. The crime may also be the result of a sheer frustration. In such cases, the sympathetic attitude of the law rather than stringent penalty will be more applicable. *Ediga Anamma v. State of Andhra Pradesh* [AIR 1974 SC 799] deserves to be noted here. The accused, a married lady, was living in illicit relations with a man. The man developed his sexual intimacy with another lady, Annusuya. The accused under the fury of sex jealousy murdered her rival Annusuya and her baby Nirmala by a chisel and disfigured the face of the deceased and buried the body of the baby beneath the river sand. She was sentenced by the trial court with death for murder and life-imprisonment for secreting the evidence of the crime under Section 201. The High Court confirmed the guilt and sentence. Justice Krishna Iyer of the Supreme Court while maintaining the conviction allowed the appeal and awarded life-imprisonment. One of the grounds on which the Court awarded life imprisonment was surrounding circumstances of the accused. She was the mother of a child. She was flogged out of her husband's house by the father-in-law. She was living with her parents. She was a sex-starved and a single lady. The paramour was a free-lance romancer. She planned to liquidate her competitor with the reckless passion of a jealous mistress.

The liberalisation of the women in law and society and the women developing themselves mentally equal to men have made the women more aggressive and assertive. The thinking that they are not inferior in any way to the men has brought a change in the outlook of the women resulting in revolt and sometimes commission of the crime. The women, sometimes, are kidnapped and abducted by the criminal gang and ultimately these women are converted as criminals due to forced circumstances. They may operate in a terrifying and ruthless manner as

hard core criminals with murderous thrust due to revengeful attitude against those who have harmed them or their family.

It is generally believed that the women are conformist to the societal norms. This conformity is because of natural gift to them of love and compassion. They are also conformist because they are controlled by the men right from very childhood to the adulthood. Where this control loses, deviancy starts. If they come in contact with different groups of people, their impact is natural on them.

In 1992, the men arrested for murders were 86,272 and the women were 2,071 (3.3%) ; for attempt to murder out of 77,403 arrested persons the arrested women were 1,333 (1.7%) ; for abduction the person arrested were 5,35,401 out of which 18,421 were women (3.4%) ; for abduction the person arrested were 29,144 out of which 1,118 were women (3.8%). The participation of women offenders which were arrested in case of kidnapping and abduction of ladies and minor girls has increased from 3.8% to 4.7%. The arrested ladies in the whole of India were 3.5%. The women offenders were more in number in Northern and Central India where they were termed as *Jadugarni*; the percentage was 0.3%. The women arrested for murder were more in number in Madhya Pradesh, Maharashtra and Uttar Pradesh. The enticement of the girls by the women offenders was more in Bihar followed by Uttar Pradesh. The women involved in the exploitation were more in prostitution and dowry death. The flesh-trade, the arrested number of women offenders was 79.4%. The women offenders who were arrested relating to dowry were 18.8%.

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RIGHTS OF VICTIMS*

Anyone with even a passing interest in victimology must understand the types of victims of crime and the ways in which to secure for them a proper place in the criminal justice process, with an emphasis on their rights.

It is also important to note the changing scope of victimology, keeping in mind the changes brought about by human rights activists. The attempt should be to trace the growth in the number of victims of crime and redefine those whose rights have been violated, either by the State or private individuals. It is also necessary to find out the existing schemes for compensation.

Victimology, therefore, needs to be studied from the point of view of recognition of the victim, awareness of the needs and rights, and understanding the process of victimisation.

Early history of victimology

Before society became organised, people merely took the law into their own hands and avenged their victimisation without any restriction or outside interference. The response to victimisation becomes a collective responsibility when the individuals became identifiable through their social groups, in the form of clans or tribes.

Alternative methods of redressal were developed to reduce violence and to arrest feuding among clans. Offenders who had surplus wealth devised the method of offering it to the victims as compensation. This method was formalised through the code of Hammurabi. In many other jurisdictions over the globe it was, however, followed under different connotations, like the death fines of the Greeks, early Hebrews, Hindus and Turks. It also existed in the Roman law of Twelve Tables and Law of Moses.

Scope of victimology

Beginning in the 1940s and particularly by the late-1960s, an emerging science of victimology significantly boosted the victims' status. At the same time, the growing movement for women's rights and the broadening horizon of human rights jurisprudence influenced and promoted victims' interests.

Separovic synthesised the definition of victimisation as:

"Victims are persons threatened, injured or destroyed by an act or omission of another man (man, structure, organisation or institution). Suffering may be caused by another man or another structure where people are also involved."

* S. C. Raina, *Branded* edited by Renu Ghosh, 2001

Separovic, therefore, interprets crime as the violation of basic human rights contained in the general universal concept of human rights as accepted by the international community with reference to right to life, health, security and well being. Man-made victimisation is a violation of the human rights of the victim, therefore crime and victimisation as per his thesis, need to be evaluated in terms of violation of human rights of individuals which were developed individualistically as political rights to freedom and to participate in shaping community.

A parallel development of thought in Latin America was expressed by legal professional Elias Neumann in 1984. He looked at certain groups of the community who were victimised by the legal system, such as victims of police brutality, torture or even instances of the non-existence of legal assistance.

Indian experience

i. Constitutional Mandate

The recognition of human rights was declared in the Indian Constitution through the Fundamental Rights and Directive Principles of State Policy.

Article 21 lays down that no person shall be deprived of life or personal liberty except according to the procedure established by law. Article 38 enjoins upon the State to promote the welfare of the people.

Thus, when an individual's fundamental or legal rights are violated because of the callous attitude of the custodians of the law, then the State shall be held responsible and the courts should not hesitate in granting compensation in appropriate cases.

ii. Other legal safeguards

In India, the provisions relating to compensation to the victims of crime are laid down in Sections 250, 357 and 358 of the Criminal Procedure Code (Cr.P.C.), 1973, Section 5 of the Probation of Offenders Act, 1958, and Sections 140-144 of the Motor Vehicles Act,

1988. Section 250 Cr.P.C. deals with compensation in a case instituted upon a complaint or information given to a police officer or magistrate on false or frivolous accusations. It does not apply to a case instituted on a police report or on any information given by the police officer regarding a cognizable offence. The following conditions must be fulfilled for an order of compensation:

- The case must have been instituted either on a complaint or on information given to a police officer or magistrate.
- The person against whom the complaint is filed or information given must be accused of an offence.
- The offence must be such that a magistrate can try it.

- The magistrate discharges or acquits the accused.
- There was no reasonable ground for making the accusation against the accused.

Similarly, the object of Section 357 is to provide compensation to those entitled to recover damages from the person sentenced, even though the fine does not form a part of the sentence. In awarding compensation it is necessary for the court to decide whether or not the case is one to be so. The capacity of the offender to pay compensation is to be determined, because the object is to collect the fine and pay it to the victim. The purpose will not be served if the offender does not have the capacity to pay and a sentence in default of payment of fine or compensation is imposed. Further, an Appellate Court, Sessions Court or High Court - while exercising its power of revision - may also make an order under this Section. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court should take into account any sum paid or recovered as compensation under this Section.

Section 358 deals with compensation to those arrested without any grounds. If the magistrate holds that the arrest has been made without sufficient ground, he can pass orders of compensation for such an arrest.

Similarly, Section 5 of the Probation of Offenders Act, 1958, empowers the court to order the released offender to pay compensation and costs in appropriate cases. Moreover, the Section provides that the compensation and costs may be recovered as a fine, as under Section 357 Cr.P.C.

In addition to these provisions, an application under Sections 140 -144 of the Motor Vehicles Act, 1988 can also be filed for recovery of damages within six months of the accident to the Motor Accident Claims Tribunals, and an action for relief in the criminal courts initiated.

These legal provisions make it clear that the victim or dependents have no legal right to claim compensation from either the offender or the State. The courts too seem to have no wide powers to deal with the plight of victims, and have to award compensation within the framework of these provisions. Further, the reluctance on the part of courts to enforce legal provisions relating to fines, works as a bottleneck in improving the lot of victims. This reluctance seems to be due to two factors: First, the courts think that the offender in most of the cases is not capable of paying the compensation; second, they are hesitant to indefinitely keep files open due to an increasing workload, and so award other sentences.

In its 41st report, the Law Commission of India expressed its view about the rigid attitude of the courts and rare use of this provision. Similarly, fines under the Cr.P.C. are a part of the penalty, whereas under the Probation of Offenders Act, it has no penal element. Further, under Section 357 Cr.P.C., where no fine is imposed, no order of compensation can be passed.

iii. Protection of Human Rights Act, 1993 and victimology

Nearly five decades after the United Nations adopted the Universal Declaration of Human Rights in 1948, Parliament enacted the Protection of Human Rights Act, 1993, with an aim to protecting the human rights of its citizens guaranteed by the Constitution. The function of the National Human Rights Commission (NHRC) has been detailed in Section 12 of the Act, which, in addition to others, gives it the power to inquire into complaints of human rights violations or public servants' negligence in the prevention of such abuse. The Commission has also been empowered to recommend measures for the effective implementation of constitutional and legal safeguards for the protection of human rights. Since the enactment of the Human Rights Act, 1993, NHRC has worked as a watchdog, providing protection to a number of people who have been victimised and whose rights have been infringed on either by the commissions or omissions of the State.

iv. Indian Society of Victimology

The Indian Society of Victimology, established in 1992, drafted the Victims (Criminal Injuries) Right to Assistance Bill, 1996, providing assistance to victims of criminal injuries and abuse of power. The Bill has set out the whole scheme regarding institution of funds, the machinery for the distribution of funds, the eligibility of the victim to receive the funds and the method of computation of compensation.

v. Jurisprudential approach

While victimology has grown rapidly in many countries, in India it has been understood more as a method of sentencing the perpetrator of the crime rather than a method of restituting the victim. This can be studied and understood as a method of compensating victims of crime (conventional) and compensating victims of abuse of power (non-conventional crime).

Compensatory technique for victims of crime

As early as 1988, the Supreme Court in *Hari Shankar v. Sukhbir Singh* [AIR 1988 SC 2127] directed all trial courts to exercise the power of awarding compensation to victims of crime under Section 357 Cr.P.C. liberally, so as to meet the ends of justice in a better way. This approach of the judiciary has now become more visible and is apparent from various pronouncements given in cases of rape, homicide, State lawlessness, custodial violence etc.

In the landmark case of *Bodhisattwa Gautam v. Subhra Chakraborty* [AIR 1996 (1) SCC 450] the Supreme Court brought out some creative principles of victim justice, which will have far-reaching impact. In this case, the respondent victim filed a complaint against the appellant for developing sexual relationship with her on the false assurance of marriage, compelling her to undergo two abortions and ultimately deserting her. The apex court said that it has the jurisdiction to pass orders compelling the accused to pay maintenance to the victim during pendency of the criminal proceedings. This case was unique because it held that the court had jurisdiction to

award compensation to the victim under such conditions even when the accused is not convicted, due to the slow progress of the proceedings. It further emphasised that when a court trying a rape case has the jurisdiction to award compensation in the final stage, there is no reason to deny the court the right to award interim compensation.

In *Dr Jacob George v. State of Kerala* [AIR 1994 (3) SCC 430] a case relating to causing the death of a woman while performing an abortion with her consent, the Supreme Court reduced the sentence of four years rigorous imprisonment imposed by the High Court, to two months, imprisonment, already undergone. The apex court, however, enhanced the fine amount of Rs. 1,000 awarded by the High Court to Rs. one lakh to be paid to the deceased's minor son. The sentence was modified as the ultimate aim was the rehabilitation of the victim's minor son.

In *State of Punjab v. Ajaib Singh* [AIR 1995 (2) SCC 486] the Supreme Court went a step further in granting a huge compensation to the victim even after acquitting the accused, as, during the pendency of the trial the accused had offered to pay a sum of Rs. five lakhs to avoid litigation.

The court, while enhancing the scope of compensation to victims, seems to have given the broader interpretation to the term 'victim' to include those whose basic human rights have been violated. Thus, in *Delhi Domestic Working Women's Forum v. Union of India* [AIR 1995 (1) SCC 14] the apex court held that the jurisdiction to pay compensation shall be treated to be part of the overall jurisdiction of the courts trying the offence of rape, which is an offence against basic human rights and the fundamental rights of liberty and life.

Similarly, in *Inder Sinha v. State of Punjab* [AIR 1983 (3) SCC 702] there was proven evidence of violation of human rights committed by the Punjab police. The Supreme Court ordered compensation to be paid by the State as a token, for failure to enforce the law and order and protect its citizens.

Victims of abuse of power and constitutional remedy

Compensation to victims of abuse of power in India came by involving the written jurisdiction and giving wider connotations to Article 21 (right to life and personal liberty).

Every individual has an inalienable right to life and personal liberty that is guaranteed by Article 21 of the Constitution of India, and the apex court has given it a new orientation. Thus, this Article became a sentinel of the poor against governmental lawlessness. The Supreme Court has attempted to fill the lacunae in the field of compensation for police excesses by using its power under Article 32.

The apex court brought about a revolutionary breakthrough in human rights jurisprudence in *Rudul Shah v. State of Bihar* [AIR 1983 SCC 1086] when it granted a compensation of Rs. 35,000 to the petitioner against the lawless act of the Bihar government that kept him in illegal detention. The court observed:

"The refusal of this court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his Fundamental Right to liberty which the State Government has so grossly violated."

It was pointed out that Article 21 would be denuded of its significant content if the power of the court was limited to passing orders of release from illegal detention. The Supreme Court further observed:

" One of the telling ways in which the violation of the right can reasonably be prevented and due compliance with the mandate of Article 11 ensured is to compel its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of Fundamental Rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection of power the State as a shield. Therefore, the State must repair the damage done, by its officers to the petitioner's rights. It may have recourse against those officers."

The Supreme Court in *People's Union for Democratic Rights v. State of Bihar* [AIR 1987 SC 355] laid down the working principle for the payment of compensation to victims of ruthless and unwarranted police firing. In this case, about 21 people — including children — died, and many more were injured due to the police's unwarranted firing. The Supreme Court observed:

"Ordinarily in the case of death, compensation of Rs. 20,000 is paid. We may not be taken to suggest that in the case of death the liability of the wrong doer is absolved when compensation of Rs. 20,000 is paid. But as a working principle and for convenience and with a view to rehabilitate the dependents of the deceased such compensation is being paid."

