



# **LAW COMMISSION OF INDIA**

**THIRTY-FIFTH REPORT**

**VOLUME I-III**

**(CAPITAL PUNISHMENT)**

**SEPTEMBER, 1967**

**GOVERNMENT OF INDIA ● MINISTRY OF LAW**

CHAIRMAN,  
Law Commission,  
5, Jor Bagh, New Delhi-3.  
December 19, 1967.

Shri P. Govinda Menon,  
Minister of Law,  
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Thirty-fifth Report of the Law Commission on Capital Punishment.

2. The circumstances in which the subject was taken up by the Law Commission for consideration are stated in the first few paragraphs of the Report. After the subject was taken up for consideration, a study of the voluminous material on the subject was undertaken. In the meantime, the Commission was asked to consider urgently the question of division of murder into categories. The matter was considered at the 42nd meeting of the Commission held on 17th, 18th and 19th December, 1962, and a note recording the views of the Commission regarding the proposal to divide murder into two categories was sent (under the signature of the then Secretary to the Commission) in December, 1962.

3. Study of the main subject of capital punishment was also proceeded with. A questionnaire on the subject was prepared. The Questionnaire was discussed at the Commission's 44th meeting held on the 2nd and 3rd March, 1963 and approved with certain modifications. Copies of the Questionnaire (as approved by the Commission) were sent to State Governments, High Courts, Members of Parliament, Members of State Legislatures, High Court Bar Associations, District Bar Associations, District and Sessions Judges, Zilla Panchayats and other interested persons and bodies. A Press Communique was also issued, informing members of the public about the Questionnaire and inviting them to express their view in the matter.

(At the 51st meeting of the Commission held on the 4th November, 1963, it was decided that evidence may be taken on the subject. But, having regard to the voluminous replies received to the Questionnaire and also on a perusal of the studies made in the Commission, it has been considered unnecessary to take oral evidence).

4. A draft Report on the subject was prepared and circulated to the Members.

The studies made on the subject and the replies received to the Questionnaire (as tabulated) were also circulated to the Members. At the 72nd meeting of the Commission, a programme for the consideration of the circulated materials was chalked out.

The circulated materials included a discussion of the existing position, consideration of the arguments for abolition or retention as formulated in various quarters, including academic literature, precis of debates in Parliament, Reports of Committees or Commissions appointed in various countries, historical, comparative and statistical studies, as well as tabulations of replies to the Questionnaire, extending over thousands of pages.

5. The above mentioned materials, including the draft Report, were considered at the following meetings of the Commission, and certain additions, deletions, and modifications were directed to be made :—

- 73rd meeting .. 9th to 11th February, 1966.
- 74th meeting .. 22nd to 26th March, 1966.
- 75th meeting .. 11th, 12th, 14th, 15th and 16th April, 1966.
- 76th meeting .. 5th to 7th and 9th and 10th May, 1966.
- 77th meeting .. 8th to 12th August, 1966.
- 78th meeting .. 5th to 7th September, 1966.

At the 78th meeting already mentioned above, it was further decided (on the 7th September, 1966), that the draft Report may be revised in accordance with the discussions that had been held up to that date.

6. Accordingly, the draft Report was revised. The revised draft was taken up, page by page, for consideration at the 86th meeting of the Commission on 18th, 19th, 20th, 22nd and 23rd May, 1967 and approved with modifications. The summary of conclusions (which also had been circulated to the Members) was approved with modifications at the same meeting on 23rd May, 1967. Further, at the same meeting, on the 18th May, 1967, it was decided that important points made in replies to the Questionnaire which could not be dealt with in the draft Report owing to their late receipt, etc., may be dealt with, so far as practicable, while further revising the draft Report.

(Copies or tabulations of these later replies were separately circulated to the Members).

7. The draft Report was further revised, in accordance with the decisions taken at the 86th meeting referred to above.

8. In the study of materials regarding this subject and in drawing up the Report I have to acknowledge the help the Commission received from its Secretary who had to devote a great deal of time and energy in collecting the materials and then putting them in proper shape for discussion by the Commission and finally in carrying out all the suggestions and corrections.

Yours sincerely,

J. L. KAPUR.



**REPORT ON CAPITAL PUNISHMENT**

**EXPLANATION OF ABBREVIATION**

**R.C. Report—Report of the Royal Commission on Capital  
Punishment (1949—1953), Cmd. 8932**

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# REPORT ON CAPITAL PUNISHMENT

## CHAPTER I

### PRELIMINARY

#### TOPIC NUMBER 1

##### *Reference to the Law Commission*

1. The subject of capital punishment has come to be considered by the Law Commission in the following circumstances—

Reference to  
the Law  
Commission.

Shri Raghunath Singh, Member, Lok Sabha, had moved a resolution in the Lok Sabha for the abolition of capital punishment<sup>1</sup>. In the course of the debate on the resolution, suggestions were made that a commission or committee should be appointed to go into the question<sup>2</sup>. Shri Harish Chandra Mathur moved an amendment to the effect that the question of abolition of capital punishment be referred to the Law Commission<sup>3</sup>. The Minister of State in the Ministry of Home Affairs (the late Shri B. N. Datar) gave an assurance that a copy of the discussions that had taken place in the House would be forwarded to the Law Commission "that is now seized of the question of examining the Code of Criminal Procedure and the Indian Penal Code with a view to consider as to whether changes are necessary therein"<sup>4</sup>. He was confident that this assurance would satisfy those honourable members, who either desired that there ought be a commission or a committee or who desired specifically that the question should be referred to the Law Commission. In view of this assurance, the resolution and the amendments were withdrawn by leave<sup>5</sup>.

2. Accordingly, a copy of the debates in the Lok Sabha was forwarded to the Law Commission. That is the genesis of this Report<sup>6</sup>.

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1 Lok Sabha Debates, 1962, Cols. 307 and 308 (21st April, 1962).

2 Lok Sabha Debates, 1962, Cols. 321 and 322 (21st April, 1962).

3 Lok Sabha Debates, 1962, Cols. 323, 334 and 335 (21st April, 1962).

4 Lok Sabha Debates, 1962, Col. 354, (21st April, 1962).

5 Lok Sabha Debates, 1962, cols. 364 and 365 (21st April, 1962).

6 There had been discussions on the subject, earlier also. See under "History of abolition move in India", paragraphs 12-18 *infra*.

## TOPIC NUMBER 2

*Why subject taken up separately*

Why the subject taken up separately.

3. The Law Commission considered it desirable to take up this subject separately from the revision of the general criminal law, in view of the importance of the subject, the voluminous nature of the materials to be considered, and the large number of questions of detail to be examined<sup>1</sup>. It may be noted, that the matter has, in recent years, been repeatedly debated in Parliament in some form or other, and its consideration, therefore, seemed to be somewhat urgent as compared with other topics arising under the Code of Criminal Procedure, etc. In other countries also, this subject has been treated as one for separate and full-fledged study.

## TOPIC NUMBER 3

*Interim Note*

Interim Note, as to categories of murders.

4. While the subject was under consideration, certain proposals for the division of murder and other capital offences into categories were forwarded to the Law Commission for consideration.

It is not necessary, to discuss the details of the scheme envisaged in those proposals. The opinion of the Law Commission was urgently sought on those proposals, and the Law Commission sent to the Ministry an Interim Note<sup>2</sup> on those proposals.

5. On the materials available at that time, and as then advised, the Commission could not agree with those proposals<sup>3</sup>. The main considerations that weighed with the Commission were, (i) the absence of a general principle at the root of the scheme, (ii) the need for caution before following any law that might have been enacted elsewhere, (iii) the difficulty of the categorisation of murders, (iv) the presence of many anomalous features in the actual scheme in its details, (v) the absence of any strong necessity for disturbing the existing law in India, under which the court already possesses the *discretion* to award the sentence of death or the lesser punishment of imprisonment for life, and (vi) doubts as to whether the proposals revealed a reasonable classification, which could stand the test of article 14 of the Constitution.

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1 See the questionnaire issued by the Commission.

2 The note was sent, under the signature of the Secretary to the Law Commission, to the Ministry of Home Affairs, on 27th December, 1962. The note represented the views of all the then members of the Commission, except shri Niren De, who could not attend the Commission's meeting of the 17th December, 1962, at which the note was discussed.

3 Paragraph 4, *supra*.

The Commission, therefore, after emphasising that it would have preferred to offer its opinion on the proposals after collecting material on the large question of abolition, expressed itself against the acceptance of the scheme of categorisation.

#### TOPIC NUMBER 4

##### *Procedure followed*

6. The procedure which the Commission followed in its deliberations on this subject may be set out briefly. Procedure followed.

On receipt of the copy of the debates in the Lok Sabha<sup>1</sup> the necessary materials for a preliminary study were collected. It was decided that a questionnaire should be issued. The questionnaire<sup>2</sup> was settled at the Commission's meeting, and copies sent to State Governments, High Courts, the Supreme Court Bar Association, High Court Bar Associations, and other interested persons and bodies. Copies were also sent to Members of Parliament and of State Legislatures, every Judge of the High Court (individually), District Bar Associations, Zila Parishads (as also to other persons and bodies, who wished to express their views on the subject). A great mass of material was received, and the tabulation of the replies, prepared in the Commission, extended to several volumes.

7. Further material for study had been collected in the meantime. A draft Report was also prepared. The subject was discussed at length in the meetings of the Commission. The present Report is based on the conclusions which the Commission has arrived at, after a consideration of the various issues, in the light of the materials collected.

#### TOPIC NUMBER 5

##### *Materials studied*

8. The Commission has, in its study of the subject, received very valuable assistance from the reports of Commissions or Committees appointed in other countries to consider this subject. Special mention must be made of the comprehensive and thorough report of Royal Commission on Capital Punishment<sup>3</sup>. In addition, the report of the Joint Committee of the Canadian Senate and House of Representatives<sup>4</sup> on capital punishment, and the Report of

<sup>1</sup> Paragraph 2, *supra*.

<sup>2</sup> The questionnaire is given separately.

<sup>3</sup> Report of the Royal Commission on Capital Punishment (1953), Cmd 8972.

<sup>4</sup> Report of the Joint Committee of the Senate and House of Commons (Canada) on Capital Punishment, dated the 27th June, 1956 (Third Session—22nd Parliament).

the Ceylon Commission on the subject<sup>1</sup> brought out several aspects which might otherwise have been missed. The Commission had also before it the debates that took place in our Parliament on the subject at various times, in connection with Bills or resolutions for the abolition of the death penalty, and the discussions in Parliament, bearing on various aspects of the problem, have been instructive.

9. The (English) Homicide Act, 1957<sup>2</sup>, the discussions that took place in the House of Commons and the House of Lords before the passing of the Act, the studies that have been published as regards the working of the Act, and the case law pertaining to several legal questions that arose under the Act, were also gone into. In 1965, relevant provisions of the Homicide Act were temporarily repealed by the Murder (Abolition of Death Penalty) Act, 1965<sup>3</sup>, and we have considered the available material relating to the latter Act also.

10. The replies received to the Questionnaire issued by the Commission on the subject<sup>4</sup> not only furnished guidance on many points, but supplied rich material, the value of which was enhanced because of the practical experience possessed by many of the persons who sent the replies.

11. Literature on the subject, which is abundant, has been gone through. Available statistical material, contained in official publications, was before the Commission, and figures on certain aspects have been obtained from the Supreme Court, High Courts, State Governments, etc. And, lastly, the excellent brochure brought out by the United Nations on Capital Punishment<sup>5</sup> has been of great use to the Commission.

## CHAPTER II

### MOVE FOR ABOLITION

#### TOPIC NUMBER 6

##### *History of the abolition move in India*

History of the abolition move in India (1953-1963). 12. The question of abolition of death sentence was raised in the old Legislative Assembly in 1931, when Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for offences under the Indian

<sup>1</sup> Report of the Commission of Inquiry on Capital Punishment (Ceylon) (September, 1959), (Sessional Paper XIV—1959).

<sup>2</sup> Relevant provisions of the Homicide Act, 1957 (5 and 6 Eliz 2 c. 11) are temporarily repealed by the Murder (Abolition of Death Penalty) Act, 1965 (Chapter 71).

<sup>3</sup> The Murder (Abolition of Death Penalty) Act, 1965 (Chapter 71).

<sup>4</sup> Paragraph 6, *supra*.

<sup>5</sup> United Nations, Department of Economic and Social Affairs (1962) Code No. ST/SOA/SD/9, "Capital Punishment".



Penal Code. The Bill was introduced on the 27th January, 1931, and on the 17th February, 1931, a motion for circulation was made. The motion was negatived after the reply of the then Home Minister Sir James Crerar. The mover, in support of his motion, cited the examples of other countries which had abolished the death sentence, pointing out that the abrogation of death penalty had not landed human society into chaos, and argued that capital punishment had a demoralizing effect on the human mind. The dangers of conviction of innocent persons and the misery caused to the wife and children of the condemned man, were also dwelt upon. The following point was made in this connection:—

“Every human judgment is liable to be mingled with error, and the torture of knowing that a man had been hanged through what he believed was a blunder is among the most vivid memories of Lord Carigmyle, the famous Scottish Judge, better known as Lord Shaw of Dunfermline, who became a confirmed opponent of capital punishment. (Amrita Bazar Patrika, dated 12th June, 1930). Sir, in my own province of Bihar, some time back, as many as five persons were condemned to death, and the sixth to be transported for life, by the Sessions Judge of Shahabad, on a charge of murder in a case which was got up by a Sub-Inspector of Police. Subsequently, owing to the attitude taken by the local public, whose conscience was shocked, an elaborate official inquiry had to be instituted, which showed that the case which had ended in the conviction of the accused for murder was entirely false. The Local Government was satisfied by evidence which was subsequently discovered that the case was altogether false and concocted and directed the release of the condemned persons. The Sub-Inspector of Police concerned and three other persons, who were found to be implicated in this remarkable conspiracy, were hauled up before the Patna High Court, and convicted. (Searchlight, dated 22nd January, 1930).”

13. The Home Member, however, in his reply pointed out, first that in many countries death sentence had been restored after abolition (He cited the examples of France and Germany); secondly, that in the abolition countries, the enactments abolishing death sentences were made after a very long period of experiment; thirdly, that in his experience as Home Member and from the familiarity he had gained with homicides throughout the length and breadth of India, he could recite to the House “crimes of so dreadful a character that one is presented with the very pressing question whether in cases of that kind any punishment other than capital punishment could on any theory of crime be regarded as the proper punishment”.

1 Legislative Assembly Debates (1931), Vol. 1, page 949.

Fourthly, he also stated that the Indian law was more elastic than the English law, as it empowered the Courts to pass an alternative sentence. In this connection, he stated ".....it is my experience, both as an official in a Local Government and as an official and a Member of the Government of India, that that discretion is very frequently, and I think on the whole, very wisely and judiciously exercised."

14. We may now briefly trace here the history of the abolition move in India in recent times.

15. We may first refer to the Bill introduced by Shri Mukund Lal Agrawal<sup>1</sup>, in the first Lok Sabha<sup>2-3</sup>.

The first reading of the Bill was moved on the 24th August, 1956, and the discussion was resumed and concluded on the 23rd November, 1956, when the Bill was *rejected* on the opposition of the Government.

Numerous points were put forth in the speech of the mover of the Bill<sup>4</sup>, which included a review of the position prevailing in other countries, and emphasised the futility of capital punishment as a deterrent and its primitiveness<sup>5</sup>.

16. Thereafter, Shri Prithvi Raj Kapur moved a Resolution for the abolition of capital punishment in the Rajya Sabha, in 1958<sup>6</sup>. The Resolution was *withdrawn* after debate; the mover observing, "The purpose of my Resolution is served; the ripples are created and it is in the air. By votes such delicate things are not decided. Let that tomorrow be there which I have been promised."

1 Before this, on Shri M. A. Kazmi's Bill to amend section 302, I.P.C. certain discussions took place in 1952 and 1954, and, in the course of the discussion, some members, e.g., Shri Venkataraman from Tanjore, raised the question of abolition. See Bill No. 77 of 1952, (withdrawn), Lok Sabha Debates, 1952, Vol. III, Part II, No. 10, Cols. 391—392, dated 16th July, 1952; Vol. IV, Part II, No. 1, Cols. 490—412, dated 30th July 1952; Lok Sabha Debates, 1954, Vol. II, Part II, dated 12th March, 1956, Cols. 2054—2058; and Vol. III, Part II, Cols. 3146—3160, dated 26th March 1954.

2 Bill No. 24 of 1956 (Lok Sabha). See Lok Sabha Debates, 1956, Vol. I, Part II, Col. 3538, dated 23rd March, 1956; Lok Sabha Debates, Vol. VII, Part II, Cols. 4345—4388, dated 24th August, 1956; and Lok Sabha Debates Vol. XI, Part II, Cols. 916—986, dated 23rd November, 1956.

3 For details, see Agrawal "Capital Punishment abolition move in India", A.I.R. 1958 Journal 69, at page 73.

4 Shri M. L. Agrawal.

5 See also discussion in this Report, under "Arguments for Abolition" paragraph 152 *et seq. infra*.

6 See Rajya Sabha Debates, 25th April, 1958, Cols. 431 to 442 and 444 to 528.

17. A Resolution for the abolition of capital punishment was moved in 1961 in the Rajya Sabha<sup>1</sup>, by Smt. Savitry Devi Nigam, but that was *negatived* after discussion.

18. After this, Shri Raghunath Singh's Resolution for the abolition of capital punishment was discussed in the Lok Sabha, in 1962<sup>2</sup>. The Resolution was withdrawn after discussion. Shri Harish Chandra Mathur had moved an amendment that the matter may be referred to the Law Commission. The Government gave an assurance that a copy<sup>3</sup> of the discussion that took place in the House would be forwarded to the Law Commission, which was seized of the question of examining the Code of Criminal Procedure and the Indian Penal Code, with a view to considering as to whether any changes are necessary therein.

Thereafter, in 1963, a question was put in the Rajya Sabha on the subject<sup>4</sup>. In the answers to the supplementaries on the question, Government gave an assurance that a copy of the debates that had taken place in the Rajya Sabha in 1961 on the resolution of Smt. Savitry Devi Nigam would be forwarded to the Law Commission<sup>5</sup>.

#### TOPIC NUMBER 7

##### *History of abolition move in England*

19. We may trace the history of the move for abolition in England. The number of capital offences in England in the 18th century was very large<sup>6</sup>. It is said<sup>7</sup>, that the crusade against capital punishment may, (so far as the modern period is concerned), be traced to the year 1764, when Beccaria wrote his essay on Crime and Punishment. His point of view, was<sup>7</sup>, that since man was not his own creator, he did not have the right to destroy human life, individually or collectively. Capital punishment, he said, would be justified only if the execution would prevent a revolution against a popularly established government, or was the only way to deter others from committing a crime.

History of the movement for abolition of capital punishment in England.

1 See Rajya Sabha Debates, 25th August, 1961, Cols. 1681 to 1784 and 8th September, 1961, Cols. 3780 to 3836.

2 Lok Sabha Debates, April 21, 1962, Cols. 307 to 365, particularly Cols. 354 and 355.

3 The copy was duly forwarded to this Commission.

4 See Rajya Sabha Debates, dated 19th December, 1963.

5 The copy was duly forwarded to this Commission.

6 See Radzindowicz, History of English Criminal Law (1948), Vol. I pages 611—659.

7 See Elizabeth Turtle, "The Crusade against Capital Punishment" (1961), page 2.

Committee  
of 1750.

20. In 1750, the House of Commons appointed a Committee to inquire into the state of the criminal laws with a view to their repeal or amendment. One of the recommendations which the Committee made was to replace the punishment of death for certain offences by "some other adequate punishments". The Bill implementing the recommendations of the Committee about death penalty was introduced and passed by the House of Commons, but rejected by the House of Lords.

Committee  
of 1770.

21. In 1770, on the motion of Sir William Meredith in the House of Commons, a Committee was appointed to consider the criminal laws so far as they related to capital offences, and the Committee, in due course, recommended the abolition of the death penalty provided under eight statutes then in force. Of these, two may be noted. There was one statute which declared that the concealment of the birth of a bastard child by the mother constituted a presumption of the guilt of the mother having murdered the child<sup>2</sup>, (unless the mother could prove that the child was born dead). There was also another statute in force at that time, whereunder, briefly, carrying away a woman of property against her will and marrying or defiling her was a capital offence<sup>3</sup>.

Some of the proposals were rejected by the House of Commons, including the proposals relating to the two statutes specifically mentioned above. The others were embodied in a "Penal Laws Bill", which was passed by the Commons; but was lost in the Lords by the prorogation of Parliament<sup>4</sup>.

Bentham.

22. Beccaria's views attracted the attention and support of Bentham. Though he agreed<sup>5</sup> that capital punishment produced a greater impression upon the public mind than any other mode, he maintained that this was not true in the case of the worst criminals who might be much more dismayed by perpetual imprisonment.

Romilly.

23. It was, however, Sir Samuel Romilly<sup>6</sup> who started a serious campaign for abolition and devoted himself primarily to attempting to influence Parliament to pass three Bills designed to repeal the death penalty for theft.

<sup>1</sup> Radzinowicz, History of English Criminal Law (1948), Vol. I, pages 399, 419, 421, 422.

<sup>2</sup> Concealment of Birth of Bastards Act, 1923 (21 Jac., 1, c. 27).

<sup>3</sup> Abduction of Women Act, 1486 (3 Hen. 7, c. 2).

<sup>4</sup> For details, see Radzinowicz, History of English Criminal Law (1948), Vol. I, Pages 427 to 445.

<sup>5</sup> For a summary of Bentham's views, see Radzinowicz, Criminal History of English Law (1948), Vol. I, pages 389, 392, 599.

<sup>6</sup> For details of Romilly's efforts, see Radzinowicz, History of English Criminal Law (1948), Vol. I, pages 313 to 336 and pages 497 to 513.

His argument was, that if the law was much less severe, juries would be more willing to convict. He could, however, succeed in getting the death sentence abrogated only in three types of cases. The campaign was carried on by Sir James Mackintosh after Romilly's death, and in March, 1819 his motion for a committee to study capital punishment was carried against the advice of Government by a majority of 19.

24. Accordingly, in 1819, a Select Committee of the House of Commons was chosen to study the criminal law relating to capital punishment. That Committee<sup>1</sup> recommended the abrogation of the death penalty for many crimes in respect of which the statutes imposing death penalty had become obsolete. A number of Acts were passed after the Report of this Committee, abolishing the death penalty for several offences. 1819 Committee.

25. Thereafter, there was a great campaign for the removal of death penalty for forgery. In 1834, John Bright began his attack on the death penalty, arguing that certainty of punishment was more important than severity, and contended that by practising capital punishment man was usurping a power belonging to God only. Another leader in the movement was Ewart, who became the leading advocate in the House of Commons of the abolition of capital punishment<sup>2</sup>. Bright.  
Ewart.

26. In 1833, a five-member Royal Commission was appointed, which gave its report in 1836. Its conclusion was, that the punishment of death ought to be confined to high treason, or (with some exceptions) to offences which consist in or are aggravated by acts of violence to the person or which tend to endanger human life. In 1837, a Bill was introduced in the House of Commons by Lord John Russell, for the removal of death penalty from 21 of the 37 offences which were capital when the Bill was passed. But, in the debates, there were some voices raised in favour of complete abolition of death penalty (even for murder). 1833 Commission.

27. In 1864, on a move made by Ewart, a Commission on Capital Punishment was appointed. The Commission had to consider the laws under which the death penalty was imposed and the method of infliction, and to report whether any changes were desirable. It sent questionnaires regarding death penalty, to almost all countries in Europe, and to some States in the United States, and took oral evidence also. The Commissioners were unable to agree upon the expediency of abolition or retention, but they did recommend the division of murder into degrees. 1864—1866 Commission.

<sup>1</sup> For details of the 1819 Committee, see Radznowicz, *History of English Criminal Law*, (1948), Vol. 1, pages 526 to 526.

<sup>2</sup> Elizabeth Turtle, "Crusade Against Capital Punishment" (1961), pages 8 to 10.

and concluded that death penalty should be retained only for murders in the first degree, that is to say,—

(i) murder deliberately committed with express malice afore-thought, such malice to be found as a fact by the jury, and

(ii) murder committed in or with a view to perpetration of specified felonies, namely, murder, arson, rape, burglary, robbery and piracy.

Public executions abolished.

Bills for abolition.

1886 Committee.

28. After the Report of the 1866 Commission, some proposals to divide murder were introduced, but without success<sup>1</sup>. Only, public executions were abolished, as recommended by the 1866 Commission. Bills were introduced in 1869, 1872, 1873, 1877, 1878 and 1881 without success, for the abolition of capital punishment. It is not necessary to go into details of the efforts made during these years in this connection. In 1886, a Select Committee of the House of Lords touched on the subject, but did not consider the feasibility of abolition<sup>2</sup>.

29. So far as the 20th century is concerned, the first legislative measure to be noticed is the Childrer: Act of 1908, which prohibited capital punishment<sup>3</sup> for persons under 16. But this was the only noticeable achievement in the period preceding the First War. After the war a noteworthy event was the Infanticide Act, 1922, under which a woman charged with causing the death of her newly-born child was to be punished for manslaughter instead of murder<sup>4</sup>. The most important event was the foundation of the National Council for Abolition of Death Penalty by a young man of 27, Roy Calvert, who educated the public on the subject by newspaper accounts, articles, radio broadcasts and books.

1930 Committee and 1938 Resolution.

30. Roy Calvert's book "Capital Punishment in the Twentieth Century" (1927) was the major factor in leading to the appointment of the House of Commons Select Committee on Capital Punishment (1930). The Report of that Committee (1931) stated, that capital punishment could be abolished without endangering life or property or impairing the security of society and recommended that for five years capital punishment should be abolished as an experimental measure<sup>5</sup>. It also made a number of recommenda-

<sup>1</sup> R. C. Report, pages 467 and 468.

<sup>2</sup> See Elizabeth Turtle, "Crusade against Capital Punishment", (1961), page 25.

<sup>3</sup> See now section 53 (1) of the Children and Young Persons Act, 1933 (23 and 24 Geo. 5 c. 12) prohibiting capital punishment on persons under 18 years, and section 16, Criminal Justice Act, 1948 (11 and 12 Geo. 6 c. 58).

<sup>4</sup> See, now, the Infanticide Act, 1938 (1 and 2 Geo. 6 c. 36).

<sup>5</sup> For details regarding the Committee of 1930, See Elizabeth Turtle, "The Crusade Against Capital Punishment", (1961), pages 34 to 44.

tions (to be implemented if the main recommendation to avoid death penalty was not implemented), regarding the McNaghten rules, (relating to the defence of insanity) death penalty for women and the restriction of death penalty to those who were 21 years or older. Government did not take any action on the report. Vyvyan Admas moved a resolution in November, 1938, in the House of Commons, for abolition of capital punishment for an experimental period of five years, which was carried by a majority of 114 to 89. But Government did not undertake any legislation on the subject<sup>1</sup>.

31. So far as the period 1950 to 1959 is concerned, the following extract from an article<sup>2</sup> gives an excellent account of the history of the movement for abolition of capital punishment in England.

In 1948, a clause was added to the Criminal Justice Bill, then before the House of Commons. This clause would have suspended the death penalty for five years. On any matter of importance to the Government or to the opposition the Party "Whips" are put on, obliging the members to vote in accordance with the decision of the Party. Capital punishment, however, has nearly always been regarded as outside party politics, and it has been the custom to leave any vote on the subject to the vote of all the members. On the vote on this clause, the then Labour Government advised members to vote against it, but it was carried on a free vote of the House. The House of Lords, while intimating that they would not have opposed a clause restricting the death penalty to the worst grades or degree of murder, rejected the clause. On the return of the Bill to the House of Commons that House substituted a clause limiting capital punishment to certain specified types of murder, but the House of Lords thereupon also rejected that clause. The Government then abandoned the clause, but appointed a strong Royal Commission,—not to advise whether capital punishment should be retained or abolished, but to advise whether it should be limited or modified, and if so how.

The Royal Commission sat for four years, heard innumerable witnesses and themselves visited Norway, Sweden, Denmark, Belgium, Holland and the United States to hear further evidence in those countries. In 1955 they reported. They said in their Report that "whether the death penalty is used or not, and whether executions are frequent or not, both death penalty States and abolition States show rates

<sup>1</sup> "As the vote was taken on a private member's motion, there was no way in the procedure of the Commons to compel Government to act on it". Elizabeth Turtle, "The Crusade against Capital Punishment", (1961), page 53, foot-note 36.

<sup>2</sup> Gardiner, "Capital Punishment in Britain", (1959) 45 American Bar Association Journal, 259.

which suggest that these are conditioned by other factors than the death penalty". And their general conclusion was as follows:—

"The general conclusion which we have reached is, that 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 rates or that its reintroduction has led to a fall". They recommended that the death penalty should be left to the jury to decide in each case. They added, with reference to this proposal, ".....its disadvantages may be thought to outweigh its merits. If this view were to prevail, the conclusion to our mind would be inescapable that in this country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty, and that the real issue is now whether capital punishment should be retained or abolished."

The Report of the Royal Commission led to a much wider knowledge in this country of the relevant facts and to an increase in the demand for the abolition of capital punishment. Many people here had not realised before that outside British territory the only civilised countries in Western world which retain capital punishment are France, Spain and some of the United States and that all other countries regard the imposition of death as a form of punishment both unnecessary as a deterrent and an anachronistic barbarity. Nor had they realised that the universal experience of abolition countries had been that the abolition of capital punishment does not in fact result in any increase in the homicide rate.

#### *The Death Penalty (Abolition) Bill*

In February, 1956, a resolution calling on the Government to introduce forthwith legislation for the abolition or suspension of capital punishment was carried in the House of Commons. When, in March, a private member introduced a Bill in the House of Commons to abolish capital punishment, the Conservative Government, in accordance with precedent, left the matter to a free vote of the House, while strongly advising the House, which had a Conservative majority, to vote against the Bill. The Bill was nevertheless carried on each of its three readings, and in July went to the House of Lords, which rejected the Bill on its second reading. Those who voted in favour on the second reading, however, included four of the judicial members of the House of Lords, the two archbishops and eight out of the nine bishops present; and it became clear that so many leading citizens of repute strongly felt that some change in the law must be made that the Government introduced its own Bill, which became the Homicide Act, 1957, which was passed into law, contrary to precedent, by means of the Conservative Party "Whips". It was a compromise.



32. Subsequent history of abolition in England is well-known, and need not be given in detail. On the 4th December, 1964, the Murder (Abolition of Death Penalty) Act, Bill was introduced by Mr. Sydney Silverman; after a long discussion the Bill was passed by both the Houses. It received the Royal assent on the 8th November, 1965. Under the Act<sup>1</sup>, no person shall suffer death for murder, and a person convicted of murder shall be sentenced to imprisonment for life<sup>2</sup>; where the person convicted of murder appears to the court to have been under the age of eighteen years at the time when the offence was committed, he is to be sentenced to be "detained during Her Majesty's pleasure", and if so sentenced, he is liable to be detained in such place and under such conditions as the Secretary of State may direct<sup>3</sup>.

33. On sentencing any person convicted of murder to imprisonment for life, the court may, at the same time, declare the period which it recommends to the Secretary of State as the *minimum period* which (in its view) should elapse before the Secretary of State may order the release of that person on licence under section 27 of Prison Act 1952, etc.<sup>4</sup>.

34. The Act<sup>5</sup> also provides, that a person convicted of murder shall not be released on licence under section 27 of the Prison Act, 1952, etc., unless the Secretary of State has, prior to such release, consulted the Lord Chief Justice of England or the Lord Justice General, as the case may be, together with the trial judge if available<sup>6</sup>.

35. The Act shall continue in force until the 31st July, 1970, and shall then expire, unless Parliament by affirmative resolutions of both Houses otherwise determines. Upon the expiration of the Act, the law existing immediately prior to the passing of this Act shall, so far as it is repealed or amended by the Act, again operate as if the Act had not been passed, and as if the said repeals and amendments had not been enacted<sup>7</sup>.

There are certain other detailed provisions, which are not relevant for the present purpose.

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1 The Murder (Abolition of Death Penalty) Act, 1965 (Chapter 71).

2 Section 1 (1).

3 Section 1 (6), amending section 53 of the Children and Young Persons Act, 1933 (Chapter 12).

4 Section 1 (2).

5 The Murder (Abolition of Death Penalty) Act, 1965 (ch. 71).

6 Section 2.

7 Section 4.

## TOPIC NUMBER 8

*Abolition move in United States of America and Central and South America*

Abolition  
move in  
U.S.A.

36. There has been a fluctuating tendency towards abolition in the United States. Most of the States have retained it, but in some States it has been abolished, either totally or for all offences except for treason.

37. The following extract from one work<sup>1</sup> shows the position in detail in the United States of America, in 1950.

"The States where death and death alone is the penalty for *murder* are Connecticut, Massachusetts, Nebraska, New Mexico, and Pennsylvania. Among other crimes punishable by *death alone* are: treason in Delaware<sup>2</sup>, Maryland and New York; arson in Delaware<sup>3</sup>, Maryland, and North Carolina, rape in Florida, Georgia, North Carolina, and Tennessee; and burglary in Delaware and North Carolina. It is to be observed, however, that the death penalty is rarely, if ever, inflicted for these crimes. Death or imprisonment are alternative punishments for murder in Alabama, Arizona, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming; for treason in Alabama, Arizona, Georgia, Mississippi, Montana, New Jersey, and West Virginia; for arson in Alabama, Louisiana, Mississippi, South Carolina, Vermont, Virginia, and West Virginia; for rape in Alabama, Delaware, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, Texas, Virginia, and West Virginia; for burglary or robbery in Alabama, Louisiana, and Virginia."

38. A brief summary of the existing position regarding capital crimes in the United States of America is given in one article<sup>4</sup> as follows:—

"There are six capital crimes under Federal law (murder, rape, bank robbery, kidnapping, treason, espionage) and some thirty under state laws (e.g. aiding a suicide in Arkansas or burning a railway bridge in Georgia), but in practice the death penalty is seldom carried out in the United States for offences other than (1) murder and (2) rape committed by a

<sup>1</sup> Scott, *History of Capital Punishment*, (1950), page 71.

<sup>2-3</sup> Delaware abolished the death penalty (See U. N. Publication Table II—page 74), but, in 1961, it re-instated it. See Clarence H. Patrick, "The Status of Capital Punishment" (1965 December) 56 J. Cr. L. Criminology, 397, 411.

<sup>4</sup> "Capital Punishment—A fading practice" published in "Time" dated 21st March, 1965, reproduced in McClellan, *Capital Punishment*, (1961) pages 24 and 25.

Negro in the South. Of the 97 men executed in the United States in 1958-59 under State laws, 81 were convicted of murder, 15 of rape (14 Negroes, one white, all in southern states), and one of armed robbery (a Negro, in Texas)."

39. The overall position regarding capital punishment in the United States as in 1961 is summarised in one article<sup>1</sup> as follows:—

"The death penalty may now (February, 1956) be imposed by forty-two States, the District of Columbia and the Federal Government. Of these, thirty-five States and the United States provide that the jury shall determine when the death penalty is to be imposed; four States provide that the jury may recommend the death penalty, but the Judge is not bound by the recommendation; and three States require capital punishment. Twenty-six of the thirty-five States (and the Federal Government) that allow the jury to determine punishment, divide murder into degrees and allow the death penalty only in the case of first-degree murder. Nine States abolished the death penalty but later restored it, with life imprisonment as an alternative. One State, Maine, abolished, restored and again abolished the death penalty."

40. The deliberations of the Royal Commission in England also led to a renewed move for abolition in the United States. The Society of Friends and the League to abolish Capital Punishment led to a number of interested groups which began to press for legislative action<sup>2</sup>.

41. In the year 1958, abolition Bills were introduced in 18 States of the U.S.A. and the State of Delaware abolished capital punishment on 24th March, 1958. That was as the result of the recommendation of a Committee of the Delaware Legislature, which recommended abolition<sup>3</sup>.

42. In the State of Massachusetts, a Commission of the Legislature was appointed in 1957 to study the subject. By a majority report, it urged abolition<sup>4</sup>. But the proposal for abolition seems to have been rejected<sup>5</sup>.

<sup>1</sup> Younger, "Capital Punishment—A Sharp Medicine Reconsidered," reproduced in McClellan, *Capital Punishment* (1961), page 14.

<sup>2</sup> Bedau, "Death Penalty Today", *Christian Century*, March 18, 1959, reprinted in McClellan, *Capital Punishment* (1961), page 99.

<sup>3</sup> McClellan, *Capital Punishment* (1961) page 37. Reasons given by the Delaware Committee are summarised at pages 41 to 43.

<sup>4</sup> Bedau, "Death Penalty Today", *Christian Century* March 18, 1959, reprinted in McClellan, *Capital Punishment* (1961) page 99 (For minority Report, McClellan, *see* page 72).

<sup>5</sup> U. S. News & World Report, 1960, March 7, pages 48 to 52, cited in McClellan, *Capital Punishment* (1961), page 11.

43. In the State of Oregon, the Legislature passed an abolition Bill which was endorsed by the Governor. Under the Constitution, a public referendum was required before abolition could be effected, and the Bill was placed on the ballot in the November 1958 election, but the proposal was defeated by 10,240 votes—about 2 per cent. of the total<sup>1-2</sup>.

44. In the State of New Jersey, Bills were introduced to abolish capital punishment in 1956, 1957 and 1958, but "died in Committee" by adjournment of the Legislature<sup>3</sup>.

45. In the State of California, a special Commission was established for investigating and studying the abolition of the death penalty in capital cases<sup>4</sup>. Interest in the subject was accentuated by the famous case of Caryl Chessman, whose execution was stayed for 12 years before he was finally executed on 2nd May, 1960<sup>5</sup>.

46. The Judiciary Committee of the House of Representatives, California, it is stated<sup>6</sup>, held a hearing of the witnesses for and against capital punishment for 16 hours. The proposal of the Governor of California (Mr. Brown) to abolish the death penalty<sup>7</sup> was rejected by eight votes against seven.

47. In 1963, Michigan abolished the death penalty<sup>8</sup>.

48. In 1959 or 1960, besides the States mentioned above, the States of Connecticut, Florida, New York, and Ohio also seem to have considered moves for abolition<sup>9</sup>.

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<sup>1</sup> Bedau, "Death Penalty Today", Christian Century, March 18, 1959 reprinted in McClellan, Capital Punishment (1961), page 11.

<sup>2</sup> Later, however, some States including Oregon seem to have abolished or limited it. See Clarence S. Patrick, "Status of Capital Punishment—A world Perspective", (Dec. 1965) 56 Journal of Criminal Law, Criminology and Police Science, 397, 411, foot-note.

<sup>3</sup> Bedau, "Death Penalty Today", Christian Century, March 18, 1959 reprinted in McClellan, Capital Punishment (1961), page 101.

<sup>4</sup> House Report No. 2575 (California).

<sup>5</sup> Article in "Time", 21st March, 1960, "Justice: The Chessman Affair", reprinted in McClellan, Capital Punishment, (1961), page 115; also see *ibid*, pages 120 and 121.

<sup>6</sup> Joyce, Right to Life (1962), page 33.

<sup>7</sup> The Governor's Message is printed in the "Californian", May, 1960 pages 1, 11 and 12, reproduced in McClellan, Capital Punishment (1961) page 112.

<sup>8</sup> See Clarence H. Patrick, "The Status of Capital Punishment—A World Perspective" (December 1965), 56 Journal of Criminal Law, Criminology and Police Science, 397, 405, foot-note 4.

<sup>9</sup> U. S. News and World Report, 1960, March 7, pages 48 to 52, cited in McClellan, Capital Punishment (1961), page 11.

49. It is understood, that recently the States of Oregon, Iowa, West Virginia, Vermont, and New York have abolished or limited the death penalty<sup>1</sup>.

50. While several countries in Central and South America abolished capital punishment towards the end of the 19th century, a few returned to it in the present century. Central and South America and Mexico.

Thus, Mexico, after abolition in 1928, re-introduced the death penalty in 1943 for crime arising from highway banditry<sup>2</sup>. Peru also, after abolition, re-introduced it in 1949, for crimes arising from highway banditry<sup>3</sup>.

51. Amongst the other countries in Central and South America which abolished the death penalty (except for military offences or very unusual crimes) are Argentina (1922), Dominican Republic (1924), Brazil (1946), Colombia (1863), Venezuela (1864), and Uruguay (1877)<sup>4</sup>.

#### TOPIC NUMBER 9

##### *Capital Punishment—Abolition in Europe, Australia and New Zealand*

52. The move for reform of the law relating to capital punishment in Europe may be regarded as having started with Beccaria, who published his famous Essay on crimes and penalties in Italian in the latter half of the 18th century. His main argument was, that man had no right to dispose of a life which he had not granted to another, and that this right did not belong even to society as a whole. Death penalty amounted to a war declared by one man over the whole nation, and if the penalty was neither useful nor necessary, as he sought to prove, then it must be abolished. "Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical."<sup>5</sup> When he wrote, the modes of execution which were prevalent in Europe were many and various, and the main effect of his writings was to humanise those modes<sup>5</sup>. The move for abolition gathered momentum by the efforts of de Sellon, a Swiss who pleaded before the Geneva Grand Council to set an example to Europe by abolishing death penalty. He also invited essays on the subject. The essays submitted in response to his invita- Capital Punishment—abolition in Europe and Australia.

<sup>1</sup> Clarence H. Patrick, "The Status of Capital Punishment : A world Perspective", (1965 December) 56 Journal of Criminal Law, Criminology and Police Science 397, 411, foot-note 12.

<sup>2</sup> Joyce, Right to Life (1962), pages 76, 78 and 79.

<sup>3</sup> Based on Joyce, Right to Life (1962), pages 76, 78 and 79.

<sup>4</sup> Beccaria, quoted in Scott, The history of Capital Punishment (1950), page xiv.

<sup>5</sup> Joyce, Right to Life (1962), pages 70 and 71.

tion were numerous, of which those of Lucas (a future Inspector General of French Prisons) and of Lamartine deserve mention. The former regarded abolition as the essential point of departure for any scheme of criminal reform, while the latter put this question "Must society and a criminal watch each other for ever to see which will be the first to cease to shed blood?" Considerable literature was published in Italy, France and Sweden on the subject. In the French Constitution of 1948, death penalty was abolished for political cases, and in the French Criminal Code of 1832 the number of capital crimes was reduced and other reforms made. Reforms followed in some Swiss Cantons also.

53. The 19th century may perhaps be described as an era of great strides in the direction of abolition. The following quotation from Joyce<sup>2</sup> gives a full picture of what took place in that century.

This movement continued steadily until the end of the century. Portugal, it may be surprising to discover, appears to have carried out no executions since 1843 and legally abolished Capital Punishment in 1867. This lead was followed by Saxony in 1868, the Netherlands in 1870, Maine (U.S.A.) in 1887, Costa Rica in 1880, Italy and Guatemala in 1889, Brazil in 1890, Nicaragua in 1892 and Honduras in 1894.

The Swiss experience will receive specific mention later, but it can here be recorded in the general sequence that the death penalty was abolished in Neuchatel in 1854, Zurich in 1869, Tessin and Geneva in 1871, Basle in 1872 and Soleure in 1874. Moreover, by a declaration of principle in the revised Federal Constitution of 1874 (Article 65), the death penalty was abolished, except in military law in time of war. At the same time, it is to be noticed that, in countries still retaining the death penalty, proposals were frequently introduced for its abolition and it was, in practice, applied less and less. For instance, while in Germany it was still retained in the penal code of 1871, the proportion of executions before the First World War was less than 1 per cent. of capital cases. In France, the President regularly reprieved those condemned and, for the first ten years of the present century, nearly 90 per cent. of sentences were commuted. Professor Jean Graven comments on these undoubted advances as follows: "It might seem that the question was almost closed and that the guillotine and the gallows would soon be relegated to the museum.... The death penalty, even for the most atrocious murders, seemed to be retreating before the advance of civilisation".

The movement was also gaining ground in the Nordic countries, where there had been no executions for many years. The abolition of the penalty in Norway, where it

<sup>1</sup> See Joyce, *Right to Life* (1962), page 73.

<sup>2</sup> Joyce, *Right to Life* (1962), pages 76 to 77.

had not been used for over a century, occurred in 1905, and was followed in Sweden in 1921, Denmark in 1930, Iceland in 1944 and Finland in 1949. Incidentally, there is no record of any condemned person having been executed in Finland since 1826, though the situation was radically changed, of course, during the course of Russo-Finish War in 1940. What happened in Norway, as a consequence of the Second World War, is reserved for comment below. In the case of Denmark, however, the death penalty was recently re-introduced for treason.

It need hardly be stressed that the Second World War and its aftermath of "retribution" played havoc with these healthy trends. On that account, no conspectus of such developments, covering the experience of so many countries, could possibly be presented in any logical or consistent manner, so none is attempted. (The Table in the Appendix<sup>1</sup> attempts a bird's eye view of the position at the present time, but is subject to explanations in the main text).

For instance, the Netherlands, gave up the penalty in 1870, but re-introduced it at the end of the Second World War; and, between 1945 and 1949, one hundred and twenty death sentences were pronounced. Belgium has carried out no non-military death sentences since 1863, but the penalty has not been legally abolished by any Act of Parliament. Portugal, as already mentioned, renounced the death penalty officially in 1867 and Spain did the same in 1932. But would any conscientious observer care to dogmatise on the practice of these two non-parliamentary dictatorships—especially in the latter case—in view of the serious inroads into personal freedom, associated with both these States, which have been the subject of frequent international concern or actual interventions?

In Italy—the birthplace and for many years the home of the modern science of criminology—no serious increase of crime was reported during the years from 1890 to 1926, when the death penalty was abolished. It was re-introduced by the Fascist regime, and abolition again decreed in 1944 and embodied in the Republican Constitution of 1947, where Article 27 declares that the purpose of penalties imposed by the courts shall be the re-education of the condemned person and that his treatment shall be humane. The death penalty must not be imposed, except under military law in time of war.

54. It would appear, that in Russia, death penalty was abolished in the mid-eighteenth century except for political offences, and was allowed as a rare measure in the penal codes of 1922 and 1926. It was abolished again in 1927 for

Capital  
punishment  
in Russia.

<sup>1</sup> The Appendix in Joyce's Book is not reproduced here.

common law offences except brigandage, but retained for grave political and military offences; it was replaced in 1947 during peace time by temporary internment. In 1950, traitors, spies and saboteurs were excepted from this leniency<sup>1</sup>.

55. The broad policy on the subject can be ascertained from the Principles of Punishment<sup>2-3</sup>.

In accordance with the federal legislation enacted in 1958 and now in force, Capital Punishment—by means of shooting—is permitted as an exceptional measure of punishment, before being completely abolished, for the following crimes: treason to the country, spying, "diversion", terrorist activities, burglary, *premeditated murder with aggravating circumstances, as these crimes are referred to in the provisions of the penal law of U.S.S.R. and the Republics of the Union* which determine responsibility for premeditated murder, and, in war-time or in war-circumstances, also for other particularly grave crimes in cases specially provided for by the legislation of U.S.S.R. Persons who have not reached, before committing their crime, the age of 18 years, cannot be put to death, nor women who are with child during their crime or at the moment of the judgment or on the day of the execution.

56. Position regarding Australia is this. Abolition took place in Queensland, (Australia) in 1962 (there being no executions since 1913), and in New South Wales in 1955 (there being no executions since 1939)<sup>4</sup>.

Abolition  
move in  
New Zealand.

57. Capital punishment has been abolished in New Zealand, except for treason<sup>5</sup>. The abolition came after a "chequered history" of abolition and restoration<sup>6</sup>. "It has been enforced and suspended and abolished, and reinstated and suspended again—a weather cock varying with every change of Government since 1935."<sup>7</sup>

#### TOPIC NUMBER 10

##### *Abolition Move in Canada*

Abolition  
move in  
Canada.

58. The history of the move for abolition in Canada and the reasons for the recent decision of the Government are

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- 1 Joyce, Right to Life (1962), pages 79 and 80.
  - 2 See translation of section 22, Principles of Punishment etc. (1958) in Joyce, Right to Life (1962), page 96.
  - 3 See also Appendix relating to Death Penalty in Russia.
  - 4 Joyce, Right to Life (1962), page 78.
  - 5 See section 74 (1) and 172, Crimes Act, 1961 (New Zealand).
  - 6 Detailed discussion about New Zealand will be found in this Report elsewhere, under "Deterrent effect".
  - 7 Mr. Hannan, Minister of Justice, in New Zealand H. R. Debates, dated 13th September, 1961, Col. 2206.



well set out by Hon. E. D. Pulton, Minister of Justice, in his speech on the second reading of Bill No. C-92, to amend the Criminal Code<sup>1</sup>. The relevant portion is quoted below:—

“In Canada attempts to alter the death penalty for murder began at least as far back as 1914, when Mr. Robert Bickerdike introduced Bills to abolish capital punishment in several sessions of the House of Commons beginning in that year. Although they were debated at length, none of them resulted in legislation. In 1924, Mr. William Irvine introduced a similar Bill which also failed of passage. In 1937 a Bill was introduced by Mr. Blair to provide that the sentence of death be executed in a lethal chamber rather than by hanging. This Bill was referred to a special committee which reported unfavourably on the proposal. In 1947 and again in 1958 the Canadian Institute of Public Opinion made two inquiries with almost identical results, 68 per cent. in favour of retaining capital punishment against 23 per cent. in favour of life imprisonment.”.

In 1950 and again in 1952 Mr. Ross Thatcher introduced a Bill to abolish capital punishment. On the latter occasion he withdrew it on the undertaking from the then Minister of Justice that at the next session Parliament would be asked to set up a committee to go into the matter fully.

“The most authoritative recent exposition in Canada has been report of the joint committee of the Senate and House of Commons on capital punishment, corporal punishment and lotteries which was set up pursuant to the undertaking referred to. This Committee, which studied these matters for two years, in 1954 and 1955, recommended the retention of capital punishment, and in this respect the Bill before the house meets the recommendation of the committee. The committee also recommended that there be no degrees of murder. In this respect the Bill does not follow the recommendation of the joint committee.”.

The deep and continuing concern of Hon. members with this subject is shown by the debates that took place both last year and this year on certain private members' Bills. Although these debates took place on one Bill only, a Bill for the abolition of capital punishment for murder, the fact is that last year at least three Bills were introduced all differing in their proposals. While these Bills approached the subject from different directions, they did have in common an assumption of dissatisfaction with the

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<sup>1</sup> Canadian House of Commons, Debates, Session 1960-61, Vol. 5, pages 5220, 5222 *et seq.* (23rd May, 1961).

present position and a desire to bring the law in this connection in closer conformity with present day concepts of crime and punishment.

"I believe we owe much to the members who sponsored those Bills, the hon. member for York-Scarborough (Mr. McGee), the hon. member for Burnaby-Richmond (Mr. Drysdale) and the hon. member for Vancouver East (Mr. Winch), quite apart from the question whether or not we agreed with their specific proposals. I believe the ensuing debate on this Bill will be all the better for the thinking and formulation of ideas about this subject which those Bills stipulated.

"Although none of those Bills was adopted, an analysis of the debates which took place, as well as discussions with those who did not participate, show quite clearly that the majority of members in the house favour retention of capital punishment. It became equally obvious, however, that even among those opposed to abolition there are serious misgivings as to the present law and practice *governing the death penalty*. It therefore *seems proper* and desirable to bring about *some modification* of the law and practice.

"There is another thing which, in my submission, a review of these debates, as well as a study of all that has been said and written elsewhere, makes quite clear. It is that while the authorities are of some assistance and the debates have been of help, nevertheless this is an area where views are held with such depth of feeling that they are never going to be changed by mere weight of argument or statistics. Indeed, on the question of the deterrent effect especially, statistics cannot give a satisfactory answer; there are no statistics of murders not committed. But as in the case of all such problems, there has to be some finality, responsibility has to be taken and a decision has to be made, and this the Government has done.

"We have accordingly approached the question on broad grounds. We have first been mindful of the fact that the criminal law must endeavour to translate into an enforceable code the highest concepts of the moral and legal standards by which society desires to be governed, while at the same time, since it must command respect if it is to achieve this purpose, it must broadly reflect the actual state of public opinion.

"Second, we have taken account of the fact that the country, as reflected by opinion in this house, favours retention of capital punishment. Third, we have also recognised that even among those who favour retention there is a general feeling that the law should be modified. Finally, we have taken account

of the feelings against the rather artificial division of murder into degrees based on the means by which it is committed or the class of person who is killed.

"Thus while we have avoided the rather arbitrary and rigid classification found in the British homicide Act, we have put more emphasis on the element of *deliberation* as the requisite for capital murder than has been the case generally in the United States. We have also provided for an automatic review by the court of appeal, and for an appeal as of right to the Supreme Court of Canada. In short, we have applied our own thinking to the mass of authority and opinion available, and have produced a Bill which represents our views of the kind of law by which Canadians would wish to be and should be governed. On this broad basis we take full responsibility for presenting this Bill to the house."

59. The amendments made in 1961 to the Canadian Criminal Code are in the nature of a division of murder into capital and non-capital.<sup>1</sup> It may be noted, that the Joint Committee<sup>2</sup> which had gone into the subject was opposed to any scheme of "degrees of murder", because such a scheme had been opposed by all the law enforcement officers, and also because it shared the conclusion of the Royal Commission on the point (that such a division would not be satisfactory). The Government, however, after taking into consideration several factors, thought it desirable to bring about some modification of the law, and introduced the Bill (to amend the Criminal Code), which has now become law.

Recently, a Bill was moved in Canada to abolish capital punishment. It will be sufficient to quote a summary of the debate:—

"The best debate of the sessions was on a Bill introduced by a private member for the abolition of capital punishment. Since the Government permitted a free vote, party lines were split on the issue and a series of excellent speeches were delivered by supporters and opponents of abolition before the Bill was defeated by 143 votes to 112. One interesting feature of the vote was that support for the retention of the death penalty came mainly from members for the rural constituencies, and urban members contributed most of the minority. The verdict of the House of Commons leaves the Government in a difficulty as 18 out of 23 members—including Mr. Pearson and his

<sup>1</sup> See comparative material—1961 amendments to the Canadian Criminal Code.

<sup>2</sup> Canadian Report (Report dated 27th June, 1956 of the Joint Committee of the Canadian Senate and House of Commons on Capital Punishment), pages 17 and 18, paragraphs 70 and 71.

<sup>3</sup> The Round Table, (The Commonwealth Quarterly) (July 1966), Number 223, under Canada 296 and 300.

4—122 *MofLaw*.

Solicitor-General, Mr. Pennel, a fervent abolitionist who advises the Cabinet about appeals for commutations—voted in favour of abolition. There are 15 murderers awaiting Cabinet decision<sup>1</sup>.”

TOPIC NUMBER 11

*Abolition in Asia*

Abolition in Asia. 60. In a few countries of Asia, the abolition or limitation of *capital punishment* has been formally considered.

61. In Ceylon, capital punishment was suspended by the Suspension of Capital Punishment Act (20 of 1958) for 3 years. (The period of suspension was subject to further extension by resolution).

(In May, 1958, death penalty was temporarily prescribed for certain offences against property). The question of restoration was considered<sup>2</sup> by a Commission of Inquiry<sup>3</sup>.

The majority of the Ceylon Commission was opposed to restoration of the capital punishment. But it was restored<sup>4</sup>, by the Suspension of Capital Punishment (Repeal) Act (Ceylon Act 25 of 1959), assented to on the 2nd December, 1959.

62. In Japan, it is understood, proposals are under consideration to *limit* the death penalty to a lesser number of offences than at present<sup>5</sup>.

63. In Burma, the Penal Code (*i.e.* the Indian Penal Code which is still in force there) has been amended so as to limit the death penalty (so far as homicide is concerned) to only certain categories of murders<sup>6</sup>.

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<sup>1</sup> The Round Table, (The Commonwealth Quarterly) (July, 1966 Number 223, under "Canada" pages 296 and 300.

<sup>2</sup> Report of the Ceylon Commission of Inquiry on Capital Punishment Sessional Paper XIV—1959, published on 14th September, 1959.

<sup>3</sup> The Commission was constituted of Professor Norval Morris (Chairman, Sir Edwin Wijeyeratne K.B.E. Bar-at-Law, and Professor T. Nadaraja (Members).

<sup>4</sup> See comparative material, in this Report.

<sup>5</sup> See "A Preparatory Draft for the Revised Penal Code of Japan, 1961, (Ministry of Justice) (Japan) (1963), page 17 of the Introduction, and Draft sections 192, 204, 213, as compared with the existing Penal Code of Japan, sections 108, 119, 126.

<sup>6</sup> See comparative material.

## TOPIC NUMBER 12

*Abolition move in United Nations*

64. The subject of Capital Punishment attracted attention in the United Nations also, towards the end of 1957, when the Third Committee of the Twelfth U. N. General Assembly opened discussion on Article 6 of the Draft Covenant on Civil and Political Rights. The draft is quoted below<sup>1</sup>:—

Abolition in  
United Na-  
tions.

"1. No one shall be arbitrarily deprived of his life. Everyone's right to his life shall be protected by law.

"2. In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes pursuant to the sentence of a competent court and in accordance with the law."

65. The delegate for Uruguay moved an amendment, the effect of which was to prohibit the taking of life under any circumstances whatsoever, and this was supported by the delegate for Colombia. A lot of discussion took place on the drafting of the clause, and the Colombia-Uruguay amendment to the effect that "The death penalty shall not be imposed on any person" was voted down on 25th November, 1957 with nine in favour (Brazil, Colombia, Dominican Republic, Ecuador, Finland, Italy, Panama, Uruguay and Venezuela) and 51 against, with 12 absentions<sup>2</sup>.

66. The Article as finally approved by the Committee read as follows<sup>2</sup>:—

## "Article 6—

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

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime and not contrary to the provisions of this Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent Court.

3. When deprivation of life constitutes the crime of Genocide, it is understood that nothing in this article shall authorise any State Party to

<sup>1</sup> See Joyce, *Right to Life*, (1962), page 178.

<sup>2</sup> Joyce, *Right to Life* (1962), page 196.

derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Covenant."

This was approved by 55 votes to none, with 17 abstentions. (India did not abstain. It voted in favour)<sup>1</sup>.

67. Two years later, the same Third Committee discussed a draft resolution on Capital Punishment, the main effect of which was to invite the Economic and Social Council to request the Commission on Human Rights to undertake a study of the question<sup>2</sup>. This resolution was moved by Austria, Ceylon, Ecuador, Italy, Sweden, Venezuela and Uruguay. The resolution was adopted in substance, and on the 6th April, 1960 the Economic and Social Council decided to initiate a review of the various aspects of this question<sup>3</sup>.

### CHAPTER III

#### EXISTING LAW .

#### TOPIC NUMBER 13

#### *Existing provisions of the Indian Penal Code regarding Capital offences*

Existing provisions of the Indian Penal Code regarding capital offences.

68. So far as the Indian Penal Code is concerned, the sentence of death can be awarded for certain offences<sup>4</sup> under the Code. In most of these cases, the sentence of death is permissive, and the court has a discretion to award the lesser sentence of imprisonment for life. It is only in one case, namely, murder committed by a person under sentence of imprisonment for life<sup>5</sup>, that the sentence of death is obligatory.

<sup>1</sup> See Joyce, *Right to Life* (1962), page 197, foot-note 1.

<sup>2</sup> Joyce, *Right to Life* (1962), page 199.

<sup>3</sup> The study has since been published under the title "Capital Punishment", by the United Nations, Department of Economic and Social Affairs New York (1962), Document No. ST/SOA/SD/9.

<sup>4</sup> See paragraph 69, *infra*.

<sup>5</sup> Section 303 Indian Penal Code.

69. The relevant sections of the Indian Penal Code and the offences concerned are as follows:— Sections quoted.

Section 121 . . . . .	Waging war, etc., against the Government of India.
Section 132 . . . . .	Abetment of mutiny by a member of the armed forces.
Section 194, second para-graph.	False evidence leading to conviction of innocent person and his execution.
Section 302 . . . . .	Murder.
Section 303 . . . . .	Murder by a life-convict.
Section 305 . . . . .	Abetment of suicide of child or insane person.
Section 307 . . . . .	Attempt to murder by life-convict.
Section 396 . . . . .	Dacoity with murder.

70. The offence of murder may be dealt with in detail. The offence is defined in section 300 of the Indian Penal Code. That section provides, that except in the cases hereinafter excepted, "culpable homicide" is murder if the act by which the death is caused is done with the intention or knowledge set out in the section. The definition of "culpable homicide" is given in section 299. The sections are set out below, omitting the illustrations:—

"Section 299—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

*Explanation 1.*—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

*Explanation 2.*—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

*Explanation 3.*—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

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1 Sections 299 and 300, Indian Penal Code.

*Section 300*—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

*2ndly*.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

*3rdly*.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

*4thly*.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

*Exception 1*.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

*First*.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

*Secondly*.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

*Thirdly*.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

*Explanation*.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

*Exception 2*.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.



*Exception 3.*—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

*Exception 4.*—Culpable homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

*Explanation.*—It is immaterial in such cases which party offers the provocation or commits the first assault.

*Exception 5.*—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”

71. It is not necessary, for the present purpose, to enter into any lengthy discussion of the ingredients of each of the offences. Broadly stated, the distinction between the two offences has been very well put by Melville J. in a Bombay case<sup>1</sup>. In that case, the accused knocked his wife down, put one knee on her chest and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain. The wife died in consequence. The court held, that since there was no intention to cause death and the bodily injury was not sufficient in the “ordinary course of nature” to cause death, the offence committed was not murder, but culpable homicide. The following analysis of the two sections is contained in the judgment:—

Distinction between murder and culpable homicide.

*Section 299*

*Section 300*

A person commits culpable homicide, if the act by which the death is caused is done—

Subject to certain exceptions, culpable homicide is murder if the act by which the death is caused is done—

- |  |  |
|--|--|
| <p>(a) with the intention of causing death ;</p> <p>(b) with the intention of causing such bodily injury as is likely to cause death ;</p> | <p>of (1) With the intention of causing death ;</p> <p>(2) With the intention of causing such bodily injury as the offender <i>knows to be likely to cause the death of the person to whom the harm is caused;</i></p> <p>(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted <i>is sufficient in the ordinary course of nature to cause death ;</i></p> |
|--|--|

- (c) with the knowledge that the act is likely to cause death. (4) with the knowledge that the act is so *imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

"I have underlined *here* the words which appear to me to mark the differences between the two offences.

"(a) and (1) show that where there is an intention to kill, the offence is always murder.

"(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result<sup>1</sup>, it is murder.

"The essence of (2) appears to me to be found in the words which I have underlined *here*. The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of constitution, or immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death. The illustration given in the section is the following.

'A knowing that Z is labouring under such disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health.'

"There remains to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4), already noticed. It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist

<sup>1</sup> These observations should be taken as referring only to clause fourth. If they are not so taken, the criticism in *Heji Khudu v. Emp.* A.I.R. 1939 Sind 57, 60 (per Davis C.J.) that they may mislead, may be valid.

or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.”

72. Certain propositions, though they may appear to be elementary, are well worth an emphasis in this context:— Some fundamental propositions.

(i) Culpable homicide is a generic offence. It will amount to murder if the conditions laid down in section 300 are satisfied.

(ii) “It does not follow that a case of culpable homicide is murder because it does not fall within any of the Exceptions in section 300. To render culpable homicide murder, the case must come within the provisions of clauses (1), (2), (3) and (4) of section 300.”

(iii) Culpable homicide may, therefore, not be murder—

(a) where, notwithstanding that the mental state is sufficient to constitute murder, one of the Exceptions to section 300 applies, or

(b) where the mental state, though within the description of section 299, is not of the special degree of criminality required by section 300.

(iv) Even where the case clearly falls under section 300, Indian Penal Code, and does not fall within the exceptions to that section, the sentence of death is not mandatory; it is one of the *alternative sentences*<sup>1</sup>.

73. For the present purpose, it is unnecessary to discuss the position under the old section 367(5), Code of Criminal Procedure, 1898 (as it stood before the Amendment of 1955) whereunder, in the case of a capital offence, if the court sentenced the accused to any punishment other than death, it had to state its reasons for not passing the sentence of death. That provision has now been repealed<sup>2</sup>.

74. The four stages to be observed in an approach to the question of culpable homicide and murder, were pointed out in a Rangoon case<sup>3</sup>. The discussion there is a useful one, and may be summarised as follows:— Stages of approach in culpable homicide and murder.

(i) The accused must have done an act by doing which he has caused the death of another person.

<sup>1</sup> Peacock C. J. in *Queen v. Sheikh Bazu*, (1867) 8 W.R. (Criminal) 47, 51 (F.B.).

<sup>2</sup> Section 302, Indian Penal Code.

<sup>3</sup> As an example of the controversy which was caused by this provision see *Emp. v. Dukari Chandra Karmakar*, A.I.R. 1930 Cal. 193.

*Nga Chit Tin v. The King*, A.I.R. 1939 Rangoon 225 (Sharpe J).

(ii) His act must amount to culpable homicide.

(iii) It must further be established, that the act was done with one of the three intentions or with the knowledge set out in section 300.

(iv) It must then be considered whether on the facts of the particular case, it is brought down from the higher plane of murder to which it has been raised, to the lower plane of culpable homicide not amounting to murder, by reason of the act falling within any of the *Exceptions* to section 300.

75. The sections relating to culpable homicide and murder were thus analysed:—

“*Stage 1*: The first stage requires that it shall be established to the satisfaction of the Court that the accused person has done an act by doing which he has caused the death of another person. There is, of course, no difficulty in appreciating that that is the starting point, but that is almost the only step in such cases which is invariably taken correctly. Even this first stage may give rise to difficulties, and such cases as 1937 I.L.R. 384<sup>2</sup>—I refer to the Full Bench decision—may have to be considered. But difficulties at this first stage are infrequent. From the very next stage onwards however difficulties frequently appear to creep in, as they have done in all the cases now under appeal.

“*Stage 2*: The trial Court must next consider whether that act on the part of the accused amounts to culpable homicide. More than one Judge of a Court of Session has considered that the second step is immediately to address his mind to the question whether the accused is guilty of murder as defined in section 300, Indian Penal Code. That almost invariably leads to confusion. Section 299 defines culpable homicide and section 300 says that, except in certain specified cases, culpable homicide is, in certain events, murder. In fact it is not out of place to describe the two offences defined in sections 299 and 300 as “culpable homicide not amounting to murder” and “culpable homicide” as defined in section 299. Therefore it is necessary in every case of the class with which I am now dealing to inquire, as the second step in the proceedings, whether culpable homicide has or has not been committed by the accused, for unless it has been, no

<sup>1</sup> *Nga Chai Tin v. The King*, A.I.R. 1939 Rang. 225.

<sup>2</sup> *The King v. Abor Ahmad*, (1937) 24 A.L.R. Rang. 396 : 171 I.C. 574 : 38 Cr. L. J. 1097 : 1937 I.L.R. 384 (F.B.).

question of murder can arise. Therefore I will at once make clear what culpable homicide is.

"Section 299 enacts that the doing of an act which causes death is culpable homicide if it is done either (i) with one of two intentions, that is to say, with the intention of causing either (a) death or (b) such bodily injury as is likely to cause death, or (ii) with the knowledge that death is likely to be caused by such act."

"My headings (i) and (ii) are, it will be noticed, alternative, the one to the other so that it follows that culpable homicide may be committed without any intention on the part of the accused, if he has the knowledge indicated under my heading (ii). Section 304 lays down what shall be the punishment for culpable homicide not amounting to murder; if the act is merely done with the knowledge that death is likely to be caused thereby and without either of the intentions mentioned in my heading (i), *supra*, [that is to say, if the case falls under my heading (ii), *supra*] a lesser punishment is provided under the latter part of section 304. If it is not possible to hold in any given case that the act which caused death was done either with one of the two necessary intentions or with the necessary knowledge, culpable homicide (and, *a fortiori*, murder) has not been committed, and other sections of the Indian Penal Code (for example, sections 321 and 322) must be taken into consideration with a view to seeing what (if any) other offence the accused has committed.

"Stage 3: Section 300 now, and only now, comes into operation. If it is established that an act which caused death was done either with one of the two intentions or with the knowledge necessary to cause that act to amount to culpable homicide, then, and only then, section 300 comes into operation, and therefore the next thing to do is to ascertain whether such act was done either (i) with one of three intentions, that is to say, with the intention of causing either (a) death, or (b) such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm was caused, or (c) such bodily injury as was sufficient in the ordinary course of nature to cause death, or (ii) (A) with the knowledge that the act was so imminently dangerous that it must, in all probability, cause either (a) death, or (b) such bodily injury as was likely to cause death, and (B) without any excuse for incurring the risk of causing either (a) death or (b) such bodily injury as was likely to cause death."

76. The judgment<sup>1</sup> then proceeds to analyse the ingredients as follows:—

“It will have been observed that an intention to cause death is a part both of section 299 and also of section 300. Therefore if in the earlier part of the inquiry, under section 299, which I have called the second stage, it appears that the act was done with the intention of causing death, then stage 3 will present no difficulties, for, it at once amounts to murder, under section 300, unless the case comes within one of the exceptions in the latter section. But if the act is not done with the intention of causing death, but is done either with what may be called the alternative intention—my heading (i) (b) under section 299—or with the knowledge mentioned in section 299—my heading (ii) under that section—then it must be ascertained whether it was done either with one of the intentions which I have marked as (i) (b) and (i) (c) under section 300, or with the knowledge, but without the excuse, mentioned in that section. Hence, it will be seen that intention is not a necessary ingredient of murder. If the act is done with the knowledge that death is likely to be caused thereby, it is culpable homicide; and if it is done with the further knowledge that the act was so imminently dangerous that it must, in all probability, cause either death or such bodily injury as was likely to cause death, then that culpable homicide is murder. Thus knowledge is sufficient to establish murder without any intention whatever being proved.”

Principle  
behind exist-  
ing capital  
offences.

77. The principle behind existing capital offences may be considered. At first sight, the capital offences listed above<sup>2</sup> may not show any common element; but a close analysis reveals that there is a thread linking all these offences, namely, the principle that the sanctity of human life must be protected. It is the “wilful exposure” of life to peril that seems to constitute the basis of a provision for the sentence of death<sup>3</sup>.

78. This principle is evident in the case of offences under sections 302 and 303, and is reflected in the other offences also. Thus, the offence under section 121 is a capital one, because it threatens the very existence of an organised Government, which is essential for the protection of human life. The offence under section 132 is, again,

<sup>1</sup> Paragraph 75, *supra*.

<sup>2</sup> Paragraph 69, *supra*.

<sup>3</sup> Compare the discussion in the Royal Commission's Report, page 161, paragraph 470, and the quotation there from the Fourth Report of the Commissioners on the Criminal Law, though the discussion there is confined to the offence of *murder*.

a capital one, because it aims at the destruction of the very forces which are intended to protect the machinery of the State in the last resort. Again, the offence under section 194, second paragraph is punishable with death, on the logic that the person concerned gave false evidence with the intention of, or knowledge of likelihood of, deprivation of innocent human life. In the case of the offence under section 305, the crime is really one of homicide, but committed indirectly; the offender does not take the life with his own hands, but encourages a person who cannot look after his own interests, to end his life. The hand that does the actual act of killing is merely a tool in the hands of another. The person killing himself is one around whom the law is compelled to throw its special cloak of protection.

79. The offence under section 307, Indian Penal Code is one where the attempt is not successful; the disregard of the sanctity of human life is, however, apparent here also, as is re-enforced by the requirement that the act must be such that if the offender by that act caused death, the offender would be guilty of murder (first paragraph of section 307). The sentence of death, however, can be awarded only where hurt is caused and the person offending is already under sentence of imprisonment for life (second paragraph, section 307). This last requirement is merely an illustration of the proposition that the law has not ruled out a consideration of the "individual". Thus, if A, after loading a gun, fires it at Z, *intending* to murder Z, A has committed the offence of an attempt to murder; if, by such firing, A wounds Z, then *hurt* has been caused; and if A is a person under sentence of imprisonment for life, he may be punished with death<sup>1</sup>.

80. The ingredient that the offender should be under sentence of imprisonment for life is common to sections 303 and 307, a special feature in section 303 being that the act of murder is complete and the sentence of death is mandatory.

81. By local amendment in Bengal, an offence under section 307, Indian Penal Code, first paragraph is, in certain cases, punishable with death. Sections 6(1) and 7 of the Bengal Criminal Law Amendment Act<sup>2</sup> are quoted below:—

"6(1) The Commissioners may pass upon any person convicted by them any sentence authorised by law for the punishment of the offence of which such person is convicted;

Bengal amendment relating to section 307.

Powers of Commissioners.

<sup>1</sup> This is a stronger case than that put in illustration (c) to section 307 Indian Penal Code.

<sup>2</sup> Bengal Criminal Law Amendment Act, 1925 (made by the Governor under section 72E, Government of India Act) (as amended) (No number given).

Provided that where the Commissioners convicted any person of any offence punishable under the first paragraph of section 307 of the Indian Penal Code, committed after the commencement of the Bengal Criminal Law Second Amendment Act, 1932, they may pass on such person a sentence of death or of transportation for life.

Application  
of Code of  
Criminal  
Procedure to  
proceedings  
of Commis-  
sioners.

7. The provisions of the Code, so far only as they are not inconsistent with the provisions of, or the special procedure prescribed by or under, this Act shall apply to the proceedings of Commissioners appointed under this Act, and such Commissioners shall have all the powers conferred by the Code on a Court of Sessions exercising original jurisdiction."

82. The offence under section 396, Indian Penal Code is a special case of vicarious liability in respect of the sentence of death, but even here it would not be difficult to discern, the principle of protection of human life; the section requires that there must be five or more persons, who are conjointly committing "dacoity" (as defined in section 391 read with section 390), and that one of such persons must commit *murder in so committing dacoity*. Joint liability under this section does not arise unless all the persons are *conjointly* committing dacoity and the murder was committed in *so committing* a dacoity<sup>1-2</sup>.

83. The distinction between culpable homicide (section 299) and murder<sup>3</sup> (section 300) can also be utilised to show the principle behind the sentence of death, which is permissible only where the offence falls under the latter section. Leaving aside a detailed discussion of the points of difference between the two sections, which is unnecessary for the present purpose, it can be broadly stated, that in most cases, the gravity either of the *mens rea* or of the bodily injury caused or the higher probability of death would be found to be of great help in determining whether the offence falls under the one or the other. And it must be added, that even when the offence falls under "murder" (section 300), the court is not bound to impose the penalty of death; the lesser penalty can be imposed. This is only intended to leave room for the exercise of the discretion of the court, having regard to the peculiarities of the case and of the individual.

84. The various *Exceptions* to section 300, Indian Penal Code<sup>3</sup> take out cases which would otherwise fall within the category of murder, from that category, and put them back in the category of culpable homicide not amounting to

<sup>1</sup> On this point, see Mathura Thakur, (1901) 6 C.W.N. 72.

<sup>2</sup> See also discussion relating to vicarious liability; paragraphs 87 *et seq* *Infra*.

<sup>3</sup> Paragraph 70, *supra*.



murder. They also seem to illustrate the concern of the law to ensure, that death sentence is imposed only where the disregard of human life is evident. In *Exception 1* to section 300, this principle is shown by the ingredients of deprivation of the power of *self-control* by grave and sudden provocation. In *Exception 2*, it manifests itself in the requirement that the offender must have acted in *good faith*, and in private defence, and the death must have been caused without pre-meditation and without *any intention* of doing more harm than is necessary for such defence. In *Exception 3*, the requirement is that the offender must be a public servant or a person aiding a public servant acting for the advancement of public justice, and death must have been caused while the act was done in *good faith* and in the belief that it was lawful and necessary for the due discharge of the duty of the public servant and without *ill-will*. Though this may be treated as a special case, the requirements of good faith and absence of ill-will show, that regard for human life is still an important criterion. *Exception 4*, in each of its ingredients, exhibits this principle; the requirements of (i) absence of pre-meditation, (ii) sudden fight, (iii) the heat of passion upon a sudden quarrel, and (iv) the absence of undue advantage, etc. are intended to bring down the punishment in view of these special features.

*Exception 5*.—Murder of a person above the age of 18 years, who suffers death or takes the risk of death with his own consent—is another special case, but is still in harmony with the general proposition stated above; it requires the consent of the victim, and the consent must be a full and free consent of a normal human being (this being a proposition resulting from section 90). If the consent is not full and free, or is given by a person who is below age or otherwise abnormal, the *Exception* would not be satisfied, and the case would continue to fall under main section 300. The sentence of death would then be permissible, and the situation would be analogous to that dealt with in section 305, though not identical with it.

85. Some consideration of the offence of dacoity with murder seems to be desirable. An elaborate discussion on the subject is contained in the draft Report of the framers of the Penal Code<sup>1</sup>. Provisions on the subject were contained in Bengal Regulation 53 of 1803. The Bombay Regulation of 1827<sup>1</sup> also contained provisions on the subject. But, as a matter of fact, the germ of these provisions is contained in the elaborate provisions for highway robbery prescribed by the Muslim law of Crimes as administered in India<sup>2-3</sup>.

<sup>1</sup> See historical discussion.

<sup>2</sup> See historical material.