In *Nilabati Behara v. State of Orissa* [AIR 1993 SC 1960] a case of custodial death, the Supreme Court once again reiterated that in cases of violation of Fundamental Rights by the State's instrumentalities or its servants, the court can direct the State to pay compensation to the victim or his heirs by way of 'monetary amends' and redressal. The principle of sovereign immunity will be inapplicable in such cases. In this case, the State was directed to pay Rs. one lakh as compensation to the deceased's mother. The court further held that other liabilities of the respondents or any other persons for custodial death remain unaffected. It was observed:

"The court is not helpless and the wide powers given to the Supreme Court by Article 32, which itself is a Fundamental Right, imposes a constitutional obligation on the court to forge such new tools, which may be necessary for doing complete justice and enforcing the Fundamental Rights guaranteed in the Constitution which enable the award of monetary compensation in appropriate cases."

To support the above observation, the court referred to Article 9 (5) of the International Covenant on Civil and Political Rights, 1966, and held that the said provision indicates that an enforceable right to compensation is not alien to the concept of a guaranteed right.

The trend to affirm the right of victim by involving Article 32 or 226 continued as late as 1997. The Supreme Court once again, in *D. K. Basu v. State of West Bengal* [AIR 1997 SC 610] reaffirmed its stand taken in *Nelabati Behra* case. The court observed:

"It is now a well accepted proposition in most of the jurisdiction, that the monetary and pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for the redressal of the established infringement of the Fundamental Right to life of a citizen by the public servants. The State is vicariously liable to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified from the wrongdoer.

In the assessment of compensation the emphasis is to be on the compensatory and not the punitive element. The object is to apply balm on the wounds and not to punish the transgressor or the offender, as, awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do.

The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages, which is lawfully available to the victim or heirs of deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will of course depend upon the peculiar facts of each case. The amount of compensation as awarded by the court and paid by the State to redress the wrong done, may in the given case, be adjusted against any amount which may be awarded to the claimant by way of damages in civil suit."

The apex court's approach has given a boost to victims and compensatory jurisprudence in India. Whatever little effort has been made by the courts should not die as a populist movement, as has happened with many innovative measures. It, therefore, seems necessary to institutionalise it by suitably amending the existing provisions of the Cr.P.C, and by enhancing a separate legislation dealing with compensation to victims of crime. It is necessary to lay down certain norms in such cases for determining the quantum of compensation (monetary) as well as the responsibility of primary assistance and other services to victims, who have been traumatised, both physically and psychologically.

vi. New trends and future action plan

When viewed from the broader perspective of human rights, the concept of victimology encompasses more than just victimisation and victims' rights. Viewed in this manner, it also helps us to understand the growing international trends that promote victimology.

So far, victimology in India has been considered as being within the realm of criminology and therefore been understood as including only victims of crime. The broader interpretation of victimology helps us come out of this mode of thought to include other victims as well.

The media also has a role to play in this. Some victims are further victimised by the media, who fiercely compete with each other to report sensational news, particularly that which pertains to crime. Such reports, more often than not, have an adverse effect on victims of crime. The media must realise the power it wields, and use it judiciously and responsibly. For, the media, like the State, must always attempt to preserve social order.

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State of Punjab v. Ajaib Singh

AIR 1995 SC 975

R.M. SAHAI, J. - In this appeal by grant of special leave under Article 136 of the Constitution of India the question that arises for consideration is whether the Order of acquittal passed by the High Court of Punjab & Haryana is so palpably erroneous or perverse that it is liable to interference in the exercise of extraordinary jurisdiction by this Court.

2. In an unfortunate incident which took place at 11 P.M. on 16th December, 1976 on the G.T. Road just in front of Sat Kartar Cold Storage, Phagwara, two police officers of the Punjab Traffic Police appeared to have fallen out on the authority to check the truck on the G.T. Road resulting in death of one Assistant Sub-Inspector of Police and one constable and conviction of the respondent under Section 302 IPC who was Sub-Inspector of Police at the time of incident, but since the date of acquittal he has now become Deputy Superintendent of Police. There was no dispute about the time, date and place of incident. Nor there was any dispute that Assistant Sub-Inspector Gurnam Singh and constable Paramjit Singh died as a result of shooting from the service revolver by the Sub-Inspector Ajaib Singh. The dispute, mainly, was whether the incident took place as stated by the prosecution and the shooting and killing by the respondent was unwarranted, unjustified and deliberate or it was, as claimed by the respondent, in exercise of right of private defence. The respondent was tried and convicted under Section 302 for committing murder of ASI Gurnam Singh and constable Paramjit Singh and sentenced by the trial judge to undergo life imprisonment. He was also convicted under Section 87 of the Arms Act and sentenced to undergo two years' rigorous imprisonment. All the sentences were to run concurrently. His co-accused Balbir Kumar was tried under Section 302 but convicted under Section 383 IPC for causing simple hurts to constable Jit Ram, P.W. 10 and Channan Singh, P.W. 13. He was directed to be released on probation. Another accused constable Jit Singh was acquitted of all charges. The State did not file any appeal either against release of Balbir Kumar on probation or acquittal of Jit Singh. But revision was filed by one Sukattar Singh for enhancing the sentence of respondent from life imprisonment to death and convicting others suitably. The High Court dismissed the revision for enhancing sentence and further acquitted the respondent. The State is aggrieved by acquittal of the respondent. Since both the trial judge and the High Court have considered the evidence in detail, it does not appear necessary to refer to them, except the findings arrived by them on which there is not much dispute. The findings recorded by the trial judge were summarised by the High Court as under :-

(1) That the incident took place at about 10 P.M. on 15th December, 1976, on the G.T. Road just opposite to the Sat Kartar Cold Storage at Phagwara;

(2) That all the three accused (Ajaib Singh and Balbir Kumar appellants and Jit Singh acquitted accused) were present at the spot and they had arrived there from the side of Ludhiana in jeep No. PUJ 250.

(3) That at that time A.S.I. Gurnam Singh along with Constables Paramjit Singh and Jit Ram was present at the spot. According to the prosecution version, Constable Chanan Singh, P.W. was also with them. However, that fact is denied by the accused.

(4) That before the main incident took place, a verbal altercation took place between A.S.I. Gurnam Singh deceased and S.I. Ajaib Singh accused and thereafter they also grappled with each other for some time.

(5) That S.I. Ajaib Singh fired three shots with his service revolver, one of which hit A.S.I. Gurnam Singh and another hit Constable Paramjit Singh and as a result thereof both of them had died at the spot. The third shot hit the shutter of the cycle shop of Subhash Chand situated near the place of the occurrence.

Apart from these findings, the trial judge held that the delay in lodging the FIR was not satisfactorily explained by the prosecution. He did not believe that the two constables who had accompanied the deceased would have hid themselves in the nearby field for the whole night and then lodged the report at 8.40 A.M. in the morning only after they came out from the field. The trial judge was not convinced that any reasonable person could have remained in the field in the wintery night on 16th December without any covering when the accused undisputedly left the place immediately after the incident. Another important finding recorded by the trial judge was that the version of the origin of the incident, as given by the accused, was acceptable in preference to one put forward by the prosecution. The trial judge did not believe that the deceased was caught hold of by Balbir Singh and Jit Singh and thereafter the respondent fired the shot. Nor did it find any truth in the version of the prosecution that Paramjit Singh was thrown down on the ground by Balbir Singh and Jit Kumar and then a shot was fired at him from point blank range by the respondent. But the conviction was based as the injuries found on the person of the respondent did not justify exercise of right of private defence.

3. The High Court while agreeing with the findings of the trial judge on these aspects further held that the story given by the prosecution that the deceased had gone to the spot for nakabandi for apprehending the robbers did not inspire confidence as there was no entry to that effect in the Rojnamacha (daily diary) of the Police Station, Kapurthala. The High Court held that no material was brought on record to prove the First Information Report of the case in which those robbers were wanted. Further, according to the High Court, it was not reasonable to believe that Assistant Sub-Inspector Gurnam Singh accompanied by constables would have gone on such a dangerous mission without any arm, except the service revolver with him. The High Court categorically concluded that the deceased and his companions were checking the trucks on the G.T. Road and extracting money from the truck drivers, 'therefore the respondent must have felt offended because it amounted to not only an unnecessary interference in the sphere of his jurisdiction but even to an illegal act of extorting money from the drivers of the vehicles by them. In this situation, when Ajaib Singh, accused, questions A.S.I. Gurnam Singh regarding his and his companions' misconduct, an altercation must have ensued between both of them which was the cause of the main occurrence. Thus, the version of the origin of the occurrence as given out by the

accused appears to be more probable than the version of the same as put forth by the prosecution. It has been even so held by the trial court in its impugned judgment'. The High Court reversed the finding of the trial judge that the injuries on the person of the respondent were self inflicted as reference in this behalf be made to the statement of Dr. Ashwani Kumar, P.W. 3. The aforesaid injuries received by the members of the either party do not appear to have been self suffered by them. The learned trial Court has found that the injuries of S.I. Ajaib Singh could be self suffered as deposed to by the doctor. But this finding appears to be incorrect because even with regard to the injuries of constables Jit Ram and Chanan Singh, the doctor has opined that those would also be self suffered. It is not understandable how the learned trial Court in spite of that medical evidence has held that the injuries of Constiable Jit Ram and Chanan Singh P.Ws. could not be self suffered. The High Court found that it appeared that Sub-Inspector Balbir Kumar of the accused party and constables Paramjit Singh, Jit Ram and Chanan Singh of the deceased party were armed with dandas at the time of occurrence and they probably used the same against their opponents. The High Court also placed reliance on the report of forensic expert that shots had been fired from the revolver of ASI Gurnam Singh. It did not believe the version of prosecution that in fact the revolver of Gurnam Singh was not taken out from the holster because when the investigating officer went at the spot he found it bolted with the belt inside the woollen overcoat. The High Court consequently was of the opinion that the act of shooting was within the scope of Clauses I and II of the exception as contained in Section 100 of the IPC and, therefore, the respondent was entitled to acquittal.

4. When this appeal was heard earlier, late Sri R.K. Garg, the senior counsel who appeared for the respondent in absence of Sri Virender Kumar, the learned senior counsel who appeared for the appellant, placed the entire record and urged that no previous enmity between the respondent and the deceased was found even by the trial judge and it was a case of mistaken identity for which it was the deceased himself who was responsible. The learned counsel had urged that even the trial Judge had found that the respondent had the right of private defence. But the conviction was founded as the deceased and his companions had used dandas whereas the respondent had used firearms. He argued that the delay in criminal cases should not be lost sight of. According to him, at this distance of time it was just and expedient to compensate the deceased family monetarily instead of entering into whether the respondent was liable to be convicted. He even offered a sum of Rs. 5 lakh not as a cover or an excuse but as a genuine feeling of remorse for what happened under mistaken belief. But when the appeals were listed on the next date Sri Virender Kumar appeared and stated that his clients refused to be compensated in terms of money. He urged that he would like to argue and convince that it was case of cold blooded murder. We accepted his request and the appeals were fixed for hearing afresh.

7. That the incident was shocking admits of no doubt. May be sitting as the appellate court the task was not easy. But where the High Court has set aside the conviction under Section 302 IPC after delving in depth and discussing evidence in detail, should this Court interfere, merely, because there could have been other view? We agree that this Court is not precluded or the Court

hearing appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a court hearing appeal against acquittal in the first instance is to satisfy itself if the view taken by acquitting court exercising appellate jurisdiction was possible view or not. And if the court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order. What had persuaded us to re-hear the appeal was that the revolver of the deceased was in the holster beneath the overcoat. At the first flush, it appeared to be a clinching circumstance. But even after accepting this and ignoring the opinion of forensic expert, the finding of the High Court is neither rendered perverse nor infirm nor palpably erroneous. It having been found by both the High Court and the Trial Judge that the defence version that the respondent received the information from a truck passing from that direction that some persons in the police uniform were forcibly collecting money from the truck drivers whereupon the respondent reached there, challenged the deceased who did not disclose his identity rather tried to move towards the car giving an impression that he was about to run away whereupon the respondent rushed towards him, grappled with him and was injured with danda blows used by three companions of the ASI, it is very difficult to say, as held by the High Court, that he had not developed a reasonable apprehension that if fire arm was not used he was himself likely to be killed. The respondent had nine injuries. They have been found not to be self-inflicted. He was attacked by the deceased and his companions. The Trial Judge found that there was no previous enmity. The submission that the respondent was not entitled to use firearm as he was attacked by dandas only cannot be accepted. That is not what is provided for by Clauses (I) and (II) of Section 100 of the IPC. It shall depend on facts of each case whether the assault was such as could cause reasonable apprehension that death would otherwise be the consequence of such assault. If the High Court found that the respondent was assaulted by three persons with dandas, and hence the accused developed a reasonable apprehension that if he did not use the firearm then death would be the consequence, it cannot be said that the High Court was guilty of taking palpably erroneous view. In any case, the prosecution could succeed on the strength of its own case and that, as observed earlier, has not been found to be authentic even by the trial judge. The conviction being solely based on failure to establish that the respondent had not exceeded his right of self-defence, it would not be an exercise of sound discretion to interfere with the order passed by the High Court.

9. For the reasons stated above this appeal fails and is dismissed. The respondent shall deposit a sum of Rs. 5 lakhs within a period of one month from today with the Registrar of the High Court as was offered on his behalf earlier. Out of this amount, Rs. 3,50,000 will be paid to the dependents of ASI Gurnam Singh and Rs. 1,50,000 to the dependents of constable Paramjit Singh.

* * * * *

Dr. Jacob George v. State of Kerala

(1994) 3 SCC 430

B.L. HANSARIA, J. :- 1. Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that, by many religious denominations that human beings cannot take away life, as they cannot give life. This idea is so intense with some religious leaders that they would even oppose any measure of birth control. Abortion or miscarriage would be opposed with greater force by these persons.

2. Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because He alone gives it. For the Jains taking away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahimsa.

3. Our *Rig Veda II* recites:

Grant us a hundred autumns that we may see the manifold world.

May we attain the long lives which have been ordained as from yore.

4. *Atharva Veda I* contains the following:

May we be enabled to see the sun for a longtime.

5. The aforesaid shows life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally.

6. In the present appeals we are not concerned with taking away of life before its birth. We are concerned with destruction of foetus life. This is what is known as abortion or miscarriage. To dispel any doubt as to whether the foetus has a life, what has been stated by Taylor in his 'Principle and Practice of Medical Jurisprudence' may be noted where the learned author has opined at page 332 (13th Edn.) that legally both abortion and miscarriage are synonymous because the foetus being regarded as a "human life... from the moment of fertilisation". It may, however, be stated that some times the word "miscarriage" is used for "spontaneous abortion" and "abortion" for "miscarriage produced by unlawful means.

7. This distinction is, however, not material for our purpose because Section 312 of the Penal Code speaks about causing of miscarriage and Section 314 punishes the person who has intent to miscarriage of a woman and while doing so causes the death of such woman. It is under this section that the appellant has been found guilty by the High court of Kerala after setting aside the acquittal order of the learned Assistant Sessions Judge. For the offence under Section 314, the appellant has been sentenced for RI four years and a fine of Rs. 5,000/-. The High Court had also taken suo motu cognizance against the order of acquittal and it is because of this that along with the criminal appeal filed by the State which was registered as Criminal Appeal No. 415/89, the High Court disposed of Cr. R.C. No. 44/89, which is relatable to its own action. So, two aforesaid appeals have been preferred by the appellant. It may be stated that out of fine of Rs. 5,000/- as

awarded, a sum of Rs. 4,000/- was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine.

8. Our law makers had faced some difficulty when our Penal Code was being enacted. The authors of the Code observed as below while enacting Section 312:

With respect to the law on the subject of abortion, we think it necessary to say that we entertain strong apprehension that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care is taken, produce few convictions but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of Procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty.

9. So what finds place in the aforesaid section is the result of very mature and hard thinking and we have to give full effect to it.

10. After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non-obstante clause in Section 3, which permits abortion/miscarriage by a registered practitioner under certain circumstances. This permission can be granted on three grounds:

(i) Health- when there is danger to the life or risk to the physical or mental health of the woman;

(ii) Humanitarian - such as, when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;

(iii) eugenic - where there is substantial risk that the child, if born, would suffer from deformities and diseases.

(See Statement of Objects and Reasons)

11. The above shows that concern for even un-born child was evinced by the legislature, not to speak of hazard to the life of the concerned woman.

12. The allegations which led the High Court to find the appellant guilty under Section 314 were these. Deceased Thankamani was married to one Sathyan. After the marriage they lived as husband and wife for about one and half years and a son was born out of the wed lock. About six months thereafter, Sathyan reportedly deserted Thankamani but then there was reconciliation three months prior to the death of Thankamani who became pregnant again. For reasons not quite known, Thankamani told her mother that she would desire to go for abortion since she did not

want another child. The mother, who was examined as PW2 in the trial, sent for PW1 her brother-in-law and told him about the predicament of Thankamani. PW1 happened to know the clinic (hospital) being run by the appellant in Nilambur where abortions were being done.

13. Prosecution case is that on 14.1.87, PW1 and Thankamani went to the clinic and the matter was discussed with the appellant. Thereafter, she was admitted and the appellant agreed to abort her on payment of Rs. 600/-, of which Rs. 500/- was paid immediately undertaking to pay the balance afterwards, which amount was paid on 15.1.87. On that day Thankamani was taken to operation theatre at about 10 P.M. and at mid night the appellant told that the operation was successful. PW1 however found Thankamani unconscious. She regained consciousness at about 5 A.M. of 16th and asked for some water. PW1 instead brought a cup of tea which Thankamani could drink with difficulty and started shivering. On information given to appellant he came with a nurse and on examination found Thankamani in sinking condition. Froth came out from her mouth and life ebbed out of her. What happened thereafter is not material, except that after some time police was informed which set it into motion resulting in chargesheeting of the appellant under various sections including Section 314. In the trial which commenced, 16 witnesses were examined, apart from bringing many documents on record. The learned trial court, however, held that charges had not established beyond reasonable doubt and therefore acquitted the appellant.

14. On appeal being preferred by the State and suo motu cognizance being taken by the High Court, the acquittal order has been set aside and the appellant has been convicted and sentenced as aforesaid, after refusing to give the benefit of Probation of Offenders Act as prayed for. Hence these appeals under Article 136 of the Constitution.

15. A perusal of the impugned judgment of the High Court shows that it has placed reliance principally on the evidence of PW 1, who is the cousin of Thankamani. As he had played a vital role in the entire episode and is a near relation of Thankamani, we find no reason to disagree with the High Court in having placed reliance on his evidence. The defence case that it was PW 1 who sought to abort the pregnancy by crude method i.e. insertion of stick and rod into the uterus was rightly disbelieved by the High Court as if the condition of Thankamani became serious because of such a crude method and Thankamani was brought to hospital for some emergent treatment, as is the defence case, the appellant, being the head of the clinic, must have informed police in view of the medico-legal significance, as pointed out by the High Court. The failure of the appellant to do so definitely speaks volumes against the veracity of the defence suggestion, as pointed out by the High Court.

16. The submission of Sh. Jain that evidence of PW 1 is the only evidence to find the appellant guilty inasmuch as PWs 3 and 4 had turned hostile, and so there was virtually nothing to corroborate the evidence of PW 1, is not quite correct. As to PWs 3 and 4 turning hostile it was an expected somersault because they were the nurses of the clinic and discretion must have been taken by them to the better part of valor. But then, PW 5, who too was an employee in the clinic, did admit that Thankamani had been admitted in the clinic on 14th and not on 15th night as was the defence case. The post-mortem examination conducted by PW 11, according to whom the

death should have taken place at about 36 hours prior to his examination which was at about 3.00 p.m. of 17th, would also corroborate the evidence of PW1 as to the date and time of the death of Thankamani. What was found in autopsy would clearly show that the uterus got perforated because of employing scientific gadgets by the appellant a homeopath, which shows that he had absolutely no training to handle the gadgets. The High Court has rightly described the exercise of the appellant in this regard as "daring, crude and criminal". We therefore, agree with the High Court that an innocent life was sacrificed at the altar of a quack.

17. We would, therefore, uphold the conviction as awarded by the High Court, as the case is apparently not covered by any exception mentioned in the aforementioned Pregnancy Termination Act. It may be pointed out that the High Court did not accept the case of the prosecution insofar as the offence under Section 201 of the Indian Penal Code, or for that matter, under Section 342, is concerned.

18. This takes us to the question of sentence. The High Court has awarded sentence of 4 years and a fine of Rs. 5000/-, of which a sum of Rs. 4,000/- was made payable to the children of the deceased towards compensation for the loss of their mother. Shri Jain has urged that the appellant has undergone imprisonment for about two months, and the sentence may be reduced to the period already undergone. Indeed the learned counsel has further prayed in this regard to grant the benefit of Probation of Offenders Act and referred us to a decision of Madras High Court in *V Manickam Pillai v. State* [1972 (1) CrL. Law Journal 1488] where the High Court had granted such a benefit. We are, however, of the opinion that keeping in view the nature of the offence and character of the appellant, he does not deserve the benefit of probation. If a homeopath takes to his head to operate a pregnant lady and perforate her uterus by trying to abort, he does not deserve the benefit of probation. It would have been a different matter if a trained surgeon while carrying out the operation in question with the consent of the lady, as in the present case, would have committed some mistake of judgment resulting in death of the patient. The present case is poles apart.

19. We, therefore, refuse to give benefit of the aforesaid Act to the appellant. We may, however, put on record that Shri Jain advanced this submission as granting of probation would have removed the disqualification attached to conviction because of what has been stated in Section 12 of the aforesaid Act. We do not, however think that if the appellant is required to be given this protection and if his practice were to suffer because of the unwanted act undertaken by him, let it suffer, as it is required to suffer.

20. Let us now deal with Shri Jain's submission that the substantive period of imprisonment may be reduced to the one already undergone which is of about 2 months. To decide whether this contention merits acceptance, we have to inform ourselves as to why a punishment is required to be given for an offence of criminal nature. The purpose which punishment achieves or is required to achieve are four in number. First, retribution: i.e. taking of eye for eye or tooth for tooth. The object behind this is to protect the society from the depravations of dangerous persons; and so, if somebody takes an eye of another, his eye is taken in vengeance. This form of protection may not

receive general approval of the society in our present state of education and understanding of human psychology. In any case, so far as the matter at hand is concerned, retribution cannot have full play, because the sentence provided by 314 is imprisonment of either description for a term which may extend to ten years where the miscarriage has been caused with the consent of the woman as is the case at hand. So death penalty is not provided. The retributive part of sentencing object is adequately taken care of by the adverse effect which the conviction would have on the practice of the appellant.

21. The other purpose of sentence is preventive. We are sure that the sentence of imprisonment already undergone would be an eye opener to the appellant and he would definitely not repeat the illegal act of the type at hand.

22. Deterrence is another object which punishment is required to achieve. Incarceration of about two months undergone by the appellant and upholding of his conviction by us which is likely to affect the practice adversely, would or should deter others to desist them from indulging in an illegal act like the one at hand.

23. Reformation is also an expected outcome of undergoing sentence. We do think that two months sojourn of the appellant behind the iron bars and stone walls must have brought home to him the need of his changing the type of practice he had been doing as a homeopath. The reformatory aspect of punishment has achieved its purpose, according to us, by keeping the appellant inside the prison boundaries for about two months having enabled him to know during this period the trauma which one suffers in jail, and so the appellant is expected to take care to see that in future he does not indulge in such an act which would find him in prison.

24. Section 314 has not visualised the sentence of imprisonment only, but permits imposition of fine also. The High Court has imposed a fine of Rs. 5000/-. According to us, however, the fine is required to be enhanced considerably. We have taken this view, inter alia, because of what has been provided in Section 357 of the CrPC which has a message of its own in this regard. It was spelt out by this Court in *Hari Kishan v. Sukhbir Singh* [1988 AIR 2127] in which Shetty, J. speaking for a two-judge Bench stated that the power of imposing fine is intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent a constructive approach to crimes and a step forward in a criminal justice system. It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable.

25. What is reasonable has to depend upon the facts and circumstances of each case. Let us see what should be the quantum of fine to be imposed in the present case. We are concerned here with the death of a woman deserted by a husband who wanted to abort. We understand that she had a son born to her earlier and that son must have become a destitute with no one to look after. The appellant, on the other hand seems to have had a roaring practice as would appear, inter alia,

from the photographs of his clinic put on record. The building is an RCC one and is three-storeyed and presents a good look.

26. If a child has to be nursed in these days and nursed reasonably, a sum of Rs. 1,00,000/- per month would definitely be necessary. We, therefore, think that the fine to be imposed should be of Rs. one lakh, and so, we enhance the fine from Rs. 5,000/- as awarded by the High Court to a sum of Rs. one lakh. We grant six months time to the appellant for depositing this amount, as prayed by Shri Jain. On this amount being deposited with the Registry of this Court, steps would be taken to deposit the same in a nationalised bank in the name of the son of the deceased after ascertaining the same from appropriate authority. The bank would allow the guardian of the aforesaid son to withdraw the interest on the aforesaid amount till the son becomes major. On the son becoming major, it would be for him to decide as how to use the money and the bank would therefore act in accordance with the decision taken by the son.

27. Before closing, we may state that this judgment of ours may not be understood to have expressed any opinion on the right of Thankamani or for that a matter of any woman of this country to go for abortion, as this question has not arisen directly in this case. We are not expressing any opinion whether such a right can be read in Article 21 of the Constitution; and if so, to what extent.

28. The result is that the appeals are disposed of by upholding the conviction of the appellant. The sentence awarded by the High Court is modified by reducing the substantive sentence of imprisonment to the one already undergone and by enhancing the fine to a sum of Rs. one lakh to be deposited and dealt with as stated above. If the fine as enhanced by us would not be paid within six months from today, the sentence as awarded by the High Court would get revived and the appellant would undergo the remaining part of imprisonment. To enable the High Court to monitor the matter, the appellant would inform the High Court also about the fact of his depositing the sum of Rs. one lakh if and when he would do so. The High Court would wait for a period of six months from today to see whether the aforesaid amount has been deposited. In case it would be noted that it has not been done so, it would, take necessary steps for execution of the sentence as awarded by it.

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The Chairman, Railway Board v. Mrs. Chandrima Das

AIR 2000 SC 988

S. SAGHIR AHMAD, J. :- Mrs. Chandrima Das, a practising advocate of the Calcutta High Court, filed a petition under Article 226 of the Constitution against the Chairman, Railway Board; General Manager, Eastern Railway; Divisional Railway Manager, Howrah Division; Chief Commercial Manager, Eastern Railway; State of West Bengal through the Chief Secretary, Home Secretary Government of West Bengal, Superintendent of Police (Railways), Howrah; Superintendent of Police, Howrah; Director General of Police, West Bengal and many other Officers including the Deputy High Commissioner, Republic of Bangladesh; claiming compensation for the victim, Smt. Hanuffa Khatoun, a Bangladeshi national who was gang-raped by many including employees of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway regarding which G.R.P.S. Case No. 19/98 was registered on 27th February, 1998. Mrs. Chandrima Das also claimed several other reliefs including a direction to the respondents to eradicate anti-social and criminal activities at Howrah Railway Station.

3. The facts as noticed by the High Court in the impugned judgment are as follows:

Respondents Railways and the Union of India have admitted that amongst the main accused are employees of the railways and if the prosecution version is proved in accordance with law, they are perpetrators of the heinous crime of gang rape repeatedly committed upon the hapless victim Hanufa Khatun. It is not in dispute that Hanufa came from Bangladesh. She at the relevant time was the elected representative of the Union Board. She arrived at Howrah Railway Station on 26th February, 1998 at about 14.00 hours to avail Jodhpur Express at 23.00 hours for paying a visit to Ajmer Sharif. With that intent in mind, she arrived at Calcutta on 24th February, 1998 and stayed at a hotel at 10, Sudder Street, Police Station Taltola and came to Howrah Station on the date and time aforementioned. She had, however, a wait listed ticket and so she approached a Train Ticket Examiner at the Station for confirmation of berth against her ticket. The Train Ticket Examiner asked her to wait in the Ladies Waiting room. She accordingly came to the ladies waiting room and rested there.