<sup>3</sup> See also Beaufort's Digest of Criminal Law (1846), page 37, paragraph 129.

86. The crime of *Sariqa* (larceny) was, under Muslim law, aggravated into highway robbery (*Sariqa-i-kubra*), and highway robbers were classified into four categories—first, those who were seized before they had robbed or murdered any person. Secondly, those who had committed robbery *only*. Thirdly, those who had committed *murder* without robbery, and lastly, those who had committed both robbery and murder. Robbers of the first class were to be imprisoned until they showed repentance, robbers of the second class were to suffer amputation of the right hand and left foot, if the share of each robbers amounted to ten dirhms. Robbers of the third class were to suffer punishment of *death* with or without amputation. Regarding robbers of the fourth class, the Ruler could order amputation and death, or death immediately, or crucifixion. *If any one among a gang of robbers committed murder*, all were liable to the penalty (of *death*), subject to certain exceptions<sup>1</sup>.

#### TOPIC NUMBER 14

##### *Vicarious or constructive liability*

Vicarious or  
constructive  
liability.

87. Liability to death sentence may arise in certain situations though the actual act of killing was done by another person. These cases may be referred to as cases of "vicarious" or "constructive liability", (though these terms may not be strictly accurate). Such cases fall under two categories; the first comprises those where "A" becomes liable for the *offence* committed by B, when A himself has not committed any substantive offence; the second comprises those where, both A and B are guilty of some substantive offence, but, by reason of some special feature in the act of B, A becomes liable for the higher sentence of death. In the former case, the substantive offence is attributed to A, while in the latter case, the liability for the sentence of death travels to A.

88. The important cases of such liability<sup>2</sup> under the Indian Penal Code seem to be these—

- |  |   |
|--|---|
| Section 34, Indian Penal Code (See also section 35). | Act done by several persons in furtherance of <i>common intention</i> .   |
| Sections 109 to 115, Indian Penal Code.              | <i>Abetment</i> .   |
| Section 120B, Indian Penal Code.                     | Punishment of criminal <i>conspiracy</i> .  |
| Section 149, Indian Penal Code.                      | Every member of unlawful assembly guilty of offence committed in prosecution of <i>common object</i> .  |
| Section 396, Indian Penal Code.                      | Dacoity with murder (Under section 396, if any one of five dacoits commits murder in committing dacoity, every one of them is punishable with death, etc.). |

<sup>1</sup> Bengal Revenue Consultations, December 3, 1790.

<sup>2</sup> Paragraph 87, *supra*.

89. The vicarious liability in all these cases<sup>1</sup> is justified on the ground that the person concerned is a party to the offence, though his physical participation is indirect. The *mens rea*, in this context, is represented by the requirement of "common intention" or of aid, conspiracy or instigation which constitutes "abetment" or of conspiracy *simpliciter*, or of "common object" or "conjoint" commission of a dacoity.

90. There is one section<sup>2</sup> whereunder vicarious liability arises in a case of house-breaking, etc., because another co-offender has caused death, etc. But here the person so vicariously liable is not sentenced to death.

91. Some discussion of two special cases of constructive liability seems to be called for, in view of their importance. The first is that under section 34, Indian Penal Code, which reads as follows:—

Section 34,  
Indian Penal  
Code.

"Section 34—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The question may be raised whether the application of this section in relation to murder leads to any hardship or injustice. Section 34 does not come into operation, unless there is a common intention and a criminal act is done by several persons in furtherance of that common intention. Joint liability, under section, is, therefore, the liability resulting from what has been called "the unity of criminal behaviour". The causing of death of one person at the hands of several by blows and by stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, is common in criminal experience as has been pointed out by the Privy Council. Though the section, as originally enacted, did not contain in the words "in furtherance of the common intention of all", they were added in 1870, simply to make the object clear<sup>3</sup>. The section does not postulate *identity* in act. But it requires a common intention and participation in crime. If several persons, set out together upon one common design be it murder or other crime, and each takes the part assigned to him, some to commit the act and others to watch at proper distance, etc., they are all (if the offence be committed), in the eye of the law "present at it", because

<sup>1</sup> Paragraph 88, *supra*.

<sup>2</sup> Section 460, Indian Penal Code.

<sup>3</sup> This phrase was used by Lord Sumner in *Barendra Kumar v. King Emperor*, 52 Ind. App. 40 ; I.L.R. 53 Cal. 197 ; A.I.R. 1925 P.C. 1, 9.

<sup>4</sup> *Barendra Kumar v. King Emperor*, A.I.R. 1925, P.C. 1, 5.

<sup>5</sup> See discussion in *King Emperor v. Brendra Kumar*, A.I.R. 1924 Cal. 257, 273 (Mookerji J.).

it was made a common cause with them, each man operating in his station at one and the same instant towards the same common end<sup>1</sup>.

92. Further, in a combination of this kind, the "mortal stroke", though given by one of the parties, concerned, is "in the eye of the law, and for sound reasons too, regarded as given by every individual present and aiding". The person actually giving the stroke, is "no more than the hand or instrument by which the others strike". The part each man takes, tends to give courtenence, encouragement and protection to the whole gang to ensure success of their common enterprise<sup>2</sup>. It is sufficient to hold a party as principal, if he acted with another in pursuance of the common design, and operated at one and the same time for the furtherance of the same pre-concerted end and was so situated as to be able to furnish aid to his associates with a view to ensuring success in the accomplishments of the common enterprise.

93. For the present purpose, it is not necessary to elaborate the meaning of each ingredient of the section, or to make an attempt to show how the section differs from other cognate sections dealing with abetment, unlawful assembly and so on<sup>4,5,6</sup>.

94. "Common intention" in section 34, Indian Penal Code, pre-supposes a pre-concerted plan, i.e., a prior meeting of minds, though it is not necessary that there should be a long interval between the plan and the act<sup>7</sup>. The common intention may even be developed on the spot<sup>8</sup>. Of course, the act must be "done". Some of the points regarding section 34 have been developed in the case noted below<sup>10</sup>.

1 Cf. Foster, Discourse on Crown Law (1809), page 350, cited by Mookerji J. in A.I.R. 1924 Cal. 257, 274 (Full Bench). The Full Bench case was approved by the Privy Council in A.I.R. 1925 P.C. 1.

2 Foster, Discourse on Crown Law (1809), page 351, cited by Mookerji J. in A.I.R. 1924 Cal. 257, 275 (Full Bench).

3 Foster, Discourse on Crown Law, (1809), page 350, cited by Mookerji J. in A.I.R. 1924 Cal. 257, 350 (F.B.).

4 As to the distinction between section 34 and section 114, see *Barendra Kumar v. King Emperor*, 52 Ind. App. 40 ; I.L.R. 53 Cal. 197 ; A.I.R. 1925 Privy Council 1.

5 As to the distinction between section 34 and section 149, see *Nanak Chand V. State of Punjab*, A.I.R. 1955 Supreme Court 274, and *Omr Prakash V. State*, A.I.R. 1956 All. 241.

6 As to the meaning of "common intention", see *Mahibub Shah V. Emperor* 52 I.A. 340 ; I.L.R. 52 Cal. 197 ; A.I.R. 1945 P.C. 118.

7 Generally as to common intention, see *Rishideo, V. State of U.P.*, A.I.R. 1955 S.C. 216 ; *Pandurang, V. State of Hyderabad*, A.I.R. 1955 S.C. 216 ; *Ibra Akanda V. Emperor*, A.I.R. 1944 Cal. 339.

8 *Kripal V. State of U.P.*, A.I.R. 1954 S.C. 706

9 *Ramayya V. State of Bombay*, A.I.R. 1955 S.C. 287.

10 *Bashir v. State*, A.I.R. 1953 All. 668, 670 to 676, paragraphs 8-24 (discuss English cases also) (Decai J.).

95. Persons liable under section 34, Indian Penal Code would, at common law also, be liable for the substantive offence committed in pursuance of the common design. If several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all<sup>1</sup>. A participation in an offence which is the result of a concerted design to commit a specific offence, is sufficient to render the participant a principal in the second degree<sup>2</sup>.

96. This<sup>3</sup> is the general rule. So far as *murder* is concerned, a modification in respect of *sentence* was made by section 5(2) of the Homicide Act<sup>4</sup>. But, as provisions of that Act relating to "capital murder" are now temporarily repealed by the Murder (Abolition of Death Penalty) Act, 1965, it is unnecessary to discuss the earlier Act, in detail. It would suffice to quote the relevant provisions<sup>5</sup> which are as follows:—

"5. (1) Subject to sub-section (2) of this section, the following murders shall be capital murders, that is to say,— Death penalty for certain murders.

(a) any murder done in the course or furtherance of theft;

(b) any murder by shooting or by causing an explosion;

(c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of affecting or assisting an escape or rescue from legal custody;

(d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;

(e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.

(2) If, in the case of any murder falling within the foregoing sub-section, two or more persons are guilty of the murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous

<sup>1</sup> *Macklin* (1838) 2 Lewin 225; *Turner and Armitage*, *Cases in Criminal Law* (1964), pages 232 and 233.

<sup>2</sup> See Archbold, *Criminal Pleadings*, etc. (1962), paragraphs 4123 and 4127.

<sup>3</sup> Paragraph 95, *supra*.

<sup>4</sup> Homicide Act, 1957 (5 and 6 Eliz. 2 c. 11).

<sup>5</sup> Sections 5 (1) and 5 (2), Homicide Act,

bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him; but the murder shall not be capital murder in the case of any other of the persons guilty of it.”.

97. Even as regards manslaughter, if two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife or other weapon *without the knowledge or consent* of the other, only he who struck with the weapon would be responsible for the death resulting from the blow given by it<sup>1</sup>.

98. The net result, therefore, under section 34 is that the common intention and participation in the crime make the person concerned guilty of the offence. Whether, however, he should be punished with the highest punishment provided for the particular offence is not a matter on which section 34 has the final say. The question of sentence is entirely in the discretion of the court. On the one hand, the mere fact that the person liable by virtue of section 34 did not actually inflict the fatal blow, may not be *conclusive*. On the other hand, if, on the facts of the case the moral culpability of the offender held to be liable by virtue of section 34 is lower than that of the actual assailant, a lesser sentence would be appropriate. Fortunately, the Indian law does not contain any rigid provisions on the subject.

99. In a recent Calcutta case<sup>2</sup>, the evidence did not make it clear which of the two appellants gave the fatal blow or did the last act of strangulation. While the conviction for murder was upheld, the sentence was altered to life imprisonment. The court followed the principle laid down by the Supreme Court in *Dalip Singh's* case<sup>3</sup>, where the following observations had been made:—

“This is a case in which no one has been convicted for his own act but is being held vicariously responsible for the act of another or others. In cases where the facts are *more fully known and it is possible to determine* who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death

<sup>1</sup> *R. v. Caton*, (1874) 12 Cox 624 (Lush J.); *Turner and Armitage*, Cases in Criminal Law (1964), pages 178, 179.

<sup>2</sup> *Arun Kumar v. State*, A.I.R. 1962 Cal. 504, 509, paragraph 42 (P. B. Mukharji and N. K. Sen JJ).

<sup>3</sup> *Dalip Singh v. State of Punjab*, A.I.R. 1953 S.C. 364, 368, paragraph 40.

when it is evident that some would not have been if the facts had been more fully known and it had been possible to determine, for example, who hit on the head or who only on a thumb or an ankle; and when there are no means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases.....”.

No single rule can, thus, be laid down for all cases.

100. We may discuss here a case which evoked some interest in England. That is the case of *Bentley and Craig*<sup>1-3</sup>. A London policeman was killed on November 3, 1952 in a gun battle while attempting to apprehend two youths who had broken into a warehouse. The youths were Craig, aged 16 and Bentley, aged 18. The shot that killed the constable was fired by Craig, fifteen minutes after Bentley had been already taken into custody by another policeman. Both were found guilty of murder.

Craig was sentenced to imprisonment for life, being under the age of 18 years. But Bentley was sentenced to death. Efforts to obtain reprieve for him failed, and he was executed in 1953. Now, it was not Bentley who had fired the actual shot, and, further, he had actually been in the hands of the police for a quarter of an hour. These facts, coupled with his age and the fact that the actual perpetrator received a lighter sentence, caused shock and indignation<sup>4</sup>.

It would appear, that though Bentley was in the custody of the police, yet he *encouraged* Craig to shoot after he himself had been seized by the police officer<sup>5</sup>. The position in India would not be different, if *encouragement* is proved, coupled with the other facts as in this case.

101. An English case on the border-line is that of *Betts and Ridley*<sup>6</sup>. In that case, both the accused—Betts and Ridley—were held to be rightly convicted of murder, where they had a common design to commit robbery with violence on the person of the deceased, though the evidence was that Betts alone was the man who actually

1 *R. v. Craig and Bentley*, (The Times, December 10-13, 1952). See the summary in Christoph "Capital Punishment and British Politics", (1962), page 98.

2 For a detailed statement of the facts, see Paget and Silverman, "Hanged—and Innocent?" (1953), pages 89 to 110.

3 See Also Russell on Crime (1964), Vol. 1, page 146 and foot-note 25.

4 See Hollis, The Homicide Act, (1964), pages 42-43, and 68.

5 See the facts stated in Russell on Crime (1964), Vol. 1, pages 146-147.

6 *R. v. Betts and Ridley*, (1930) 144 Law Times 526 ; 22 Cr. App. Rep. 148, discussed in Russell on Crime, (1964) Vol. 1, pages 144 and 488, See R. C. Report, page 389 ; see also *Bashir v. State*, A.I.R. 1953 All. 668, 674. 675, paragraphs 7-23.

committed the violence, while Ridley remained in a car at the corner on the street nearby, where Betts after committing the robbery immediately ran. We are not concerned with the doctrine of "implied malice" or "constructive malice" as was then known to the English Law; what is important is, that the appeal of Ridley was dismissed, because he was a party to the *agreement* that the deceased man should be robbed, and "he anticipated that he would at least be pushed down", and was thus a principal in the second degree<sup>1,2</sup>.

102. A somewhat similar case is a Lahore one<sup>3</sup>. In that case, the common intention of the culprits was to commit robbery, and one of them, S, went to fetch the owner of the house from his fields, to threaten him to surrender the property. While S was thus *temporarily* absent, one of the other culprits shot down the son of the owner of the house. It was held, that S, though temporarily absent, was participating in the joint criminal action in the course of which the murder was committed, and that the murder was committed in furtherance of the common intention of the culprits to commit robbery, and that he was therefore rightly convicted of murder by virtue of section 34. As regards the sentence, though his liability was constructive, yet the fact that all the four culprits were *armed with guns* showed that they all intended to use the gun when necessary in furtherance of their common object. The sentence of death on S was therefore held to be justified.

103. That the question of sentence is one of discretion has been stressed more often than once in the decisions. The following observations of Roberts C. J. are helpful<sup>4</sup>.

"The conclusion at which the learned Judge has arrived is that because in some cases the lesser penalty may be given when it is not certain who struck the fatal blow, the lesser penalty should always be awarded in such cases; this is far from being correct. When once the guilt of murder is proved, the proper penalty to be awarded is a matter for discretion of the learned Judge and it is by no means true to say that merely because there is doubt as to which of several of the attackers inflicted the fatal blow this is a sufficient ground for withholding the death sentence in the case of any or all of them. On the other

<sup>1</sup> Ridley was not, however, executed.

<sup>2</sup> For a discussion of the legal propositions on which the case was based, see Glanville Williams, *Criminal Law, The General Part*, (1961), pages 353 to 354, and 396 to 397.

<sup>3</sup> *Indar Singh v. Emperor*, I.L.R. 14 Lahore 814 ; A.I.R. 1933 Lab. 819 (D. B.).

<sup>4</sup> *Tun Khine v. The King*, A.I.R. 1938 Rangoon 331, 333 (Roberts C.J.)



hand, it is, of course, clear that there are cases in which once it has been established that one person out of several took a leading part and the others a comparatively subsidiary part, the greater penalty may be inflicted upon the ring-leader and the lesser penalty upon those who took a comparatively subsidiary part. That is a matter of discretion entirely.”.

104. How far the application of section 34 would be justified in cases where the actual persons participating are named or unnamed is a point which has received detailed consideration at the hands of the Supreme Court in recent cases<sup>1</sup>, which contains a helpful analysis. A similarly helpful analysis in relation to cases under section 149 is also contained in another Supreme Court case<sup>2</sup>.

105. In many cases, sections 34 and 149 may overlap; nevertheless, the common intention which is the basis of section 34 is different from the common object which is the basis of unlawful assembly. Section 34 applies where the facts disclose an element of participation of action on the part of the accused persons. The acts may be different, and may vary in their character, but they are all actuated by the same common intention<sup>3</sup>.

106. The act which caused the death of the victim may have been committed by another person. But, since the said act was done by the other person in furtherance of the “common intention”, shared by that person and by the person who is to be liable under section 34, in law the act must be deemed to have been committed by the person to be liable under section 34<sup>4</sup>. It may be noted, that as observed by the Royal Commission<sup>5</sup>, when two or more persons are concerned in a crime which involves the use of unlawful violence, there may be substantial differences in the degree of moral guilt, but it is obviously unjustifiable to assume that the man who does the killing must always be more guilty than any of the others; he may be the agent of a stronger personality who has planned and instigated the crime. It was on this principle, that the Royal Commission<sup>6</sup>, even while recommending the abolition of the doctrine of constructive malice as known in England, took care to record its strong view that no change should be made in the existing liability of “principals in

<sup>1</sup> *Krishna v. State of Maharashtra*, (1964) 1 S.C.R. 678 ; A.I.R. 1963 S. C. 1413, 1415 (Paragraph 6).

<sup>2</sup> *Mohan Singh v. State*, (1962) Suppl. 3, S.C.R. 848 ; A.I.R. 1963 S.C. 174.

<sup>3</sup> *Mohm Singh v. State of Punjab*, A.I.R. 1963 S.C. 174, 178, 179, paragraphs 9 to 11.

<sup>4</sup> *Mahobir Gope v. State of Bihar*, A.I.R. 1963 S.C. 118.

<sup>5</sup> Royal Commission's Report, page 44, paragraph 118.

<sup>6</sup> Royal Commission's Report, pages 44 and 45, paragraphs 120 and 121.

the second degree. In its view, considerations both of equity and of public protection demand the maintaining of the principle of the existing law that when two or more persons are *parties to a common design* for the use of unlawful violence and the victim is killed, all the parties to the common design should be held responsible and all should be liable to the same punishment." The Commission also pointed out<sup>1</sup> that it may often be impossible to prove which of the two struck the blow or fired the shot when two persons are concerned, for example, in a robbery with violence<sup>2</sup>.

Section 149, Indian Penal Code. 107. Section 149 of the Indian Penal Code is the second specific case<sup>3</sup> which deserves some detailed discussion. The section<sup>4</sup> runs as follows:—

"149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly know to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

The main ingredients of the section are, first, the existence of an unlawful assembly; secondly, the formation of a common object; thirdly, the commission of an offence by one of its members; and fourthly, the requirement that the offence must be committed in prosecution of that common object or must be such as the members of that assembly knew to be likely to be committed in prosecution of that object. It is only when these ingredients are satisfied that the constructive liability under the section arises, namely, that every *other* member of the assembly is guilty of that offence. Before the section can be called in aid, the court must find with certainty that there were at least *five* persons sharing the common object<sup>5</sup>.

108. The central fact on which the liability of the person other than the actual doer of the act depends is the "common object", coupled with the requirement expressed by the expression "knew to be likely to be committed". This expression imports, at least, an expectation founded upon facts, known to the members of the assembly, that an offence of the particular kind committed, would be committed. Courts have not overlooked this requirement. The leading case on the subject is that of *Sabid Ali*<sup>6</sup>. In that case, there was a dispute about land between S and

<sup>1</sup> Royal Commission's Report, page 44, paragraph 120. See also page 389, Appendix 7 (d).

<sup>2</sup> See, however, section 5 (2), Homicide Act, 1957.

<sup>3</sup> As to the first case, see paragraph 91, *supra*.

<sup>4</sup> Section 149, Indian Penal Code.

<sup>5</sup> *Dalip Singh v. State of Punjab*, A.I.R. 1953 S.C. 364, 366.

<sup>6</sup> *Queen v. Sabid Ali*, (1873), 11 Bengal Law Reports, 347; 20 W.R. Cr. 5 (F.B.).

F, which ended in a riot, in the course of which T fired a gun and killed X. T was a member of an unlawful assembly, of which the appellants were also members, and it was found that S had directly invoked the aid of the assembly, among whom was this T armed with a gun. S and other appellants were held guilty of murder under section 302 read with section 149, and sentenced to transportation for life. It was held, that it was not satisfactorily made out by the evidence that the taking of life was immediately connected with the common object of the assembly, or that the prisoners knew that this offence was likely to be committed in prosecution of the common object. It was pointed out, that the common object was to drive F off the land and to prevent him from cultivating it. But it was not proved that the members of the assembly were prepared and intended to accomplish that object *at all hazards of life*. They did not think that the gun would be used in the particular manner in which it was used by T.

109. The provision in section 149, Indian Penal Code<sup>1</sup> is not peculiar to India. Even in England, the rule at common law is, that where several persons are engaged in the pursuit of a common unlawful object, and one of them does an act which, the others ought to have known, was not improbable to happen in the course of pursuing such common unlawful object, all are guilty<sup>2</sup>. The test of common purpose is applied in England also<sup>3</sup>. It is important to bear in mind, that members of an assembly may have a community of an object only up to a certain point, beyond which they may differ *in their objects*; and the knowledge possessed by each member of what *is likely* to be committed in prosecution of the common object will vary not only according to the information at his command, but also according to the extent to which he shares the community of objects. If knowledge of the likelihood of the particular offence cannot be reasonably attributed to the other members, then their liability does not arise.

110. The impact of section 149, Indian Penal Code<sup>4</sup>, lies in this; that the person whose case falls within the terms of the section cannot put forward the defence that he did not commit the offence *with his own hands*<sup>5-6</sup>.

<sup>1</sup> Paragraph 107, *supra*.

<sup>2</sup> *cf.* Russell on Crime, (1964), Vol. 1, page 144.

<sup>3</sup> See discussion in Glanville Williams, Criminal Law, (1961), Vol. 1, pages 396 to 397, paragraph 133 and foot-note 3.

<sup>4</sup> Paragraph 107, *supra*.

<sup>5</sup> *T. Gounder, in re.* (1924) I.L.R. 47 Mad. 746; A.I.R. 1925 Mad. 1, 6 (F.B.).

<sup>6</sup> *Q. E. v. Bisheshar*, (1887) I.L.R. 9 All. 645, 650, 653 (section 396 also discussed).

Section 149, "so to speak, takes him out of the region of abetment, and makes him responsible as a principal for the acts of each and all, merely because he is a member of an unlawful assembly".

111. For the present purpose, it is not necessary to discuss in detail the various ingredients of the section, which has received interpretation at the hands of the Supreme Court more than once<sup>2-4-5</sup>.

112. Next comes the question of sentence, in cases to which section 149 applies. This is a matter of discretion. Here again, no hard and fast rule can be laid down. It may be that on the particular facts of the case, the person constructively liable under section 149 deserves a lesser sentence<sup>6</sup>. But the facts may be such that all deserve the highest penalty.

As has been observed<sup>7</sup>, it would not be correct to lay down a broad proposition that in no case can the highest penalty be given because the person who inflicted the actual blow cannot be ascertained.

113. That the matter is one of discretion, has been stressed by the Federal Court also<sup>8</sup>. In a proper case<sup>9</sup>, the lesser sentence may be imposed on the person vicariously liable.

114. The following observations made in a recent decision of the Supreme Court may be quoted<sup>10</sup>.

"That leaves one question still to be considered and that has relation to the sentence of death imposed on 10 persons. Mr. Sawhney argues that in confirming the sentence of death imposed by the trial Court on 10 accused persons in this case, the High Court has adopted a mechanical rule. The High Court has held that the 10 persons who carried fire-arms should be ordered to be hanged, whereas other who have also been convicted under section 302/149, should be sentenced to imprisonment for life. It is true that except for Laxmi Prasad, the charge under section 302/149 rests against the other accused persons on the ground that five murders have been committed by some members

1 *Emp. v. Ram Pratab*, (1883) I.L.R. 6 All. 121, 123 (Straight J.).

2 *Ram Bilas v. State of Bihar*, (1964) 1 Cr. Law Journal 573 (S.C.).

3 *Mizaji v. State of U. P.* A.I.R. 1959 S.C. 572.

4 *W. Staney v. State of M. P.*, A.I.R. 1956 S.C. 116.

5 *Lakhan Mahto v. State of Bihar*, (1966) 8 S.C.N. item 139.

6 *cf. Emp. v. Ranli Lal*, A.I.R. 1941 Lah. 117, 120 (Young C. J. and Sale J.).

7 *cf. Parshadi v. Emp.*, A.I.R. 1929 All. 160, 161 (Boys and Banerjee JJ.).

8 *Rajagopalan v. Emperor*, (1944) F.C.R. 169 ; A.I.R. 1944 F.C. 35.

9 *See Masalti v. State of U. P.*, (June, 1964) 1 S.C. J. Notes of Recent Cases, page 75 (S.C.).

10 *Masalti v. State of U. P.* (1965) 1 S.C.J. 605, 613.

of the unlawful assembly of which they were members, and the argument is that unless it is shown that a particular accused person has himself admitted the murder of one or the other of the victims, the sentence of death should not be imposed on him. In other words, the contention is that if a person is found guilty of murder under section 302/149 and it is not shown that he himself committed the murder in question, he is not liable to be sentenced to death. In support of this argument, Mr. Sawhney has relied on certain observations made by Bose, J. who spoke for the Court in *Dalip Singh and others v. State of Punjab*<sup>1</sup>. In that case, what this Court observed was that the power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest reasons; and it was added that it is not enough for the appellate Court to say or think that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate Court but the trial Judge, and the only ground on which the appellate Court can interfere is that the discretion has been improperly exercised. These observations have no relevance in the present case, because we are not dealing with a case where the High Court has enhanced the sentence imposed by the trial Judge at all. In fact, both the trial Court and the High Court are agreed that the sentence of death imposed on 10 persons are justified by the circumstances of the case and by the requirements of justice. *As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person, is found to have committed the murder himself.* Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case. In the present case, it is clear that whole group of persons belonged to Laxmi Prasad's faction, joined together armed with deadly weapons and they were inspired by the common object of exterminating the male member in the family of Gayadin. 10 of these persons were armed with fire-arms and others with several other deadly weapons, and evidence shows that five murders by shooting were committed by the members of this unlawful assembly. The conduct of the members of the unlawful assembly both before and after the commission of the offence has been considered by the Courts below and it has been held that in

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<sup>1</sup> (1953) S.C.J. 532 ; 1954 S.C.R. 145.

order to suppress such fantastic criminal conduct on the part of villagers it is necessary to impose the sentences of death on 10 members of the unlawful assembly who were armed with fire-arms. It cannot be said that discretion in the matter has been improperly exercised either by the trial Court or by the High Court. Therefore, we see no reason to accept the argument urged by Mr. Sawhney that the test adopted by the High Court in dealing with the question of sentence is mechanical and unreasonable.

"There are, however, three cases in which we think we ought to interfere. These are the case of accused No. 9 Ram Saran who is aged 18, accused No. 11 Asha Ram who is aged 23, and accused No. 10 Deo Prasad who is aged 24. Ram Saran and Asha Ram are the sons of Bhagwati who is accused No. 2. Both of them have been sentenced to death. Similarly, Deo Prasad has also been sentenced to death. Having regard to the circumstances under which the unlawful assembly came to be formed we are satisfied that these young men must have joined the unlawful assembly under pressure and influence of the elders of their respective families. The list of accused persons shows that the unlawful assembly was constituted by members of different families and having regard to the manner in which these factions ordinarily conduct themselves in villages, it would not be unreasonable to hold that these three young men must have been compelled to join the unlawful assembly that morning by their elders, and so, we think that the ends of justice would be met if the sentences of death imposed on them are modified into sentences of life imprisonment. Accordingly, we confirm the orders of conviction and sentence passed against all the appellants, except accused Nos. 9, 11 and 16 in whose cases the sentences are altered to these of imprisonment for life. In the result, appeals are dismissed subject to the said modification."

Section 396  
in the com-  
mission.

115. Section 396 may be briefly dealt with. Section 396, of course, does not require that the murder should be committed with the consent or acquiescence of the other dacoits; the section would be almost superfluous if that were the correct interpretation. It does not also require that murder must have been within the contemplation of all or some of them<sup>1,2</sup>. But it does require, that there be some connection between the dacoity and the murder. If the transaction of the

<sup>1</sup> *Punjab Singh v. Emperor*, I.L.R. 15 Lah. 84; A.I.R. 1933 Lahore 977 to 985 (Tek Chand and Monroe JJ.).

<sup>2</sup> *Samundar Singh v. State*, A.I.R. 1965 Cal. 598, paragraphs 58 and 74.

dacoity has ended before the transaction of murder has commenced, the section would not apply<sup>1</sup>.

116. It is true, that under section 396 questions may arise as to whether the murder was committed "in so committing dacoity". Thus, when the murder is committed but the dacoity is not successfully accomplished<sup>2</sup>, the question may arise whether the case falls under this section; the question cannot be answered without a study of the facts of the case. The under-mentioned decisions may be seen on this point<sup>3-5</sup>.

117. Again, when one dacoit, while making good his escape with the booty obtained in the dacoity, commits murder, the liability of the others will depend on the facts. The undermentioned<sup>6-7-8</sup> decisions may be seen on this point.

118. Similarly, it is a question depending on the facts of each case whether the murder can be regarded as committed "in the commission of a dacoity", when the person sought to be made liable is absent. As was observed<sup>10</sup> ".... it matter not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under section 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that act."

It may be, that on the facts of a particular case, persons who were absent from the scene, may be regarded as falling outside the section<sup>11</sup>.

<sup>1</sup> cf. discussion in *Shyam Behari v. State of Uttar Pradesh*, A.I.R. 1957 S.C. 320, 322, 323, paragraphs 8 to 14. (The point was not decided in that case).

<sup>2</sup> See section 391, which mentions "attempt to commit robbery" also.

<sup>3</sup> *Sirajuddin v. State*, A.I.R. 1951 All. 834, 835, paragraph 8.

<sup>4</sup> *Queen Empress v. Sakharan*, (1900) 2 Bombay Law Reporter 325 (Jenkins C.J.). (Retreat not separated by time or space from the offence which formed the common object of the assembly).

<sup>5</sup> *Monoranjan Bhattacharya v. Emperor*, A.I.R. 1932 Cal. 818, 820 33 Cr. L. J. 722 (F.B.).

<sup>6</sup> *Karim Baksh v. Crown*, A.I.R. 1923 Lah. 329 (1).

<sup>7</sup> *Lashkar v. Crown*, I.L.R. 2 Lah. 275 ; A.I.R. 1921 Lah. 115 (Shadi Lal C. J. and Harrison J.).

<sup>8</sup> *Sunder v. K. Emp.*, A.I.R. 1925 Lah. 142 (Shadi Lal C. J. and Fforde J.).

<sup>9</sup> *Emperor v. Chandar*, (1906) A.W.N. 47 ; 3 Cr. L. J. 294 discussed in *Sirajuddin v. State*, A.I.R. 1951 All. 834, 835, paragraph 5.

<sup>10</sup> *Q. E. v. Teja*, (1895) I.L.R. 17 All. 86, 87 (Sir John Edge and P. C. Banerji JJ.).

<sup>11</sup> The decision in *Q. E. v. Umrao Singh*, (1894) I.L.R. 16 All. 437 can be explained on this ground.

The matter has been dealt with also in a recent Calcutta case<sup>1</sup>.

119. Where the murder is committed before the dacoity actually takes place, the answer to the question whether it was still committed "in the commission of the dacoity", depends on the facts of each case<sup>2-3</sup>.

120. All these<sup>4</sup> are questions of application of the section, and do not detract from the soundness of the principle on which it is based.

Moreover, it is not a general rule that the sentence of death must necessarily follow on a conviction under section 396. The facts of the case may justify the highest sentence<sup>5-6,7</sup>, or the lesser one<sup>8</sup>.

121. If the section is applied with discrimination,—and we believe that it has been so applied in the past,—we do not think that the provision can be regarded as too harsh. The question whether the murder was committed in the commission of dacoity must always be a question of fact and of degree, on which the Legislature cannot lay down a general rule. Factors of time and place, of objects and intention, of preparation and participation, may or may not be relevant in a particular case. But the crucial test, indicated by the words "in so committing dacoity" appears to be basically sound, so far as a justification for the highest penalty is to be sought for.

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1 *Samunder Singh v. The State*, A.I.R. 1965 Cal. 598, paragraphs 5 and 74.

2 *Mathura Thakur*, 6 C.W.N. 72 (Assault resulting in death as committed by one person; case held to be outside the section, because the assault not only preceded the theft, but was not committed for the purpose of robbery).

3 *Sita Ram v. Emperor* A.I.R. 1925 Oudh 723 (Shot fired to keep off the rescue party and, thus, to allow the theft to be committed, held to be act committed in course of dacoity).

4 Paragraphs 116 to 119, *supra*.

5 *Emperor v. Nga Tha, Hmwe*, A.I.R. 1935 Rang. 504 (Murder committed wantonly to intimidate villagers during dacoity; knowledge that murder was likely to be committed).

6 *Punjab Singh v. Emp.* I.L.R. 15 Lah. 84; A.I.R. 1933 Lah. 977, 985 (Tek Chand and Monroe JJ.).

7 *Emperor v. Sheo Shankar*, I.L.R. 32 Pat. 243; A.I.R. 1954 Pat. 109 (Imam and Narayan JJ.).

8 *Aheila Sheikh v. The State*, A.I.R. 1953 Assam 45, 46, paragraph 8.

9 *See Q. E. v. Sahharam*, (1900) 2 Bom. L.R. 325 (Jenkins C. J.).



## CHAPTER IV

## ABOLITION OR RETENTION

## TOPIC NUMBER 15

*Major question of abolition or retention*

122. The major question of abolition or retention has to be considered first. It must be remembered, that this question is linked up with the topic of objects of capital punishment; if the objects of capital punishment are commendable and if they are achieved in a fair measure, then only its retention will be justified. If they are not commendable or not achieved in fair measure in practice, abolition of capital punishment would have to be considered.

Major question of retention linked up with objects of Capital punishment.

123. It should be borne in mind, that the arguments against retention have to be considered in the light of conditions in India. Arguments that may be valid in respect of other countries may not necessarily be valid for India. India is a vast country. The position regarding maintenance of law and order may vary from State to State, and, even within a State, there are districts which are notoriously criminal.

124. A large mass of the population is illiterate. The majority of the people live in villages, scattered wide and apart and looked after by a police force which is not uniformly adequate. There are, in some parts of the country, sectional feuds marred by fanaticism. The extra-legal factors that act as a check on murder in Western countries—education, prosperity, homogeneity and viability—are sadly absent in many parts of India, or, are in times of emergency, overpowered by other and more violent factors.

125. In this situation, criminal law and punishment constitute practically the only major safeguards for the protection of society, and the only barriers against the upsurge of violence by individuals and groups.

## TOPIC NUMBER 16

*Arguments for retention*

126. The arguments for retention or abolition of capital punishment have been stated times out of number on various occasions. For convenience of reference, the important arguments on either side are summarised below.

Argument for retention.

We begin with the arguments for retention.

Deterrent effect.

127. Capital punishment acts as a deterrent.<sup>1</sup>

If death sentence is removed, the fear that comes in the way of people committing murders will be removed. "Do we want more of murders in our country or do we want less of them?"

All sentences are awarded for security and protection of society, so that every individual, so far as it is possible, may live in peace. Taking a realistic view, so long as the society does not become more refined, death sentence has to be retained.

The security of the society as well as individual liberty of every person has to be borne in mind. Capital punishment is needed to ensure this security<sup>4</sup>.

Crimes of violence.

128. Experience of other countries would not be conclusive for India. Need for deterrent control provided by capital punishment is greater in various classes of society. There is greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly in respect of professional criminals<sup>5,6</sup>.

Moreover many Countries or States had to re-introduce capital punishment after abolition.

Elimination of the criminal.

129. When the public peace is endangered by certain particularly dangerous forms of crime, death penalty is the only means of eliminating the offender<sup>7</sup>.

Realism in the prevention of crime.

130. A particularly potent weapon is needed for dealing with dangerous criminals and individuals not only for protecting human life and cultural values but even to safeguard certain social property, which is placed under the protection of the law<sup>8</sup>.

<sup>1</sup> The question of deterrent effect is discussed in detail separately paragraphs 303—372 *infra*.

<sup>2</sup> Late Shri Govind Ballabh Pant, Minister of Home Affairs, Rajya Sabha Debates, 25-4-1958, col. 458.

<sup>3</sup> Late Shri Govind Ballabh Pant, Minister of Home Affairs, Rajya Sabha Debates, 25th April, 1958, cols. 458, 459.

<sup>4</sup> Late Shri Datar, Minister of State in the Ministry of Home Affairs Lok Sabha Debates, 21st April, 1962, col. 356.

<sup>5</sup> *cf.* the argument put forth before the Canadian Committee—Canadian Report, page 11, paragraph 35 and conclusion at page 14, paragraph 54.

<sup>6</sup> In this connection, it may be noted that in India cases of dacoity and goondaism, accompanied with murder or attempt to murder, are frequent in certain areas.

<sup>7</sup> U. N. Publication, page 59, paragraph 216.

<sup>8</sup> U. N. Publication, (1962), page 60, paragraph 217.

131. There will be increased risk to police officers if murderers are not sentenced to death. Very often, there have been cases when murderers, after they come out of prison, pursue the man who got them convicted.<sup>1</sup> Risk to officers.

132. Society must be protected from the risk of a second offence by a criminal who is not executed and who may be released subsequently or may escape.<sup>2</sup> Possibility of repeated murders.

After release, the murderer may well kill again<sup>3</sup>.

133. In countries where capital punishment has been abolished, the figure of homicide is very low; four in a million, or even less than that<sup>4</sup>. Conditions in India.

134. Capital punishment marks the society's detestation and abhorrence of the taking of life and its revulsion against the "crime of crimes". It is supported not because of a desire for revenge, but rather as the society's reprobation of the grave crime of murder<sup>5</sup>. Reprobation by society.

135. As also observed by the Royal Commission<sup>6</sup>, there is a strong association between murder and death penalty in the popular imagination, and "it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder."<sup>7</sup>

136. By emphasising the gravity of murder, capital punishment tends to foster the community's abhorrence of the crime. This decreases the incidence of murder in the long run<sup>7</sup>.

137. Public opinion is substantially in favour of capital punishment, and it would be unwise to abolish capital punishment contrary to the wishes of the majority of the citizens<sup>8</sup>. Public opinion.

<sup>1</sup> Smt. Violet Alva, Rajya Sabha Debates, 8th September, 1961, col. 3827.

<sup>2</sup> U. N. Publication, page 59, paragraph 215.

<sup>3</sup> Ceylon Report, Summary of Arguments, page 40, under "Alternative Punishment".

<sup>4</sup> Smt. Violet Alva, Rajya Sabha Debates, 8th September, 1961, col. 3824.

<sup>5</sup> Canadian Report, page 10, paragraph 30.

<sup>6</sup> R.C. Report, page 20, paragraph 59.

<sup>7</sup> Ceylon Report, Summary of Arguments, page 39, under "Long-term Effect".

<sup>8</sup> Cf. Canadian Report, page 10, paragraph 31.

138. Since public opinion believes in the effectiveness of death penalty, this sincere belief should be respected, and possible victims should be protected by maintaining the penalty of death. In other words, even if its deterrent effect should be debatable, for reasons of public safety, those concerned ought to be encouraged to believe in it<sup>1</sup>.

Prison administration.

139. If all convicted murderers were imprisoned, additional administrative problems would arise. Safety of the prison staff and the general public from the dangerous prisoners would be at risk, as a further sentence of imprisonment would have no deterrent effect on the dangerous prisoners<sup>2</sup>.

Keeping murderers alive in the prison greatly complicates the work of prison administration<sup>3</sup>.

Saving of funds.

140. The taxpayers should not be called upon to pay for the maintenance of anti-social criminals for an indefinite or for a very long period<sup>4</sup>.

Money of the citizens should not be spent on maintaining people who cause great harm<sup>5</sup>.

Proportionate to crime.

141. Punishment should bear a just proportion to the crime. Therefore, capital punishment is the only fit punishment for those who have deliberately violated the sanctity of human life<sup>6</sup>.

142. If a cold-blooded murder is committed, there is no other way by which society can be recompensed than by taking a life for a life. Cruel murders and mutilation of children still go on; and it is not yet time to do away with capital punishment<sup>7</sup>.

Avoidance of lynching.

143. Execution avoids certain popular reactions, which must be expected in cases of heinous crimes if an over-excited public opinion were not aware that the criminal can be sentenced to death<sup>8</sup>.

1 U. N. Publication, page 60, paragraph 218.

2 *cf.* Canadian Report, pages 10 and 11, paragraph 32.

3 Ceylon Report, Summary of Arguments, page 40, under "Prison Administration".

4 U. N. Publication, page 60, paragraph 220.

5 Kumari Shanta Vashist, Rajya Sabha Debates, 8th September, 1961, col. 3817.

6 Ceylon Report, Summary of Arguments, page 39 under "Life for a Life".

7 Smt. Violet Alva, Rajya Sabha Debates, 8th September, 1961, col. 3822.

8 U. N. Publication, (1962), page 60, paragraph 220.

When a murderer is placed before the court and he is either not convicted (because of want of evidence) or is given a lighter sentence, and the persons aggrieved think that they have not got justice according to their desire, they take the law into their own hands<sup>1</sup>.

144. Death penalty is the only just punishment for the gravest of crimes, or the only one capable of effacing an unpardonable crime<sup>2</sup>. Atonement.

145. Capital punishment in a painless and humane form is less cruel than imprisonment for life. Death sentence more human.

146. If there is miscarriage of justice in one or two cases, the higher courts can be approached. The whole machinery of the Government would be there to protect the life of a person who is really innocent. We should not be misguided by a single instance of erroneous conviction, especially when the Supreme Court is there looking very carefully into all such cases<sup>3</sup>. No miscarriage of justice.

147. In India, formerly, in capital cases, a lesser sentence could not be imposed except for special grounds. The Judge was thus expected to justify the lesser sentence, but this has now been amended<sup>4</sup>. Hence the matter is completely in the discretion of the Judge. Discretion of court.

Formerly, it was provided that whenever an accused person was convicted of murder, capital punishment was the rule; that provision has now been taken away, and it is now open to the judge to give the reduced punishment even without giving reasons<sup>5</sup>.

148. It is impossible to replace the death penalty by any effective substitute. Imprisonment even for life is inadequate, particularly because of the practice of earlier release<sup>6</sup>. No substitute

There is no satisfactory alternative to capital punishment<sup>7</sup>.

1 Late Shri Datar, Minister of State in the Ministry of Home Affairs Lok Sabha Debates, 21st April, 1962, col. 363.

2 U. N. Publication, page 59, paragraph 216.

3 Late Shri Datar, Minister of State in the Ministry of Home Affairs Lok Sabha Debates, 21st April, 1962, cols. 361, bottom and 362.

4 Late Shri Govind Ballabh Pant, Minister of Home Affairs, Rajya Sabha Debates, 25th April, 1958, col. 460.

5 Late Shri Datar, Minister of State in the Ministry of Home Affairs Lok Sabha Debates, 21st April, 1962, col. 357.

6 U. N. Publication, page 60, paragraph 219.

7 Ceylon Report, Summary of Arguments, page 40, under "Alternative Punishment".

149. The majority of murders in India are committed by poorer and backward classes. Prison conditions are often better than conditions prevailing in their homes; and for such person, *death is the only deterrent*<sup>1</sup>.

Time not  
yet ripe.

150. Even if the principle of abolition is accepted, the time is not yet ripe in India. Present day society is not ripe for this reform, and the community has not reached such a stage<sup>2</sup>.

Burden on  
Abolitionist.

151. Those who advocate the abolition of capital punishment must prove their case before any change carrying risk to the lives of innocent people is introduced<sup>3</sup>.

## TOPIC NUMBER 17

### *Arguments for abolition*

Arguments  
for abolition.

152. Arguments for abolition of capital punishment, as put forth in various quarters, may now be summarised.

153. The arguments for abolition are numerous. To facilitate their consideration, it may be convenient first to classify them. First, there is the general argument against retention, based mainly on religious, moral and humanitarian grounds. Next is the group of arguments which emphasises its evil features, namely, that it is immoral, inhuman, irrevocable, and morbid, and leads to injustice. Next in order is a group of arguments, which tries to point out, that its deterrent object is not achieved and its other objects are not praiseworthy. Then, there are arguments which try to meet some of the contentions advanced by retentionists. Next comes the argument that an experiment of abolition is worth-making, and the argument which takes pains to point out that the substitution of other punishment for the death penalty is worth attempting and desirable, and involves no risk. Lastly, there is the argument that the onus for retention lies upon the retentionists, who have not discharged that onus.

We now proceed to state these arguments in detail.

### I. *General*

General.

154. "Capital punishment should be abolished because it is a legalised, revengeful and cruel destruction of God's most wonderful creation, the human being."<sup>4</sup>

<sup>1</sup> cf. Ceylon Report, Summary of Arguments, page 41, under "Present Social Circumstances of Ceylon".

<sup>2</sup> Smt. Violet Alva, Rajya Sabha Debates, 8th September, 1961, col. 3827.

<sup>3</sup> Ceylon Report, Summary of Arguments, page 41, under "Present Social Circumstances of Ceylon".

<sup>4</sup> cf. the resolution notified but not moved by Smt. Savitry Devi Nigam. This was referred to in her speech on Shri Prithvi Raj Kapoor's resolution, Rajya Sabha Debates, 25th April, 1968, cols. 483, bottom and 484.

It will be the greatest of *dharmā* to do away with that which does away with life and thus give people a chance to become better, to become improved, giving a chance to people to live in amity, brotherhood, love and affection<sup>1</sup>.

155. The question of capital punishment is a question of values, the values we put on human life<sup>2</sup>.

### II. Immoral

156. Capital punishment is morally indefensible. Immoral. Society has no right to take the life of any person. This is a consideration which is paramount to all other considerations.

It is morally wrong for the State in the name of the law to take life deliberately<sup>3</sup>.

Capital punishment is morally wrong because it is barbarous and out of step with modern morality and thought<sup>4</sup>.

157. In eliminating the criminal, it is stated, the State does not erase the crime, but repeats it<sup>5</sup>.

### III. Inhuman

158. Capital punishment is essentially inhuman. Inhuman.

Death penalty is a form of cruelty and inhumanity unworthy of a humane civilization; even the most efficient methods of execution do not result in instantaneous and painless death<sup>6</sup>.

Humanity demands that capital punishment comes to an end<sup>7</sup>.

159. Capital punishment is most inhuman. Those who have witnessed the tortuous process know it. The prisoner, if he is to be executed tomorrow morning, is informed, the previous evening,—“Tomorrow morning at 6 o'clock you will be hanged.” This is the first torture. Then his entire family is brought there, even the youngest kid to weep there. Then there is the remaining 12 hours in the

1 Shri Prithvi Raj Kapoor, Rajya Sabha Debates, 25th April, 1958, col. 435.

2 Shri Jaipal Singh, Lok Sabha Debates, 21st April, 1962, col. 324.

3 Ceylon Report, page 38, *et seq.*, Summary of Arguments, under “Long-term effect”.

4 Canadian Report, page 12, paragraph 37, stating the argument.

5 U. N. Publication (1962), page 61, paragraph 222.

6 U. N. Publication (1962), page 61, paragraph 227.

7 Shri Raghunath Singh, Lok Sabha Debates 21st April, 1962, col. 308 (in Hindi).

night; that kills him hour by hour. In the last half an hour, he is killed minute by minute. If the law abolishes whipping because it is inhuman, how can it permit this legal murder'?

#### IV. Non-violence

Non-violence. 160. Indian ideology is based on non-violence. This is the great ideal which the Father of the Nation kept before us, and if we have any regard and respect for him, death sentence must be immediately removed<sup>1</sup>.

If "a country physically and morally in shambles, as was Germany in 1948, could abolish the death penalty without any ill effects, this country of ours, the land of Lord Mahabir and Buddha—and of Mahatma Gandhi; the apostles of peace and of Ahimsa.....should need the continued protection of the hangman<sup>2</sup>?"

161. Indian tradition is based on reformation of the mind and spirit. Capital punishment was discarded by Gandhiji, who, regarded it as a negation of non-violence, and was of the opinion that only God could take away life given by him<sup>3</sup>. "I do regard death sentence as contrary to Ahimsa. Only He takes life who gives it. All punishment is repugnant to Ahimsa. *Under a State governed according to the principles of Ahimsa, therefore, a murderer would be sent to a penitentiary and there given every chance of reforming himself. All crime is a kind of disease and should be treated as such.*"<sup>4</sup>

#### V. Irrevocable

Irrevocable. 162. Capital Punishment is irrevocable. If an innocent person is sentenced to death and executed, the greatest injustice results<sup>5</sup>.

163. Several cases of erroneous conviction are known. An innocent person was once hanged for murder, while the person who actually committed the offence later on

1 Shri Umanath. Lok Sabha Debates, 21st April, 1962, col. 332.

2 Smt. Savitry Devi Nigam. Rajya Sabha Debates, 25th August 1961, col. 1692.

3 Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956, cols. 4345 to 4388.

4 Shri Raghunath Singh. Lok Sabha Debates, 21st April, 1962, cols. 310 and 311 (in Hindi).

5 This view of Gandhiji, referred to by Shri M. L. Agrawal, Lok Sabha Debates, 24th August 1956, cols. 4345 to 4388, is quoted in N. B. Sen (Ed.) *Wit and Wisdom of Mahatma Gandhi (1960)*, page 67 (New Book Society of India, New Delhi).

6 See also Canadian Report, page 12, paragraph 40 stating the argument.



spent 14 years in the Andamans for an attempt on the life of the Governor of Bengal'.

164. In one case the man who really committed the murder was never prosecuted and a man who was innocent of the crime was sentenced to death. In the Punjab, 3 or 4 persons were prosecuted for the alleged murder of a woman, and while the case had been going on for over a year there, the alleged victim—the woman—appeared in some court in U.P., and thereafter the cases against the alleged murderers were withdrawn<sup>2-3</sup>.

165. A case in which error might have ensued is cited. In the Mehboob Nagar district in the Andhra Pradesh, when the trial of a person for the murder of 'A' was about to begin in the Sessions court, 'A' who was alleged to have been murdered was walking alive in the court room<sup>4</sup>.

166. Capital punishment is irrevocable. When as a result of an erroneous conviction, a man is sent to prison, he can be compensated. "But death admits of no compensation."<sup>5</sup>

167. Sometimes there may be a mistaken view of the law. Thus, (it is argued), a person was sentenced to death in one Madras Full Bench case, on a confession made by him, to an investigating officer. Ten years later, the Privy Council, in a similar case, held, that this case was wrongly decided, and that the confessions ought not to have been admitted in evidence<sup>6</sup>.

168. The penalty of death is based on the postulate of human freedom, while actually the offender does not generally enjoy complete freedom. Absolute justice, therefore, is an illusion, and full atonement a fiction<sup>7</sup>.

Man not free.

1. Shri Bhupesh Gupta, Rajya Sabha Debates, 25th August 1961, cols. 1701 and 1702.

2. Shri B. K. P. Sinha, Rajya Sabha Debates, 25th August, 1961, col. 1717.

3. See also cases cited by Mr. Justice B. N. Banerjee, "Abolition of Capital Punishment" Law Quarterly (Journal of the Indian Law Institute West Bengal State Unit), June 1965, pages 123 and 128.

4. Shri Umanath, Lok Sabha Debates, 21st April, 1962, col. 333 (cites also his own case of being falsely implicated on a murder charge).

5. Shri M. L. Agrawal, Lok Sabha Debates, 24th August 1956, cols. 4343 to 4388.

6. Shri M. L. Agrawal, Lok Sabha Debates, 23rd November 1958, cols. 916 to 986. The reference is to :—

(i) *Athappa Goundan v. Emp.*, I.L.R. 1937 Mad. 695 ; A.I.R. 1937 Mad. 613, 629 (F. B.) (Confession made under section 27, Evidence Act).

(ii) 74 I. A. 65 ; A.I.R. 1947 P. C. 67, 71, paragraph 12.

7. U. N. Publication (1962), page 61, paragraph 225.

VI. *Morbid*

- Morbid.* 169. By giving rise to sensationalism, capital punishment deflects potential offenders towards violence.
- The curiosity aroused by the execution is morbid, and the penalty of death itself may have the effect of leading to crime, particularly in respect of abnormal individuals<sup>1</sup>.
- One murder breeds another murder. After every sensational execution, there comes a wave of crimes<sup>2</sup>.
- Hanging a mockery.* 170. Hanging is a mockery of punishment. "Real criminals do not look like guilty people at that moment. If you go and see there, it is the officers who look guilty. They are huddled together, they are afraid, they are ashamed, they know that they are doing something ghastly."<sup>3</sup>
- Brutalizing effect.* 171. Capital punishment has a brutalizing effect not only on the prisoners and the staff of the prisons, but on society at large<sup>4</sup>.

VII. *Unjust*

- Injury to family.* 172. The sentence of death injures the family of the offenders, and thus imposes suffering on persons who have done nothing to deserve the suffering. "Have you ever tried to visualise the feelings of a mother on the night before her boy is to be hanged?.....The agony and horror which you and I representing the State must inflict on this perfectly innocent woman must be more terrible than any pain the murderer can inflict on his victims."<sup>5</sup>
- Unequal application.* 173. Death penalty is applied unequally. Some persons who have not sufficient financial means to defend themselves, or are *morally* unable to do so, suffer<sup>6</sup>. The penalty, therefore, which should be the expression of absolute justice, often leads in practice to injustices against individuals.
- Justice not possible.* 174. It has become difficult to obtain justice in the present judicial system in India. The standard of investigation has terribly deteriorated. Further, until total separation of the judiciary from the executive is carried out, death sentence should be suspended. Thirdly, persons who

1 U. N. Publication (1962), page 62, paragraph 229.

2 Smt. Savitry Devi Nigam, Lok Sabha Debates, 1st April, 1962, col. 339

3 Shri Prithvi Raj Kapoor, Rajya Sabha Debates, 25th April, 1958, col. 525.

4 Canadian Report, page 12, paragraph 39, stating the argument.

5 Stacey Aumonier, cited by Shri M. L. Agrawal, Lok Sabha Debates, 24th August 1956, cols. 4343 to 4388.

6 U. N. Publication (1962), page 62, paragraph 229.

cannot afford to engage a good lawyer, are unable to fight the case to the last. Counsel provided by the State are paid low, and they cannot be expected to devote their whole heart to the case<sup>1</sup>.

175. Since human beings are imperfect, the system of administration of justice will always remain imperfect. Therefore, from the point of view of *justice*, the assumption behind capital punishment that justice can be meted out to another person only by killing him, cannot be supported<sup>2</sup>.

176. Even in those States of United States of America where death sentence has been retained, the matter is left to the jury and not to the Judge<sup>3</sup>.

### VIII. Deterrent and other objects not achieved.

#### A.-Deterrent effect not achieved

177. The deterrent effect of capital punishment is not established<sup>4</sup>. Deterrent effect not established.

In England, very petty offences were previously capital. They are no longer capital<sup>5</sup>.

178. The question is, to what extent capital punishment has a greater impact on the mind, compared with life imprisonment. It has not been settled yet, for example, that "90 degrees" of deterrence will be created by imprisonment for life, and "100 degrees" by capital punishment<sup>6</sup>. Not a unique deterrent.

"It is no doubt a deterrent, but we have to see if it is a deterrent which is unique and which cannot be replaced by any other punishment."<sup>7</sup>

179. The crime curve and the existence on the Statute Book of the capital punishment are not related in any way. The two things are virtually independent of one another<sup>8</sup>. Crime curve and sentence not inter-related.

<sup>1</sup> Shri Raghunath Singh, Lok Sabha Debates, 21st April, 1962, cols. 318 to 320 (in Hindi). (Quotes discussion from Law Commission's 14th Report Vol. 2, pages 736 and 738, paragraph 11 about standard of investigation)

<sup>2</sup> Shri Yogendra Jha, Lok Sabha Debates, 21st April, 1962, col. 351 (in Hindi).

<sup>3</sup> Shri Raghunath Singh, Lok Sabha Debates, 21st April, 1962, cols. 314 (in Hindi).

<sup>4</sup> The topic of deterrent effect will be discussed in detail separately, paragraphs 303 to 372, *infra*.

<sup>5</sup> Shri Bhupesh Gupta, Rajya Sabha Debates, 25th August, 1961, col. 1699.

<sup>6</sup> Shri Bhupesh Gupta, Rajya Sabha Debates, 25th August, 1961, col. 1700.

<sup>7</sup> Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956, cols. 4345 to 4388.

<sup>8</sup> Dr. W. S. Barlingay, Rajya Sabha Debates, 25th August, 1961, col. 1706.

180. If capital punishment had any deterrent value, murders would be less and less, since capital punishment has been on the statute book for many many years. The crime curve would be a declining one; but it is not actually so<sup>1</sup>.

Examples of  
Indian  
States.

181. In the old State of Hyderabad, for the last forty years, no death sentence was executed. Every sentence of death was commuted by the Nizam of Hyderabad; and there had been no instance to show that it required the revival of execution of death sentence in Hyderabad<sup>2</sup>.

[We understand that in the old State of Hyderabad the death sentence was not executed. In individual cases the Nizam used to commute it to life imprisonment. There were no standing orders in this regard, but individual cases were being considered<sup>3</sup>.]

In the States of Cochin and Travancore, capital punishment was not in existence for a number of years; the incidence of crime in those years was no higher there than in other parts of India<sup>4</sup>.

Examples of  
other  
countries.

182. Numerous countries have abolished capital punishment, and have not thought of going back to it again<sup>5</sup>.

"If you drive a motor car and it runs exactly at the same speed whether the brakes are off or on, surely it is an indication that the brakes are not working.<sup>6</sup>"

In countries where capital punishment has been abolished, the incidence of crimes has not gone up<sup>7</sup>.

For many crimes which were capital in England previously, the death sentence has been abolished, and yet there has not been any increase in the incidence of those crimes in that country<sup>8</sup>.

In those countries of Europe where death sentence has been abolished—for example, Austria, Belgium, Denmark, Finland, Iceland, Netherland—and also Norway, Portugal and Sweden—abolition has led not to an increase but to a decrease in homicide<sup>9</sup>.

1 Shri Bhupesh Gupta, Rajya Sabha Debates, 25th August, 1961, col. 1699.

2 Shri V. K. Dhage, Rajya Sabha Debates, 25th August, 1968, col. 468 top.

3 Based on letter of Government of Andhra Pradesh, dated 27th January, 1966, to the Law Commission.

4 Shri P. N. Nair, Raja Sabha Debates, 25th May, 1958, col. 469, top.

5 Dewan Chaman Lao, Rajya Sabha Debates, 25th August, 1961, cols. 1741.

6 Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956, col. 4346 to 4388.

7 Shri P. N. Nair, Rajya Sabha Debates, 25th April, 1958, col. 472.

8 Shri B. K. P. Sinha, Rajya Sabha Debates, 25th April, 1958, col. 447.

9 Shri Raghunath Singh, Lok Sabha Debates, 21st April, 1962, cols. 314 and 315 (in Hindi).

183. As far as ordinary crimes are concerned, capital punishment has not achieved its objective. Under the British, capital punishment had been used, and yet murders have gone on increasing and dacoity has become in some places the order of the day<sup>1</sup>. Experience in India.

184. The deterrent theory does not hold good, on a close analysis. 70 per cent of those who go to the gallows are men who had committed the crime in the course of a heated argument, in a fit of insane jealousy, or robbers who, when they were fearful of discovery, unwillingly pulled the trigger and became murderers. When such people commit the crime, they do not think of the consequences.<sup>2</sup> Crimes committed in excitement.

Serious crimes are committed only in a state of mental excitement, and in such a state punishment never acts as a deterrent to such a person<sup>3</sup>.

"Mostly people get suddenly provoked by passion and without considering the consequences commit murder."<sup>4</sup>

185. The arguments that capital punishment does not deter the various categories of persons who commit homicide can be thus elaborated. Offenders fall into following categories:—

(i) Those who carefully *plan* a murder or a crime like robbery;—they deliberately plan to *avoid* detection, and are not therefore influenced by the threat of the death penalty;

(ii) Those who meet the test of the legal defence of "insanity; they can never be deterred;

(iii) Those who do not meet such test, but are yet not fully responsible for their actions. They also cannot be restrained by the threat of any punishment;

(iv) Thus, there remains only the normal law-abiding citizens, who would *not murder* in any case<sup>5</sup>.

186. Capital punishment is not an effective deterrent. On the planned murder, it has no effect. On the unplanned murder committed in the heat of passion, etc., it has no effect. Further, its effect is weakened by the comparative infrequency of its application due to difficulties of detection, apprehension and conviction, and by the exercise of the power of reprieve after conviction<sup>6</sup>. Infrequency of application.

1 Shri Bhupesh Gupta, Rajya Sabha Debates, 25th April, 1958, cols. 492 and 493.

2 Shri B. K. P. Sinha, Rajya Sabha Debates, 25th April, 1958, col. 447

3 Shri Yogendra Jha, Lok Sabha Debates, 1st April, 1962, col. 352 (Hindi)

4 Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956, cols. 4345 to 4388.

5 Canadian Report, page 11, paragraph 36, stating the argument.

6 Ceylon Report, page 38 *et seq.* Summary of Arguments, under "Deterrence"

Secrecy of execution. 187. There is a contradiction in claiming that the death penalty has a deterrent effect and at the same time surrounding the execution with secrecy<sup>1</sup>.

B. Retributive object criticised

Criticism of retribution. 188. Capital punishment is cold-blooded murder. Crime cannot be replied by crime. Stealing or prosecution is not replied by stealing and prosecution in return. The basis of jurisprudence for retaining capital punishment—death for death—requires to be changed<sup>2</sup>.

The retributive aspect of capital punishment is not in conformity with modern theories. "It is theoretically primitive and it ignores social responsibility and disregards the possibility of reformation."<sup>3</sup>

189. Revenge is a very primitive and barbaric instinct. With intellectual renaissance and progress, such notions should disappear<sup>4</sup>.

190. The old, ancient society was based upon violence, and the entire object of that society (to maintain its own existence) was to put an end to or minimise violence. It is because of this approach that when a person committed a murder, the relatives of the murdered person could take revenge, and if they did not do so, the society would take revenge. An eye for an eye, a tooth for a tooth and life for life—that was the ancient society. "Surely, in 1961 we have advanced far enough to know that that is not the principle that should govern society at all." The more humane principle of trying to better the conditions of human being, so that they may not indulge in these crimes, should be followed<sup>5</sup>.

Revenge should not be part of any just punishment<sup>6</sup>.

IX. Counter-arguments for abolition (in reply to retentionist arguments)

Certainty of punishment better than severity. 191. Detection is important. Deterrence by any means can be substituted by detection and prevention<sup>7</sup>.

192. Capital punishment, or the possibility of sentence of death being awarded in a particular case, diminishes, the certainty of punishment and makes the jury unwilling to convict.

1 U. N. Publication (1962), page 62, paragraph 229.

2 Shri Umanath, Lok Sabha Debates, 21st April, 1962, col. 331.

3 Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956.

4 Smt. Savitry Devi Nigam, Rajya Sabha Debates, 25th August, 1961, col. 1683.

5 Diwan Chaman Lall, Rajya Saha Debates, 25th August, 1961, col. 1739 and 1740.

6 Canadian Report, page 12, paragraph 38, stating the argument.

7 Shri Bhupesh Gupta, Rajya Sabha Debates, 25th April, 1958, col. 495.

193. Abolitionists do not want to take away the right of the State to punish the offenders. They would like to punish those who offend against the State or any person. But the truth is, that because of capital punishment, offenders escape unpunished. Capital punishment "hangs like the Damocles sword on the heads of the Judges." They dread it, and are afraid to give capital punishment, because they fear so many loopholes are there<sup>1</sup>.

When it is abolished, there will be less murders, because everybody will be punished<sup>2</sup>.

194. Existence of capital punishment makes murder trials protracted and sensational, and distorts the administration of justice and renders the dispassionate examination of the evidence more difficult<sup>3</sup>. "When life is at hazard in a trial, it sensationalises the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad. I think, scientifically, the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life."<sup>4</sup>.

Sensationalism.

195. Juries are unduly swayed in their verdict by fear of death penalty<sup>5</sup>.

The presence of capital punishment falsifies criminal proceedings, which take on the character of a tragi-comedy. This renders justice uncertain<sup>6</sup>.

196. The argument that the homicide percentage in other abolitionist countries was low seems to be plausible, but what brought down the incidence of murders there in such countries was not the sentence of death, but better living conditions and training of the emotion and the impulses and proper education<sup>7</sup>.

Better living conditions in other countries.

197. Public opinion is divided over the matter; those who argue for abolition, also reflect, to some extent, public opinion<sup>8</sup>.

Public opinion.

1 Shri Prithvi Raj Kapoor, Rajya Sabha Debates, 25th April, 1958, col. 523.

2 Shri Prithvi Raj Kapoor, Rajya Sabha Debates, 25th April, 1958, col. 524.

3 Ceylon Report, page 38 *et seq.*, Summary of Arguments under "Administration of Justices".

4 Mr. Justice Felix Frankfurter (U.S.A.) cited by Shri M. L. Agrawal, Lok Sabha Debates 24th August, 1956, cols. 4345-4388.

5 Canadian Report, page 12, paragraph 41, stating the argument.

6 U. N. Publication (1962), page 61, paragraph 224.

7 Sirci P. N. Nair, Rajya Sabha Debates, 25th April, 1958, col. 470.

8. Shri Bhupesh Gupta, Rajya Sabha Debates, 25th April, 1961, col. 1698.

198. The argument of public opinion is an irrelevant one. For no social reform, even the Hindu Marriage Act, there was any public opinion. Still, legislation was brought forward, because the leaders who are Members of Parliament are responsible for creating public opinion and for reforming society<sup>1</sup>.

199. Public opinion is divided on the issue, and is largely uninformed. Practically all specialised studies by experts favour abolition. Parliament should give a lead to public opinion, if abolition is desirable<sup>2</sup>.

Opinion of  
Judges  
and police  
officers not  
conclusive.

200. Judges, lawyers and police officers are not in any favourable position to form views, on this question, since they see the murder only after or at the stage of detection of the crime, when his attitude to the possible punishment is likely to be very different from his attitude before or during commission of the crime<sup>3</sup>.

Prison  
Administra-  
tion.

201. Difficulties of prison administration are no argument for retention. The execution of murderers runs counter to the established purpose of the prison administration,—namely the reformation of criminals. Further, advocates of abolition include many experienced prison administrators. Taking of life by the State for economic reasons is counter to universally accepted religious and moral principles<sup>4</sup>.

202. Even if the housing of all convicted murderers presented difficulties it would be improper to permit mere administrative considerations to stand in the way of abolition, which is justified on broad grounds of public policy<sup>5</sup>.

The argument that it is unreasonable to expect the State to feed and clothe convicted murderers for the rest of their lives was met in very forceful language by Professor Goodhart<sup>6</sup>:—

“There are, undoubtedly, serious arguments, which have been advanced against the abolition of capital punishment, but this particular one seems to be wicked and immoral. Are we to kill men and women in cold blood because it is too expensive to maintain a

1 Smt. Savitry Devi Nigam, Rajya Sabha Debates, 8-9-1961, col. 3831.

2 Ceylon Report, page 38 *et seq.*, Summary of Arguments under “Public Opinion.”

3 Ceylon Report, page 38 *et seq.*, Summary of Arguments under “Public Opinion.”

4 Ceylon Report, page 40 *et seq.*, Summary of Arguments, under “Prison Administration” items (i) and (ii) the right hand column.

5 Canadian Report, page 12, paragraph 42, stating the argument.

6 Letter of Professor A. L. Goodhart to the *Manchester Guardian*, cited in the Woodrow Wyatt “Again the issue of Capital Punishment”, *Times Magazine* January 8, 1956, reproduced in McClellan, *Capital Punishment* (1961), pages 105—106.



prison in which to house them? If the terrible problem of life or death is to be decided on the basis of pounds, shillings, and pence, then we can have little reason to be proud of our modern civilization."

203. Sympathy for the victim's family does not justify capital punishment. Death cannot cure a crime or restore the life of the victim. By just "murdering the murderer", we do not show any sympathy for the family of the victim. Nor do we show any sympathy for the person who has been murdered by the State and his family<sup>1</sup>.

Sympathy for victim no justification.

#### X. Experiment of abolition worth making

204. Progressive jurisprudence requires abolition.

Some country at some time has to make an experiment and go by this progressive jurisprudence. India, with its great traditions is more fitted to make this experiment than any other countries. If crimes go up as a result of abolition, "Parliament will be sitting for several months every year" and can restore capital punishment<sup>2</sup>.

Experiment should be made.

#### XI. Substitute possible

205. Criminals can be reformed. They are the victims of circumstances. "They are bone of our bone and flesh of our flesh. They are from us and we should not be afraid of them. . . . We should have faith in humanity; we should have faith in the goodness of man."<sup>3</sup>

Reformation possible.

206. Murderers can be reformed. Murderers who have been kept in prisons instead of being sentenced to death have proved to be the most docile and most obedient people<sup>4</sup>.

207. The fear that abolition will create a sort of risk in the society is a fear not based on facts, and is "childish and primitive"<sup>5</sup>.

No risk in abolition.

208. Abolition, by showing the State's reverence for life, tends to inculcate the same approach in the minds of its citizens, and decreases the incidence of murders<sup>6</sup>. By reason of the great example of acceptance by the State of the principle of sanctity of life, by abolition would lead to a substantial and progressive diminution of murder<sup>7</sup>.

<sup>1</sup> Smt. Savitry Devi Nigam, Rajya Sabha Debates, 8th September, 1961, col. 3832.

<sup>2</sup> Shri Bhupesh Gupta, Rajya Sabha Debates, 25th August, 1961, cols. 1700 and 1701.

<sup>3</sup> Shri Prithvi Raj Kapoor, Rajya Sabha Debates, 25th April, 1958, col. 438.

<sup>4</sup> Smt. Savitry Devi Nigam, Rajya Sabha Debates, 25th August, 1961, col. 1688.

<sup>5</sup> Smt. Savitry Devi Nigam, Rajya Sabha Debates, 25th August, 1961, cols. 1682 and 1683.

<sup>6</sup> Ceylon Report, page 38 *et seq.* Summary of Arguments, under "Long-term effect".

<sup>7</sup> Shri M. L. Agrawal, Lok Sabha Debates, 24th August, 1956, cols. 4345 to 4388.

209. Experience shows that there is no appreciable risk of convicted murderers killing again<sup>1</sup>.

Death  
penalty  
a lazy  
answer.

210. Society can protect itself by other means, and the death penalty is no more than a lazy answer which hampers the search for effective means of curbing crime and a rational system of prevention<sup>2</sup>.

211. Deterrent punishments have not been able to check murders, and the time has come to replace them with some other punishment<sup>3</sup>.

Other  
methods  
should be  
tried.

212. The only objects which can be justified in consonance with the modern tendencies, are prevention and punishment, and these objects can be achieved by means other than the taking of the life. Capital punishment is often abused, particularly for political purposes<sup>4</sup>.

## XII. Onus

Onus.

213. The execution of a human being is a punishment of the most final nature, and those who advocate it must justify its morality and social utility<sup>5</sup>.

### TOPIC NUMBER 18

#### *Abolition or retention—Replies to Question No. 1.*

Question 1.

214. The general question of abolition or retention was the subject-matter of question 1 in the Questionnaire issued by us. The question was as follows:—

“1. Are you in favour of retention or abolition of capital punishment?”.

This being the most important question in the Questionnaire, naturally almost every person or body which has sent a reply to the Questionnaire has expressed definite views on this question. While it would not be proper to come to a conclusion about the state of public opinion by merely counting the replies on either side, it would not be out of place to mention here briefly the nature of the replies received.

215. The replies received to Question 1 may be classified into three categories:—

(a) those who are for total abolition;

<sup>1</sup> Ceylon Report, page 38 *et seq.* Summary of Arguments under “Alternative punishment”.

<sup>2</sup> U.N. Publication (1962), page 61, paragraph 228.

<sup>3</sup> Shri Raghunath Singh, Lok Sabha Debates, 21st April, 1962, col. 309 (in Hindi).

<sup>4</sup> U.N. Publication (1962), page 61, paragraphs 221 and 223.

<sup>5</sup> Ceylon Report, page 38 *et seq.* Summary of Arguments under “Onus of proof”.

(b) those who are for retention without any modification; and

(c) those who are for partial retention.

216. In the last category again, there are several sub-categories which, while not favouring total abolition, suggest abolition of capital punishment,—

(a) for certain offences, or

(b) in certain cases on the lines of the (English) Homicide Act, 1957<sup>1</sup>, or

(c) for particular persons.

217. It is unnecessary to enter here into details of these sub-categories of partial retention, since the relevant topics are dealt with in the Questionnaire<sup>2</sup> under other questions.

218. Those who favour *total* retention seem to form the largest majority, and considerably out-number those who favour partial abolition or total abolition. In favour of total retention are almost all High Courts that have sent replies, almost all High Court Judges individually who have sent replies, all State Governments and Administrations of Union territories that have sent replies, some Members of Parliament and State Legislatures, all Inspectors-General of Police who have sent replies, many State Bar Councils or members of State Bar Councils, almost all State or District Bar Associations that have sent replies, and many Advocates.

219. The Bar Association of India is also for retention<sup>3</sup>.

220. An eminent member of the Bar is for retention<sup>4</sup>.

221. Almost all the High Courts that have sent replies have favoured the retention of capital punishment<sup>5</sup>.

222. Almost all State Governments that have sent replies are in favour of retention of capital punishment<sup>6</sup>.

223. The views of the Home Secretaries or the Law Ministers of some State Governments have been received through the State Governments, and they are also in favour of retention<sup>7</sup>.

<sup>1</sup> The replies were received before the Murder (Abolition of Death Penalty) Act, 1965, became law.

<sup>2</sup> See question Nos. 3(a), 6(a) and 9, in the Questionnaire.

<sup>3</sup> S. No. 183 (Bar Association of India). The reply of the Bar Association of India under Question 1, is subject to its reply to Question 3(a).

<sup>4</sup> S. No. 161 (An eminent member of the Bar).

<sup>5</sup> S. Nos. 187, 167, 140 (High Courts).

<sup>6</sup> S. Nos. 129, 242, 261, 143, 154, 182 and 311 (State Governments)

<sup>7</sup> S. Nos. 131 and 313 (Law Ministers and Home Secretaries)

224. Governments and Administrations of certain Union territories have sent replies, and all of them are in favour of retention<sup>1</sup>.

225. A State Government<sup>2</sup> has expressed itself in favour of retention, emphasising the need for maintenance of security and peace, and also pointing out that the abstract theoretical doctrine that human life is sacred may work hardship if applied to the classes of persons who consider the life of a human being not so sacred and who act recklessly without any such considerations crossing their minds.

226. Another State Government<sup>3</sup>, while noting that there are equally forceful arguments for and against retention, has stated that in the present uncertain conditions of life and in view of the fact that lawlessness and violence are increasing in all the spheres of life, it would not be advisable to abolish the capital sentence. In its opinion, the death penalty is a social necessity, because it effectively deters people from committing murders by affecting—

(i) the future of the immediate family and friend's circle of the person punished;

(ii) the future conduct of others.

227. Many High Court Judges have sent replies in their individual names, and almost all the High Court Judges who have sent such replies, are in favour of retention<sup>4</sup>.

228. Replies of several Members of Parliament and of State Legislatures are in favour of retention<sup>5</sup>.

229. The Bar Association of India is for retention<sup>6</sup>.

One High Court Bar Association<sup>7</sup> has sent a reply in favour of retention.

The Indian Federation of Women Lawyers<sup>8</sup> is for retention.

<sup>1</sup> S. Nos. 164, 106 and 303 (Governments or Administrations of Union territories).

<sup>2</sup> S. No. 574, replies to questions 1 and 2.

<sup>3</sup> S. No. 580.

<sup>4</sup> S.No. 97(a), 97(b), 316, 393, 394, 395, 396, 397, 251, 262, 130, 137, 105 and 147 (High Court Judges).

<sup>5</sup> S. Nos. 102, 207, 209, 210, 213, 214, 216, 221, 224, 225, 226, 232, 236, 241, 244, 248, 249, 257, 258, 273 and 401. (Members of Parliament and of State Legislatures).

<sup>6</sup> S. No. 183 (Bar Association of India).

<sup>7</sup> S. No. 493 (A High Court Bar Association).

<sup>8</sup> S. No. 151.

230. A High Court Bar Association in a Presidency Town<sup>1</sup> is of the view that capital punishment should be retained. In its opinion, the primary object of punishment is retribution, and one of its purposes is to serve as an outlet for the indignation of the community. To be dovetailed into main volume.

231. Several Advocates are for retention<sup>2,3,4,5,6,7</sup>.

Many Advocates are in favour of retention<sup>8</sup>.