At about 17.00 hours on 26th February, 1998 two unknown persons (later identified as one Ashoka Singh, a tout who posed himself as a very influential person of the Railway and Siya Ram Singh a railway ticket broker having good acquaintance with some of the Railway Staff of Howrah Station) approached her, took her ticket and returned the same after confirming reservation in Coach No. S-3 (Berth No. 17) of Jodhpur Express. At about 20.00 hours Siya Ram Singh came again to her with a boy named Kashi and told her to accompany the boy to a restaurant if she wanted to have food for the night. Accordingly at about 21.00 hours she went to a nearby eating house with Kashi and had her meal there. Soon after she had taken her meal, she vomitted and came back to the Ladies Waiting room. At about 21.00 hours Ashoke Singh along with Rafl Ahmed a Parcel Supervisor at Howrah Station came to the Ladies Niwas before boarding the train. She appeared to have some doubt initially but on being certified by the lady

attendants engaged on duty at the Ladies Waiting Room about their credentials she accompanied them to Yatri Niwas. Sitaram Singh, a Khalasi of Electric Department of Howrah Station joined them on way to Yatri Niwas. She was taken to room No. 102 on the first floor of Yatri Niwas. The room was booked in the name of Ashoke Singh against Railway Card Pass No. 3638 since 25th February, 1998. In room No. 102 two other persons viz. one Lalan Singh, Parcel Clerk of Howrah Railway Station and Awadesh Singh, Parcel Clearing Agent were waiting. Hanufa Khatun suspected something amiss when Ashoke Singh forced her into the room. Awadesh Singh bolted the room from outside and stood on guard outside the room. The remaining four persons viz. Ashoke, Lalan, Raft and Sitaram took liquor inside the room and also forcibly compelled her to consume liquor. All the four persons who were present inside the room brutally violated, Hanufa Khatun, it is said, was in a state of shock and daze. When she could recover she managed to escape from the room of Yatri Niwas and came back to the platform where again she met Siya Ram Singh and found him talking to Ashoke Singh. Seeing her plight Siya Ram Singh pretended to be her saviour and also abused and slapped Ashoke Singh. Since it was well past midnight and Jodhpur Express had already departed, Siya Ram requested Hanufa Khatun to accompany him to his residence to rest for the night with his wife and children. He assured her to help entrain Poorva Express on the following morning. Thereafter Siyaram accompanied by Ram Samiram Sharma, a friend of Siyaram took her to the rented fiat of Ram Samiram Sharma at 66, Pathuriaghata Street, Police Station Jorabagan, Calcutta. There Siyaram raped Hanufa and when she protested and resisted violently Siyaram and Ram Samiran Sharma gagged her mouth and nostrils intending to kill her as a result Hanufa bled profusely. On being informed by the landlord of the building following the hue and cry raised by Hanufa Khatun, she was rescued by Jorabagan Police.

4. It was on the basis of the above facts that the High Court had awarded a sum of Rs, 10 lacs as compensation for Smt. Hanuffa Khatun as the High Court was of the opinion that the rape was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the Railway employees.

5. In the present appeal, we are not concerned with many directions issued by the High Court. The only question argued before us was that the Railways would not be liable to pay compensation to Smt. Hanuffa Khatun who was a foreigner and was not an Indian national. It is also contended that commission of the offence by the person concerned would not make the Railway or the Union of India liable to pay compensation to the victim of the offence. It is contended that since it was the individual act of those persons, they alone would be prosecuted and on being found guilty would be punished and may also be liable to pay fine or compensation, but having regard to the facts of this case, the Railways, or, for that matter, the Union of India would not even be vicariously liable. It is also contended that for claiming damages for the offence perpetrated on Smt. Hanuffa Khatun, the remedy lay in the domain of Private Law and not under Public Law and, therefore, no compensation could have been legally awarded by the

High Court in a proceeding under Article 226 of the Constitution and, that too, at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

6. We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 226 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the Court in the realm of Private Law so that all the questions of fact could have been considered on the basis of the evidence adduced by the parties to record a finding whether all the ingredients of the commission of tort against the person of Smt. Hanuffa Khatoon were made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practicing Advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

7. The distinction between "Public Law" and "Private Law" was considered by a Three-Judge Bench of this Court in Common Cause, a *Regd. Society v. Union of India* [(1999) 6 SCC 667] in which it was, *inter alia*, observed as under :

Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Article 226 or 32 has been categorised as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Article 14 read with other Articles dealing with Fundamental Rights, every executive action of the Govt. or other public bodies, including Instrumentalities of the Govt., or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinised on the touchstone of the Constitutional mandates.

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanuffa Khatoon was a victim of

rape. This Court in *Bodhisattwa v. Ms. Subhra Chakraborty* [(1996) 1 SCC 490] has held "rape" as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under (Para 10 of AIR):

Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

18. Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she could not file that petition as there was nothing personal to her involved in that petition must be rejected.

19. It was next contended by the learned Counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the 'Moral Code of Conduct' having been adopted by the General Assembly of the United Nations,

29. The Fundamental Rights are available to all the "Citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen" both, Article 15 speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hostel and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and place of public resort on the aforesaid grounds. Fundamental Rights guaranteed under Article 15 is, therefore, restricted to "citizen". So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The Fundamental Rights contained in Article 19, which contains the right to "Basic Freedoms", namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to

practice any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country.

30. The word "citizen" in Article 19 has not been used in a sense different from that in which it has been used in Part II of the Constitution dealing with "citizenship" (See *State Trading Corporation of India Ltd. v. Commercial Tax Officer* [AIR 1963 SC 1811]). It has also been held in this case that the words "all citizens" have been deliberately used to keep out all "non-citizens" which would include "aliens". It was laid down in *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta* [AIR 1955 SC 367] that this Article applies only to "citizens". In another decision in *Anwar v. State of J. & K.* [(1971) 3 SCC 104] it was held that non-citizen could not claim Fundamental Rights under Article 19. In *Naziranbai v. State* [AIR 1957 Madh Bha 1] and *Lakshim Prasad v. Shiv Pal* [AIR 1974 All 313] it was held that Article 19 does not apply to a "foreigner". The Calcutta High Court in *Sk. Mohamed Soleman v. State of West Bengal* [AIR 1965 Cal 312] held that Article 19 does not apply to a Commonwealth citizen.

33. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. [See Article 3 quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as out by this Court in *Kubic Darusz v. Union of India* [(1990) 1 SCC 568]. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this Country, but also to a "person" who may not be a citizen of the country.

37. It has already been pointed out above that this Court in *Bodhisatwa* case has already held that "rape" amounts to violation of the Fundamental Right guaranteed to a woman under Article 21 of the Constitution.

38. Now, Smt. Hanuffa Khatoon , who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Govt. employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her. The judgment passed by the Calcutta High Court, therefore, allowing compensation to her for having been gang raped, cannot be said to suffer from any infirmity.

39. Learned Counsel for the appellants then contended that the Central Govt. cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the Law of Torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Govt. would not be liable even under the Law of Torts. The argument is wholly bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions.

43. Running of Railways is a commercial activity. Establishing Yatri Niwas at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of Sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the Railway Stations and Yatri Niwas, are essential components of the Govt. machinery which carry on the commercial activity. If any of such employees commits an act of tort, the Union Govt., of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. *Kasturi Lal* decision, therefore, cannot be pressed in aid. Moreover, we are dealing with this case under Public Law domain and not in a suit instituted under Private Law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.

44. No other point was raised before us. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt. Hanuffa Khatoon. The payment to the High Commissioner shall be made within three months. There will be no order as to costs.

* * * * *

Rachhpal Singh v. State of Punjab

AIR 2002 SC 2710

SANTOSH HEGDE, J. :- The brief facts necessary for disposal of these cases are as follows:

3. There was a civil dispute pending between the deceased Virsa Singh and his family on the one hand and Kuljinder Singh on the other in regard to a small plot of land which was abutting the residence of the said parties in the village of Srawan Bodla at Police Station Sadar Malout. In the said dispute, appellant No.2 and his family were supporting Kuljinder Singh. On 11.10.1996 the civil case pertaining to the said dispute was listed before the concerned court and in the said proceedings the deceased Virsa Singh had obtained an interim order against the said Kuljinder Singh. On the date of the incident at about 3.30 p.m. there was a verbal fight which also led to the parties grappling with each other but that did not culminate in any serious incident due to the timely intervention of some ladies in the families. It is the prosecution case that thereafter at about 8 p.m. the appellants herein along with 3 other accused persons came in a white Maruti car driven by the second appellant and the said accused persons got down from the car, raising a 'Lalkara' (challenge) that they would teach the complainant party a lesson for obtaining stay in regard to the land in question. Thereafter, it is stated that the first appellant herein who was armed with a .12 bore double barrel gun and the second appellant who was armed with a rifle along with 3 other accused persons who were armed with 'dangs' attacked the deceased Virsa Singh and his younger son Kulwant Singh on the roof of their house. It is stated that during the said attack the first appellant Rachhpal Singh and the second appellant Gurmit Singh fired shots from their respective weapons at Virsa Singh and Kulwant Singh, consequent upon which each one of them received two bullet injuries and died on the spot. This incident in question was witnessed by Ravinder Singh, PW-3, who is the son of the deceased Virsa Singh and the brother of deceased Kulwant Singh and Darbara Singh, PW-4, who is the mother's sister's husband of PW-3 who resides about a kilometer and a half away from the house of the complainant and was visiting the complainant and his family for returning a trolley which he had borrowed from them. It is the further case of the prosecution that thereafter PW-3 went to the Police Station at Malout which is about 9 kms. from the place of the incident and lodged a complaint at about 11 p.m. with SHO Ranjit Singh which complaint was registered and forwarded to the jurisdictional Magistrate who received the same by 2.45 a.m. on 12.10.1996. Immediately after registering the crime under Sections 302, 148, 149 IPC and Sections 25 and 27 of the Arms Act against the named accused, the said SHO took up the investigation of the case and proceeded to the place of the incident along with PW-10, Assistant Sub-Inspector, Bohar Singh and others. During the course of the said investigation, the said Officer recorded the statements of the witnesses and at the time of the spot inspection he also collected the blood-stained earth which was found underneath the dead bodies of Virsa Singh and Kulwant Singh in the presence of local Panchas. The Investigating Officer also found two empty .12 bore cartridge casings which were sealed as also 3 empties of 44.40 of the bore rifles found near the dead bodies which were also sealed separately. During the

course of investigation, the Investigating Officer arrested the said accused persons (except appellant No.1) on 25.10.1996 while they were travelling in a white Maruti car bearing No. CHK 8320 driven by the second appellant near the village of Punnu Khera. During the said arrest they found Gurmit Singh, appellant No.2, in possession of a rifle of 44.40 bore on his shoulder and 4 live cartridges which were seized from his possession by the Investigating Officer. He also took the car in question into his possession under Ex. P-Z. It is stated that on statement made by the concerned accused the Investigating Officer also recovered certain 'dangs' from the places disclosed by them. It is the further case of the prosecution that on 27.10.1996, the first appellant Rachhpal Singh was traced near the Railway Station of village Kabarwala and at the time of his arrest he was in possession of .12 bore double barrel gun and one belt containing 9 live cartridges which was also seized by the investigating agency.

4. The post mortem report and the evidence of Dr. R. S. Randhawa, PW-2, shows that both the deceased persons had lacerated wounds on vital parts of their bodies which had lacerated the lung and the Doctor had opined that the injuries in question were anti-mortem and had been caused by the use of fire-arms.

5. Learned Sessions Judge considering the material placed before him found the appellants herein and the 3 other accused persons guilty of the offence charged against them and convicted and sentenced appellant Nos. 1 and 2 herein to death for offence under Section 302 IPC while other accused were sentenced to life imprisonment. He also sentenced them to varying terms of imprisonment with fine in regard to other offences and referred the case of appellant Nos. 1 and 2 for confirmation to the High Court.

6. It is against this conviction and sentence, Murder Reference No. 2/99 was lodged before the High Court while Criminal Appeal Nos. 130-DR to 132-DB/99 were preferred by the convicted accused persons challenging their convictions and sentences. The complainant separately preferred a Criminal Revision No. 443/99 praying for compensation under Section 357 Cr.P.C. among other reliefs. The High Court as per the impugned judgment, concurred with the finding of the learned Sessions Judge as to the conviction imposed on the appellants herein but came to the conclusion that the imposition of capital punishment was uncalled for since it felt that the case in hand was not one of those rarest of the rare cases and accordingly reduced the sentence to one of life imprisonment in regard to these appellants. The High Court on an analysis of the evidence, disagreed with the finding of the Sessions Court as to the guilt of the 3 other accused persons and acquitted them of the charge under Section 302 read with 148 IPC. It, however, maintained the conviction under Section 449 but reduced the period of sentence to the period already undergone. While considering the claim of the complainant in Criminal Revision No. 443/99 for compensation, the High Court felt that this was a fit case for the exercise of its jurisdiction under Section 357 Cr.P.C. and directed each of the appellants to pay a sum of Rs. 2 lacs, totalling Rs. 4 lacs as compensation and in default it imposed a default sentence of 5 years' RI on each of the appellants and directed that the said sentence should run consecutively with the sentence of life imprisonment.

7. Mr. K.B. Sinha, learned senior counsel appearing for the appellants, very strenuously contended that the courts below erred in placing reliance on the evidence of the alleged eye-witnesses - PWs. 3 and 4. He contended that it is clear from the evidence of these 2 witnesses that they could not have seen the incident in question from the place where they were allegedly standing and their very presence at the place of the incident was highly improbable because if at all PW-3 was present at the place of the incident, he being the son of Virsa Singh and brother of Kulwant Singh would have intervened in the fight. There being no such attempt on the part of PW-3, it is reasonable to presume that he was not present at the time of the incident. In regard to PW-4, he submitted that though he is related to the deceased, he was staying far away from the house of the deceased and his stated reason for being present at the place of the incident having not been established and he having small children with a disabled brother, it was highly improbable that he would have been investing the deceased at that late hour in the day. In support of this contention, Mr. Sinha pointed out that it was the case of PW-4 that he had come to return a trolley which he had borrowed from the deceased and nowhere in the evidence it is seen that the prosecution has been able to establish that any such trolley was in fact there at the residence of the deceased.

13. According to Mr. Sinha, learned senior counsel, while exercising the power under Section 357 Cr.P.C. if the court decides to levy a fine then the compensation will have to be paid out of the fine as stipulated under Section 357(1)(b). In the instance case he points out that the Sessions Judge had awarded a fine of Rs. 5,000/- in regard to the offence under Section 302, therefore, the High Court could have in appeal or revision, enhanced that fine to a reasonable extent and awarded a compensation from out of that amount, according to the learned counsel, the court could not have awarded compensation in addition to the fine that is awarded in regard to the same offence. We are not in agreement with this argument of the learned counsel. Learned counsel presumes that the High Court has also confirmed the fine of Rs. 5,000/- awarded by the learned Sessions Judge for offence under Section 302 IPC. A perusal of the operative part of the judgment of the High Court clearly shows that so far as the punishment under Section 302 is concerned, it has disagreed with the Sessions Court and altered the sentence to one of life imprisonment from death. It has nowhere stated that it is also awarding a fine or that it was confirming the fine awarded by the Sessions Court for the offence under Section 302 IPC. In the absence of any such specific recording in our opinion it should be deemed that the High Court has awarded only a sentence of life imprisonment for an offence under Section 302 IPC. In such cases where the court does not award a fine along with a substantive sentence, Section 357(3) comes into play and it is open to the court to award compensation to the victim or his family. In our opinion it is in the exercise of this power under Section 357(3) that the High Court has awarded the compensation in question, therefore it was well within the jurisdiction of the High Court. The question then is, as contended by the learned counsel for the appellants, was there sufficient material for awarding this sum of Rs. 2 lacs each. Learned counsel submits that this figure is arrived at arbitrarily by the High Court without there being any evidence in this regard and that the High Court has not given an opportunity to the appellants to adduce any evidence as to their

monetary capability or as to the requirement of victim's family. Therefore, the learned counsel pleads that this exorbitant amount could not have been awarded. In support of this argument learned counsel has relied on *Palaniappa Gounder v. The State of Tamil Nadu* [(1977) 2 SCC 634] and *Sarwan Singh. v. The State of Punjab* [(1978) 4 SCC 111]. It is true that in those cases this Court while considering the compensation awarded by the courts below held that the compensation in question should commensurate with the capacity of the accused to pay as also other facts and circumstances of that case like the gravity of the offence, the needs of the victim's family etc. While saying so, we notice from these very same judgments cited by the learned counsel that it is clear that the jurisdiction of the court to grant compensation is accepted by this Court.

14. It is true that the High Court in the instant case did not have sufficient material before it to correctly assess the capacity of the accused to pay the compensation but then keeping the object of the Section in mind as seen from the reasoning of the High Court we think it is a fit case in which the court was justified in invoking Section 357. The question then will be : is the amount of Rs. 2 lakhs per accused too exorbitant a figure ? Since the material on record is scanty, the court will have to assess this monetary figure from material available and also taking into consideration the facts, judicial notice of which the court can take note of.

15. We have perused the records to find out the reasonable amount which would befit the facts of this case as also the capacity of the appellants to pay. It is on record that the appellants own agricultural land though the extent and fertility of the same is not available. It is also seen that they own a tractor and a trolley which we can assume are normally owned by farmers having large extent of land. We also notice that they own a Maruti car which also indicates that appellant are reasonably affluent. On this basis, we think it is reasonable to conclude that the appellants are capable of paying at least Rs. 1 lac per head as compensation. Therefore, we modify the order of the High Court by reducing the compensation payable from Rs. 2 lakhs each to Rs. 1 lakh each and direct the appellants to pay the said sum, totalling Rs. 2 lakhs, as directed by the High Court.

16. With this modification the substantive appeal of the appellants in regard to their conviction and sentence is dismissed and their challenge to the grant of compensation is accepted partly and the compensation granted by the High Court is modified, as stated above.

* * * * *

Prakash Singh v. Union of India

(2006) 8 SCC 1

Y.K. SABHARWAL, C.J.:- Considering the far reaching changes that had taken place in the country after the enactment of the Indian Police Act, 1861 and absence of any comprehensive review at the national level of the police system after independence despite radical changes in the political, social and economic situation in the country, the Government of India, on 15th November, 1977, appointed a National Police Commission (hereinafter referred to as 'the Commission'). The commission was appointed for fresh examination of the role and performance of the police both as a law enforcing agency and as an institution to protect the rights of the citizens enshrined in the Constitution.

2. The terms and reference of the Commission were wide ranging. The terms of reference, inter alia, required the Commission to redefine the role, duties, powers and responsibilities of the police with special reference to prevention and control of crime and maintenance of public order, evaluate the performance of the system, identify the basic weaknesses or inadequacies, examine if any changes necessary in the method of administration, disciplinary control and accountability, inquire into the system of investigation and prosecution, the reasons for delay and failure and suggest how the system may be modified or changed and made efficient, scientific and consistent with human dignity, examine the nature and extent of the special responsibilities of the police towards the weaker sections of the community and suggest steps and to ensure prompt action on their complaints for the safeguard of their rights and interests. The Commission was required to recommend measures and institutional arrangements to prevent misuse of powers by the police, by administrative or executive instructions, political or other pressures or oral orders of any type, which are contrary to law, for the quick and impartial inquiry of public complaints made against the police about any misuse of police powers. The Chairman of the Commission was a renowned and highly reputed former Governor. A retired High Court Judge, two former Inspector Generals of Police and a Professor of TATA Institute of Special Sciences were members with the Director, CBI as a full time Member Secretary.

3. The Commission examined all issues in depth, in period of about three and a half years during which it conducted extensive exercise through analytical studies and research of variety of steps combined with an assessment and appreciation of actual field conditions. Various study groups comprising of prominent public men, Senior Administrators, Police Officers and eminent academicians were set up. Various seminars held, research studies conducted, meetings and discussions held with the Governors, Chief Ministers, Inspector Generals of Police, State Inspector Generals of Police and Heads of Police organizations. The Commission submitted its first report in February 1979, second in August 1979, three reports each in the years 1980 and 1981 including the final report in May 1981.

4. In its first report, the Commission first dealt with the modalities for inquiry into complaints of police misconduct in a manner which will carry credibility and satisfaction to the public

regarding their fairness and impartiality and rectification of serious deficiencies which militate against their functioning efficiently to public satisfaction and advised the Government for expeditious examination of recommendations for immediate implementation. The Commission observed that increasing crime, rising population, growing pressure of living accommodation, particularly, in urban areas, violent outbursts in the wake of demonstrations and agitations arising from labour disputes, the agrarian unrest, problems and difficulties of students, political activities including the cult of extremists, enforcement of economic and social legislation etc. have all added new dimensions to police tasks in the country and tended to bring the police in confrontation with the public much more frequently than ever before. The basic and fundamental problem regarding police taken note of was as to how to make them functional as an efficient and impartial law enforcement agency fully motivated and guided by the objectives of service to the public at large, upholding the constitutional rights and liberty of the people. Various recommendations were made.

In the second report, it was noticed that the crux of the police reform is to secure professional independence for the police to function truly and efficiently as an impartial agent of the law of the land and, at the same time, to enable the Government to oversee the police performance to ensure its conformity to the law. A supervisory mechanism without scope for illegal, irregular or mala fide interference with police functions has to be devised. It was earnestly hoped that the Government would examine and publish the report expeditiously so that the process for implementation of various recommendations made therein could start right away. The report, inter alia, noticed the phenomenon of frequent and indiscriminate transfers ordered on political considerations as also other unhealthy influences and pressures brought to bear on police and, inter alia, recommended for the Chief of Police in a State, statutory tenure of office by including it in a specific provision in the Police Act itself and also recommended the preparation of a panel of IPS officers for posting as Chiefs of Police in States. The report also recommended the constitution of Statutory Commission in each State the function of which shall include laying down broad policy guidelines and directions for the performance of preventive task and service oriented functions by the police and also functioning as a forum of appeal for disposing of representations from any Police Officer of the rank of Superintendent of Police and above, regarding his being subjected to illegal or irregular orders in the performance of his duties.

With the 8th and final report, certain basic reforms for the effective functioning of the police to enable it to promote the dynamic role of law and to render impartial service to the people were recommended and a draft new Police Act incorporating the recommendations was annexed as an appendix.

5. When the recommendations of National Police Commission were not implemented, for whatever reasons or compulsions, and they met the same fate as the recommendations of many other Commissions, this petition under Article 32 of the Constitution of India was filed about 10 years back, inter alia, praying for issue of directions to Government of India to frame a new Police Act on the lines of the model Act drafted by the Commission in order to ensure that the

police is made accountable essentially and primarily to the law of the land and the people. The first writ petitioner is known for his outstanding contribution as a Police Officer and in recognition of his outstanding contribution, he was awarded the "Padma Shri" in 1991. He is a retired officer of Indian Police Service and served in various States for three and a half decades. He was Director General of Police of Assam and Uttar Pradesh besides the Border Security Force. The second petitioner also held various high positions in police. The third petitioner-Common cause is an organization which has brought before this Court and High Courts various issues of public interest. The first two petitioners have personal knowledge of the working of the police and also problems of the people. It has been averred in the petition that the violation of fundamental and human rights of the citizens are generally in the nature of non-enforcement and discriminatory application of the laws so that those having clout are not held accountable even for blatant violations of laws and, in any case, not brought to justice for the direct violations of the rights of citizens in the form of unauthorized detentions, torture, harassment, fabrication of evidence, malicious prosecutions etc. The petition sets out certain glaring examples of police inaction. According to the petitioners, the present distortions and aberrations in the functioning of the police have their roots in the Police Act of 1861, structure and organization of police having basically remained unchanged all these years.

6. The petition sets out the historical background giving reasons why the police functioning has caused so much disenchantment and dissatisfaction. It also sets out recommendations of various Committees which were never implemented. Since the misuse and abuse of police has reduced it to the status of a mere tool in the hands of unscrupulous masters and in the process, it has caused serious violations of the rights of the people, it is contended that there is immediate need to re-define the scope and functions of police, and provide for its accountability to the law of the land, and implement the core recommendations of the National Police Commission. The petition refers to a research paper 'Political and Administrative Manipulation of the Police' published in 1979 by Bureau of Police Research and Development, warning that excessive control of the political executive and its principal advisers over the police has the inherent danger of making the police a tool for subverting the process of law, promoting the growth of authoritarianism, and shaking the very foundations of democracy.

The commitment, devotion and accountability of the police has to be only to the Rule of Law. The supervision and control has to be such that it ensures that the police serves the people without any regard, whatsoever, to the status and position of any person while investigating a crime or taking preventive measures. Its approach has to be service oriented, its role has to be defined so that in appropriate cases, where on account of acts of omission and commission of police, the Rule of Law becomes a casualty, the guilty Police Officers are brought to book and appropriate action taken without any delay.

7. The petitioners seek that Union of India be directed to re-define the role and functions of the police and frame a new Police Act on the lines of the model Act drafted by the National Police Commission in order to ensure that the police is made accountable essentially and

primarily to the law of the land and the people. Directions are also sought against the Union of India and State Governments to constitute various Commissions and Boards laying down the policies and ensuring that police perform their duties and functions free from any pressure and also for separation of investigation work from that of law and order. The notice of the petition has also been served on State Governments and Union Territories. We have heard Mr. Prashant Bhushan for the petitioners, Mr. G.E. Vahanvati, learned Solicitor General for the Union of India, Ms. Indu Malhotra for the National Human Rights Commission and Ms. Swati Mehta for the Common Welfare Initiatives. For most of the State Governments/Union Territories oral submissions were not made. None of the State Governments/Union Territories urged that any of the suggestion put forth by the petitioners and Solicitor General of India may not be accepted.

Besides the report submitted to the Government of India by National Police Commission (1977-81), various other high powered Committees and Commissions have examined the issue of police reforms, viz. (i) National Human Rights Commission (ii) Law Commission (iii) Ribeiro Committee (iv) Padmanabhaiah Committee and (v) Malimath Committee on Reforms of Criminal Justice System.

8. In addition to above, the Government of India in terms of Office Memorandum dated 20th September, 2005 constituted a Committee comprising Shri Soli Sorabjee, former Attorney General and five others to draft a new Police Act in view of the changing role of police due to various socio-economic and political changes which have taken place in the country and the challenges posed by modern day global terrorism, extremism, rapid urbanization as well as fast evolving aspirations of a modern democratic society. The Sorabjee Committee has prepared a draft outline for a new Police Act (9th September, 2006). About one decade back, viz. on 3rd August, 1997 a letter was sent by a Union Home Minister to the State Governments revealing a distressing situation and expressing the view that if the Rule of Law has to prevail, it must be cured. Despite strong expression of opinions by various Commissions, Committees and even a Home Minister of the country, the position has not improved as these opinions have remained only on paper, without any action. In fact, position has deteriorated further. The National Human Rights Commission in its report dated 31st May, 2002, inter alia, noted that:

Police Reform:

28(i) The Commission drew attention in its 1st April 2002 proceedings to the need to act decisively on the deeper question of Police Reform, on which recommendations of the National Police Commission (NPC) and of the National Human Rights Commission have been pending despite efforts to have them acted upon. The Commission added that recent event in Gujarat and, indeed, in other States of the country, underlined the need to proceed without delay to implement the reforms that have already been recommended in order to preserve the integrity of the investigating process and to insulate it from 'extraneous influences.

9. In the above noted letter dated 3rd April, 1997 sent to all the State Governments, the Home Minister while echoing the overall popular perception that there has been a general fall in the

performance of the police as also a deterioration in the policing system as a whole in the country, expressed that time had come to rise above limited perceptions to bring about some drastic changes in the shape of reforms and restructuring of the police before the country is overtaken by unhealthy developments. It was expressed that the popular perception all over the country appears to be that many of the deficiencies in the functioning of the police had arisen largely due to an overdose of unhealthy and petty political interference at various levels starting from transfer and posting of policemen of different ranks, misuse of police for partisan purposes and political patronage quite often extended to corrupt police personnel. The Union Home Minister expressed the view that rising above narrow and partisan considerations, it is of great national importance to insulate the police from the growing tendency of partisan or political interference in the discharge of its lawful functions of prevention and control of crime including investigation of cases and maintenance of public order.

Besides the Home Minister, all the Commissions and Committees above noted, have broadly come to the same conclusion on the issue of urgent need for police reforms. There is convergence of views on the need to have (a) State Security Commission at State level; (b) transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure; (c) separation of investigation work from law and order; and (d) a new Police Act which should reflect the democratic aspirations of the people. It has been contended that a statutory State Security Commission with its recommendations binding on the Government should have been established long before. The apprehension expressed is that any Commission without giving its report binding effect would be ineffective.

10. More than 25 years back i.e. in August 1979, the Police Commission Report recommended that the investigation task should be beyond any kind of intervention by the executive or non-executive. For separation of investigation work from law and order even the Law Commission of India in its 154th Report had recommended such separation to ensure speedier investigation, better expertise and improved rapport with the people without of-course any water tight compartmentalization in view of both functions being closely inter-related at the ground level. The Sorabjee Committee has also recommended establishment of a State Bureau of Criminal Investigation by the State Governments under the charge of a Director who shall report to the Director General of Police. In most of the reports, for appointment and posting, constitution of a Police Establishment Board has been recommended comprising of the Director General of Police of the State and four other senior officers. It has been further recommended that there should be a Public Complaints Authority at district level to examine the complaints from the public on police excesses, arbitrary arrests and detentions, false implications in criminal cases, custodial violence etc. and for making necessary recommendations.