Many Public Prosecutors are in favour of retention<sup>9</sup>.

A number of State Bar Councils<sup>10</sup> are for retention.

232. The Presidency Magistrates, in a Presidency Town<sup>11</sup>, who are in favour of retention (by majority) have emphasised that the offences for which the Indian Penal Code provides capital punishment have not lost their gravity with the passage of time or change of regime.

Some of them, however, are against retention, on the ground that retention would serve as a revenge by the society and the law should not sanction it, and that if the imprisonment for life actually lasts for the whole life and not for a period of 14 to 20 years reduced by remission, then that sentence too would have an equally deterrent effect as a sentence of death.

233. The Judicial Section of the Indian Officers' Association in a State<sup>12</sup> is for retention, on the ground that the deterrent object of preventing heinous crimes involving a high degree of violence is substantially, though not sufficiently, achieved.

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1 S. No. 493

2 S. No. 161(i) (An eminent member of the Bar).

3 S. No. 229 (Advocate-General of a State).

4 S. No. 143(a) (Advocate-General of a State).

5 S. No. 146 (Senior) Deputy Advocate-General and Deputy Advocate-General of a State).

6 S. No. 101(i) (Member of a State Bar Council).

7 S. Nos. 92, 109, 128, 152, 201, 203, 250 and 272.

8 S. No. 318 (an experienced Advocate of the Bombay High Court) 321, 400 (an Advocate who has been a Public Prosecutor and Government Pleader), 402 (an Advocate who is also a Public Prosecutor), 403, 407 (an Advocate who has been a Public Prosecutor), 408, 409, 410, 412, 451, 453 and 466.

9 S. No. 459, (a Public Prosecutor), 471 (a Public Prosecutor), 515 and 547.

10 S. Nos. 116, 132, and 159. (State Bar Council).

11 S. No. 549, replies to questions 1 and 3.

12 S. No. 562.

We find that of the Judicial Officers or Judicial Officers' Associations that have sent replies, an overwhelmingly large number are in favour of retention. These include—

- (i) District & Sessions Judges<sup>1</sup>; and a Chief Presidency Magistrate<sup>2</sup>;
- (ii) Additional Sessions Judges<sup>3</sup>;
- (iii) Assistant Sessions Judges, Civil Judges, First Class Magistrates and officers exercising powers both of Civil Judges and First Class Magistrates<sup>4</sup>;
- (iv) Judicial Service Officers' Associations<sup>5</sup>.

234. A large number of District Bar Associations<sup>6</sup> are in favour of retention.

235. Of the Inspectors-General of Police and Inspectors-General of Prisons of State Governments that have sent replies<sup>7</sup>, some are for retention.

236. Certain District Magistrates<sup>8</sup> are also for retention.

237. Apart from the replies already summarised, we have received replies on our Questionnaire from public men, private individuals and certain Institutions. Several of these replies are for retention<sup>9 10</sup>.

1 S. Nos. 212, 325, 330, 333, 334, 335, 336, 339, 342, 346, 347, 348, 349, 350, 351, 352, 353, 354, 358, 359, 360, 362, 364, 366, 370, 371, 372, 375, 382, 383, 384, 385, 387, 388, 389, 391, 399, 415, 416, 418, 419, 420, 421, 423, 424, 425, 427, 429, 431, 434, 436, 437, 438, 440, 442, 444, 445, 447, 448, 452, 454, 455, 456, 458, 462, 463, 467, 473, 475, 478, 480, 488, 490, 498, 500, 501, 502, 503, 505, 509, 512, 516, 517, 520, 521, 522, 524, 525, 526, 548, 553, 554, 556, 557, 560, 563, 567, 568 and 570 (District & Sessions Judges).

2 S. No. 549 (Chief Presidency Magistrate of a Presidency Town)

3 S. Nos. 367, 381, 470, 499, 527, 533, 534, 535 and 559.

4 S. Nos. 340, 529, 530, 531, 532, 536, 537, 538, 539, 541, 543, 544, 545 and 546.

5 S. Nos. 373, 374 and 562.

6 S. Nos. 125, 218, 219, 220, 223, 228, 31 (one group), 233, 234, 239, 270, 323, 343, 368, 411, 412, 426, 430, 432, 457, 468, 484 and 485.

7 S. No. 143(b) and 143(c), 263 and 264.

8 S. No. 286, 491, 508, 513, 555 and 565.

9 S. No. 95 (a Retired Judge of the Bombay High Court).

10 S. No. 338 (A very eminent public man).

11 S. Nos. 12, 138, 139 (a Retired Sessions Judge), 145, 151, 155, 235, 265, 278, 279, 280, 281, 284, 288, 289, 290, 294, 295, 297, 299, 300, 320 and 332 (a retired Collector and District Magistrate).

12 S. Nos. 344, 357 (a social worker and State Jail visitor), 365, 413, 414, 417, 460, 461, 476, 477, 481, 483, 489, 496, 497, 506, 514, 519, 523 and 552.

238. Those who favour total abolition are few in number.

Very few High Court Judges have expressed themselves in favour of total abolition<sup>1</sup>.

No High Court Judge who has expressed his individual view has favoured abolition, except as already noted under summary of views of High Courts<sup>2</sup>.

None of the replies received from State Governments or Union territories is in favour of abolition.

Of the replies received from Members of Parliament and State Legislatures, very few are for abolition<sup>3</sup>.

239. Several Advocates have sent replies in favour of abolition<sup>4</sup>.

240. No State Bar Council has expressed a view favouring total abolition.

No State Bar Association has expressed a view favouring total abolition.

241. As regards Sessions Judges and other Judicial officers, and Associations of Judicial Officers, very few of them have sent replies in favour of total abolition<sup>5</sup>.

242. The number of District Bar Associations favouring abolition is very small<sup>6</sup>.

243. As regards Inspectors General of Police and Inspectors-General of Prisons and District Magistrates, only one Inspector General of Prisons<sup>7</sup> has favoured total abolition.

1 S. No. 187 (Minority view of one High Court).

2 S. No. 187 (Minority view of one High Court).

3 S. Nos. 206 (for abolition except for waging war and treason); 215, 243 (for abolition, but not immediately); 247, 255 and 401 (Member of a State Legislative Council who is also an Advocate).

4 S. No. 104(b) (A Member of a State Bar Council); 108, 141, 149, 161 (ii), 161(iii), 161(iv), 305 (an Advocate who has previously been a Member of Parliament), 331, 405 (an Advocate who has been a Member of a State Legislative Council) 406, 439 and 474.

5 S. Nos. 341 (A District & Sessions Judge in Maharashtra), 379 (A City Civil Court Judge and Additional Sessions Judge), 390 (A District & Sessions Judge in the State of Gujarat), 433 (A District and Sessions Judge in the State of Orissa), 443 (A District & Sessions Judge in Gujarat), 446 (A Sessions Judge in Rajasthan), 507 (An Additional District Judge in Kerala), 518, (A District and Sessions Judge in the State of Gujarat), 528 (A Joint Civil Judge and Judicial Magistrate in the State of Maharashtra), 558 (A District & Session Judge in the State of Madras) and 561 (An Additional District and Sessions Judge in the State of Madras).

6 S. Nos. 227 and 238.

7 S. No. 131(i) (An Inspector General of Prisons).

244. Several public men, institutions and private persons have favoured total abolition. It is not necessary to enumerate them, but a few replies<sup>1,2,3</sup> make points worth consideration, and these points are dealt with later<sup>4</sup>. Some of the replies are from Zila Parishads or similar bodies<sup>5</sup>.

245. Those who favour partial abolition may be grouped as follows:—

- (i) one High Court<sup>6</sup>;
- (ii) two Judges of High Courts<sup>7</sup>;
- (iii) some Members of Parliament; and State Legislatures<sup>8</sup>;
- (iv) some officers of Governments (in their personal capacity)<sup>9</sup>;
- (v) one major Bar Association<sup>10</sup>;
- (vi) one Bar Council<sup>11</sup>; and
- (vii) others<sup>12</sup>.

Arguments for abolition (advanced in the replies) set out.

246. The arguments which have been put forward in the replies received on this question, may now be set out. So far as those who have supported total abolition are concerned, one contention advanced is that there is always a possibility that an innocent person may be hanged. It is stated, that the conviction is based on the oral testimony of witnesses to the occurrence or on circumstantial evidence and the appreciation thereof by a *human* judge. The evidence, it is contended, may be tainted by so many factors, and these may be coupled with the inefficiency or want of resources of the accused; and, further, the investigation might have been coloured by corruption and malpractice. It is pointed out, that in several cases, the Privy Council or the Supreme Court has set aside sentences of death even after confirmation by the High Court, and it is argued, persons who do not command talent or ability for taking their case to the highest Court would still suffer.

1 S. No. 479 (A leading Theosophist).

2 S. No. 315 (Dr. K. N. Katju, in a published article).

3 S. Nos. 119, 122, 126 and 221.

4 See paragraphs 246 to 261 *infra*.

5 S. Nos. 277 (Zila Parishad in Rajasthan), 282 (Zila Panchayat Raj Officer in Bihar), 285 (A Sarpanch of a Circle Panchayat in Madhya Pradesh).

6 S. No. 136.

7 S. No. 105, and 397, in reply to Questions 1, 3(a) and 6(a).

8 S. Nos. 206, 237 and 253 (Law Minister of a State).

9 S. No. 162 and 131(a).

10 S. No. 110. ¶

11 S. No. 115.

12 S. Nos. 107, 133 (a State Law Commission), 150, 376 (Judge of a City Civil Court), 378 (Judge of a City Civil Court), 380 (Judge of a City Civil Court), 386 (District and Sessions Judge), 449, 459 (a District and Sessions Judge), 464 (an Advocate), 465 (an Advocate), 487 (a District and Sessions Judge). —



247. Further, it is argued that capital punishment is a serious blot on our civilization, that in the last 200 years tremendous change has taken place in the attitude towards capital punishment; that many offences which were capital in England in the 19th Century have now ceased to be capital<sup>1</sup>; that many countries in Europe have abolished capital punishment and many States in America have also abolished capital punishment, and that the people of India with *ahimsa* should have abolished the death sentence long ago.

248. It is also stated, that there are so many aspects, namely, biological, social, psychological, economic, educational and moral, to the problem, and that social problems should be tackled at the roots rather than in their symptoms. It is pointed out, that modern concepts of criminology and penology rightly demand a fundamental re-construction and radical re-orientation of the existing penal system. It is also stated, that society is not so far advanced that it can demand the life of another being, whatever crime he might have committed. The deterrent effect of capital punishment has been questioned also<sup>2</sup>.

249. The reply of a State Government<sup>3</sup> tries to meet the arguments usually advanced for abolition. First, the argument that life is a gift of the creator is met by stating that the abstract theoretical doctrine that human life is sacred will work hardship if applied to a class of persons who consider life of human being not so sacred; secondly, the argument that retaliation is not a defensible basis for a penal system is met by stating, that the dominant idea of penalty of imposing death sentence is the deterrent idea, and that capital punishment is intended to serve, and in most cases does really serve, as a deterrent. It is also stated, that the consciousness of the general public that certain kinds of offences are punished with death itself gives security to the general public to move about freely. Thirdly, the argument that the death penalty is unjust and inhuman is noted; the reply states that punishment is evolved for the maintenance of security and peace for the citizens in general, and what kind of offences should be met with death penalty should be determined at a given time and place having regard to the state of development of citizens and their requirements for maintaining security and safety.

250. One of the replies<sup>4</sup> states, that society is not so far advanced that it can demand the life of another human

<sup>1</sup> The replies were received before the Murder (Abolition of Death Penalty) Act, 1965, became law.

<sup>2</sup> Detailed treatment of deterrent effect falls under Question 2(b); see paragraphs 334—369, *infra*.

<sup>3</sup> S. No. 574.

<sup>4</sup> S. No. 161(ii).

being, whatever he may have done. Further, there is always the risk of an innocent man being hanged.

251. Another reply<sup>1</sup> states, that capital punishment neither deters the criminal nor achieves the object of rendering justice; that family feuds are carried on to such a length that murders take place in the concerned families in coming generations as a matter of retribution; that it is based on the old principles "tooth for tooth", and on the assumption that man cannot be cured. Since its deterrent object is not achieved, the reply favours abolition.

252. Another reply<sup>2</sup> points out, that studies conducted in foreign countries reveal that the assumption that a person who has once committed a murder will again commit a serious crime is not warranted<sup>3</sup>. Again, it is stated, if it is assumed that a person who has once committed a murder has a proclivity to repeat the same or similar offences, and thus constitutes threat to human being, that must be equally true in the case of a person who has at any time committed any act of violence. Unassailable evidence, it is urged, is still lacking to show that fear of punishment is the dominant factor which dissuades human beings from committing socially forbidden acts. History of punishment in the middle ages in Europe shows that the increase in the number of capital offences did not produce the expected result. It is also emphasised, that the spectacle of the State taking away the life by judicial killing tends to produce just the result contrary to what is intended. It is also stated, that criminals are of three classes, those who commit murder as a result of defective personality or highly unfortunate social environment; those swayed by extreme passion; and those who commit premeditated murders. In the first two cases, the deterrent effect of death penalty is very negligible, while, as regards the last case, it is very seldom that criminals carry with them firearms and deadly weapons during their adventure so far as India is concerned. It is also stated, that the assumption that the fear of penalty deters them from carrying weapons should be tested by facts. The statistical analysis made by the Royal Commission<sup>4</sup> is referred to in order to show that in countries like Norway, Sweden, Italy, etc., the homicide rate has not been affected by abolition. The example of Travancore-Cochin is also cited. It is also stated, that public opinion may not be easy to ascertain in the matter of abolition or retention, and further, that public opinion always fluctuates with current events. Moreover, it is not based on rational grounds<sup>5</sup>.

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1 S. No. 255.

2 S. No. 304 (A University Professor).

3 R.C. Report, page 228 cited.

4 R.C. Report, Appendix 6, cited.

5 Gowers. Life for Life, page 136 cited.

253. Another reply<sup>1</sup> emphasises the reformatory aspect of punishment, which, it is stated, is wanting in our penology. The chances of error, and the futility of capital punishment as a deterrent, are also put forth as grounds of abolition.

254. Dr. Katju, in an article<sup>2</sup>, made these points:—

“...The public conscience is said to revolt against the death penalty, and the fear of a miscarriage of justice and of an innocent person being hanged is ever present.

“I know of one case reported in the Calcutta High Court Law Reports where an old man was accused of murdering a young girl and then doing away with her body. He protested his innocence. He was however tried, found guilty, sentenced to death and hanged. Two years later the young girl returned to her village home and said that she had just run away out of sheer terror.

\* \* \* \*

“During the past 12 years between ten and eleven thousand people have been accused of murder each year all over India. There were protracted trials and numerous acquittals, about 72—75 per cent by Sessions Judges; later, another 15 per cent were acquitted by the High Courts on appeal. And then many of those convicted escaped the extreme penalty by the exercise of the prerogative of mercy by State Governments and by the President of India. Ultimately, only a small number—between 100 and 150—go to the gallows every year.

\* \* \* \*

“This aspect of the situation requires very careful consideration. Every case involving the death sentence causes numerous difficulties for the investigating authorities and the courts concerned. Every one is conscious throughout the duration of the case that a human life is at stake, and the accused gets the benefits of even the slenderest doubt. This attitude is based upon purely humanitarian consideration right upto the President of India.

“Those who support capital punishment stress its deterrent effect and say its abolition will probably lead to a larger number of murders, but the answer is that if out of 10,000 to 15,000 people accused of murder

<sup>1</sup> S. No. 305.

<sup>2</sup> Article in *Statesman*, December 19, 1961, “To Hang or not to Hang”, Enclosure to S. No. 315.

you punish with death only 125 or 150 in a year, it appears that the phrase 'deterrent effect' has no real meaning. Further more, the vast majority of these murders are committed on the spur of the moment without any premeditation and the murderers seldom reflect that by their action they are running the danger of being sentenced to death.

"In death sentence cases, from the Magistrates up to the High Court. the inconvenience, waste of time, waste of effort and waste of money and human energy is indescribable, and often guilty people escape.

"The problem is a perplexing one. I have, however, come to the conclusion, after considerable experience in many spheres of administrative and judicial activity, that it may be worthwhile abolishing the death penalty, at least as a temporary measure throughout India. If mischievous results do not follow, then a good day will have dawned in India with the extinction of capital punishment. The law courts and all administrative agencies and authorities up to the President of India will have a sigh of relief. The administration of justice in all cases will also become a sure proposition, and there will be fewer acquittals in murder cases."

255. Another reply<sup>1</sup> summarises the argument thus:—

'We do not consider that the death sentence acts as a deterrent, for the various reasons enumerated below:

(i) Belgium, Finland, Norway, Sweden, Switzerland, New Zealand and many states of the U.S.A. have either abolished capital punishment or allowed it to fall into disuse. Their statistics not only show no increase in the homicidal rate but also indicate decrease in many cases. On the contrary, life sentences and long imprisonment have proved more deterrent.

(ii) The police would do their duty better without the fear of having to bring a man to the gallows.

(iii) Juries would do their duties better. Decent and intelligent men avoid serving on juries of murder trials, since they shrink from shedding the blood of a fellow being.

(iv) Administration of law would be speedier.

(v) There would be less corruption in courts.

(vi) Executioners and others concerned suffer from the degrading and brutalising effect of such work.

<sup>1</sup> S. No. 479 [A leading Theosophist and a society of Theosophists) under Q. 2 (b)].

(vii) Witnesses and readers of executions feel a brutalising and hardening influence.

(viii) The criminal is deprived of the chance of reform.

(ix) The nature of the punishment is due to a barbaric tendency as an outcome of ignorance of man's nature and of what happens to him when he is violently thrown out of his body.

(x) It is immoral. The erring ones are infected in the moral plane. Why murder them when we do not murder diseased people who also are a menace to society? Why not cure morally ill?

(xi) Justice might be miscarried and the innocent slaughtered. Such cases do happen and are on record.

(xii) The wrong done by the murder is not righted by another murder, since by this method the victim is not brought back to life.

(xiii) The criminal is like a delinquent child and requires intelligent guidance. We do not kill naughty children but guide and educate them to behave better.

(xiv) Sometimes the accused is like an insane person. We do not kill insane people but endeavour to rehabilitate them. Why kill a criminal for manifesting his mental aberrations?

(xv) "Though shalt not kill!" is one of the commandments of Jesus. This is a universal ethical injunction based on metaphysical philosophy and reflected in all spiritual traditions.

(xvi) "Kill not—for Pity's sake—and lest you slay the meanest thing upon its upward way". Thus spoke Lord Buddha in enunciating the Panchasila. Not without reason did he adjure his hearers so".

256. On the other hand, those who have favoured total retention emphasise that the time is not yet ripe in India for abolition of capital punishment. The law and order situation obtaining in the country has been referred to as justifying its retention. It is also pointed out, that in most progressive countries in the world, the average citizen is well informed and conscious of his duty to society and has a healthy outlook on life, and does not lose his balance except under provocation, while in India, because of lack of education and proper social outlook, people are easily upset emotionally and, (in such uncontrolled state), are a grave menace to society. The deterrent effect of capital punishment has been strongly emphasised<sup>1</sup>.

<sup>1</sup> Detailed discussion as to the deterrent effect falls under Q. 2(b). See paragraphs 334—369, *infra*.

257. In the reply of the Chief Justice of a High Court<sup>1</sup> it has been stated, that a cold, calculated and brutal murderer cannot be equated with a murderer committing the crime in the heat of passion and other extenuating circumstances. In the former case, the reply states, the only befitting sentence is the sentence of death.

258. The reply of a High Court Judge<sup>2</sup>, who has had extensive experience in the Court of Session also, states that the existing law sufficiently achieves the deterrent object, i.e., the object of preventing other persons from committing serious crimes.

259. In reply of a District Bar Association in Madhya Pradesh<sup>3</sup>, it has been emphasized, that in many parts of the country the people are very backward and are temperamentally very rash. Prices of land and food products are going high; disputes about possession of lands are increasing in great number; and gundas are actually hired for obtaining forcible possession of property. The incidence of murder due to political rivalry is also increasing. It is, therefore, stated that abolition will be a great risk.

260. An eminent public man<sup>4</sup>, who had had rich and varied experience of criminal law, and who has held very high public offices, has expressed himself strongly against abolition, in these words:—

“The deterrent effect of the well known and universally dreaded sentence of hanging is not to be measured by statistics of cases. The wicked and reckless thoughts of angry or greedy man to do away with a human obstruction in his way do not take active shape because of the universally known law that killing means hanging of the offender. *Many a murder ends only with the thought of it.* These do not come to be numbered. If this death sentence is abolished, hundreds of angry and foolish minds would take the chance of 15 years in jail much more readily than they do now. And the motives for such crime are increasing these days, and jail life has lost most of its terrors.

“I therefore am clearly of opinion that judges should take the motive and the distress of the offender into account and be free to deal with the convicted offender; but the death penalty should be there for suitable cases so that men may abstain from killing on account of the dread of the death sentence.”

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1 S. No. 393, reply to question 2(a).

2 S. No. 396, reply to question 2(a).

3 S. No. 426.

4 S. No. 338.

261. Those who have favoured partial retention, have emphasised the unjustifiability of capital punishment, except for brutal crimes, and have argued for liberalisation of extenuating circumstances. Some of them would like to abolish the death penalty except for waging war or treason. Some would suggest adoption of a law similar to the (English) Homicide Act, 1957<sup>1</sup>.

One of the suggestions is for retaining the death sentence only for waging war and treason<sup>2</sup>:

Another reply suggests<sup>3</sup>, that the sentence of death should be retained for offences under sections 194, Indian Penal Code and for offences under s. 302, Indian Penal Code only if attendant with very cruel circumstances, and offences under section 396, Indian Penal Code only if attendant with very cruel circumstances. Examples of cruel circumstances given are—murder by burning, murder by cutting to pieces, and murder by taking the victim unawares.

Another reply states<sup>4</sup>, that the imposition of death sentence in a few selected cases of gruesome, premeditated, cold-blooded and ghastly murders did act as a deterrent, and that, capital punishment is found effective at some notorious places with some classes of people. The reply also suggests, that the sentence of death should be retained for offences under sections 121, 132, 302, 303 and 396, Indian Penal Code.

Another reply<sup>5</sup>, while stating that capital punishment is found to be effective at a particular place and with some people only, seems to contemplate that it should be reserved for murders of a heinous character committed after planning and cold calculations, and that it should be abolished for the offence under section 307, Indian Penal Code.

The reply of a High Court Judge<sup>6</sup> states, that so far as murder is concerned, the sentence of death should not ordinarily be imposed unless there are aggravating circumstances on record, by reason of which the Judge considers it proper to award the extreme penalty. Examples of aggravating circumstances given in the Reply are—enormity of the crime (cold-blooded and premeditated),

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1 The replies were received before the passing of the Murder (Abolition of Death Penalty) Act, 1965.

2 S. No. 206.

3 S. No. 237 (Member of a State Legislature) under Questions 3(a) and 7(b).

4 S. No. 376 (A City Civil Court Judge, who has experience as Sessions Judge in several districts).

5 S. No. 380 (a City Civil & Sessions Judge), reply under questions 3(a) and 6(b).

6 S. No. 397 (a High Court Judge) in reply to questions 1, 3(e) and 6(a).

unnecessary brutality, murder by a life convict, murder with dacoity, etc.

Another reply<sup>1</sup> suggests that capital punishment be retained only for waging war and abatement of mutiny.

#### TOPIC NO. 19

##### *Arguments for abolition considered*

Arguments  
to be  
counter-  
balanced  
against  
each other.

262. We have carefully considered these arguments. The arguments for and against have to be counter-balanced against each other. Ultimately, the question must be decided on the total result of such counter-balancing. No single argument for abolition or retention can decide the issue. But, in arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind<sup>2</sup>.

Conclu-  
sion re-  
garding  
abolition  
or reten-  
tion.

263. It is difficult to rule out the validity of, or to deny the strength behind, many of the arguments for abolition. Nor do we treat lightly the argument of irrevocability of the sentence of death, or the need for a modern approach, or the severity of capital punishment or 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 the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, we do not think that the country can risk the experiment of abolition of capital punishment. The figures of homicide during the several years in India have not shown any marked decline<sup>3</sup>. The rate of homicide per million of the population is considerably higher in India than in many of the countries where capital punishment has been abolished<sup>4</sup>. There are many parts of the country where a wave of crime shoots up occasionally. In many States, there are districts which are notoriously criminal. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context, and similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.

<sup>1</sup> S. No. 459 (a District & Sessions Judge) in reply to questions 1 and 2(a).

<sup>2</sup> This would show the importance of the deterrent object of the capital punishment and of a consideration of that question.

<sup>3</sup> The figures of homicide are given elsewhere.

<sup>4</sup> See paragraphs 314—316, *infra*.



264. The suggestion that death penalty may be abolished as an experiment (so that it can be re-introduced after abolition) is an argument to which we have given our thoughtful attention; but we have to take note of certain possibilities. Between abolition and re-introduction may intervene an era of violence—we do not say that this is a certain consequence—but it is a possibility which cannot be ignored. Irreparable harm would then have been done not only to the victims of such violence, but to the general cause of security of the society. Once the forces of lawlessness are let loose re-introduction of capital punishment may not have the desired effect of restoring law and order immediately. Further, Parliament may not be sitting all the time, and the interval that might elapse before the law is again actually amended would prove disastrous. *On a consideration of all the issues involved, we are of the opinion that capital punishment should be retained in the present state of the country.*

265. We state below, briefly, our views as to the main arguments that have been advanced in favour of abolition:—

Arguments for abolition considered in detail.

(1) *General*.—The general argument against capital punishment, that it is a legalised, revengeful and cruel destruction of human beings, really attempts to summarise so many facts of this big question. In the final analysis, capital punishment is a question of values, or rather, of the balancing of values, and the detailed discussion of each argument, that follows, is only intended to show the relative importance of each.

(2) *Immoral*.—That the taking of life by the State is not morally justified, is an argument which could perhaps be answered by drawing attention to the ends for which the State so takes life. One of those ends is the very protection of human life, by protecting the individual and by protecting the society.

(3) *Inhuman*.—To some extent, the argument that the penalty of death is inhuman<sup>1</sup> is connected with the mode of execution. However, all punishments comprise suffering. In fact, the very concept of punishment implies suffering. It is true that capital punishment is different in quality from all other punishments, and to that extent, the question as to its justifiability assumes greater importance than questions as to the justification for any other punishment.

<sup>1</sup> It would be interesting to note that the Privy Council has held that the mandatory death penalty for arson under section 33A, Law and Order (Maintenance) Act, 1960 of Rhodesia, does not contravene section 60 of the Rhodesian Constitution, which prohibits "torture or inhuman or degrading punishment". *Ruzovwa v. R.*, The Times, January 20, 1966; (1966), 1 Current Law 385-C (January 1966).

(4) *Non-violence of Indian tradition.*—Stress has been laid on the principle of non-violence as requiring the abolition of death penalty. But it must be remembered, that non-violence is an “ideal”, and practical difficulties have to be borne in mind in determining how far the action of the State and the policy of the law should conform to that ideal. All punishments imply suffering, and (excepting pecuniary punishments), all the usual punishments imply some degree of violence to the person. Moreover, protection of the society from violence is an object of punishment (and particularly, of capital punishment); and the retention of capital punishment, far from being inconsistent with the doctrine of non-violence, actually promotes it. Opinions may, of course, differ as to whether the particularly, of capital punishment); and the retention law and order is desirable, and, so many aspects of the question have to be considered before a decision can be reached on the subject. It cannot, however, be asserted, that non-violence requires the abolition of the death penalty irrespective of other practical considerations.

(5) *Irrevocability.*—This has been dealt with separately<sup>1</sup>.

(6) *Human Freedom.*—This is a fundamental question concerning all punishments. If an offender is not a free agent, then no punishment is justified. The argument would take away the very basis for all punishments. It may also be pointed out, that where the circumstances show that the volition of the offender was affected, the Courts in India are free to discriminate in respect of punishments.

(7) *Morbid.*—Executions as such are not given much publicity in India, and, therefore, every execution may not lead to violence in its wake.

(8) *Mockery.*—It is stated that hanging is a mockery of punishment and that it is the officers who look guilty and feel ashamed. There is, however, no evidence to show that this is so.

(9) *Injury to family.*—That the sentence of death causes injury to persons who have no part in the *crime*, i.e., the family of the victim, is a factual proposition, which it will be useless to deny. In all punishments, there is some suffering to the members, though, no doubt, death causes more suffering than any other punishment. How far that consideration should be taken into account is a question of values.

<sup>1</sup> See discussion as to irrevocability; paragraphs 266—275, *infra*.

(10) *Unequal*.—That persons who have no sufficient financial means, or who for some other reason, cannot fight the case to the last, suffer, and that the law proves to be unjust to them, is an argument which concerns the subject of legal aid rather than the substantive penal law<sup>1</sup>.

(11) *Jury system*.—Whether it would be better to leave the discretion as to the sentence to the Judge or to the jury is a matter on which conflicting views have been expressed<sup>2</sup>. So far as *India* is concerned, however, experience of the working of the present system, under which the question of sentence is left to the Judge, has not shown the system to be faulty in this respect.

(12—17). *Deterrent effect*.—The various arguments connected with deterrent effect of capital punishment need not be dealt with here<sup>3</sup>.

(18) *Retributive object*.—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 of special abhorrence of murder. That this 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<sup>4</sup>.

(19) *Eye for an eye*.—It will suffice to note that the system of *invidual revenge* is no longer recognised. Social abhorrence is intended to take the place of revenge which would otherwise manifest itself in the persons concerned taking the law into their own hands. Punishment is meted out by the society, and not by the individual, through the organs of society and not by

<sup>1</sup> This mainly concerns legal aid.

<sup>2</sup> See also discussion relating to discretion of the courts; paragraphs 541—578, *infra*.

<sup>3</sup> See separate discussion relating to deterrent effect; paragraphs 308—372, *infra*.

<sup>4</sup> See the R.C. Report, page 18, paragraph 53.

the family of the individual, for the protection of society and not for the vindication of the wronged individual. If the society does not express its abhorrence of the offence of murder by appropriate sentence, there is a danger that individuals may take the law into their own hands, as a large number of cases from the Northern part of India will show.

(20) *Effect on trial.*—It is stated that juries are unwilling to convict in view of the possibility of the sentence of death. Certainty of punishment, it is stated, is thus reduced, thereby affecting deterrent effect of the penalty of death. As to this argument, we wish to point out, that in India, the system of trial of murder and other capital offences is somewhat different from that in Western countries. "Trial by jury<sup>1</sup> is not in force *uniformly* throughout the country. (In fact, it is practically abolished). Even where it is in force, the final decision in the Court of Session on questions of fact does not entirely rest with the jury, as there are provisions in the Code of Criminal Procedure whereunder, if the Sessions Judge disagrees with the verdict of the jurors or the majority of them, he can refer the matter to the High Court<sup>2</sup>. Further, the question of *sentence* is also not left to the jury<sup>3</sup>. Trained judicial officers, with long experience, are not likely to be influenced by sentimental considerations.

In this connection we may refer to the observations in an English case<sup>4</sup>, which, though made in the context of contempt of court are applicable to the point under discussion also. "A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This indeed happens daily to judges on Assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who in regard to an appeal against conviction is dealing almost entirely with points of law and who in the case of an appeal against conviction is considering whether or not the sentence is correct in principle."

(21) *Living conditions and other factors.*—It is true, that the sentence of death by itself may not exclusively influence the rate of homicide, and in those countries where the rate was low, it might have been low because of a better standard of living, and level of education of the people. But this would not, we are

<sup>1</sup> See sections 268-269, Code of Criminal Procedure, 1898. As to High Courts, see section 305, Code of Criminal Procedure, 1898.

<sup>2</sup> See sections 306, 307 and 374 to 378, Code of Criminal Procedure, 1898.

<sup>3</sup> See sections 374-378, Criminal Procedure Code, 1898.

<sup>4</sup> *R. v. Duffy*, (1960), 2 All E.R. 891, 895 (Lord Parker C.J.).

afraid, constitute an argument for abolition at all. What has to be emphasised, is, that these factors also act in conjunction with the sentence of death, or any other sentence that may be substituted.

(22) *Public opinion.*—How far public opinion favours abolition or retention<sup>1</sup>, and secondly, how far such opinion should be taken into account, are two important questions that have often been the subject-matter of debate whenever the question of abolition or retention is considered. We believe that though public opinion is not a conclusive factor, its importance cannot be brushed aside. In this as in many other fields where the law operates, there is a constant interaction between law and public opinion. Sometimes the one is advanced, sometimes the other. But a wide hiatus between the two might bring the law into disrepute. If public opinion favours retention, and yet the law ventures to abolish the sentence of death, there is a danger that public opinion might assert itself in a reckless and unrestrained manner by killing or injuring the offender, particularly when the offence is a brutal one arousing intensely the sentiments of the public.

It is true, that those who argue for abolition also reflect public opinion. But, then, their views have to be weighed against the views of those who still favour retention—we do not say that the matter can be decided only on the numerical strength of either.

(23) *Opinion of Judges, etc.*—It is stated that Judges, lawyers and police-officers are not in any particularly favourable position for expressing a view on this question, and that they see the offender only when he is detected. It cannot, however, be denied, that the persons mentioned above have more points of contact with the behaviour of criminals than others. Further, it would not be always accurate to assume that their knowledge of the conduct of the criminal begins only from the point of detection; often, the relationship between the accused and the victim, prior to the crime, has to be investigated and gone into by them. We do not go to the length of saying that the views of judges and lawyers should be treated as concluding the question. But they deserve special consideration. They are concerned with the administration and application of the law, and the whole evidence comes before them. To that extent they are in a superior position.

(24) *Prison administration.*—We agree that the difficulty of maintaining in the prison prisoners convicted of capital offences can be no argument for retention.

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<sup>1</sup> The replies received to the Commission's Questionnaire on Question 1 are summarised elsewhere in the discussion on that question.

(25) *Sympathy for the family of the victim.*—We also agree, that mere sympathy for the family of the victim does not justify capital punishment. We should, however, hasten to observe, that, in so far as this sympathy plays its part in building up public abhorrence of the crime, it is a commendable one, and may constitute a link in the process of merger of other elements of punishment into the deterrent one<sup>1</sup>.

(26) *Experiment.*—We do not think that in the present state of the country, India can risk an experiment which may put into danger the lives of numerous citizens. It may not be easy to restore the *status quo* if the experiment fails—as it may, in those parts of the country which are notorious for crimes.

(27) *Reformation.*—That a criminal can be reformed is a consideration to which even now the law is not blind. The discretion left to the court in the matter of sentence leaves ample room for considering whether the offender is a person who can be retrieved from his evil ways. It is unnecessary to cite here cases in which, on the ground of age, ignorance, or other factors which show the possibility of reformation, courts have refrained from passing the death sentence<sup>2</sup>.

(28) *Abolition no risk.*—It has been stated, that the fear that abolition constitutes a risk in society is childish and primitive, and that, rather, it will inculcate a spirit of reverence for life in the people, who will have the example of the State before them. Mainly, this argument raises the question of the deterrent effect of capital punishment, which is discussed elsewhere<sup>3</sup>, and we need not tread the same ground again. But we would like to draw attention to events that led to the restoration of capital punishment in several countries<sup>4</sup>. Opinions may differ as to whether the restoration in those countries was really due to an increase in homicide or due to political considerations, and, if it was due to any assumed increase in the rates of homicide, whether there was really any factual basis for that assumption. But it cannot be gainsaid, that the experience of those countries constitutes at least a reasonable argument for believing that the fear of capital punishment operated on the minds of human beings, and conversely, that the removal of that fear led to an increase in homicide.

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1 Compare discussion relating to the retributive object of punishment paragraphs 295—299, *infra*.

2 See Analysis of case law.

3 See paragraphs 303—372, *infra*.

4 See paragraphs 306—308, *infra*.

(29) *Experience of other countries regarding convicts.*—That convicted murderers do not kill again, is a proposition which has been urged in favour of abolition. The Royal Commission recorded some evidence and collected certain figures as to the conduct of murderers after release from prison<sup>1</sup>, and observed that the evidence and figures would tend to show that released murderers, *in general*, behave well after leaving prison. The conclusion of the Ceylon Commission<sup>2</sup> also was, that the danger to the community from such prisoners on their release is minimum, particularly if they are sentenced to life imprisonment and a flexible and undetermined system of release accompanied by after-care supervision replaces the present system. It must, however, be noted, that much depends on the personal idiosyncrasy of the offender.

Further, it would not be out of place to point out, that these figures relate to the conduct of prisoners, who by the very hypothesis, were not sentenced to the highest penalty, because their cases deserved special consideration and sympathetic approach. The same cannot be said of those who were sentenced to death. In the case of the latter categories of offenders, it may not be safe to predict that they would, if they had been sentenced to the lesser sentence, also have behaved in the same way. To this extent, the value of the figures obtained in respect of retentionist countries is diminished. Moreover much depends also on the training which a prisoner receives in a prison, the social hierarchy to which he belongs, the environment in which he lives, and the "after-care" given to him.

(30) *Death penalty a lazy answer.*—If the object which can be achieved by the penalty of death could be achieved by any other penalty, no one would for a moment justify its retention. But the very question is, whether the objects could be so achieved. This again raises the issue of deterrent effect<sup>3</sup>.

(31) *Onus.*—The onus, it is stated, lies on those who favour retention, as the question at issue is of human life. This is, perhaps an argument which could be advanced by retentionists also in their favour, since it is the protection of human life which is the mainstay of their case.

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<sup>1</sup> R.C. Report, page 229, paragraph 651, and page 486, Appendix 15.

<sup>2</sup> Ceylon Report, page 59, paragraph 55 and page 58, paragraph 51.

<sup>3</sup> The question of deterrent effect is dealt with separately; see paragraphs 303—372, *infra*.

## TOPIC NUMBER 20

*Irrevocability*

Irrevocability.

266. An argument which deserves our most anxious consideration is that based on the chances of error and execution of an innocent person. It is stated, that one peculiar feature of capital punishment, as contrasted with other punishments, is that it is irrevocable, and if an innocent person is sentenced to death on a charge of a capital offence and executed the injustice caused to him cannot be retrieved.

Some cases of erroneous convictions are cited in some of the studies<sup>1</sup>.

We have not the slightest intention of underrating the paramount importance of ensuring that no innocent person is subjected to any punishment by a criminal court, much less to a punishment depriving him of life. Nor do we intend to answer the argument by stating that *in no circumstances* would an innocent person be executed. All the same, we would like to draw attention to the safeguards which the law has anxiously provided for avoiding any such unfortunate consequence. Those safeguards are contained in the Constitution, in the substantive law, in the procedural law and in the administrative orders in force, and are re-inforced by the prerogative of mercy, and can be classified below:—

Constitutional.

267. Every person, who is arrested, has the right to consult and to be defended by a legal practitioner of his choice<sup>2</sup>. The Supreme Court has jurisdiction to entertain appeals where the accused has been sentenced to death<sup>3</sup>, where the requisite conditions of article 134 are satisfied; in other cases also, the accused can appeal to the Supreme Court by obtaining special leave<sup>4</sup>. The Supreme Court has the power to review its judgments<sup>5</sup>.

Substantive.

268. A person who gives or fabricates false evidence with intent to procure conviction of another person of a capital offence, is himself punishable with death, if an innocent person is convicted and executed in consequence of such false evidence<sup>6</sup>. There are other provisions dealing with false evidence and offences against public justice<sup>7</sup>.

<sup>1</sup> Mr. Justice B. N. Banerjee, "Abolition of Capital Punishment" (1965) June, Vol. 2, No. 2, Law Quarterly (Journal of the Indian Law Institute, West Bengal Unit), 123, 128.

<sup>2</sup> Article 22(1) of the Constitution.

<sup>3</sup> Article 134(1) of the Constitution.

<sup>4</sup> Article 136 of the Constitution.

<sup>5</sup> Article 137 of the Constitution.

<sup>6</sup> Section 194, Second paragraph, Indian Penal Code.

<sup>7</sup> Section 182 and sections 191 to 229, Indian Penal Code.



269. The procedural safeguards can be sub-divided Procedural into—

- (i) those relating to trial;
- (ii) those relating to judgment and sentence;
- (iii) those relating to appeals.

A case relating to a capital offence can be tried only by a Court of Session<sup>1</sup> (or a High Court). There are provisions requiring pre-commitment by Magistrates in such cases<sup>2</sup>. The actual trial before the Court of Session, whether it is held by the Judge himself or with a jury, must proceed in accordance with the Code<sup>3</sup>. For enabling the accused to explain any circumstance appearing in the evidence against him, the Court must question him generally on the case after the close of the prosecution<sup>4</sup>. The accused is free to give evidence on oath<sup>5</sup>. The law of evidence<sup>6</sup> contains elaborate provisions for excluding from evidence confessions obtained improperly.

270. Coming to the stage of judgment, if a sentence of death is proposed by a Court of Session, it must be confirmed by the High Court<sup>7</sup>. The powers of the High Court, on a reference for such confirmation are very wide<sup>8</sup>. The confirmation must, when the High Court consists of two or more Judges, be made, passed and signed by at least two of them<sup>9</sup>. The Court of Session, at the time of passing a sentence of death, in cases where it is appealable as a right, must inform the accused of the period within which the appeal must be preferred<sup>10</sup>.

271. Where the trial was held by the Court of Session, there is a right of appeal to the High Court on conviction<sup>11</sup>. Where the trial was held by a Judge of the High Court in its original criminal jurisdiction, there is a right of appeal<sup>12</sup> to the High Court in certain cases. In addition, the Constitution provides for appeal to the Supreme Court in certain cases<sup>13</sup>.

<sup>1</sup> Section 28 and Second Schedule, Code of Criminal Procedure 1898.

<sup>2</sup> Sections 206—220, Code of Criminal Procedure, 1898.

<sup>3</sup> Sections 266—335, Code of Criminal Procedure, 1898.

<sup>4</sup> Section 342(1), Code of Criminal Procedure, 1898.

<sup>5</sup> Section 342A, Code of Criminal Procedure, 1898.

<sup>6</sup> Sections 24 to 27, Indian Evidence Act, 1872.

<sup>7</sup> Section 31(2), Code of Criminal Procedure, 1898, and sections 374—378, *ibid.*

<sup>8</sup> Sections 375-376, Code of Criminal Procedure, 1898.

<sup>9</sup> Section 377, Code of Criminal Procedure, 1898.

<sup>10</sup> Section 371(3), Code of Criminal Procedure, 1898.

<sup>11</sup> Section 410, Code of Criminal Procedure, 1898, subject to section 418.

<sup>12</sup> Section 411A, Code of Criminal Procedure, 1898.

<sup>13</sup> Articles 132, 134 and 136, Constitution.

Prerogative  
of mercy.

272. Lastly, these are provisions dealing with the power of the President and the Governor to grant pardon, reprieve, respite or remission in respect of the punishment of death, or to suspend, remit or commit the sentence of death, under articles 72 and 161 of the Constitution, and the power of the Government to suspend, remit or commute such sentence under sections 401-402, Code of Criminal Procedure, 1898.

Administrative.

273. The assistance of counsel is provided at the cost of the State in all capital cases<sup>1</sup>.

274. The above *resume* of statutory provisions will show the anxious concern of the law to ensure that the chances of error are kept to the minimum. That minimum, perhaps, will never be a zero. We must constantly endeavour to bring it as near as possible to zero. Cases of erroneous conviction, whether noticed officially or unofficially, deserve to be looked into when they are brought to the notice of the authorities, to prevent a recurrence of such errors.

We hope, however, that such cases have not been many. After passing through the sieve of judicial scrutiny under the provisions already set out, and the scrutiny applied in proceedings for the exercise of the prerogative of mercy, it should be difficult—we do not say that it would be impossible—for a case to retain elements of material falsehood. If, in spite of such scrutiny, such elements survive, that only shows the need for keeping the procedural and other provisions constantly under review. Elsewhere, in this Report, we ourselves have raised and discussed the question of improvements in the provisions relevant to safeguards against error<sup>2</sup>. But, viewing the matter in its proper perspective, we are not in a position to say that the possibility of error is an argument which can totally displace the paramount need for a provision intended to protect society.

275. We give below some of the important arguments advanced under the head of "erroneous conviction", and state briefly the safeguards—existing or proposed:—

1	2
(1) Conviction is based on the oral testimony of witnesses or circumstantial evidence. Both suffer from weaknesses.	The trial is held before an experienced officer. The sentence of death when passed by a <i>Sessions Judge</i> , is subject to <i>confirmation</i> by the High Court, and the confirmation must be made by at least two Judges. There is further a limited right of appeal to

<sup>1</sup> Detailed discussion of legal aid to accused is made separately, see paragraphs 1166—1176, *infra*.

<sup>2</sup> See, for example, discussion relating to appeals in capital cases (Question 10 of our Questionnaire) (Paragraphs 967—989, *infra*).

1	2
	the Supreme Court. These safeguards are intended to ensure, as far as possible, that defects or discrepancies in the evidence are carefully considered.
(2) Witnesses may lie . . . .	In addition to the usual safeguards against false evidence, namely, efficient cross-examination by counsel for the accused and power of the Court to observe the demeanour of the witnesses and to take into account contradictions with previous statements made before the Police or before the committing Magistrate, there is the additional safeguard of the sentence of death provided for giving false evidence in such cases. <sup>1</sup>
(3) Appreciation of the evidence by the Judge may be faulty.	Faulty appreciation by the trial Judge is subject to correction by at least two Judges of the High Court, sitting in confirmation proceedings.
(4) Accused may not be adequately represented by counsel.	Separate discussion relating to legal aid to the accused may be seen. <sup>2</sup>
(5) Investigation might have been coloured by corruption and mal-practice.	Investigation into homicide cases is usually done by, or under the direct supervision of, senior Police officials.
(6) Persons who do not command talent or ability for taking the case with the highest court, would suffer.	A case involving sentence of death must, even now, go up to the High Court. As regards appeals to the Supreme Court, separate discussion may be seen. <sup>3</sup>

## CHAPTER 5

### OBJECTS OF CAPITAL PUNISHMENT

#### TOPIC No. 21

##### *Objects of capital punishment*

276. We may now proceed to an examination of the **Objects of capital punishment.**

<sup>1</sup> Section 194, second paragraph, Indian Penal Code.

<sup>2</sup> See discussion relating to legal aid to the accused, paragraphs 1166—1175, *infra*.

<sup>3</sup> See discussion relating to appeals to the Supreme Court, paragraphs 957—989, *infra*.

For convenience of reference, these objects, as suggested in the literature on the subject, may be enumerated as follows:—

- (i) Deterrence;
- (ii) Retribution;
- (iii) Disabling;
- (iv) Avoidance of lynching, and private revenge;
- (v) Disapprobation by the public;
- (vi) Atonement by the offender.

Of these, the first two are those most frequently put forth, and subjected to approval or disapproval.

#### TOPIC No. 22

##### Objects of Capital Punishment—Answer to Q. 2 (a)

Question  
2(a).

277. We had in our Questionnaire put a specific question about the object of capital punishment. The question<sup>1</sup> was as follows:—

“What, in your opinion, is the object of capital punishment? Does the existing law sufficiently achieve that object”.

As was expected, most of the replies on this question have stressed the deterrent object of capital punishment. That object has been described from its various aspects, such as, to preserve the social order, to deter persons from crimes, to act as a deterrent in respect of *serious* offences, to deter persons from homicide, or more *elaborately*, to deter anti-social and criminal elements who may not (in the absence of such punishment) hesitate to take away life or to commit other offences which are capital at present. Detailed discussion as to how far the deterrent object has been achieved, falls under Question 2(b)<sup>2</sup>.

278. Another object which has been mentioned in the replies is, the *retributive* one or “social justice” as reflected in the mind of the society to obviate private vendetta. But several replies have expressed disagreement with this proposition, either (i) by stating that vengeance, (“tooth for tooth and eye for eye”) is not at all the object of capital punishment, or (ii) by stating that retribution is hardly an appropriate function of the State, or (iii) by arguing that it is “impossible to determine what penalties provide the varying but exact amount of retribution called for by a list of crimes ranging, *e.g.*, from theft of a

<sup>1</sup> Question 2(a) in the Questionnaire.

<sup>2</sup> See discussion of replies under Question 2(b); Paragraphs 334--369, *infra*.

handkerchief to murder,<sup>1</sup> or (iv) point out that even this retributive object has not been sufficiently achieved.

279. The reply of a High Court Judge<sup>2</sup> states the object of the punishment of death to be three-fold, namely, first, retributive with reference to the murder itself, secondly, deterrent on those persons who might under the influence of anger, greed or religious frenzy feel tempted to take other people's lives; and, thirdly, morally satisfying the feeling of society that wrong-doers are likely to be punished effectively.

280. The reply of a State Government<sup>3</sup> states, that the object is two-fold, (i) primarily as a deterrent, and (ii) to a lesser extent, retribution. The reply points out, that the object is such that one cannot expect to achieve it fully, but, since the penalty of death inevitably acts as a deterrent, the object can be stated to have been sufficiently achieved.

281. The reply of another High Court Judge<sup>4</sup> states that some element of retribution is, of course, involved in all punishments, in the sense that a decision as to whether a person is punishable must be based on his *past actions*; but that the principal object of punishment may be stated to be the protection of society, which is sought to be achieved partly by reforming the criminals and partly by deterrence.

The reply of another High Court Judge<sup>5</sup> states that the object is deterrence, and that it is a principle of criminal jurisprudence that murder (deliberate homicide) should be deterrently punished with the gravest penalty.

Another High Court Judge<sup>5</sup> describes the object as "to mark the crime which carries with it the death penalty as the most heinous, and to prevent it."

In the reply of another High Court Judge<sup>6</sup>, it has been stated that a more subtle meaning has to be given to the word "deterrence"<sup>7</sup>. The reply refers to a case which occurred a few years ago, where the entire family of an Advocate was done to death on the outskirts of Bangalore,

<sup>1</sup> Quoting from the Manual of Correctional Standards, issued by the American Corrections Association, (1965), page 9.

<sup>2</sup> S. No. 251 (A High Court Judge).

<sup>3</sup> S. No. 242 (A State Government).

<sup>4</sup> S. No. 230 (A High Court Judge).

<sup>5</sup> S. No. 262 (A High Court Judge).

<sup>6</sup> S. No. 262 (A High Court Judge), under questions 1 and 2.

<sup>7</sup> Observations of Lord Denning about emphatic denunciation by the immunity cited.

by a murderer in the hope of gain. The community felt shocked beyond words; the necessity of inflicting death penalty in similar cases for proved offenders illustrates the point made above."

The reply also proceeds to deal with the point made by Dr. K. N. Katju<sup>1</sup>, and states that the reasons given by Dr. Katju for abolition that so few persons ultimately receive the death penalty, and that the severity of the punishment leads to too many acquittals, "appear to be really the proper reasons for *retaining* the capital sentence for murders committed in the circumstances which shock the community by their aggravated circumstances or by premeditation."

The reply of another High Court Judge<sup>2</sup> discusses the various theories (the ancient theory of placating the God and expressing group disapproval by removing the culprit, retribution theory, and theory of deterrence), and notes the criticism levelled against each theory. The reply, however, states that none of these theories seem to state the real object of capital punishment.

The reply of the Chief Justice of a High Court<sup>3</sup> states that the main object and the sole justification of capital punishment is its deterrent effect on persons who might otherwise take away the lives of their fellow beings.

282. Most of the District and Sessions Judges have emphasized the deterrent object of capital punishment, and stated that it is achieved sufficiently or to a considerable extent.

283. One of the replies<sup>4</sup> emphasizes that the object of capital punishment is not tooth for tooth, but to create caution or realisation in the mind of a murderer that he will also meet the same fate as his victim.

284. Another reply<sup>5</sup>, while stating that the principal object is prevention of offences, states that at times there is an element of vindictiveness which cannot be left out of sight, and that both public and personal sentiments demand that the person who has made another person suffer unjustly should be made to suffer himself.

285. In the reply of a very senior Advocate of the Bombay Court<sup>6</sup>, the object of capital punishment is described as two-fold, namely, to punish the killer adequately for

<sup>1</sup> Dr. K. N. Katju's article "To hang or not to hang" which was published in the *Statesman* of December 19, 1964.

<sup>2</sup> S. No. 316 (A High Court Judge).

<sup>3</sup> S. No. 317 (Chief Justice of a High Court).

<sup>4</sup> S. No. 367.

<sup>5</sup> S. No. 371.

<sup>6</sup> S. No. 318.

his cruel and wicked crime; and, secondly, to serve as a deterrent not only to prospective criminals, but also to the average citizens who have a natural dread of capital punishment.

286. The reply<sup>1</sup> of the Chief Justice of a High Court states, that "the first and primary object is that it should act as a deterrent. The second object is that the punishment should correspond with the gravity of the crime. In regard to punishment, a cold, calculated and brutal murder cannot be equated with a murderer committing the crime in the heat of passion and other extenuating circumstances. In the former case the *only befitting* sentence is the sentence of death."

287. The reply of a City Civil Court and Additional Sessions Judge<sup>2</sup> states, that the experience of Sessions Judges and practising Advocates on the criminal side shows that the accused as well as the common man does have the fear of death sentence; even in ordinary or casual conversation, expressions such as "What will you do at your worst? You would not be able to hang me" are met with.

288. The reply of a High Court Bar Association<sup>3</sup> states, that the primary object of punishment is retribution—in the sense that punishment looks to the past and originates in the instinct of vengeance. "One of the purposes of punishment is to serve as an outlet, a kind of safety valve for the indignation of the community. All cases ultimately depend on their enforcement upon public sentiment in their favour. Fear of punishment protects a man against himself. Both the deterrent theory and reformatory theory are inadequate to express the whole truth about punishment."

289. The object of *removing* a person from the world for ever, and thus protecting the society, is stressed in the reply of one of the Sessions Judges<sup>4</sup>.

290. In the reply of a District Panchayat Officer<sup>5</sup> it has been emphasised, that capital punishment gratifies, as no amount of imprisonment can, the "natural and healthy resentment" of the relations and friends of the murdered man and it is an effective check on murder.

291. There has been a strong objection in one of the replies to the retributive aspect, on the ground that the

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<sup>1</sup> S. No. 393.

S. No. 484, under "additional note".

<sup>3</sup> S. No. 493 (A High Court Bar Association in a Presidency town).

<sup>4</sup> S. No. 516.

S. No. 425.

prejudice that the murder should not go unavenged has in several cases, been the cause of a sentence of death<sup>1</sup>.

292. The retributive aspect has been expressed in some of the replies<sup>2,3,4</sup> in a different form, namely, to allay the grief of the family of victims, and to give consolation to the relatives of the murdered person.

293. One object which has been mentioned in some of the replies is that of "disabling", that is to say, the object of *doing away* with a person who, if allowed to live, may, on regaining liberty, be a serious menace to society.

#### TOPIC No. 23

#### *Conclusion regarding object—Deterrent object strongest justification—retributive object how relevant*

Aspect of  
punish-  
ment as  
a deter-  
rent.

294. For the present purpose, it is not necessary to enter into a detailed discussion of the various aspects of punishment as a deterrent. Punishment, in general, seeks to control future events in "three ways". It seeks—

(a) to stop the offender from offending again; (Particular deterrence);

(b) to deter other potential offenders; (General deterrence); and

(c) to protect the society from the persistent offender<sup>5</sup>. (Protection).

It has been also pointed out<sup>6</sup>, with reference to (a) above, that whether the punishment aims at deterring the offender or at *reforming* him, the real object is to check his criminal career.

As has been observed<sup>7</sup>, to some extent it is one of the objectives of practically every sentence to fix a penalty which will deter others from committing a like offence or

<sup>1</sup> The decision in *Gurdev Singh v. Emperor*, (A.I.R. 1948, Lah. 5) has been referred to in this connection. But that decision does not go so far, and (as far as is relevant), merely holds that the sentence of death could not be refused on the ground of age of the convicted person (alleged to be 19 to 20 years).

<sup>2</sup> S. No. 154 (A State Government).

<sup>3</sup> S. No. 166 (An Inspector-General of Prisons).

<sup>4</sup> S. No. 161 (A Member of the Bar through the Bar Council of India).

<sup>5</sup> *cf.* Report of the Interdepartmental Committee on the Business of the Criminal Courts, (1961), Cmd. 1289 (Streatfield Committee), page 79, paragraph 271.

<sup>6</sup> Report of the Interdepartmental Committee on the Business of the Criminal Courts, (1961), Cmd. 1289, page 79, paragraph 272.

<sup>7</sup> Report of the Interdepartmental Committee on the Business of Criminal Courts, (1961), Cmd. 1289, page 81, paragraph 280.



a penalty which will at any rate not have an anti-deterrent effect. "In general, the courts proceed on the assumption that this will be achieved by fixing a sentence proportionate to the offender's culpability, but occasionally the need to deter others is regarded as so pressing that it becomes the dominant consideration and the court passes a sentence which is specially designed to be exemplary."

Where a court imposes a sentence to protect the society from an individual offender, it is still concerned with future events, but in a somewhat different way. "It is not so much seeking to control future events in order to prevent them from taking another course. Its decision involves not a prognosis of the effect of the sentence but a prognosis of the effect of not giving the sentence<sup>1</sup>."

Lastly, in the case of capital punishment unlike in the case of other punishment, there is the object of *eliminating* the offender. This appears to be a special form of particular prevention, the offender being totally and permanently eliminated.

295. We feel that the deterrent object of capital punishment is the most important object. Indeed, it would seem to constitute its strongest justification. Even if all the other objects were to be kept aside, the deterrent object would, by itself, furnish a rational basis for its retention. We are aware that there is nothing new in this approach; those who have studied the subject are fully conscious of the controversy that has centered round the deterrent object of the capital punishment, the amount of research devoted to it, (particularly in the shape of statistics) and the volume of literature on this aspect.

Deterrent  
object im-  
portant.

296. We would point out, that the chief object not only of capital punishment, but of all punishments, is deterrent, or what has been called "general prevention". In the language of Bentham<sup>2</sup>, "If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless--- But when we consider that an unpunished crime leaves the path open not only to the same delinquent, but also to those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. Punishment is elevated to the first rank of benefits, when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice

<sup>1</sup> Report of the Interdepartmental Committee on the Business of the Criminal Courts, (1961) Cmd. 1289, page 82, paragraph 284.

<sup>2</sup> Bentham's Rationale of Punishment, 20, cited in Halsbury, 3rd Edn., Vol. 10, page 487, paragraph 889 and foot-note (k).

to the common safety." Capital Punishment is no exception to this rule.

297. This is not, however, to rule out the retributive object totally. Misunderstanding is caused by certain misconceptions about the retributive object. If it is taken to mean the *primitive* concept of "eye for an eye", that is, retribution in the literal sense, it is open to criticism. But, in a refined sense, as expressing public indignation at a shocking crime, it exists in reality, though not as the chief end of capital punishment. It can better be described as "reprobation" or "the emphatic denunciation by the community of a crime.<sup>1</sup>". An abhorrent crime deserves severe and abhorrent punishment.

298. The retributive object is reflected in practice in a different aspect—what may be called the "negative" one. Where the circumstances of a crime are such that they excite not a sense of shock, but a feeling of pity, the "reprobation" is off-set by the "extenuating" circumstances. The extenuating circumstances are regarded as justifying the lesser punishment. This demonstrates negatively the retributive object. Here, the negative aspect helps in the individualisation of punishment. A subdued sympathy takes the place of reprobation; public feeling sides itself in favour of the offender; the law bows down to this feeling "whether through the court or through the exercise of the prerogative of mercy, or by express provision in some cases.<sup>2</sup>". These observations, trite though they may seem, appear to be necessary, since the question of object of punishment is a fundamental one, and no misunderstanding in that field should be allowed to obscure the discussion<sup>3</sup>.

299. What we have said above can be substantiated by pointing out, that even in many countries<sup>4</sup> where death sentence for murder has been abolished, it has been retained for treason. One reason for this seems to be the feeling that treason is such a serious crime that it must receive adequate condemnation.

Cruel  
Murders.

300. Even after all the arguments advanced to support the abolition of capital punishment are taken into account, there does remain a *residuum* of cases where it is absolutely impossible to enlist any sympathy on the side of the criminal, or to postulate any mental abnormality on his part, or to assert that the deterrent effect is counter-balanced by any external factors, i.e., factors other than the will and determination of the criminal. As Stephen said, there

<sup>1</sup> cf. Lord Denning, cited in R.C. Report, page 18, paragraph 53.

<sup>2</sup> For example, section 300, Exception 5, Indian Penal Code.

<sup>3</sup> Discussion relating to arguments for abolition may also be seen.

<sup>4</sup> c.g. England, and New Zealand.

are, in the world, "a considerable number of extremely wicked people, disposed, when opportunity offers, to get what they want by force or fraud, with complete indifference to the interests of others, and in ways which are inconsistent with the existence of civilized society. Such persons, I think, ought in extreme cases to be destroyed<sup>1</sup>."

"To allow such persons to live would be like leaving wolves alive in a civilized country<sup>2</sup>."

301. As was observed in one American case<sup>3</sup>: To permit a man of dangerous criminal tendencies to be in a position where he can give indulgence to such propensities would be a folly which no community should suffer itself to commit, any more than it should allow a wild animal to range at will in the city streets. If, therefore, there is danger that a defendant may again commit crime, society should restrain his liberty until such danger be past, and, in cases similar to the present, if reasonably necessary for that purpose, to terminate his life. Admittedly, restraint by imprisonment can never be as wholly effectual as execution, and there are, from time to time, cases where imprisonment may not be sufficient for the protection of society. It is on this ground that it is pertinent to take testimony in regard to the history of a defendant and of the circumstances attending his commission of crime. If his record shows that he is of a dangerous type, or that he habitually commits grave crimes, or that he has a homicidal tendency, or that he is hopelessly depraved, or that he has a savage nature, or that he has committed murder under circumstances of such atrocity and inhuman brutality as to make his continued existence one of likely danger to society, then in my opinion, the sentence of death is both justifiable and advisable. The community may not be safe with such a man in existence even though he be serving a term of life imprisonment; he may again commit murder within the prison walls, or may escape and again make innocent victims, his prey, or may even, by cunning simulation of repentance, obtain a pardon from governmental authorities.

302. In such cases, there is no chance of reformation, no scope for expiation, and every reason for employing the punishment provided by law as a terror to others similarly inclined. It is for the general good that the criminals of this type should not remain in society.

<sup>1</sup> Stephen, *History of Criminal Law of England*, (1883), Vol. 2, page 91.

<sup>2</sup> Stephen, *History of Criminal Law of England*, (1883), Vol. 2, page 92.

<sup>3</sup> *Commonwealth v. Ritter*, Court of Oyer and Terminer, Philadelphia (1930), per Stern J. (later Chief Justice of the Pennsylvania Supreme Court) see *Paulsen & Kadish, Criminal Law and its Processes* (1962), page 57 and 60.

## TOPIC No. 24

*Deterrent effect—Detailed discussion*

## I. Deterrent Effect—experience of countries where capital punishment abolished, or abolished and restored.

Experience of other countries where it has been abolished, or abolished and restored.  
Preliminary observations.

303. It would be useful to discuss, with reference to the deterrent effect of capital punishment, the experience of other countries where it has been abolished, or abolished but restored later<sup>1</sup>.

304. It must be noted at the outset, that the definition of the crime of murder differs in various countries and the figures of the various countries cannot, therefore, be taken as an *absolutely satisfactory* basis for a comparative study, because the like is not contrasted with the like and there are slight differences and variations in the objects of comparison. Further, differences of character, behaviour and outlook and difference in the method of compiling statistics naturally create complications<sup>2</sup>. However, the available material has to be studied; and an analysis of the figures of selected countries is, therefore, attempted. Even for these selected countries, only certain sample figures have been taken, for brevity.

Abolition without restoration

305. Besides the countries in which the capital punishment has been abolished *but restored later*, there are countries where it has been abolished or kept in abeyance, *but not restored*. An analysis of the figures for such countries is given separately<sup>3</sup>.

## II. Reasons for restoration in foreign countries.

for restoration in foreign countries.

306. In the various countries in which capital punishment has been restored, the reasons which led to restoration may be analysed as follows<sup>4</sup>:—

*New Zealand*.—The main reasons were<sup>5</sup> (apart from political factors), the attitude of murderers towards the penalty, (during the abolition period, one murderer said "you do not get hanged for murder now-a-days"), the evidence given before the Select Committee by the police about the deterrent effect, increase in: the number of sexual murders and murders associated with robbery, and newspaper reports about increase in the number of murders after abolition.

<sup>1</sup> The statistical data have been compiled from the Royal Commission Report, Appendix No. 6, pages 340—372, after a study of the tables and other information given therein.

<sup>2</sup> *cf.* R.C. Report, page 340, paragraph 24.

<sup>3</sup> See Appendix containing Table analysing effect of non-restoration (Abolition countries).

<sup>4</sup> The analysis has been made on a study of material given in the R.C. Report, pages 372—375.

<sup>5</sup> *cf.* R.C. Report, page 337, paragraph 16, and page 343, paragraph 34.

(In New Zealand, death penalty has now been abolished, except for treason<sup>1</sup>).

In New Zealand, capital punishment has had a chequered history. It is said that, to some extent, it has varied with the party in power. The following quotation from the speech of Mr. Hanan, Minister of Justice, on the Crimes Bill<sup>2</sup> will show the position:—

“Capital punishment for murder has had a chequered history in New Zealand. It has been enforced and suspended and abolished, and re-instated and suspended again—a weather cock varying with every change of Government since 1935. The Bill makes an attempt to resolve the issue by prescribing the death penalty for certain types of murder—which are referred to as an aggravated murder—and life imprisonment for murder in the other categories.”

(The scheme of division of murders into categories, proposed in the Bill was not finally adopted, and capital punishment for murder abolished in New Zealand in 1961).

*Washington (U.S.A.)*.—“The Legislature evidently regarded capital punishment as a deterrent force, for it was restored after a trial of six years of life imprisonment as the maximum penalty.” The restoration was also the result of a series of murders; in one particular case, a murderer had boasted that the State could do nothing to him but board him for the rest of his life<sup>3</sup>.

*Oregon (U.S.A.)*.—Restoration was initiated by the Governor by calling a special session of the Legislature, and in the address he said that a wave of crime had swept over the country since 1919, and because of a series of homicide offences, public sentiment demanded greater protection. After a plebiscite, capital punishment was restored<sup>4</sup>.

*Tennessee (U.S.A.)*.—After the repeal of the Capital Punishment Act in 1915, there was a reign of crimes of the most heinous nature, which brought about a reversal of public sentiment<sup>5</sup>.

*Missouri (U.S.A.)*.—In the period immediately following abolition, capital crimes occurred with frequency so that the public sentiment of the State demanded restoration of the death penalty<sup>6</sup>.

<sup>1</sup> See Crimes Act, 1961, (New Zealand), (Sections 74 and 172).

<sup>2</sup> Parliamentary Debates, New Zealand, House of Representatives, (Vol. 328), dated 13th September, 1961, page 2206.

<sup>3</sup> R.C. Report, page 374, paragraph 99.

<sup>4</sup> R.C. Report, page 374, paragraph 100.

<sup>5</sup> R.C. Report, page 374, paragraph 101.

<sup>6</sup> R.C. Report, page 374, paragraph 102.

*Kansas (U.S.A.)*.—Prior to restoration, numerous deliberate murders were committed in the State by persons who had previously committed murders in the surrounding States where death penalty was in force<sup>1</sup>.

*South Dakota (U.S.A.)*.—Two Illinois convicts, having finished serving their terms, tramped across the State and killed a couple of filling-station attendants, after committing robbery. This led to re-introduction of the death penalty<sup>2</sup>.

*Switzerland*.—Some particularly heinous murders took place shortly after abolition, leading to restoration in some Cantons<sup>3</sup>. Ultimately, it was abolished throughout all Cantons<sup>4</sup>.

307. The following analysis of the developments in Switzerland might be interesting<sup>5,6</sup>.

Principle of abolition adopted in the Federal Constitution of 1874. 1874.

Series of murders took place. 1876-1878.

Referendum held, giving small majority for restoration. 1879. Restoration took place thereafter in certain Cantons, but the crime wave subsided. Between 1868 and 1892, there were no execution. Between 1892 and 1937, there were a few executions.

Both Houses of the Federal Parliament secured majority in favour of abolition. 1928-31.

Death penalty abolished with effect from 1942 by the Swiss Penal Code of 1937, except in time of war, with the alternative of perpetual solitary confinement. 1937.

Owing to increase in crimes, question of restoration was discussed, but the proposal rejected in spite of increase in the number of murders since 1948. 1952.

308. Ecuador, which in 1878 was the first to dispense with capital punishment restored it in 1883, but again in 1895, it abolished it<sup>7</sup>.

1 R.C. Report, page 375, paragraph 103.

2 R.C. Report, page 375, paragraph 104.

3 R.C. Report, page 375, paragraph 105.

4 R.C. Report, page 360.

5 Based on material in Joyce, *Right to Life* (1962), pages 80 and 81.

6 See also R.C. Report, page 360, paragraph 69.

7 Scott, *History of Capital Punishment* (1950), page 75.

### III. Comparison of figures of abolition and non-abolition States for the same period.

309. It may be of interest to study the rise in homicide rate in States *with* capital punishment, and to contrast or compare it with States *without* capital punishment. As a sample of such study, we may take the figures for Rhode Island (capital punishment abolished in 1882) and Massachusetts (capital punishment in force).

Comparison of figures of abolition and non-abolition States for the same period.

The average annual number of deaths due to homicide per million of the population for the two States is as follows:<sup>1</sup>—

Country or State	1910-19	1920-29	1930-39	1940-49
Massachusetts (capital punishment retained)	29	23.4	18.6	13.7
Rhode Island (no capital punishment)	31	25.3	17.4	13.7

If this could be represented in the form of a graph, it would be evident, that in both the States, there has been a steady decrease in the homicide rate from the first time lag ending 1919 to the last time lag ending 1948. This shows, that besides punishment, there are also other factors which determine the incidence of homicide.

310. It has been stated, that statistics studied by various persons, e.g., by Warden Lawes, by Karl Schuessler for the period 1931—1946 (Comparative study of Abolition and Retention States) and by Barnes and Teeters, show that the rate of homicide is not affected by the presence or absence of death penalty<sup>2</sup>.

The pioneering work in statistics on the subject, as is well known, is by Professor Thoruston Sellin. His views are quoted in the Royal Commission Report<sup>3</sup> and in the Canadian Report<sup>4</sup>.

<sup>1</sup> For figures, see R.C. Report, page 371; for diagram, see R.C. Report page 377; for dates of abolition, see R.C. Report, page 345.

<sup>2</sup> Younger "Capital Punishment A Sharp Medicine Reconsidered" American Bar Association Journal, February, 1956, cited in McClellan, Capital Punishment (1961), page 18.

<sup>3</sup> R.C. Report, page 24, paragraph 67 and in Appendix (from page 328 onward).

<sup>4</sup> Canadian Report, pages 12—13, paragraphs 43—49.

## VI. Specific illustrations of deterrent effect

Specific illustrations of deterrent effect.

311. It may be of interest to note some specific illustrations of the deterrent effect of capital punishment. Thus, Sir Harold Scott, Commissioner of Police, London, narrated the following facts<sup>1</sup> of one case:—

A person was arrested for house and shop-breaking behind a wall on the top floor of some premises; he had kept a "jemmy" for use against persons who may come to arrest him but left it on a box at the top of the stairs. When asked why he had left it there, he said that he decided not to use it, as he may have a "swing"

312. Compare also the case from New Zealand<sup>2,3</sup>, in which, after committing the murder on one occasion, the offender said, "you do not get hanged for murder now-a-days; even if you commit murder now-a-days you only get 8 years for it. That is the good Government we have in". A case from U.S.A. may be cited. In South Dakota, two persons crossed the border from Illinois to that State, and committed "robbery murders" of the attendants of a filling-station, at a time when capital punishment had been abolished in South Dakota<sup>4</sup>.

313. Similarly, at the time when capital punishment was not in force in Kansas, persons who had previously committed murders in surrounding States (where a capital punishment was in force) started *deliberately* committing murders in Kansas<sup>5</sup>.

## V. Special position in India.

Special position in India.

314. (a) In arriving at a decision about the necessity of capital punishment, it is desirable to make oneself familiar with the homicide rate in other countries as compared with the murder rate in India. (By "homicide" or "murder" rate here is meant the homicide or murder rate per million of the population). Murder rate in India has fluctuated in the nine years ending with 1962 between 25 and 30.6. It has *never been less than 25 in this period*<sup>6</sup>.

<sup>1</sup> R.C. Report, page 335, paragraph 15.

<sup>2</sup> R.C. Report, page 337, paragraph 16, quoting the speech of the Minister of Justice of New Zealand in the House of Representatives.

<sup>3</sup> New Zealand has, however, now abolished capital punishment for murder. See (New Zealand) Crimes Act, 1961, sections 74 and 172.

<sup>4</sup> See R.C. Report, page 375, paragraph 104.

<sup>5</sup> See R.C. Report, page 375, paragraph 103.

<sup>6</sup> Figures showing murder rate in India are given separately.



(b) It must be stated, that the homicide rate per million of the population in several countries or States is less than 25.

The figures for 1940 to 1948 (or 1940 to 1949) for some countries are as follows<sup>1</sup>:—

	Murders per million of the population
England and Wales <sup>2</sup> (Abolished 1965)	4.0
Scotland	2.7
New Zealand (Abolished 1941, restored 1950, again abolished except for treason, 1961)	7.2
New South Wales (Retains)	10.3
Queensland (Abolished 1922)	17.0
South Australia (Retains)	6.2
Sweden (Abolished 1910)	5.4
Maine (U.S.A.) (Abolished 1876, restored 1884)	14.1
Massachusetts (U.S.A.) (Retains)	13.7
Nebraska (U.S.A.) (Retains)	18.4
Rhode Island (U.S.A.) (Abolished 1852)	13.7
Vermont (U.S.A.) (Retains) <sup>3</sup>	12.6

(c) It may also be stated, that in many countries, the rate of homicide per million (for the period 1940 to 1948<sup>4</sup>) was higher than 25. Thus, for South Africa, it was 108.9; for Georgia (U.S.A.), it was 167.3; for Kansas (U.S.A.), 29.8; for Michigan (U.S.A.), it was 33.4; for Missouri (U.S.A.) it was 56.3; and for New York (U.S.A.), it was 28.8.

315. Out of the States or countries mentioned above, with figures higher than India, Kansas (U.S.A.) and Missouri (U.S.A.) had abolished capital punishment at one

South  
Africa,  
Georgia,  
Kansas,  
Michigan,  
Missouri  
and New  
York.

<sup>1</sup> Taken from the R.C. Report, page 371, Table 46, giving a general comparison of prevalence of "Murders" in the British sense of the term. The figures given there are per million of the population; see *ibid* page 370, paragraph 89.

<sup>2</sup> By the Murder (Abolition of Death Penalty) Act, 1965, death penalty has been temporarily suspended.

<sup>3</sup> It appears, however, that recently some States including Vermont have abolished or limited the death penalty. See Clarence H. Patrick, "The Status of Capital Punishment, A World Perspective", (1965 December) 56 *Journal of Criminal Law, Criminology and Police Science* 397, 411, foot-note 12.

<sup>4</sup> The figures are per million of the population. See R.C. Report, page 370, paragraph 89.

time, but restored it later, while in Michigan (U.S.A.), it was abolished in 1847, and it is understood to be not restored even now. Others, namely, South Africa, Georgia (U.S.A.) and New York (U.S.A.) have not abolished the death penalty<sup>1</sup>.

316. There is another aspect of the matter, so far as India is concerned. The murder rate per million of the population in India seems to have been fluctuating. Thus, the figures for the 10 years ending 1962 are<sup>2</sup>:—

1953	. . . . .	27.1 (per million)
1954	. . . . .	26.9
1955	. . . . .	27.7
1956	. . . . .	27.8
1957	. . . . .	28.9
1958	. . . . .	29.6
1959	. . . . .	29.8
1960	. . . . .	25
1961	. . . . .	26
1962	. . . . .	26

These figures show—

- (a) continuous increase during 1954—1959,
- (b) slight *decrease* in 1960, but
- (c) *increase* again in 1961, which was maintained in 1962.

It may also be noted, that in some cities of India, the increase has been noticeable<sup>3</sup>.

#### VI. Punishment not the only deterrent.

Punish-  
ment not  
the only  
deterrent.

317. It is stated that punishment is not the only deterrent. It does not play a major part for many persons, so far as grave offences are concerned. It has been said<sup>4</sup>, that if every form of punishment were abolished for murder, rape, and arson, only a very small number of persons would thereby become more disposed to commit these

<sup>1</sup> Figures for 1962 for abolitionist and retentionist countries are given separately.

<sup>2</sup> Figures for 1953 to 1961 are based on the figures supplied by the Home Ministry, and have also been checked with "Crime in India". Figures for 1962 are based on "Crime in India, 1962", page 25.

<sup>3</sup> Table showing *noticeable* increase in certain cities is given separately.