Undoubtedly and undisputedly, the Commission did commendable work and after in depth study, made very useful recommendations. After waiting for nearly 15 years, this petition was filed. More than ten years have elapsed since this petition was filed. Even during this period, on more or less similar lines, recommendations for police reforms have been made by other high

powered committees as above noticed. The Sorabjee Committee has also prepared a draft report. We have no doubt that the said Committee would also make very useful recommendations and come out with a model new Police Act for consideration of the Central and the State Governments. We have also no doubt that Sorabjee Committee Report and the new Act will receive due attention of the Central Government which may recommend to the State Governments to consider passing of State Acts on the suggested lines. We expect that the State Governments would give it due consideration and would pass suitable legislations on recommended lines, the police being a State subject under the Constitution of India. The question, however, is whether this Court should further wait for Governments to take suitable steps for police reforms. The answer has to be in the negative.

11. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of Criminal Justice System in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions. Nearly ten years back, in *Vineet Narain. v. Union of India* [(1996) 2 SCC 199] this Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above. The Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons which has not only demoralizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from demoralizing the police force, it has also the adverse effect of politicizing the personnel and, therefore, it is essential that prompt measures are taken by the Central Government.

12. The Court then observed that no action within the constitutional scheme found necessary to remedy the situation is too stringent in these circumstances. More than four years have also lapsed since the report above noted was submitted by the National Human Rights commission to the Government of India. The preparation of a model Police Act by the Central Government and enactment of new Police Acts by State Governments providing therein for the composition of State Security Commission are things, we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an

important measure for securing the rights of the citizens under the Constitution for the Rule of Law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments.

13. Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court. The decision in *Vineet Narain case* notes various decisions of this Court where guidelines and directions to be observed were issued in absence of legislation and implemented till legislatures pass appropriate legislations.

14. With the assistance of learned Counsel for the parties, we have perused the various reports. In discharge of our constitutional duties and obligations having regard to the aforementioned position, we issue the following directions to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislations:

State Security Commission

(1) The State Governments are directed to constitute a State Security Commission in every State to ensure that the State Government does not exercise unwarranted influence or pressure on the State police and for laying down the broad policy guidelines so that the State police always acts according to the laws of the land and the Constitution of the country. This watchdog body shall be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its ex-officio Secretary. The other members of the Commission shall be chosen in such a manner that it is able to function independent of Government control. For this purpose, the State may choose any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee, which are as under:

<i>NHRC</i>	<i>Ribeiro Committee</i>	<i>Sorabjee Committee</i>
1. Chief Minister/HM as Chairman.	1. Minister i/c Police as Chairman	1. Minister i/c Police (ex-officio Chairperson)
2. Lok Ayukta or, in his absence, a retired Judge of High Court to be nominated by Chief Justice or a Member of State Human Rights Commission.	2. Leader of Opposition	2. Leader of Opposition

3. A sitting or retired Judge nominated by Chief Justice of High Court.	3. Judge, sitting or retired, nominated by Chief Justice of High Court.	3. Chief Secretary
4. Chief Secretary	4. Chief Secretary	4. DGP (ex-officio Secretary)
5. Leader of Opposition in Lower House	5. Three non-political citizens of proven merit and integrity.	5. Five independent Members.
6. DGP as ex-officio Secretary	6. DG Police as Secretary.	

The recommendations of this Commission shall be binding on the State Government. The functions of the State Security Commission would include laying down the broad policies and giving directions for the performance of the preventive tasks and service oriented functions of the police, evaluation of the performance of the State police and preparing a report thereon for being placed before the State legislature.

Selection and Minimum Tenure of DGP:

(2) The Director General of Police of the State shall be selected by the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force. And, once he has been selected for the job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission consequent upon any action taken against him under the All India Services (Discipline and Appeal) Rules or following his conviction in a court of law in a criminal offence or in a case of corruption, or if he is otherwise incapacitated from discharging his duties.

Minimum Tenure of I.G. of Police & other officers:

(3) Police Officers on operational duties in the field like the Inspector General of Police in-charge Zone, Deputy Inspector General of Police in-charge Range, Superintendent of Police in-charge district and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them or their conviction in a criminal offence or in a case of corruption or if the incumbent is otherwise incapacitated from discharging his responsibilities.

This would be subject to promotion and retirement of the officer.

Separation of Investigation:

(4) The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/urban areas also.

Police Establishment Board:

(5) There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the posting and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotion/transfer/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

Police Complaints Authority:

(6) There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization. The State level Complaints Authority would take cognizance of only allegations of serious

misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority.

National Security Commission:

(7) The Central Government shall also set up a National Security Commission at the Union level to prepare a panel for being placed before the appropriate Appointing Authority, for selection and placement of Chiefs of the Central Police Organisations (CPO), who should also be given a minimum tenure of two years. The Commission would also review from time to time measures to upgrade the effectiveness of these forces, improve the service conditions of its personnel, ensure that there is proper coordination between them and that the forces are generally utilized for the purposes they were raised and make recommendations in that behalf. The National Security Commission could be headed by the Union Home Minister and comprise heads of the CPOs and a couple of security experts as members with the Union Home Secretary as its Secretary.

The aforesaid directions shall be complied with by the Central Government, State Governments or Union Territories, as the case may be, on or before 31st December, 2006 so that the bodies afore-noted became operational on the onset of the new year. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/Union Territories are directed to file affidavits of compliance by 3rd January, 2007.

15. Before parting, we may note another suggestion of Mr. Prashant Bhushan that directions be also issued for dealing with the cases arising out of threats emanating from international terrorism or organized crimes like drug trafficking, money laundering, smuggling of weapons from across the borders, counterfeiting of currency or the activities of mafia groups with trans-national links to be treated as measures taken for the defence of India as mentioned in Entry I of the Union List in the Seventh Schedule of the Constitution of India and as internal security measures as contemplated under Article 355 as these threats and activities aim at destabilizing the country and subverting the economy and thereby weakening its defence. The suggestion is that the investigation of above cases involving inter-state or international ramifications deserves to be entrusted to the Central Bureau of Investigation.

16. The suggestion, on the face of it, seems quite useful. But, unlike the aforesaid aspects which were extensively studied and examined by various experts and reports submitted and about which for that reason, we had no difficulty in issuing directions, there has not been much study or material before us, on the basis whereof we could safely issue the direction as suggested. For considering this suggestion, it is necessary to enlist the views of expert bodies. We, therefore, request the National Human Rights Commission, Sorabjee Committee and Bureau of Police

Research and Development to examine the aforesaid suggestion of Mr. Bhushan and assist this Court by filing their considered views within four months. The Central Government is also directed to examine this suggestion and submit its views within that time.

Further suggestion regarding monitoring of the aforesaid directions that have been issued either by National Human Rights Commission or the Police Bureau would be considered on filing of compliance affidavits whereupon the matter shall be listed before the Court.

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Rama Murthy v. State of Karnataka

AIR 1997 SC 1739

KULDIP SINGH, B.L. HANSARIA AND S.B. MAJMUDAR, JJ. -

ORDER

1. This writ petition has its origin in a letter dated 12.4.1984 by a prisoner of Central Jail, Bangalore (one Rama Murthy) to the Hon'ble Chief Justice of this Court making grievance about some jail matters. The letter was ordered to be treated as a writ petition and court proceedings followed which are being wound up by delivering this judgment.

2. The epistolatory power had been invoked earlier also in a similar matter when Sunil Batra had written a letter to a Hon'ble Judge of this Court from Tihar Jail, Delhi. The judgments in his cases and that of Charles Sobraj are such which can be said to be beacon lights insofar as management of jails and rights of prisoners are concerned. This Court in these judgments (1) *Charles Sobraj v. Superintendent Central Jail Tihar* [AIR 1978 SC 1514]; (2) *Sunil Batra (I) v. Delhi Administration* [(1978) 4 SCC 494]; and (3) *Sunil Batra (II) v. Delhi Administration* [(1980) 3 SCC 488] on being approached either through formal writ petitions or by addressing letter, which was treated as a writ petition, has laid bare the constitutional dimension and rights available to a person behind stone walls and iron bars.

3. These are not the only decisions on the question of rights of prisoners and approach to be adopted while dealing with them as there are many other renderings of this Court which deal with some other aspects of prison justice. A brief resume of earlier decisions would be helpful to tread the path further. The resume reveals this:

(1) In *State of Maharashtra v. Prabhakar* [AIR 1966 SC 424] aid of Article 21 was made available perhaps for the first time to a prisoner while dealing with the question of his right of reading and writing books while in jail.

(2) *Suresh Chandra v. State of Gujarat* [(1976) 1 SCC 654]; and *Krishan Lal v. State of Bihar* [(1976) 1 SCC 655] saw this Court stating about penological innovation in the shape of parole to check recidivism because of which liberal use of the same was recommended.

(3) A challenge was made to the segregation of prisoners in *Bhuvan Mohan Pattnaik v. State of Andhra Pradesh* [AIR 1974 SC 2092] and a three-Judge bench stated that resort to oppressive measures to curb political beliefs (the prisoner was a Naxalite because of which he was put in a 'quarantine' and subjected to inhuman treatment) could not be permitted. The court, however, opined that a prisoner could not complain of installation of high-volt live wire mechanism on the jail walls to prevent escape from prisons, as no prisoner has fundamental right to escape from lawful custody.

(4) In *Charles Sobraj* it was stated that this Court would intervene even in prison administration when constitutional rights or statutory prescriptions are transgressed to the injury of a prisoner. In that case the complaint was against incarceratory torture.

(5) Sunil Batra (I) dealt with the question whether prisoners are entitled to all constitutional rights, apart from fundamental rights. In that case this Court was called upon to decide as to when solitary confinement could be imposed on a prisoner. In *Kishor Singh v. State of Rajasthan* [(1981) 1 SCC 503] also the Court dealt with the parameters of solitary confinement.

(6) *Prem Shankar v. Delhi Administration* [(1980) 3 SCC 526] prohibited putting of undertrial prisoners in leg-irons.

(7) In *Sunil Batra (II)* the Court was called upon to deal with prison vices and the judgment protected the prisoners from these vices with the shield of Article 21, Krishna Iyer, J. stated that "prisons are built with the stones of law.

(8) A challenge was made to a prison rule which permitted only one interview in a month with the members of the family or legal advisor in *Francis Coralie v. Union Territory of Delhi* [(1981) 1 SCC 608] and the rule was held violative, inter alia, of Article 21.

(9) In series of cases, to wit, *Veena Sethi v. State of Bihar* [AIR 1983 SC 339]; (ii) *Sant Bir v. State of Bihar* [AIR 1982 SC 1470]; and (ii) *Sheela Barse v. Union Territory* [(1993) 4 SCC 204], this Court was called upon to decide as to when an insane person can be detained in a prison. In *Sheela Barse* it was held that jailing of non-criminal mentally ill persons is unconstitutional and directions were given to stop confinement of such persons.

It would be of some interest to point that in *Sheela Barse*, an order was passed to acquaint the Chief Secretaries of every State with the decision and he was directed to furnish some information to the Standing Counsel of his State. On being found that State of Assam had not complied with the order, this Court appointed Sr. Advocate Shri Gopal Subramaniam as its Commissioner by its order dated 13.5.1994 to have discussion with the Chief Secretary of that State and to ensure immediate obedience of the orders passed in that case. Shri Subramaniam's voluminous report dated 15.9.1994 running into 532 pages tells a story too wet for tears. All concerned were found ignorant of the decision in *Sheela Barse* which was rendered in 1993; and what is more a disturbing nexus between the judiciary, the police and the administration came to light. This was said to have led to a most shocking light. This was said to have led to a most shocking state of affairs negating the very basis of the existence of human life.

We do hope that by now all the States of the country must have acted as per the directions in *Sheela Barse*.

(10) The judicial work done by this Court on the subject at hand would not be complete without mentioning what was held in *Mohammad Giasuddin v. State of Andhra Pradesh* [(1977) 3 SCC 287] because in that case reformative aspect was emphasised by stating that the State has to rehabilitate rather than avenge. Krishna Iyer, J., speaking for a two-Judge bench,

pointed out that the "sub-culture that a lead to anti-social behaviour has to be countered not by undue cruelty but by re-culturalisation.

(11) On top of all, there is the undoubted right of speedy trial of undertrial prisoners, as held in a catena of cases of this Court, reference to which is not deemed necessary. Mention may only be made of the further leaves added to this right. These consist of ordering for release on bail where trial is protracted. The first decision in this regard is by a two-Judge bench in Supreme Court Legal Aid Committee representing *Undertrial Prisoners v. Union of India* [(1994) 6 SCC 731] wherein the bench was concerned with the detention of large number of persons in jail in connection with various offences under Narcotic Drugs and Psychotropic Substances Act, 1985. The Court, after noting the stringent provisions relating to bail as incorporated in that Act, directed for release of those undertrial prisoners who were languishing in jail for a period exceeding half of the punishment provided in the Act. This decision was cited with approval by another two-Judge bench in *Shaheen Welfare Association v. Union of India* [(1996) 2 SCC 616] in which harsh provisions of TADA were borne in mind and the bench felt that a pragmatic and just approach was required to be adopted to release TADA detainees on bail because of delay in conclusions of trials. The Bench classified these undertrials in four categories and passed different orders relating to their release on bail.

More comprehensive view was adopted in two later decisions - these being (1) *FD Upadhyay v. State of Andhra Pradesh* [(1996) 3 SCC 422]; and (ii) *Common Cause v. Union of India* [(1996) 4 SCC 33]. The first of these cases dealt with undertrial prisoners lodged in Tihar jail and directions were given to release them on bail depending upon the type of offences alleged against them on the completion of period mentioned in the judgment. The second case is more general inasmuch as it dealt with undertrial prisoners lodged in various jails of the country. The bench directed for their release on conditions laid down in the order. It was stated that directions shall be valid in all the States in Union Territories and would apply not only to pending cases but also to future cases. The directions were, however, not made applicable to certain classes of cases mentioned in the order.

4. The journey which commenced in 1966 has thus, during the last 30 years, planted many milestones. But it seems there are yet promises to keep and miles to go before one can sleep. And how can one sleep with wailings of prisoners getting louder and louder which requires a sentinel on the qui-vive, as this Court is so far as fundamental rights are concerned, to take note of the agony and to lay down what is required to be done to make prisons match the expectations of society?

5. Let it be seen how to protect various rights of the prisoners and how the object of rehabilitation of a prisoner does not remain will of the wisp. We have to be pragmatic also. Constitutional rights of the prisoners shall have to be interpreted in such a way that larger public interest does not suffer while trying to be soft and considerate towards the prisoners. For this, it has to be seen that more injury than is necessary is not caused to a prisoner. At the same time

efforts have to be made to reform him so that when he comes out of prison he is a better citizen and not a hardened criminal.

6. Before proceeding to lay down the do's and don'ts it would be useful to note what is the general position of prisons in the country presently. To bring home this, it would be enough to note what has been mentioned in the 1994-95 Annual Report of National Human Rights Commission in this regard at page 13 in para 4.17. The same is as below:

The situation in the prisons visited was varied and complex. Many, such as Tihar Jail in Delhi were over-crowded; yet others, like the open jail in Hyderabad were under-utilized. Often, within a single State, conditions varied from one jail to another in this respect, pointing to the need for a more rational State-wide use of facilities. The Commission saw a few jails which were notably clean and where the diet was reasonable such as the Central Jail in Vellore. Unfortunately, it saw many others which are squalid, such as the newly constructed Central Jail in Patna. In yet others, the diet was inferior, and the management was denounced by the inmates as brutal and corrupt. In some, care was being taken to separate juveniles from others, petty offenders from hardened criminals. In others, no such care was being taken and the atmosphere appeared to nurture violence and criminality. In a few, major efforts were being made to reform conditions, to generate employment in a worthwhile and remunerative way, to encourage education and restore dignity. In others, callousness prevailed, prisoners were seen in shackles, mentally disturbed inmates - regardless of whether they were criminal or otherwise - were incarcerated with others, with no real effort being made to rise above the very minimum required for the meanest survival. Where prisoners worked, their remuneration was often a pittance, offering scant hope of savings being generated for future rehabilitation in society. By and large, the positive experiences were the exceptions rather than the rule, dependent more upon the energy and commitment of individual officials rather than upon the capacity of the system to function appropriately on its own.

Facts

7. As alluded, this petition has its origin in a letter from one Rama Murthy, a prisoner in Central Jail, Bangalore, addressed to the Hon'ble Chief Justice of this Court. In the letter the main grievance was about denial of rightful wages to the prisoners despite doing hardwork by them in different sections of the prison. Mention was also made about "uneatable food" and "mental and physical torture". On the matter being taken up judicially, a need was felt, in view of the denial of the allegations in the objection filed on behalf of the respondent, that the District Judge, Bangalore, should visit the Central Jail and should find out the pattern of payment of wages and also the general conditions of the prisoners such as residence, sanitation, food, medicine etc. This order was passed on 26.11.1992 and the District Judge, after seeking time for submitting report from this Court, did so on 28.4.1993. His report runs into more than 300 pages (alongwith voluminous annexures), which shows the earnestness and pains which the District Judge evinced and took in submitting the report.

8. It would be enough for our purpose to note the various conclusions arrived at by the District Judge, which have been incorporated in para 23 of the report reading as below:

23. Therefore, on the basis of a through and proper enquiry by me in the Central prison, Bangalore as directed by the Hon'ble Supreme Court, I have reached the following conclusion:

1. The general condition of the prisoners is satisfactory. Their treatment by the Jail Authorities is also satisfactory.

2. The quality, quantity and timely supply of food to the prisoners are satisfactory.

3. The pattern of payment of wages is as per Annexure-F and it is being followed properly. The wages are correctly recorded and paid to the prisoners as per rules.

4. The sanitation is not satisfactory due to acute scarcity of water. The jail premises is normally maintained clean and tidy with great efforts. But it is improving since about a month after opening 3 or 4 borewells.

6. The medical facilities in the Jail Hospital and supply of medicines to the prisoners are satisfactory. Due to over population in the jail the two Doctors and their staff at present in the jail Hospital are unable to cope up with the demands but still there is no slackness or negligence in their work. For want of Lady Doctor and women staff in the hospital the Medical attendance to women prisoners is not proper or satisfactory.

7. Visit of prisoners to their homes or their places is not prompt or regular as per rules due to want of Police Escorts. This has caused lot of dissatisfaction and depression among the prisoners.

8. The production of prisoners in Courts on the dates of hearing in their cases is not regular or prompt due to want of Police Escorts and vehicles. This has affected the expeditious disposal of custody cases in Courts. The prisoners are very much agitated over this.

9. The production of prisoners in the Hospitals outside the jail for examination or treatment by the experts is not prompt or regular due to want of Police Escorts.

10. Mental patients in the jail and the prisoners with serious diseases requiring treatment outside the jail are compelled to remain in jail for want of accommodation in such hospitals.

11. The place and procedure followed for interviews between the prisoners their kith and kin, friends and visitors is not satisfactory.

12. Canteen facilities should improve. The sale of articles in the Canteen at the price above market prices to make profit is causing great hardship to the prisoners.

9. In view of the above conclusions, the District Judge made certain recommendations which are contained in para 24 of the report reading as below:

24. In view of the above conclusions the following recommendation are made for consideration and implementation:

1. P.W.D. Authorities in charge of the maintenance of the buildings and the premises of the jail are to be directed to maintain the buildings properly as per the requirement in the jail by getting necessary funds from the Government on priority basis. Necessary instructions may be issued to the Government in this regard to provide funds and to accord permission.

2. Sanitation in the jail premises requires lot of improvement. P.W. 10 Authorities are to be directed to repair the existing pipe lines and the sewerage lines in addition to providing Electric pumps to the bore-wells in the jail premises.

3. The staff in the jail hospital has to be increased by providing at least 2 more Doctors preferably who have specialised in the particular field where the prisoners may require their services in special cases. One Lady Medical Officer, a Lady Nurse and two lady attendants for the purpose of attending the women prisoners. The location of their office may be provided in the separate block meant for women prisoners. If regular posting of Doctors cannot be made for the purposes stated above, the services of the Doctors from other Government Hospitals in Bangalore may be secured as a routine periodically or in case of emergencies by providing them some conveyance. It is suggested that Doctors incharge of the Hospital may visit each barrack at least once in a week and meet the inmates to know their health problems and to treat the, in jail Hospital. In case of emergency as agreed by them, they may visit the prisoners whenever their services are required.

4. The Jail Authorities may be directed to arrange for the regular visit of the prisoners to their homes or their places periodically as per the rules without insisting any deposit or security or police report unless it is inevitable and in case of emergency like death, serious illness and other important festivals, functions arrangements should be made for their visit relaxing all the required formalities. By way of follow up action, the Jail Authorities may be instructed to submit the report of the returns to the prl. City Civil & Sessions Judge, Bangalore. For this purpose the Home Department has to be requested to spare sufficient number of police Escorts and the vehicles as and when it is required by the Jail Authorities. If possible as suggested by the Superintendent of Jail, some fixed number of escorts the jail to assist the Jail Authorities in cases of visits due to emergencies.

5. The Superintendent of the jail may be instructed to produce the UTPs before the Courts in which their cases are pending on the dates of hearing fixed by the Courts regularly and promptly. For this purpose, the Home Department of the Government may be requested to spare sufficient number of police Escorts and the vehicles as and when it is required by the Jail Authorities. The Superintendent of the Jail has to be instructed to submit a report in this regard at least once in a month to the prl. City Civil & Sessions Judge, Bangalore compliance of such instructions.

6. The Superintendent of the jail should take all the steps to produce the prisoners to the Hospitals outside the jail for the purpose of examination and treatment whenever necessary as per the opinion of the Jail Doctors and for this purpose also, the same procedure may be followed regarding police Escort as stated above.

7. All the hospitals under the control of the Government who are expected to treat the prisoners either in the normal cases or in special cases may be strictly instructed to treat the prisoners either as in-patients or otherwise as per the recommendation of the jail Doctors and the Superintendent of the Jail without referring them back to the jail for treatment, particularly in case

of mental patients, the Nimhans authorities may be requested to treat them as in-patients till they become normal without referring them back to the jail.

8. It is absolutely necessary to provide proper accommodation with sufficient space for the interviews between the prisoners with their kith and kin, friends and visitors. The procedure which is being followed at present also required to be modified as suggested in the discussion stated above in para-20. If possible separate portions may be made in the accommodation for the purpose of interviews. The Superintendent of the jail may be instructed to submit the report in this regard at least once a month to the prl. City civil & Sessions Judge, Bangalore who may review the same issue instructions as and when it is necessary.

9. Canteen facilities in the jail require improvements. Some more articles for day to day use of the inmates may be sold in the Canteen. The superintendent of the Jail may in consultation of the prisoners submit a report in this regard to the prl. City Civil & Sessions Judge, Bangalore mentioning the articles which may be sold in the Canteen. The Jail authorities should be strictly instructed not to sell any of the articles to the prisoners at a rate more than the market price or for profit. For this purpose, they may adopt any procedure whereby the articles can be held on the Principle 'no loss no profit' basis.

10. It may be necessary to instruct follow up action by all the concerned Authorities in regard to the implementation of the items stated above.

10. We wish to place on record our appreciation for the admirable work done by the District Judge.

11. Being concerned with a problem which is not confined to the happenings in Central Jail, Bangalore, but which are faced more or less by all the persons confined in 1155 prisons of different kinds in India, we have thought it fit not to confine our attention and concern to what was found in the Central Jail by the District Judge. According to us, it would be more apposite to keep in view all the prisoners, whose population at the end of 1993 was 1,96,240, of whom 1,37,838 were unconvicted remandees or undertrials.

12. It may be pointed that the National Human Rights Commission is also of the view that the prison system as such is in need of reform, nation-wide. (See para 4.18 of the aforesaid Report).

13. The literature on prison justice and prison reform shows that there are nine major problems which afflict the system and which need immediate attention. These are : (1) overcrowding; (2) delay in trial; (3) torture and ill-treatment; (4) neglect of health and hygiene; (5) insubstantial food and inadequate clothing; (6) prison vices; (7) deficiency in communication; (8) streamlining of jail visits; and (9) management of open air prisons.

14. We propose to take each of the problems separately and express our view as to what could reasonably be done and should be done to take care of the same.

Overcrowding

15. That our jails are overcrowded is a known fact. To illustrate, in Tihar Jail as against the housing capacity of 2,500 persons in 1994-95, there were 8,500 prisoners, as mentioned in Chapter 16 of 'I Dare', a biographical work on Ms. Kiran Bedi. Of course, the percentage of overcrowding varies from prison to prison.

16. Though the aforesaid fact is known, what is not known is the controversy as to whether overcrowding itself violates any constitutional right. This question arises because overcrowding contributes to a greater risk of disease, higher noise levels, surveillance difficulties, which increase the danger level. This apart, life is more difficult for inmates and work more onerous for staff when prisoners are in over capacity.

17. Though we have no decision of ours yet on the subject, the American Supreme Court in two major decisions had addressed itself on overcrowding problem. First of these is *Wolff v. Me Donnell* [418 US 539 (1974)] involving pretrial detainees. The Court held that the principle of 'one man, one cell' cannot be read in the Due Process Clause of the Fifth Amendment. It was further held that the practice of placing two detainees in a cell meant for one person was not unconstitutional. Of course, this view was taken because of the facts of that case where it was found that the detainees in the federal Metropolitan Correctional Centre were not required to spend much time in their cells - only 7 or 8 hours per day. Further more, they were not exposed to the overcrowding for very long as average stay was 60 days. The second decision was in *Rhodes v. Chapman* [452 US 337 (1981)]. The Court there was concerned with a convicted prisoner and examined the question whether overcrowding constituted cruel and unusual punishment. It did not read any violation of the Eighth Amendment as there was no evidence that double-celling had inflicted "unnecessary or wanton pain or was grossly disproportionate to the severity of the crimes warranting imprisonment" (See, 'American Prison System' by Richard Hawkins and Geoffery, p. 420 of 1989 edition). The Court went on to conclude that "the Constitution does not mandate comfortable prisons.

18. Mention has been made of the aforesaid two decisions despite there being no exact parallel to the Due Process Clause of the Fifth Amendment of American Constitution or of guarantee against cruel and unusual punishments mentioned in their Eighth Amendment, in our constitution, but Article 21 of our paramount parchment also does prohibit cruel punishment, which would be apparent from the decision of a three-Judge Bench in *Deena v. Union of India* [AIR 1983 SC 1155] in which execution of death sentence by hanging was challenged on the ground of being cruel and barbarous.

19. Even if overcrowding be not constitutionally impermissible, there is no doubt that the same does affect the health of prisoners for the reasons noted above. The same also very adversely affects hygienic conditions. It is, therefore, to be taken care of.

20. The recent decision of this Court requiring release on bail of certain categories of undertrial prisoners, who constitute the bulk of prison population, has to result in lessening the

over capacity. It would be useful to refer here to the Seventy-Eighth Report of the Law Commission of India on 'Congestion of Undertrial Prisoners in Jails'. The Commission has in chapter 9 of the Report made some recommendations acceptance of which would relieve congestion in jails. These suggestions include liberalisation of conditions of release on bail. It may be pointed out that it has already been held by this Court in *Babu Singh v. State of U.P.* [AIR 1978 SC 527]; and *Gurbaksh Singh Sibbia v. State of Punjab* [AIR 1980 SC 1632] that imposing of unjust or harsh conditions, while granting bail, are violative of Article 21.

20A. We require the concerned authorities to take appropriate decision on the recommendations of the Law Commission within six months from today.

21. Overcrowding may also be taken care of by taking recourse to alternatives to incarceration. These being: (1) Fine; (2) civil commitment; and (3) probation. There is an enlightened discussion on these judicial choices in Chapter IV of "Justice, Punishment, Treatment" by Leonard Orland. In that chapter (of 1983 edition) the learned author has referred to may case on this subject and has pointed out the difference between "civil" and "penal" institutions from the perspective of the inmate. As to release on probation, it may be stated that it really results in suspension of sentence, as the person released on probation is required to execute bond under the provisions of the Probation of Offenders Act, 1958, requiring maintenance of good conduct during the probationary period, the failure to do which finds the concerned person in prison again. That Act has provision of varying conditions of probation and has also set down the procedure to be followed in case of the offenders failing to observe conditions.