<sup>4</sup> Glanville Williams, *The Reform of the Law* (1951), page 196.

crimes, but on the other hand, if motoring offences could be committed with impunity, the relevant laws would soon become a dead letter. In other words, the "deterrent influence of punishment is in inverse ratio to the gravity of the offence."

There is some force in this argument. At the same time, it must be noted, that the sanction flowing from the pressure of public opinion and the general sense of the community, though it may operate on many persons, may not operate on hardened criminals or a person with strong passions. It is for such cases that the deterrent effect of punishment is needed badly.

VII. Deterrent use unjustified—Wrong to punish A to deter B.

318. It is often argued that it is wrong to punish A to deter B so that C may be deterred from killing D.

319. We think that a sufficient answer to this argument is provided by the following observations of Bentham<sup>1</sup>:—

"The principal end of punishment is to prevent like offences. The past offence is only as one point, the future is infinite. The past offence concerns only one individual; similar offences may affect every one. . . . Some actions are hurtful; what ought to be done to prevent them? . . . prohibit such actions; punish them. This method of combating offences is the most simple, and the first adopted. . . . The remedy consists in the application of punishment and punishment can only be inflicted after the crime is committed."

320. The argument that it is wrong to punish A to deter B has been put more forcefully in this form. So far as punishment is a deterrent only, it amounts to treating the criminal as a means to an end, and though the law might aim at preventing him from the crime, the actual infliction of the punishment is mainly concerned, with other people. To that extent (it is argued), it is non-moral, and if there were no other elements in any instance of punishment, it would be immoral, for it is always immoral to treat a person only as a means to some end other than his own well-being. Now, in reply to this argument, it should be pointed out, that a criminal is not punished merely as a means. The social good, which includes his own individual good, is taken into account while awarding punishment. The decision whether the criminal should receive any punishment, and if so, the highest punishment, is an empirical one, based on the facts. In coming to that decision, the social good is considered, but the individual

<sup>1</sup> Bentham—Principles of Penal Law, Vol. I, pages 367 and 533; see Radzinowicz, History of English Criminal Law (1956), Vol. 3, page 433.

Deterrent  
use un-  
justified  
—wrong  
to punish  
A to de-  
ter B.

criminal's good is also considered, and his past history, possibility of reform etc. are weighed against the other circumstances.

321. Moreover, this argument, in a way, raises a fundamental question which applies not only to the sentence of death but to all sentences. For even in the case of sentences other than death, the punishment is intended to deter other persons also. When a man is imprisoned, for example, for theft, the imprisonment is intended not only to prevent him from committing similar crimes in future, but also as an example to others.

322. So long as the deterrence of similar offences is the foundation upon which the structure of criminal law is based, it is not possible to accept this fundamental objection. One further answer to this argument would be, that it is an inevitable sacrifice which a proved offender has to make for the well-being of society, and that there is no other way of avoiding serious danger to the lives of numerous citizens.

#### VIII. Other arguments regarding deterrent effect.

Arguments for and against deterrent effect.

Arguments for deterrent effect.

323. There are certain other arguments in connection with the deterrent effect of capital punishment, which may also be added here, to make the study comprehensive:—

(i) Deterrent effect cannot be seen directly, but it acts on the community through its moral consciousness.

(ii) It does not operate on impulsive murderers or abnormal persons, but it does operate on normal persons.

(iii) Because of its uniqueness (as compared with imprisonment), it acts on the professional criminal also.

Arguments against deterrent effect.

(a) Human nature is complex, and acts not by fear alone but by love, loyalty, greed, lust and many other factors.

(b) Individuals do not think of the death penalty before they act.

(c) Detection of murder is uncertain, and reduces the deterrent effect.

(d) Long delays in trial reduce the deterrent effect.

(e) Death penalty is permissive, and very few murderers are actually *executed*. This reduces the deterrent effect<sup>1</sup>.

<sup>1</sup> See, for example, the figures regarding U.P. quoted in the speech of Shri M. L. Agarwal, Lok Sabha Debates, 24-8-1956, cols. 4345-4388.

(f) Executions are closed to the public. Hence the public do not feel the impact of the penalty.

#### IX. Some important points.

324. Much of the controversy that exists as to the deterrent effect of capital punishment would disappear, if certain points, which should in fairness be conceded by both the rival camps, are borne in mind. Elementary though they are, they are often lost sight of. We merely state them, without much elaboration:—

(i) Human behaviour is conditioned by many factors, and not by law alone.

(ii) Punishment is only one such factor. There may be other factors, which operate to influence the behaviour of a particular offender or potential offender.

(iii) Those factors may be classified as factors *contradictory* to deterrent effect, (e.g. offenders' own upbringing, likelihood of gain, existence of passion, or lust), factors *complementary* to it, (e.g. social pressure), and *neutral* factors.

(iv) How far and to what extent punishment operates in a particular case on a particular person, will thus depend to some extent also on what those other factors are; how many of them are *contradictory*, *complementary* or *neutral* to the deterrent effect; and what is their respective intensity.

(v) Therefore, the deterrent effect of punishment may not be uniform in all cases and on all persons.

(vi) But punishment provides the most *concrete* and *tangible* deterrent.

#### X. The basic argument.

325. It would also be worthwhile to draw attention to a basic feature of human behaviour—love of life. To the overwhelming majority of human beings, nothing is more dear than life. We cannot help quoting the observations of Sir James Fitzjames Stephen:<sup>1</sup>

"No other punishment deters man so effectually from committing crimes as the punishment of death. 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

<sup>1</sup> Stephen—"Capital Punishment", in Fraser's Magazine, Vol. LXIX, June, 1864, page 753, cited in R.C. Report, page 19, paragraph 57.

which resort has always been made when there was an absolute necessity for producing some result... 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 his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has will he give for his life'. In any secondary punishment, however, terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

326. This basic argument about the deterrent value of capital punishment has been well put in the minority report of the Massachusetts Commission<sup>1</sup>:—

"Does the death penalty for first-degree murder really serve as a deterrent to potential murderers? All human beings fear the loss of their lives, even those who may be suffering from major mental disturbances. The instinct of self-preservation is so fundamental that the threat of death, apprehended as such, must have a powerful determining influence on the voluntary direction of human activity. *No one will knowingly drink poison or cast himself over a precipice unless he is so deranged that he cannot evaluate the consequences of what he is doing, or unless he studiously chooses the alternative of death to continued existence in what he judges to be an intolerable situation. The claim that the death penalty in itself, decreed for the committing of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology.*"

#### XI. Discussion in other Reports.

Discussion  
in other  
Reports.

327. Valuable discussion about the deterrent effect of capital punishment is contained in the Report of the Royal Commission. It will be convenient to set out briefly the precise conclusions of that Commission on this point. These are as follows:—

First, *prima facie*, the death penalty is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment.<sup>2</sup> Secondly, there is

<sup>1</sup> Minority Report of the Special Commission for the purpose of investigating and studying the abolition of the death penalty in capital cases; Commonwealth of Massachusetts, House Report No. 2575 (Boston) dated 30th December, 1958, cited in McClellan, *Capital Punishment* (1961) pages 72, 75 and 76.

<sup>2</sup> R.C. Report, page 24, paragraph 68, and details in pages 19-20, paragraphs 57 and 58.

some evidence that this is so<sup>1</sup>. Thirdly, there is no convincing statistical evidence that the penalty of death has a stronger effect as a deterrent than any other form of punishment<sup>2</sup>. Fourthly, this effect (that is to say, stronger effect as a deterrent) does not operate universally or uniformly; "there are many offenders on whom it is limited and may often be negligible."<sup>3</sup> Fifthly, the deterrent force of capital punishment operates not only by affecting the conscious thought of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder<sup>4</sup>.

Sixthly, it is impossible to arrive confidently at a firm conclusion about the deterrent effect of the death penalty, or indeed of any form of punishment<sup>5</sup>. Seventhly, it is important to view the question in a 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<sup>6</sup>.

It would, thus, appear that the Royal Commission did not totally rule out the deterrent effect; but the Commission emphasised its limitations, and also the desirability of not overrating its importance<sup>7</sup>.

Appendix to its Report<sup>8</sup> the Commission discussed figures and other aspects of the deterrent effect of the capital punishment.

328. It may be noted, that even in the Canadian Report<sup>9</sup>, the view taken is in favour of the deterrent effect. After a careful consideration of the statistics presented by experts, and after noting the evidence received from Law Enforcement Officers to the effect that capital punishment was an important and necessary deterrent to murder, the conclusion reached in that Report was this: First<sup>10</sup>, that this opinion of the officers was not displaced by other evidence based upon statistical comparison, and that capital punishment did exercise a deterrent effect, which would not result from imprisonment or other forms of punishment; secondly<sup>11</sup>, the fact that a considerable proportion

1 R.C. Report, page 24, paragraph 68 and details in paragraphs 60 and 61.

2 R.C. Report, page 24, paragraph 68 and details in paragraph 62—65.

3 R.C. Report, page 24, paragraph 69 and page 20, paragraph 60.

4 R.C. Report, page 20, paragraph 59.

5 R.C. Report, page 24, paragraph 68.

6 R. C. Report, page 24, paragraph 68.

7 R.C. Report, page 20, paragraph 59; and page 24, paragraph 67.

8 R.C. Report, pages 328 — 380, (Appendix 6).

9 Canadian Report, pages 13—14, paragraphs 48—53.

10 Canadian Report, page 14, paragraph 52.

11 Canadian Report, page 14, paragraph 53.

of murders was committed under compulsion of passion or anger seemed to demonstrate that death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, had succeeded in deterring deliberate pre-meditated murders; thirdly<sup>1</sup>, the deterrent effect was also indicated by the widespread association of death penalty with murder; fourthly<sup>2</sup>, it was necessary to retain the stern penalty of death as a continuing restraint against the use of violence by professional criminals; fifthly<sup>3</sup>, public abhorrence of murder reflected a traditional attitude built up by the reservation of capital punishment for this particular crime, and the abolition of a penalty traditionally accepted as a just and effective deterrent could only be recommended if it was established clearly that the view of the ordinary citizens about its efficacy was demonstrably wrong; sixthly<sup>4</sup>, capital punishment did protect the police to a greater extent than imprisonment alone would do, by deterring criminals from using violence to facilitate the commission of crimes, escape, etc.

329. We may state here briefly the conclusions reached by the majority of the members of the Ceylon Commission as to deterrent effect. That Commission, after a study of the statistics of other countries and of Ceylon, came to the conclusion that the statistics tended to prove the case against the general deterrent effect of the death penalty<sup>5</sup>. It agreed with the conclusion of the Royle Commission<sup>6</sup>, that *prima facie* the penalty of death was likely to have a strong effect as a deterrent to normal human beings than any other form of punishment, and that there was some evidence, though there was no convincing statistical evidence, that this was, in fact, so, and that this effect does not operate universally or uniformly. But it noted<sup>7</sup>, that in Ceylon, this statistical evidence *went further* than merely leaving open the question of deterrence or no deterrence. On the basis of statistics, it came to the conclusion that in Ceylon, re-introduction of the penalty of death could not be justified on the argument that it was a more effective deterrent to potential killers than protracted imprisonment.

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1 Canadian Report, page 14, paragraph 53.

2 Canadian Report, page 14, paragraph 54.

3 Canadian Report, page 15, paragraph 56.

4 Canadian Report, page 15, paragraph 58.

5 Ceylon Report, page 45, paragraph 15.

6 See Ceylon Report, page 44, paragraph 12.

7 Ceylon Report, page 46, paragraph 17.



330. The Ceylon Commission further added<sup>1</sup>, that the experience of many countries, which had suspended or abolished capital punishment, supplied cogent evidence against the existence of the "hidden protection" believed to be afforded by the sentence of death. If the "hidden protection" existed, then, it observed, in some of the countries, which had abolished or suspended capital punishment, evidence would have appeared and would have been reported, suggesting an increase in the murder rate subsequent to suspension or abolition. While the Commission agreed that it may be true that the fear of death is the most intense of all fears, it recorded the view, that there was a great difference between the fear of death when it was *imminent*, and the fear of it when it was regarded as only a remote possibility.<sup>2</sup> In other words, from the terror of death, experienced by the unprievd murderer, during his last days on earth, one could not assume that the same fear was operative in his mind as a deterrent at the time of the crime. It stressed the fact that developing psychological knowledge gave no support to the assumption that a potential murderer<sup>3</sup> calculated (before killing), the ultimate consequences, and pointed out that in an impulsive action, which, as in Ceylon, frequently led to murder, it was unlikely that there was any intellectual consideration at all prior to the killing, let alone a reflection of possible and remote penalties<sup>4</sup>. Further, in its opinion<sup>5</sup>, difficulties of detection, apprehension and conviction and the discretionary exercise of reprieve, militated against death penalty being the unique deterrent which it was claimed to be.

331. The Ceylon Commission expressed its definite view<sup>6</sup>, that certainty of detection and conviction was more conducive to the reduction of crime than the actual severity of punishment. Its final conclusion<sup>7</sup> was—"In deciding on the wisdom of retention or abolition of capital punishment, reliance cannot be placed on there being any greater deterrence to potential murderers by imposing capital punishment on a few than by imprisoning all convicted murderers.<sup>8</sup>"

## XII. Abolition in Indian States.

332. Capital punishment was abolished in Travancore and in Cochin in November, 1944. It was re-introduced in 1951 in both the States when (after they became part of

Abolition  
in Indian  
States.

<sup>1</sup> Ceylon Report, page 47, paragraph 20.

<sup>2</sup> Ceylon Report, page 49, paragraph 23.

<sup>3</sup> Ceylon Report, page 49, paragraph 24.

<sup>4</sup> Ceylon Report, page 49, paragraph 29.

<sup>5</sup> Ceylon Report, page 50, paragraph 26.

<sup>6</sup> Ceylon Report, page 51, paragraph 27.

<sup>7</sup> Ceylon Report, page 52, paragraph 28(a).

<sup>8</sup> In Ceylon, Capital Punishment was re-introduced by the Suspension of Capital Punishment (Repeal) Act, 1959 (25 of 1959).

the Union of India) the Indian Penal Code became applicable to them. The statistics of murder during the abolition period in those States are inconclusive on the question of deterrence. Those statistics are given below<sup>1,2</sup>:—

*Murders in Travancore and Cochin*

	1942	. . . . .	121
	1943	. . . . .	112
	1944	. . . . .	123
	1945	. . . . .	133
	1946	. . . . .	148
	1947	. . . . .	168
	1948	. . . . .	203
Retention	1949	. . . . .	140
	1950	. . . . .	164
	1951	. . . . .	188
	1952	. . . . .	165
	1953	. . . . .	200
	1954	. . . . .	171
	1955	. . . . .	129
	1956	. . . . .	114

XIII. Result of U.N. Survey as to deterrent effect.

Result of  
U.N. Survey  
as to  
deterrent  
effect.

333. A few years ago, the United Nations (Department of Economic and Social Affairs) conducted a survey as to capital punishment, and issued a specific questionnaire as to its deterrent effect. The result of the survey on this point was as follows:—

“191. The purpose here was to gather, for purposes of comparison, positive indications regarding the death penalty. It is, however, very difficult to

<sup>1</sup> Figures for 1945 to 1956 are taken from reply dated 1-7-1963 of the Secretary, Home Department, Government of Kerala to the Law Commission's Questionnaire (S. No. 131 in the Law Commission file).

<sup>2</sup> Figures for 1942 to 1944 are taken from Ceylon Report, page 61.

<sup>3</sup> United Nations—Capital Punishment, (1962), pages 53—54, paragraphs 191—195. See also page 1.

obtain data of that type which are complete and, above all, objective. There are numerous gaps in this respect in the material, and many of the replies are silent on the question. There is also a great diversity from one country to another regarding the points on which exact data were supplied.

"192. Subject to these remarks, the first point to be noted is that the information assembled confirms the now generally held opinion that the abolition or (which is perhaps even more significant) the suspension of the death penalty does not have the immediate effect of appreciably increasing the incidence of crime. This point is stressed by the abolitionist countries where abolition *de jure* was preceded by a period of *de facto* suspension. Likewise, some countries which have maintained the death penalty have experienced periods during which it was not applied, or at least not carried out, and in these the fact that there were no executions was well known to the general public and therefore to possible offenders. This was the case in France early in the twentieth century under President Fallieres and in the United Kingdom in the period preceding the Homicide Act, 1957. No noticeable increase in crime resulted in either case.

"193. The replies received from many abolitionist countries, in particular the Scandinavian countries, Austria and certain Latin American countries, take this consideration as the basis for the view that the deterrent effect of the death penalty is, to say the least, not demonstrated. And even a number of countries which have maintained the death penalty query its value as a deterrent in their official replies. This is true of the replies of Spain, Greece, Turkey, and in particular of the United Kingdom, and also (with qualifications) Japan.

"194. Many other government replies, however, state that no *final opinion* can be expressed as to whether the death penalty has a deterrent effect or not. This is the view of Austria and Yugoslavia.

"195. In the United States, many studies have been carried out on the deterrent effect of the death penalty on the basis of crime statistics, but these studies are largely the work of private specialists and there is no government reply on this specific point."

## TOPIC NUMBER 25

*Deterrent effect how far achieved—Replies to Question 2(b) summarised*

Replies to  
question  
2(b).

334. Regarding the deterrent effect of capital punishment, a specific question was put in our Questionnaire<sup>1</sup> as follows:—

“In particular, do you think that the sentence of death acts as a *deterrent*?”

Conflicting views have been expressed in the replies received to this question. One view, which may be said to represent the opinion of the largest single majority of those who have replied to this question, is that capital punishment<sup>2</sup> does act as a deterrent. At the other extreme is the view that it has failed to act as a deterrent. Between these two extremes we find varying shades, such as, that—

(i) Capital punishment may not necessarily act as a deterrent, but in the present circumstances it is likely to act as a deterrent<sup>3</sup>;

(ii) it acts as a strong deterrent for *normal* human beings<sup>4</sup>;

(iii) in the case of hardened criminals it does act as a deterrent;

(iv) it acts as a deterrent *only* in cases where there are no extenuating factors or sentiments,

(v) though it may be debatable whether it necessarily acts as a deterrent, yet in the conditions which prevail in the country, it tends generally speaking to act as a deterrent<sup>5</sup>;

(vi) it acts to a large extent as a deterrent; but in some cases, particularly where passions are aroused, it cannot in the circumstances possibly act as a deterrent, especially having regard to the present trends of thinking on the subject, which attributes an act of homicide to a psychological or other imbalances or to a criminal tendency which flares up on passions being roused up<sup>6</sup>.

335. We may record here, that all the State Governments and Administrations that have sent replies, all Inspectors-General of Police who have replied, and all

<sup>1</sup> Question 2(b).

<sup>2</sup> Question 2(a), latter half dealt *generally* with achievement of the objects of capital punishment.

<sup>3</sup> S. No. 139.

<sup>4</sup> S. No. 150.

<sup>5</sup> Bar Association of India, S.No. 183.

<sup>6</sup> S. No. 161 (An eminent member of the Bar).

High Courts or Judges of the High Courts who have sent replies to this Question, are of the opinion that the deterrent object is sufficiently achieved.

336. The reply of the Chief Justice of a High Court states<sup>1</sup>, that statistics from other countries are not safe criteria for the decision of the question whether the deterrent object is sufficiently achieved, because the incidence of murders and other crimes would largely depend on the cultural and educational level and social conditions prevailing in a particular country. And, further, the statistics do not also reveal the type and nature of the murders. The reply also emphasises one aspect, namely, that since jail reforms have been effected with the emphasis more on the reformative than on the punitive object of the sentence of imprisonment, and facilities like release on parole and other amenities are provided to prisoners, a sentence of imprisonment would, as a deterrent, have little effect on the minds of the criminal elements in society, for whom the death sentence only would be the effective deterrent. On the minds of the average potential criminal, it is stated, the death sentence does act as a deterrent.

337. A High Court Judge<sup>2</sup>, who has had experience as a Sessions Judge in more than one District noted for its crimes of murder, has stated, that this particular offence against the person showed a marked fall, if it was known to be dealt with firmly.

Another High Court Judge<sup>3</sup> has stated, that his experience as an Advocate and as a Judge makes him feel, that it has a deterrent effect, and points out that every Advocate pleads for the reduction of death sentence to imprisonment for life, and every condemned prisoner entertains hope till the end that the death sentence would be altered into one of imprisonment by the appellate court or the executive. "If it is properly carried out, it will satisfy the sense of justice and provide social satisfaction and a sense of protection."

338. A number of Members of Parliament and State Legislatures have stated that capital punishment does act as a deterrent<sup>4</sup>.

339. The reply of a Member of a State Legislative Council<sup>5</sup> states, that after all the right to life is the greatest of all rights, and its deprivation is the greatest of all deterrents, provided the punishment is certain and reasonably prompt.

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1 S. No. 393 (Chief Justice of a High Court).

2 S. No. 262 (A High Court Judge).

3 S. No. 262 (A High Court Judge).

4 S. Nos. 221, 223 224, and 226.

5 S. No. 248.

340. In the reply of the Advocate General of a State<sup>1</sup>, it is emphasised that the fact that certain offences are made punishable with death itself infuses a sense of security in the citizens.

341. The reply of the Law Minister of a State<sup>2</sup>, while noting that the number of cases of murder have not come down substantially, points out, that the very idea of a possible sentence of death seems to continue to act as a deterrent, and that the reason for the number of crimes not coming down may be the materialistic trend and the acute struggle for existence in modern society, rather than the inefficiency of capital punishment.

342. The reply of one Member of State Legislature<sup>3</sup> states, that it does act as a deterrent for the criminally minded class.

343. According to the Judge of a City Civil Court in a Presidency Town<sup>4</sup>, the deterrent object is sufficiently achieved in respect of the offences now punishable by death under the Indian Penal Code.

344. According to the majority of the Presidency Magistrates in a Presidency Town<sup>5</sup>, the sentence of death does act as a deterrent on deliberate murders.

345. According to the Judicial section of the Indian Officers' Association in a State<sup>6</sup>, the object is to serve as an ultimate deterrent against heinous crimes involving high degree of violence, and the existing law "substantially, though not sufficiently", achieves this object.

The reply of a Judicial Officers' Association<sup>7</sup> states, that retention of capital punishment is absolutely necessary as a deterrent, so long as we have in our country divergent castes, creeds and communities, who do not see eye to eye in the social and national problems, and whose education and cultural standards are not above the average.

346. It is the view of a City Civil Court Judge<sup>8</sup> who has had experience as a Sessions Judge in several districts of the bilingual State of Bombay, that the giving of capital punishment in a very few selected cases of gruesome, pre-meditated, cold-blooded and ghastly murders did act as a deterrent.

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1 S. No. 229.

2 S. No. 253.

3 S. No. 242.

4 S. No. 484.

5 S. No. 549.

6 S. No. 562.

7 S. No. 373, in reply to Question 2(a).

8 S. No. 376.

347. The reply of a Sessions Judge in the State of Madras<sup>1</sup> states, that death sentence acts as a deterrent, especially when it is carried out within a reasonable time of the occurrence.

348. A Sessions Judge in the State of Madhya Pradesh<sup>2</sup> also states that his experience has shown that the awarding of death sentence has reduced the number of capital offences.

349. A District and Sessions Judge in the State of Maharashtra<sup>3</sup> has stated, that in some measure the infliction of capital punishment does impress the social mind that a life of crime is not worth living. He, however, emphasises that the deterrent effect does not last for a sufficiently long period. Public memory, it is stated, is always short, and an effective check on capital offences is not to be solely found in the retention of death sentence.

350. In the reply of another District and Sessions Judge in the State of Maharashtra<sup>4</sup>, it has been pointed out, that it is not merely the awarding of a death sentence or its execution that acts as a deterrent, but that the very *existence of capital punishment* on the Statute Book, and the chance of its being meted out, together with its actual application once in a while, works out as a deterrent on the criminal mind. The reply adds, that in certain criminal districts, where the number of murders is particularly large, it has been noticed that the awarding of death sentence does work as a curb on heinous crimes at least for some time. The long period of association of the death sentence with the particular crime of murder has worked out a deterrent fear in respect of that particular crime, on the social mind and the removal of the capital punishment from the Statute Book is likely to unsettle that "traditionally settled fear", and so work out an unprecedented spurt of serious crime<sup>5</sup>.

351. In the reply of another District and Sessions Judge<sup>6</sup>, it is stated, that the fact that serious crimes are on the increase is no reason for concluding that the death sentence or any other sentence should be abolished. Other measures for the prevention of crimes are necessary, but there is no justification for being more lenient than the law at present is.

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1 S. No. 419.

2 S. No. 437.

3 S. No. 330, reply to question 2(a) and 2(b).

4 S. No. 334.

5 S. No. 336.

352. The reply of an Additional Sessions Judge<sup>1</sup> points out, that fast changing values have led to the result, that offenders take to killing on insignificant pretexts, and that capital punishment is the only answer to such murders.

353. We may also refer here to the view expressed by Sir Patrick Spens to the effect, that from his experience in India he could say, that capital punishment *did act* as a deterrent to murder. We quote his speech<sup>2</sup> *in extenso*—

“What I have to say to the House is partly, but not very greatly, founded on my experience as a judge in India. . . . I never, of course, there presided over a murder trial of the first instance, but I did preside over the Supreme Court of Appeal, and during the four years that I sat as Chief Justice we had a great number of appeals from death sentences. Our duty was, perhaps, not so difficult as that of a judge of first instance, but equally serious when we had to consider whether a death sentence was to be set aside or reduced—as we were entitled to reduce it, to 14 years’ rigorous imprisonment—or confirmed. It is partly from that experience that I, myself, am convinced that the death penalty is a deterrent in certain cases, and if the death penalty is a deterrent in certain cases, we then have to consider, and consider most carefully, what would be the result of doing away with it.

“Of course, it is perfectly true that the bulk of the murders with which I had to deal in the Appeal Court were similar to the bulk of murders in this country; that is to say, they were murders committed suddenly, fiercely, unpremeditatedly, and so forth. But, in the course of that experience, I came across another type of murder, which I think does indicate, and indicate reasonably clearly, that the death penalty is a deterrent. Those were cases arising out of crimes of violence when the perpetrators may or may not, have intended that the victim was to die, but, as a result of the violence used, the victim did in fact die and the crime, of course, was that of murder.

“I propose to quote only two very different types of those cases. The first was one of the earliest appeals that I had to hear in August, 1943. It arose out of the uprisings in Bihar the previous year. There, on 13th August, 1942, a police station was captured by rioters. It was burned and the police officers were made prisoners by the rioters. The rioters then proceeded to strip the policemen and toast them in front of the fire. They proceeded to withdraw them as soon as they thought the policemen looked as if they were

<sup>1</sup> S. No. 367.

<sup>2</sup> House of Commons Debates (1955-56), Vol. 548, Col. 2565—2566.



about to collapse. There were two of these unfortunate victims. One of them did collapse after three or four toasts and the other did not collapse. As soon as the first one was seen to be about to die, or to be liable to die, every person concerned set to work trying to revive the victims and to prevent them from dying.

"The rioters had already committed a crime which would obviously attract the longest term of rigorous imprisonment—why should they have tried to revive their unfortunate victims, but for the fact that they knew perfectly well that if one of those victims died they would be hanged, and hanged for a certainty?"

"That is one instance. The other was a quite different one. A middle-aged lady, who strongly disliked her husband, proceeded every evening to give him an evening meal in which she put, not poison, but a very obnoxious irritant to the bowels. This went on over a period, after which it was quite obvious that the man was about to die. Thereupon, she rushed him to hospital and did everything in the world she could to prevent him dying. Why? Again, because she knew perfectly well that if he died she would incur liability to the death penalty.

"Of course, those are very small indications that the death penalty is a deterrent. I entirely concur in what has been said by my right hon. and gallant Friend that no statistics can prove one way or the other whether the death penalty is a deterrent, but every one of us knows—knows inside himself—whether violent death is a deterrent to us and whether it will deter us from doing certain things. Masses of hon. Members in this House have served in the Armed Forces. I do not believe a single one if he says that he has never been deterred by bullets or bombs. Of course we have been deterred by bullets and bombs. I am not ashamed to confess that I have been gravely deterred, almost to the length of turning my back and not going forward when I ought to be going forward—"

Mr. S. Silverman: "But the right hon. and learned Member did not do so."

Sir, P. Spens: "I did not do so, but I did not go forward in the way I would have done if there had not been bullets flying about. I will give another instance. Just before I left India there were bad riots in Delhi. There was a great deal of firing on one occasion and somehow or other I had to get round the area where the rioting was going on. I motored miles to avoid going through the middle of it. I am sure that anyone else would have done the same.

"I am absolutely convinced—I know—that fear of violent death is a deterrent, and no statistics, no arguments whatever, will convince me that it is not. It is something we know and, if we know that violent death is a deterrent, we must assume that in the past there have been cases when someone would have committed murder—not hor. Members of this House—had that person not known that if he did so he would hang for it. If there have been cases like that in the past, all I can say is that I am sure that we shall do a grave injury to society if we suspend or abolish the death penalty for the future.

"The right hon. Member for South Shields (Mr. Ede) made a powerful speech about the Evans case. Having seen the difficulty of evidence in that great country overseas, I am certainly no one to go to the length of saying that is impossible for the wrong man to be hanged. I am not one who would say that. I think the choice is between whether this country is going to risk in a very exceptional case under our procedure—which is as fool-proof as it can be—the possibility of the wrong man being hanged in future, or to risk the case, which gets far more sympathy from me, that some unknown and unknowable man, woman, or child is to be murdered in future who would not be murdered if the death penalty were retained.

"To me, there is no question of what the choice is to be. I should regard a vote cast for suspending or doing away with the death penalty as one full of risk that some innocent person would be murdered who otherwise would not have been murdered. I would much rather take the risk that some fellow might get himself into a position in which he is brought before a judge and jury and yet, with all the evidence against him that he is a murderer there is something wrong. In my view, there is an enormous chance against that sort of thing happening, whereas, if we abolish the death penalty, the chances of innocent persons being murdered who otherwise would not be murdered I believe are very great indeed."

354. We shall now refer to the arguments advanced in support of each of the main views which have been summarised above. Those who have expressed the view that capital punishment acts considerably as a deterrent (i.e. that the deterrent object is sufficiently achieved), have pointed out, that successive confirmation of death sentences in cases from districts notorious for the record of crime has served as a check<sup>1</sup>. A hardened criminal, it is said, is very likely to commit murder after undergoing a life

<sup>1</sup> S. No. 95 (A Retired Judge of the Bombay High Court); S. No. 212 (A District and Sessions Judge in Gujarat State).

term. The psychological and social effect of the severest punishment on society has also been stressed, and it had been contended that even if a particular form of punishment is not a deterrent by itself, that is no ground for substituting it by some other form of punishment, if it is felt necessary to have that punishment for creating the proper *psychological* and social effect on society. Execution of a person responsible for treason and murder, it is pointed out, has certainly a far more desirable and much better effect on every one than if he is merely sent to jail from where he can return and again commit serious crimes<sup>1</sup>.

355. It is also stated, that the fear of capital punishment is the greatest deterrent, and if it is not sufficiently achieved, the failure of the object may be due to the inadequate implementation of the law. An apprehension has also been expressed, that if the sentence of death is abolished, the murderer would be equated, so far as the award of punishment is concerned, with those who commit rape or robbery. This may encourage persons who commit robbery or rape to kill their victims (in the course of the commission of the crime), because, even if they do that, the punishment would remain the same<sup>2</sup>. Every potential criminal or person who commits a crime, it is stated, knows in his heart of hearts what the consequences of his action would be, and his actions are also guided to a great extent by the nature and quantum of punishment likely to be awarded. In this context, death penalty does have a deterrent effect, and is in any case a suitable punishment for certain types of crime. It is also stated, that in a country like India, where there is acute poverty and where the percentage of literacy is very low and party or family feuds are innumerable, abolition of capital punishment would result in an adverse psychological effect, aggravating the crime situation<sup>3</sup>.

356. To sum up, while nobody has stated that death penalty acts as a deterrent in *all* cases (in fact it will be logically impossible to make such an assertion so long as there is a single case of murder), the persons and bodies in this category have pointed out, that it acts considerably as a deterrent, or acts as a deterrent in a large number of cases.

357. As against this, those who have questioned the deterrent effect of capital punishment have advanced several arguments. An argument advanced in many of the replies is, that on the basis of the studies made and figures collected in other countries, it appears that the object of

1 A State Government, in reply under question 2(a), S. No. 182.

2 A State Government under question 2(b), S. No. 182.

deterrence is not achieved. It is pointed out, that the temporary abolition of capital punishment in some countries has actually decreased capital crimes. It is also stated<sup>1</sup>, that psychologists take the view, that in every given community, there will be found a segment of it pre-determined with pathological and criminal potentials transcending the deterrent effect of *any punishment*, including capital punishment.

358. According to a leading Theosophist<sup>2</sup>, the death sentence does not act as a deterrent; The reply adduces various reasons in support of this view, which may be briefly summarised as follows:—

(i) Many other countries have abolished capital punishment without any increase in homicide;

(ii) The police would do their duty better without the fear of having to bring a man to the gallows;

(iii) The juries would do their duties better. Decent and intelligent men avoid serving on juries of murder trials, since they shrink from shedding the blood of a fellow being;

(iv) Administration of the law would be speedier,

(v) There would be less corruption in courts;

(vi) Executioners and others concerned suffer from the degrading and brutalising effect of such work;

(vii) Witnesses and readers of executions feel a brutalising and hardening influence.

359. The conclusion of the Royal Commission on Capital Punishment<sup>3</sup> is also quoted to the effect, that the figures of other countries do not give any clear evidence that the abolition of capital punishment has led to an increase in homicide rate, or that its re-introduction has led to a fall. Another argument advanced is to the effect that re-examination of the entire field of criminal law, based on Indian culture and philosophy, is needed. The highest Brahman dwells in every one of us, in the criminal, in the policeman and in the Judge<sup>4</sup>, it is stated. It is contended, that punishment and the prisons should have an Indian "ethos" as the basis to reform the criminal, and not the legal system which the British rulers have evolved for ensuring a loyal social set up and respect for the colonial power. Another argument advanced is, that the rates of crimes are conditioned by factors other than the death penalty. Thus, man

<sup>1</sup> Quoting from Dr. Philip Q. Roche, "A Psychiatrist Looks at the Death Penalty", in the Prison Journal (October 19, 1958), page 46.

<sup>2</sup> S. No. 479.

<sup>3</sup> The reference seems to be to R.C. Report, page 23, paragraph 65.

<sup>4</sup> S. No. 118

is unimportant in this tragic drama, and is simply caught in the steel-trap of circumstances<sup>1</sup>.

360. It has also been contended that certainty of detection and conviction act as a deterrent rather than the prospect of capital punishment. It is pointed out, that in England numerous minor crimes were capital at a certain time, but the abolition of death penalty has not increased their number<sup>2</sup>. The comparative figures for the yearly rate of murders for States in America *with* and *without* death penalty have been referred to<sup>3</sup>, in support of the argument that abolition States have consistently lower rates in most cases than retention State<sup>4</sup>. As regards the argument that a released murderer might commit the same offence again, it is stated<sup>5</sup>, that the evidence received by the Royal Commission<sup>6</sup> showed, that in countries like Belgium, Denmark, Netherlands, Norway, Sweden and Switzerland, cases of released murderers committing crimes of violence *again* were rare. It has been pointed out, that the majority of murderers can be remoulded by proper treatment and guidance<sup>8</sup>.

361. The personal opinion of Sir Ernest Gowers<sup>7</sup> has been quoted to the effect, that it is impossible to arrive at a firm conclusion about the deterrent effect of the death penalty or, indeed, of any form of punishment. It is also argued<sup>8</sup>, that capital punishment is a type of punishment whose advantages can be obtained by other means and whose disadvantage cannot be prevented in any other way than by abolishing it<sup>9</sup>.

362. The want of publicity in the execution of death sentence in India has also been put forth as weakening its deterrent effect<sup>10</sup>. It is also argued, that figures all over the world show that the deterrent effect is not achieved<sup>11</sup>.

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1 S. No. 122.

2 S. No. 126.

3 S. No. 119.

4 Figures from the "Crime Problem" by W.C. Reckless, New York, page 465, quoted.

5 Royal Commission Report, page 239, paragraph 651, end.

6 View of Mr. Lawes, former warden of Sing Sing prison, quoted from the "Encyclopaedia of Criminology" by Branham and Kutash.

7 Sir Ernest Gowers, view expressed in his book. "Life for Life".

8 Relying on Bentig, "Punishment—Its origin, purpose and psychology".

9 S. No. 122.

10 S. No. 117.

11 A Member of the Rajya Sabha, S. No. 206.

In one of the replies<sup>1</sup>, two of the usual types of homicide have been dealt with thus—

“Where murder is done without premeditation on spur of the moment and under grave or sudden provocation<sup>2</sup>, it is obvious that death sentence can never act as a deterrent. The other type of murder commonly found is where a feud or faction exists in a village. Here too the sentence of death for the man found guilty does not put an end to the feud or faction.”

363. This brings us to the last category under this topic, namely, those who have emphasised that capital punishment acts as a deterrent, but *partially*. It is not necessary to re-state in detail<sup>3</sup> the various shades of opinions expressed by these persons.

364. Another reply<sup>4</sup> states, that it neither deters criminals nor renders justice, and, that, on the other hand, family feuds are carried on.

365. Another reply<sup>5</sup> states, that the existing law does not sufficiently achieve the deterrent object, because courts award the death sentence in a very rare number of cases.

368. A few replies<sup>6</sup> state, that it does not act as a deterrent, because it is not carried out in public.

367. The reply of an Advocate, who was previously a Member of Parliament<sup>7</sup>, states, that due to its application during these long years the death penalty has lost its deterrent effect (if it had any such effect initially), and that, making the utmost concession that it has some deterrent effect, it is certainly not a unique deterrent; because, if it were a unique deterrent, the number of murders would not have been what it has been throughout these years. “If a motor-car runs at exactly the same speed whether the brakes are off or on, surely it is an indication that the brakes are not working.” The reply states, that the example of the State taking life does more to lower the value of human life than the deterrent influence of death penalty.

368. A District and Sessions Judge in the State of Maharashtra<sup>8</sup>, while stating that death penalty is successful as a preventive measure, expresses the view that it is not more effective as a deterrent than any other penalty. When a murder is committed, the deterrent effect has obviously

1 An Advocate, through the Bar Council of India, S.No. 161.

2 As regards provocation, see section 300, Exception 1, I.P.C.

3 See, paragraph 334, *supra*.

4 S. No. 255.

5 S. No. 286 (A District Magistrate).

6 S. Nos. 291 and 296.

7 S. No. 306.

8 S. No. 341.

failed. Sex murders and murders committed by mentally abnormal persons are unlikely to be deterred by any threats. The same is true about impulsive murders. "The repulsive features and undesirable effects of capital punishment outweigh its unique force as a deterrent."

369. Another District and Sessions Judge in the State of Maharashtra<sup>1</sup> states, that the actual imposition of capital punishment is confined to very few cases of murder, so that the number of capital sentences in a particular area or district is not commensurate with the number of proved cases of murder from that area or district. He states, that the ratio between cases of actual imposition of capital sentence and cases in which the lesser sentence was imposed in a particular area would work out at 1 to 50. This necessarily makes it difficult to state confidently, that the existing law, as now administered, sufficiently achieves the deterrent object.

#### TOPIC No. 26

##### *Conclusion regarding deterrent effect*

370. In our view, capital punishment does act as a deterrent. We have already discussed<sup>2</sup> 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:—

Conclusion regarding deterrent effect.

(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 Government, 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<sup>3</sup>.

(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.

<sup>1</sup> S. No. 346.

<sup>2</sup> See detailed discussion as to deterrent effect, Paragraphs 303—369, *supra*.

<sup>3</sup> See replies to question 2(b), summarised separately; Paragraphs 334—369, *supra*.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt<sup>1</sup>.

(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.

371. The statistical material which we have tried to analyse shows that the effect of abolition has not been uniform. There are countries in respect whereof the figures are inconclusive; there are countries, in respect whereof the figures tend to prove the deterrent effect of the death penalty; and there are countries in respect of which the figures do not prove the deterrent effect of the death penalty. As regards the last category, we should state here, that in regard to social and economic conditions, cultural level and in regard to general climate, as regards law and order, many of them differ from India. Lord Hewart's observations may be quoted<sup>2</sup>:

"The figures of any country over a series of years may vary for quite other reasons than the presence or absence of the death penalty. They may be affected by such circumstances, as for example, economic depression or civil unrest and disorder. Of such undescribably varying influences in different parts of the world statistics take no account."

372. As was pointed out in the Canadian Report<sup>3</sup>, the interpretation of statistical data involves difficulty because the figures cannot express the differences in tradition, standards of law—enforcement, social conditions and other factors in various countries or even regions within a country.

(g) Moreover, in most of the countries which, having abolished capital punishment, have maintained the abolition, the rates of homicide are far lower than in India<sup>4</sup>.

(h) Certainty of punishment, is, no doubt, an important factor contributing to the deterrent effect of punishment; but that is a consideration applicable to all kinds of punishments, and thus, to any other punishment that may be substituted for the penalty of death. That does not detract from the basic difference between death and a lesser punishment.

<sup>1</sup> See also discussion relating to arguments for abolition; Paragraphs 262—265, *supra*.

<sup>2</sup> Lord Hewart, Not without prejudice, page 214, cited in the Ceylon Report (minority view), page 103, paragraph 18.

<sup>3</sup> Canadian Report, page 13, paragraph 48.

<sup>4</sup> See figures for 1962, for abolitionist and retentionist countries, given separately.



(i) Cases of abnormal persons or persons acting under peculiar mental stress apart, a human being of ordinary frame of mind would, before committing a crime, think of the consequences certainly where death is the consequence.

(j) Further, the argument that the offender never thinks of the possible punishment would take away the foundation of all punishments, and not merely of the punishment of death.

(k) There is a considerable body of opinion to the effect, that the death penalty acts as a deterrent<sup>1,2</sup>.

(l) When a person is brought up in the knowledge of a possibility of a sentence of death, that knowledge must form part of his mental make-up, and may be reasonably supposed to influence his actions in ordinary situations; and we do not believe that every case of murder (or other capital offence) is one where the offender completely disrobs himself of the fabric of fears that would have been woven by the threads of this knowledge. The element of fear would not be totally absent, though its operation may be offset in part by certain other facts.

(m) In short, the one big basic fact of fear of death has not been displaced by all the arguments, taken together, that have been advanced in negation of it. The springs of human behaviour flow within the channels created by law on psychologically valid foundations. The erratic storms of provocative circumstances, or the obstacles erected by other counter-acting influences, may divert those springs or block their smooth flow, but *only occasionally*.

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<sup>1</sup> See replies to Question. 2(b), summarised separately; paragraphs 334—369, *supra*.

<sup>2</sup> See also view of Sir Patrick Spens, House of Commons (1955-56), Vol. 548, Cols. 2565—2566, paragraph 353, *supra*.

## CHAPTER VI

## DETAILED CONSIDERATION OF OFFENCES

## TOPIC NUMBER 27

*Replies to question No. 3 (a)*

373. One<sup>1</sup> of the questions put in the Questionnaire, was as follows:—

“Would you like to retain the sentence of death for all or any of the offences under the Indian Penal Code which are at present punishable with death?”

(The object behind putting this question was to elicit the opinions of those who, while favouring retention of capital punishment, would still like it to be *abolished* for certain offences, or of those, who, while favouring its abolition in general, would still like to *retain* it for certain offences).

374. The replies received on this question fall in two categories. Certain persons or bodies have suggested a scheme of their own, in total substitution for the existing capital offences under the Penal Code. There are, on the other hand, some replies, which suggest only removal of capital punishment for one or more of the offences at present punishable with death, without disturbing the other sections. It would be convenient to deal with the two categories separately.

375. Under the first category (i.e., persons or bodies sending replies suggesting a specific scheme), there are several sub-categories. One suggestion is, that legislation on the lines of the (English) Homicide Act, 1957 may be adopted<sup>2,3</sup>. Certain replies<sup>4,5</sup> have suggested that the death sentence may be confined to—

(i) pre-meditated murder;

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<sup>1</sup> Question 3(a).

<sup>2</sup> A High Court, S.No. 136, under question 3(a).

<sup>3</sup> Reply of a High Court Judge, S. No. 105, under question No. 1, suggests the adoption of the provision for diminished responsibility from the Homicide Act, 1957.

<sup>4</sup> The replies were received before the Murder (Abolition of Death Penalty) Act, 1965, was passed.

<sup>5</sup> Supreme Court Bar Association, S. No. 110, and Bar Association of India, S. No. 183.

- (ii) murder in the course of dacoity;
- (iii) waging war against the Union of India;
- (iv) abetment of suicide by child or insane person;
- (v) offence under section 303, Indian Penal Code on the same lines as under section 302, Indian Penal Code;
- (vi) abetment of mutiny by a member of the Armed Forces;
- (vii) attempt to murder by life convict.

(Some replies<sup>1</sup> have also suggested, that certain other offences, like adulteration of food and drugs and espionage during grave emergency, should also be punishable with death; but this is a matter to be dealt with separately.<sup>2</sup>)

376. One gentleman<sup>3</sup> would like the retention of death sentence only in certain cases enumerated by him, being (a) offences under sections 303, 121, 132, 194, second paragraph and section 307, Indian Penal Code, and (b) only certain types of murders, namely, (i) murder of a person under 12 years of age; (ii) murder of a person under 18 years, or of a woman in the course of or furtherance of theft, robbery or dacoity of property on their person; (iii) murder of a woman after committing rape on her; (iv) murder in the course of resisting, etc., of lawful arrest; (v) murder of a police officer acting in the execution of his duty; (vi) murder of a Prison Officer acting in the execution of his duty or of a person assisting a Prison Officer; (vii) murder by a convicted murderer; (viii) murder preceded by torture; (ix) murder of more than one person in the course of the same transaction; (x) murder committed in the course or furtherance of or following an offence punishable with imprisonment, and (xi) murder by shooting or causing an explosion.

377. In one of the replies<sup>4</sup>, the suggestion has been made that the death sentence may be retained only for *waging war*.

378. Another reply<sup>5</sup> has suggested, that the death penalty should be retained by way of *exception* only in the case of homicidal *maniacs* or those lunatics with homicidal tendencies or motiveless malignities or those who, in the interest of the safety of the society, cannot be left at large.

<sup>1</sup> For example the Supreme Court Bar Association, S. No. 110.

<sup>2</sup> See discussion relating to question 3(b); Paragraphs 414—428 and 436—439, 463, 473—474, *infra*.

<sup>3</sup> Law Secretary to a State Government, S. No. 162.

<sup>4</sup> A Member of the Rajya Sabha, S. No. 206.

<sup>5</sup> S. No. 211.

379. It may also be noted here<sup>1</sup>, that in the replies to another question, a division of the categories of murders into "capital" and "non-capital" has been suggested in some replies; but a detailed discussion of that aspect is unnecessary here<sup>2</sup>.

380. One of the replies<sup>3</sup> states, that for the offences under sections 121, 132, 194, 305 and 307, Indian Penal Code, the sentence of death is unreasonable. Substitution of life imprisonment or rigorous imprisonment for specific periods will, it states, restore the individual to society by bringing about a lasting reform in his character. Most of these crimes, it is stated, arise out of an undisciplined will, and therefore, reformation of criminals, which is the most important element in punishment, should be taken note of. In the case of these offences, we must measure the gravity of the crime by the gravity of the right violated, and (it is stated) deterrence should come in as a secondary qualification; it should not occupy a pre-eminent place.

381. The suggestion of a District Bar Association<sup>4</sup> is that the death penalty be limited to offences under sections 121, 132, 302 (where there are aggravating circumstances, i.e., where the motive is a personal gain or sex), 303 and 307, Indian Penal Code.

382. The replies of two Sessions Judges<sup>5</sup> suggest that the sentence of death should be retained only for offences under sections 121, 302, 303, 305 and 396, Indian Penal Code. This is also the reply of a District Bar Association<sup>6</sup>, and is, in substance, the suggestion of a Judicial Officers' Association<sup>7</sup>.

383. The reply of an Advocate, who is also the Member of a State Legislature<sup>8</sup>, suggests retention of the death sentence only for offences under sections 302, 303, and 396, Indian Penal Code.

384. The Law Minister of a State Government has suggested the following scheme<sup>9</sup>:—

"I would like the retention of the permissibility of death sentence only in the following cases:—

(1) Offences under section 303; (Death sentence to remain obligatory);

1 Q. 6(a) and 6(b).

2 See paragraphs 663—699, *infra*.

3 A District Panchayat Officer, S. No. 425.

4 S. No. 343.

5 S. Nos. 358, 360.

6 S. No. 368.

7 S. No. 373.

8 S. No. 226.

9 S. No. 253, under question 3(a).

- (2) Offences under section 121;
- (3) Offences under section 132;
- (4) Offences under paragraph 2 of section 194;
- (5) Following types of offences under section 302:—
  - (i) Murder of a person under 12 years of age;—
  - (ii) Murder of a person under 18 years of age, or of a woman, in the course of furtherance of theft, robbery or dacoity of property on their person;
  - (iii) Murder of a woman after committing rape on her;
  - (iv) Murder done in the course of or for the purpose of resisting or avoiding or preventing a lawful arrest or of affecting or assisting escape or reserve from lawful custody;
  - (v) Murder of a Police Officer acting in the execution of his duty or of a person assisting a police officer so acting;
  - (vi) Murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting;
  - (vii) Murder by a person who has already been convicted of another murder;
  - (viii) Murder preceded by torture;
  - (ix) Murder of more than one person in the course of the same transaction;
  - (x) Murder committed in the course of furtherance of following an offence punishable with imprisonment for life; and
  - (xi) Murder by shooting or causing an explosion.
- (6) Offence under the second paragraph of section 307 (death sentence to be obligatory);
- (7) Abetment of offence punishable with death.

No other offence under the Indian Penal Code need, in my opinion, be made punishable with death.”

385. We may now deal with the second group of replies, i.e., the suggestions regarding specific offences of the Indian Penal Code.

Section 121  
waging war  
against the  
Government.

386. Abolition of the death sentence (with retention of imprisonment for life) for the offence of waging war against the Government, has been suggested in certain replies<sup>1-2-3-4-5</sup>. One reply states<sup>6</sup>, that section 121, Indian Penal Code has become obsolete, as it was intended to punish insurrections designed to prevent *the King* from reigning according to law.

Regarding section 121, Indian Penal Code one suggestion<sup>7</sup> is, that where a man, by reason of his political views, openly revolts against the system of Government which, he believes, has rendered itself unserviceable for the cause of the advancement of the people and the country, the death sentence may be done away with. But, on the other hand, even those who are against the death sentence<sup>8</sup> have stated, that if it is to be kept, it should certainly be kept in the case of traitors, saboteurs, spys, etc.

In the reply of an Advocate it has been stressed<sup>9</sup> that it is natural with "every young blood" to endeavour to bring about a change in the existing form of Government, and therefore, the offence under section 121, Indian Penal Code should not be a capital one.

Section 132  
Abetment of  
mutiny by a  
member of  
the armed  
forces.

387. Abolition of the death sentence for the offence of abetment of mutiny by a member of the armed forces has been suggested in certain replies.<sup>10-11-12-13</sup>

A few other suggestions are to the effect that the offence under section 132, Indian Penal Code should be removed from the list of capital offences<sup>15</sup>.

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1 A Pleader, S. No. 151.

2 Bharat Sewak Samaj, New Delhi, S. No. 145.

3 S. No. 138.

4 Bharat Sewak Samaj, New Delhi, S. No. 145.

5 A Pleader, Saharanpur, S. No. 151.

6 A former Law Secretary to a State Government. S. No. 139.

7 S. No. 249.

8 S. No. 255.

9 S. No. 409.

10 S. No. 138.

11 An Inspector General of Police, S. No. 131.

12 A Reader in Criminal Law, S. No. 107.

13 S. No. 145.

14 A Pleader, Saharanpur, S. No. 151.

15 S. Nos. 279, 358, 410, 412.

388. Abolition of the death sentence for the offence of giving false evidence leading to execution of innocent persons has been suggested in certain replies<sup>1-2</sup>.

Section 194  
second  
paragraph —  
False evi-  
dence  
leading to  
execution of  
innocent  
persons.

Several other replies have, impliedly or expressly suggested the deletion of the offences under section 194, second paragraph, Indian Penal Code, from the list of capital offences<sup>3</sup>. One reply<sup>4</sup> states, that the giving of false evidence under section 194 may be due to police pressure, and therefore the offence should not be punished with death.

389. Abolition of death sentence for the offence of murder has been suggested in certain replies. In view of the importance of this offence, it would not be out of place to discuss and analyse the replies on this point somewhat in detail.

Section  
302—  
Murder.

390. In one reply, the suggestion made is that as regards murder, the sentence of death should be retained only where the act is done with the intention of causing death, and even here, it should be murder premeditated, or murder of more than one person or murder by fire-arms or poisoning<sup>5</sup>. This and similar suggestions can be considered under another question<sup>6</sup>.

391. It has been suggested in some replies that death sentence should not be *mandatory* for the offence under section 303 of Indian Penal Code.

Section  
303—  
Murder by a  
life convict.

Some High Court Judges have suggested that in the case of an offence under section 303, Indian Penal Code, the death sentence should not be mandatory, and the alternative of imprisonment for life should be provided<sup>7-8</sup>. This is the view of some Sessions Judges also<sup>9</sup>.

One reply<sup>10</sup> states, that there is no reason why a life convict should be subject to a higher penalty than others.

1. A Bar Council, S. No. 132 (impliedly).

2. An Inspector-General of Prisons, S. No. 143.

3. A Member of a State Legislature, S. No. 226 ; a High Court Judge, S. No. 230 ; a City Civil Court Judge, S. No. 373 ; District and Sessions Judges, S. No. 384, 386 and 440.

4. A District and Sessions Judge in Madhya Pradesh S. No. 375.

5. A Bar Council of Kerala (S. No. 132), under Questions 5 and 6(b).

6. Questions 5 and 6(b).

7. Chief Justice of a High Court, S. No. 393.

8. A High Court Judge, S. No. 230.

9. A District and Sessions Judge, S. No. 383; under Question 4, S. No. 121.

10. A District and Sessions Judge, S. No. 375.

Section  
305—  
Abetment  
of suicide  
by child or  
insane  
person.

392. Abolition of the death sentence for the offence of abetment of suicide by child or insane person (section 305, Indian Penal Code) has been suggested.

Abolition of the death sentence for this offence<sup>1</sup> has been suggested by one High Court<sup>2</sup>.

Its abolition for this offence is also suggested by one Bar Council<sup>3</sup>, one Inspector General of Police<sup>4</sup>, one Inspector General of Prisons<sup>5</sup>, and others<sup>6-7</sup>. A retired High Court Judge<sup>8</sup> has suggested, that the death sentence may be retained, except perhaps under sections 305 and 307, Indian Penal Code. The death sentence for this offence has been criticised as too "severe" in another reply<sup>9</sup>.

Several other replies<sup>10</sup> have suggested that capital punishment should be abolished for the offences under section 305, Indian Penal Code.

The reply of a District and Sessions Judge in the State of Madhya Pradesh<sup>11</sup> states that capital punishment should be removed for the offences under section 305. The reply also states, that it is true that suicide under section 305, is committed by a child or insane person, but there is no justification to place the offence under this section on a different footing than the offence under section 306.

Section  
307—  
Attempt to  
murder by  
a life convict.

393. Abolition of the death sentence for the offence of attempt to murder by a life convict has been suggested in certain replies. <sup>12,13,14</sup>.

A retired High Court Judge has suggested<sup>15</sup> that the death sentence may be retained, except perhaps under sections 305 and 307.

1 Section 305, Indian Penal Code.

2 A High Court, S. No. 187, in reply to Question 3(a).

3 A Bar Council, S. No. 132. (impliedly);

4 An Inspector-General of Police, S. No. 131.

5 An Inspector-General of Prisons, S. No. 166.

6 A Reader in Criminal Law, S. No. 107.

7 A Mercantile Association, S. No. 153.

8 A Retired Judge of the Bombay High Court, S. No. 95.

9 A member of the Bar Council of Madras, S. No. 104(a).

10 A High Court Judge, S. No. 230 ; Members of State Legislatures S. No. 237 and 257 ; A State Government, S. No. 242 ; Law Minister of a State who has suggested his own scheme, S. No. 253 ; an Advocate in West Bengal, S. No. 404 ; a District and Sessions Judge in Orissa, S. No. 433 ; District and Sessions Judges in Kerala S. No. 438 and 364 ; a Collector and District Magistrate, S. No. 332 ; A District and Sessions Judge, S. No. 548.

11 S. No. 371.

12 A Bar Council, S. No. 132 (impliedly).

13 An Inspector General of Police, S. No. 131(a).

14 A Pleader, Saharanpur, S. No. 151.

15 A Retired Judge of the Bombay High Court, S. No. 95.



Several replies have suggested that the offence under section 307, Indian Penal Code, should not be capital one.<sup>1</sup>

The reply of a District and Sessions Judge in the State of Madhya Pradesh<sup>2</sup> states, that there is no reason why a person undergoing a sentence of imprisonment for life should be punished with death, if in committing the offence of attempt to murder, he causes some hurt.

The reply of a District and Sessions Judge<sup>3</sup> states, that in respect of sections 303 and 307, Indian Penal Code, there is no reason why a life convict should be subject to a higher penalty than others.

394. Abolition of the death sentence for the offence of dacoity with murder has not been suggested specifically.

Section  
396—  
Dacoity with  
murder.

One suggestion<sup>4</sup> relating to section 396 states that only the dacoit who actually commits the murder should be punished with death, and not the other dacoits.

A High Court Judge<sup>5</sup> would like to retain the death sentence only for murder, and that too murder for gain and pre-meditated murders. On the other hand, however, many of the replies which otherwise are in favour of partial abolition have favoured the retention of capital punishment for the offence under section 396.<sup>6</sup>

#### TOPIC NUMBER 28

##### *Retention or abolition for each offence considered*

395. Assuming that capital punishment is to be retained, the next question is whether its abolition for any of the particular offences, which are, at present, capital should be recommended. We have summarised the replies received in this connection.<sup>7</sup> But, as at present advised, we do not feel ourselves justified in recommending any material change. We have attempted to show the principle on which the penalty of death is allowed by the law for these offences.<sup>8</sup> Unless the application of that principle leads to any serious anomalies or hardships, arising from other factors which overthrow the balance, the principle need not be abandoned.

Retention  
or abolition,  
for each  
offence  
considered.

1 High Court Judges, S. Nos. 230, 262 a District Bar Association in West Bengal, S. No. 234 ; a Member of a State Legislature, (impliedly), S. No. 237 a Bar Association in the State of Madras S. No. 239 ; a Member of State Legislative Council, S. No. 257 ; a District and Sessions Judge in the State of Maharashtra, (impliedly), S. No. 358 ; a District and Sessions Judge in the State of Kerala (impliedly), S. No. 364 ;

2 A District and Sessions Judge, Madhya Pradesh, S. No. 371.

3 A District and Sessions Judge in Madhya Pradesh, S. No. 375.

4 A District Bar Association in West Bengal, S. No. 234.

5 S. No. 262.

6 S. Nos. 358, 360, 367, 370, 373, 421, 425, 431 and 433.

7 Paragraphs 313—394, *supra*.

8 Paragraphs 77—80, *supra*.

396. Even the offence under section 121, Indian Penal Code, though it may, in one view, be treated as a "political" one, is one for which there is abundant justification for retaining the sentence of death. If the persons committing such offence were to succeed in their object, the whole machinery of the Government would collapse. We cannot agree with the view that this section has become obsolete. Preservation of an orderly society is essential to the functioning of all laws, and should be ensured by all possible means. If we encourage the change of Government by violent means, every disgruntled person will take it into his hands to overthrow the Government.

Section 132, Indian Penal Code, also stands on a somewhat similar footing.

397. As regards the offences under sections 121 and 132, Indian Penal Code, we may refer to the reply of a very senior Advocate of the Bombay High Court<sup>1</sup>, which states—

"Sections 121 and 132 of the Indian Penal Code deal with matters of high policy, general security, allegiance and loyalty to the State and the country, and military discipline; and is mainly a matter for the civil and military authorities of the State to consider. From the stand-point of public security, they are grave offences, and the death penalty, if appropriate in the exigencies of the situation, is by no means excessive."

398. Next, the penalty of death for the offence of giving false evidence leading to the execution of an innocent person (under second paragraph of section 194, Indian Penal Code), is not only in conformity with the above mentioned principle, but is eminently commendable from other ethical considerations also.

Under section 194, the witness giving false evidence ought to be held as much responsible as if he had killed the person innocently with his own hands.

399. The question may be asked whether the offence of giving false evidence leading to the execution of an innocent person is a capital one in England. It is not easy to answer this question. There is no statutory provision on the subject. The offence of perjury is punishable in England under the Perjury Act, 1911.<sup>2</sup> But that does not provide for the sentence of death in such cases. Section 1 of that Act authorises imprisonment only up to 7 years. Fabrication of false evidence is a mis-demeanour, for which also only imprisonment can be awarded.<sup>4</sup>

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<sup>1</sup> S. No. 318.

<sup>2</sup> Perjury Act, 1911 (1 and 2 Geo. 5, Chapter 6).

<sup>3</sup> Archbold (1962), paragraph 3501.

<sup>4</sup> Archbold (1962), paragraph 3544.

400. In a case<sup>1</sup> which arose in the 18th century, an attempt was made to secure a conviction of murder for killing by perjury, but the attempt was given up. This case is sometimes cited as authority for the proposition that a person who gives false evidence which leads to the conviction and execution of an innocent person is *not* guilty of murder.<sup>2</sup> From a detailed study of the case, however,<sup>3</sup> it would appear that the attempt was given up not from any apprehension that the point was not maintainable, but from other prudential reasons, probably a fear that witnesses would be rendered afraid to give evidence. A full history of the English case will be found in the under-mentioned work.<sup>4</sup>

401. If the matter were to be considered purely from the point of causation<sup>5</sup> it could perhaps be argued, that the chain of events started by the offender is "interrupted" by the act or omission of a third person (in this case, the Court), who is not a confederate of the accused or controlled by him or acting in pursuance of a common purpose with him. There is, however, a sufficient answer, namely, the offender in this case intended or knew it to be likely that a death sentence would be passed, and the course of justice was polluted by the offender's own misconduct.

It would appear, that in 1692, a Bill was introduced in England to make it a capital offence, to commit or suborn perjury in a capital case, but the Bill did not become law.<sup>6</sup>

It may be of interest to refer to a provision in the Tasmanian Criminal Code on the subject.<sup>7</sup>

402. In any case, the provision in the Indian Penal Code should be retained to avoid doubts. There have not been many reported cases under the section. The offence is non-cognizable, and triable exclusively by a Court of Session, and a prosecution cannot be initiated without the complaint of the Court.<sup>8</sup>

1 *R. v Macdaniel*, (1756) 1 Leach 44.

2 Halsbury, Third Edition, Vol. 10, page 707, paragraph 1353.

3 Turner and Armitage, *Cases on Criminal Law* (1964), pages 215 and 216.

4 Radzinowicz, *History of English Criminal Law* (1956), Vol. 2, pages 327—332.

5 Generally as to causation, see Russell, on *Crime* (1964), Vol. I, pages 412—418 and Howard, *Australian Criminal Law* (1965), pages 28—29.

6 Russell on *Crime* (196), Vol. I, page 426.

7 Under section 153(6) of the Tasmanian Criminal Code, if two or more persons bring about the execution of a person by carrying out a *conspiracy* to give false evidence against him they are deemed to have caused his death.

8 Section 195, Code of Criminal Procedure, 1898.

403. Offences under sections 196, 197, 198, 199 and 200, Indian Penal Code, are akin to offences under section 194, and need not be discussed separately.

Perjury in  
other  
countries.

404. It may be noted, that in several countries of the world, perjury or unlawfully causing sentence of death and execution is a capital offence. These countries are Ceylon, Ivory Coast, Dahomey, France, Iran, Luxemburg (*de facto* abolitionist), the United Arab Republic, Somalia (Northern), Somalia (Central and Southern), Sudan, Togo and Turkey.<sup>1-2</sup>

405. So far as the offences under sections 302 and 303, Indian Penal Code, are concerned, no discussion of the *principle* on which the penalty of death is imposed is necessary at this place. Certain points of detail, such as categories of murders, will be considered separately.<sup>3</sup> The suggested tests of "pre-meditation" and "intention" are also discussed separately.<sup>4</sup>

406. As regards the question whether the death sentence under section 303 of the Indian Penal Code should continue to be *mandatory*, we have dealt with it in detail separately.<sup>5</sup>

407. Some observations appear to be called for regarding the offence under section 305, Indian Penal Code. This deals with abetment of suicide by a child or an insane person. This is really a case of homicide, where the criminal sends his mental faculties to work in aid of the physical act of another person. That other person, now dead by his own hand, cannot be punished (and ought not to be punished), but the moral reprehensibility of the invisible hand, that guided the act is unquestioned, and, in our opinion, is of a magnitude sufficient to justify the inclusion of the act within the range of the highest penalty of the law. We are aware, that this offence does not attract the penalty of death in many of the countries which have retained capital punishment in general.<sup>6-7</sup> But that is not a conclusive argument.

<sup>1</sup> See U. N. Publication on Capital Punishment, (1962); Table at the end.

<sup>2</sup> See also paragraph 401, *supra*.

<sup>3</sup> See paragraphs 704—706, *infra*.

<sup>4</sup> See paragraphs 706—725, *infra*.

<sup>5</sup> See separate discussion as to mandatory sentence under section 303, under question 4; paragraphs 586—591, *infra*.

<sup>6</sup> See U. N. Publication on Capital Punishment (1962), Table I, at the end, under "Aiding in the suicide of a child, etc." The offence is capital in Ceylon, India, Somalia (Northern) and Sudan. Pakistan is also understood to have retained the sentence of death for abetment of suicide, etc., though not so stated in the U. N. Publication.

<sup>7</sup> As to England, see section 4, Homicide Act, 1957, as amended by the Suicide Act, 1961.

408. If the punishment of death, while being retained for murder, is removed for this offence, an attempt might be made to circumvent the law either by doing acts which will fall only under abetment of suicide, or by distorting the facts and circumstances so as to make it appear that the case is one only of abetment of suicide. It may be noted, that even in England, at common law,<sup>1,2</sup> a person abetting suicide was treated as a principal in the second degree to the "self-murder"<sup>3</sup> of the person committing suicide, if he was present at the time when suicide is committed.<sup>4</sup>

409. This, of course, does not mean that in every case of abetment of suicide by a child, etc., the penalty of death will be imposed in India. The discretion left to the Court leaves ample room for a consideration of the moral culpability of the offender with reference to the particular circumstances of the case.

410. So far as the offence under section 307, Indian Penal Code (attempt to murder by a life convict), is concerned, a detailed discussion does appear to be necessary. The ingredients of the offence are sufficient to show that the case will fall within a very narrow compass.

411. The offence under section 396, Indian Penal Code—dacoity with murder—is, in a sense, of peculiar interest to India. Its historical background has already been explained<sup>5</sup> elsewhere. It may be pointed out, that in a few other countries,<sup>6</sup> robbery or armed burglary is punishable with death.

412. Where section 396 applies, the person to be sentenced to death would be either the person who actually committed the murder, or the other persons who are sought to be made liable vicariously. So far as the person who actually committed the murder is concerned, special discussion is obviously unnecessary, as he would be liable under section 302 also. So far as the other persons are concerned, their vicarious liability is justifiable in view of the special features of this offence.<sup>7</sup> We do not, therefore, consider it necessary to take out this offence from the range of the penalty of death.

1 *R. v. Dyson*, (1823) R. & R. 523.

2 *R. v. Croft*, (1944) 1 K.B. 295, (Court of Criminal Appeal).

3 R. C. Report, page 59, paragraph 164.

4 See now, section 4, Homicide Act, 1957, as amended by the Suicide Act, 1961, passed after the Second Report of Criminal Law Revision Committee (October, 1960), Cmd. 1187.

5 See paragraphs 85—86, *supra*.

6 Ivory Coast, Dahomey, some States of U.S.A., France, Greece, Netherlands, New Guinea, South Africa and Togo. See U. N. Publication, 'Capital Punishment' (1962), Table I, under "Robbery (armed burglary)".

7 See paragraphs 115—121, *supra*.

## TOPIC NUMBER—29

*Whether other offences to be capital—Replies to Q. 3(b).*

Question  
3(b).

413. Question 3(b) of our Questionnaire was as follows:—

“Are there any other offences under the Indian Penal Code or any other law which, in your opinion, should be punishable with death.”

Many of the replies received on this question have stated that it is not necessary to make any change in the existing law. But several replies have suggested the addition of a provision for sentence of death for various offences, and it would be convenient to deal with them *offence-wise*.

Adulteration:

414. It has been suggested in some replies, that adulteration of food and drugs should be a capital offence. It is stated,<sup>1</sup> that while an ordinary murderer might in some circumstances have some motive, the manufacturers of spurious drugs are “arch-criminals” guilty of mass murder of innocent citizens who have not given any cause for offence. Another suggestion<sup>2</sup> is to the effect that offences of adulteration of food and drug, where there is a *deliberate* act done with the knowledge of the consequences likely to follow, may be punishable with death *where death is caused*. The imposition of death sentence for adulteration of medicines and drugs has been suggested by certain High Court Judges also.<sup>3</sup> Another suggestion<sup>4</sup> is to the effect that adulteration of food and drugs in a manner likely to *endanger human life*, or to cause serious or permanent, bodily harm (such as blindness or other permanent physical disability) should be made punishable with death.

415. Another suggestion<sup>5</sup> is to the effect that adulteration of drugs *causing* or *calculated* to cause mass deaths should be made a capital offence, being an anti-social act of a grave nature. Still another reply<sup>6</sup> suggests, that adulteration of food which *causes death* may be made a capital offence.

416. Several other replies<sup>7-8</sup> have also suggested, that adulteration of food and medicines *endangering human life* should be punishable with death.

417. The suggestion to make adulteration of food and drugs a capital offence has the support of a State Bar Council<sup>9</sup>.

<sup>1</sup> A Pleader in Calcutta, S. No. 128.

<sup>2</sup> A State Law Commission, S. No. 133.

<sup>3</sup> Two High Court Judges, S. No. 105.

<sup>4</sup> Supreme Court Bar Association, S. No. 110.

<sup>5</sup> An eminent member of the Bar, through the Bar Council of India, S. No. 161.

<sup>6</sup> Bar Association of India, S. No. 183.

<sup>7</sup> A District Bar Association, S. No. 219.

<sup>8</sup> A District Bar Association, S. No. 218.

<sup>9</sup> A Bar Council, S. No. 159.

418. A State Government<sup>1</sup> has suggested, that "offences of food and drug adulteration where there is a deliberate act with knowledge of the consequences and death is actually caused", should be punishable with death.

419. A High Court Judge<sup>2</sup> has suggested the extreme penalty for the manufacture of medical drugs that are either adulterated or happen to be below standard. Distributors and sellers of such drugs can be dealt with by imprisonment, but those who manufacture them are responsible for slow but sure murder on a larger scale, and nowadays go scot-free or with easy punishments. This must be stopped by legislation, and the offence should be made capital.

420. Some other important replies<sup>3,4,5</sup> also suggest the capital punishment for adulteration of food and drugs.

421. It may also be stated here, that in the course of the evidence before the Joint Committee on the Prevention of Food Adulteration Bill, 1963, the question of the penalty for adulteration of food was raised. Shrimati Poorabi Mookerjee (the then Health Minister of West Bengal), stated<sup>6,7</sup>, that she would be the first person to accept the death penalty for adulteration, if such a change in the law was proposed.

422. In the dissenting note to the Joint Committee's Report, two Members stated as follows<sup>8,9</sup>:—

"We believe that the maximum penalty for major offences of adulteration, particularly so if repeated, should be, not six years as recommended by the Committee, but death or imprisonment for life. Our suggestion finds valiant support in the view of a former Union Health Minister, Shri D. P. Karmarkar while he was in office, that adulterators of food are potential murderers who deserve the highest penalty. So also the Minister of Health, West Bengal, who gave evidence before the Joint Committee, described adulterators as worse than murderers. If the adulterator's

1 A State Government, S. No. 31

2 A High Court Judge, S. No. 251

3 A District Bar Association in West Bengal, S. No. 223; Sessions Judges, S. Nos. 358, 359; A Lawyers' Association in Assam, S. No. 227.

4 Chief Minister of State, in his personal capacity, S. No. 255.

5 S. Nos. 294, 316, 321, 323, 327, 335, 352.

6 Report of the Joint Committee on the Prevention of Food Adulteration (Amendment) Bill, 1963, published by the Lok Sabha Secretariat, New Delhi (September, 1964), pages 272—273.

7 S. No. 571.

8 Report of the Joint Committee on the Prevention of Food Adulteration (Amendment) Bill, 1963, published by the Lok Sabha Secretariat, New Delhi (September 1964), pages xvi, xvii.

9 No. 571.

calculated crime can cause death, why should not capital punishment be prescribed for such a criminal, in any case during the Emergency, and even thereafter, so long as capital punishment is not abolished by law."

423. The offence of adulteration of food has received some detailed attention in many other replies which are in favour of death sentence for this offence. Thus, it has been stated by the Judge of a City Civil Court in a Presidency Town<sup>1</sup>, that public opinion in the country appears to be that the death penalty should be extended to adulterated manufacture, sale or offer for sale of food or drugs that is likely to cause death and where death has been caused by the use or consumption of such food or drug, where the accused had *knowledge or reason to believe* that such food or drug had been adulterated.

424. In the reply of a District and Sessions Judge<sup>2</sup> in Orissa, it has been suggested that adulteration of food where the food is "adulterated with lethal or slow and sure acting poisons" should be punishable with death.

425. A State Government<sup>3</sup> has emphasised, that the death penalty carries with it "the ultimate restraining influence on human conduct, the greater the threat the more effective it would be". Having regard to this, it states that adulteration of drugs and foodstuffs leading to death of a person or persons, should be punishable with death.

426. Other suggestions for punishing adulteration with death have been received.<sup>4-5,6,7,8</sup>

427. Another suggestion<sup>9</sup> is to the effect that harder cases of *pre-meditated planned* action in the nature of adulteration, which affects the vitality or virility of the nation or human life, may be made capital.

428. In our Report on social and economic offences also<sup>10</sup> we have referred to the suggestions received by us to increase the punishment for offences under the Prevention of Food Adulteration Act, 1954.

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1 S. No. 484.

2 S. No. 494.

3 S. No. 580.

4 S. Nos. 429, 431, 439 (District and Sessions Judges in West Bengal, and a District and Sessions Judge in Orissa).

5 A District and Sessions Judge in Maharashtra, S. No. 354.

6 S. Nos. 400, 403, 404, 407 (Advocates in West Bengal).

7 S. No. 401 (an Advocate in Bihar).

8 S. Nos. 280, 286, 357.

9 A Barrister-at-Law, Calcutta, S. No. 150.

10. Twenty-ninth Report of the Law Commission (Proposal to include certain social and economic offences in the Indian Penal Code), paragraph 152.



429. One suggestion<sup>1</sup> is that offences relating to the Army, Navy and Air Force should be made capital.

430. It has been suggested in some replies<sup>2</sup> that arson **Arson** should be punishable with death.

431. Several replies<sup>3,4,5</sup> have suggested that black **Black marketing** marketing should be punishable with death.

Other suggestions to make the offence of black marketing a capital one have also been received.<sup>6,7,8,9,10</sup>

One suggestion<sup>11</sup> is, that activities intended to corner the market or calculated to withhold effectively the supply of essential commodities to the society in times of national emergency with a view to earning profits should be punished with death.

432. It has been suggested by some High Court Judges,<sup>12</sup> **Corruption** that people placed in positions of responsibility who indulge in serious *corruption* against vital national interest should also receive the death sentence. A suggestion for punishing with death bribery and corruption has been made in other replies also<sup>13</sup>.

433. One reply<sup>14</sup> suggests that offences under the Prevention of Corruption Act, when committed in respect of amounts exceeding one lakh of rupees, should be made capital, and the amount also forfeited.

434. One of the Bar Councils<sup>15</sup> is amongst those who would like the sentence of death to be imposed for corruption.

1 S. No. 127.

2 S. No. 138.

3 A Bar Council, S. No. 116.

4 A Bar Council, S. No. 159.

5 A District Bar Association, S. No. 219.

6 A District Magistrate, S. No. 286.

7 A District and Sessions Judge, S. No. 358.

8 A District and Sessions Judge (Black marketing of extreme type) S. No. 362.

9 An Advocate S. No. 410 .

10 S. Nos. 281, 294, 432.

11 A District and Sessions Judge in Maharashtra, S. No. 333.

12 Two High Court Judges, S. No. 105.

13 A Bar Council, S. No. 116.

14 A District Bar Association, S. No. 218.

15 A Bar Council, S. No. 159.

435. Other suggestions to the effect that the offence of corruption should be punishable with death, are given in the foot-notes.<sup>1-2-3-4-5-6.</sup>

**Espionage.**

436. Several replies<sup>7-8-9</sup> have suggested that espionage should be punishable with death. In another reply<sup>10</sup>, it has been suggested that espionage regarding *essential military secrets* and espionage by police and security officers on behalf of foreign countries in relation to military secrets, should be made a capital offence. A State Government<sup>11</sup> has suggested, that the death sentence should be prescribed for espionage *against the security of the State*.

437. Espionage during *grave emergency* should according to another suggestion<sup>12</sup>, be made a capital offence.

Espionage on an extensive scale, particularly when secrets for the nation's protection and safety are involved, should be made capital, according to another suggestion<sup>13</sup>.

438. A High Court Judge<sup>14</sup> has expressed his views regarding espionage in these words:—

'One batch of offences is connected with espionage, sabotage, particularly of transport system, military equipment and installations. In a way, these can even now be brought by some logic under the description "waging war with the Government or abetting or preparing for such war". But, for clarification, these should be separately enacted as offences calling for capital punishment. Ours is probably the only country in the present world which allows these offences to go on ruining the country's morale and exposing it to invasion by hostile neighbours, and letting off the offender with ridiculously lenient sentence of imprisonment.'

1 A District Bar Association, S. Nos. 223.

2 An Advocate, S. No. 272.

3 A Zila Panchayat Officer, S. No. 281.

4 S. No. 295.

5 A District Bar Association, S. No. 323.

6 A Sessions Judge in Orissa, S. No. 429.

7 A Bar Council, S. No. 132.

8 S. No. 127.

9 The Supreme Court Bar Association, S. No. 110.

10 Chief Justice of a High Court and one Judge of the High Court agreeing with the Report of the Secretary, Rules Committee, S. No. 130.

11 A State Government, S. No. 182.

12 The Bar Association of India, S. No. 183.

13 S. No. 50.

14 (A High Court Judge), S. No. 251

439. Other suggestions to make the offence of espionage a capital one are given in the foot-notes.<sup>1-2-3-4-5.</sup>

440. Several suggestions have been made regarding the offence of kidnapping. One suggestion is to the effect<sup>6-7</sup> that—(i) the offence of kidnapping together with crippling, maiming or mutilating of the minor should be punishable with death, as this type of offence is on the increase and minors are mutilated in order to earn by begging for the benefit of kidnapping, and

(ii) kidnapping together with the offence of rape or sodomy against the minor under the age of 10 should be a capital offence, as capital punishment in such cases would act as a deterrent.

Another reply<sup>8</sup> also suggests that child-lifting should be punishable with death.

441. Another reply<sup>9</sup> suggests death sentence for kidnapping of a child under 5 years. One of the replies<sup>10</sup> suggests death sentence for all *heinous crimes in respect of women and children.*

442. Other suggestions to punish with death the offence of kidnapping have also been received, being suggestions to punish with death—

(i) child lifting in the most atrocious manner<sup>11</sup>;

(ii) forcible abduction of a girl or women and rape, which results in death<sup>12</sup>;

(iii) kidnapping of children with a view to blackmail and extorting money from their parents or guardians or wreck vengeance upon their parents or elders<sup>13</sup>

443. It should be noted here, that a proposal to increase the punishment for the offence of kidnapping, made by a State Government, has been received through the Ministry of Home Affairs<sup>14</sup>; but the proposal does not contemplate

1 Members of State Legislature, S. No. 243, 244s.

2 District Bar Associations, Nos. 231, 239—411.

3 Inspector General of Police of a State, S. No. 263.

4 A Judicial Officers' Association, S. No. 374.

5 S. Nos. 294, 365, 414.

6 The Indian Federation of Women Lawyers, Bombay, S. No. 121.

7 An Advocate of High Court, S. No. 92.

8. A Bar Council, S. No. 116.

9 The Bharat Sevak Samaj, New Delhi, S. No. 145.

10 An Inspector-General of Prisons, S. No. 160.

11 A Lawyers' Association in Assam, S. No. 227.

12 A District Bar Association in Madras, S. No. 239.

13 A very senior Advocate of the Bombay High Court, S. No. 318.

14 Suggestion of a State Government received through the Home Ministry. S. No. 569.

the imposition of the *death penalty*. It suggests a penalty of imprisonment for life and fine, for kidnapping for ransom. It is, therefore, outside the scope of the present report, and is noted here only to make the discussion comprehensive.

444. (The State Government has drawn attention to the increase in the incidence of kidnapping for ransom during the years 1956 to 1964, in the State, and has stated, that dacoits have now taken to kidnapping on a large scale, as this is less risky, the punishment being only 7 years' imprisonment).

Homicide  
by negligence.

445. It has been suggested, that the offence under section 304A, Indian Penal Code, should be made punishable with death<sup>1</sup>.

446. A more specific suggestion regarding section 304A, Indian Penal Code has been made by a retired High Court Judge.<sup>2</sup> The suggestion is to the effect, that there should be death penalty (with imprisonment for life as an alternative and a heavy fine in certain types of serious accidents resulting in death where the driving is callous, grossly negligent and in utter disregard of human life and safety, and that a suitable amendment in section 304A, Indian Penal Code, may be made. The suggestion is intended to include Railway and other accidents.

It has been suggested, that under section 304A, Indian Penal Code, when the "gross negligence" of the driver is proved, the sentence of death must be provided for<sup>3</sup>.

Rape.

447. Some replies have suggested that rape should be made a capital offence<sup>4-5</sup>. One suggestion is that it should be punishable with death if resulting in serious injury to or death of the victim<sup>6</sup>.

448. It has been suggested<sup>7</sup>, that for "murder of a woman after having committed rape and murder of children after criminal assault on them", the death sentence should be mandatory.

1. A District Bar Association, S. No. 125.

2. A Retired Judge of the Bombay High Court, S. No. 95.

3. A Member of Parliament under question 3(b), S. No. 224.

4. A Retired District Session Judge and formerly Law Secretary to a State Government, S. No. 139.

5. S. No. 138.

6. Bharat Sevak Samaj, New Delhi, S. No. 145.

7. A State Government, reply to question 3 (b) read with reply to questions 4 and 6 (b), S. No. 580.

449. A High Court Judge has suggested that rape should be made a capital offence<sup>1</sup>.

Suggestions to punish with death the offence of rape have been received in respect of—

- (a) rape of girl under 13 years<sup>2</sup>;
- (b) gang rape<sup>3</sup>;
- (c) rape generally<sup>4-5-6</sup>.

450. Suggestions to make *sabotage* a capital offence have been made in several replies. One suggestion<sup>7</sup> is to the effect, that acts of sabotage of trains, bridges and similar installations or undertakings involving death of a large number of persons causing widespread alarm and panic in society and causing a sense of insecurity and loss of confidence in the basic Governmental undertakings, should be punishable with death. Sabotage.

Sabotage of public utility services leading to loss of life or property, it has been suggested, should be punishable with death<sup>8</sup>.

451. A High Court Judge<sup>9</sup> has stated that there are several other offences which should be punishable with death. "One batch of offences are connected with sabotage, particularly of transport system, military equipment and installation.

452. Other replies for making sabotage a capital offence have also been received<sup>10-11-12</sup>.

453. Suggestions to punish with death certain specific types of sabotage have also been received<sup>13-14</sup>.

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1 A High Court Judge S. No. 262.

2 Reply of a Member of Parliament S. No. 224.

3 for gang rape S. Nos. 402 and 406.

4 A District Bar Association S. No. 223.

5 A District and Sessions Judge in Rajasthan S. No. 336.

6 S. No. 278.

7 Chief Justice of a High Court and a Judge of the High Court agreeing with Report of Secretary Rule Committee, S. No. 143.

8 A State Government 8 S. No. 580.

9 A High Court Judge S. No. 251.

10 A State Government. "Cases of sabotage in which people lose their lives through derailment of railway trains blowing up of aircrafts, removal of land-marks leading to marine disasters and the like". S. No. 311.

11 A District Magistrate S. No. 286.

12 District and Sessions Judges S. No. 333, 339, 3366.

13 S. No. 242 (A State Government) (in respect of the offences under section 126, Indian Railways Act, 189C—maliciously wrecking, or attempting to wreck a train).

14 District Bar Association) (Mischief by fire or otherwise in respect of national properties) S. No. 223.

## Secession.

454. A suggestion has been made by a retired High Court Judge<sup>1</sup>, to the effect that there should be death penalty (with an alternative of life imprisonment, as also confiscation of property) for the offence of advocating and actively working for *by violent means* the secession of a State or part of a State from the Union of India. The suggestion emphasises that this should be done by an amendment of the *Penal Code*. (In this connection; it would be appropriate to refer to a recent Act<sup>2</sup>, which punishes any person who questions the territorial integrity or frontiers of India in a *manner* which is, or is likely to be, prejudicial to the interest of the safety or security of India. The punishment is imprisonment for three years or fine or both).

455. [By the Constitution (Sixteenth Amendment) Act, 1963, clauses (2), (3) and (4) of article 19 of the Constitution have been amended. Reasonable restrictions can now be imposed on the freedom of speech and expression, freedom of assembly and freedom of movement, in the interest of the sovereignty and integrity of India. These amendments were the result of the recommendation of the National Integration Committee to amend article 19 so as to make it possible for the State to impose restrictions for preventing activities designed to have further disintegration of the country, and were considered to be necessary, because the wording of article 19(2), etc., (as it stood in 1963), did not cover a power designed to curb activities which sought to challenge the sovereignty and integrity of India, as some parties had sought to do]<sup>3,4</sup>.

456. (The object of the amendment was to empower the State to impose restrictions on the activities of individuals and organizations who wanted to make secession from India or disintegration of India as political issues for the purpose of fighting elections)<sup>5</sup>.

Other suggestions to make the offence of preaching or advocating secession a capital one have also been received<sup>6</sup>.

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1 A retired Judge of the Bombay High Court, S. No. 95.

2 Criminal Law Amendment Act, 1961 (23 of 1961), section 2.

3 Speech of Shri A. K. Sen, then Minister of Law, Lok Sabha Debates, 2nd May, 1963, Cols. 13409, 13410.

4 Speech of Shri A. K. Sen, then Minister of Law, Lok Sabha Debates 2nd May, 1963, Col. 13410.

5 See—(i) Statement of Objects and Reasons, Gazette of India, Extraordinary, Part II, section 3, dated 21st January, 1963.

(ii) Speech of Shri A. K. Sen, then Minister of Law in the Lok Sabha, on 22nd January, 1963, cols. 7560 and 7561.

6 A City Civil and Sessions Judge, S. No. 380.

457. Smuggling on a mass scale or by international Smuggling gangs has been suggested as suitable for capital punishment<sup>1</sup>.

Other suggestions to punish the offence of smuggling with death have also been received<sup>2</sup>.

458. It has been suggested in certain replies<sup>3</sup> that Treason. treason should be made a capital offence.

Amongst those who have suggested the imposition of the death penalty for treason are certain Members of Parliament<sup>4,5,6</sup>.

459. One suggestion<sup>7</sup> is to the effect that offences connected with removal of untouchability, like restricting members of the "untouchable" classes from drawing water from wells, or not selling foodstuffs to them, or debarring them from using public land or other places, should be made capital. Untouchability.

A High Court Judge<sup>8</sup> has stated, that the question of death sentence for gross anti-national and anti-social offences be considered.

Other suggestions to punish with death the offence of treason have also been received<sup>9</sup>.

We may also quote the reply of the Member of a State Legislature<sup>10</sup>:

"Any person who indulges in the nefarious activity of selling away the honour and self-respect of his motherland for the matter of bits of gold, silver and paper currency to personally benefit himself, causing a serious injury to the freedom and integrity of the country should be made to answer a charge of capital punishment. Similarly, anybody who is so irresponsible and unscrupulous as to tear off the national flag or spit on it and who internationally insults the nation as a whole through his contemptuous behaviour against the national flag, should also be called up to answer a charge for capital punishment."

1 A Barrister-at-Law, Calcutta, S. No. 150.

2 An Advocate in Bihar, Smuggling of goods to enemy [countries S. No. 321.

3 S. No. 127.

4 A Deputy Minister in the Union, S. No. 210.

5 Dewan Chaman Lal, Member, Rajya Sabha, S. No. 206.

6 A Member, Rajya Sabha, S. No. 207.

7 An Advocate, S. No. 152.

8 A High Court Judge, S. Nos. 262.

9 A District and Sessions Judge in Gujarat S. No. 387.

10 Member of a State Legislature under, question 3(b).

Other offences. 460. Certain other offences have also been suggested as offences for which capital punishment would be suitable. One suggestion<sup>1</sup> mentions offences under sections 195 to 200, Indian Penal Code.

461. Another reply<sup>2</sup> states offences of cheating, misappropriation, criminal breach of trust, offences against currency, bribery, etc., assume the nature of "white collar" crimes, and so is the case with adulteration of food, and that these acts corrupt the morale of the public "which naturally is the breeding place for murderers or petty thieves who are merely scapegoats of society", and that such criminals should be eliminated.

#### TOPIC No. 30.

##### Other offences—whether to be made capital

Other offences whether to be made capital. 462. We may now consider the question whether any other offences under the Indian Penal Code or any other law should be made capital. We shall consider only those offences in respect of which such a suggestion has been made in the replies received to our question<sup>3</sup> on the subject. Mainly, the offences covered in those suggestions are—adulteration of food and drugs, offences against the Army, arson, espionage, kidnapping and abduction, homicide by negligence, rape, sabotage, smuggling and treason.

Adulteration. 463. So far as adulteration of food and drugs is concerned, it is true that such offences endanger the lives of numerous persons. We are not, however, satisfied that strict enforcement of the existing law would not be enough to check serious offences of adulteration. We may also point out, that adulteration has several aspects—

(1) Adulteration may fall under sections 299 and 300, Indian Penal Code, if death is caused thereby, and if the conditions of those sections (particularly as to *mens rea*) are satisfied.

(2) If death is not caused, then to regard adulteration as a capital offence would not be in symmetry with the scheme of the Indian Penal Code. It may be noted, that a person throwing a bomb into a crowd is not punished with death, if none is killed. He may be guilty of an attempt to murder, but not of murder.

Armed Forces. 464. Regarding offences against the law relating to Armed Forces, we think that, so far as civilians are concerned, the existing provision in section 132 of the Indian Penal Code is adequate for ordinary situations. If, in circumstances requiring special provisions, need for imposing

1. A pleader, S. No. 208.

2. An Advocate, S. No. 149.

3. Question 3(b) of our Questionnaire.



any drastic penalties is felt, suitable action could be taken for the duration of the particular situation.

465. The offence of *arson* is one offence in respect of *Arson*, which suggestions have been received to make it a capital one. At present, there are provisions in the Indian Penal Code, sections 425 to 440, dealing with various forms of the offence known as "mischief" and these comprise certain provisions dealing particularly with mischief by fire or explosive substance,—sections 435 to 438; but the emphasis in all these provisions is on damage to *property* and not on the loss or possible loss of human life. Where arson actually causes death, the case can be dealt with under sections 299 and 300, Indian Penal Code. What remains is the case of *arson* not causing death, and we have to consider whether such arson should be visited with death penalty on the ground that one or more lives are put in danger by the act constituting the *arson*<sup>1-2</sup>.

466. In certain countries<sup>3</sup>, arson, wilful inundation, sabotage, and dynamiting causing death, fall under the category of capital offences. In England, arson is dealt with as follows:— *Arson under English Law.*

(i) At common law, wilfully and maliciously burning the dwelling house of another is a felony, and the punishment for such arson is imprisonment for not more than seven years<sup>4</sup>.

(ii) By statute, certain specific kinds of arson are punishable in England with imprisonment for life or a shorter term<sup>5</sup>.

(iii) Setting fire to the Queen's ships or arsenals or dockyards, or aircraft factories and other buildings and military, etc. stores is a felony punishable with death<sup>6-7</sup>. But, there again, the offence is treated as a grave one because of its effect on security and the damage to *property*, and is a species of "malicious damage to property<sup>8</sup>".

467. So far as explosives are concerned, there are specific provisions in the Indian statutes on the subject, which *Arson by explosives* (i) regulate the manufacture, possession, use, etc., of explosives<sup>9</sup>, and also (ii) punish persons who unlawfully and

<sup>1</sup> See also Analysis of case-law, case No. 14.

<sup>2</sup> See also section 39, Illustration, Indian Penal Code.

<sup>3</sup> See U. N. Publication, Capital Punishment (1962), Table of Capital Offences at the end.

<sup>4</sup> Halsbury, 3rd Edn. Vol. 10, page 876, paragraph 1698.

<sup>5</sup> Malicious Damage Act, 1861 (24 and 25 Vict., c. 97).

<sup>6</sup> Dockyards, etc., Protection Act, 1772 (12 Geo. 3, c. 24).

<sup>7</sup> See Archbold, Criminal Pleadings, etc., (1962), paragraph 2272.

<sup>8</sup> It is so treated in Halsbury, 3rd Edn., Vol. 10, page 874, *et seq.*

<sup>9</sup> Indian Explosives Act, 1884 (4 of 1884).

maliciously cause, by any explosive substance, an explosion likely to endanger life or likely to cause serious injury to property, irrespective of whether an injury to person or property has been *actually caused or not*. The punishment in the latter case can extend up to imprisonment for life<sup>1,2</sup>.

468. We may also refer to the Bengal Amendment to the Explosive Substances Act.<sup>3</sup> Sections 5A and 5B (as inserted in that Act by the Bengal Amendment) run as follows:—

Bengal Act  
12 of 1932.

“5A. *Enhanced punishment for all offences under sections 3, 4 and 5 in certain cases.* Notwithstanding anything contained in section 3, section 4, or section 5, if an offence under any of these sections is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925<sup>4</sup> or by a Special Magistrate under the Bengal Suppression of Terrorist Outrages Act, 1932 any person found guilty of such offence shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to fourteen years, to which fine may be added.”

“5B. *Enhanced punishment in certain cases.* Notwithstanding anything contained in this Act, any person who makes or has in his possession any explosive substance under circumstances indicating that he intended that such explosive substance should be used for the commission of any offence of murder shall, if he is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, be punished *with death*, or with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to fourteen years, to which fine may be added.”

469. Where there is a deliberate intention to cause death by arson or explosives, but the object of causing death is not successful, the offence would be an *attempt to murder*. This is separately dealt with in the Indian Penal Code.<sup>5</sup> The English law also does not provide for the punishment of death in such cases, as would be apparent from the statutory provisions dealing with attempt to murder.<sup>6</sup>

1 Explosives Substances Act, 1908 (6 of 1908), sections 3 and 4.

2 Section 5(2)(b), Defence of India Act, 1962 (52 of 1962) punishes with death, *inter alia*, any person who contravenes, in a notified area, a notified provision of or a notified rule under the Arms Act, 1959, the Indian Explosives Act, 1884, the Explosive Substances Act, 1908, or the Inflammable Substances Act, 1952.

3 Explosive Substances Act (6 of 1908), as amended by Bengal Acts 21 of 1932 and 7 of 1934, *i.e.*, the Bengal Criminal Laws (Arms and Explosives) Act, 1932, and the Bengal Criminal Law Amendment Act, 1934.

4 No number was given to the 1925 Act. It was made by the Governor of Bengal (under section 72E, Government of India Act) See West Bengal Code, (1964 Edn.), Vol. 4, page 739.

5 Section 307, Indian Penal Code.

6 Sections 11 to 15, Offences against the Person Act, 1861 (24 and 25 Vic. c. 100); Russell on Crime, (1964), Vol. I, page 615.

470. It may also be noted, that by a Bengal amendment<sup>1</sup> to the Indian Arms Act, 1878, an enhanced punishment was provided for certain offences relating to arms, in these terms:—

“20A. Notwithstanding anything contained in this Act, whoever goes armed with a pistol, revolver, rifle or other fire-arm in contravention of the provisions of section 13, or has any such fire-arm in his possession or under his control in contravention of the provisions of section 14 or section 15, under circumstances indicating that he intended that such fire-arm should be used for the commission of any offence of murder shall, if he is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, be punished with death, or with transportation for life or any shorter term or with imprisonment for a term which may extend to fourteen years, to which fine may be added.”

Enhanced  
punishment  
in certain  
cases.

471. We do not think that the sentence of death should be provided for arson (except, of course, where the case falls under one or other of the four clauses of section 300, Indian Penal Code).

472. As to black marketing, separate discussion may be seen.<sup>2</sup>

Black  
marketing.

473. The offence of espionage should, it has been suggested, be made a capital one. It may be noted, that where espionage consists of acts which constitute an abetment of the waging of war against the State, the offence would be amply covered by section 121 of the Indian Penal Code, which allows the penalty of death. Other cases of collection and transmission of State secrets mostly fall under the Official Secrets Act<sup>3</sup> section 3(1) of which provides the maximum punishment of imprisonment up to 14 years. In times of emergency, additional provisions are made by special legislation.<sup>4</sup>

Espionage.

474. Thus under section 5(4) of the Official Secrets Act, 1923, as amended by Defence of India Act,<sup>5</sup> a person guilty of an offence under section 5 of the Official Secrets Act shall, if such offence is committed with intent to wage war or to assist any country committing external aggression against India, be punishable with death, or imprisonment for life or imprisonment upto ten years etc.<sup>6,7</sup>

<sup>1</sup> Section 20A, inserted in the Indian Arms Act, 1878 (11 of 1878); Bengal Criminal Law Amendment Act, 1934 (7 of 1934); West Bengal Code (1964); Vol. 4, page 598.

<sup>2</sup> See discussion as to hoarding and profiteering; paragraph 476 *infra*.

<sup>3</sup> The Official Secrets Act, 1923 (19 of 1923).

<sup>4</sup> See the Defence of India Act, 1962.

<sup>5</sup> See section 6(1)(b), Defence of India Act, 1962 (51 of 1962).

<sup>6</sup> See also rule 34(6), rule 38(1)(a) and (b), rule 38(5), rule 39(1)(a) and rule 39(2), Defence of India Rules, 1962.

<sup>7</sup> See also discussion relating to “treason”, paragraph 532 *et seq.*

*We think that the provisions of the law on the subject as they exist now, are, in substance, adequate.*

Espionag  
in other  
countries.

475. In some countries, spying (disclosure of national defence secrets) is a capital offence.<sup>1</sup> These are China (Taiwan), Dahomey, Spain, some States of U.S.A., France,<sup>2</sup> Greece, Iran, Luxembourg (Abolitionist *de facto*), Poland, United Arab Republic, Central African Republic, South Africa, El Salvador, Somalia (Northern), Czechoslovakia, Togo, Turkey, U.S.S.R. and Yugoslavia.

Hoarding  
and profi-  
teering.

476. We have considered the question whether hoarding and profiteering should be made capital offences. Without a detailed study of the working of the relevant Acts and of the difficulties felt in their enforcement by reason of the existing penal provisions, and in the absence of specific proposals of a precise nature, *we do not consider it safe to make a recommendation in this respect.* The cardinal principle of *wilful disregard of human life*, which is the foundation of the sentence of death for the existing capital offences,<sup>3</sup> will have to be borne in mind, and the question examined whether the existing law is not adequate. If it is found to be inadequate, then before embarking on an amendment, it will have to be considered whether a precise formula could be evolved which, while conforming to this principle, *can define* clearly the scope of the acts of hoarding or profiteering that are to be made capital.<sup>4</sup>

Kidnapping  
and abduction.

477. We have also considered the question whether kidnapping and abduction of children, particularly when the kidnapping is with the object of maiming, should be made a capital offence. So far as kidnapping generally is concerned, there is one difficulty if the offence is made a capital one. The offender would (if the offence is punishable with death) have a temptation to take the life of the victim, because by doing so, he would not get a higher punishment.<sup>5</sup> So far as kidnapping for *maiming* is concerned, this difficulty may not be there. But we do not think that the social harm caused by kidnapping for maiming approaches, in gravity that caused by murder. *We are not, therefore, inclined to make the suggested change.*

<sup>1</sup> See U.N. Publication on Capital Punishment (1962), Table at the end.

<sup>2</sup> Provisions of the French Penal Code are of particular interest.

<sup>3</sup> See discussion relating to existing capital offences; paragraph 77-80 *supra*.

<sup>4</sup> From the U.N. Publication on Capital Punishment (1962), Table at the end, it would appear, that *aggravated hoarding and unlawful raising of prices, etc.*, are capital offences in China (Taiwan), Spain, Republic of Vietnam, and Czechoslovakia.

<sup>5</sup> The point is discussed in detail in the discussion relating to rape paragraph 522, *infra*.

478. In the State of Ohio (U.S.A.), legislation<sup>1</sup> making kidnapping a capital offence was introduced and enacted after the kidnapping and subsequent death of a boy.<sup>2-3</sup>

479. Kidnapping is a capital offence in certain countries, and these seem to fall under three groups—

- (i) kidnapping simply;
- (ii) kidnapping accompanied with aggravating circumstances (e.g., kidnapping for ransom); and
- (iii) kidnapping followed by death.

480. After the kidnapping and murder in New Jersey in 1932 of the child of Charles A and Anne Morrow Lindberg,<sup>4</sup> State Legislatures in the U.S.A. expanded the definition of kidnapping, and many States made it a capital offence. At the same time, it was made a federal offence to transport the victim of a kidnapping across a State boundary, with a maximum penalty of death<sup>5-6</sup>.

The following table shows the representative penalties for kidnapping in the States of U.S.A.<sup>7</sup>

TABLE -  
*Representative Penalties for kidnapping*  
(in U.S.A.)

Jurisdiction	Category	Minimum penalty	Maximum penalty
California	(i) Simple	1 year	25 years
	(ii) Ransom, reward or robbery—victim unharmed	Life, with possibility of parole.	Life with possibility of parole.
	(iii) Ransom, etc.—victim harmed	Life, without possibility of parole.	Death

<sup>1</sup> It is popularly known as the Baby Lindbergh Act.

<sup>2</sup> See the statement of Mr. Michael Disalle, Governor of Ohio, dated 10th February, 1959, reproduced in McClellan, *Capital Punishment*, (1961), pages 108-109.

<sup>3</sup> Kidnapping a *minor* is also a federal capital offence in U.S.A., in cases where the federal Code applies. See U.N. Publication, page 38, paragraph 120, as to the position in various countries.

<sup>4</sup> *State v. Hauptmann* (1935) 115 N.J.L. 412, 180 Atl. 809 (Hauptmann was convicted and executed for murder in course of burglary of the child's sleeping suit, under felony-murder rule).

<sup>5</sup> (1958) 18 U.S.C. 1201.

<sup>6</sup> See also Fisher and McGuire, "Kidnapping and the So-called Lindbergh Law" (1935) 12 N.Y.L.Q. Rev. 646.

<sup>7</sup> Adapted from Rex A. Collings Jr. "Offences of Violence Against the Person" (1962 Jan.) Vol. 339 "Annals of the American Academy of Political and Social Sciences" pages 24, 54, Table 3.

Jurisdiction	Category	Minimum Penalty	Maximum Pe
Delaware	No categories	Life	Life
New York	(i) Victim returned above	20 years	Life
	(ii) Victim dead	20 years	Death
Wisconsin	(i) Simple	None	15 years
	(ii) Ransom—victim released without permanent injury	None	30 years
	(iii) Ransom—other	Life	Life

Negligence—  
homicide  
by.

481. The question of homicide by rash or negligent act crops up from time to time. When A is guilty of rashness or negligence, and, by the conduct of A, the death of B is caused (without an intention to kill), the criminal liability of A may vary according to his knowledge and the nature of the act. Assuming that there is no intention to cause death,<sup>1</sup> the answer to the question of the criminal liability of A would depend on the nature of the injury caused and the degree of intention or knowledge of the offender. The matter would be clear from the following chart.

*Chart of negligent acts<sup>2</sup> affecting the human body*

Degree of knowledge, etc.	Offence
Knowledge that the act is so <i>imminently dangerous</i> that it must in all probability cause death, or injury sufficient in the ordinary course of nature to cause death.	Murder (section 300, clause 4).
Knowledge that the act was <i>likely</i> to cause death or injury sufficient in the ordinary course of nature to cause death.	Culpable homicide not amounting to murder (Section 299, last clause).

<sup>1</sup> Cases of intention to cause death would fall under the first clause of section 300, Indian Penal Code.

<sup>2</sup> The sections referred to are those of the Indian Penal Code.

Degree of knowledge, etc.	Offence
<i>Rash or negligent</i> act causing death but not amounting to culpable homicide.	Offence of causing death by negligence (section 304A).
Knowledge that the Act might possibly, but was unlikely to, cause death or injury sufficient in the ordinary course of nature to cause death.	Hurt or grievous hurt. <sup>1</sup>
482. "Hurt" can be further analysed:—	
Voluntarily causing grievous hurt (grievous hurt may not be intended, but only known to be likely, etc.)	Sections 322 and 325.
Voluntarily causing hurt (hurt may not be intended, but only known to be likely, etc.)	Sections 321 and 323 and 325.
Causing grievous hurt by act endangering life etc. (whether or not grievous hurt intended or known to be likely etc.)	Offence under section 338.
Causing hurt by act endangering life etc., whether or not hurt intended or known to be likely, etc.)	Offence under section 337.
Doing any act so rashly or negligently as to endanger human life or the personal safety of others (No hurt need be caused).	Offence under section 336.

NOTE :—The expression of 'voluntarily', as defined in section 39, Indian Penal Code includes cases of causing an effect by employing means known to be likely to cause that effect, and this definition has to be read in the sections dealing with 'voluntarily' causing hurt, or grievous hurt, etc. (sections 321 and 322), and their aggravated forms, particularly sections 323, 324, 325 and 326.

483. Clause 4 of section 300 is the main provision to be discussed in detail. The relevant portion of section 300 runs as follows:—

"300. Except . . . culpable homicide is murder if the act by which the death is caused is done, . . . 4thly, If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Illustration (d) to the section, which is relevant to this clause, runs as follows:—

"A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual".

See for details as to "hurt", etc. paragraph 482, *infra*.

The clause thus, stresses several elements—

(i) *knowledge* that the act is so *imminently dangerous*, that (ii) it must, *in all probability*, cause death, etc., and, further, requires that (iii) there must be absence of an excuse for incurring the risk of causing death, etc. Extreme recklessness by itself is not sufficient. It must be a "wholly inexcusable act of recklessness."<sup>1</sup>

484. We do not think that there is any substantial defect in the law. The test adopted is one of disregard of human life. We cannot abandon that test and make a lesser offence, a capital one.

We appreciate the feeling that cases of negligence, particularly rash and negligent driving, should be dealt with severely. Whatever steps are needed to avoid danger to human life by such acts have to be taken. But the provisions of the Indian Penal Code, so far as offences attracting the sentence of death are concerned, do not seem to need a radical change on this point.

485. We would point out, that a really heinous case of causing death by negligence (including rash or negligent driving), would fall under the 4th clause of section 300, Indian Penal Code, provided there is no excuse for that particular act. The matter depends upon the degree of knowledge of the offender and the nature of the act.

486. Under section 304A, Indian Penal Code, several cases of negligence by Railway Officers have come up before the Courts, as also cases of rash driving on the Railways.<sup>2</sup> Rash driving *generally*, or negligence in relation to vehicles has also figured.<sup>3-4-5</sup> The undermentioned case may be seen regarding fast driving.<sup>6</sup>

487. We have discussed this matter somewhat in detail, in view of the suggestions received to make offences under section 304A, Indian Penal Code, punishable with death.<sup>7</sup>

488. It has been suggested,<sup>8</sup> that serious accidents, which result in death, where the driving is callous, grossly negli-

<sup>1</sup> See observations of Plowden J. in *Barkulla*, (1887) P.R. No. 32 of 1887, page 64.

<sup>2</sup> *Tapti Prasad v. Emp.* A.I.R., 1918 All. 429 (Line clear wrongly given).

<sup>3</sup> *Kaku v. Emp.*, A.I.R., 1921 Lah. 297 (Child hurt by accident).

<sup>4</sup> *Ueen Emp. v. Bhutan*, (1894), I.L.R. 16 All. 472 (Boat which was unsound used by lessee of ferry—25 persons drowned).

<sup>5</sup> *King Emperor v. Abdul Qayum* (1940) I.L.R., 21 Lah. 646 (driving when visibility very low).

<sup>6</sup> *Gurdev Singh v. Emp.*, A.I.R. 1941 Lah. 459, 460.

<sup>7</sup> Reply of a District Bar Association, S. No. 125.

<sup>8</sup> Reply of a retired High Court Judge, S. No. 95, under question 3 (b).



gent and in utter disregard of human life and safety, deserve the highest penalty of the law. But, according to our view, this is already permissible under section 300; if the conditions of section 299 or section 300 are satisfied, the case would not fall under section 304A. Indeed, section 304A makes this clear by the words "not amounting to culpable homicide".

489. If the act or omission—albeit unintentional—is so imminently dangerous that it must in all probability cause death, the charge of murder can be brought home to the accused. This can be illustrated by a snake-bite case,<sup>1</sup> in which the accused actually caused the snake to bite the person who was killed.

490. If the knowledge is of "likelihood" of death, the case would fall under section 299. Thus, where a snake-charmer exhibited in public a venomous snake and to show his skill, put the snake on the head of a spectator, who tried to push off the snake, was bitten and died, the accused was held to be guilty under section 299.<sup>2</sup>

Illustrations can also be drawn from cases of woman jumping into well with a child. In such cases, the question whether there was an "excuse" within the meaning of section 300, fourth clause, Indian Penal Code, becomes material.<sup>3-4</sup> Cases of women administering dhatura, etc., to husbands<sup>5</sup> may also be referred to in this connection.

As has been observed,<sup>6</sup> the real question which arises in such cases is whether the act was done with the knowledge that it was likely to cause death or that it was so imminently dangerous that it must in all probability cause death.

Often the facts do not fall within section 299 or section 300; and no amendment of the law can amend the facts. By way of illustration, we may refer to a case which seems to fall on the border line.<sup>7</sup> In that case, the accused was driving a lorry on the Grand Trunk Road from Delhi in the direction of Panipat. He had five more passengers than he was permitted to carry. He was signalled by a Sub-Inspector of Police to stop, so that the lorry might be checked. But, in order to escape, he refused to stop and drove on. The Sub-Inspector, with his constables, proceed-

<sup>1</sup> *Queen v. Poonai Fattmah*, 12 W.R. Cr. 7.

<sup>2</sup> *Emp. v. Gonesh Dooley*, (1879), I.L.R. 5 Cal. 351, 352.

<sup>3</sup> Cf. the cases discussed in *Gyarsi bai v. The State*, A.I.R. 1953 M. B 61, 63.

<sup>4</sup> *Emp. v. Dhiralia*, I.L.R. 1940 All. 647 ; A.I.R. 1940 All. 486.

<sup>5</sup> *Emp. v. Chatterpal Singh*, A.I.R. 1930 Oudh, 502.

<sup>6</sup> Cf. *Nga Ba Tu v. Emp.* A.I.R. 1921 Lower Burma 26, 27 (Heald J.).

<sup>7</sup> *Gurdev Singh v. Emp.*, A.I.R. 1941 Lah. 459, 460 (Young C. J. and Sale J.).

ed in a motor car "to chase the lorry". The chase proceeded for five miles but the accused refused to allow the police car to pass his lorry, by driving his lorry in front of the police car, or by driving it on the side of the road and raising dust. Most of the time the speed was between 50 and 55 miles per hour. When the lorry came near a bridge, a small girl, who was standing on the side of the road, commenced to cross the road in order to get to her father who was washing clothes on the opposite side of the road. The accused was going so fast that he could not stop. The child also added to the trouble by starting to run across the road. The result was, that the unfortunate child was hit by the bumper of the lorry, and was knocked down and killed. The accused was ultimately arrested at Panipat.

The accused was convicted by the Sessions Judge under section 302, Indian Penal Code on the ground that the accused knew that the act he was committing was so imminently dangerous that it must in all probability cause death. Counsel for the Crown *did not support* this contention, but argued that the conviction ought to be under section 304, Indian Penal Code, as the accused knew that he was likely by his act to cause death. The High Court, however, did not consider that the offence came either under section 304 or under section 302. In its view, the offence fell under section 304A. In coming to this conclusion, the High Court emphasised two facts, namely, first, that the child who was killed came from the side of the road and attempted to cross in front of the lorry, and secondly, that it was not a crowded place like a city—in which case the offence might result in a charge under section 304, or even under section 302. The High Court sentenced the accused to rigorous imprisonment for 18 months under section 304A, Indian Penal Code.

491. An instructive analysis of the words "with the knowledge that he is likely by such act" used in section 299, Indian Penal Code has been made by Peacock C.J. in the undermentioned case.<sup>1</sup>

492. If the ingredients of section 300 are satisfied, it becomes the highest degree of homicide. But otherwise it will constitute only the lowest degree of culpable homicide—section 304, second paragraph, whereunder one of the possible punishments is fine only. It is, therefore, obvious that great care is required in cases where "knowledge" constitutes the only *mens rea*, and the provisions of sections 299, 300, and 304A fall to be considered.

If, even the conditions of section 299, Indian Penal Code, are not satisfied, i.e., if knowledge of the likelihood of death cannot be proved, then it remains a case of section 304A. Thus, the evaluation of the evidence, the drawing

<sup>1</sup> *Gorachand Gopee*, (1866) 5 W.R. (Criminal) 45 ; Bengal Law Reports, (Supplementary Volume), 443, 451 (Full Bench).

of factual inferences, and the application of the law, in such cases, becomes a matter of the greatest importance. The act may even be no offence.<sup>1</sup>

493. Most cases under section 304A, Indian Penal Code, would, in England, fall under "man-slaughter."<sup>2</sup> The maximum punishment for manslaughter in England is imprisonment for life.<sup>3</sup>

494. Cases are not infrequent where a conviction under section 302 has been altered to one under section 304A.<sup>4</sup>

495. For certain interesting points relating to the question of liability under section 304A, Indian Penal Code, the undermentioned decisions<sup>5,6,7,8,9,10,11,12,13</sup> may be seen.

496. As to section 101, Railways Act, the undermentioned Supreme Court case<sup>14</sup> may be seen.

We should also state here, that every case of rash or negligent driving may not be necessarily heinous. In this connection, we should like to quote the following observations of Beaumont, C.J., in a Bombay case<sup>15</sup>—

.....Then the learned Magistrate says that there was "extremely rash and callous conduct of the accused causing the accident without the least justification." If I took that view of the accused's conduct, I should certainly be in favour of enhancing the sentence. I think that in all these cases one has to consider whether the rash and negligent act of the accused **which has occasioned the death, shows callousness on**

<sup>1</sup> Cf. *Nagawa Bhimappa*, (1902) I.L.R. 4 Bom. L.R.-425 (Poisonous substance administered as charm—no knowledge of poison—held no offence).

<sup>2</sup> Cf. *Suharoo Kobiraj v. Emp.*, (1887) I.L.R. 14 Cal. 566, 569.

<sup>3</sup> Offences against the Person Act, 1761, section 5, as amended by the Criminal Justice Act, 1948.

<sup>4</sup> See *Pika Rewa v. Emp.* (1912) I.L.R. 43 Cal. 855, 861.

<sup>5</sup> *State v. Banshi Singh*, A.I.R. 1960 Madh. Pradesh 105, (section 304A, Indian Penal Code and section 101, Railways Act, considered).

<sup>6</sup> *Emp. v. Khan Mohammad Sher Mohammad*, A.I.R. 1937 Bom. 96, 98 (Beaumont C. J. and Wasoodew J.).

<sup>7</sup> *Emp. v. Marshall*, A.I.R. 1937 Bom. 80, (Beaumont C.J. and Wasoodew J.).

<sup>8</sup> *Parthasarathy, in re.*, A.I.R. 1959 Madras 497, referring to *H. W. Smith v. Emperor*, I.L.R. 53 Cal. 333; and *Ganesan, in re.*, A.I.R. 1950 Mad. 71.

<sup>9</sup> *State of Mysore v. Bantra Kunjiana*, A.I.R. 1960 Mys. 177.

<sup>10</sup> *State of M. P. v. Ranjit Kumar*, A.I.R. 1959 M.P. 284.

<sup>11</sup> *Sahadevan, in re.*, A.I.R. 1955 Mad. 548.

<sup>12</sup> *Pitabash Panda v. State*, A.I.R. 1961 Orissa. 45.

<sup>13</sup> *Emp. v. Shahu*, A.I.R. 1917, Sind. 42 (1).

<sup>14</sup> *Awadh Behari v. State of M. P.*, A.I.R. 1956 S.C. 2738.

<sup>15</sup> *Emperor v. Khan Mohammad Sher Mohammad*, A.I.R. 1937 Bom. 96, 98 (Beaumont C. J.).

his part as regards the risk to which he was exposing other persons. I think the severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused. Here I do not think there was any callous conduct. As I said before, the accused committed an error of judgment, but, having done so, he did his best to avoid the consequences of his error. The learned Magistrate's third ground is that—

Accidents of this nature are of frequent occurrence, and in the interest of administration of justice and protection and safety of human life, such offences require to be sternly dealt with.

'I do not agree with that principle. One has to remember that driving motor cars has become an essential part of human activities, and it is impossible to avoid a certain number of accidents. In my view it is no part of the duty of Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence.'

497. A moment's inattention should not attract the death penalty. Reference may be made, in this connection, to the observations made by an English Judge with reference to prosecutions under section 1, Road Traffic Act, 1960. Stevenson J. said: "It is terribly important that these cases should be most carefully scrutinised before they are started, and that people should not take the view that merely because of death there should be a prosecution."

498. Every case where a risk of life is involved is not one of rashness. "A surgeon is not reckless in performing an operation merely for the reason that he knows it very likely to be fatal; it may afford the patient's only chance."<sup>2</sup>

499. We may refer in this connection to two cases decided in England by Streatfield J. in November, 1964. He had to consider the sentence to be passed on the accused persons who had pleaded guilty at the Suffolk Assizes to causing death by dangerous driving. In one case, the court merely fined the accused £50 and banned her for driving for five years; and in other case, the court fined the accused £50 but did not disqualify him for driving, as that would have led to very serious consequences for him. In the first case, a young woman who had no driving licence, asked the man who gave her a lift for permission to drive

<sup>1</sup> Stevenson J.'s view reported in the Times, July 12, 1961, cited in 1963 26 Modern Law Review 432.

<sup>2</sup> Herbert Wechsler, "On Culpability and Crime", in (January, 1962) Vol. 339, Annals of the American Academy of Political and Social Sciences 24, 29.

his Mark 10 Jaguar car. He allowed her to do so, and while rounding a bend on the wrong side of the road, she collided head-on with a small saloon, killing two women passengers and seriously injuring a man. In the second case, a man had killed a motor-cyclist by dangerous driving. The principle on which these sentences were based was thus explained—"The fact that a death resulted from a piece of dangerous driving did not make the dangerous driving any more or less. It would be quite wrong for the court to measure a man's culpability by the amount of damage he did."<sup>1</sup>

500. We do not, of course, rule out any improvements or changes in matters of detail that may have to be made in section 300, clause 4, Indian Penal Code, or in the other sections dealing with negligent acts. If there is any hiatus between that clause on the one hand and section 299, 3rd clause or section 304A of the Indian Penal Code on the other hand (in the sense that cases at present falling under the latter sections, should really be brought under section 300), the matter can be considered. As at present advised, we do not find any such serious gap as to require immediate attention.

501. It must also be remembered, that a decision whether a case of homicide by negligence falls or does not fall under section 300, 4th clause, Indian Penal Code, is a matter of great importance. There is no intention to cause a bodily injury, and such a case is, therefore, one only of "knowledge". If it falls under section 300, it becomes a capital offence. But if it does not fall under section 300, then, it is punishable only under the second part of section 304, Indian Penal Code (whereunder the maximum punishment is ten years' imprisonment).

English law relating to homicide by negligence.

Murder.

Manslaughter.

Malice aforethought.

502. We proceed to consider the English Law. At English law, it is murder for a person of sound memory and discretion unlawfully to kill any human creature in being and under the Queen's peace, with *malice aforethought* either expressed or implied by law, provided the person killed dies of the injury inflicted within a year and a day after the same.

503. Manslaughter is the unlawful killing of such a person *without malice*, either express or implied<sup>2</sup>.

504. The requisite mental element in the crime of murder in English law is, thus, "malice aforethought". The definition of this expression is not to be found in any statute, and has to be drawn from the decided cases. Malice aforethought is either expressed or implied by law. *Express malice*, according to Halsbury<sup>3</sup>, exists where the

<sup>1</sup> See note in (1964) 80 L.Q.R. 18, 19.

<sup>2</sup> Halsbury, 3rd Edn., Vol. 10, page 704, paragraph 1349.

<sup>3</sup> Halsbury, 3rd Edn., Vol. 10, page 707, paragraph 1354.

*deliberate* purpose of the accused is to deprive another of life or, to do some great bodily harm. Malice aforethought, according to Halsbury<sup>1</sup>, is implied by law—(i) where the person killed is an officer of the law, legally arresting or imprisoning the accused or executing other process of law in a legal manner; (ii) where, although there may have been some provocation, the provocation has not been sufficient to reduce the offence to manslaughter; (iii) where the killing has been caused by the accused while engaged in committing some other felony involving an act of violence or an act dangerous to life<sup>2</sup>.

An offence which does not fall under murder, may yet fall under manslaughter. Briefly speaking, 'Manslaughter' is the unlawfully killing of a human creature in being and under the Queen's peace, without malice either expressed or implied<sup>3</sup>. More elaborately, any one is guilty of manslaughter, who—(i) unlawfully kills another upon provocation of such a character as to reduce the offence from murder to manslaughter, or (ii) who, while committing an unlawful act or a felony, not likely to cause danger to others, unintentionally kills another person; or (iii) who unintentionally causes the death of another by the culpable neglect of a legal duty, resting upon the person causing the death<sup>4</sup>.

505. Apart from this position at common-law, we may refer to the statutory provisions in sections 2 and 4 of the Homicide Act, 1957<sup>5</sup>. Under section 2, a person suffering from such abnormality of mind as substantially impaired his mental responsibility—i.e., who comes under "diminished responsibility", who would otherwise be liable for murder (whether as a principal or accessory), is now liable for manslaughter; and under section 4, a person acting in pursuance of a suicide pact between himself and the deceased (whether he himself kills the deceased or is a party to the killings), is guilty of manslaughter and not of murder.

506. Generally as to manslaughter by negligence, the detailed discussion in the under-mentioned cases<sup>6-7</sup> may be seen.

<sup>1</sup> As to this last category—Death caused while committing felony, see Halsbury, 3rd Edn., Vol. 10, paragraph 1368.

<sup>2</sup> This should be read subject to the Homicide Act, 1957.

<sup>3</sup> Halsbury, 3rd Edn., Vol. 10, paragraph 1349.

<sup>4</sup> Halsbury, 3rd Edn., Vol. 10, page 715, paragraph 1371.

<sup>5</sup> The Homicide Act, 1957.

<sup>6</sup> *Andrews v. D. P. P.* (1937) A.C. 576 ; (1937) 2 All Eng. Reports 552 H.L.; and see the analysis in *The People v. Dunleavy*, (1948) Irish Reports 95. (C.C.A. of Eire), summarised in Turner, and Armitage, *Cases in Criminal Law* (1964), page 302.

<sup>7</sup> See also *Vishwanath Vishnu v. The King*, A.I.R. 1948 P.C. 183, 184 (on appeal from East Africa—a case under section 223, Tanganyika Penal Code, corresponding to section 279—289, Indian Penal Code).

507. Unfortunately, cases of *unintentional* death which have arisen in England have almost all been<sup>1</sup> those where some felony was intended, and the result is that in the books a discussion of the topic of "implied" or "constructive" malice is always presented with reference to the special situations of resistance to officers of justice or offences constituted by acts done in the course or furtherance of felony involving violence<sup>2</sup>.

508. There have not been many cases in England where there was no intention to cause death or bodily harm, and yet death ensued, because of negligence (*apart from cases accompanied with the complication of "violence involving felony" or resistance to officers of justice*).

509. It would appear that where there is no intention to cause death or great bodily harm, then (in the absence of a special feature, such as the victim being an officer of the law or the accused being engaged in a felony, etc.), there is no "malice aforethought", and, therefore, no murder.

510. We shall now note the provisions of the 1957 Act. Section 1 of the Homicide Act, 1957, runs as follows:—

"1. (1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the *same malice aforethought (express or implied)* as is required for a killing to amount to murder when not done in the course of furtherance of another offence.

(2) For the purpose of the foregoing sub-section, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody shall be treated as a killing in the course or furtherance of an offence."

Now the question is, "What is the position resulting from this provision of the law and the 1957 Act regarding death caused by negligence?"

View of  
Russell and  
Stephens.

511. The view<sup>3</sup> expressed in a leading work in Criminal Law is, that if malice aforethought could be defined as "foresight that *death* would or might be caused" then exposition of the law of murder would be simplified and no change in the law itself would be involved in the majority of cases<sup>4</sup>. This seems to be in harmony with the view of

<sup>1</sup> See the various cases summarised in Turner and Armitage, *Cases in Criminal Law* (1964), pages 219 to 235 and 280 *et seq.*

<sup>2</sup> This difficulty has been noticed in Russell on Crime (1964), Vol. I pages 477, 586, 591, 594, and conclusion at page 598.

<sup>3</sup> See Russell on Crime (1964), Vol. I, page 467.

<sup>4</sup> As to the Act of 1967, see Russell on Crime (1964), Vol. I, page 593 *et seq.*

Stephens<sup>1</sup>, and of the Royal Commission on Capital Punishment<sup>2</sup>. One who has shown a disregard for the life of others, should, on this reasoning, be guilty of murder (if he causes death).

512. Most of the definitions of manslaughter in English law are of a negative character, for example, that manslaughter consists of killing another person unlawfully, yet under conditions not so heinous as to render the act a murder, or that the offence of manslaughter includes a felonious homicide not amounting to murder, or that it is the unlawful and felonious killing of another without any malice either express or implied<sup>3</sup>.

513. It has been the practice to divide manslaughter into two main categories, voluntary manslaughter and involuntary manslaughter<sup>4</sup>. So far as homicide by negligence is concerned, it is the latter category which is applicable. [The former is confined to cases where intentional killing is reduced to manslaughter owing to provocation or where special statutory provisions, such as section 2(3) and section 4(1) of the Homicide Act, 1957 are applicable].

514. According to Russell<sup>5</sup>, the main thread running through all the line of development of manslaughter is the fact that the prisoner brought about a death when engaged in what he realised was exposing someone's person to the certainty or to the risk of some (but not fatal) physical harm. Therefore, if the prisoner caused the death as the result of conducting himself in the manner which, at that time, he realised involved either the certainty or the risk that a physical harm less than death would be suffered by some person, that amounts to manslaughter<sup>6,7</sup> (in the absence of a legal excuse or justification).

515. It is often difficult to decide whether a case of dangerous driving resulting in death amounts to manslaughter or not<sup>8</sup>.

516. The expression usually used in the English cases for denoting the *mens rea* requisite for manslaughter (in this context) is "criminal negligence". But it has been

1 See Archbold (1962), paragraph 2484.

2 See R. C. Report, pages 27-28, paragraph 76 (v) and contrast with "pure accidents" dealt with in *ibid*, page 40, paragraph. 109.

3 See the definitions collected in Russell on Crime (1964), Vol. I, page 562.

4 See Russell on Crime, (1964), Vol. I, page 562.

5 See Russell on Crime, (1964), Vol. I, page 598.

6 See Russell on Crime, (1964), Vol. I, page 598.

7 Cf. *R. v. Sharnpal Singh*, (1962), A.C. 188 ; (1962) 2 W.L.R. 238 (P. C.).

8 Cf. *Andrews v. D. P. P.* (1937) A.C. 576, 584 ; (1937) 2 All. Eng. Reports 552, 577 (H.L.).

9 *Andrews v. D. P. P.*, (1937) A.C. 576, 583 ; (1937) 2 A.E.R. 552, 557 (H.L.).



pointed out<sup>1</sup>, that this fails to say *affirmatively* what exactly is the *mens rea* in manslaughter.

517. Kenny<sup>2</sup> has submitted that the law should be clarified by a statutory provision which should, in effect, settle that it shall be the crime of involuntary manslaughter when a man who has caused the death of another did so in a course of conduct which, he realised, would or might cause someone a physical harm but not a fatal harm, provided that he had no lawful justification or excuse for inflicting or risking the infliction of the physical harm which he foresaw. The test is intended to be subjective.

518. Sometimes it may not amount to manslaughter, but many amount to an offence under section 1 of the Road Traffic Act, 1960 or section 2 of that Act.

519. Sections 1 and 2 of the Road Traffic Act, 1960<sup>3,4</sup>, run as follows<sup>5</sup>:—

Causing death by reckless or dangerous driving.

“(1). (1) A person who causes the death of another person by the driving of a motor vehicle on a road *recklessly*, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment for a term not exceeding five years.

(2) An offence against this section shall not be triable by quarter sessions; and nothing in the foregoing sub-section shall be construed as empowering a court in Scotland, other than the High Court of Judiciary, to pass for any such offence a sentence of imprisonment for a term exceeding two years.”.

(3) Section 20 of the Coroners (Amendment) Act, 1926 (which makes special provision where the coroner is informed before the jury have given their verdict that some person has been charged with one of the offences specified in that section) shall apply to an offence against this section as it applies to *manslaughter*.

1 Kenny, Criminal Law, (1962), page 182.

2 Kenny, Criminal Law, (1962), page 184.

3 Road Traffic Act, 1960 (8 and 9 Eliz. 2 c. 16).

4 See, generally, Gross & Jones, Introduction to Criminal Law(1962), pages 154 and 314, 318.

5 The predecessor of section 1 was section 8, Road Traffic Act, 1956 (Halsbury, Statutes Vol.36, page 807).

2. (1) If a person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public<sup>1</sup>, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable—

(a) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both a fine and such imprisonment;

(b) on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding four months or to both such fine and such imprisonment, or in the case of a second or subsequent conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

(2) If upon the trial of a person for an offence against section one of this Act the jury are not satisfied that his driving was the cause of the death but are satisfied that he is guilty of driving as mentioned in sub-section (1) of this section, it shall be lawful for them to convict him of an offence under this section. **Reckless, and dangerous driving generally.**

(3) Upon the trial of a person who is indicted for manslaughter in England or Wales, or for culpable homicide in Scotland, in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section, to find him guilty of that offence.”

520. Moreover, there is one practical consideration to be borne in mind. It is useless to hold the person responsible where he did not foresee death, because no threat of punishment would deter a man from doing something unless he was directing his mind to the matter. The law of manslaughter has not changed by the introduction of motor-vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence<sup>2,3</sup>.

521. As to profiteering, separate discussion may be seen<sup>4</sup>. **Profiteering.**

<sup>1</sup> As to section 2 see *R. v. Clow*, (1963) 2 All E. R. 216.

<sup>2</sup> See *Andrews v. D., P. P.* (1937) A.C. 576; (1937) 2 A.E.R. 552, (H.L.).

<sup>3</sup> For a comprehensive discussion, see Brett, "Manslaughter and the Motorists" (1943) 27 Australian Law Journal 6, 89.

<sup>4</sup> See discussion relating to hoarding and profiteering, paragraph 476, *supra*.

Rape.

522. A suggestion has been made by many persons that the offence of rape should also be punishable with death. Nobody can doubt that chastity should be as zealously protected as life. There is, however, one important practical consideration which has to be borne in mind. If the offence of rape is made punishable with death, the offender will always have a temptation, after committing rape, to put his victim to death. We cannot, in this connection, do better than quote the words of the authors of the Indian Penal Code<sup>1</sup>, who made the following observations on the subject:—

“To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life. . . . Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt. . . . As he has almost always the power to murder, he will often have a strong motive to murder, by inasmuch as murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment for murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which also hangs for murders, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder.”

523. We may also mention here that the offence of rape was previously punishable with death in Canada, but in the new Criminal Code of Canada, as revised in 1954, the punishment is only imprisonment for life and whipping<sup>2</sup>. This deletion has been approved in the Report of the Joint Committee of the Senate and of the House of Commons on Capital Punishment in Canada<sup>3</sup>.

524. In England<sup>4</sup>, rape was, at first, a felony punishable by death. The Statute which made it a capital offence in the beginning, was the Statute of 1576, 18 Elizabeth C. 7,

<sup>1</sup> Draft Penal Code, Note A, page 93.

<sup>2</sup> Section 136, Criminal Code of Canada.

<sup>3</sup> Report of the Joint Committee of the Senate and the House of Commons on Capital Punishment, 27th June, 1956, page 16, paragraph 64.

<sup>4</sup> See Radzinowicz, History of English Criminal Law (1948), Vol. page 631, foot-note 2.

under which a person feloniously committing rape or unlawfully and carnally knowing and abusing any woman-child under the age of 10 had to suffer death. By later Statutes, the same punishment was prescribed for sodomy and for the crime against nature. Later, the offence was reduced to great mis-demeanour punishable with loss of eyes and castration. Subsequently, by the Statute of Westminster 1, C. 13, it was reduced to trespass (punishable with imprisonment up to 2 years and fine). But the Statute of Westminster 2, C. 34, again declared it to be a felony.

525. The evolution of the doctrine of constructive malice in connection with felonious acts, however, made a difference in England where death resulted from a rape or attempted rape. This was on the principle that an act of violence done in the course of or in the furtherance of a felony involving violence, if it led to the death of the victim, amounted to murder, even if there was no intention to kill<sup>1,2,3</sup>.

526. This artificial concept of constructive malice has now been abolished by the Homicide Act<sup>4</sup>. The present position in England is that rape is a felony punishable with imprisonment for life<sup>5</sup>.

527. It would appear<sup>6</sup> that simple rape is a capital offence in very few countries<sup>7</sup>, whereas rape followed by death is a capital offence in some countries<sup>8</sup>.

In the light of the above discussion, we do not recommend the sentence of death for rape.

528. As regards acts of sabotage, generally the discussion relating to arson<sup>9</sup> may be seen.

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<sup>1</sup> Cf. *D. P. P. v. Beard*, (1920) A.C. 479, 492, 493, and Russell on Crime (1964), Vol. 1, pages 468, 482, 483; P. H. Dean's article in (198) 54 L.Q.R.23.

<sup>2</sup> *R. v. Stone*, (1937) 54 Times Law Reports 1046.

<sup>3</sup> See also observations of Stephen J. in *R. v. Serme* (1887) 16 Cox 311; Turner and Armitage, Cases on Criminal Law (1953), page 118.

<sup>4</sup> The Homicide Act, 1957 (5 and 6 Eliz. Ch. 17), section 1 (1).

<sup>5</sup> Sexual Offences Act, 1956 (4 and 5 Eliz. 2, C. 69), section 1, read with section 37 and second schedule.

<sup>6</sup> See U. N. Publication on Capital Punishment (1962), Tables at the end.

<sup>7</sup> China (Taiwan), Nyasaland, South Africa, Northern Rhodesia, and 18 States of U.S.A.

<sup>8</sup> Japan and Philipines.

<sup>9</sup> See discussion relating to arson, separately, paragraph 465, *supra*.

**Secession.** 529. We have considered the question whether the preaching of secession from the Union of India by violent means should be made a *capital offence*. We feel that this is a matter of a special character, and would not in this Report, suggest a provision of this nature<sup>1</sup>.

**Smuggling.** 530. Some of the replies to our question on the subject suggest that the smuggling of goods should be made a capital offence. We are unable to agree with this suggestion, for the reason that ordinarily speaking, the sentence of death should (apart from offences which are destructive of the country's integrity, independence or safety which interfere with the loyalty and morale of the army), be reserved for an offence which shows a *wilful disregard of human life*.

**Train robbery and wrecking.** 531. Train robbery and train wrecking are capital offences<sup>2</sup> in certain areas<sup>3</sup>. We do not think, however, that it is necessary to go beyond section 209 and 300, Indian Penal Code, which sufficiently take care of the matter where death is caused as a result of such acts.

**Treason.** 532. We proceed to examine whether the offence of *treason*, as suggested in some of the replies<sup>4</sup>, requires to be made a capital one.

533. In India, the provision that corresponds to the offence known as "treason" in English law is the offence of "waging war against the Government of India". The main offence is punishable with death<sup>5</sup>, and conspiracies and preparations and other connected offences are punishable with varying punishments<sup>6-7</sup>.

**English law relating to treason.** 534. According to the law of England, death sentence is mandatory in all cases of high treason<sup>8</sup>. The sentence is one of hanging by the neck until such person be dead, but the Crown may substitute another mode of execution directing that the head shall be severed from the body of such person whilst alive<sup>9</sup>. What is meant by "high treason" has to be gathered from the Treason Act, 1351<sup>10</sup>, and the Treason Act, 1795<sup>11</sup>.

<sup>1</sup> A Bill to punish secession has been recently introduced—The Unlawful Activities (Prevention) Bill, 1967 (Lok Sabha Bill No. 60 of 1967).

<sup>2</sup> See U. N. Publication on Capital Punishment (1962), Table at the end.

<sup>3</sup> Mainly, certain States of U.S.A. (about 20 States).

<sup>4</sup> Replies to Question 3 (b) are summarised separately. See paragraph 458, *supra*.

<sup>5</sup> Section 121, Indian Penal Code.

<sup>6</sup> Sections 121A, 122, 123, Indian Penal Code.

<sup>7</sup> See also section 196, Code of Criminal Procedure, 1898.

<sup>8</sup> Treason Act, 1814 (54 Geo. 3, c. 146), section 1.

<sup>9</sup> Treason Act, 1814, section 2.

<sup>10</sup> Treason Act, 1351 (25 Edw. 3 st. 5, c. 2).

<sup>11</sup> Treason Act, 1795 (36 Geo. 3, c. 7), section 1.

535. There are certain other Acts regarding high treason constituted by hindering the succession to the Crown, which are not of importance for our purpose<sup>1,2</sup>.

536. In England, a temporary addition to the murder of capital offences was made in 1940, when the legislature passed the Treachery Act<sup>3</sup>, section 1 of which provided:—

“1. If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act, which is *designed or likely* to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony and shall on conviction suffer death.”.

Russell's discussion of the Act may be quoted<sup>4,5</sup>:—

“Save in the case of a prisoner who is subject to the Naval Discipline Act, to military law, or to the Air Force Act, or an enemy alien, persons charged with this offence are to be prosecuted upon indictment, and if convicted, are to be dealt with in like manner as persons convicted on indictment for murder, but no prosecution is to be instituted (otherwise than by way of proceedings for a trial by court-martial) except by or with the consent of the Attorney-General, although any person may be arrested, charged, and remanded without that consent. The Treachery Act would seem to be *temporary*, for by section 6 no person shall be guilty of an offence under this Act by reason of anything done after such day as His Majesty may by Order in Council declare to be the date on which the emergency which was the occasion of the passing of this Act came to an end.”.

The Act has been recently repealed<sup>6</sup>.

537. Under Regulations 1(b) and 38-A of the Defence General Regulations, 1939, death sentence could be inflicted for certain offences, including looting<sup>7</sup>. These Regulations were revoked on May 9, 1945.

538. The French Penal Code contains elaborate provisions regarding treason, which specifically cover disclosure of secrets also<sup>8</sup>.

<sup>1</sup> Various Acts relating to treason will be found dealt with in Archbold Criminal Pleading, etc. (1962), paragraph 3001 *et seq.*

<sup>2</sup> For detailed discussion, see Appendix relating to English law treason.

<sup>3</sup> Treachery Act, 1940 (3 and 4 Geo. 6, c. 21).

<sup>4</sup> Russel on Crime (1964), Vol. 1. page 215.

<sup>5</sup> See also Halsbury, 3rd Edn., Vol. 10, page 566, paragraph 1048.

<sup>6</sup> See the Criminal Law Act, 1967 (Chapter 58), Schedule 3, Part I, “Repeals of obsolete or unnecessary enactments”.

<sup>7</sup> Cf. section 5, Defence of India Act, 1962.

<sup>8</sup> Article 75 *et seq.*, French Penal Code.

Recommendation regarding a reason.

539. The provisions of the Indian Penal Code regarding waging war are sufficient for practical purposes.

540. An overwhelmingly large number of replies express satisfaction with the present provisions.

## CHAPTER VII

### DISCRETION OF THE COURT

#### TOPIC No. 31(a)

##### *Replies to Question No. 4*

541. Question No. 4 in our Questionnaire was as follows:—

“The relevant provisions in the Indian Penal Code vest in most cases a discretion in the court to award the sentence of death or the lesser sentence of imprisonment for life. Is the vesting of such discretion necessary and are the provisions conferring such discretion working satisfactorily? If not, have you any suggestion to make in this behalf?”

542. The question<sup>1</sup> comprises three parts; first whether the vesting of the discretion in the court to award the sentence of death or the lesser sentence is necessary; secondly, whether the provisions on the subject are working satisfactorily; and, thirdly, whether there are any suggestions to make in that behalf. The three points, however, are connected with one another, and can be dealt with together.

543. The replies received on this question<sup>1</sup> fall under three categories—those which regard the existing position as satisfactory, those which express the view that the discretion is not being exercised in a proper way, and, lastly, those which, while expressing general agreement with the present provisions, have made suggestions on certain points of detail. This group comprises almost all the State Governments, High Courts, and individual High Court Judges who have sent replies to the Questionnaire<sup>2</sup>, besides a number of other bodies and individuals.

544. The reply of the Chief Justice of a High Court<sup>3</sup> states that the existing provisions of the Indian Penal Code, when considered with the judicial decisions of the various High Courts, do give sufficient discretion of the court to award either the sentence of death or the lesser sentence, and that the system is working satisfactorily.

<sup>1</sup> Paragraph 541, *supra*.

<sup>2</sup> It is unnecessary to enumerate these replies.

<sup>3</sup> Chief Justice of a High Court, S. No. 316.

545. In the reply of a High Court Judge<sup>1</sup>, it has been emphasised that murders may be "murders in the park" or "murders in the dark alley", "murders due to family or close relationship", "murders due to quarrels or violent rage" and so on. The perfect legislative prescription of detailed degrees of offences and regulation of offences on such a basis is not possible. Even if this is possible, this cannot be efficient. The present provisions, it is stated, are working satisfactorily.

546. In the reply of a Member of the State Legislature<sup>2</sup>, it has been stated, that the discretionary powers are working satisfactorily, though with a lenient trend.

547. In the reply of another High Court Judge<sup>3</sup>, it has been pointed out that the vesting of the discretion is necessary, so that punishment suitable to the facts and circumstances of the case can be meted out. The reply adds that it is on the balance of the particular facts and circumstances of each case that the question as to which punishment to be awarded has to be decided.

548. The reply of another High Court Judge<sup>4</sup> states that even after the amendment of 1955 in section 367(5), Code of Criminal Procedure, 1898, the assumption that death is the normal punishment continues, and suggests, that the Criminal Procedure Code may be suitably amended to provide that reasons should be given for imposing the death penalty.

549. The reply of an Advocate, who has been a Member of the Lok Sabha<sup>5</sup>, states that the amendment of section 367, Criminal Procedure Code, has been of no avail, and that to make the discretion effective, it should be fortified by a provision that the discretion of the Sessions Judge or of the High Court, in awarding the lesser punishment, would not be overruled or reversed by the High Court or the Supreme Court, even if, in the opinion of the High Court or the Supreme Court, as the case may be, there are no extenuating or mitigating circumstances. By way of illustration, the reply refers to the decision in a Madras case<sup>6</sup>, where the High Court observed that the Sessions Judges ought not to refrain from awarding capital punishment merely on the ground that public opinion favours the abolition of capital punishment. The High Court also criticised the Sessions Judge's view that it was not necessary to

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1 A High Court Judge, S. No. 230.

2 A Member of a State Legislature, S. No. 232.

3 A High Court Judge, S. No. 396.

4 A High Court Judge, S. No. 262.

5 An Advocate, who has been a Member of the Lok Sabha, S. No. 305.

6 *In re Sambangi*, A.I.R. 1939 Mad. 109, 111.



condemn four persons to death for the murder of one man<sup>1</sup>.

550. The reply also refers to the Supreme Court observations in *Vadivelu Thevar v. State of Madras*<sup>2</sup> to the effect that if the court is satisfied that there are mitigating circumstances, only then it will be justified in imposing the lesser sentence. It should be stated here that what the Supreme Court was trying to emphasise in that case was that the character and volume of the evidence in support of the prosecution could not be the basis for not awarding the sentence of death. Further, the decision does not deal with the position after the 1955 amendment.

551. It has been emphasised, in the reply of the Advocate-General of a State<sup>3</sup>, that the award of death penalty must ultimately rest with the Judge who would decide the case. The gravity of the situation, and the deliberate manner in which the offence is committed with no extenuating circumstances, etc., are, it is stated, all factors to be considered while awarding the death sentence.

552. It has been suggested in the reply of an Advocate, who is also a Member of a State Legislature<sup>4</sup>, that the vesting of the discretion is absolutely necessary, and that, in every case where the sentence of death is to be awarded, it should be clearly provided in the statute that the court has got a discretion to award the lesser sentence of imprisonment for life. The reply refers to the conflict of decisions on the subject whether, after the amendment of section 367(5), Code of Criminal Procedure, 1898, by the Act of 1955, death sentence still remains the normal sentence for murder.

553. The reply of a very senior Advocate of the Bombay High Court<sup>5</sup> states that the discretion "is both necessary and beneficial". "This discretion is the main feature of the Indian law relating to murder, which makes it more sensible, rational and humane than the corresponding English law, enabling the Judge to discriminate between qualities of murder. My only comment is that there is a tendency to use this discretion much too lavishly in favour of the lesser sentence, which, in the long run, may make the death penalty a dead letter in practice. On the whole, the provisions conferring the discretion have worked satisfactorily."

<sup>1</sup> It should, however, be noted that the case in A.I.R. 1939 Mad. 109 was one of brutal and carefully planned murder, which "reminds one of the days of the thugs".

<sup>2</sup> *Vadivelu Thevar v. State of Madras*, A.I.R. 1957 S.C. 614.

<sup>3</sup> An Advocate General, S. No. 229.

<sup>4</sup> A Member of a State Legislature, S. No. 226.

<sup>5</sup> A very senior Advocate, under question 4, S. No. 318, i.

554. In the reply of a Member of a State Legislature<sup>1</sup>, it has been stated that the provision of discretion generally works in the right direction, excepting in a few cases.

555. The reply of a High Court Judge<sup>2</sup> states that discretion has necessarily to be left with the courts, but one cannot say that it is working satisfactorily, as, after the amendment of 1956 in section 367, Code of Criminal Procedure, 1898, courts have become even more erratic in the matter of choosing between the extreme penalty on the one hand and lesser penalty on the other. The reply proceeds to observe that an element of discretion necessarily involves some uncertainty, but the uncertainty can be reduced by re-enacting some provisions, not only in section 302, Indian Penal Code but in other sections (such sections as 396 and 121, Indian Penal Code) that the *death sentence* should be compulsory unless the court records special reasons why it may not be awarded.

556. The reply of another High Court Judge<sup>3</sup> states that the responsibility of deciding between death sentence and life sentence has been discharged by the Judges in India in a human and conscientious manner. The reply, however, expresses an anxiety as to the future, stating that there is deterioration in the qualities of judgment in the Sessions Courts in the recent years, and that "there will soon come a point of time when the existing law may have to be reviewed by a Commission appointed for the purpose to see if statutory provisions can be embodied for giving guidance to Judges in respect of the award of the sentence".

557. The reply of another High Court Judge<sup>4</sup> states that recently there is tendency among Sessions Judges to find an excuse for giving the lesser sentence or for reducing the offence.

558. The replies of most of the District and Sessions Judges<sup>5</sup> expressly state that the present position is working satisfactorily.

559. This is also the view of an association of officers of the judicial service<sup>6</sup>.

560. In the reply of a City Civil Court Judge<sup>7</sup>, it has been emphasized that a decision as to sentence depends

1 A Member of a State Legislature, S. No. 249.

2 A High Court Judge, S. No. 251.

3 A High Court Judge, S. No. 262 under questions 1, 2, 4, 5 and 6.

4 A High Court Judge, S. No. 252.

5 Principal Judge of a City Civil Court in a Presidency Town emphasises that it is difficult to determine in advance the right measure of punishment, S. Nos. 335, 336, 341, 342, 347, 348, 349, 351, 352, 354, 358, 360, 362, 364, 366, 370, 371.

6 A Judicial Officers' Association; S. No. 374.

7 A City Civil Court Judge, S. No. 377.

on the facts and circumstances of each case, and that the court would be the best judge of those facts and circumstances.

561. A District and Sessions Judge has in his reply stated<sup>1</sup> that, as a practising lawyer for more than 25 years, he had noticed that many Sessions Judges were reluctant to award the death sentence even for brutal murders, but that on the whole it was described that a Sessions Judge must have a free hand in awarding sentence.

562. In the reply of Presidency Magistrates in a Presidency town, it has been pointed<sup>2</sup> out that discretion is necessary because the circumstances under which each individual offence of murder is committed would be vastly different, and so would be the motives and methods.

563. According to these replies, the vesting of such discretion is necessary, and on the whole, the provision is working satisfactorily also. The courts, it is stated, should be given the fullest opportunity to consider the question of inflicting capital punishment having regard to the circumstances of the case<sup>3</sup>. It has been pointed out by one State Government<sup>4</sup> that the question of sentence is and must always remain a matter of discretion; the vesting of discretion in courts is based on sound and equitable principles. Any rigid approach to matters relating to human affairs may unnecessarily produce harsh and damaging results. The discretion, it is pointed out in another reply<sup>5</sup>, has to be left with the courts. It is also stated<sup>6</sup> that the discretion is necessary for the "individualisation of the offender before fitting the punishment with the criminals, as otherwise the court is likely to impose punishment simply having regard to the apparent enormity of the crime, disregarding the circumstances of the case".

564. It has also been pointed out<sup>7</sup> that the High Court has ample powers to see that the penalty imposed by the trial court is adequate and to enhance it where necessary. The argument that the discretion may be affected by personal bias, prejudice, likings and sympathies has been anticipated in one of the replies<sup>8</sup>, which takes care to observe that the discretion would not be abused, as the desire to do justice, especially in such serious crimes, is inherent in every individual.

1 A District and Sessions Judge in Gujarat, S. No. 386.

2 S. No. 549.

3 Chief Justice of a High Court and a Judge of the High Court agreeing with the Report of the Secretary, Rules Committee, S. No. 130.

4 A State Government, S. No. 182.

5 A State Law Commission, S. No. 101.

6 An Inspector-General of Police, S. No. 131.

7 A High Court Judge, S. No. 105.

8 A Member of the Bar Council of Madras, S. No. 104.

565. In the reply of the Judicial Section of the Indian Officers' Association in a State<sup>1</sup>, the reason for retaining discretion is thus stated:—

“Discretion is necessary, since compassion as a basic element, even in administering justice should not be lost sight of. Facts of every case present an infinite variety that cannot be provided for except by some latitude involved in judicial discretion. By and large, provisions conferring discretion have worked out satisfactorily. Inherent in the nature of the discretion that needs to be exercised is an impossibility to define more precisely, or in any set terms, the limits or premises on which such discretion should be exercised.”

566. On the other hand, a small group of replies has expressed dissatisfaction with the way in which the discretion is exercised at present. A Secretary to one State Government<sup>2</sup> has replied that often the courts err on the side of leniency, and award the lesser punishment of imprisonment for life owing to sentimental reasons.

Another State Government<sup>3</sup> has, while agreeing that the present provisions are working satisfactorily on the whole, ventured to point out that death sentence is passed in very rare cases, as Judges appear to have some “fallacy” on this issue that capital punishment should be avoided as far as possible.

567. Two High Courts Judges<sup>4</sup> have stated that their experience is that the discretion has been exercised on the whims of the individual judicial officer, and not on any recognised principles. That the vesting of discretion adds an element of luck is a point made in another reply<sup>5,6</sup>.

568. One argument advanced is that the vesting of discretion places both the sentences on the same footing, but, as a matter of fact, the sentence of death is more severe; courts, it is stated, will be in a dilemma in such a case, and often they feel like giving the less severe punishment<sup>7</sup>.

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1 Reply to Question 4, S. No. 562.

2 Home Secretary to a State Government, S. No. 131.

3 A State Government, S. No. 154.

4 Two High Court Judges, S. No. 105.

5 An Advocate, S. No. 201.

6 See also the observations in *Nand Kumar v. The State* (1963) 2 Cr. L. J. 702, 706 paragraph 23. (S.C.).

7 S. No. 127.

Those who have favoured the continuance of the existing provisions have also referred to one case where the Supreme Court had to criticise the leniency of the lower court<sup>1</sup>. It is also stated that the vesting of discretion is against the spirit of the law, which aims at *equal treatment for equal offences*.<sup>2</sup>

569. In the reply of a High Court Judge<sup>3</sup>, the position has been thus analysed:—

“Where the law expressly prescribes, for a crime, two alternative punishments, it impliedly recognises the existence of degrees in the crime, although technically the same. Those degrees are determined by the circumstances of the case, the state of mind of the offender and the quantum of moral obliquity displayed by the act. The existence of two alternative penalties must necessitate vesting of discretion in the court, so as to decide which of the two alternative penalties should be imposed in the facts of a particular case.”.

The reply, however, adds that in the Muffasil courts in the State, this discretion has not been satisfactorily exercised, and, in many cases, the High Court had to reverse the sentence of death.