22. Overcrowding is reduced by release on parole as well, which is a conditional release of an individual from prison after he has served part of the sentence imposed upon him. Various aspects of parole have been dealt in Chapter 11 of Professor Orland's aforesaid book. In Suresh Chandra and Krishan Lal (*supra*) liberal use of parole was recommended by this Court.

23. Reference may also be made in this connection to Chapter 20 of the Report of All India Committee on Jail Reforms (headed by Justice A.N. Mulla) (1980-83) Vol. 1. That chapter deals with the system of remission, leave and premature release. The Committee has mentioned about various types of remission and has made some recommendations to streamline the remission system. As to premature release, which is the effect of parole, the Committee has stated that this is an accepted mode of incentive to a prisoner, as it saves him from the extra period of incarceration; it also helps in reformation and rehabilitation. The Committee has made certain suggestions in this regard too. We direct the concerned authorities to take appropriate decision on the suggestions within a period of six months from today. It may be pointed out that there is really a grievance about allowing the recommendations to remain in cold storage. (See article of T. Ananthachari "Human Rights Behind Prison Walls" published at pp. 35-47 of the 1995 report by Commonwealth Human Rights Initiative (ANGO) titled 'Behind Prison Walls - Police, Prisons and Human Rights'). While taking appropriate decision, the authorities may apprise themselves of what has been in Chapter 6 (headed 'Parole') of the British White Paper on "Crime, Justice and Protecting the Public" (1990).

24. There is yet another baneful effect of overcrowding. The same is that it does not permit segregation among convicts - Those punished for serious offences and for minor. The result may be that hardened criminals spread their influence over others. Then, juvenile offenders kept in jails (because of inadequacy of alternative places where they are required to be confined) get mixed up with others and they are likely to get spoiled further. So, problem of overcrowding is required to be tackled in right earnest for a better future.

Delay in Trial

25. It is apparent that delay in trial finds an undertrial prisoner (UTP) in jail for a longer period while awaiting the decision of the case. In the present proceeding, we are really not concerned regarding the causes of delay and how to remedy this problem. Much has been said in this regard elsewhere and we do not propose to burden this judgment with this aspect. We would rather confine ourselves as to how to take care of the hardship which is caused to a UTP because of the delay in disposal of this case. The recent judgments of this Court (noted above) requiring release of UTP on bail where the trial gets protracted would hopefully take care to a great extent the hardship caused in this regard. We desire to see full implementation of the directions given in the aforesaid cases.

26. Another aspect to which we propose to advert is the grievance very often made about non-production of (UTP) in courts on remand dates. The District Judge in his report has also found this as a fact. The reason generally advanced for such non-production is want of police escorts. It has to be remembered that production before the court on remand dates is a statutory obligation and the same has a meaning also inasmuch as that the production gives an opportunity to the prisoner to bring to the notice of the Court, who had ordered for his custody, if he has faced any ill-treatment or difficulty during the period of remand. It is for this reason that actual production of the prisoner is required to be insured by the trial court before ordering for further remand, as pointed out in a number of decisions by this Court.

27. we are also conscious of the fact that police force in the country is rather overworked. It has manifold duties to perform. In such a situation it is a matter for consideration whether the duty of producing UTP on remand dates should not be entrusted to the prison staff. To enable the prison staff to do so, it would, however, need escorts vehicles.

28. We could require the concerned authorities to take appropriate decision in this regard within a period of six months from today.

Torture and ill-treatment

29. There are horror stories in this regard. The cellular jail in Port Blair resounds with the cries of the prisoners who were subject to various forms of torture. This is now being brought home in the Light and Sound programme being organised in that jail, which after Independence has been declared as a national monument. Other jails would also tell similar stories.

30. Apart from torture, various other physical ill-treatments like putting of fetters, iron bars are generally taken recourse to in jails. Some of these are under the colour of provisions in Jail Manuals. The permissible limit of these methods has been spelt out well in many earlier decisions of this Court to which reference has been already made. We do not propose to repeat.

31. What we would rather state is that if what is being done to prisoners in the above regard is to enforce prison discipline mentioned in various Jail Manuals, there exists a strong need for a new All India Jail Manual to serve as a model for the country, which Manual would take note of what has been said about various punishments by this Court in its aforesaid decisions. Not only this, the century old Indian Prison Act, 1894, needs a thorough look and is required to be replaced by a new enactment which would take care of the thinking of the Independent India and of our constitutional mores and mandate. The National Human Rights Commission has also felt that need for such exercise, mention about which has been made in para 4.18 and 4.21 of the aforesaid Report.

32. A reading of the Chapter IX on 'Prison Discipline' in RN Datir's book on 'Prison as a Social System', shows that in some Jail Manuals even flogging/whipping has been retained as a punishment, which would not be permissible in view of the right enshrined in Article 21 of the Constitution. We have mentioned about this only to highlight the need for a new model All India Jail Manual.

33. It would be apposite in this context to refer to the recent decision of the United States Supreme Court in *Hudson v. Mc Million*, 403 US 1, in which that Court was required to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even when the inmate does not suffer serious injury. This question was answered in affirmative by majority of 7 : 2. As already mentioned, Article 21 of our Constitution also does not permit cruel punishment.

34. May we say that the ideal prison and the advance prison system which the enlightened segment of the society visualise would not permit torture and ill-treatment of prisoners. Of course, if for violating prison discipline some punishment is required to be given, that would be a different matter.

Neglect of health and hygiene

35. The Mulla Committee has dealt with this aspect in Chapter 6 and 7 of its Report, a perusal of which shows the pathetic position in which most of the jails are placed insofar as hygienic conditions are concerned. Most of them also lack proper facilities for treatment of prisoners. The recommendations of the Committee in this regard are to be found in Chapter 29. We have nothing useful to add except pointing out that society has an obligation towards prisoners' health for two reasons. First, the prisoners do not enjoy the access to medical expertise that free citizens have. Their incarceration places limitations on such access; no physician of choice, no second opinions, and few if any specialists. Secondly, because of the conditions of their incarceration, inmates are

exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap.

36. In 'American Prison System' (supra) there is a discussion at pages 411-13 as to whether a prisoner can seek any relief from the Court because of neglect of medical treatment on the ground of violation of their constitutional right. Policy makers may bear this also in mind while deciding about the recommendations of the Mulla Committee Report, which they would so do within six months from today.

Insubstantial food and inadequate clothing

37. There is not much to doubt that the rules contained in concerned Jail Manual dealing with food and clothing etc. to be given to prisoners are not fully complied with always. All that can usefully be said on this aspect is the persons who are entitled to inspect jails should do so after giving shortest notice so that the reality becomes known on inspection. The system of complaint box introduced in Tihar Jail during some period needs to be adopted in other jails also. The complaint received must be fairly inquired and appropriate actions against the delinquent must be taken. On top of all, prisoners must receive full assurance that whoever would lodge a complaint would not suffer any evil consequence for lodging the same.

Prison vices

38. On this aspect nothing more is required to be said than what was pointed out in Sunil Batra (II). It may only be stated that some vices may be taken care of if what is being stated later on the subject of jail visits is given concrete shape. We have said so because many of the vices are related to sexual urge, which remains unsatisfied because of snapping of marital life of the prisoner. If something could be done to keep the thread of family life unbroken some vices many take care of themselves, as sexual frustration may become tolerable.

39. The aforesaid seems to us a more rational way to deal with prison vices rather than awarding hard punishment to them. We may not be, however, understood to say that the jail authorities need not take action against the prisoners indulging in vices; but in the situation in which they are placed, a sympathetic approach is also required.

Deficiency in communication

40. While in jail, communication with outside world gets snapped with a result that the inmate does not know what is happening even to his near and dear ones. This causes additional trauma. A liberalised view relating to communication with kith and kin specially is desirable. It is hoped that the model All India Jail Manual, about the need of which we have already adverted, would make necessary provision in this regard. It may be pointed out that though there may be some rationale for restricting visits, to which aspect we shall presently address, but insofar as

communication by post is concerned, there does not seem (sic) be any plausible reason to deny easy facility to an inmate.

Streamlining of jail visits

41. Prison visits fall into three categories: (1) relatives and friends; (2) professionals; and (3) lay persons. In the first category comes the spouse. Visit by him/her has special significance because a research undertaken on Indian prisoners sometime back showed that majority of them were in the age group of 18 to 34, which shows that most of them were young and were perhaps having a married life before their imprisonment. For such persons, denial of conjugal life during the entire period of incarceration creates emotional problems also. Visits by a spouse are, therefore, of great importance.

42. It is, of course, correct that at times visit may become a difficult task for the visitors. This would be so where prisoners are geographically isolated. This apart, in many jails facilities available to the visitors are degrading. At many places even privacy is not maintained. If the offenders and visitors are screened, the same emphasises their separation rather than retaining common bonds and interests. There is then urgent need to streamline these visits.

43. Dr. Mir Mehraj-ud-din in his book 'Crime and Criminal Justice System in India' has dealt with different aspects of prison visits in Chapter VI headed 'Resocialization: Search for Goals'. The learned author has said that frequent jail visits by family members go a long way in acceptance of the prisoner by his family and small friendly group after his release from jail finally, as the visits continue the personal relationship during the term of imprisonment, which brings about a psychological communion between him and other members of the family.

44. As to visits by professionals, i.e. the lawyer, the same has to be guaranteed to the required extent, if the prisoner be a pre-trial detainee, in view of the right conferred by Article 22(1) of the Constitution.

Management of open air prisons

45. Open air prisons play an important role in the scheme of reformation of a prisoner which has to be one of the desideratum of prison management. They represent one of the most successful applications of the principle of individualization of penalties with a view to social readjustment as stated by B. Chandra in the Preface to his book titled "Open Air Prisons". It has been said so because release of offenders on probation, home leave to prisoners, introduction of wage system, release on parole, educational, moral and vocational training of prisoners are some of the features of the open air prison (camp) system. Chandra has stated in the concluding portion of Chapter 3 at page 150 that in terms of finances, open institution is far less costly than a closed establishment and the scheme has further advantage that the Government is able to employ in work, for the benefit of the public at large, the jail population which would have otherwise

remained unproductive. According to the author, the monetary returns are positive, and once put into operation, the camps pay for itself.

46. Reference may also be made to what has been stated in Chapter 5 about the change in the humans and social outlook, which activities and programmes of these camps bring about. The whole thrust is to see that after release the prisoners may not relapse into crimes, for which purpose they are given incentives to live normal, life, as they are trained in the fields of agriculture, horticulture etc. Games, sports and other recreational facilities, which form part of the routine life at the open air camps, inculcate in the prisoners a sense of discipline and social responsibility. The prayers made regularly provide spiritual strength.

47. While on the subject of prayer, mention may be made about the experiment carried out even in the closed Tihar Jail sometime in 1993-94, when Vipassana meditation was introduced in a big way, which according to Tarsem Kumar, one of the Jail Superintendents of the Jail, brought about a radical change in the living and thinking of the prisoners, as narrated in his book titled "Freedom Behind Bars".

48. Open air prison, however, create their own problem which are basically of management. We are, however, sure that these problems are not such which cannot be sorted out. For the greater goods of the society, which consists in seeing that the inmates of a jail come out, not as a hardened criminal but as a reformed person, no managerial problem is insurmountable. So, let more and more open air prisons be opened. To start with, this may be done at all the District Headquarters of the country.

Conclusion

49. We have travelled a long path. Before we end our journey, it would be useful to recapitulate the directions we have given on the way to various authorities. These are:

(1) To take appropriate decision on the recommendations of the Law Commission of India made in its 78th Report on the subject of 'Congestion of undertrial prisoners in jail' as contained in Chapter 9, (Para 20A).

(2) To apply mind to the suggestions of the Mulla Committee as contained in Chapter 20 of Volume I of its Report relating to streamlining the remission system and premature release (parole), and then to do the needful). (Para 23).

(3) To consider the question of entrusting the duty of producing UTPs on remand dates to the prison staff. (Para P7).

(4) To deliberate about enacting of new Prison Act to replace century old Indian Prison Act, 1894'. (Para 31). We understand that the National Human rights Commission has prepared an outline of an All-India statute, which may replace the old act; and some discussions at a national level conference also took place in 1995. We are of the view that all the States must try to amend their own enactments, if any, in harmony with the all India thinking in this regard.

(5) To examine the question of framing of a model new All India Jail Manual as indicated in para 31.

(6) To reflect on the recommendations of Mulla Committee made in Chapter 29 on the subject of giving proper medical facilities and maintaining appropriate hygienic conditions and to take needed steps. (Paras 35 and 36).

(7) To ponder about the need of complaint box in all the jails. (Para 37).

(8) To think about introduction of liberalisation of communication facilities. (Para 40).

(9) To take needful steps for streamlining of jail visits as indicated in para 42.

(10) To ruminate on the question of introduction of open air prisons at least in the District Headquarters of the country. (Para 48).

50. The end of the journey is in sight. We conclude by saying that the cognizance of the letter written by Rama Murthy and the efforts made thereafter to find out what was really happening in the Central Jail of Bangalore, resulting in submission of a voluminous report by the District Judge, would not prove to be an exercise in futility, if what we have stated above is taken in all seriousness and our prisons become reform houses as well, in which case the social and economic costs of incarceration would become more worth while. There seems to be no cause for disillusionment, despite what has been stated in this regard by Roy D. King and Rod Morgan in 'The Future of Prison System'. According to us, talk about treatment and training in prisons is not rhetoric; it can prove, to be real, given the zeal and determination. And we cannot afford to fail in this sphere as a sound prison system is a crying need of our time in the backdrop of great increase in the numbers of prisoners and that of various types and from different strata of society.

51. Let us, therefore, resolve to improve our prison system by introducing new techniques of management and by educating the prison staff with our constitutional obligations towards prisoners. Rest would follow, as day follows the night. Let the dawning ray (of hope) see the end of gloom cast on the faces of majority of prisoners and let a new awakening percolate every prison wall. Let it be remembered that "where there is will, there is way". Will there is, way would be found.

52. We had desired to dispose of the writ petition accordingly. But as we could not hear all the States, because of constraint of time and as they have to be heard before giving directions as detailed above, let notices be issued on the Secretary to the Government of India, Ministry of Home and the Chief Secretaries of all the States and Union Territories, as to why they should not be asked to act for above. Let causes be shown within three months and let the case be placed for further hearing thereafter soon.

T H E E N D