570. The reply of a District and Sessions Judge<sup>4</sup> states that though the discretion has to be exercised judicially, in actual practice it has been found that the personal predilections and conscientious objections to capital sentence on the part of the Judge concerned have entered in the exercise of the judicial discretion. The reply suggests that unless uniform principles are evolved pertaining to the imposition of capital sentences, the law as administered at present cannot be said to have achieved its deterrent object<sup>5</sup>.

571. A State Government<sup>6</sup>, while stating that discretion is necessary and that the existing provisions are working satisfactorily, has added that “a disinclination to award the death sentence is prominently noticed in recent judgments. Often the feeling is that the judge is bending himself away from the irrevocable sentence of death, and,

1 Reply of Chief Justice of a High Court and a High Court Judge under Question No. 4.

2 S. No. 117.

3 A High Court Judge, under question, 4, S. No. 316.

4 A District and Sessions Judge in Maharashtra, S. No. 346 ; under questions 4 to 7.

5 The reply cites two cases decided by the Bombay High Court. One is not reported. Regarding the other, *State v. Shankar*, A.I.R. 1957 Bom. 226, 231, paragraphs 15 and 232, it appears that the death sentence was not imposed, because the evidence was wanting as to who *actually committed* the murder. This judgment discusses the *Bawla case* (31 Bom. Law Reporter 515).

6 A State Government, S. No. 580.

therefore, trying to look out for reasons to award the lesser punishment". The reply, further, states that it would be better "if the legislature stepped in to indicate a clear distinction between cases where death sentence *shall* be awarded and one where it *may* be awarded."

572. It appears, from its reply<sup>1</sup> to other questions, that in the category of murders which *shall* be punishable with death (first degree murders), it would place "murder of a woman after having committed rape and murder of children after criminal assault on them".

573. The third and last group of replies under this question consists of those who, while in favour of retaining the existing provisions, have suggested certain modifications in detail. One suggestion is that the discretion should be applied according to the latest views on penology and psychiatry<sup>2</sup>. Another is to the effect that there should be no discretion in case of heinous or repeated murders<sup>3</sup>.

574. Another reply<sup>4</sup> emphasises that the discretion can be effective only when the judiciary is an "enlightened" one. One reply<sup>5</sup> assumes that the courts have to give the death sentence unless there are circumstances justifying the lesser penalty, and suggests that the mode of exercise of the discretion must change. Another reply<sup>6</sup> would like the discretion to be taken away from Sessions Judges, "as they have had not much experience of criminal work", and suggests that when a sentence comes up for confirmation before the High Court, it can be relied upon to exercise the discretion vested in it. This reply states that the provisions conferring the discretion on the Session Judges are not working satisfactorily.

575. It remains, now, to note a suggestion<sup>7</sup> in the other direction, to the effect that discretion should be given to the Court in the case of offences under *section 303, Indian Penal Code also*.

576. The view of one Association of Judicial Officers<sup>8</sup> is that if a discretion is vested in the courts, there is always a tendency to err on the wrong side, and the best step would be to "codify the law". It suggests that the practice is to record reasons for awarding the death sentence, and that this practice may be codified.

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1 S. No. 580 under questions 6 (b) and 3 (b).

2 A Barrister-in-Law, Calcutta., S. No. 150.

3 S. No. 138.

4 S. No. 118.

5 A Bar Council, S. No. 115.

6 Bharat Sewak Samaj, New Delhi, S. No. 145.

7 Indian Federation of Women Lawyers, Bombay, S. No. 121.

8 S. No. 373, reply to Questions 3, 4, 5 and 8.

577. A suggestion made by an Advocate<sup>1</sup> is that though the vesting of discretion is necessary, records of all death sentences should be compulsorily perused and examined by a special Bench of the High Court. Another suggestion made by an Advocate<sup>2</sup> is that though the discretion is necessary, in such cases the court should have the help of a set of special jury.

578. Another suggestion of an Additional Sessions Judge<sup>3</sup> is that a provision should be inserted that if the trial court awards the lesser punishment, it should be made final and incapable of being enhanced and turned into a sentence of death.

#### TOPIC NUMBER 31(b)

##### *How discretion exercised*

579. The way in which the discretion is exercised by the court can be seen from the decided cases<sup>4</sup>. Case-law.

#### TOPIC NUMBER 31(c)

##### *Recommendation regarding discretion of the Court*

580. On a consideration of the replies received to the question as to whether discretion of the Court in the matter of the sentence to be awarded for capital offence should be retained, we have come to the conclusion that it is necessary to retain this discretion, and that by and large discretion is exercised satisfactorily, and in accordance with judicial principles. Recommendation regarding discretion of the Court.

581. If the discretion is to be abolished, the alternatives would be, either to substitute a provision that the sentence of death shall be the rule and the lesser sentence shall be the exception; or, to substitute a provision that imprisonment for life shall be the ordinary sentence and the sentence of death shall be the exception. So far as the first alternative is concerned, we are not inclined to agree with any such proposal. The amendment of section 367(5) of the Code of Criminal Procedure in 1955 has dealt with the matter. In the absence of strong reasons, we would not like to disturb it. We know that the question how far such a discretion should be conferred on either the Judge or Jury is a matter which raised great controversy in England<sup>5</sup>. It is not necessary to consider the various

<sup>1</sup> An Advocate, S. No. 410.

<sup>2</sup> An Advocate in West Bengal, S. No. 407.

<sup>3</sup> An Additional Sessions Judge, S. No. 379.

<sup>4</sup> See Analysis of case-law.

<sup>5</sup> Royal Commission Report, pages 191 to 193, paragraph 538-549 (Discretion of Judge), pages 214, paragraph 611 (Discretion of Jury).

aspects of that controversy in detail for our purpose<sup>1</sup>. The Judges in England felt that the burden of choosing between the two sentences would be too heavy for them. The Royal Commission recommended leaving the discretion to the Jury, but the recommendation was not accepted by the Government<sup>2</sup>. The position in India is different. The cases of homicide in India are not so few and far between as to justify any apprehension that the decision of the Judge regarding the sentence would cause embarrassment to the Judges. Moreover, experience in India of the working of the provisions has not revealed any serious practical difficulties as to the burden placed on the Judges. In fact, Sir John Beaumont, in his evidence before the Royal Commission<sup>3</sup>, expressed the view that the alternative sentence had worked well in India, and that no Judge had complained that the burden was either unfair or excessive.

582. We do not think that the exercise of discretion by the Judges has evoked or is likely to evoke any public controversy, and so far there has been no public criticism of the judiciary on this point, and we do not apprehend any such controversy. The law, as it exists in India, or as it existed before the amendment of the Code of Criminal Procedure, 1898, in 1955, did not lead to any complaint from the Judges in India of the burden being onerous. On the other hand, the judges have exercised their discretion according to judicial principles.

In this view of the matter, we do not think that any change in the law is called for.

583. Moreover, in principle, the highest penalty of the law should not follow automatically. We are aware that there is a shade of opinion which has regarded the amendment of section 367 in 1955 as unfortunate, but the majority of the views expressed on this question are on the other side, and no strong case has been made out for going back upon this amendment. The tendency in modern times is, in general, more and more to drop the mandatory character of death penalty<sup>4</sup>.

584. So far as the second possible alternative, namely, a provision substituting imprisonment for life as the ordinary sentence, is concerned, the matter will be discussed separately<sup>5</sup>.

<sup>1</sup> For a good discussion, see J. E. Hall Williams, "Jury discretion in murder trials", (1954), 17 *Modern Law Review*, page 315.

<sup>2</sup> For a detailed discussion, see Christoph, "Capital Punishment and British Politics" (1962), pages 91, 92 and 127 (middle), and see *House of Commons Debates* (November 10, 1955), Vol. 545, columns 219-220.

<sup>3</sup> Royal Commission Report, page 193, paragraph 545.

<sup>4</sup> See discussion and information summarised in U. N. Publication, *Capital Punishment* (1962), pages 11 and 12, paragraphs 14-19.

<sup>5</sup> See discussion relating to Question 7 (a); paragraph 790 *infra*.



585. We note that some of the replies reveal dissatisfaction with the manner in which the discretion is exercised, and that a view has been expressed that judges are inclined to be lenient. We, however, think that since the matter of sentence is *essentially* one of discretion, though a judicial discretion, to be exercised in accordance with sound judicial principles, a change in the provisions should not be thought of as a possible remedy to cure the dissatisfaction referred to above.

TOPIC NUMBER 31(d)

*Lesser sentence for offences under sections 302 and 303*

586. Two points regarding the punishment under sections 302 and 303, Indian Penal Code, may be discussed here though they do not directly arise from the question of abolition of capital punishment. The first is, whether in respect of the offence under section 302, Indian Penal Code (murder), a punishment of imprisonment for a *specified period* should be added in addition to the existing provision for punishment by imprisonment for life. Cases have arisen in the past where it was felt that, in the circumstances, imprisonment for a specified period (and not for life), would be adequate. Even though the offence does fall under murder, the court may feel that neither the sentence of death nor the sentence of imprisonment for life is called for the circumstances of the case. The usual practice in such cases has been for the High Court to make a recommendation to the Government for suitable action under section 401 of the Code of Criminal Procedure<sup>1</sup>. We do not consider it necessary to recommend any change in the statutory provisions.

Lesser sentence for offences under sections 302 and 303.

587. For the offence under section 303, Indian Penal Code, the sentence of death is mandatory. The reason for this is that in the case of an offence committed by a person who is already under sentence of imprisonment for life, the lesser sentence of imprisonment for life would be a formality. It has, however, been suggested<sup>2-3</sup> that even for this offence the sentence of death should not be mandatory. We have considered the arguments that can be advanced in support of the suggested change. It is true that, ordinarily speaking, leaving the court no discretion in the matter of sentence is an approach which is not in conformity with modern trends. It may also be noted that section 303 is not confined to a person who is undergoing imprisonment for murder. It applies in all cases where the sentence is of imprisonment for life, which would take in persons

<sup>1</sup> See Analysis of Case law, Cases No. 4 (Footnotes), 33, 34, 36, 46, 53, 57 and 93.

<sup>2</sup> cf. suggestion of the Indian Federation of Women Lawyers, S. No. 121.

<sup>3</sup> See also replies to Question 3 (a)—dealing with section 303, Indian Penal Code, paragraph 391, *supra*.

sentenced, for example, under section 304 (culpable homicide), under section 395 (dacoity), sections 388 and 389 (extortion by threat of accusation of an offence of unnatural intercourse), mischief by fire (section 438) and counterfeiting currency notes (section 489A). In all these cases, if the person sentenced to imprisonment for life commits murder again, the court would (by the terms of section 303) be precluded from considering the extenuating circumstances of the case, with a view to passing the lesser sentence.

588. It may also be noted that under section 307, second paragraph, Indian Penal Code (attempt to murder by a person undergoing imprisonment for life, if hurt is caused), the offender "may be punished" with death. The punishment of death is *not mandatory*. This paragraph was added by the Amendment Act<sup>1</sup>, and has not gone so far as to make the sentence of death obligatory.

589. As against these points, it can be argued that where a person has been already sentenced to imprisonment for life, it means that he has been at least once guilty of a serious offence, and, in the vast majority of cases the commission of a murder by him would tend to show that he is a dangerous criminal who has not mended his ways.

590. We also considered the question whether section 303, Indian Penal Code, should be confined to cases where the sentence which the offender is undergoing is one in respect of a capital offence, by adding the words "for an offence for which he could have been sentenced to death" after the words "imprisonment for life".

591. We have, however, come to the conclusion that it is not necessary to make any change. We feel that in such cases it would be pointless to award the sentence of imprisonment, which under the Code of Criminal Procedure<sup>2</sup> must run concurrently. Acute cases of hardship, where the extenuating circumstances are overwhelming in their intensity, can be dealt with under section 401, Code of Criminal Procedure, 1898, and that seems to be sufficient.

#### TOPIC NUMBER 32(a)

##### *Considerations guiding the discretion of the court*

Considerations guiding the discretion of the court.

592. Courts exercise their discretion (as to awarding the higher or lesser sentence in a capital case) on certain broad principles. The case-law on the subject, representative examples of which are collected elsewhere<sup>3</sup>, shows in a fair measure some of the important principles that are taken note of, in this context.

<sup>1</sup> Indian Penal Code Amendment Act, 1870 (27 of 1870).

<sup>2</sup> See section 397 (2), Code of Criminal Procedure, 1898.

<sup>3</sup> See analysis of case-law.

## TOPIC NUMBER 32(b)

*Replies to Question No. 5*

593. Question No. 5 in our Questionnaire was as follows:—

“If the vesting of such discretion is necessary, what should be the considerations which should weigh with the court in awarding the lesser punishment of imprisonment for life? Is it possible to codify such considerations?”.

The two parts of the question, namely, what should be the considerations to be followed in awarding the lesser punishment, and whether it is possible to codify such considerations, may be dealt with together. The replies to the Question fall under three classes—those against codification, those in favour of it, and those suggesting a middle course, *i.e.*, provisions in certain respects.

594. Most of the replies<sup>1</sup> received on this question have expressed the view that the considerations for awarding the lesser punishment do not admit of exhaustive codification. In a way, consideration of the topic is linked up with the question of the court's discretion, and, for that reason, one reply<sup>2</sup> to this question points out that the field of discretion should not be curtailed or widened by a rigid classification. That a codification might both widen and curtail the discretion is a point which can be elucidated from the elaboration made in another reply<sup>3</sup>, which points out that it is undesirable to codify the considerations, because there may be a case where the death sentence is provided for under such codification, but having regard to the special features of the case, the particular accused does not deserve it. On the other hand, it is dangerous also for the State to attempt such codification because in some cases, where according to such codification there is no capital punishment, the accused should have been punished with death in view of the exceptional nature of the offence. That reply further points out that it is not possible to categorise (i) all circumstances of human ingenuity, or (ii) more particularly, the ingenuity of a criminal mind, or (iii) the circumstances under which the crime may be committed. That the considerations for awarding sentence might even change with time, is a point made by a retired High Court Judge<sup>4</sup>. Another danger of codification has been noted by a High Court<sup>5</sup>, namely, that it might result in resurrecting the old view,—now discarded by progressive

<sup>1</sup> It is unnecessary to enumerate all of them.

<sup>2</sup> A High Court, S. No. 140.

<sup>3</sup> Chief Justice of a High Court, and a Judge of a High Court. S. No. 130.

<sup>4</sup> A Retired Judge of the Bombay High Court, S. No. 95.

<sup>5</sup> A High Court, S. No. 167.

judicial opinion,—that where both the punishments are provided, the normal rule is to award the higher punishment.

595. Certain replies, while suggesting that the test of intention to cause death may be adopted<sup>1</sup>, or that the absence of pre-meditation would be a principal consideration in awarding the lesser sentence<sup>2</sup>, have taken care to state that the considerations cannot be codified. And many replies<sup>3</sup> have pointed out that the principles have been laid down by judicial decisions, but that, at the same time, the considerations cannot be codified.

596. A State Government<sup>4</sup> has stated that the enumeration or codification of the considerations would make the matter very rigid in its application. Another State Government<sup>5</sup> has stated that at present considerations of age, sex, previous conduct, mental conditions, premeditation, intoxication and the nature of the crime are the principles which guide the use of discretion. These considerations are sufficient and it is not necessary to codify them, as codification would mean limiting the discretionary power.

597. The reply of the Chief Justice of a High Court who is against codification, is as follows:—

“It is well settled by judicial decisions that capital sentence should not be imposed unless there is pre-meditated cold-blooded murder. Murders committed in the heat of the moment are seldom punished with capital sentence unless the offender has acted in an exceptionally cruel manner, especially towards a helpless victim or has been guilty of multiple murder committed in the course of the same transaction after committing other serious offences like rape, dacoity, etc.”

598. The Chief Justice of another High Court<sup>7</sup> has stated that the main considerations are sex, age, provocation, though not sufficient to reduce the crime to manslaughter, absence of premeditation or cruelty or barbarity, motive and other circumstances indicating that the accused is not a person with a selfish, cruel and calculating nature with little or no respect for human life. The reply however points out that the mitigating considerations vary in each case, and are so infinite in variety that it would not be

1 A Bar Council, S. No. 132.

2 An Inspector-General of Police, S. No. 131.

3 For example, one High Court, S. No. 117 and one High Court Judge, S. No. 147.

4 S. No. 574.

5 S. No. 580.

6 S. No. 317.

7 Chief Justice of a High Court, S. No. 393.

possible to codify them. "Any attempt to do so may tend to the undesirable result of fettering the discretion of the courts."

599. A High Court Judge<sup>1</sup>, while stating that the courts generally have regarded extreme youth, extreme old age, provocation, mental disorder and miserable family life as some of the considerations for awarding the lesser sentence, has stated, that an exhaustive list of such considerations cannot be prepared, and that it should be left to the Judges to exercise their discretion on a proper consideration of the circumstances of individual cases, within the limits, if any, indicated in the legislative policies or by enlightened public opinion.

600. It has been stated in the reply of another High Court Judge<sup>2</sup>, that the considerations should better remain undefined. The reply adds that such considerations, amongst others, may be: conduct of the offender, nature of the temptation to which the offender has yielded, the manner in which the crime was committed, and the circumstances in which the murderous assault was made.

601. It has been emphasised in the reply of another High Court Judge<sup>3</sup>, it is on a balance of the particular facts and circumstances of each case that the question of punishment can be decided.

602. The reply of a State Government states that a court in passing a sentence<sup>4</sup>, should inflict such sentence as the gravity or otherwise of the crime of which the accused has been convicted warrants and merits. Experience in courts shows that the provisions should be flexible. Any attempt to codify the law, it is stated, would fetter the judicial discretion, and create unimaginable hardships.

603. It has been pointed out by many High Court Judges<sup>5</sup> that the considerations depend on the nature and degree of intention, and on every single relevant fact of the circumstances of the crime; and that codification, if any, can only indicate the principle.

604. A City Civil Court Judge in Bombay<sup>6</sup> has stated that it will be incorrect to codify the considerations for the exercise of such discretion, "for the very conception of codification is a negation of the concept of discretion".

1 A High Court Judge, S. No. 230.

2 A High Court Judge, S. No. 395.

3 A High Court Judge, S. No. 396.

4 A State Government, S. No. 242.

5 High Court Judges, S. No. 262.

6 S. No. 484.

605. A High Court Bar Association<sup>1</sup> has stated that the discretion vested in the court was a wise one, and the law need not be altered because for the last 100 years it has worked very satisfactorily. The reply adds that while the law reports are replete with the considerations which weigh with the court in awarding the lesser punishment, it is undesirable to codify them, as the discretion of the judges should be left unfettered. The reply of the majority of the Presidency Magistrates in the Presidency Town<sup>2</sup> states that there are extremes of murders,—two extreme instances being a cold blooded murder committed with utmost cruelty or for dastardly motives (on the one hand), and murder by a mother of her child owing to poverty (on the other hand). These two extreme instances “would illustrate the gamut of motives and methods for the commission of the crime; it would be difficult to enumerate or codify them”. The discretion regarding sentence, it is stated, is being exercised judiciously, and it is not necessary to codify the considerations.

606. The reply of a District Bar Association<sup>3</sup> states that each case will have to be considered in its own context and circumstances. As times change and circumstances vary, considerations will also differ.

607. It should be noted that a very large majority of the District and Sessions Judges<sup>4</sup> have expressed themselves strongly and in very clear terms against codification.

608. One of the replies emphasises that human nature is so complex, that in every case a different set of circumstances is likely to arise and all of them cannot be selected and codified.

609. Another reply<sup>5</sup> states that while considerations like the gravity of the offence and the motive of the crime should weigh in awarding the punishment, it would be difficult and inexpedient to codify them, and the considerations should be elastic because cases differ in their magnitude and complexity.

610. Several District and Sessions Judges<sup>7</sup> are of the view that as the circumstances of murder vary from case

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1 Reply to questions 4 and 5, S. No. 493.

2 S. No. 549.

3 S. No. 239.

4 Districts and Sessions Judges, S. Nos. 339, 354, 364, 367, 390, 448, 456, 459, 462, 473, 480, 488, 500.

5 A District and Sessions Judge, S. No. 354.

6 A District and Sessions Judge, S. No. 353.

7 S. No. 520 ; S. No. 522 ; S. No. 524 ; S. No. 526 ; S. No. 527 ; S. No. 534 ; S. No. 535 ; S. No. 551 ; S. No. 553 ; S. No. 554 ; S. No. 560.

to case, it would not be wise to codify the considerations. In one reply<sup>1</sup>, it is emphasised that it is the "sum total" of the circumstances that guides the court in awarding sentence.

611. The reply of a very senior Advocate of the Bombay High Court<sup>2</sup> seems to express concisely the reasons for opposing codification. "All extenuating circumstances, such as motives for the crime, absence of premeditation or previous preparation, provocation, even falling short of "grave and sudden", in appropriate circumstances; *stress of the situation* which led to the murder, age, sex, family circumstances, etc., may *cumulatively* incline the court to take a lenient view.

"It is neither possible nor advisable to codify the considerations, and fetter the court's discretion. Each case of murder has its own peculiar features which deserve consideration."

612. Another difficulty of codification has been thus brought out<sup>3</sup>:—

"It is not possible to codify the considerations that should weigh with the Judge, for otherwise it is *no discretion at all*. The judge who is trusted to try such cases must be trusted to exercise it wisely."

613. A small number of replies has, however, stressed the desirability of codification. This category comprises two classes—first, those who, while not expressly suggesting codification, have stated that the *principles* should be *indicated*; and secondly, those who regard codification as possible.

614. Under the first class fall the opinions expressed by certain High Court Judges<sup>4</sup> to the effect that if discretion (in the matter of sentence) is to be left, some principles for its exercise should be indicated, for example, minority of the accused.

615. To the second class belong several replies which have ventured to suggest a basis for codification. Various bases have been suggested, *e.g.*, motive<sup>5</sup>, and absence of pre-meditation and tender age<sup>6</sup>.

<sup>1</sup> A District and Sessions Judge, S. No. 556.

<sup>2</sup> S. No. 318.

<sup>3</sup> An Additional Sessions Judge, in the State of Gujarat, S. No. 379.

<sup>4</sup> Two High Court Judges, S. No. 105.

<sup>5</sup> A Pleader, Madras, S. No. 109.

<sup>6</sup> Administration of a Union Territory, S. No. 106.

616. One reply<sup>1</sup> suggests that the only two considerations are that, if the Judge strongly feels that the accused is honest, or, if the past history of the accused shows satisfactory character, the lesser punishment should be awarded, and that these are the only two considerations for lesser punishment. Another reply<sup>2</sup> states that the age, nature of the offence, circumstance of the offence (*i.e.*, whether it was committed on the spur of the moment or on excitement or emotional outburst, etc.) may be considered. Another reply<sup>3</sup> after stating that the considerations to be taken into account pertain to the offence and the offender, proceeds to give an elaborate enumeration of the factors to be taken into consideration regarding the offence as well as the offender. These are as follows:—

(1) the greatness or smallness of the evil likely to result from the acts;

(2) the facility or difficulty with which it can be committed or with which it can be detected;

(3) the frequency or parity with which acts are committed;

(4) the aggravating or extenuating circumstances which accompany this particular act, *viz.*, (a) the victim, as where a woman or child is involved, (b) the place, (c) the time, and (d) the company.

617. As regards the offender himself, account should be taken, it is stated, of the following facts:—

(a) his age, health and sex;

(b) his rank, education, career and disposition;

(c) his motive;

(d) any temptation or intoxication;

(e) his susceptibility to punishment; and

(f) the evil which the judicial proceedings have inflicted on him already.

From these considerations, a five-fold classification of offenders, it is stated, may be formulated:—

(i) passion; (ii) opportunity; (iii) acquired habit; (iv) insanity and (v) innate instinct.

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1 An Inspector-General of Police, S. No. 166.

2 A Member of the Rajya Sabha, S. No. 207.

3 S. No. 122.



618. It remains now to consider replies suggesting the middle course (provisions in certain respects). Thus, it has been stated<sup>1</sup> that there is no insurmountable difficulty in making a specific provision regarding the considerations to guide the court's discretion, but that it should be made clear that the enumeration is not exhaustive.

619. One reply states as follows<sup>2</sup>:—

“I would not put it as if the exercise of discretion should be on considerations which weigh with court in awarding the lesser punishment of imprisonment for life. I would put it the other way. The considerations which should weigh with court in awarding the higher punishment of sentence of death would have to be thought of and discretion vested in courts in this regard. It must be possible to codify such considerations.”

620. Another reply<sup>3</sup>, while favouring total abolition, states, that if total abolition is not conceded, the extreme penalty should be reserved only for the following offences:—

“(a) Cold-blooded pre-planned murders for sordid gain, specially of children, women, infirm and old persons.

(b) After satisfying sexual lust, murder of the victim of rape;

(c) Murder for hastening succession or obtaining riddance from an uncongenial spouse;

(d) murder falling under section 194, second para. and under section 396, I.P.C.;

(e) high treason, passing to the enemy secret information to the detriment of India or otherwise aiding the enemy of the country;

(f) where the accused has, taking undue advantage, acted in a cruel, unusual and revolting manner shocking to human feelings.”

621. A District and Sessions Judge in the State of Maharashtra<sup>4</sup> has also suggested codification.

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<sup>1</sup> Law Secretary to a State Government, S. No. 162.

<sup>2</sup> A Member of a State Legislature, who is also an Advocate under question 5, S. No. 226.

<sup>3</sup> Under questions 5, 6 and 7, S. No. 305.

<sup>4</sup> A District and Sessions Judge under questions 4 to 7, S. No. 346.

His suggestion is this—

“I think that imposition of capital sentence should be made compulsory in certain categories of crimes which are at present punishable with death. The categories of crimes indicated in section 5 of the English Homicide Act, 1957 and which are punishable with death under Indian Penal Code may be taken as offences for which sentence of hanging should be the capital sentence. So far as the remaining categories of the offences punishable with death under the Indian Penal Code are concerned, certain uniform principles should be laid down in the matter of the imposition of the sentence. Where the murder is premeditated cold blooded and brutal such as where the offence falls within the ambit of paragraph 1, or paragraph 2 of section 300 Indian Penal Code, capital sentence should be the normal sentence.

“Where the offence of murder falls within the ambit of paragraph 3 or paragraph 4 of section 300 of Indian Penal Code, then the lesser sentence should be imposed.”

622. One District and Sessions Judge has stated<sup>1</sup> that the vesting of discretion is necessary, but that the provision is not working satisfactorily, and that for the exercise of discretion, some broad principles by way of illustrations or illustrative cases may be appended to the relevant sections. The reply, while enumerating some of the considerations which usually weigh with the court, takes care to emphasise that it is not possible to attempt an exhaustive enumeration of these considerations.

622. One District and Sessions Judge has stated<sup>1</sup> that policy of the law can be laid down, though an exhaustive codification cannot be attempted; the reply gives (i) extreme youth and (ii) grave provocation which is not sudden provocation, as examples of the considerations to be taken into account. An eminent member of the Bar has also<sup>3</sup> suggested, that while the discretion should remain unfettered, it would be useful to lay down the general policy of the law, though the considerations cannot be codified. Another reply<sup>4</sup> suggests that in the case of a conviction under section 302, Indian Penal Code read with section 34 or section 149, Indian Penal Code, the normal sentence should be death, in the absence of extenuating circumstances.

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<sup>1</sup> Reply to questions 4 and 5, S. No. 570.

<sup>2</sup> A Bar Council, S. No. 159.

<sup>3</sup> An eminent Member of the Bar, through the Bar Council of India, S. No. 161.

<sup>4</sup> A District and Sessions Judge, Gujarat State, S. No. 212.

624. The reply of a High Court Judge<sup>1</sup> is as follows:—  
 “The considerations should be—

In murder cases—

(i) where the offender is under eighteen years of age;

(ii) if an offence under the fourth clause of section 300, Indian Penal Code, when there was no intention to commit murder;

(iii) the murder, though intentional, having been committed without premeditation and in the heat of passion, without brutality;

(iv) the murder having been committed under grave provocation, the provocation not being both grave and sudden so as to reduce the offence to culpable homicide not amounting to murder;

(v) reasonable doubt as to the sanity of the offender, at the time of murder actual insanity not being proved;

(vi) where murder has been committed by more than one person—on the person who did not take a principle part in the murder.

I do not aspire to be exhaustive, but these are the few I can think of at the moment. I do not find any difficulty in amending the Indian Penal Code accordingly.”

625. The reply of a member of a State Legislature<sup>2</sup> suggests the following considerations:—

(a) the circumstances of the murder, if the murderer was forced to commit the murder;

(b) the nature and character of the murderer, if there is enough ground to believe that it was committed only by accident and the murderer will repent and prove to be a good and peaceful citizen;

(c) the provocation was of a nature which could not be tolerated.

626. The reply of a Member of a State Legislative Council<sup>3</sup> is as follows:—

“The following considerations, *inter alia*, should weigh with the court in awarding the lesser punishment of imprisonment for life—

(a) Whether the offence was pre-meditated, calculated, in cold blood and of malice aforethought or deliberate and very heinous;

<sup>1</sup> A High Court Judge, under question 5, S. No. 316.

<sup>2</sup> A Member of a State Legislature, S. No. 243.

<sup>3</sup> Member of a State Legislative Council, who is also an Advocate under question 5, S. No. 257.

(b) whether it was a crime of passion, sudden and unprovoked case of revenge for deep personal injury to one's prestige, honour and reputation;

(c) offence committed in self-defence;

(d) the impact of the sentence on the dependents of the offender;

(e) other humanitarian and psychological considerations. All these considerations can be codified but with ultimate analysis initiative and discretion of the Judge and the jury cannot be completely bound and limited."

627. The reply of a District and Sessions Judge deals with the matter in detail<sup>1</sup>:—

"In suitable cases, the Court may award the lesser punishment of life imprisonment, but what is a suitable case is within the court's discretion which must, of course, be exercised judicially and not arbitrarily or on irrelevant considerations. The conduct of the murderer, the nature of the temptation to which he yielded and the manner in which the crime was committed are some of the considerations which will weigh with the court. It is not possible to codify these considerations. Codification would make the law rigid which is not desirable. Some of the considerations which should weigh with the court in awarding the lesser punishment are noted below:—

(i) immaturity of mind, as might be seen in youth or persons of retarded mental development;

(ii) degeneracy of mind, as might be seen in extreme old age or in neuropathic or psychopathic persons who are not definitely insane;

(iii) undue influence of a person in authority, though not amounting in law to coercion;

(iv) where there is a doubt as to the sanity of the accused at the time of the offence, actual sanity not being proved;

(v) where the murder is committed under provocation which is grave, though not sudden; or is sudden though not grave; or is neither;

(vi) where the murder was committed due to frustration in love;

(vii) minor degree of participation in the crime *e.g.*, where incomplete knowledge of common purpose existed or where the part played in carrying the crime into effect was a minor one;

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<sup>1</sup> A District and Sessions Judge, under question 5, S. No. 429.

(viii) where the murder was committed in a state of intoxication;

(ix) murder to avoid some imaginary mishap due to some superstitious belief such as witchcraft;

(x) murder on the spur of the moment on a sudden quarrel without pre-meditation;

(xi) where the *corpus delicti* is wanting;

(xii) where there is no motive disclosed for the crime, or the motive is to conceal one's shame, e.g., murder of a new-born illegitimate child;

(xiii) where considerable time has elapsed since the crime and the offender has behaved well during that time;

(xiv) where the offender has voluntarily made a clean confession of his guilt at the earliest opportunity."

628. Another reply states<sup>1</sup>, that though it is not possible to codify the considerations, yet the position can be broadly stated thus:—

The death sentence be given in cases of—

(a) murder for gain;

(b) dacoity with murder;

(c) cool calculating diabolical murders.

#### TOPIC NUMBER 32(c)

##### *Conclusion regarding codification of considerations*

629. Having considered the matter in all its aspects, we have come to the conclusion that it is not possible to codify the various considerations which weigh or should weigh with the court in the exercise of the discretion. There are circumstances which should never be taken into account, but they cannot be exhaustively enumerated. There may be circumstances which, when taken into account along with other circumstances, may suffice; but they cannot be exhaustively enumerated. Lastly, there may be circumstances which are by themselves sufficient, but they cannot also be exhaustively enumerated.

Conclusion regarding codification of considerations.

Most of the replies received to the question on the subject<sup>2</sup> also take the same view.

630. Further, the exercise of the discretion may depend on local conditions, future developments, evolution of the moral sense of the community, state of crime at a particular time or place and many other unforeseeable features. In

<sup>1</sup> A District and Sessions Judge, under question 5, S. No. 359.

<sup>2</sup> See summary of replies to question 5.

short, codification of these considerations may, if attempted, be too wide and too narrow at the same time.

631. *We do not, therefore, recommend any change in the law on this point.* A "codification", which does not purport to be exhaustive, would not be of much value, and a codification, which purports to be exhaustive may be rigid and give rise to difficulties.

### TOPIC NUMBER 33

#### *Apprehension about discretion*

Apprehension about discretion.

632. The apprehension expressed in some of the replies, that the leaving of the discretion to the Court makes the actual event arbitrary, does not seem to constitute a very strong argument. In the first place, the discretion is exercised, and expected to be exercised judicially, and not on whim or caprice. In the second place, if in a particular case a miscarriage of justice occurs by reason of the improper exercise of the discretion, the High Courts would always be there to correct such miscarriage. Thirdly, it may be pointed out that even in England the Royal Commission did not favour the position then existing, under which the sentence of death was mandatory for murder<sup>1</sup>.

633. As was observed by Lord Halsbury L. C.<sup>2</sup>—

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion<sup>3</sup>; according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself<sup>4</sup>."

634. If, therefore, a discretion is to be left, it should be a real and effective discretion, not trammelled by conditions laid down for all times, all places, all offences and all offenders.

<sup>1</sup> R.C. Report, page 214, paragraph 611.

<sup>2</sup> *Sharp v. Wakefield*, (1891) A.C. 173, 179 (H.L.).

<sup>3</sup> *Roobe's case*, 5 Pep. 100. a.

<sup>4</sup> *Witness v. Rastali Al*. T.R. at page 757.

**CHAPTER VIII**  
**CATEGORIES OF MURDERS**

TOPIC NUMBER 34(a)

*Division of murders—introductory*

635. We have next to consider the question whether it is possible to divide murders into different categories<sup>1</sup>. The question is an important one. The movement for abolition of capital punishment has induced many persons to think of a formula which would, at least, reduce the number of capital murders to the *minimum*. Division of murders—Introductory.

TOPIC NUMBER 34(b)

*Categories of murder—General discussion, and Homicide Act, 1957*

636. Several attempts have been made in the past to sub-divide murder into various degrees, according to the severity of the act, and to regulate punishment for it. It would be of interest to note these attempts, and to find out whether it is possible to arrive at a satisfactory sub-division. Introductory.

637. In England, the Royal Commission on Capital Punishment of 1866 suggested the following formula<sup>2</sup>, for "first degree murders", which would be capital:— 1866 Commission.

(a) All murders *deliberately* committed with express malice aforethought, such malice to be found as a fact by the jury;

(b) All murders committed in or with a view to the preparation or escape after the perpetration or attempt at perpetration of any of the following felonies—murder, arson, rape, burglary, robbery, or piracy. The remaining murders would be second degree murders and non-capital. Some legislative proposals were introduced after this Report, but they did not become law.

638. A number of Bills, under the title "Murder Law Amendment Bill" or "Homicide Law Amendment Bill", etc. were later introduced in 1867, 1871, 1877, 1878 and 1908<sup>3</sup>, in England. It is unnecessary to go into details, but speaking roughly, in most of these cases the test was deliberate intention or association with other offences, or murder in the course of escaping from arrest, or murdering a constable, etc., acting in the discharge of his duty. Subsequent Bills. Criminal Justice Bill.

<sup>1</sup> On certain proposals for such a categorisation, the Law Commission sent an interim note to the Ministry of Home Affairs in December, 1962. See paragraph 4, *supra*.

<sup>2</sup> Cited in R.C. Report of 1953, page 470.

<sup>3</sup> See R. C. Report, pages 470, 471 for details.

Criminal  
Justice Bill,  
1948.

639. The Criminal Justice Bill, 1948, as sought to be amended by the Government amendment may, however, be considered in detail. (This Bill, originally, contained no provision for the abolition of death penalty, though it was expected that it would contain such a provision in view of the resolution passed in the Commons in 1938. The Bill was introduced in October, 1947, and Mr. Sydney Silverman, in March, 1948, moved a new clause proposing the suspension of capital punishment for an experimental period of five years in the case of death penalty for murder. The clause was approved by the Commons, though not by the Lords, and the Bill came back to the Commons. Government, thereupon, thought of a compromise, and presented its proposal to the House of Commons through the Attorney-General, Sir Hartley Shawcross<sup>1</sup>). Briefly the Government proposed to maintain the death penalty for murders committed during certain specified offences (robbery, burglary and housebreaking, wounding or inflicting grievous bodily harm by three or more persons acting in concert, crime committed by means of explosives or other destructive substances, rape or indecent assaults on females and sodomy and indecent assaults on males and also murder committed in the course of systematic administration of poison or abnoxious substances or for resisting or avoiding arrest, etc., or by a prisoner on a prison officer, or murder by a person previously convicted of murder). In these cases, the murder was capital, and in other cases, the sentence was imprisonment for life. The clause was passed by the Commons. In the House of Lords, Lord Chancellor Viscount Jowitt supported the clause, and argued that capital punishment could be justified only if it helped to prevent murders, and the cases for which the death penalty would be retained in this proposal were those where it was believed that it acted as a deterrent. The basis was *deterrence* rather than some other criterion, such as pre-meditation or degree of moral guilt<sup>2</sup>. The clause, however, met with strong opposition, and was described as a "Murderers Code" and dubbed as "illogical", and was ultimately deleted by a vote of 97 against 19 in the House of Lords.

Position in  
other coun-  
tries—  
France.

640. In some countries in Europe certain forms of *intentional homicide* are regarded as more heinous and punishable by death instead of imprisonment for life. As a typical example may be cited the law in France<sup>3</sup>. Murder (*meurtre*) is defined in Article 295 of the French Penal Code as homicide committed intentionally.

<sup>1</sup> See Elizabeth Turtle, "Crusade against Capital Punishment" (1961) pages 55, 62.

<sup>2</sup> Parliamentary Debates, Lords, Vol. 157 (July 20, 1948), Columns 1006, 1007, 1013 : See also Elizabeth Turtle "Crusade against Capital Punishment" (1961), page 79.

<sup>3</sup> See R. C. Report, page 443, and also page 437, paragraph 12 (c).



641. The following forms of intentional homicide are punishable in France by death:—

(i) "Assassinat"—Murder committed with premeditation or by lying in wait (Articles 296 and 302, French Penal Code).

(ii) Murder accompanied by torture or barbarity (Article 303, French Penal Code).

(iii) Murder preceded, accompanied or followed by another felony (Article 304, French Penal Code).

(iv) Murder of a magistrate, public officer, police officer or person performing some public duty, if he is assaulted in the exercise of his duty or on the occasion of it (Article 233, French Penal Code).

(v) "Parricide"—murder of a father, mother or ancestor (Articles 299 and 302, French Penal Code).

(vi) Murders the purpose whereof is to prepare, facilitate or commit a misdemeanour or to further the escape, etc., of a principal or accessory to the misdemeanour (Article 304, French Penal Code).

(vii) "Poisoning", (defined as any attempt on the life of a person by means of any substance which can cause death more or less quickly, irrespective of the manner in which the substance was used or administered or the result of its administration) (Articles 301 and 302, French Penal Code).

642. In several States in the United States of America,<sup>1</sup> U.S.A. murder has been classified into degrees. While the punishment for "first degree murder" is death or imprisonment for life, that for second degree murder is imprisonment for life (or a lesser period, in some cases). As an example, may be quoted section 4761 of the Penal Code of Pennsylvania, under which all murder which should be perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and premeditated killing or which shall be committed in the perpetration of or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree.

643. The division of murder into capital and non-capital Canada, has been recently adopted in Canada.<sup>2,3</sup>

644. In Australia, two states—Queensland and Western Australia, Australia—appear to have divided murder into degrees. We may take, as an example, section 278 of the Western

<sup>1</sup> For details, See R. C. Report, table given at page 442, and text at pages 439-441.

<sup>2</sup> See sections 200A and 206 Criminal Code of Canada, as amended in 1961.

<sup>3</sup> Detailed discussion of the Canadian Act will be in paragraph 650 *et seq.*

Australia Criminal Code, which defines wilful murder as follows:—

“278. Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.”

Murder is defined in section 279. Under section 282 (as amended by Act 28 of 1961), in the case of wilful murder, the penalty must be death, while in the case of murder, it is imprisonment for life.

645. The scheme of division was considered, but rejected after discussion in New Zealand,<sup>1</sup> when the Bill which led to the New Zealand Crimes Act 1961 was under consideration.

Royal Commission.

646. The Royal Commission on Capital Punishment examined this question<sup>2</sup> very carefully, and ultimately came to the conclusion, that while the introduction of degrees of murder in some countries had resulted in limiting the application of capital punishment and had for this reason commended itself to the public opinion, yet there were a number of practical difficulties, and that juries often refused to give a verdict of murder in the first degree even in clear cases, and instead returned a verdict of murder in the second degree.<sup>3</sup> The Royal Commission noted that it would be impracticable to define a class of murders in which alone infliction of death penalty is appropriate, and recorded that the great majority of witnesses of all professions were firmly opposed to degrees of murder. Regarding the tests adopted in other countries, its views were as follows:

(i) *Pre-meditations.*—Impulsive killing does not present any stronger case for mitigation than homicide committed after genuine internal struggle in response to a strong provocation.<sup>4</sup> What time should have elapsed to bring a case of pre-meditation is also a matter of controversy, and the problem where a line can be drawn between pre-meditation and mere intention could not easily be resolved.<sup>5</sup>

(ii) *Categories of murders as contained in the Criminal Justice Bill, 1948.*—The classification of murder by categories would produce anomalies, as in the compromise clause in the Criminal Justice Bill, 1948. The murder of a Prime Minister by a fanatic may be as atrocious as the murder of a policeman, yet the former was excluded and the latter included in the Bill.

<sup>1</sup> New Zealand, Parliamentary Debates, (House of Representatives), Vol. 328 pages 2206, 2210, 2190.

<sup>2</sup> R.C. Report, paragraph 485—534. Conclusion in paragraph 534.

<sup>3</sup> R.C. Report, paragraph 532, regarding position in U.S.A.

<sup>4</sup> R.C. Report, paragraph 500.

<sup>5</sup> R.C. Report, paragraph 501.

(iii) *Provision in the Indian Penal Code.*—The difference between murder and culpable homicide, given in the Indian Penal Code—(apart from the exceptions given in section 300),—rested on a distinction far too subtle and refined to constitute a just criterion of liability to suffer capital punishment, particularly, in England where the distinction would have to be applied by the jury.<sup>1</sup>

(iv) *Intent to Kill.*—Whether death results from a direct intention to kill or from a wilful act of which death is a probable consequence, should not make a difference. “It is the wilful exposure of life to peril that constitutes the crime.”<sup>2</sup> Moreover, for practical purposes one cannot make a distinction between (i) a man who shoots through the head for killing, (ii) a man who strikes a violent blow with a sword, and (iii) a man who, for some object of his own, to stop a railway train, contrives an explosion of gunpowder under the engine, hoping that death may not be caused, but *determined* to effect his purpose whether it is so caused or not”.

647. Though the Royal Commission had not favoured the division of murder into degrees,<sup>3</sup> the Homicide Act, 1957, The Homicide Act. adopted<sup>4</sup> a different course by providing (in sections 5 and 6) that only certain murders shall be capital murders. Under section 5(1), the following murders are capital, namely:—

(a) any murder done in the course or furtherance of theft;<sup>5</sup>

(b) any murder by shooting or by causing an explosion;

(c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest or of effecting or assisting an escape or rescue from legal custody;

(d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;

(e) in the case of a person who was a prisoner at the time when he did or was a party to the murder.

<sup>1</sup> R.C. Report, paragraph 511.

<sup>2</sup> R.C. Report, paragraph 470, the discussion is under definition of murder but is relevant.

<sup>3</sup> R.C. Report, page 173 *et seq.* paragraph 173 *et seq.* and page 189, paragraph 534.

<sup>4</sup> The relevant provisions of the Homicide Act, 1957 have been temporarily repealed by the Murder, etc., Act, 1965.

<sup>5</sup> For an interesting case as to the meaning of the expression “in course of”, see *R. V. Jones*, (1959) 1 All. E. R. 411, (C.C.A.) and criticism thereof (1959) 22 Modern Law Review 426.

any murder of a prison officer acting in the execution of his duty or a person assisting the prison officer so acting.

Further, a person who after a conviction for murder, is again convicted of murder, is sentenced to death.

Section 5(2) contains special provisions dealing with cases where more than one person is concerned in a homicide.<sup>1</sup>

643. The various categories may be explained.<sup>2</sup> Category (a), relating to theft, seems to have been suggested by the clause which was proposed to be introduced as the Government amendment to the Criminal Justice Bill, 1948 read with the Schedule thereto<sup>3</sup>, under which, *inter alia*, a murder committed in the course of or immediately before or after and in connection with the commission of the offence of robbery, burglary, etc., was to be punishable with death.

Category (b) relating to shooting or explosion seems to have been suggested by the compromise clause of the Criminal Justice Bill, 1948 read with the Schedule (item 4) which relates to explosives and other destructive substances.

Category (c) relating to resisting arrest, etc., might have been suggested by the provision proposed in the Murder Law (Amendment) Bill, 1867 [clause (d)].<sup>4</sup> Compare also the provision in the compromise clause in the Criminal Justice Bill, 1948 on the subject.<sup>5</sup>

Category (d) relating to murder of a police officer can be traced to the Murder Law (Amendment) Bill, 1877, the Homicide Law (Amendment) Bill, 1876 and also the compromise clause in the Criminal Justice Bill, 1948.<sup>6</sup>

Category (e) relating to murder of a prison officer can be traced to the compromise clause in the Criminal Justice Bill, 1948.

(These details have not been given in the Explanatory Memorandum to the Homicide Bill. The Explanation relating to clause 5 merely recites the provisions of the clause.<sup>7</sup>)

1 See also paragraph 96, *supra*.

2 Paragraph 647, *supra*.

3 See R.C. Report, pages 471 and 473, where the Bill of 1948 is reproduced.

4 See R.C. Report, page 470, where the Bill of 1867 is reproduced.

5 See R.C. Report, page 471, where the Bill of 1948 is reproduced.

6 See R. C. Report, pages 470 and 471, where the various Bills are reproduced.

7 For general criticism, see Silverman, Parliamentary Debates (Commons) Vol. 500 and Elizabeth Turtle, "Crusade against Capital Punishment" (1961), page 130.

649. The classification of murder made in the Act cannot be regarded as completely above criticism. Certain methods of murder have been picked and chosen, but others have been left out. A person who uses a poison, a knife, or strangulation or other means, to commit a murder cannot be sentenced to death. Murderers can thus "choose their weapons" carefully to avoid capital punishment. For example, Ruth Ellis, hanged in July 1955 for shooting her faithless lover, would, if she had merely used a hatchet and committed the offence after 1957, have escaped capital punishment under the new Act.<sup>1</sup>

Criticism of  
the provision  
in the  
Homicide  
Act.

Again, the words "in the course of or furtherance of" in section 5(1)(a), Homicide Act, may raise minute and difficult questions. Brutal attacks on defenceless young girls and boys in the course of rape or other sexual offences would escape the capital sentence, and as has been said, "It is a sad reflection on the values of our society that we rate the protection of private and public property from theft more highly than the protection of the lives of children and young women."<sup>2</sup> Lord Goddard, in his criticism of the 1948 Bill, pointed out an anomaly,<sup>3</sup> that a murderer entering a house through an open door would not be guilty of a capital crime, whereas one who opened the door, though unlocked, would have committed capital murder, because in the latter case there would be house-breaking.

650. It may be useful to discuss here the scheme recently adopted in Canada. Though the Canadian Committee<sup>4</sup> did not favour the suggestion to divide murder into degrees, and shared the conclusions of the United Kingdom Royal Commission on this point, yet, by the amendment to the Criminal Code of Canada, which was assented to on the 13th July, 1961, a division of murder into capital and non-capital has been introduced by new section 202A. Under section 206 of the Criminal Code of Canada, as amended, a person who commits "capital" murder, shall be sentenced to death, while a person who commits non-capital murder, shall be sentenced to imprisonment for life. (A person who is under the age of 18 years, even though he commits a capital murder, is to be sentenced only to imprisonment for life).

Position in  
Canada.

651. Murder is thus defined in Canada<sup>5</sup> :—

"202. *Murder in commission of offences.*—Culpable homicide is murder where a person causes the death of

<sup>1</sup> See Russell on Crime (1964), Vol. I, pages 555 to 557.

<sup>2</sup> See the note by J. E. Hall Williams in the Appendix to Elizabeth Turtle "Crusade against Capital Punishment", (1961), page 159.

<sup>3</sup> Parliamentary Debates, Lords, Vol. 157 (July 20, 1948) Columns 1030, 1034, cited in the "Crusade against Capital Punishment" (1961), page 30.

<sup>4</sup> Canadian Report, page 17, paragraph 70.

<sup>5</sup> Section 202, Criminal Code of Canada.

a human being while committing or attempting to commit treason or an offence mentioned in section 52, piracy, escape or rescue from prison or lawful custody, resisting lawful arrest, rape, indecent assault, forcible abduction, robbery, burglary or arson, whether or not the person means to cause death to any human being, if

*Intention to cause bodily harm.*

(a) he means to cause bodily harm for the purpose of—

(i) facilitating the commission of the offence, or

(ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm;

*Administering overpowering thing.*

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;

*Stopping the breath.*

(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom, or

*Using weapon.*

(d) he uses a weapon or has it upon his person—

(i) during or at the time he commits or attempts to commit the offence, or

(ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence.”.

Classification  
of murder.

“Capital murder” is dealt with in section 202-A of the Criminal Code of Canada,<sup>1</sup> quoted below:—

“202A. (1) Murder is capital murder or non-capital murder.

(2) Murder is capital murder, in respect of any person, where—

(a) it is *planned and deliberate* on the part of such person,

(b) it is within section 202, and such person—

(i) by *his own act caused*<sup>2</sup> or assisted in causing the bodily harm from which the death ensued.

<sup>1</sup> Section 202A, Criminal Code of Canada.

<sup>2</sup> Emphasis added.

(ii) *by his own act administered* or assisted in administering the stupefying or overpowering thing from which the death ensued,

(iii) *by his own act stopped* or assisted in the stopping of the breath from which the death ensued,

(iv) *himself used or had* upon his person the weapon as a consequence of which the death ensued, or

(v) *counselled* or procured another person to do any act mentioned in sub-paragraph (i), (ii) or (iii) or to use any weapon mentioned in sub-paragraph (iv), or

(c) Such person by his *own act* caused or assisted in causing the death of

(i) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties, or

(ii) a warden, deputy warden, instructor, keeper, gaoler, guard or other officer or permanent employee of a prison, acting in the course of his duties, or counselled or procured another person to do any act causing or assisting in causing the death.

(3) All murder other than capital murder is non-capital murder." Non-Capital  
murder.

652. In the New Zealand Crimes Act,<sup>1</sup> sections 167 and 168, the elevation of the crime of culpable homicide into murder has been made to depend on two alternative criteria, namely, either the subjective element (intention to cause death, etc.) dealt with in section 167, or, *irrespective of whether* the offender means death to ensue or knows that death is likely to ensue or not, if he means to cause grievous bodily injury for facilitating commission of certain offences, or if he administers any stupefying or overpowering thing, or wilfully stops, the breath of any person for these purposes. These provisions, however, stand on a different footing from the scheme on which the English Act is based, because, under the New Zealand provisions, the sentence of death is abolished for murder and, therefore, the falling of a case in one category or the other of murder does not make any difference in the sentence by itself.

In fact, in the Bill introduced in New Zealand, a scheme for division of murder into capital and non-capital seems to have been embodied, but the scheme was dropped later.<sup>2</sup>

<sup>1</sup> The (New Zealand) Crimes Act, 1961.

<sup>2</sup> See speech of Hon'ble J. R. Hanan (Attorney-General), New Zealand Parliamentary Debates, House of Representatives, Vol. 328, 3rd October, 1961, pages 2684 and 2685; and 12th October, 1961, page 2990, voting on clause 172.

Aggravated  
murder.

653. The clause as it stood in the New Zealand Bill is quoted below:—

“167. Culpable homicide is aggravated murder in each of the following cases:—

(a) If the offender means to cause the death of the person killed or any other person and the killing is *planned and deliberate*;

(b) If the offender means to cause the death of the person killed or any other person, or means to cause to the person killed or any other person any bodily injury that he knows to be likely to cause death, and the act that causes the death is done for the purpose of—

(i) facilitating the commission of any other crime; or

(ii) facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission of any other crime; or

(iii) resisting lawful apprehension in respect of any other crime.”.

654. (The penalty on conviction for aggravated murder was to be death—under clause 172—subject to consideration by Executive Council, and subject to any recommendations that might be made for the exercise of the Royal prerogative of mercy.)

“168. Culpable homicide is murder in each of the following cases:—

(a) If the offender means to cause the death of the person killed;

(b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not.”.

(The penalty for murder was not death, but life imprisonment under clause 172).

655. The scheme of division was referred to by Mr. Hanan, Attorney General, in his speech on the first reading of the Crimes Bill, and even at that time he had hinted at the amendment which would be introduced on the subject, i.e., an amendment for abolishing capital punishment for murder.<sup>2</sup> He explained that the issue of

<sup>1</sup> See New Zealand, House of Representatives, Debates, Vol. 328, page 2766.

<sup>2</sup> New Zealand, House of Representatives, Debates, Vol. 328, page 2206.



capital punishment was a very solemn and controversial one, and the Bill made an attempt to resolve the issue by prescribing the death penalty for certain types of murders. He referred to the precedent of the English Act and the amendments in Canada and pointed out that the Bill provided for categories different from the English Act. "Under the present Bill the types of murder singled out as calling for the death penalty may briefly be described as planned murder, or murder committed in association with other crimes, and, of course murder by a person who has previously been convicted of murder." His own views were known on the subject, and he was opposed to capital punishment for murder in any case. He did not believe that it was possible to draft a compromise without leaving serious flaws. The clause in the Bill was probably the best that had ever been attempted, but he did not wish to discuss that now. He could also see one immediate difficulty regarding planned and deliberate murder. A nice point would arise in the legal sense as to at what point in time a murder was planned.

656. In his speech on the second reading of the Bill, Mr. Hanan dealt with in detail the scheme of division, and pointed out that the clause dealing with aggravated murder was based on the concept that there were murders which shocked the public conscience and merited the death sentence, and the clause was intended to embrace such crimes. It would cover poisoners and robbers, and most cases of rape where the victim was killed. It was much better than the English provision, which had worked out very badly in the United Kingdom. But he had some fundamental objections. First, it did not deal with all types of murders for which the people might feel that the death penalty is the appropriate sentence, for example, a murder in a fit of resentment of an unwanted child, or a cruel murder committed by a sadist on a sudden impulse for the pleasure of seeing his victim suffer and die. Another objection was that it would include "mercy killing" in the aggravated category and also a planned killing of a deformed child by its father. Thirdly, in many cases, it would be difficult to establish "planned" and deliberation when in fact it had been so. If the clause became law, injustices as between one murder and another would creep in, "depending on the evidence, the ability of the prosecutor, or the ability of the defence". In America there had been trouble over pre-meditation. Fourthly, the clause took into account the circumstances of the murder only and ignored the history and circumstances of the murderer. Factors other than pre-meditation tended to lose their importance under the clause. "It is not true that the measure of a murderer's guilt is in the length of time he had murder in contemplation." Finally, British law, as opposed to American law, had always set its face against degrees of murder. There seemed to be unanimity that the provision in the Homicide Act, which departed from the traditional British pattern,

was a complete failure. The proposed compromise would not work out in practice. The choice was, therefore, between abolition and retention.<sup>1</sup> (He then went on to explain why he favoured abolition.)

657. Mr. Marshall, Deputy Prime Minister, defended the provision in the Bill, and thought that the fear about its operation was not justified. Though he favoured the law as it stood, he believed that the compromise clause was workable. As to killing of an unwanted child, he considered it unusual for the death penalty to be imposed in such cases or in cases of sudden impulse. In such cases the prerogative of mercy was exercised. In the case of mercy killings, even though they would be planned and deliberate, the prerogative of mercy would continue to be exercised. The compromise was an attempt to meet the view of those who felt that the present law went too far but who were also unhappy about abolition. Stability in this branch of the law was highly desirable, and he hoped that the clause would be generally acceptable.<sup>2</sup>

658. Mr. Nordmeyer, who was for total abolition, expressed the view that an attempt at compromise must inevitably end in failure, as a very great deal would depend upon the interpretation of the words in the statute, and it may very well be that a person charged with aggravated murder in one court under one Judge may have a verdict of guilty brought in against him by a jury, while another person charged with a fairly similar offence might have a verdict of murder not punishable with death. It was very difficult to have basic criteria which could separate one case from another. He also referred to the difficulty of deciding whether a crime committed after death (of the victim) was a crime "for which" the murder was perpetrated and would fall under aggravated murder.<sup>3</sup>

659. Mr. Gotz, Minister of Internal Affairs, expressed his preference for retaining the death penalty for murder. As regards the scheme of division, he stated that the jury could determine whether murder was premeditated or not, but the society "would still have some protection against brutal and horrifying murders" and (he hoped) "against potential murders". There was weakness in every compromise; but the death penalty should be kept at least for those whose wild acts had caused them to "forfeit the right to live".

<sup>1</sup> New Zealand, House of Representatives, Debates, Vol. 328, pages 2684 to 2687.

<sup>2</sup> New Zealand, House of Representatives, Debates, Vol. 328, pages 2697 to 2698. (He also stated his six reasons for retention, but that is not relevant here).

<sup>3</sup> New Zealand, House of Representatives, Debates, Vol. 328, pages 2699 to 2700.

<sup>4</sup> New Zealand, House of Representatives, Debates, Vol. 328, pages 2766 to 2767.

660. Mr. Harker stated<sup>1</sup> that the origin of the compromise clause was in the recommendation of the 1950 Committee. When the Bill reintroducing capital punishment was brought in (in 1950) after an exhaustive enquiry, the Committee recommended that the death penalty should be inflicted only for the worst type of cases, and that is what the proposed provision meant. There were types of murders for which death penalty could not conceivably be a deterrent, but there were other types of murders where it certainly could be.

661. Mr. Hanan, (Attorney General), in his later speech<sup>2</sup>, opposed the scheme of aggravated murders, and supported abolition *in toto*. He observed that it was "inherently impossible to prescribe by law a formula that will do justice". There was no proof that capital punishment could deter. The statistics did not prove it one way or the other, and that is what the Attorney-General had also stated in 1953 when introducing the Bill restoring capital punishment. Hanging was a barbarous performance, which edified no one and caused suffering to innocent people<sup>3</sup>.

662. After a long discussion, the scheme of division was dropped, and the Bill was amended so as to remove the death penalty for murder<sup>4</sup>. The scheme was negated by 41 votes against 30. In consequence, original clause 170 relating to "Diminished responsibility" was deleted<sup>5</sup>.

#### TOPIC NUMBER 34 (c)

##### Replies to Question 6(a) (b)

663. Question No. 6 in our Questionnaire consisted of two parts, and was as follows:—

Replies to  
Question  
6 (a) (b).

"(a) Is it possible to divide murders into different categories for the purpose of regulating the punishment for murder?

(b) Is it possible to divide murders into two categories—

(i) murders punishable with death;

(ii) murders not punishable with death?"

Part (a) of this question, it may be noted, deals generally with the possibility of division of murders, while part (b) deals specifically with the division of murders into capital and non-capital.

<sup>1</sup> New Zealand, House of Representatives, Debates, Vol. 328, page 2779, left-hand.

<sup>2</sup> New Zealand, House of Representatives, Debates, Vol. 328, page 2784, right-hand.

<sup>3</sup> New Zealand, House of Representatives, Debates, Vol. 328, page 2784—2785.

<sup>4</sup> New Zealand, House of Representatives, Debates, Vol. 328, page 2990.

<sup>5</sup> Clause 170 (relating to Diminished responsibility) was, in substance, the same as the provision in the (English) Homicide Act, 1947.

664. Replies received on this question can be classified into three groups—first, those which take the view that a division of murders is not possible; secondly, those which take the view that such division is possible, but not desirable; and thirdly, those which take the view that such division is possible, and have made suggestions as to the scheme of division.

665. The first two groups of replies naturally stop with part (a) of the question because part (b) does not arise in their case. So far as the third group of replies is concerned, their general reply falls under part (a), and the scheme of division really falls under part (b).

666. The first group comprises the largest number of replies, and represents the opinion of the majority of the State Governments, High Courts, High Court Judges, Bar Associations, Bar Councils and individuals that have sent replies to the Questionnaire<sup>1</sup>. Some of the important points made in these replies may be noted. Thus, it has been pointed out<sup>2</sup>, that homicide has already been divided into different categories under sections 302, 304 and 304A, Indian Penal Code, for the purpose of regulating the punishment. There are other exceptions provided in the Code, under which homicide may be completely justifiable in the circumstances of a particular case. (Hence a further division is not required).

667. Most High Court Judges are opposed to any division of murders into capital and non-capital, and are of the view that such a division is neither possible nor desirable<sup>3</sup>.

Most District and Sessions Judges<sup>4</sup> are opposed to any scheme of division of murder.

668. One of the State Governments<sup>5</sup> has pointed out that it is well-nigh impossible to enumerate the various types of murders in respect of which capital punishment may be retained. There is always a chance of a certain category of murders being left out without much justification, from the category of those for which capital punishment may be retained. This, it is stated, is an additional reason for retaining capital punishment for murders punishable under section 302 *in the entirety*, without making any distinction between one type of murder and another for the imposition of sentence.

<sup>1</sup> It is unnecessary to enumerate all of them.

<sup>2</sup> A High Court Judge, S. No. 147.

<sup>3</sup> High Court Judges, S. Nos. 230, 251, 316, 317, 393, 394, 396.

<sup>4</sup> District and Sessions Judges, S. Nos. 352, 367, 373, 374, 376, 377, 378, 384, 385, 386, 388, 418, 419, 420, 421, 423, 424, 429, 437, 442.

<sup>5</sup> A State Government. S. No. 182.

669. The Judicial Section of the Indian Officers' Association in a State<sup>1</sup> has, while opposing the division of murder, stated as follows:—

“Categories . . . . can only be based on motives or circumstances. The existing law permits the motives and circumstances to be considered and evaluated for the purpose of exercising discretion in regard to punishment. To categorise murders on the basis of motives would almost require an impossible task of judging evidence to find out whether they are of the categories laid down. Such categorisation would introduce an undesirable element of vagueness, rigidity, fanciful interpretations, etc.”.

670. That no amount of categorisation can meet the infinitely varied situations and circumstances in which murders take place, has been stressed in another reply also<sup>2</sup>. An eminent member of the Bar<sup>3</sup> has also pointed out that the scheme of the Indian Penal Code has been tested over a long period of time and found satisfactory, and therefore no change seems to be called for to make the distinction envisaged by the question<sup>4</sup>. One danger of a rigid division of murders has been pointed out in one of the replies<sup>5</sup>, namely, once it is known to the criminal mind that certain types of murders cannot be punished with death, then the incentive to commit such murders will increase, and at the hearing stage, items of evidence will be led to show that though the case is one of murder, yet it is not a *capital* murder. This, it is stated, will confuse the issue at sessions trials.

671. We may, under this group, refer to the argument put forth in the reply of a Government officer<sup>6</sup>. That reply states that while it is never impossible to divide anything into separate categories, the division of the offence of murder would not be desirable. The case-law in this context, it is pointed out, has developed on clear-cut lines and continues so to develop. The scheme of the Indian Penal Code, whereunder culpable homicide is first defined, then it is laid down as to when culpable homicide is murder, and, lastly, certain exceptions are laid down which take the offence back within the fold of culpable homicide, has been tried in the country for over a century. The doubtful points have been clarified by case-law to such an extent as to make the scheme well-nigh foolproof. The case-law can be trusted to give good and safe guidance

<sup>1</sup> S. No. 562.

<sup>2</sup> A High Court, S. No. 187.

<sup>3</sup> An eminent member of the Bar, through the Bar Council of India. S. No. 161.

<sup>4</sup> A Bar Council has also replied to the same effect, S. No. 159.

<sup>5</sup> Chief Justice of a High Court and a Judge of the High Court, S.No. 130

<sup>6</sup> Law Secretary to a State Government, S. No. 162.

to the judiciary in determining whether an offence is murder, culpable homicide or a lesser offence. The law laid down in clear and precise terms in *Rex v. Govinda*<sup>1</sup> still holds good. If this system is disturbed, confusion will become the order of the day. Hence, the best course would be to let murder remain murder, and to leave the severity of the punishment to be decided by the court in accordance with the principles. (The principles, the reply goes on to state, should be stated with greater clarity).

672. A State Government<sup>2</sup> has pointed out, that the variety of circumstances cannot be fully envisaged and categorised.

673. Another State Government<sup>3</sup> has stated, that while it may be possible to codify the situations and offences in respect of which the death penalty ought to be mandatory or discretionary, in practice it will be very difficult of application.

674. It has been stated in the reply of several District and Sessions Judges<sup>4</sup> that it will not be possible to divide murders into capital and non-capital.

675. The majority of the Presidency Magistrates in a Presidency Town<sup>5</sup> are of the view that a division of murders would amount to hampering the discretion of the courts, who have been exercising their discretion in the matter of punishment in a judicious and appropriate manner. "After all, the criteria for such a division would be either the method or the motive of murder, and both would, in the ultimate analysis, be the very criteria which will determine the sentence to be awarded even if there are no two categories of murder".

676. The second group of replies under this question is a small one, which adds that the division of murder as envisaged may be possible, but not *desirable*<sup>6-7</sup>.

Several replies fall in this group<sup>8-9-10-11-12</sup>.

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1 *Rex v. Govinda*, I.L.R. 1 Bom. 342.

2 S. No. 574.

3 S. No. 580.

4 S. No. 520 ; S. No. 524 ; S. No. 534 ; S. No. 535.

5 S. No. 549.

6 The Indian Federation of Women Lawyers, S. No. 92.

7 An Advocate (O.S.) Bombay, 1, S. Nos. 92 and 121.

8 A High Court Judge. S. No. 393.

9 A very senior Advocate of the Bombay High Court, S. No. 318.

10 A Member of a State Legislature, S. No. 249.

11 Law Minister of a State, S. No. 253.

12 S. No. 330.

677. This brings us to the third group, namely, those who consider that the division of murder into categories is possible, and have suggested an actual scheme of classification. It is not necessary to summarise each and every reply on this point. But the replies mostly seem to fall mainly under the categories detailed below:—

(i) *Replies suggesting adoption of the Homicide Act*

Certain replies have suggested that legislation on the lines of the (English) Homicide Act, 1957, may be introduced in India<sup>1,2,3,4</sup>.

(ii) *Replies suggesting exhaustive scheme*

An exhaustive scheme of categorisation of murders into capital and non-capital has been suggested in one of the replies<sup>5</sup>. That scheme is as follows:—

(a) For offences under section 303, Indian Penal Code, death sentence may be obligatory;

(b) For offences under section 307, second paragraph Indian Penal Code, sentence of death should not be made obligatory when any hurt is caused. Further, the previous sentence of imprisonment for life should have been for committing a murder;

(c) Death sentence may be retained for offences under section 121, 132, 194, second part, Indian Penal Code;

(d) Death sentence may be retained for the following cases of murder under section 302, and abetment of murder punishable with death:—

(i) Murder of a woman after committing rape on her;

(ii) Murder in course of or in furtherance of theft, robbery or dacoity of property;

(iii) Murder done in course of or for the purpose of resisting or avoiding or preventing lawful arrest or of effecting or assisting escape or rescue from lawful custody;

(iv) Murder of a Public Officer acting in the execution of his duties or of a person assisting a Public Officer so acting;

(v) Murder of more than one person in course of same transaction;

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1 A High Court Judge, S. No. 105.

2 (Reader in Criminal Law) under reply to question 3(a), S. No. 107

3 A (High Court) under question 1, S. No. 136.

4 The replies were received before the passing of the Murder (Abolition of Death Penalty) Act, 1965.

5 A State Law Commission, S. No. 101.

(vi) Murder by shooting or causing an explosion or by deliberately gruesome acts of torture or dismembering;

(vii) Murder by a person who has been once convicted of murder and sentenced to imprisonment for life.

(According to this reply, there are no special reasons for generally prescribing death sentence for murder of a person under 12 years, or for murder of a woman or a person under 18 years of age for depriving them of the property on their person. Further, the reply states, police officers or prison officer should not be distinguished from other public officers).

678. A somewhat similar reply has been received from one officer<sup>1</sup>.

679. The reply of a High Court Judge<sup>2</sup> is that the normal rule for exercising the discretion in respect of sentence should be, that unless there are aggravating circumstances like the enormity of the crime, the sentence of death should not be imposed. Further, if the normal rule so suggested is adopted, murders should be so divided, and, in that case, murders punishable with death would be those only which are attendant with aggravating circumstances like the enormity of the crime, the murder being cold-blooded and premeditated, accompanied with unnecessary brutality, etc., or murders by a life convict and dacoity with murder under section 396, Indian Penal Code.

680. The reply of the Law Minister of a State<sup>3</sup> is that it is possible to divide murders into categories, and that murders under sections 121, 132, 302, 303 and 396, Indian Penal Code, may be included in the categories of murders punishable with death. The reply states that the normal sentence for murder should be imprisonment for life, and it should be aggravating circumstances only that the court should award the death sentence. The aggravating circumstances, it is stated should be—

- (i) deliberate violence;
- (ii) use of lethal weapons;
- (iii) wanton cruelty and malignity;
- (iv) treachery;
- (v) nature of injury;

<sup>1</sup> Home Secretary to a State Government, S. No. 131.

<sup>2</sup> S. No. 397 (A High Court Judge), under Questions 5 and 6.

<sup>3</sup> (Law Minister of a State) under question 6·7 (a) and 7 (b), S. No. 313.



- (vi) motive;
- (vii) (murder of) a public servant in discharge of duty; and
- (viii) (murder) in course of jail breaking.

681. Some Members of State Legislatures have suggested schemes of division. Thus, it has been suggested<sup>1</sup>, that in murders punishable with death should be included murders for gain and planned murders with conspiracy.

682. The reply of another Member of State Legislature<sup>2</sup> is that the division of murders into capital and non-capital may be made on the following lines, that is to say—

(a) the circumstances of the murder, if the murderer was forced to commit the murder;

(b) nature and character of the murder, if there is enough ground to believe that the murder was an accident and the murderer will repent and prove to be a good and peaceful citizen; and

(c) the provocation being of a nature which could not be tolerated.

(The intention seems to be that these cases should be non-capital).

683. The suggestion of another Member of a State Legislature<sup>3</sup> is that murders may be divided into categories, and pre-meditated murders and group murders, and dacoity combined with murders, should be punishable with death.

684. Another suggestion is<sup>4</sup> that murders committed out of provocation caused by some moral infliction on the murderer or persons near and dear to him, or murders committed in self-defence or to save his family members or to save his property, should be non-capital, and other murders should be punishable with death.

685. Some District and Sessions Judges have suggested a scheme of division. Thus, one suggestion<sup>5</sup> is that murders of heinous character and murders committed after planning and cold calculations should be included in the category of capital murders.

<sup>1</sup> Member of a State Legislative Assembly, S. No. 225.

<sup>2</sup> Under questions 5 and 6. Member of a State Legislature, S. No. 243.

<sup>3</sup> Member of a State Legislature, S. No. 248.

<sup>4</sup> Member of a State Legislature, under questions 5 and 6, S. No. 232.

<sup>5</sup> A District and Sessions Judge, S. No. 380.

686. The suggestion of a District and Sessions Judge<sup>1</sup> is that the principle laid down in the Homicide Act<sup>2</sup> may be followed, but one more category may be added, namely, where murder has been committed by a murderer sentenced to life imprisonment, it should be a capital murder.

687. The suggestion of another District and Sessions Judge<sup>3</sup> is that of the four classes of murder mentioned in the four clauses of section 300, Indian Penal Code, the sentence of death should be restricted to—

(i) cases under section 300, first clause, because it is always brutal and barbarous to intentionally kill another;

(ii) to murder under the second, third and fourth clauses of section 300, where the injuries caused are brutal or the action is highly repugnant.

In other cases, the sentence of imprisonment for life should be imposed.

688. Many other suggestions for division have been received, for example, that heinous, cold-blooded, conspiratorial murders for some selfish wrongful gain, should be capital murders<sup>4</sup>.

(iii) *Replies emphasising particular types of murders with reference to victims of connection with other offences*

689. Another suggestion<sup>5</sup> is that murders punishable with death would include dacoity with murder, rape with murder, death caused by arson, murder of women and children.

689. Another suggestion<sup>5</sup> is that murders punishable with death would include premeditated and deliberate murder, murder by fire-arms and poisoning, and murder of more than one person, but infanticide should be excluded. Another reply<sup>7</sup> would include offences under sections 131, 132, 302, 303 and 396, Indian Penal Code, under the category of capital offences.

1 S. No. 443.

2 The Homicide Act, 1957.

3 A District and Sessions Judge., S. No. 325.

4 An Advocate, S. No. 410.

5 S. No. 138.

6 A Bar Council, S. No. 132.

7 A District Bar Association, S. No. 125.

691. One reply<sup>1</sup> suggests a simple classification, e.g., (i) voluntary murder with evil motive, (ii) accidental murder through negligence, (iii) murder for self defence, and (iv) murder under provocation.

Another suggestion<sup>2</sup> is that if the death penalty is to be retained at all, only murders under the following categories should be punishable with death:—

(a) murders committed brutally without any motive whatever by persons having sadistic nomicidal tendencies;

(b) murders committed in cold blood and brutally with a view to personal gain or connected with robbery or dacoity;

(c) other cases of murders in furtherance of vengeance or spite of family feuds or deep rooted plans to kill a person.

692. One State Government<sup>3</sup> has suggested that the following should be non-capital murders not punishable with death, and that other murders should be capital murders punishable with death or imprisonment for life. The suggested scheme is briefly as follows:—

(Non-capital murders as suggested in the reply are—

(i) murders committed in the heat of passion and *without premeditation* by normally law abiding persons;

(ii) killing in pursuance of suicide pact;

(iii) mercy killing;

(iv) and the life.)

693. It has also been suggested<sup>4</sup> that, for a conviction under section 302 read with section 34 or section 302 read with section 149, Indian Penal Code, and for cases where murder is resorted to for the sake of robbery or dacoity or rape or allied sex offences, *invariably* the sentence should be the capital sentence, and for offences under sections 303, 305, 307 and 396, the minimum sentence should be capital sentences.

(iv) *Wilful or pre-meditated murders*

694. In several replies, the test for imposing the death sentence has been suggested as "wilful" murder or "intentional" murder; or "premeditation"<sup>5</sup>. In many other

<sup>1</sup> An Inspector General of Police, S. No. 166.

<sup>2</sup> S. No. 211.

<sup>3</sup> A State Government, S. No. 129, under question 6 (b).

<sup>4</sup> A District and Sessions Judge, Gujarat, No. 212.

<sup>5</sup> A Pleader, Madras, S. No. 109 and an Inspector General of Police S. No. 131.

replies<sup>1</sup>, premeditation along with other elements has been taken as the basis for division.

695. One reply<sup>2</sup> suggests that categories of murder can be made, and under murders punishable with death should fall pre-planned and well-thought out brutal murders.

696. An additional Sessions Judge in the State of Maharashtra<sup>3</sup> has stated that section 304 of the Indian Penal Code is enacted in the direction of division of murder, and has given this suggestion:—

“Murder with rape, murder of women, murder during dacoity, pre-meditated, cold-blooded murder should be in the first category. Others should be left to the discretion of the court.”

(v) *Classification otherwise than on the lines of death sentence*

697. One reply suggests<sup>4</sup> that murders should be divided into (a) murders punishable with imprisonment till correction is achieved, and (b) murders punishable with imprisonment for life.

(vi) *Suggestions for further investigation*

698. A retired High Court Judge has<sup>5</sup> suggested that such division of murders is possible, and that Government should appoint a committee to study the subject and consider the changes made in various countries on this point.

(vii) *Suggestion of the Bar Association of India*

699. The reply of the Bar Association of India<sup>6</sup> has also dealt with this point. The scheme suggested by it contemplates that the imposition of the sentence of death should, (so far as murders are concerned), be confined to *pre-meditated murders*, murders in the course of dacoity, *pre-meditated murders* under section 303, and attempt to murder by a life convict.

#### TOPIC NUMBER 34 (D)

*Categories suggested in the various replies considered.*

Categories in various replies considered.

700. We may consider whether any of the suggestions for division of murders can be adopted usefully.

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- 1 The Bar Association of India, S. No. 183.  
 2 A District and Sessions Judge, S. No. 521.  
 3 S. No. 527.  
 4 An Inspector General of Prisons, S. No. 131.  
 5 A Retired Judge of the Bombay High Court, S. No. 95.  
 6 Reply of the Bar Association of India, S. No. 183, under question 6, read with questions 3 (a) and (b).

701. Some of the replies suggest a division more or less similar to that embodied in the Homicide Act, 1957, which has already been dealt with.<sup>1</sup> Others suggest their own self-contained schemes for particular kinds of murders. Of these, some emphasise the element of premeditation or brutality. We deal with pre-meditation separately<sup>2</sup>.

702. Some replies emphasise the element of *association with another crime*, for example, rape, theft, robbery or dacoity, while some combine these elements along with special provisions regarding murder of public servants, murder by shooting or explosion or torture, repeated murder, and so on. We feel that all these suggestions are open to the general objection, namely, that murder is a complex crime comprising so many elements, and it is not desirable to pick and choose only some of them as the basis for the higher penalty, neglecting the others. There is always the risk of certain categories of murder being left out from the one or the other class. We cannot also overlook the other danger, that once it is known to the criminal mind that certain types of murders *cannot be punished with death*, the number of such murders will increase, and efforts will be made at the trial to show that the case falls under the category of non-capital murder. True it is that there is a natural desire to treat, as aggravated murders, those which shock the public conscience; the inclusion of the cruellest modes of killing in the category of capital murders can be easily understood as the result of such desire. Again, the need for protecting officers concerned with the maintenance of law and order, which lies at the root of the proposals that would treat the murder of such officer as aggravated murder, is obvious. Next, the association of murder with another serious crime may, it is understandable, justify the higher punishment, not only on considerations of efficient enforcement of the criminal law, but also as manifesting social abhorrence of the motive in such cases.

703. But the fundamental objection still remains, namely, that the infinite variety of subjective as well as objective elements,—the history of the offender, the circumstances of the offence, the motive with which the offence was committed, the circumstances in which the victim was placed and the like,—cannot be compressed into one single formula. To give undue importance to one and to neglect the others would mean injustice, anomaly and hardship in practice<sup>3</sup>. There might also be a yawning gap in the categories when a situation occurs in real life, which is not covered by the category of aggravated murder, and

<sup>1</sup> See paragraphs 647—649, *supra*.

<sup>2</sup> See discussion relating to pre-meditation, etc., paragraphs 706—716 *infra*.

<sup>3</sup> See also discussion regarding questions 4 and 5, paragraphs 580—585, and 629—631 *supra*.

the law will be brought into disrepute. The classification might cover situations which should not be covered, or might leave uncovered situations which should be covered. The former can, to some extent, be rectified by the exercise of the prerogative of mercy; but the latter cannot be rectified, except by an amendment of the law.

#### TOPIC NUMBER 35

##### *Conclusion as to categories of murders*

Conclusion  
as to cate-  
gories of  
murders.

704. The real difficulty is that there are not, in fact, two classes of murder, but a variety of offences which "shade off from the most atrocious to the most excusable". Many factors have to be taken into consideration, and not infrequently, a careful balancing of conflicting considerations has to be undertaken. No amount of "verbal dexterity" in the definition of the offence or of degrees of the offence can surmount these difficulties. However atrocious or dangerous may be the generality of murders comprised in a selected category, murders will occur from time to time which fall within the category, but are so different in character and circumstances from the generality of murders belonging to the category that they cannot properly be classed as murder of the aggravated category<sup>2</sup>.

705. Hence, the best course would be not to interfere with the discretion of the Courts and with the scheme of murder and culpable homicide as defined in the Indian Penal Code and as interpreted by Courts. The scheme is both logical and clear, and has been in operation for over a century without causing any serious difficulty.

#### TOPIC NUMBER 36

##### *Premeditation*

Premedita-  
tion.

706. Whenever the question of minimising the cases of penalty of death come up, a plausible test—premeditation—suggests itself to the mind. It seems natural to assume that if a murder is *premeditated*, the sentence of death would be justified, and otherwise it would not be. The test has, to some extent, been adopted in some States in America as a basis for the sentence of death in case of murder, either by itself or in conjunction with other elements. A typical example is the statute establishing degrees of murder, enacted in 1794 in Pennsylvania, under which all murders which shall be perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and *premeditated* killing, or which shall be committed in the perpetration of, or attempt to perpetrate,

<sup>1</sup> Cf. R. C. Report, page 174, paragraph 498, citing the view of the Home Office.

<sup>2</sup> Compare the criticisms in the R. C. Report, page 176, paragraph 504 of the categories given in the Criminal Justice Bill, 1948.

arson, rape, robbery or burglary, shall be deemed "murders of the first degree"<sup>1</sup> (attracting the death penalty).

707. This classification—deliberate and premeditated killing as a 'first degree murder'—has been adopted in certain other States of America, with or without variations<sup>2</sup>. Thus, in Massachusetts, "first degree murder" includes "murder committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty" or "in the commission or attempted commission of a crime or for example, France—murder committed with "premeditation or lying in wait" is punishable with death, instead of imprisonment for life<sup>3-4</sup>. Again, in some countries of Europe<sup>5-6</sup> which have abolished the death penalty, imprisonment for life may be awarded for certain forms of intentional homicide if the offender acted with *premeditation* or if he committed homicide in order to facilitate or conceal another crime, etc., while a lesser punishment is awarded in other cases. In England, in 1866, a Royal Commission was appointed to enquire into the provisions and operation of laws under which the punishment of death was inflicted, etc. That Commission recommended the division of murder into two degrees, on the model adopted in certain States in the United States, and suggested that the punishment of death should be retained for all murders *deliberately* committed with express malice aforethought, and for all murders committed in or with a view to perpetration etc. of certain felonies<sup>7-8</sup>.

708. Judicial decisions in the majority of the States in America, however, appear to have whittled down the meaning of "premeditation" in this context, so that, in substance, intention to kill is now sufficient to constitute murder in the first degree. Actual deliberation and long

1 The section is quoted in R.C. Report, page 168, paragraph 486.

2 About 27 States, including Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Iowa, Kansas, Maryland, Michigan, Missouri, North Carolina, Rhode Island, etc., See Perkins, Criminal Law (1957), page 72 and foot-note 38.

3 See R. C. Report, page 182, paragraphs 518, 519.

4 The French provision is quoted in R. C. Report, page 443, paragraph 21 (c).

5 See summary in R. C. Report, page 180, paragraph 513.

6 See the provisions in Norway, Sweden, and Switzerland, cited in R.C. Report, page 444.

7 See R. C. Report, page 169, paragraph 488.

8 For details of this proposal, see R. C. Report, pages 467 to 471 (Appendix 12—Degrees of murder). The draft of the Royal Commission of 1866 is at page 470, *ibid.*

premeditation are unnecessary, so long as there was time (however short) for these processes to occur<sup>1-2</sup>.

709. It will be sufficient to refer to the discussion in what is regarded as the leading case on the Pennsylvania statute<sup>3</sup>.

“The intention to kill is the essence of the offence. Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence of a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The Law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in the evidence.”

710. Sometimes a different view is taken<sup>4</sup>, namely, a killing is deliberate and premeditated, only if it results from real and substantial reflection. Even according to this view, it is not necessary that deliberation and pre-meditation must take place after the formation of the intent to kill. If the offender has pondered over the possibility of taking another's life and has reflected upon this matter coolly and fully before a decision is reached, he may truly be said to have killed “wilfully, deliberately and premeditatedly”, though, after his intent to kill was fully formed, he carried his intention into effect as rapidly as thought can be translated into action<sup>5</sup>. What is required is that the homicide must be intentional, that the intent to kill must be formed by a mind that is cool rather than one that is unreasonably inflamed or excited, and that the thought of taking the victim's life must have been reflected upon for some appreciable length of time before it was carried into effect, although not necessarily after the fatal decision was made<sup>6</sup>.

711. It now remains to be considered whether “premeditation” would be a satisfactory test for the award of the highest penalty. There seem to be theoretical as well as

<sup>1</sup> See Keedy, “History of the Pennsylvania Statute creating Degrees of Murder”, 97 University of Pennsylvania Law Review 759.

<sup>2</sup> See also cases and literature cited in Paulsen and Kadish, Criminal Law and its processes (1962), pages 558, 561.

<sup>3</sup> *Commonwealth v. Drum* (1868) 58 Pa. 9.

<sup>4</sup> See the cases cited in Perkins, Criminal Law (1957), page 75, footnotes 62 to 65.

<sup>5</sup> *People v. Russo*, 133 Cal. App. 468, 24 P. 2d 580 (1933); Perkins Criminal Law (1957), page 76.

<sup>6</sup> Cf. Perkins, Criminal Law (1957), page 76.



practical objections of considerable weight to the adoption of such a test.

712. Premeditation and deliberation as tests for imposing the sentence of death have been regarded as unsatisfactory in America<sup>1</sup>. The trend in several European countries<sup>2</sup> is towards discarding them. Difficulties of interpretation, particularly in demarcating the respective areas of premeditation and intention, are likely to be created if they are adopted.

A criterion susceptible of such diverse and conflicting interpretation ought not be made the basis for liability to suffer death.

713. Moreover, these criteria may be inadequate because, as was pointed out in the Home Office Memorandum to the Royal Commission<sup>3</sup>, among the worst murders are some which are not premeditated, such as those committed in connection with rape, or by criminals who are interrupted in the commission of some serious offence and use violence without premeditation but with a reckless disregard of the consequences to human life.

714. It should also be pointed out that many killings, though premeditated, may deserve a sympathetic treatment—e.g., “mercy killings”.

As has been observed by Stephen<sup>4</sup>, if A, passing along the road, sees a boy sitting on a bridge over a deep river, and out of mere wanton *barbarity*, pushes the boy into the river and drowns him, there is no premeditation, and yet A's act represents more diabolical cruelty and ferocity than that involved in premeditated murders. The very fact of an internal long struggle may be evidence that the homicidal impulse was an aberration—far more the product of extraordinary circumstances than the true reflection of the normal self of the offender, while a sudden killing may be the direct expression of a very vicious nature<sup>5-6</sup>.

715. We may also quote here the opinion of Lord Chief Justice Parker<sup>7</sup> on the question of premeditation. He said,

<sup>1</sup> Cf. Cardozo's criticism quoted in R. C. Report, page 186, paragraph 523.

<sup>2</sup> Cf. R. C. Report, page 81, paragraph 514.

<sup>3</sup> R. C. Report, page 174, paragraph 500.

<sup>4</sup> Stephen, *History of the Criminal Law of England* (1883), Vol. 3, page 94.

<sup>5</sup> Cf. See the views of Professor Wechsler, stated in R. C. Report, page 175, paragraph 500.

<sup>6</sup> See also Model Penal Code (A.L.I.), May, 1959, Tentative Draft No. 9, Comments to article 201.6, page 70.

<sup>7</sup> Lord Parker, quoted by Mr. J. A. Hanan in *New Zealand Parliamentary Debates*. (*Debates on the Crimes Bill*, 3rd October, 1961. Col. 2685).

"When does a murder reach the stage of being planned? In 5 minutes? A few hours? A day?"

It may also be noted, that premeditation *by itself* is not treated by the Courts in India as a ground for imposing the higher penalty<sup>1</sup>.

716. In view of all these difficulties, and having regard to the fact that there is no mandatory sentence of death even now for the offence of murder in India, we do not recommend adoption of *the test of premeditation*, as a criterion for the sentence of death for murder.

#### TOPIC NO. 37

##### *Scheme in the Burmese Code*

717. While on the question of dividing murders into categories, we may discuss the scheme adopted in the Burmese Penal Code. Burma has made certain amendments in the sections of the Indian Penal Code (known in Burma as the Burmese Penal Code) relating to culpable homicide and murder. The effect of these changes, stated shortly<sup>2</sup>, is, that first, where death is caused by an act done with the intention of causing such bodily injury as is *likely* to cause death, it is only culpable homicide. The offender's knowledge of the peculiar infirmity of the victim does not necessarily make it murder, but is a relevant factor in proving the nature of his *intention*. Secondly, in the clause relating to causing death by an act done with the intention of causing bodily injury *sufficient* in the ordinary course of nature to cause death, the words "in fact" have been inserted before the words "is sufficient", apparently to make it clear that it is not the *subjective* knowledge of the offender which is relevant, but, objectively, the nature of the injury<sup>3</sup>. Thirdly, causing death by an act done with the *knowledge* that the offence is likely to cause death ceases to be culpable homicide, and ceases to be murder also, and merely becomes an offence punishable as "causing death by negligence" under section 304A, the only special provision being that in such a case the imprisonment may extend to 10 years.

Scheme in  
the Burmese  
Code.

718. The scope of murder is, thus, considerably limited in Burma, in contrast with the Indian Penal Code. Cases which would fall in India under the second clause of section 300 of the Indian Penal Code are *vitaly affected*; cases which fall under the third clause of section 300 are subjected to a *verbal* change; and cases which fall under the fourth clause of section 300 totally fall outside the category of murder.

<sup>1</sup> Cf. Spencer J. in *In re Bhyri Rajayyo*, A.I.R. 1921 Mad. 303.

<sup>2</sup> Detail of Burmese Code are given in the comparative material.

<sup>3</sup> Cf. *Virsa Singh*, (1958) S.C.R. 1495 ; A.I.R. 1958 S. C. 465, 467.

719. Having made these substantive changes in the law of murder, the Burmese Code further divides murders into two classes, for the purpose of *punishment*. If murder is committed by a person being under sentence of transportation for life or with *premeditation*, or in the course of committing any offence punishable under the Penal Code with imprisonment up to 7 years, the offender *shall* be punishable with *death*, and shall also be liable to fine. In other cases, the punishment will be transportation for life or rigorous imprisonment up to 10 years, and also fine. (Punishment for culpable homicide which does not amount to murder has also been simplified, but we are not here concerned with that).

720. To summarise, in Burma the scheme is—

- (i) to concentrate on *intention*;
- (ii) to provide that even intentional acts punishable under "murder" are capital only if there is *premeditation* or if the act is committed for committing an offence punishable up to 7 years' imprisonment; and
- (iii) in the case of such aggravated murders, to provide a *mandatory* punishment of death.

721. We are unable to *recommend the acceptance* of these changes. The tests of *intention and premeditation* are not satisfactory as tests for the sentence of death<sup>1</sup>; nor can the test of association with another serious *crime* be regarded as a satisfactory one by itself<sup>2</sup>. It would leave out many cases which really deserve the sentence of death.

#### TOPIC No. 38

##### *Intent to kill*

722. We may also consider whether the criterion of "intent to kill" (which has been suggested by some) can be suitably adopted so as to reduce the number of murders in which the sentence of death would be imposed. This is a "natural and usual" approach<sup>3</sup>. And if it can be found to be acceptable on the merits, its adoption would be very easy so far as the Indian Penal Code is concerned, because section 300 of the Code, which defines murder, already puts it in a separate clause,—“if the act by which the death is caused is done *with the intention* of causing death.”.

Intent to  
kill

723. The test of "wilful murder" (apart from premeditated murder or deliberate murder) has been adopted (in substance) by some countries, which treat "wilful murder" as an aggravated form of murder, justifying the sentence of

<sup>1</sup> See separate discussion as to pre-meditation and intention, paragraphs 706—716 *supra* and 722—725 *infra*.

<sup>2</sup> See also discussion as to categories of murders, paragraphs 700—703 *supra*.

<sup>3</sup> Cf. R. C. Report, page 161, paragraph 470.

death (instead of imprisonment for life) or justifying the sentence of imprisonment for life for lesser imprisonment<sup>1</sup>.

724. We are afraid that the adoption of such a test might lead to serious anomalies. It would remove the protection afforded by the sentence of death in quite a large number of cases.

A person who, by means of explosives, derails a passenger train in reckless disregard of the probable consequences of his act, thereby causing death of numerous passengers, would be saved from the highest penalty, if the test of "intent to kill" is adopted.

We may, in this connection, refer to certain passages in the Royal Commission's Report<sup>2</sup> where this aspect of the matter has been dealt with—

*The Criterion of intent to kill*

470. The more radical proposals, on the other hand, are primarily designed, not to clarify the existing law or to amend it in minor respects, but to limit the scope of murder substantially. The natural and usual approach to redefinition of this sort is to attempt to confine murder to cases where there is intent to kill. If this is taken to mean an actual intent to cause death, we regard it as a defective and inadequate definition, whether it is considered from a logical point of view or as a means of distinguishing those heinous cases that deserve the punishment of death. The reasons why such a definition is unsatisfactory were clearly expounded in the Reports of two Commissions which gave very careful consideration to this question during the last century. In 1839 the Commissioners on the Criminal Law, in their Fourth Report, observed:—

"Again it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from wilfully doing an act of which death is the probable consequence. According to the well-established judicial rule, every one must be presumed to contemplate the probable consequence of his own act. Neither is there any difference between the direct intention to kill and the intention to do some great bodily harm short of death such case being within the immediate operation of the principle just adverted to, as no one can wilfully do great bodily harm without placing life in jeopardy."

<sup>1</sup> See R. C. Report, pages 437 and 438, paragraphs 14 and 15, and pages 433 and 434, paragraphs 3 and 4.

<sup>2</sup> R. C. Report, pages 161-162, paragraphs 470-471.

and later:

"It is the wilful exposure of life to peril that constitutes the crime."

Forty years later, the Report of the Criminal Code Bill Commission contained the following passage:

"The principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer if death ensue. For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not."

471. We find ourselves in entire agreement with the views expressed in these two Reports, which appear to us to be still valid. We should agree that there may not infrequently be cases where death results from an act intended only to cause grievous bodily harm or from an act done with reckless indifference whether such harm is caused, in which the execution of the capital sentence would not be justified, but the same will be true of cases where there was intent to kill. It is equally certain that so long as capital punishment is maintained there will be cases in each of these categories which call for the infliction of the death penalty, and that no definition can be satisfactory which is not based on a recognition that this is so."

725. Nor is there any injustice to the offender involved in the present law. The law still requires that he must have an intention to cause bodily injury of a certain description (or knowledge that the act is so imminently dangerous that it must in all probability cause death etc'.)

Conversely, if every case of intention to kill were to be treated as deserving death, injustice would result.

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<sup>1</sup> See section 300, Indian Penal Code, 2nd, 3rd and 4th clauses.

There may be an intent to kill, and yet other factors may reduce the moral culpability of the crime<sup>1</sup>, e.g., provocation though not "grave and sudden". The test of intent to kill cannot, therefore, be adopted.

## CHAPTER IX

### NORMAL SENTENCE

#### TOPIC No. 39(a)

#### Replies to Question No. 7

726. Question No. 7 in our Questionnaire was as follows:—

"7(a) Are you in favour of the view that the normal sentence for murder should be imprisonment for life, but in aggravating circumstances, the court may award the sentence of death?

(b) If so, what, in your opinion, should be the aggravating circumstances?"

727. Conflicting replies have been received to this question<sup>2</sup>. One group of replies suggests that imprisonment for life should be the normal sentence for murder. Another view is, that the normal sentence for murder should be death, and the lesser sentence should be awarded only in the case of extenuating circumstances. A third view is that the matter should be left to the discretion of the court.

There is no strong majority in favour of any of these various views, and opinion is sharply divided.

728. According to the first view, the normal sentence for murder should be imprisonment for life. This view has been expressed by a few High Court Judges<sup>3</sup>, a State Government<sup>4</sup>, some members of the Bar<sup>5,6</sup>, a Bar Council<sup>7</sup>, and several others.

729. That the normal punishment for murder should be imprisonment for life is also the view of a High Court

<sup>1</sup> Cf. R. C. Report, page 176, paragraph 502.

<sup>2</sup> Paragraph 726, *supra*.

<sup>3</sup> S. No. 147.

<sup>4</sup> S. No. 129.

<sup>5</sup> An eminent member of the Bar, S. No. 161.

<sup>6</sup> A Member of the Bar Council of Madras, S. No. 104.

<sup>7</sup> A Bar Council, S. No. 159

Judge<sup>1</sup>, of the Law Minister of a State<sup>2</sup>, a Member of Parliament<sup>3</sup>, some Members of State Legislatures<sup>4</sup> and several others<sup>5-6</sup>.

730. A High Court Judge<sup>7</sup> has stated that the normal punishment should be imprisonment for life, and that in aggravating circumstances the Court may award the sentence of death. The aggravating circumstances, in his opinion, are—Deliberate murders, evidencing moral turpitude and brutality.

731. Many replies suggesting that the normal sentence for murder should be imprisonment for life have been received from District and Session Judges<sup>8</sup>. One of these replies states<sup>9</sup> that actual judicial experience shows that the sentence of death is awarded in few cases in cases of murders, and hence there is no harm in providing that the normal sentence shall be imprisonment for life.

732. Certain other District and Session Judges<sup>10</sup> and Additional Sessions Judges<sup>11</sup> are in favour of making imprisonment for life the normal sentence for murder.

733. In the reply of a District and Sessions Judges<sup>12</sup>, it has been stated that imprisonment for life should be the normal sentence. The reply points out that after the amendment of section 367 of the Code on Criminal Procedure, 1898, in 1955, the sentence is to be determined on the facts of the case. The reply also states that the court must state its reasons for awarding the sentence of death, and advance the following reasons for this suggestion:—

(i) No court is bound to pass the maximum sentence, and the scheme of the Indian Penal Code also indicates that the maximum sentence should be awarded only in exceptional cases;

(ii) the presiding officer should be given a perfect chance of meeting cases of doubt or hardship;

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1 A High Court Judge, S. No. 230.

2 Law Minister of a State, S. No. 313.

3 A Member of Rajya Sabha, S. No. 245.

4 Members of State Legislatures, S. Nos. 225, 237, 241, 243, 248, 253 and 257.

5 An Inspector General of Prisons, S. No. 264.

6 A University Professor, S. No. 304.

7 A High Court Judge, under question 7 (a) and 7 (b) S.No. 316.

8 District and Sessions Judges, S. Nos. 330, 341, 353, 359, 376, 377, 378, 380, 381, 382, 383, 389, 390.

9 A District and Sessions Judge, S. No. 353.

10 S. No. 524.

11 S. No. 535.

12 Reply to questions 2(a) and 7(a), S. No. 553.

(iii) since the death sentence negatives reformation, the court must have adequate reasons for considering that the offender is not corrigible or that the reformatory method would do no good to him;

(iv) cogent reasons must appear on the record of the case to justify the extinction of human life;

(v) the court must show caution in exercising its discretion in awarding sentence in cases of vicarious constructive liability.

734. On the other hand, the opposite view states that the normal sentence for murder should be death, and the lesser sentence should be awarded only when there are extenuating circumstances. This view has been expressed by certain High Courts<sup>1</sup>, some High Court Judges<sup>2</sup>, a few State Governments and Administrations<sup>3</sup>, some Bar Associations, etc.<sup>4</sup> and a few officers<sup>5</sup>.

735. It is the view of the Chief Justice of a High Court<sup>6</sup>, that if capital sentence is to serve its primary purpose of acting as a good deterrent, the normal sentence should be the capital sentence, though the lesser sentence of imprisonment for life can be passed for adequate reasons as in the existing law.

736. That the normal punishment should be death, is also the view of several High Court Judges<sup>7</sup>. It is the view of a State Government<sup>8</sup>.

737. The view of a very senior Advocate of the Bombay High Court<sup>9</sup> is that the normal sentence on conviction of murder should be death, unless there are circumstances extenuating or palliating the offence. Aggravating as well as extenuating circumstances it is stated differ, and are peculiar to each case.

1 S. No. 140.

2 S. No. 97.

3 S. Nos. 182, 154, 164, 106.

4 Indian Federation of Women Lawyers ; Poona Bar Association. S. Nos. 121 and 125.

5 An Inspector-General of Police. A Home Secretary to State Government of Kerala ; and another Inspector-General of Police, S. Nos. 131 and 143.

6 Chief Justice of a High Court, S. No. 317.

7 A High Court Judge, S. No. 251 ; Two High Court Judges. S. No. 262.

8 A State Government, S. No. 311.

9 A very senior Advocate of the Bombay High Court, S. No. 318.



738. Some District and Sessions Judges have also expressed the view that death should be the normal punishment<sup>1</sup>.

739. Some Members of Parliament have expressed the view that death should be the normal punishment<sup>2</sup>. This is also the view of an Inspector-General of Police<sup>3</sup>.

740. The reply of the Judicial Section of the Indian Officers' Association of a State<sup>4</sup> states that the normal sentence should be death. "To put it the other way would imply an acceptance of the position that capital punishment should be abolished in effect, but at the same time, retaining it in the statute".

741. Several others have expressed the view that the normal punishment should be death. Amongst these are some District Bar Associations<sup>5</sup>.

742. One reply<sup>6</sup> adds that where the case is heard by a Division Bench and one of the Judges expresses a dissenting view as to the offence or the sentence, the appropriate lesser punishment should be awarded.

743. According to the third view, the matter should be left to the discretion of the court. This group comprises several categories, namely, those who belong to this group because they would like to emphasise the discretion of the court; those who take this view subject to their answers to other questions, (particularly questions 4 and 5); and those who content themselves by merely disagreeing with the suggestion made in the question.

744. Under this group fall replies received from certain High Courts<sup>7</sup>, some High Court Judges<sup>8</sup>, one State Law Commission<sup>9</sup>, certain State Governments<sup>10</sup>, certain Members of Parliament<sup>11</sup> and State Legislatures<sup>12</sup>, and a retired High Court Judge<sup>13</sup>.

1 District and Session Judges. S. Nos. 325, 334, 336, 339, 342, 347, 348, 370.

2 Member of Parliament : S. Nos. 232 and 255 Member of State Legislatures, S. No. 224.

3 An Inspector-General of Police, S. No. 263.

4 S. No. 562.

5 District Bar Associations, S. Nos. 220, 233 and 239

6 Indian Federation of Women Lawyers. S. No. 121.

7 S. Nos. 187 and 167.

8 S. Nos. 105, 130, 147 and 262.

9 A State Law Commission, S. No. 101.

10 A State Government, S. No. 143.

11 S. Nos. 207, 210 and 209.

12 S. No. 102.

13 A retired Judge of the High Court of Bombay, S. No. 95.

745. Several other replies<sup>1-2-3-4</sup> express the same view.

746. Many other replies are in favour of retaining the existing provisions, *i.e.*, the discretion of the court<sup>5</sup>. Replies which merely oppose the suggestion to provide that imprisonment for life shall be the normal sentence can be regarded as falling under this group.

747. Apart from them, several replies point out that it is unwise to interfere with the discretion of the court in the matter of sentence.

748. A helpful elucidation of this view is found in the reply of one High Court<sup>6</sup>, and we quote the relevant portion:—

“If the death sentence is to serve as a deterrent to the fullest extent that it is expected to, it will not be desirable to make it appear that the normal punishment for murder is imprisonment for life and death sentence will be awarded only in extreme cases. But we are of the view that Capital Punishment should be awarded only in extreme cases of murder. Murders committed after cool calculation or with a bad motive attended by excessive cruelty or bestiality are instances of such extreme cases.”

749. The reply of the Chief Justice of a High Court<sup>7</sup> expresses the view, that there should be no such thing as a normal sentence, whether the capital sentence or the lesser sentence of imprisonment for life. The reply makes four points—

- (i) the sentence is in the discretion of the court;
- (ii) the discretion being judicial reasons should be, and, as a matter of practice are, given for imposing one sentence or the other;
- (iii) the discretion should not be fettered in any way by prescribing any particular sentence as “normal”;
- (iv) prescribing the sentence of imprisonment for life as the normal sentence may result in diminution of the deterrent effect of the death sentence.

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<sup>1</sup> Law Minister of a State, S. No. 253.

<sup>2</sup> An Advocate General, S. No. 229.

<sup>3</sup> A Member of Parliament under questions 6 (a) and 7(a) S. No. 273.

<sup>4</sup> A Member of a State Legislature, S. No. 244.

<sup>5</sup> These are too numerous to be enumerated.

<sup>6</sup> Under reply to question 7. (A High Court), S. No. 167.

<sup>7</sup> Chief Justice of a High Court, S. No. 393.

750. Some of the replies which we have received under question 7(a) or question 7(b) imply that a "normal sentence" for murder exists even now. Thus, in the reply of a High Court Judge<sup>1</sup>, it has been stated that the "normal sentence" for the offence of murder is death sentence, and if there are extenuating circumstance then the lesser sentence may be awarded; existing provisions, it is stated, are sufficient, and no change is necessary.

751. In the reply of a State Government<sup>2</sup>, it has been simply stated that the existing provisions are sufficient.

752. A State Government<sup>3</sup> has pointed out, that the sentence must be left to the discretion of the Judge, because in a given situation whether the death sentence or the lesser punishment to be imposed, must be a matter for the discretion of the Judge who decides the case.

753. Another State Government<sup>4</sup> states as follows:—

"Although the extreme penalty is the normal penalty to be given, in practice it is given in very rare cases. The law and practice are so well-settled that it is unnecessary to make any change."

754. The reply of a Principal Judge of a City Civil Court and Sessions Judge<sup>5</sup> emphasises that both the punishments should be regarded as normal punishments, with a discretion left to the court to award such punishment as the circumstances of the case warrant.

755. The reply of a Judicial Officers' Association<sup>6</sup> states that it should be left to the Judge to decide whether capital sentence is to be passed or not. The reply adds that if one attempts to codify the law for imposing capital sentence for murder, and to enumerate the aggravating circumstances, then the Judges are bound to consider the aggravating circumstances as one of the grounds for awarding capital punishment. But, then, aggravating circumstances in relation to a particular murder depend upon the facts of a particular case. "So it is not proper to define what aggravating circumstances are. If you define it in any form in a particular case, it may appear in a different form and thereby it might prejudice the conclusion to be arrived at in a given case".

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1 S. No. 262, reply under questions 7 (a) and 7 (b).

2 S. No. 261, reply under questions 7 (a) and 7 (b).

3 S. No. 574.

4 S. No. 580.

5 Principal Judge of a City Civil Court and Sessions Judge S. No. 352.

6 An Association of Judicial Service Officers, S. No. 373.

756. The reply of another Judicial Officers' Association<sup>1</sup> is also opposed to any provision that the normal sentence should be imprisonment for life.

757. A District and Sessions Judge<sup>2</sup> has stated that there should be nothing like a "normal" sentence for murder. The facts of the particular case should decide what is the appropriate sentence.

758. The reply of another District and Sessions Judge<sup>3</sup> points out that there is a discretion in the court in awarding the punishment, and if imprisonment for life is made the normal sentence, it would whittle down the whole object of the present provisions and it would also do away with the object underlying capital punishment.

759. The reply of an Additional Sessions Judge<sup>4</sup> states that the existing law is the only provision to meet the ends of justice. The reply adds that Indian Judges are slow in awarding the death sentence because of their spiritual background, and that they do seek grounds for awarding the lesser punishment of imprisonment for life. The reply opposes the making of a provision that the imprisonment for life should be the normal sentence, because, in that case, a practice may set in the Sessions courts of awarding only the sentence of imprisonment for life.

760. The reply of an Assistant Judge<sup>5</sup>, while stating that at present the courts award the sentence of death in cases of deliberate murder, in cases where a murder is committed to facilitate the commission of some offence or to avoid arrest for an offence and for other heinous cases of murder, takes care to add, that it is not possible to define aggravating circumstances with any mathematical precision. What is an aggravating circumstance under one condition may not be so in other cases.

761. The reply of the majority of the Presidency Magistrates in a Presidency Town<sup>6</sup> has stated, that, considering the variety of human methods and motives for the commission of murders, it could be left to the court to consider what under the particular circumstance of each case is the proper sentence to award. It is possible that in the absence of any law laying down the aggravating circumstances under which the sentence should be death, the various judges trying murder cases might differ, and one

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1 Association of Judicial Service Officers, S. No. 374.

2 A District and Sessions Judge, S. No. 331.

3 A District and Sessions Judge, S. No. 444.

4 An Additional Sessions Judge, S. No. 367.

5 An Assistant Judge, S. No. 340.

6 S. No. 549.

judge may hold a particular set of circumstances to be aggravating, while another may not. But all the circumstances cannot be provided for by any law, and, therefore, no provision in the law enlisting those aggravating circumstances can be exhaustive.

Aggravating  
circumstances.

762. The latter part of question 7 of our Questionnaire dealt with what should be *aggravating circumstances*. This was intended for reply only by those who were of the view that the normal sentence for murder should be imprisonment for life, but in *aggravating circumstances*, the court may award the sentence of death. Therefore, those who were of a different view on that point, *i.e.*, either those who regarded *death* as the ordinary punishment, or those who were against any punishment being regarded as the normal punishment, naturally would not be concerned with this part.

763. The replies on this point may be said to fall under three groups. The first group comprises those who are of the view that aggravating circumstances need *not* be defined. This view has been expressed by one High Court<sup>1</sup>. One State Government<sup>2</sup> has, in its reply, emphasised that no exhaustive list of either extenuating or mitigating circumstances can be prepared.

764. It has been pointed out in the reply of an Advocate<sup>3</sup> who is also a Member of a State Legislature that it is not possible to give an arm-chair definition of aggravating circumstances.

765. Several District and Sessions Judges have stated that aggravating circumstances cannot be codified<sup>4</sup>.

766. It has also been pointed out by a District and Sessions Judge that aggravating circumstances cannot be reduced to mathematical calculations and that they will depend on the facts of each case. As long as the *ingenuity or brutality of a criminal* cannot be put forth in certain terms, those circumstances also cannot be mentioned<sup>5</sup>.

767. Another District and Sessions Judge<sup>6</sup> has stated that if one codifies the law for imposing the sentence of death for murder, the Judges are bound to consider the aggravating circumstances as one of the grounds for

1 A High Court, S. No. 140.

2 A State Government, S. No. 182 under question 7 (b). Its reply to question 7 (a) states that the normal sentence should be death.

3 S. No. 226.

4 S. Nos. 381, 383 and 399.

5 S. No. 416.

6 S. No. 440.

awarding the capital punishment. Aggravating circumstances, it is stated, depend on the facts of each case, and it is not proper to define them. If one defines them in any form in a particular case, they may appear in a different form, and this might prejudice the conclusion to be arrived at in a given case.

768. A City Civil Court and Sessions Judge<sup>1</sup> has also stated that extenuating circumstances cannot be formulated and must depend on the facts of each case.

769. The second group comprises those who, while suggesting certain aggravating circumstances, make it clear (in some form or other) that the situations which they suggest are merely *examples*, and not intended to be exhaustive. The majority of the replies seem to fall under this group. Thus, certain High Court Judges<sup>2</sup> have suggested, as examples of aggravating circumstances, murder by people standing in a fiduciary relationship (master and servant), murder involving family relationship, sabotage and espionage, and political murders.

770. A High Court Judge<sup>3</sup> has suggested that the normal rule relating to the discretion regarding sentence should be not to impose the sentence of death unless there are aggravating circumstances. Examples of aggravating circumstances given in his reply are—enormity of the crime, the offence being cold-blooded and premeditated accompanied with unnecessary brutality, etc., or a murder by a life convict under section 302, or a dacoity with murder under section 396.

771. Another High Court Judge<sup>4</sup> has (without a claim to exhaustiveness), stated that the following may be regarded as factors which may be taken into consideration in determining whether the offence of murder has been committed in aggravating circumstances to justify the sentence of death. He has, at the same time, pointed out that the presence of one single factor may not be sufficient, but all or some of them may justify the extreme punishment. The factors which he has mentioned are—

- (i) murder was unprovoked, deliberate and planned;
- (ii) murder was motivated by greed or other considerations;
- (iii) unfair advantage taken;

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<sup>1</sup> S. No. 434.

<sup>2</sup> S. No. 130, reply to question 7 (b). But the reply to question 7 (a) states that the discretion of the court should continue.

<sup>3</sup> S. No. 397, reply to question 7 (b) read with question 6.

<sup>4</sup> A High Court Judge, S. No. 230.

- (iv) murder for the second time after conviction;
- (v) unusual cruelty;
- (vi) murder by hardened criminals.

772. Another reply<sup>1</sup> gives, as examples, extreme cruelty or extreme depravity of mind, accompanied by extreme disregard of the interests of the society, premeditation, deliberate, cold-blooded, brutal murders and the like; the reply, however, makes it clear that this may be counter-balanced by extenuating circumstances.

773. One of the Bar Councils<sup>2-3</sup> states that the aggravating circumstances would be such as unnecessary cruelty, cold-blooded act, planning and pre-meditation.

774. A State Law Commission<sup>4</sup> has stated that aggravating circumstances need not be catalogued.

775. According to a District and Sessions Judge<sup>5</sup>, no enumeration of aggravating circumstances can be exhaustive, but if it is a case of cool and calculated murder or murder brought about by design or by creating a feeling of confidence in the victim, then capital punishment would be justified. Similarly, if a person is murdered merely for money or if it is done being blinded by a feeling of revenge, not with a laudable object, capital punishment may be justified.

776. According to a District and Sessions Judge in the State of Maharashtra<sup>6</sup>, aggravating circumstances depend upon the singular facts of each particular case, and cannot, therefore, be enumerated. The paramount consideration according to him should be the threat to the community if the lesser punishment were to be imposed. Wanton disregard for human life or a challenge to the Government or its officers, when resulting in death, may be punishable by imposing the death sentence.

777. Another District and Sessions Judge<sup>7</sup> has stated that some of the aggravating circumstances can be described as—

- (i) heinousness of the offence;
- (ii) no provocation;
- (iii) revolting nature of the crime;
- (iv) filthy lucre which motivated the crime.

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1 Law Secretary to a State Government, S. No. 251.

2 A Bar Council, S. No. 159.

3 To the same effect is the reply received from an eminent member of the Bar Council of India, S. No. 161.

4 A State Law Commission, S. No. 101.

5 S. No. 330.

6 S. No. 341.

7 S. No. 353.

778. We now come to the third group of replies, namely, those who state the aggravating circumstances *without stating* that what they suggest are mere examples. Various suggestions have been made. For example, aggravating circumstances have been listed as professional murderer<sup>1</sup>, malice, acquired habit, innate instinct and company in the commission of murder<sup>2</sup>, spoiling the chastity, pre-planned murder<sup>3</sup>, motive of gain and advantage, cruelty and like conditions<sup>4</sup>, and danger of further revengeful action<sup>5</sup>.

779. In the view of a distinguished Member of the Rajya Sabha<sup>6</sup>, the normal sentence for murder should be imprisonment for life and the sentence of death may be awarded for aggravating circumstances. Aggravating circumstances would be cold-blooded murder, but the reply points out that very specialised opinion will have to be sought before coming to any conclusion that the circumstances have been so aggravating that capital punishment has been called for. The reply also emphasises that the judiciary should fully consult experts in the medical and sociological field to find that physical, mental and emotional imbalance in a murderer before the law could decide the course of maximum action, namely, the capital punishment.

780. According to the reply of Law Minister of a State<sup>7</sup>, the normal sentence should be imprisonment for life, and the aggravating circumstances should be—

- (i) deliberate murders;
- (ii) use of lethal weapons;
- (iii) wanton cruelty and malignity;
- (iv) treachery;
- (v) nature of injury;
- (vi) motive;
- (vii) murder against public servant in discharge of duty; and
- (viii) murder in course of jail breaking.

781. In the reply of the Law Minister of another State<sup>8</sup>, it has been stated that, generally speaking, the aggravating

1 S. No. 119.

2 S. No. 122.

3 A Pleader, Madras, S. No. 109.

4 A Member, Bar Council of Madras, S. No. 102.

5 An Inspector-General of Prisons, S. No. 130.

6] S. No. 245.

7 S. No. 313.

8 S. No. 253.



circumstances should be extreme cruelty or extreme depravity of mind, accompanied by extreme disregard of the interest of the society, premeditation, deliberate cold-blooded and brutal murders and the like. The reply, however, takes care to point out that aggravating circumstances could be counter-balanced by extenuating circumstances.

782. In the reply of a Member of a State Legislative Council<sup>1</sup>, emphasis has been placed (while stating the aggravating circumstances) on pre-planned, malicious, daring, organised and brutal murders.

783. In the reply of a Member of a State Legislative Council<sup>2</sup>, pre-meditated murder, dacoity combined with murder and group murders are enumerated as aggravating circumstances.

784. In the reply of a Member of the State Legislature in the U.P.<sup>3</sup>, the aggravating circumstances are enumerated as—

- (i) pre-planned and calculated murder;
- (ii) murderer being a habitual criminal.

785. In the reply of an Inspector-General of Prisons<sup>4</sup>, it is stated that the aggravating circumstances should be pre-meditation or deliberation and the brutality accompanying the offence.

786. One reply<sup>5</sup>, though not strictly falling under question 7(b), states that *murder itself* is the highest aggravating circumstance, and that by being over-lenient we have encouraged a state of affairs whereunder private vengeance is fast replacing public retaliation. One murder, it is stated, is retaliated by another murder, and this vicious chain goes on, but in the courts it is not possible to prove that the particular murder is the result of a previous murder, and so on.

787. In the reply of a District and Sessions Judge<sup>6</sup> it has been stated that the aggravating circumstances should include the degree of cruelty accompanying the murder, deliberate, cold-blooded murders, and murders of innocent persons who have not given any cause or grievance.

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1 S. No. 257.

2 S. No. 248.

3 S. No. 243.

4 S. No. 264.

5 A District and Sessions Judge in Gujarat, S. No. 212.

6 S. No. 377.

788. According to the reply of another District and Sessions Judge<sup>1</sup>, aggravating circumstances would be murders committed as a result of conspiracy, those committed for facilitating dacoity, robbery or theft, and murders which are committed without any extenuating reasons and with cold calculation.

789. In the opinion of another District and Sessions Judge<sup>2</sup>, the aggravating circumstances are—when death is caused in furtherance of a felony of violence; when death is caused to a person who comes to make a lawful arrest; heinous murder specially when after the commission of murder the dead body is disposed of in such a manner as not to get a chance of decent burial or cremation.

#### TOPIC NUMBER 39(b)

*Whether normal sentence should be imprisonment for life*

790. We shall now consider the question whether imprisonment for life should be the normal sentence and the sentence of death should be imposed only when aggravating circumstances exist. For the reasons given below, *we are not in favour of such a change*. In the first place, the existing scheme has worked satisfactorily, and no serious criticism has been made thereof. In the second place, it will be difficult to define aggravating circumstances, and in the absence of such a definition, the provision would not serve a particularly useful purpose. If the sentence of death is to serve as a deterrent to the fullest extent, it will not be desirable to make it appear that the normal sentence for murder is imprisonment for life and death sentence is to be awarded only in extreme cases. Moreover, an enumeration or illustration of "aggravating circumstances" will be open to the same criticism that the division of murders into categories is subject to<sup>3</sup>.

Whether normal sentence should be imprisonment for life.

#### TOPIC NUMBER 40

*Whether normal sentence should be death*

791. The other alternative, namely, whether a provision should be inserted to the effect that the normal sentence for murder shall be death, may now be considered. Some of the replies received to question 7 have suggested the insertion of such a provision<sup>4</sup>.

Whether normal sentence should be death.

<sup>1</sup> S. No. 380.

<sup>2</sup> S. No. 445, reply to questions 7 (a) and 7 (b).

<sup>3</sup> See discussion relating to categories of murder, paragraphs 704—705, *supra*.

<sup>4</sup> Replies to Question 7 have been summarised separately. See paragraphs 727—761, *supra*.

792. There are certain objections to the adoption of this course. In the first place, it would not be in accord with the change made in section 367(5), Code of Criminal Procedure in 1955. Section 367(5) of the Code of Criminal Procedure, as it stood before the amendment of 1955, required the court to give reasons for imposing the lesser sentence. Though that sub-section did not say in so many words that the normal sentence for a capital offence shall be death, yet many courts had interpreted it as having that effect<sup>1</sup>. That provision was deleted in 1955, and it would now require strong grounds to support a decision to insert the suggested provision. Secondly, it would constitute a fetter on the discretion of the court, and we may note that a large number of replies received to question 4 of the Questionnaire are in favour of retaining the discretion. Thirdly, there appears to be some force in the argument, that the highest penalty of the law should not be imposed as a *matter of course*. Fourthly, if such a provision is inserted, difficulties may arise where there are extenuating circumstances.

793. We are not, therefore, inclined to recommend any such change in the law.

794. There is, we find, a conflict of decisions as to how far death is the normal sentence even after the amendment of section 367(5) of the Code of Criminal Procedure in 1955. In a recent Bombay case<sup>2</sup>, the High Court considered in detail the effect of the amendment of section 367(5), Criminal Procedure Code in 1955. The High Court took the view that the amendment did not affect the question regarding death sentence. In its view, in regard to the exercise of the discretion, even section 367(5), as it stood before the amendment, did not offer any guidance, and therefore the deletion of that portion of the section could not affect the exercise of discretion. "A discretion has to be exercised judicially. It must also appear that it is so exercised. This can be done if reasons for the exercise of the discretion are given in the order given in exercising the discretion. Whether the statute requires it or not, reasons have to be given. The section could, therefore, have no relevance on the decision itself."

795. The court stated, that the view taken by the Supreme Court, namely, that unless there are extenuating circumstances, the normal punishment for murder should be death, would prevail in spite of the amendment of 1955 in section 367(5) (even though the Supreme Court case related to an offence before the amendment).

<sup>1</sup> See Analysis of case-law, Cases No. 3, 40, 61, 64, 65, 66, 80, 84.

<sup>2</sup> *State of Maharashtra v. Gourishankar*, (1966) 68 Bom. Law Reporter 236 : A.I.R. 1966 Bom. 179.

<sup>3</sup> *V. Thevar v. State of Madras*, A.I.R. 1957 S.C. 614.

796. The court cited certain Bombay decisions before the 1955 Amendment where the view was taken that for murder the normal sentence is death<sup>1-2</sup>. It did not accept the argument of the counsel for the accused that the amendment of 1955 was intended to change the old position that death is the normal sentence for a capital offence. It agreed with the decisions of the Allahabad<sup>3</sup> and Madras<sup>4</sup> High Courts on the point. In the Allahabad case, the view was taken that the amendment of section 367 did not affect "the law regulating punishment under the Penal Code" and that the amendment related to the 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 in preferring the lesser punishment. A court may not record reasons for not passing the death sentence, but if it awards life imprisonment for a *cold-blooded and revolting murder*, the absence of reasons will not save its preference from being unjudicial.

797. In the Madras case, the Sessions Judge had not given any reason for imposing the lesser sentence. The High Court did not interfere with the sentence, as there was no application for enhancement. But it observed that the case was one in which the extreme penalty of the law definitely appeared to be called for.

798. The Bombay High Court's attention does not appear to have been drawn to an Andhra Pradesh case<sup>5</sup>, holding that, after the amendment of 1955, the theory that death is the normal sentence for capital offence does not hold good.

799. The conflicting views as to whether, after the amendment of section 367(5), Criminal Procedure Code in 1955, death sentence is the "normal sentence", are further illustrated by the case-law discussed in the under-mentioned decision<sup>6</sup>. The provision which we propose<sup>7</sup> will, it is hoped, settle this controversy also, as we are recommending that reasons must be given in either case—and that will re-emphasise that the sentence is entirely in the discretion of the court.

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<sup>1</sup> *State v. Airarsing*, A.I.R. 1956 Bom. 231.

<sup>2</sup> *State v. Pandurang*, A.I.R. 1956 Bom. 711, 714.

<sup>3</sup> *Ram Singh v. State*, A.I.R. 1960 All. 748.

<sup>4</sup> *In re Veluchami*, A.I.R. 1965 Mad. 48.

<sup>5</sup> *Amalla Koleswar Rao, in re.* A.I.R. 1963 A.P. 240.

<sup>6</sup> *Rajnikant v. State*, A.I.R. 1967 Goa 21 (F. B). paragraph 22, and paragraphs 46—52.

<sup>7</sup> See amendment proposed to section 367(5) and discussion regarding question 8.

CHAPTER X  
REASONS FOR SENTENCE

TOPIC NUMBER 41

*Replies to Question No. 8*

800. Question 8 in our Questionnaire was as follows:-- Question 8.

"Should there be a provision in the law requiring the court to state its reasons for imposing a sentence of death or the lesser punishment of imprisonment for life?"

801. The replies received on this question may be said replies to  
Question 8. to fall under four groups. First, those which take the view that a provision should be inserted requiring the court to state its reasons for imposing *either* of the two sentences; secondly, those which express the view that reasons should be given only where *death* sentence is imposed; thirdly, those which express the view that reasons should be given only when the *lesser* sentence is awarded; and, fourthly, those which maintain that reasons need *not* be given in either case.

Perhaps the largest number of replies fall under the first group, and suggest that there should be a *provision in the law requiring the court to state reasons* for imposing the sentence of death or imprisonment for life. This view is shared by certain State Governments<sup>1</sup>, Bar Councils<sup>2</sup>, High Courts<sup>3</sup>, some Members of Parliament or State Legislatures<sup>4</sup>, one retired High Court Judge<sup>5</sup>, several officers<sup>6</sup>, certain Associations<sup>7</sup> and several members of the Bar and other gentlemen<sup>8</sup>.

802. In the reply of a State Government<sup>9</sup>, it has been stated that reasons are normally given in both cases, but that it would be desirable to insert a provision that the Judge should give the reasons for the sentence which he

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<sup>1</sup> A State Government, and Government of a Union Territory. See also reply of a Home Secretary, S. Nos. 154, 164 and 131.

<sup>2</sup> Two Bar Councils, S. Nos. 116 and 159.

<sup>3</sup> A High Court, S. No. 187.

<sup>4</sup> A Dy. Minister in the Union, S. No. 210 ; a member, Rajya Sabha S. No. 207 ; a Revenue Minister of a State, S. No. 216 ; an M.L.A., Madhya Pradesh, S. No. 213.

<sup>5</sup> A retired Judge, High Court of Bombay, S. No. 95.

<sup>6</sup> Law Secretary to a State Government, S. No. 162 ; an Inspector General of Prisons, S. No. 131 ; an Inspector-General of Police, S. No. 131 ; an Inspector-General of Prisons, S. No. 143.

<sup>7</sup> The Indian Federation of Women Lawyers, Bombay, S. No. 121.

<sup>8</sup> S. No. 122, an eminent Advocate through the Bar Council India of S. No. 161 ; an Advocate of the Original Side (Bombay), S. No. 921 a Barrister of Calcutta, S. No. 150 ; a Pleader, Saharanpur, S. Nos. 151 and 126.

<sup>9</sup> S. No. 242.

awards, whatever be the sentence. According to another State Government<sup>1</sup>, the court ordinarily gives reasons, but, there is no objection to a provision as suggested.

One State Government<sup>2</sup>, while not stating that a statutory provision is needed, has emphasized that when the matter is left to the judges it means that it must be judicially determined, based on reasons and on the facts of the case. This is especially so when the decision is subject to appeal.

Another State Government<sup>3</sup> is in favour of a provision requiring reasons in both cases.

803. One of the High Courts<sup>4</sup> has stated that in view of the fact that the discretion is to be vested in the court, it would be *desirable* that reasons for awarding or not awarding the death penalty should be stated, so that the higher court can examine whether the discretion has been properly exercised; at the same time, the High Court states, it is not necessary to make any specific *provision* in the matter, as it is well-known to courts exercising discretion in appealable cases that they should give reasons as to why the discretion has been exercised one way or the other.

804. A High Court Judge<sup>5</sup>, while stating that the normal sentence for murder should be death, but in mitigating circumstances the court may award the lesser sentence, has expressed in these words his opinion as to the need for a provision requiring reasons to be given for both the sentence of death and the sentence of imprisonment for life. "In my opinion, there should be a provision in the law requiring the court to state its reasons for imposing the sentence of death or the lesser punishment of imprisonment for life in any case in which it has a discretion to do so, so that the court of appeal or the higher authorities can consider the reasons of the learned Judge in deciding to pass the particular sentence that he has done".

805. According to the Law Minister of a State<sup>6</sup>, the law should provide that the court should record adequate reasons for awarding any sentence whatsoever; that is very necessary and would, to a large extent, prevent miscarriage of justice.

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1 S. No. 361.

2 S. No. 574.

3 S. No. 580.

4 A High Court, S. No. 167.

5 S. No. 396, in reply to questions 7(a) and 8.

6 S. No. 253.

The Law Minister of another State is also in favour of such a provision<sup>1</sup>. Several High Court Judges are in favour of such a provision<sup>2</sup>.

806. It is also the view of a distinguished Member of the Rajya Sabha<sup>3</sup>, and of several Members of State Legislatures<sup>4</sup>, that reasons should be required to be given in both cases.

807. According to a Judicial Officers' Association<sup>5</sup>, there should be a provision in the law requiring the court to state its reasons for imposing either sentence.

808. In the reply of several District and Sessions Judges<sup>6</sup>, a provision requiring reasons for either sentence is favoured on the ground that this would furnish material to the Appellate Court to consider the reasons.

809. According to a District and Sessions Judge in the State of Maharashtra<sup>7</sup>, if the Judge is made to give reasons for the particular sentence which he wished to impose, there would be less chances of the imposing of the sentence being based on caprice, and the Appellate Court will have proper material to assess whether the reasons are in accordance with the principles or not.

In the reply of a Judicial Officer<sup>8</sup>, it has been pointed out that a judgment is an indivisible whole, and when the judge convicts or acquits, he rivets his eye on every circumstance. A plea for requiring reasons is nothing better than an insistence upon the essential requirements of a judgment.

810. It may be stated here that those who belong to the first group have advanced various arguments in support of a provision requiring statement of reasons. It is stated that such a provision will enable the Appellate Court, when reviewing the quantum of punishment, to appreciate the correctness of the punishment<sup>9</sup>. It is also stated that it will show that justice is done on the basis of satisfactory evidence and logic and reasonable conclusions<sup>10</sup>. One reply<sup>11</sup> points out, that it would be guide to the concerned authorities in dealing with petitions for mercy.

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1 S. No. 313.

2 S. Nos. 251, 252 and 316.

3 S. No. 245.

4 S. Nos. 243, 244, 248 and 249.

5 S. No. 374.

6 S. Nos. 387 and 437.

7 No. 346.

8 S. No. 472.

9 An Inspector-General of Police, S. No. 131.

10 S. No. 118.

11 A retired Judge of the Bombay High Court, S. No. 95.

811. The second group comprises those who take the view that reasons should be given only where the sentence of death is imposed. This view is expressed by a State Government<sup>1</sup>, several High Court Judges<sup>2</sup>, some Members of State Legislatures<sup>3</sup>, a State Law Commission<sup>4</sup> (which has suggested that section 367(5) of the Code of Criminal Procedure 1898 should be amended accordingly); a Judicial Officers' Association, some Judges of City Civil Courts<sup>5</sup>, District and Session Judges<sup>7</sup>, a Bar Association<sup>8</sup>, a Bar Council<sup>9</sup>, some Members of the Bar<sup>10</sup> and others<sup>11-12</sup>.

812. The argument advanced in support of this view<sup>13</sup> is, that a provision, requiring statement of reasons for imposing death sentence is necessary to ensure that the courts do not impose the extreme penalty arbitrarily without a consideration of the extenuating circumstances mitigating the offence.

813. The third group comprises replies which take the view that reasons should be given where imprisonment for life is awarded. Thus, one reply has stated that, to the average man, the judiciary is next to God, and judgments of courts carry respect, honour and dignity, and that while imposing the death sentence reasons need not be given, but reasons should be given for the lesser punishment<sup>14</sup>.

The Chief Justice of a High Court has suggested<sup>15</sup> that old section 367(5) of the Code of Criminal Procedure, 1898, should be restored.

Certain High Court Judges<sup>16</sup> have stated that, as a rule, capital punishment should be awarded unless the Judge, in his discretion, for reasons to be recorded, comes to the conclusion that it is a fit case where the death sentence should not be awarded. To this third group belong certain

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- 1 S. No. 129.
  - 2 S. Nos. 197, 230, 262 and 397.
  - 3 S. Nos. 221, 225 and 226.
  - 4 S. No. 101.
  - 5 S. No. 373.
  - 6 S. Nos. 379, 380, 381 and 434.
  - 7 S. Nos. 353, 383, 399, 416, 440 and 420.
  - 8 S. No. 426.
  - 9 S. No. 115.
  - 10 S. No. 104.
  - 11 S. No. 117.
  - 12 S. No. 304.
  - 13 A State Government. S. No. 129.
  - 14 S. No. 127.
  - 15 S. No. 316.
  16. Two high Court Judges., S. No. 154



other High Court Judges<sup>1</sup>, a few State Governments<sup>2</sup>, and Administrations<sup>3</sup>, and some Bar Associations<sup>4</sup>, and certain officers<sup>5</sup>.

814. One State Government<sup>6</sup> has stated that such a provision (for giving reasons when awarding the lesser punishment) will exclude the possibility of a Judge acting arbitrarily in the matter of imposition of sentence in any particular case.

Several District and Sessions Judges<sup>7</sup> and others<sup>8</sup> are of the view that reasons for imposing the lenient sentence should be given.

815. The fourth and last group comprises those replies which take the view that there is no necessity for requiring reasons to be stated in either case. One High Court<sup>9</sup>, one State Government<sup>10</sup>, a Member of a State Legislature<sup>11</sup>, and others<sup>12-13</sup> are of this view.

816. According to the Chief Justice of a High Court<sup>14</sup>, the question of giving reasons for a particular sentence would arise only if that sentence is regarded as not the "normal" sentence. According to him, there should be no such thing as a "normal" sentence for murder. The sentence is in the discretion of the court. It would not be proper for the law to select any particular sentence for the purpose of prescribing that reasons should be given for imposing it.

Some High Court Judges have stated that no specific provision is necessary<sup>15</sup>.

817. It has been stated by the Home Minister of a State<sup>16</sup> that it would not be advisable to make the law rigid in the manner suggested. The reply of an Advocate General<sup>17</sup> states that no special rule need be enacted for death sentence. Reasons, it is stated, must be given for awarding any sentence.

1 S. Nos. 97, 236 and 394.

2 A State Government, S. No. 182.

3 Administration of a Union Territory, S. No. 106.

4 A District Bar Association, S. No. 125.

5 An Inspector General of Police, S. No. 143.

6 Reply of a State Government, S. No. 182. under question 8.

7 S. No. 325 ; S. No. 335 ; S. No. 336 ; S. No. 348 ; S. No. 349 ; S. No. 370 ; S. No. 431 ; S. No. 444.

8 An Inspector-General of Prisons, S. No. 264.

9 A High Court, S. No. 140.

10 A State Government, S. No. 143.

11 An M.L.A., Lucknow, S. No. 102.

12 A retired District and Sessions Judge, Nagpur, S. No. 139.

13 A District Bar Association, S. No. 218.

14 S. No. 393, reply to questions 7(a) and 8.

15 S. No. 262.

16 S. No. 258.

17 S. No. 229.

818. A principle Judge<sup>1</sup> of a City Sessions Court is also of the view, that there is no need for a provision requiring reasons to be stated.

819. Some replies state, that courts invariably give reasons, but no separate provision is necessary<sup>2,3,4,5</sup>. Some District and Sessions Judges have expressed a view to the same effect<sup>6</sup>.

#### TOPIC NUMBER 42

#### *Conclusion regarding necessity of provision requiring reasons for lesser sentence*

Provision  
requiring  
court to  
state reasons  
recommended.

820. The replies to question 8 show a considerable body of opinion which is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life<sup>7</sup>. Further, this would be a good safeguard to ensure that the lower courts examine the case elaborately from the point of view of sentence as from the point of view of guilt. It would also provide good material at the time when a recommendation for mercy is to be made by the court, or a petition for mercy is considered. Again, it would increase the confidence of the people in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death), or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life).

Recommendation.

821. Thus, there *appears to be sufficient justification for a provision requiring the court to state its reasons, whenever it awards either of the two sentence in a capital case. We recommend the insertion of such a provision in the Code of Criminal Procedure, 1898.*

822. It is possible to think of an alternative, namely, that the court should be required to state its reasons only when the sentence of *death* is passed. Or, the opposite alternative can be thought of, namely, the court should be required to give its reasons only where the sentence of *imprisonment for life* is passed. Neither of these alternatives can, however, be recommended. The adoption of

1 S. No. 352.

2 An Inspector-General of Police, S. No. 263

3 A District Magistrate, S. No. 286.

4 A State Government, S. No. 311.

5 Administration of a Union Territory, S. No. 303

6 District and Sessions Judges, S. No. 330 ; S. No. 339 ; S. No. 340 ; S. No. 347 ; S. No. 350 ; S. No. 366 ; S. No. 415 ; S. No. 442.

7 Paragraphs 801—882 *supra*.

either alternative would mean, or would be construed as meaning, a legislative determination that the sentence for which reasons are to be given is to be the exception, and the other sentence is to be the rule. Further, the adoption of the second alternative would mean<sup>1</sup> the virtual restoration of section 367(5) of the Code of Criminal Procedure, 1898, as it stood before the Amendment of 1955.

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<sup>1</sup> See Paragraphs 791—799, *Supra*.

## CHAPTER XI

## EXEMPTION IN PARTICULAR CASES

## TOPIC NUMBER 43

## Replies to Question 9

Section 9 823. Question 9 in our Questionnaire was as follows:—

“Do you consider that even if the sentence of death is retained certain classes of persons should not be punished with death, e.g., children below a particular age, women, etc? What classes of persons should, in your opinion, be excluded from the sentence of death?”

Replies to Question 9. 824. The replies received on this question<sup>1</sup> mostly express views about granting exemptions in respect of—

- (i) children;
- (ii) pregnant women;
- (iii) women generally;
- (iv) old persons;
- (v) diminished responsibility, and
- (vi) others.

825. It will be convenient to deal with each category separately. But, before dealing with these categories, it would be useful to point out that there are certain replies which state that no statutory provision is necessary and that the matter should be left to the discretion of the Court<sup>2-13</sup>.

826. A State Government<sup>14</sup> is of the view that women and children cannot be excluded *altogether* from the death penalty, as it is difficult to conceive of any extenuating circumstances merely because of non-age or sex.

<sup>1</sup> Paragraph 823, *supra*.

<sup>2</sup> A High Court, S. No. 167.

<sup>3</sup> A High Court Judge, S. No. 97.

<sup>4</sup> A State Government, S. No. A 182.

<sup>5</sup> A State Government, S. No. 143.

<sup>6</sup> A Member, Madras Bar Council, S. No. 104.

<sup>7</sup> A retired Judge of the Bombay High Court, S. No. 95.

<sup>8</sup> An Advocate, (Original Side) Bombay, S. No. 92.

<sup>9</sup> A Member of the Rajya Sabha, S. No. 207.

<sup>10</sup> A Member of the Rajya Sabha, S. No. 209.

<sup>11</sup> Revenue Minister of a State, S. No. 216.

<sup>12</sup> An M.L.A., Lucknow, S. No. 102.

<sup>13</sup> Bharat Sewak Samaj, New Delhi, S. No. 145.

<sup>14</sup> S. No. 574.

Another State Government<sup>1</sup> has thus expressed its view:—

“The differential treatment of offenders who have committed similar offences punishable with death is already affected by courts or by Governments acting in pursuance of sections 401-402A of the Criminal Procedure Code and articles 72 and 161 of the Constitution of India. Since clemency where extenuation can be shown is more usual than not, it is not necessary to classify persons as liable to be sentenced to death and as not liable to be so sentenced.”

827. According to the view expressed by the Chief Justice of a High Court<sup>2</sup>, the matter should be left to the discretion of the courts because the age of the offender is always taken as a good ground for not passing the capital sentence, and (as regards women), women are not ordinarily sentenced to death except in certain cases of cold-blooded murders like murder by poisoning.

828. A High Court Judge<sup>3</sup> has stated that it is not desirable to exempt any particular classes of persons from the penalty of death, but the conventional standards regarding awarding of death sentence operate quite satisfactorily—for example, a pregnant woman or a child of immature or emotional age not being sentenced to death.

829. According to several High Court Judges<sup>4</sup> no exception is necessary, and no change is required in the present law.

830. According to the Administration of a Union territory<sup>5</sup>, discretion in the matter may be left to the courts.

831. A City Civil Court Judge in Bombay has stated that it will be highly dangerous to exclude women and children from death penalty, because intending criminals will then employ women and children to commit planned and calculated murders. The reply states that the employment of children in the transportation and possession of illicit liquor is common, particularly in the city of Bombay.

832. According to a District and Sessions Judge in the State of Maharashtra<sup>6</sup> no provision in law should be made for exempting particular classes of persons, because it would be unjust to lay down rules of law excluding certain

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1 S. No. 580.

2 S. No. 316.

3 S. No. 396.

4 S. No. 262.

5 S. No. 303.

6 S. No. 330.

classes of people from the operation of death sentence merely on account of their age and sex. It is stated that it is not possible for the Legislature or for the Legal Draftsman to envisage every possibility or contingency in the infinite complexity of human life.

833. Several District and Sessions Judges also think that a statutory exemption is not necessary<sup>1</sup>.

834. One District and Sessions Judge in the State of Maharashtra<sup>2</sup> has stated that the classification of murders should not be person-wise, but the sentence of death should be reserved for cases where the act is very brutal and highly repugnant to morals. The reply states that the courts do take into consideration the youth and sex of the offender, but it would not be a good public policy to provide by law, that no matter howsoever cold-blooded, pre-meditated and brutal the murder is, the offender would not be punished with death only because of his youth or her sex.

835. According to a Bar Association<sup>3</sup>, no exemption should be granted, because a murderer is a murderer whether a child or a woman, and the court should treat them alike.

836. Certain replies<sup>4</sup> express no views on the subject.

Children.

837. We may now take up the opinions expressed as to each category of persons proposed to be exempted. Coming, first, to children, we may note that a vast number of replies have favoured a provision for exempting children below a particular age from death penalty.

838. A State Law Commission<sup>5</sup> has suggested that a person who has not attained the age of 18 years should not be sentenced to death, except in case of a murder after he has been convicted of a murder previously or while undergoing a sentence of imprisonment for having committed a murder.

839. According to the Chief Justice of a High Court<sup>6</sup>, persons below the age of 21 may be excluded from the operation of the sentence of death.

840. According to a High Court Judge<sup>7</sup>, the death sentence should not be imposed on a person below 25.

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1 S. Nos. 382, 385, 387, 391, 416, 421, 431 and 436.

2 S. No. 420.

3 S. No. 220.

4 A High Court, S. No. 140.

5 A State Law Commission, S. No. 101.

6 S. No. 393.

7 S. No. 397.

841. A State Government<sup>1</sup> has favoured exemption of children below 21 years.

842. Exemption for children has been favoured in the reply of a Minister of a State Government<sup>2</sup> on the ground that the brain of a child is supposed to be immature. "He is unsophisticated. Even murder is committed without thinking of any consequences. So this is a state of innocence and, therefore, death sentence may be too harsh a punishment.

843. According to the Law Minister of another State<sup>3</sup>, persons under the age of majority should be exempt.

844. Some High Court Judges<sup>4</sup>, a High Court<sup>5</sup> and a State Government<sup>6</sup>, have replied that the death penalty should not be imposed on children below 18 years of age.

845. Several other persons and bodies have also favoured the grant of exemption to children, though the ages suggested differ. Certain replies suggest the age of 16<sup>7</sup>. Certain replies suggest the age of 18<sup>8</sup>. Certain replies suggest the age of 14<sup>9</sup>. Certain replies suggest the age of 12<sup>10</sup>.

846. According to some District and Sessions Judges<sup>11</sup>, persons below 21 should be exempt.

Many District and Sessions Judges<sup>12</sup> have suggested exemption for persons under 18.

847. The age of 20 has been suggested in certain replies<sup>13</sup>. One reply<sup>14</sup> suggests that a person under the age

1 S. No. 242.

2 S. No. 221.

3 S. No. 313.

4 High Court Judges, S. No. 147 ; S. No. 230 ; S. No. 316, reply to questions 5 and 9.

5 A High Court, S. No. 187.

6 A State Government, S. No. 154.

7 An Advocate-General, S. No. 143 ; A Bar Council, S. No. 132 ; A Home Secretary to State Government, S. No. 131 ; A District Bar Association, S. No. 125 ; An Inspector-General of Prisons, S. No. 166.

8 Bar Association of India, S. No. 183 ; Supreme Court Bar Association, S. No. 110.

9 A Bar Council, S. No. 159 ; An eminent Member of the Bar, through the Bar Council of India, S. No. 161 ; Indian Federation of Women Lawyers, Bombay, S. No. 121.

10 A State Government, S. No. 129 ; A Bar Council, S. No. 116.

11 S. Nos. 341, 375 and 386.

12 S. Nos. 351, 354, 362, 366, 388, 427, 437, 444 and 445.

13 An Advocate, through the Bar Council of India, S. No. 161.

14 A Member, Rajya Sabha, S. No. 206.

of 20 should not be sentenced even to life imprisonment. Some other replies<sup>1,2</sup> merely suggest that children should be exempted, but do not specify the age.

848. As pointed out already<sup>3</sup>, some of the replies to question 9 are opposed to any statutory provision relating to the grant of exemption for any class. A few important points may be stated. Thus, a State Government<sup>4</sup> has pointed out that if any provision is made in the law (exempting particular categories of persons), a habitual criminal would employ the services of exempted persons to commit serious crimes.

849. One High Court<sup>5</sup>, while opposing the suggestion of grant of exemption to children, has stated that even in the absence of such exemption, the sentence of death is not likely to be passed for an offender below 18 except in rare or exceptional cases.

850. A senior Advocate of the High Court of Bombay<sup>6</sup> is of the opinion that while the death sentence should not ordinarily be awarded to persons under 18 except in extremely aggravated cases of murder, yet crimes of gross and brutal violence by young people have become extremely common, and any general exemption on the ground merely of age, regardless of other circumstances, might encourage this tendency to stab or shoot on the part of young persons for a slight cause.

851. A Bar Association<sup>7</sup> has stated that sex and youth need not, in all cases, be a ground for a lenient view, and has referred in this connection to a Madras case of cold-blooded murder of a boy aged 18 years for gain, committed by two boys between 16 and 17 years<sup>8</sup>.

Pregnant  
women.

852. The second category of persons which we may discuss is that of pregnant women. A large number of replies has suggested the exemption of such women from the death penalty. Such replies have been received from various sources, e.g., a State Government<sup>9</sup>, High Court

1 A Deputy Minister of the Union, S. No. 210.

2 An M.L.A. in Madhya Pradesh, S. No. 213.

3 See paragraphs 825 —835 *supra*.

4 A State Government, S. No. 182.

5 A High Court, S. No. 167.

6 S. No. 318.

7 S. No. 426.

8 The reference seems to be to the case of *Govindaswami*, A.I.R. 195 Mad. 372. (The sentence of death was not, however, awarded in that case owing to a difference of opinion between the two Judges of the Bench which heard the matter).

9 A State Government, S. No. 129.



Judges<sup>1</sup>, Bar Councils<sup>2</sup>, Members of State Legislature<sup>3</sup>, Bar Associations<sup>4</sup>, Sessions Judges<sup>5</sup>, and eminent members of the Bar<sup>6</sup>.

853. One State Government<sup>7</sup> has suggested that women with small children should be exempted.

854. Exemption of pregnant women from the death penalty has been suggested by certain Bar Association<sup>8</sup>, High Court Judges<sup>9</sup>, Law Minister of a State<sup>10</sup>, Government of a State<sup>11</sup> and some High Court Judges of the same State<sup>12</sup>.

855. The Judicial Section<sup>13</sup> of the Indian Officers' Association in a State favours exemption of pregnant women.

856. As against this, a State Government<sup>14</sup> and a State Law Commission<sup>15</sup> regard the existing provisions of section 382, Code of Criminal Procedure as enough. And, as already noted<sup>16</sup>, a general opposition to exempting any class of persons is also evidenced in certain replies.

857. Coming to the third category—*women generally*,—<sup>Women generally,</sup> we may note that several replies are in favour of exempting *women generally* from capital punishment. These replies have been received from various sources, e.g., some High Court Judges<sup>17</sup>, Officers<sup>18</sup>, Bar Councils<sup>19</sup>, individuals<sup>20</sup>, and members of the Bar<sup>21</sup>.

1 Some High Court Judges, S. Nos. 97 and 147.

2 A Bar Council, S. Nos. 116 and 159.

3 An M.L.A., Madhya Pradesh, S. No. 213.

4 The Bar Association of India, S. No. 183.

5 A District and Sessions Judge in Gujarat State S. No. 212.

6 An eminent member of the Bar through the Bar Council of India, No. 161.

7 A State Government, S. No. 154.

8 S. Nos. 223 and 227.

9 S. No. 230.

10 S. No. 253.

11 S. No. 261.

12 S. No. 262.

13 S. No. 562.

14 A State Government, S. No. 311.

15 A State Law Commission, S. No. 101.

16 See paragraphs 825 —835, *supra*.

17 Chief Justice of a High Court and one High Court Judge, S. No. 130. Two High Court Judges, S. Nos. 394 and 397.

18 An Inspector-General of Police and a Home Secretary to State Government, S. No. 131.

19 A Bar Council, S. No. 115.

20 S. No. 117.

21 An Advocate, through the Bar Council of India, S. No. 161.

858. Exemption for women has also been suggested by a Member of a State Legislative Assembly<sup>1</sup>, a Bar Association<sup>2</sup>, a State Government<sup>3</sup>, a Member of a State Legislature in U.P.<sup>4</sup>, Chief Minister of a State<sup>5</sup>, an Advocate who was formerly a Member of the Lok Sabha<sup>6</sup>, and by several District and Sessions Judges<sup>7</sup>.

859. A District and Sessions Judge in Maharashtra<sup>8</sup>, who favours exemption of women has, however, expressed the apprehension that it might be regarded as unconstitutional.

860. Certain District and Sessions Judges in other States are also in favour of exemption of women<sup>9</sup>.

861. But many of the replies on this point are in the other direction, and oppose the suggestion to exempt women. Women, it is stated<sup>10</sup>, should not be protected as a rule, because some of the most cold-blooded murders are committed by women out of jealousy, desire for gain or vengeance.

862. A High Court Judge<sup>11</sup> has stated, that there is no justification for making a distinction between men and women so far as crime and punishment are concerned, apart from the fact that such distinction would offend the Constitution. One officer<sup>12</sup> is opposed to any exemption being given to women, on the ground that they are partisans in murders, and stand on equal footing with men in the conduct of murders.

The reply of another High Court Judge<sup>13</sup> points out that the heinousness of a crime is not reduced merely by the fact that it is committed by a woman, and that there have been numerous cases in which women have been found guilty of murdering their husbands in cold-blood. Such women do not, it is stated, deserve any mercy. These replies are in addition to the general opposition to the grant of exemption to any class of persons evinced in many replies.

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1 S. No. 232.

2 S. No. 234.

3 S. No. 242.

4 S. No. 243 (excluding women convicted previously for moral turpitude).

5 S. No. 255.

6 S. No. 305.

7 S. Nos. 354, 358, 362, 371, 383, 386, 388, 389, 390, 525 and 551.

8 S. No. 366.

9 S. No. 433 A District and Sessions Judge in Orissa ; S. No. 445. A District and Sessions Judge in Bihar.

10 A retired District and Sessions Judge, Nagpur, S. No. 139.

11 A High Court Judge (Assam High Court), S. No. 97.

12 An Inspector-General of Prisons, S. No. 147.

13 A High Court Judge, S. No. 147.

863. A High Court Judge<sup>1</sup>, who has opposed the grant of exemption to women, has stated that women might get exemption either on the ground of age or general extenuating circumstances, but women as such should not be exempted. He has stated that the popular notion that women are less likely to commit murders is not based on experience. Actually, some of the most cruel and premeditated murders have been committed by women.

General exemption for women has been opposed by an Advocate General<sup>2</sup>.

A distinguished Member of the Rajya Sabha<sup>3</sup> has stated that there should be no difference made between the sexes in the case of capital punishment.

864. A senior Member of the Bombay Bar<sup>4</sup> has expressed this view, while opposing the exemption of women generally:—

“There is no ground at all for exemption of women. If anything, a female killer is more brutal and malignant than a male murderer. It is not merely in fiction and drama that female friends of the type of Lady Macbeth commit or abet diabolical murders. Besides, the present generation of militant women might resent such discrimination as derogatory.”

865. The Principal Judge of a City Civil Court and Sessions Judge in a Presidency Town<sup>5</sup> has stated that there should be no exclusion for women and children, as otherwise intending criminals will employ women or children to commit such crimes.

866. A Judicial Officers' Association<sup>6</sup> has stated that it has been their experience that women are equally ferocious as men, if not more, and that if they are exempt from death sentence, they might be made a tool in the hands of men to commit murders.

867. A District and Sessions Judges<sup>7</sup> has pointed out that in actual experience it is not impossible that cases may arise where a woman may be found to be deserving the capital punishment.

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1 S. No. 251.

2 S. No. 229.

3 S. No. 245.

4 S. No. 318.

5 S. No. 434.

6 S. No. 373.

7 S. No. 334.

868. A District and Sessions Judge in the State of Maharashtra<sup>1</sup> has expressed this view:—

“I would not include women in that category. I have strong opinion as regards women. Their crimes of murders sometimes are most heinous, motivated by immoral causes as distinguished from righteous indignation sometimes obtaining in the case of men, and at the same time they are able to swallow and conceal quietly the poison and after effects of their crimes. They should also be met in such circumstances with death sentence.”.

869. A District and Sessions Judge<sup>2</sup>, while stating that generally courts are not inclined to sentence women to death and it is only in serious types of cases that such a sentence is awarded, is opposed to any statutory exemption.

870. Several replies would like the exemption of a particular class of women, e.g., women with small children<sup>3</sup>, unmarried mothers killing the unwanted child<sup>4</sup>, and women committing murders under extreme and distressed conditions<sup>5</sup>.

Old persons.

871. We may now come to the question of exemption of old persons. This exemption has been suggested in a few replies. Various ages have been suggested, e.g., 80 years<sup>6</sup>, 70 years<sup>7</sup>, 60 years<sup>8</sup>, and 55 years<sup>9</sup>.

Diminished responsibility.

872. Taking up the defence of “diminished responsibility”, we note that its adoption has been suggested in a few replies as a ground of exclusion from the death sentence<sup>10,11</sup>. It may be noted that in reply to another question a High Court Judge<sup>12</sup> has also suggested the extension of this principle as introduced in the United Kingdom, and one High Court<sup>13</sup> has suggested legislation generally on

1 S. No. 367.

2 S. No. 415.

3 A State Government, S. No. 154.

4 A Pleader, Calcutta, S. No. 128.

5 A District Bar Association, S. No. 125.

6 S. No. 138.

7 An Inspector-General of Police, S. No. 131.

8 S. No. 117.

9 An eminent member of the Bar, through the Bar Council of India, S. No. 161.

10 Shri M.P. Somasekhara Rao, Advocate and Chairman, Gokhale Institute of Public Affairs, Bangalore, S. No. 126 (under question 9).

11 S. No. 122.

12 A High Court Judge, S. No. 105 (under question No. 1).

13 A High Court, S. No. 136, under questions 1 and 3 (a).

the lines of the Homicide Act, 1957. Adoption of the provisions of the Homicide Act has been suggested in another reply also<sup>1</sup>.

Reply of a High Court Judge<sup>2</sup> is as follows:—

“There is the existing structure; sections 299 and 300 Indian Penal Code and the different punitive sections 302 and 304, Indian Penal Code. Perhaps, as in the Homicide Act in United Kingdom, we could introduce an exception for abnormality of mood viz., psychotic state, where the requirements of section 84 Indian Penal Code cannot be satisfied. This could be punishable under section 304, Indian Penal Code.”

The Chief Justice of a High Court<sup>3</sup> has stated that persons of unsound mind should be exempt.

A provision for exemption for abnormality of mind on the lines of the (English) Homicide Act, 1957 has been suggested by a High Court Judge<sup>4</sup>.

873. Apart from the categories of persons to be exempted on the ground of age, sex, mental state or pregnancy, not many other categories have been proposed. One such is that of persons killing others due to necessity, duress and mistake<sup>5</sup>. Another suggestion is that a person who has a family dependent upon him, or whose earlier record of life has been commendable, or whose intelligence quotient is below average, should be exempted<sup>6</sup>. Other categories.

Amongst the other exemptions suggested are old persons above the age of 60<sup>7</sup> and “very old” persons<sup>8</sup>.

It has been stated by a State Government<sup>9</sup> and by a High Court Judge in the same State<sup>10</sup> that the Criminal Rules of Practice of that State provide for recommendation to the State Government for commutation of death sentence in the case of women convicted of infanticide, and that statutory provision for such cases may be made in the Indian Penal Code.

1 A Reader in Criminal Law, S. No. 107, under question 3 (a).

2 A High Court Judge, S. No. 262, under question 6,

3 S. No. 393.

4 S. No. 262.

5 An Inspector-General of Police, S. No. 131.

6 S. No. 117.

7 A District and Sessions Judge, S. No. 390.

8 A High Court Judge, S. No. 397.

9 S. No. 261.

10 S. No. 262.

## TOPIC NUMBER 44

*Exemption on the ground of young age*

Exemption  
on the ground  
of young  
age.

874. Whether a person, who is below a particular age, should be exempted by statute from the penalty of death is a question which requires detailed investigation, in view of the abundant material available on the subject. The question has fallen to be decided by the Courts more than once, and—though it is not easy to reconcile all the decisions—the position seems to be, that young age is a factor which is taken into account by the Court *along with other factors*, when considering whether the sentence of death should be awarded<sup>1</sup>.

875. There are decisions which take the view that young age by itself is an extenuating circumstance. But in most of those decisions, the age was tender,—say, not more than 16 years<sup>2</sup>. In a Calcutta case<sup>3</sup>, a girl of sixteen years was charged with the deliberate killing of her husband by poisoning, and was sentenced to transportation in view of *her age*.

876. On the other hand, there are decisions that youth is not a consideration for giving the lesser sentence at all<sup>4</sup>.

877. The majority of the decisions would seem, however, to take age into account *along with other circumstances*.

878. In this position of the case-law, a statutory provision—*whatever* may be the content of that *provision*—would be useful as clarifying the position. It may be noted that the number of children or young persons involved in cases of homicide is not small<sup>5</sup>, and the matter is not, therefore, purely academic.

<sup>1</sup> See Analysis of case-law, cases number 70 (age and provocation), 60 (Boy of 12), 66B (youth by itself not an extenuating circumstance), 56 (youth by itself is not sufficient for leniency), 81 (young age and backward class and belief in witch-craft), 52 (Girl of less than 17 acting under influence of husband, etc.), 47 (Woman of 20 and of weak intellect murdering her daughter of eleven days owing to poverty), 38 (Boy of 17, probably a tool in the hands of others), 33 (Girl of 18, strangling her *illegitimate* child), 99 (Court refused to take age—22 years into account), 49 (age and provocation), 83 (youth of the accused *by itself* taken into consideration), 49A (age not taken into account, because the convicts were terrorists and not shown to be dominated by others), 72 (youth *by itself* not a ground), 73 (age of 22 years *by itself* not a ground for lesser sentence), 46 (Boy of 17 acting under the influence of father), 45 (young age and provocation), 42 (sentence of death on a young man probably under 18 years maintained because of cold-blooded and premeditated murder), 41 (sentence of transportation on a lad of 18 enhanced—for deliberate murder for greed).

<sup>2</sup> See Analysis of case-law, case number 99, decisions cited in the footnote thereto. Also see cases No. 60 and 66.

<sup>3</sup> *Josha Ram* (1907) 11 C.W.N. 904, cited in Ratan Lal, Law of Crimes (1961), page 771.

<sup>4</sup> See *In re: Renudu*, I.L.R. 1943 Mad. 148; A.I.R. 1943 Mad. 69 (Mockett and Happell, JJ).

<sup>5</sup> See figures regarding number of juvenile offenders involved in homicide, etc., given separately.

879. There are provisions in the Childrens' Acts of several States<sup>1</sup>, prohibiting the awarding of a sentence of death in the case of persons under a certain age. The ages laid down by those provisions vary. The insertion of a provision, *applicable to the whole of India, would serve the purpose* of bringing uniformity also.

Further, the replies received to our Questionnaire<sup>2</sup> show that a vast number of persons are in favour of such an exemption.

880. It may be noted that, in England, a person under the age of 18 cannot be sentenced to death, but has to be detained during Her Majesty's pleasure<sup>3</sup>.

881. Similar provisions are contained in the laws of many other countries also<sup>4</sup>.

Under the English provisions, it is the age at the time of the commission of the offence that is taken into account. Section 53(1) of the Children and Young Persons Act, 1933 as amended by section 16, Criminal Justice Act, 1948 and by section 9(3) of the Homicide Act, 1957, provides as follows:—

“(1)—Sentence of death shall not be pronounced on or recorded against a person convicted of an offence, who *appears* to the Court to have been under the age of *eighteen years at the time of offence being committed*. Nor shall any such person be sentenced to imprisonment for life under section 9 of the Homicide Act, 1957.....”.

882. Whether the age of 18 should be enhanced to 21 was a question into which the Royal Commission went in great detail<sup>5</sup>.

The Select Committee on Capital punishment, 1930, had recommended that the age should be raised to 21 on the ground that that was the age when full civil responsibility was assumed. Before the Royal Commission of 1953, conflicting views were expressed about the raising of the age-limit. Most of the medical witnesses were in favour of raising the age, because, in their opinion, persons under the age of 21 should not be regarded as fully mature and the brain is not fully developed until after that age. The Society of Labour Lawyers stressed the argument that, if a person was so immature and irresponsible that he could not vote or own a legal estate in land or settle an action

<sup>1</sup> A summary of the provisions in Childrens' Acts is given elsewhere.

<sup>2</sup> Replies to question 9 are summarised in paragraphs 824—873.

<sup>3</sup> See section 53, Children and Young Persons Act, 1933, as amended in 1948; and Archbold (1962), paragraph 684.

<sup>4</sup> Comparative material on the subject is given separately.

<sup>5</sup> R.C. Report, pages 65 to 72, paragraphs 188—209.

without leave of the Court, he should not be subjected to the extreme penalty. The younger the offender, the more chance there was of reform and rehabilitation. Witnesses opposing the proposal, however, thought that beyond the age of 18, the matter should be left to the discretion of the Crown in exercising the prerogative of mercy. Many members of the Royal Commission were of the view that "of all proposals that could be made for reducing the number of cases in which the capital sentence is executed, there was none that had a stronger and clearer claim to support than the proposal to raise the age-limit." However, some of the members were not in favour of this recommendation. They thought that the Commission could not overlook the fact that grave increase in violent crimes since the beginning of the war had not yet passed its peak, so far as persons between 17 and 21 were concerned; and that public opinion would not favour the removal of the restraining influence of the death sentence on such persons. Ultimately, the Commission recommended<sup>1</sup>, by a majority<sup>2</sup> of 6 to 5, that the statutory age-limit below which a person may not be sentenced to death *should be raised to 21.*

383. It would be interesting to trace the history of the provision in the English Act<sup>3</sup>. The Childrens' Act, 1908, provided that a person, under 16 years of age at the time of conviction, should not be sentenced to death but should be sentenced to be detained during His Majesty's pleasure. The Childrens' and Young Persons' Act, 1933, section 53, re-enacted this provision in substance, with one change of 16 years replaced by the age of 18 at the time of conviction. Section 16 of the Criminal Justice Act, 1948, extended the scope of this provision to persons under 18 at the time *when the offence was committed.* Section 9(3) of the Homicide Act, 1957, amended the provision in the 1933 Act, the important change made being that a person under the age of 18 years was not only not to be sentenced to death but he was also not to be sentenced to imprisonment for life. This change was necessary because, otherwise, under section 9(1) of the 1957 Act, whenever a court is precluded from passing a sentence of death "the sentence shall be one of imprisonment for life". It is stated that no person under 18 years of age has in fact been executed in England since 1887<sup>4</sup>. It would seem, however, that before that there had been such cases. For example, in 1801, a boy aged 13 was publicly hanged for breaking into a house and stealing a spoon; and in 1808, a girl aged

1. R.C. Report, page 68, paragraph 195, and summary at page 275, item (12).

For reasoning, see R.C. Report, paragraphs 196—206.

2. *Majority*—Sir Ernest Gowers, Mrs. Cameron, Mr. Macdonald, Mr. Mann, Sir Alexander Maxwell and Dr. Slater.  
*Minority* — Mr. Fox-Andrews, Dame Florence Hancock, Sir William Jones, Professor Montgomery and Mr. Radzinowicz.

3. R.C. Report, page 64, paragraph 183.

4. R.C. Report, page 64, paragraph 183.



7 was hanged at Lynn, and in 1831, a boy of 9 was hanged at Chemsford for having set fire to a house<sup>1</sup>.

884. We may also refer here to the provision adopted in Canada on the subject. The Canadian Committee<sup>2</sup> noticed that the invariable practice in Canada had been to commute the sentence of death of all persons under 18, and that, since 1945, the sentence had rarely been executed against a person 20 years and under. The Committee balanced the consideration that youth must always be a mitigating factor against the fact that some of the most callous crimes are committed by young offenders, showing a total disrespect for life or property. After taking note of the discussion in the report of the United Kingdom Royal Commission, the Canadian Committee concluded that it would be proper to amend the law to provide that the death penalty should not apply to a person of the age of eighteen years or less at the time of commission of the offence. The Committee also recommended strongly that, except in extraordinary cases, the present practice of commuting most death sentences passed on persons under 21 should be continued.

885. The recommendation for amendment of the law has been carried out by amendment of the Criminal Code of Canada, made in 1961<sup>3</sup>. The relevant section now provides as follows:—

“(3) Notwithstanding sub-clause 1, a person who appears to the court to have been under the age of 18 years at the time he committed a capital murder, shall not be sentenced to death upon conviction therefor but shall be sentenced to imprisonment for life.”

886. We feel that having regard to the need for uniformity to the view expressed on the subject, and to the consideration that a person under 18 can be regarded as intellectually immature, there is a fairly strong case for adopting the age of 18 as the minimum for death sentence. We are aware that cases will occasionally arise where a person under 18 is found guilty of a reprehensible killing, or, conversely, a person above 18 is found to be immature and not deserving of the highest punishment. A line has, however, to be drawn somewhere, and we think that 18 can be adopted without undue risk.

887. We, therefore, recommend that a person, who is under the age of 18 years at the time of the commission of the offence, should not be sentenced to death. A provision to that effect can be conveniently inserted in the Indian Penal Code, as section 55B.

<sup>1</sup> See Christoph, Capital Punishment and British Politics, (1962), page 15.

<sup>2</sup> Canadian Report, page 18, paragraph 76.

<sup>3</sup> Section 206(3), Criminal Code (Canada).

Recommen-  
dation  
regarding  
age.

Recommen-  
dation.

## TOPIC NUMBER 45

*Exemption to women generally*

Exemption  
to women  
generally.

888. We have considered the question whether women generally should be exempted from the sentence of death. While we appreciate that it would be a natural desire to avoid the death sentence on females in most cases, *we do not think that a general exemption is called for*. A woman may be guilty of a brutal cold blooded murder, and the case, therefore, may be one deserving the highest penalty of the law. In a case before the Supreme Court that was the situation<sup>1</sup>. Sex may have to be weighed against other circumstances.

889. The matter was gone into by the Royal Commission also<sup>2</sup>. Their conclusion was that, if there was a valid case for the retention of capital punishment, it must apply to women as well as to men, "although possibly not to an equal degree". The Commission found no adequate reason for the law to differentiate between the two sexes. It also noted that murders by women included atrocious and cold blooded cases of baby farming and of poisoning over a long period. This conclusion of the Royal Commission was shared by the Canadian Committee also<sup>3</sup>.

890. In India, the case for *general exemption of women* is still less strong, the death penalty not being mandatory. The question of women placed in a particular situation, such as pregnant women, or women guilty of murder of their own children within a particular period after the delivery, is a separate one<sup>4</sup>.

## TOPIC NUMBER 46

*Exemption for pregnant women*

Exemption  
for pregnant  
women.

891. The question whether any exemption should be given *by statute* to pregnant women may be considered. A provision on the subject, in some form or the other, is found in the laws of certain countries<sup>5</sup>. The law in some countries provides that the sentence of death shall not be passed on pregnant women. In some countries, the sentence of death is not to be notified till the lapse of 40 days after child birth. In some countries, the *execution* of the sentence is merely to be postponed. The period of postponement is also specified by the laws of certain countries. For example, in Greece, it is postponed for six months in case of breast-feeding and otherwise for 30 days.

<sup>1</sup> Analysis of case-law, Case No. 4, (*Nisa Stree*, A.I.R. 1954 S.C. 279).

<sup>2</sup> R.C. Report, page 65, paragraphs 185—186.

<sup>3</sup> Canadian Report, page 18, paragraph 75.

<sup>4</sup> See separate discussion as to pregnant women and infanticide; paragraphs 891—894 and 895—898, *infra*.

<sup>5</sup> Comparative material is given elsewhere.

392. The English provision on the subject is contained in the Sentence of Death (Expectant Mothers) Act<sup>1</sup>, 1931, sections 1 and 2 of which run as follows:—

“Section 1.—Where a woman convicted of an offence punishable with death is found in accordance with the provisions of this Act to be pregnant, the sentence to be passed on her shall be sentence of imprisonment for life instead of a sentence of death.”

Section 2.—(1) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before whom a woman is so convicted thinks fit so to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by a jury.

(2) Subject to the provisions of this sub-section, the said jury shall be the trial jury, that is to say, the jury to whom she was given in charge to be tried for the offence, and the members of the jury need not be resworn:

Provided that—

(a) if any member of the trial jury, either before or after the conviction, dies or is discharged by the court as being through illness incapable of continuing to act or for any other cause, the inquiry as to whether or not the woman is pregnant shall proceed without him; and

(b) where there is no trial, jury have disagreed as to whether the woman is or is not pregnant, or have been discharged by the court without giving a verdict on that question, the jury shall be constituted as if to try whether or not she was fit to plead, and shall be sworn in such manner as the court may direct.

(3) The question whether the woman is pregnant or not shall be determined by the jury on such evidence as may be laid before them either on the part of the woman, or on the part of the Crown, and the jury shall find that the woman is not pregnant unless it is proved affirmatively to their satisfaction that she is pregnant.

(4) Where on proceedings under this section the jury find that the woman in question is not pregnant, the woman may *appeal* under the Criminal Appeal Act, 1907, to the Court of Criminal Appeal, and that court, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed

<sup>1</sup> The Sentence of Death (Expectant Mothers) Act, 1931, 21 & 22 Geo. 5, c. 24.

on her and instead thereof pass on her a sentence of imprisonment for life.

(5) The rights conferred by this section on a woman convicted of an offence punishable with death shall be in substitution for the right of such a woman to allege in stay of execution that she is quick with child and the last mentioned right shall cease as from the commencement of this Act.”

893. The provision in India is contained in section 382 of the Code of Criminal Procedure, 1908, which may be quoted:—

“382. If a woman, sentenced to death, is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.”

This section leaves the matter to the discretion of the High Court, which can—

- (i) either postpone execution of the sentence, or
- (ii) commute it to the lesser one.

894. Detailed provisions as to medical examination of the woman, or as to an appeal by her from a finding that she is not pregnant which are contained in section 2(4) of the English Act, or in the laws of certain other countries<sup>2</sup>, are not found in the Indian Code. Since, however, this has not caused any practical difficulty, it does not appear to be necessary to make any change in the law by inserting elaborate provisions.

#### TOPIC NUMBER 47

##### *Infanticide*

*Infanticide by woman.* 895. There is one specific type of homicide by women which requires some detailed consideration. That is infanticide by a woman of her own child, within a certain period after the delivery. It is believed that, within certain period after delivery, the mother would not have fully recovered from the effects of giving birth to the child; and the balance of her mind would, therefore, have been disturbed. In such a situation, it would be just not to impose the sentence of death on her. In fact, though there is no statutory provision on the subject in India, courts have, in the few cases of this type that have been reported, exercised their discretion in favour of the lesser sentence<sup>3</sup>.

1. Section 382, Code of Criminal Procedure, 1898.

2. Comparative material given elsewhere may be seen.

3. For example, see Analysis of case-law, Case No. 53. Also see, *ibid*, Case No. 47.

896. This subject has had a long history in England<sup>1</sup>. A private member's Bill, "The Child Murder Trial Bill, 1922", was passed into law as the Infanticide Act, 1922. That Act provided that where a woman, by any wilful act or omission, causes the death of her *newly-born child* in such circumstances that, but for that Act, the offence otherwise would have amounted to murder, but at the time she had not fully recovered from the effect of giving birth to the child and by reason thereof the balance of her mind was then disturbed, then she would be guilty of infanticide and might be dealt with and punished as if she had been guilty of manslaughter. Difficulties arose as to the scope and meaning of the expression "newly born child"; and the Infanticide Act of 1938<sup>2</sup> repealed this Act and substituted a provision, whereunder a woman who cause death of her child under the age of 12 months would get the protection where the balance of her mind was disturbed by reason of her not having fully recovered from the effect of child's birth. Even in cases where the Act of 1938 does not apply, for example, where the child is more than a year old, the practice in England is to commute the sentence<sup>3</sup>.

Section 1 of the Infanticide Act, 1938<sup>4</sup>, is quoted below:—

"1. (1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit, of *infanticide*. and may for such offence be dealt with and punished as if she had been guilty of the offence of *manslaughter* of the child. Offence of Infanticide.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon

1. See detailed discussion, see R.C. Report, pages 57 to 59, paragraph 154—162.

2. The Infanticide Act, 1938 (1 & 2 Geo. 6 c. 36).

3. R.C. Report, page 59, paragraph 162, and page 277, paragraph 646.

4. The Infanticide Act, 1938 (1 and 2 Geo. 6, c. 36).

the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane, or a verdict of concealment of birth, in pursuance of section sixty of the Offences against the Person Act, 1861, except that for the purposes of the proviso to that section, a child shall be deemed to have recently been born if it had been born within twelve months before its death.

(4) The said section sixty shall apply in the case of the acquittal of a woman upon indictment for infanticide as it applies upon the acquittal of a woman upon an indictment for murder."

Mere age of the child is not sufficient; the balance of mind of the mother should also have been disturbed<sup>1</sup>.

897. It may be noted, that a provision reducing the punishment in the case of infanticide exists in the laws of a few other countries<sup>2</sup>. A typical provision is that found in the Criminal Code of Canada<sup>3</sup>, sections 204 and 208 of which are quoted below:—

"Section 204—A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

Section 208—Every female person who commits infanticide is guilty of an indictable offence and is liable to imprisonment for five years."

898. We have considered the question whether it is necessary to insert any provision in the Indian Penal Code on the subject. In India the question of sentence for murder is in the discretion of the court<sup>4</sup>, and it is open to the court to impose the lesser sentence of imprisonment for life where the mind of the offender appears to have been influenced by the effects of recent child-birth<sup>5</sup>.

<sup>1</sup> *R. v. Soanes* (1948) 1 All. E.R. 289.

<sup>2</sup> See R.C. Report, page 447, paragraph 30, and succeeding paragraphs.

<sup>3</sup> (Canada) Criminal Code, sections 204 and 208.

<sup>4</sup> Section 302, Indian Penal Code.

<sup>5</sup> See *Analysis of Case-Law*, Case No. 53.

Where even the sentence of imprisonment for life is regarded as harsh, the court can make a recommendation to the State Government for suitable commutation of the sentence. For these reasons, we do not recommend the insertion of any specific provision on the subject. In fact, by keeping the matter flexible, we can avoid the difficulties which arise if a rigid period is put in the provision. The question of burden of proof, namely, whether it is the duty of the defence to bring the case within the lesser offence of infanticide, would also be avoided.

## CHAPTER XII

### DIMINISHED RESPONSIBILITY

#### TOPIC NUMBER 48

899. A topic which merits some detailed discussion is the concept of "diminished responsibility", in relation to the law of homicide. This concept, borrowed from Scotland, has found a place in the Homicide Act, 1957, section 2. The section<sup>1</sup> runs as follows:—

Diminished  
responsibility.

"2. (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

Person  
suffering  
from diminished  
responsibility.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it."

900. The plea of diminished responsibility was intended to supplement the plea of insanity, *i.e.*, to cover those cases in which the accused, though mentally incapacitated, did not come within the strict rules relating to insanity<sup>2</sup>.

<sup>1</sup> Section 2, Homicide Act, 1957.

<sup>2</sup> 560 H.C. Debates, Col. 1153 *et. seq.* and 1251 *et. seq.* (November 15, 1956); 202 House of Lords Debates, Col. 364 (March 7, 1957).

901. The Royal Commission on Capital Punishment<sup>1</sup>, after an elaborate discussion of the doctrine, was unable to recommend its adoption in England. Though the doctrine as known to the Scottish law was confined to murder, the doctrine as known to the laws of several European countries touched all crimes, and not merely murder.

902. The conclusions which the Royal Commission reached on the subject<sup>2</sup> may be thus summarised:—

(i) Diminished responsibility as known in Europe is a concept of general application relevant for all crimes and not only for murders or for capital offences. The forms of mental abnormality, including psychopathic personality, which may cause diminution of responsibility, are of common occurrence and are of importance in relation to a wide range of offences; and to consider whether the doctrine of diminished responsibility in this wide sense should be adopted in England would take the Commission far beyond its terms of reference<sup>3</sup>.

(ii) The Scottish doctrine of diminished responsibility on the other hand has a far narrower scope. It is confined to murder. It is a device to enable the courts to take account of a special category of mitigating circumstances in cases of murder and to avoid passing of sentence of death in cases where such circumstances exist. So radical an amendment of the law of England would not be justified for this limited purpose<sup>4</sup>.

(iii) The jury should, however, be empowered to take account of extenuating circumstances, so as to correct the rigidity which is the outstanding defect of the then existing law of capital punishment<sup>5</sup>.

903. However, the doctrine has been introduced by the Homicide Act, 1957. Under that Act<sup>6</sup>, even if a person is not technically insane within the meaning of the M'Naghten Rules, he is entitled to a lesser punishment if he shows that he was suffering from such *abnormality of mind* (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as has *substantially* impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

<sup>1</sup> R.C. Report pages 143 to 144, paragraph 411—413. Also see pages 426 *et seq.*

<sup>2</sup> R.C. Report, pages 143 and 144, paragraphs 411—413.

<sup>3</sup> R.C. Report, page 144, paragraph 413.

<sup>4</sup> R.C. Report, page 144, paragraph 413.

<sup>5</sup> R.C. Report, page 208, paragraph 595.

<sup>6</sup> Section 2(1), Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11).



904. As has been observed<sup>1</sup>, the effect of proof of diminished responsibility is to reduce the quality of the crime from murder requiring the obligatory sentence of death (if capital murder) or life imprisonment (non-capital murder) to manslaughter, where the sentence is in the discretion of the court, and may range from fine to any term of imprisonment to life imprisonment. The difference between this defence and that of insanity is—

(i) insanity results in acquittal and is a defence to every crime, while diminished responsibility is a defence only to murder, and merely reduces the crime to manslaughter; .

(ii) diminished responsibility covers not only lesser forms of insanity but also different forms of insanity and mental abnormality not covered by the technical M'Naghten rules.

905. As would appear from the leading Scottish case of *H. M. Advocate v. Braithwaite*<sup>2</sup>, even if a man changed with murder is not insane, still the Scottish law recognises that "if he was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence—from murder to culpable homicide. Approving a passage from the change in the case of *Savage*<sup>3</sup>, the court stated that there must be a state of mind which is *bordering on*, though not amounting to, insanity, and there must be a mind so affected that responsibility is *diminished* from full responsibility to partial responsibility. Again, citing previous cases, the court said that the question to be put to the jury was. "Was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?"<sup>4</sup> Scot Law.

906. As the court pointed out, stress had been laid, in all the formulations, upon the weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like.

907. This exposition of the Scottish law has, after the passing of the Homicide Act, been expressly approved (for the interpretation of the defence as adopted in the Homicide Act) by the Court of Criminal Appeal<sup>4</sup>.

<sup>1</sup> See the article on the Homicide Act by A.L. Armitage, (1957) Cambridge Law Journal 183, 187, 188, 189.

<sup>2</sup> *H. M. Advocate v. Braithwaite*, 1945 J.C. 55 extracted in R.C. Report, page 349.

<sup>3</sup> *Savage*, 1923 J.C. 49.

<sup>4</sup> *R. v. Dunbar*, (1957) 3 W.L.R. 330; 333, (1957) 2 All. E.R. 737 (C.C.A.)

Irresistible  
impulse.

908. An English case of the Court of Criminal Appeal<sup>1</sup> may be cited to illustrate how the defence has been actually applied in practice in England. There, the appellant was charged with the murder of a young girl whom he had strangled and whose dead body he had mutilated. He admitted the guilt, but pleaded the defence of diminished responsibility. The uncontradicted evidence of the senior medical witnesses was that the accused was a "sexual psychopath", and suffered from abnormality of mind, in that he had violent perverted sexual desires which he found it difficult or impossible to control. Except when under the influence of such perverted sexual desires, he might be normal. They (the medical witnesses) were of the opinion that the killing was done under the influence of those desires, and that though he was not "insane" in the technical sense, his sexual psychopathy could be described as "partial insanity". The Judge directed the jury that if the appellant killed the girl under an abnormal sexual impulse which he found impossible to resist, *but was otherwise normal*, the section would not apply. The jury found him guilty of murder. On appeal, on the ground of misdirection, the court allowed him the defence of diminished responsibility, and pointed out that "abnormality of mind" as used in the Homicide Act had to be contrasted with the time-honoured expression "defect of reason" used in the M'Naghten rules, and appeared to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise the will power to control physical acts in accordance with rational judgment". The court pointed out that, before the passing of the Homicide Act, a person could escape liability for murder or any other crime requiring *mens rea* if he was insane, that is to say, "he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act and what he was doing, or if he did know it, that he did not know that he was doing wrong". That test was a rigid one because it related solely to a person's *intellectual ability* to appreciate the physical act that he is doing and whether it is wrong. If he has such intellectual ability, his power to control his physical acts by exercise of his will is irrelevant. Diminished responsibility, on the other hand, took note of every mental abnormality.

909. The court proceeded to lay down certain other propositions (apart from the interpretation of "abnormality of mind", already noted) which may be summarised thus:

(i) Whether the accused was suffering from abnormality of mind, as so interpreted, is a question for the jury. On this question medical evidence is no

<sup>1</sup> *R. v. Byrne*, (1960) 3 W.L.R. 440, 444 (C.C.A.).

doubt of importance, but the jury is entitled to take into consideration all the evidence and not bound to accept the medical evidence.

(ii) The aetiology of the abnormality of mind, namely, that it arose from a condition of arrested development, etc., seemed to be a matter to be determined on expert evidence.

(iii) Assuming that there was abnormality of mind from the specified cause, the crucial question nevertheless was, "Was his responsibility for his acts in doing or being a party to the killing *substantially impaired*?" This was a question for the jury. Medical evidence was, of course, relevant, but as a question involving a decision of "substantial impairment", it was a matter upon which juries may quite legitimately differ with doctors.

(iv) When the abnormality affects his control, the distinction between "he did not resist his impulse" and "he could not resist his impulse" is one which is incapable of scientific proof. These problems, in the present state of medical knowledge, are scientifically insoluble, and could be approached only in a broad common-sense way.

(v) On the evidence in the case, the accused was "what would be described in ordinary language as on the *border line* of insanity." The test of "border line" has been expressly approved by Lord Goddard.<sup>1</sup> He also pointed out that one cannot go into nice distinctions between mind and emotion, or intellect and emotion.

910. Another illustration of the application of this defence may be cited. In *R. v. Matheson*<sup>2</sup> the appellant who was fifty-two years old and a confirmed sodomite, murdered a boy of fifteen by smashing his head. He was convicted of capital murder, but on appeal, the Court of Criminal Appeal accepted the defence of diminished responsibility. One prison medical officer, - one physical superintendent and one consulting psychiatrist agreed that, while he was not insane, his mind was abnormal and substantially impaired his mental responsibility. Giving the reasons for this conclusion, the prison medical officer stated that the prisoner's intelligence (measured by certain tests) was not more than 73, while that of a normal person would be 100. The consulting psychiatrist called attention to the records showing that the appellant had, on many occasions, swallowed razor blades and inserted nails in his body. The

Illustrative Cases.

<sup>1</sup> *R. v. Spriggs*, (1958) 1 All. E.R. 300, 303, 304 (C.C.A.).

<sup>2</sup> *R. v. Matheson*, (1958) 2 All. E.R. 87, 89. (Lord Goddard C.T. Streatfield, Slade, Donovan and Havers JJ.) (CCA.).

physical superintendent agreed that the mental development was rather less than what one expects of a child of ten. Since this evidence was unrebutted, the defence had been satisfactorily proved. Evidence of premeditation could not rebut the defence, because "an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do."

Negative  
illustrations.

911. A negative case, *R. v. Walden*<sup>1</sup>, in which the defence was not accepted, may be cited. There, Walden, a lecturer in a college, had proposed marriage to Joyce, a girl employed in the office of the college. The girl declined the proposal and favoured a student of the college, Neil. A week later, Walden left a class which he was taking, and in the corridor on his way to his locker, he passed Neil who was talking to Joyce. Returning from his locker, he shot Neil through the back, went into the office and shot Joyce through the back six times, the last three shots being fired into her back as she lay on the ground. Both of them died. Walden then ran up to his car, which he later abandoned with the pistol which he had used. He was found three weeks later by a constable in a shelter. Evidence about the murder was overwhelming, but Walden tried to prove abnormality of mind impairing his mental responsibility. While one consulting psychiatrist was of the opinion that Walden was suffering from a severe type of abnormality and was suffering from paranoia and was grossly abnormal, the senior prison medical officer and another consulting psychiatrist disagreed and said that the accused had no abnormality of mind. The jury rejected the defence, and on an appeal on the ground of misdirection, the court dismissed the appeal. The objection in appeal was to the summing up by the Judge to jury to the effect that the jury had to decide whether the accused was "wandering on the border-line—being between sane and insane", so that he was not fully responsible for what he had done. The Court found nothing wrong in this summing up, on the facts of the case.

Burden of  
proof of di-  
minished  
responsibi-  
lity.

912. Regarding onus, section 2(2) of the Homicide Act, 1957, provides that it should be for the defence to prove that the person charged is (by virtue of this section) not liable to be convicted of murder. The Court of Criminal Appeal<sup>2</sup> has held, that when a plea of diminished responsibility is put forward, the burden of proof on the accused is not so heavy as the burden which rests on the prosecution to prove its case beyond reasonable doubt, and that the burden on the defence is discharged if the evidence justifies the conclusion that the balance of probabilities is

<sup>1</sup> *R. v. Walden*, (1959) 1 W.L.R. 1008; (1959) 3 All E.R. 207 (C.C.A.).

<sup>2</sup> *R. v. Dunbar*, (1957) 3 W.L.R. 330; (1957) 2 All E.R. 737.

in favour of the defence. The court followed the leading case as to burden of proof, *R. v. Carr-Briant*<sup>1</sup>.

913. Recent cases on the section in the English Act have clarified the application of the provision<sup>2</sup>. The defence of diminished responsibility is sometimes put forth as a false excuse. In a recent case<sup>3</sup>, the appellant, while robbing a bank, shot and killed a bank employee. The defence was that he felt that he was possessed by the spirit of a deceased American gangster, Legs Diamond, who controlled his acts. Two psychiatrists gave evidence that they believed that this delusion was a genuine one; two doctors (for the Crown), however, said that he was "shamming". The appellant was convicted and sentenced to death. The appeal was dismissed by the Court of Criminal Appeal.

914. Irresistible impulse has also come up. In *R. v. King*<sup>4</sup>, the defendant, a Ugandan, was charged with the murder of four persons. His defence was diminished responsibility within s. 2 of the Homicide Act, 1957, to an "irresistible . . . . impulse". On his behalf, a doctor gave evidence that the behaviour of the defendant's mother-in-law would be a stimulus such as might well cause a person of his racial type to lose his self-control. The defendant suffered from no *abnormality of mind*, either before or after the killings. McNair J. directed the jury that irresistible impulse was no defence to a charge of murder, and that if the defendant's conduct was merely the *normal* reaction for his racial type, it was not an abnormality at all. The defendant was convicted of all the murders, and applied for leave to appeal. The Court of Criminal Appeal (Lord Parker C. J., Winn and Atkinson JJ.), dismissing the application, held (1) that the Judge's direction was entirely correct; and (2) that there was in any event no evidence of abnormality arising from any causes that would bring the case within s. 2 of the Act.

Irresistible impulse, if arising from abnormality of mind, would perhaps, be covered<sup>5-6</sup>.

<sup>1</sup> *R. v. Carr-Briant* (C.C.A.), (1943) 2 All E.R. 156; (1943) K.B. 607 (C.C.A.).

<sup>2</sup> Most of the cases are discussed in the article by Richard F. Sparks' "Diminished Responsibility in theory and practice" (Jan. 1964), *Modern Law Review*, page 9.

<sup>3</sup> *R. v. Terry*, (1961) 2 W.L.R. 961 (C.C.A.).

<sup>4</sup> *R. v. King*, (December 3, 1963) Facts taken from (1963) 12 *Current Law*, Item 193 (December, 1963), (C.C.A.).

<sup>5</sup> See article on the Homicide Act, in (1957) *Camb. Law Journal* 183, 189.

<sup>6</sup> See also Russell on Crime (1964), Vol. 1, page 125.

915. In a recent case<sup>1</sup>, the meaning of the expression "substantially" was considered. The facts were these: The defendant, who pleaded diminished responsibility under section 2(1) of the Homicide Act, 1957, was charged with the murder of his wife. The jury convicted him of murder, and he was sentenced to life imprisonment. He appealed to the Court of Criminal Appeal. In appeal, the ground taken was that the judge had misdirected the jury, and that, had it not been so, the verdict of the jury would have been that of manslaughter with diminished responsibility.

916. In directing the jury, Ashworth J., of the Birmingham Assizes had said that according to medical evidence, the accused was suffering from mental abnormality, but that the accused must also show that the mental abnormality substantially impaired his mental responsibility. In explaining the word "substantially", the Judge said:

"I am not going to try to find a parallel for the word "substantial". You are the judge, but your own commonsense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between, and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and if so, was it substantially impaired?"

917. The Court of Criminal Appeal said that the direction given to the jury on the meaning of the word "substantially" could not be validly criticised. The direction, though not identical with, was in substance quite the same as that given in *Reg v. Simcox*<sup>2</sup>. (*The Times*, February 24, 1964), and approved by this Court. The Court went on to quote the observations of Lord Parker, C. J. given in the case of *Simcox*, as follows:—

"All four experts were of the opinion that this appellant suffered from an abnormality of mind, and that abnormality of mind arose from inherent causes, the name given to the abnormality being paranoid personality.

Not one of them however, would go to the length of saying that as a result of that abnormality the appellant's mental responsibility was substantially impaired. They used words to the effect that the impairment was moderate, that it was harder for him to control his actions, that the degree of paranoid personality was, as one doctor said, persistent and strong.

<sup>1</sup> *R. v. Lloyd*, (1966) 2 W.L.R. 13 (C.C.A.).

<sup>2</sup> *Reg. v. Simcox*, "*The Times*", February 24, 1964 (C.C.A.).

Those and other expressions were used, but not one of the mental experts felt that he could say that the impairment was substantial. In those circumstances the jury, after what this court considers to be a most admirable and fair summing-up, refused to return a verdict of manslaughter, but returned a verdict of capital murder.”

918. The Court of Criminal Appeal further quoted the direction of the trial Judge Finnemore J. in the case of *Simcox*, about which the Court of Criminal Appeal had stated in the previous case that it could not be validly criticised. The direction was as follows:—

‘Members of the jury, the real thing you may think here is this word “substantially”, and we will come to it in a moment. Neither doctor called for the defence obviously liked the word, and it may be so, but that is the word in the Act of Parliament, that is the word you have got to use, and I expect you will not have as much difficulty as some people might have. There is no scientific precise test. That cannot be and never can in human conduct, otherwise we should not need juries or anybody, and if you will allow me to say so, I think you should look at it in a broad commonsense way and ask yourselves, having heard what the doctors have said, having made up your minds about it, knowing what this man did, knowing the whole story, do we think, looking at it broadly as common-sense people, there was a substantial impairment of his mental responsibility in what he did? If the answer to that is “yes”, then you find him not guilty of murder, but guilty of manslaughter. If the answer to that is “no” there may be some impairment, but we do not think it was substantial, we do not think it was something which really made any great difference, although it may have made it harder to control himself, to refrain from crime, then you would find him guilty as he is charged in the only charge to this indictment.’

After approving the direction to the jury given by Ashworth J. in the assize Court, the Court of Criminal Appeal dismissed the appeal.

919. It would appear, that the defence of diminished responsibility is recognised in the laws of some of the Commonwealth countries also<sup>1</sup>. Recently, it has been incorporated in Queensland<sup>2,3,4</sup>.

1 For the position in 1953, see R.C. Report, pages 413 and 416.

2 Section 304A, Criminal Code of Queensland.

3 See (1962)36 Australian Law Journal 171.

4 Colin Howard *Austra Crimin Law* (1965) pages 83-84.

920. The necessity of using care while employing the phrase "borderline insanity" in connection with diminished responsibility was emphasised by the Privy Council in a case<sup>1</sup> which arose under the Homicide (Special Defence) Act, 1959 of the Bahama Islands, an Act which is similar to the Homicide Act, 1957. The Privy Council pointed out that the distinction between legal insanity and mental irresponsibility may be one of kind and not of degree, for a man may clearly recognise that he is doing wrong, but nevertheless be unable to resist the temptation to act owing to abnormality of mind.

921. Opinion is not unanimous as to whether the provision on the subject in the English Act has worked well. Though it has not been an unqualified success, it would appear to have served some useful purpose. The provision, while not abolishing the M'Naghten rules, supplements them by providing for cases where there cannot be said to be complete irresponsibility, but there is substantial impairment<sup>2</sup>. Perhaps in countries where the sentence of death is mandatory and the application of the M'Naghten rules is felt to cause hardship, the provision would come in handy as saving the Judge from having to pass a formal sentence of death in a case of insanity outside those rules, where the sentence would not, in any case, be carried out, and also to give a measure of recognition to mental abnormalities short of insanity<sup>3</sup>.

922. The defence of diminished responsibility may however be abused. Sometimes persons, sentenced to a lesser imprisonment under this provision, may come out of prison and commit the same killing again<sup>4</sup>. Again, a person, who is really insane, may, instead of taking the defence of insanity, put forth the defence of diminished responsibility, in order to obtain a fixed sentence and avoid detention in the prison meant for lunatics. He may thus escape the treatment which would have been given to him in such a prison<sup>5</sup>.

923. However, the defence seems to have served some useful purpose in many cases, for example, cases of infanticide outside the Infanticide Act<sup>6</sup>. One suggestion has

<sup>1</sup> *Rose v. The Queen*, (1961) A.C. 496, (1961) 2 W.L.R. 506 (P.C.).

<sup>2</sup> See note on Homicide Act in (1957) 20 *Modern Law Review*, 38 by J.E. Hall Williams.

<sup>3</sup> Glanville Williams, *Criminal Law—the General Part* (1961), paragraph 173.

<sup>4</sup> See the case of *Bennet*, discussed in Glanville Williams, *Criminal Law* (1961), page 552, paragraph 177.

<sup>5</sup> See the view of Dr. Patrick McGrath, (1958) 1 *British Medical Journal* 641, cited in Glanville Williams, *Criminal Law—the General Part*, (1961) page 554, paragraph 177.

<sup>6</sup> See the cases of *Budden* and *Rowley*, cited by Glanville Williams, *Criminal Law the General Part* (1961), page 557, paragraph 177.



been to delete the requirement of "mental abnormality", so as to leave to the jury discretion to reduce the conviction to manslaughter in all cases where the culpability is substantially diminished'.

924. Since, in India, the question of sentence is entirely in the discretion of the Court, and the sentence of death is not mandatory, such a provision does not appear to be necessary. Courts may, while considering the question of sentence, be expected to take into account the mental state of the accused, even if it falls short of legal insanity<sup>2,3</sup>.

A change in the law is not, therefore, suggested.

#### TOPIC NUMBER 49

##### *Other exemptions considered*

925. We have already discussed<sup>4</sup> the categories of persons to be exempted on the ground of age, sex, mental state, or pregnancy. Certain other circumstances have been put forth as justifying such exemption. But we do not think that an exemption from death sentence should be granted in respect thereof. Elements of necessity, duress and mistake, or excellent earlier record of the offender and other personal circumstances, can be taken into account by the court. It would not be desirable to lay down a general rule that in every such case, only the lesser sentence must be imposed.

Other exemptions suggested.

### CHAPTER XIII

#### SOME PROCEDURAL QUESTIONS

##### TOPIC NUMBER 50 (a)

##### *Replies to question 10.*

926. Question 10 in our Questionnaire, after referring to article 134 of the Constitution and section 411A, Criminal Procedure Code, solicited views on this point—

Question 10 and replies thereto.

"Are you in favour of enlarging the powers of the Supreme Court so that an appeal shall lie to the Supreme Court as a matter of right in all cases in which a sentence of death has been passed or confirmed or upheld by the High Court?"

Conflicting views have been expressed on this point. While many replies oppose the enlargement of the powers of the Supreme Court as suggested in the question, many other replies favour such enlargement.

<sup>1</sup> See Glanville Williams, *Criminal Law—the General Part* (1961), page 558, paragraph 177.

<sup>2</sup> See *Analysis of case-law*, Case Nos. 26, 36, 57, 62, 92.

<sup>3</sup> See also *In re Sankappa Shetty*, A.I.R. 1941 Madras 326.

<sup>4</sup> See paragraphs 874—924.

927. Amongst those who favour the enlargement of the appellate jurisdiction are a few High Court Judges<sup>1-2</sup>, two State Governments<sup>3</sup>, many Bar Associations and similar bodies<sup>4</sup>.

Some Bar Council have favoured it<sup>5</sup>. Enlargement is favoured by several members of the Bar<sup>6</sup>, several Members of Parliament and State Legislatures<sup>7-8</sup>, and certain officers<sup>9</sup>. The Law Minister of a State is in favour of enlargement<sup>10</sup>. A distinguished Member of the Rajya Sabha is in favour of enlargement<sup>11</sup>.

A former Member of the Lok Sabha, who is an Advocate, is in favour<sup>12</sup>.

The Principal Judge of a City Civil Court in a Presidency Town<sup>13</sup> is in favour of enlargement

Some City Civil Court Judges are in favour<sup>14</sup>.

928. The majority of Presidency Magistrates in a Presidency Town<sup>15</sup> are in favour of enlargement, on the ground that no person should lose his life unless the highest Court has considered his case.

An Inspector-General of Prisons is in favour of enlargement<sup>16</sup>.

1 Chief Justice of a High Court and a Judge of the High Court, S.No. 130.

2 S. Nos. 97, 307, 316.

3 S. No. 130 and S. No. 580 (State Governments).

4 Bar Association of India ; Supreme Court Bar Association ; A District Bar Association; The Indian Federation of Women Lawyers, S. Nos. 183, 110, 125 and 121.

5 A Bar Council, S. No. 132.

6 An eminent member of the Bar, through the Bar Council of India, S. No. 161 ; Two Members of the Madras Bar Council, S. No. 104 ; A Advocate, Bangalore, S. No. 126 ; A Barrister, S. No. 150.

7 A Deputy Minister of the Union, S. No. 210 ; A Member, Rajya Sabha, S. No. 206 (suggests right of appeal in every case of life imprisonment) ; A Member, Rajya Sabha, S. No. 209.

8 Revenue Minister of a State, S. No. 216 ; An M.L.A., Madhya Pradesh, S. No. 213.

9 Law Secretary to a State Government, S. No. 162 ; An Inspector General of Prisons, S. No. 166 ; An Inspector General of Police, An Inspector General of Police, S. No. 143.

10 S. No. 253.

11 S. No. 245.

12 S. No. 305.

13 S. No. 352. also 434.

14 S. Nos. 376, 377, 378, 379, 380 and 381.

15 S. No. 549.

16 S. No. 264.

929. The Judicial Section of the Indian Officers Association in a State has stated that an appeal should lie as a matter of right in all cases where the sentence of death has been confirmed, passed or upheld by the High Court. Further, it has suggested that appeals against acquittal on charges of murder should also be permissible up to the Supreme Court. "While the deterrent of death sentence is necessary in the interest of society, no consideration of the time or labour involved in scrutiny with the utmost care of all the evidence available should be spared even up to the highest tribunals of land. It is a miscarriage of justice whether it is a conviction or an acquittal, when it is not justified. No effort is too small to render impossible the miscarriage of justice even in a single instance." Many District and Sessions Judges are in favour of enlargement<sup>1</sup>.

930. One District and Sessions Judge<sup>2</sup> who favours enlargement has stated that though such a right would amount to a second appeal in some cases, yet it would be justified in the case of a death sentence, and the accused must have right to get his case decided by the highest tribunal in the country.

931. Another District and Sessions Judge<sup>3</sup> has supported enlargement on the ground that a person condemned should have a right of second appeal to the highest Tribunal.

932. An Assistant Judge<sup>4</sup> has favoured the enlargement of the appellate jurisdiction, on the ground that it would give a guarantee that the punishment has been rightly given. He adds—

"In some of the cases the Supreme Court has reviewed even a finding of facts because it granted a leave to appeal. In some cases a certificate has been given by the High Court that the case is a fit one to appeal. There cannot be a sound basis for discrimination of these cases from the cases where no leave was given by the High Court or by the Supreme Court."

Some Bar Associations are in favour of enlargement<sup>5</sup>.

933. It is suggested by a District Bar Association<sup>7</sup> in Madhya Pradesh that life is precious to every human being and every human being does his utmost for survival. The

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1 S. No. 562.

2 S. Nos. 325, 330, 335, 339, 347, 349, 521, 524, 525, 533, 548, 551, 554-556, 557, 561 and 570.

3 S. No. 354.

4 S. No. 358.

5 S. No. 340.

6 S. No. 345.

7 S. No. 426.

Supreme Court being the highest and final judicial authority for pronouncing judgment on important matters pertaining to life and property and other matters of public interest, a man condemned must also have an opportunity as of right of putting his case before the highest judicial tribunal of the land by way of appeal.

Limited  
enlargement.

934. There are some views favouring a limited enlargement. Thus the suggestion of a High Court Judge<sup>1</sup> is that the Supreme Court should have only a *limited* jurisdiction, namely, where questions of law are involved.

935. The suggestion of a District and Sessions Judge<sup>2</sup> in Maharashtra is that an appeal to the Supreme Court be provided but only to the extent of the *propriety* of the death sentence, where the sentence passed by the Court of Session is life imprisonment and is enhanced to death by the High Court.

936. A District and Sessions Judge<sup>3</sup> is in favour of a limited right of appeal, where the High Court imposes the death sentence for the first time, the principle being that this would eliminate (from the field of appeal as of right to the Supreme Court) all death sentence cases in which the Trial Court and the High Court have concurred in the matter of awarding the death sentence.

937. Some replies expressed no views on the question<sup>4</sup>.

938. Those who favour enlargement have advanced a number of arguments in support of their suggestion. One argument is that a further chance to the accused to agitate the question of sentence should be given in all cases of death sentence, including confirmation. The Supreme Court, it is stated, has found in a few cases, that while the finding of the High Court indicated that a particular type of culpable homicide was committed, the sentence happened to be awarded on a different type<sup>5</sup>. A few decisions<sup>6</sup> have also been referred to in this context.

939. The point has also been made in one reply<sup>7</sup>, that considering the impossibility of rectification of mistake, a further process of scrutiny by a superior and more experienced judicial authority is always desirable. (In fact, the

1 S. No. 262.

2 S. No. 420.

3 S. No. 334.

4 A. High Court, S. No. 140.

5 Chief Justice of a High Court and Judge of that High Court S. No. 130.

6 *Pandu Rang v. State of Hyderabad*, (1955) 1 S.C.R. 1083; 1955 S.C. 216 ; *William Staney v. State of Madhya Pradesh*, A.I.R. 1956 S.C. 116 ; also *Inder Singh v. Crown* (1928), I.L.R. 10 Lah. 477.

7 Reply of an Inspector-General of Police, S. No. 131.

reply suggests that every sentence of death should be subject to confirmation by a Division Bench of the Supreme Court. It is stated<sup>1</sup> that as death is the highest sentence, an opportunity of appeal should be given.

940. Amongst those who have opposed the proposed enlargement of jurisdiction are some High Courts<sup>2</sup>, and certain High Court Judges<sup>3-4</sup>.

941. A State Law Commission<sup>5</sup>, many State Governments<sup>6</sup>, and Administrations of Union Territories<sup>7</sup>, and many others are opposed to enlargement.

942. A High Court Judge<sup>8</sup> is opposed to enlargement because—

(a) it will mean permitting a second appeal in case of concurrent decisions of two Courts awarding a death sentence, which is not ordinarily contemplated in the criminal law;

(b) in other countries there is no such power;

(c) in appropriate cases articles 134 and 136 are sufficient.

943. Several High Court Judges are opposed to enlargement<sup>9</sup>.

944. Another High Court Judge<sup>10</sup> is opposed to enlargement on the ground that it would shift on the Supreme Court a burden which should appropriately lie in the High Court.

945. The Home Minister of a State<sup>11</sup> is opposed to enlargement.

946. The Law Minister of a State<sup>12</sup>, who is opposed to enlargement, has expressed the view that the provisions relating to mercy are enough.

1 A State Government, S. No. 143.

2 Two High Courts, S. Nos. 167 and 187.

3 Chief Justice of a High Court, S. No. 316.

4 Several High Court Judges, S. Nos. 105, 147 and 97.

5 A State Law Commission, S. No. 133.

6 S. Nos. 129, 154, 182, 242, 261, 311 and 574.

7 S. Nos. 164 and 303.

8 S. No. 230.

9 S. Nos. 262, 393, 394, 395, and 396.

10 S. No. 251.

11 S. No. 258.

12 S. No. 313.

947. A Minister<sup>1</sup> in a State Government is opposed to enlargement, on the ground that the procedure will become very lengthy and expensive.

948. Some members of Parliament are opposed to enlargement<sup>2</sup>. So are some members of the State Legislatures opposed to enlargement<sup>3</sup>.

949. An Inspector-General of Police<sup>4</sup> has stated that enlargement would lead to delay.

950. A very Senior Advocate of the Bombay High Court<sup>5</sup> has, while opposing enlargement, stated that generally speaking the right of appeal to superior court should not be extended and that it encourages litigation, protracted proceedings and inordinate delays, and keeps the condemned criminals in a state of suspense for an indefinite period. In his view, the right of multiple appeals in America has led to tortuous and protracted proceedings. He has observed that in America, the unfortunate appellant is not only kept in a state of agonising suspense for years, but, in some cases (the case of Sacco and Vanzetti for instance), it ends in the inhuman spectacle of the man being executed after years of suspense and expectation.

951. Certain District and Sessions Judges are opposed to enlargement<sup>6</sup>.

952. A District and Sessions Judge<sup>7</sup> has opposed enlargement on the ground that theoretically there can be no end to the successive appeals which we can provide. He has pointed out that both the Sessions Judge and the High Court are very careful in convicting the accused and in imposing the death sentence, and enlargement would increase the work in the Supreme Court with no corresponding benefit.

953. Several District and Sessions Judges are also opposed to enlargement<sup>8</sup>.

954. A small number of the members of the Bar are against it<sup>9</sup>.

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1 S. No. 221.

2 S. No. 207.

3 S. Nos. 102, 248 and 249.

4 S. No. 264.

5 S. No. 318.

6 S. Nos. 416, 418, 553 and 560.

7 S. No. 336.

8 S. Nos. 351, 353, 359, 364, 366, 380, 384, 385 and 391.

9 A Pleader, Calcutta, S. No. 128.

955. Some others are also opposed to it<sup>1</sup>.

956. The opposition to enlargement is based on several points. The first is that the Supreme Court has ample powers to rectify miscarriage of justice; secondly, that the Supreme Court is not a court of criminal appeal in the ordinary sense, and an unconditional right of appeal would not be justified; thirdly, that a departure from the existing system is not necessary because justice is not hampered under the present system; fourthly, it would mean delaying justice and increasing the cost of litigation, would make the High Courts lose their prestige and would weaken the deterrent effect of the death penalty; and fifthly, that it would unnecessarily increase the work in the Supreme Court.

#### TOPIC NUMBER 50(b)

*Scope of appeal in criminal cases where a sentence of death is in issue.*

957. We propose to consider in detail the present law as to appeals in cases where the sentence of death is in issue. The Courts, which can pass a sentence of death, are either the High Courts in the exercise of their original criminal jurisdiction, or the Courts of Session. The only High Court, which now exercises such criminal jurisdiction on the ordinary original side, is the Calcutta High Court; but every High Court has, what can be described as, "extraordinary original criminal jurisdiction" which may arise either by reason of withdrawal of a case from a subordinate court to the High Court under article 228 of the Constitution, or by transfer of a case from a subordinate court to the High Court under section 526(1)(iii) of the Code of Criminal Procedure, 1898, or by an order passed by the High Court, directing that an accused person be committed for trial to itself under section 526(1)(iv) of the same Code, or by transfer of a case from a subordinate court to the High Court under the Letters Patent<sup>2-3</sup>, or by exercise of the High Court's extraordinary criminal jurisdiction, under the Letters Patent<sup>4</sup>, or an order under section 197 of the Code of Criminal Procedure, whereby the trial is directed to be held by the High Court, or transfer or committal of a case to the High Court under section 526A and section 527 of that Code.

Scope of appeal in criminal cases where a sentence of death is in issue.

Sentence of death by High Court.

Appeal from sentence of High Court.

958. So far as cases tried on the original side by the High Court are concerned, two provisions relevant to appeals may be noted. The first is section 411A of the

<sup>1</sup> A retired Judge, High Court of Bombay, S. No. 95; A retired District and Sessions Judge, Nagpur, S. No. 139; A District and Sessions Judge (Gujarat), S. No. 212.

<sup>2</sup> For example, clause 24 of the Letters Patent of the High Courts of Bombay, Madras and Calcutta.

<sup>3</sup> See *Sasihar v. Charles Taggar*, A.I.R. 1932 Cal. 123.

<sup>4</sup> For example, clause 24 of the Letters Patent of the High Court of Bombay, Madras and Calcutta.

Code of Criminal Procedure, 1898, which is quoted below:—

"411A. (1) Any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent or law by which the High Court is constituted or continued, appeal to the High Court—

(a) against the conviction on any ground of appeal which involves a matter of law only;

(b) with the leave of the Appellate Court, or upon the certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the Appellate Court to be a sufficient ground of appeal; and

(c) with the leave of the Appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the State Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent or law by which the High Court is constituted or continued, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two Judges, being Judges other than the Judge or Judges by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the State Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court.

(4) Subject to such rules as may from time to time be made by the Supreme Court in this behalf and to such conditions as the High Court may establish or require, an appeal shall lie to the Supreme Court from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court certifies that the case is a fit one for such appeal."



959. It may be added, that section 411A applies to extraordinary criminal jurisdiction also<sup>1</sup>.

Sub-section (4) of section 411A of the Code of Criminal Procedure, it would have been noted, deals with appeals to the Supreme Court.

960. The second is the group of provisions contained in articles 134 and 136 of the Constitution, which are quoted below:—

Appellate jurisdiction of Supreme Court in regard to Criminal matters.

"134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies that the case is a fit one for appeal to the Supreme Court.

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

961. So far as Courts of Session are concerned, the present position is this. Any person convicted at a trial held by the Sessions Judge or by the Additional Sessions Judge may appeal to the High Court<sup>2</sup>. When the sentence passed by the Court of Session is one of death, the proceedings have to be submitted to the High Court for confirmation of the sentence, and the sentence cannot be executed unless it is confirmed by the High Court<sup>3</sup>.

Appeal from Court of Session.

1 *Sunil Chandra v. State*, A.I.R. 1954 Cal. 305, 313 (D.B.).

2 Section 410, the Code of Criminal Procedure, 1898.

3 Section 374, the Code of Criminal Procedure, 1898.

**Confirmation.**

962. The powers of the High Court on such reference are very wide, both in respect of procedure and in respect of the substantive order to be passed. The High Court can make or cause to be made a further enquiry into, or take or cause to be taken additional evidence upon, any point bearing upon the guilt or innocence of the convicted person<sup>1</sup>. It may confirm the sentence, or pass any other sentence warranted by law, or annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or acquit the accused person. The order of confirmation is not to be made until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of<sup>2</sup>. In fact, the confirmation proceeding and the appeal, if any, are heard together.

**Revision.**

963. Where the Court of Session, while convicting the accused of a capital offence, has imposed the lesser sentence, the High Court may, in exercise of its powers of revision, enhance the sentence<sup>3</sup>, after giving the accused an opportunity of being heard<sup>4</sup>.

A revision cannot, of course, result in alteration of an *acquittal* into conviction<sup>5</sup>. Where the High Court confirms the sentence of death in confirmation proceedings, and maintains it in the appeal (if any), or enhances the lesser sentence to a sentence of death, further appeal to the Supreme Court is governed by articles 134 and 136 of the Constitution<sup>7</sup>.

**Appeals from acquittal.**

964. Where the Court of Session has acquitted the accused, the State can appeal to the High Court<sup>8</sup>, and, in certain cases, a private party may also be allowed to appeal<sup>9</sup>. In such appeals, the High Court can reverse the order of acquittal and direct that further inquiry be made, or that the accused be re-tried, or committed for trial, or find him guilty and pass sentence on him according to law<sup>10</sup>.

1 Section 375 (1), Code of Criminal Procedure, 1898.

2 Section 376, Code of Criminal Procedure, 1898.

3 Section 376, Proviso, Code of Criminal Procedure, 1898.

4 Section 439 (1), Code of Criminal Procedure, 1898. As to appeal, see section 423 (1A) of the Code.

5 Section 439 (2) and section 439 (6) Code of Criminal Procedure 1898.

6 Section 439 (4), Code of Criminal Procedure, 1898.

7 We need not discuss here article 132 of the Constitution.

8 Section 417 of the Code of Criminal Procedure, 1898.

9 Section 417 (3) of the Code of Criminal Procedure, 1898.

10 Section 423 (1)(a) of the Code of Criminal Procedure, 1898.

965. In an appeal from conviction, the High Court may <sup>Appeal from conviction.</sup> enhance the sentence after the accused has had an opportunity of showing cause against the proposed enhancement<sup>1,2</sup>.

966. Thus, whatever be the venue of the trial, every case of a capital offence, where the sentence of death is in issue, must ultimately come up before the *High Court*.

967. Article 134(1) of the Constitution sets out the extent of jurisdiction of the Supreme Court in criminal matters. The appeal lies in three cases--

(a) where the High Court, on appeal, reverses the order of acquittal by a Court of Session and sentences the accused to death;

(b) where the High Court withdraws a case from the Sessions Court and, on conviction, sentences an accused person to death;

(c) where the High Court certifies that a case is fit one for appeal to the Supreme Court.

This right of appeal under (c) above is not restricted to cases involving sentence of death, but extends to all criminal cases; it is however subject to rules made by the Supreme Court under article 145 of the Constitution.

Parliament has the power to confer on the Supreme Court any further powers to entertain and hear appeals from judgments, final orders or sentences in a criminal proceeding of a High Court under article 134(2).

968. The appeal, therefore, lies as a matter of right where the High Court, for the first time imposes a sentence of death, either when the matter comes up in an appeal to the Court or when it tries a matter itself; but it does not lie as a matter of right in cases where the sentence is enhanced under section 439 of the Criminal Procedure Code.

As to when the appeal lies under clause (c) of article 134(1), the principles have been laid down by the Supreme Court in some of its judgments, which we shall briefly discuss.

There is still another provision in the Constitution which confers jurisdiction on the Supreme Court to entertain appeals and that is article 136, which also we shall discuss.

1. Section 423 (1A) of Code of the Criminal Procedure, 1898, as amended in 1955.

2. Figures relating to appeals to High Courts in capital cases are given separately.

969. Under clause (c) of article 134(1) of the Constitution, an appeal lies to the Supreme Court in all criminal matters where a certificate has been granted by the High Court of its being a fit case for appeal to the Supreme Court.

970. As to when a certificate can be granted under article 134, the Supreme Court has laid down certain criteria for the exercise of discretion<sup>1</sup>. In *Haripada Dey v. the State of West Bengal*<sup>2</sup>, where a certificate had been granted in spite of the fact that the question involved was one of fact, the Supreme Court held that the grant of certificate was improper, and that the High Court had no jurisdiction to grant the certificate in these circumstances. The mere fact that the High Court was unable to remedy any defect on a question of fact was held not to be a ground on which a certificate could be granted. In a later case<sup>3</sup>, where an appeal was dismissed by the High Court summarily and another Bench of the High Court had granted a certificate on the ground that on account of summary dismissal of the appeal, the appellant did not have the satisfaction of having fully heard, the Supreme Court held the certificate to be illegal, and observed—"Certifying" is a strong word and, therefore, it has been repeatedly pointed out that a High Court is in error in granting a certificate on a mere question of fact, and that the High Court is not justified in passing on an appeal for determination by this Court when there are no complexities of law involved in the case, requiring an authoritative interpretation by this Court. On the face of the judgment of the learned Chief Justice, the leave granted cannot be sustained"<sup>4</sup>.

971. In *Khushal Rao v. State of Bombay*<sup>5</sup>, where a certificate was granted not on a difficult question of law and procedure which required to be settled by the Supreme Court, but on a question which was essentially one of fact, namely, whether there was sufficient evidence of the guilt of the accused, the Supreme Court, following its previous judgment in *Haripada Dey's* case, made these observations:—

"In other words, this Court does not function, ordinarily, as a Court of Criminal Appeal. Under the Constitution, it has the power, and it is its duty, to hear appeals, as a regular Court of Appeal, on facts involved in cases coming up to this Court on a certificate under article 134(1)(a) or (b). To the same

<sup>1</sup> *Nar Singh v. State of Uttar Pradesh*, (1955) 1 S.C.R. 238, 241—242.

<sup>2</sup> *Haripada Dey v. State of West Bengal*, (1956) S.C.R. 639.

<sup>3</sup> *Sidheshwar Ganguly v. State of West Bengal*, (1958) S.C.R. 749, 754.

<sup>4</sup> *Haripada Dey v. State of West Bengal*, (1956) S.C.R. 639, and case referred to therein.

<sup>5</sup> *Khushal Rao v. State of Bombay*, (1958) S.C.R. 552, 559.

effect are the other decisions of this Court, referred to in the reported decisions<sup>1-2,3</sup>.

It is, therefore, incumbent upon the High Courts to be vigilant in cases coming up before them, by way of an application for a certificate of fitness under article 134(1) (c) of the Constitution."

In this case also, the certificate was held to be illegal.

Therefore, a certificate under clause (c) of article 134(1) can be granted only where the question is one of great importance<sup>4,5</sup>.

972. There is also another provision in the Constitution which gives to the Supreme Court the jurisdiction to hear appeals in criminal matters, and that is article 136 of the Constitution. Several tests have been laid down as to when the Supreme Court will entertain an appeal under article 136. As early as 1950, in *Pritam Singh v. State*<sup>6</sup>, the law was thus stated. The Supreme Court will not grant special leave to appeal under article 136(1) of the Constitution unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question brings features of sufficient gravity to warrant a review of the decision. In the *State of Madras v. A. Vaidyanatha Iyer*<sup>7</sup>, the Court held that the Supreme Court will not readily interfere with the findings of the fact given by the High Court, but if the High Court acts perversely or otherwise improperly, interference will be called for.

The Supreme Court refused to give leave under article 136 in *Nar Singh v. State of U.P.*<sup>8</sup> where the sole question was the applicability of section 149 of the Indian Penal Code to a case where the High Court had held that the condition of five persons in section 149 had been complied with, and the only question was which was those of five persons and therefore a question of fact.

973. Thus, in our opinion, there is adequate provision in the Constitution to safeguard the interests of an accused person to prevent any miscarriage of justice or the imposition of a capital sentence not called for.

1 *Nor Singh v. The State of U. P.*, (1955) 1 S.C.R. 238.

2 *Baladin v. The State of U. P.*, A.I.R. 1956 S.C. 181.

3 *Sunder Singh v. The State of U. P.*, A.I.R. 1950 S.C. 411.

4 *Banarsi Prasad v. Kasli Krishan*, 28 I.A. 11, 13, 18 (P.C.).

5 See also *Vaithianath Pillai v. King Emperor*, 40 I.A. 193; L.R. 36 Mad. 501; 14 Cr. L.J. 577 (P.C.).

6 *Pritam Singh v. State*, (1950) S.C.R. 453.

7 *State of Madras v. A. Vaidyanatha Iyer*, (1957) S.C.R. 581.

8 *Nar Singh v. The State of U. P.*, (1955) 1 S.C.R. 238, 242.

The decisions on the subject of interference by the Privy Council in Criminal cases were reviewed in *Arnold's* case<sup>1</sup>, where it was pointed out that the Judicial Committee was not a court of Criminal Appeal. It was also stated that the practice of the Court of Criminal Appeal in England would not be necessarily relevant regarding the procedure of the Privy Council in advising interference<sup>2</sup>.

974. In a recent decision of the Supreme Court<sup>3</sup>, the scope and ambit of article 136 was considered. After pointing out that an appeal under article 136 was not as of right, nor by special certificate of the High Court, the Supreme Court made the following observations:—

“Once a decision is given by the High Court, that is final unless an appeal is allowed by special leave of this Court. No doubt this Court has granted special leave to the appellants, but the question is one of the principles which this Court will ordinarily follow in such an appeal. It has been ruled in many cases before that this Court will not re-assess the evidence at large, particularly when it has been concurrently accepted by the High Court and the court or courts below. In other words, this Court does not form a fresh opinion as to the innocence or the guilt of the accused. It accepts the appraisal of the evidence in the High Court and the court or courts below. Therefore, before this Court interferes something more must be shown, such as, that there has been in the trial a violation of the principles of natural justice or a deprivation of the rights of the accused or a misreading of vital evidence or an improper reception of evidence which, if discarded or received, would leave the conviction unsupportable, or that the court or courts have committed an error of law or of the forms of legal process or procedure by which justice itself has failed. We have, in approaching this case, borne these principles in mind. They are the principles for the exercise of jurisdiction in criminal cases, which this Court brings before itself by a grant of special leave.”.

Cases not  
appealable  
at Present  
without  
certificate,  
etc.

975. This survey of the constitutional and statutory provisions shows, that at present there are certain situations wherein, even if the sentence is one of death, a right of appeal, without certificate of High Court or leave of Supreme Court, to the Supreme Court from the determination of the High Court, is not available.

<sup>1</sup> *Channing Arnold v. Emaceror*, (1914) 15 Cr. L.J. 309, 324, 325 (C. P.)

<sup>2</sup> As to this point, see also *Clifford v. Emperor*, 40 I.A. 241; 15 Cr. L.J. 144 (P.C.) (A Court of Criminal Appeal can go into questions of evidence and questions of procedure on the same footing as an ordinary Court of Appeal, but the Privy Council is limited by the principle laid down in *Dillet's* case.).

<sup>3</sup> *Saravanabhovan v. State of Madras*, (1966) 1 S.C.A. 730, 734 A.I.R. 1966 S.C. 1276 (majority judgment).

These are as follows:—

(i) Where the Court of Session has convicted the accused of a capital offence and sentenced him to death, and the sentence is confirmed by the High Court in proceedings for confirmation;

(ii) where the Court of Session has convicted the accused of a capital offence and sentenced him to death and the sentence is upheld in appeal by the High Court;

(iii) where the Court of Session has convicted the accused of a capital offence, but sentenced him to the lesser sentence, and the High Court has *enhanced the sentence* to one of death, either in revision or in the appeal from the conviction filed by the accused under sections 411(1A) and 439(2), Code of Criminal Procedure, 1898;

(iv) where a Judge of the High Court, sitting on the original side, sentences the accused to death, and the sentence is maintained by the High Court in an appeal under section 411A of the Code of Criminal Procedure, 1898<sup>1</sup>;

(v) where a Judge of the High Court, sitting on the original side, convicts the accused of a capital offence, but sentences the accused to the lesser sentence, and the High Court, in an appeal by the accused against the conviction, enhances the sentence to one of death, under section 411A read with section 423(1A) of the Code of Criminal Procedure, 1898.

976. The next question to be considered is whether any change in the law is required. The necessity for considering this question arises because of the fact that the move for abolition of capital punishment has raised questions as to whether the existing law ensures that a person sentenced to death gets adequate justice. Whether change required.

977. The Law Commission had occasion to consider this question previously, when examining generally the reform of judicial administration. Its observations on the subject were as follows<sup>2</sup>:— Recommendation in Fourteenth Report.

“40. We have not before us any substantial body of opinion calling for the enlargement of the jurisdiction of the Supreme Court under article 134. A view has, however, been expressed by the Government of Criminal Appellate Jurisdiction.

<sup>1</sup> The right under section 411A (4), Criminal Procedure Code, is not an unqualified one.

<sup>2</sup> Fourteenth Report of the Law Commission (Reform of Judicial Administration), Vol. 1, pages 51 and 52, paragraphs 40—41.

Madras that the limited right of appeal now conferred in cases of persons sentenced to death by clauses (a) and (b) of article 134(1) should be enlarged and that in all cases in which the accused persons are sentenced to death, there should be a right of appeal to the Supreme Court, without the need of a certificate from the High Court. It was suggested that Parliamentary legislation to this effect under article 134(2) should be undertaken.

41. In our view adequate grounds have not been made out for the proposed enlargement of the right of appeal. Even in cases not covered by clauses (a) and (b) of article 134(1), the High Court has the power to certify a case as fit for appeal to the Supreme Court under clause (c). There is no reason to suppose that cases in which accused persons are sentenced to death other than those falling under clauses (a) and (b) of article 134, if they are fit ones for appeal, are not being certified as fit cases under clause (c) of article 134(1). There is also the safeguard provided by the wide powers of the Supreme Court under article 136 which will not fail to be exercised in cases of death sentences where a miscarriage of justice has occurred. The proposal of the Madras Government is based on the view that all cases, where the extreme penalty of the law has been awarded, should be examined by the Supreme Court. We are not inclined to accept this view. For over a century such cases have been dealt with by the High Courts subject to the superintendence of the Privy Council under its special leave jurisdiction and there is no reason why the High Courts should not continue to deal with such cases in the same manner."

Thus, enlargement of the jurisdiction, so as to allow an appeal in all cases wherein persons are sentenced to death, was not favoured, for several reasons; first, because of the Commission had not a substantial body of opinion calling for enlargement of jurisdiction; secondly, because the Commission thought that there was no reason to suppose that cases which were fit for appeal were not being certified under article 134(1)(c); and thirdly, because the Commission felt that the safeguard under article 136 would not fail to be exercised to rectify a miscarriage of justice.

Develop-  
ments dur-  
ing last 10  
years.

978. It has, no doubt, to be noted, that since this Report was submitted, there has been a lot of thinking generally on the subject of capital punishment and particularly on the question of appeals in capital cases. During the last 10 years or so, the question of abolition has been debated again and again in many countries as well as in India, and one of the arguments against the retention of capital punishment is the possibility of erroneous conviction. That consideration, which no doubt must have been pre-



sent to the minds of the framers of the Constitution<sup>1</sup>, has now come to the forefront, and it would not be improper if the question of right of appeal is re-examined in this light.

979. We may, in this connection, refer to the views of the Canadian Committee. That Committee noted<sup>2</sup> that under the law in force then, a person whose conviction was upheld by a Provincial Court of Appeal, might appeal as of right to the Supreme Court of Canada, where there was a dissent on a question of law in the lower Court, and that, otherwise he could appeal to a single Judge of the Supreme Court after obtaining leave of appeal on a question of law. After noticing that, under the law in force then, Courts could not grant an extension of time for leave to appeal in certain cases, and stating that this might cause injustice and embarrassment and the accused may be deprived of his right to appeal on a technical slip, the Committee recommended, first, an "automatic appeal" to a Provincial Appellate Court after every capital conviction, (so that the record would be transmitted to the Appellate Court automatically); secondly, that competent counsel should be provided to the appellant in such cases; and thirdly, that an appeal should be allowed from the Provincial Court of Appeal to the Supreme Court of Canada as of right to every person subject to a capital sentence<sup>3</sup>. It is the last recommendation that is of interest to us. The Committee made this recommendation "because of the gravity of the crime and sentence". We quote below the relevant paragraph:—

Views of  
Canadian  
Committee.

"84. At present, appeals to the Supreme Court of Canada are limited to appeals as of right where there is a dissent on a question of law in the Provincial Court of Appeal. Otherwise an appeal may be taken only on a question of law if leave is obtained from one judge of the Supreme Court of Canada. Because of the gravity of the crime and sentence, the Committee considered it proper that an opportunity to be heard by the court of last resort should be open to every person subject to a capital sentence and recommends that the law be amended to provide for an appeal as of right in such event to the Supreme Court of Canada."

980. Accordingly, the law has now been altered in Canada by the amendment made in 1961 to the Criminal Code, Sections 583A and 597A, of that Code (inserted in Canadian provision

1 See article 134 (1)(a) and (b) of the Constitution.

2 Canadian Report, page 4, para 9.

3 Canadian Report, page 21, paragraphs 83 and 84.

1961) (dealing respectively with first and second appeals) are quoted below<sup>1</sup>:—

Right of appeal of person sentenced to death.

“583A. (1) Notwithstanding any other provisions of this Act, a person who has been sentenced to death may appeal to the court of appeal—

(a) against his conviction on any ground of appeal that involves a question of law or fact or mixed law and fact; and

(c) against his sentence unless that sentence is one fixed by law.

Notice deemed to have been given.

(2) A person sentenced to death shall, notwithstanding he has not given notice pursuant to section 586, be deemed to have given such notice and to have appealed against his conviction and against his sentence unless that sentence is one fixed by law.

Court of appeal may consider.

(3) The court of appeal, on an appeal pursuant to this section, shall—

(a) consider any ground of appeal alleged in the notice of appeal, if any notice has been given; and

(b) consider the record to ascertain whether there are present any other grounds upon which the conviction ought to be set aside or the sentence varied as the case may be.

Appeal on law or fact or mixed law and fact.

“597A. Notwithstanding any other provision of this Act, a person—

(a) who has been sentenced to death and whose conviction is affirmed by the court of appeal, or

(b) who is acquitted of an offence punishable by death and whose acquittal is set aside by the court of appeal;

may appeal to the Supreme Court of Canada on any ground of law or fact or mixed law and fact.”.

Position in other countries.

981. It must, however, be noted that in other countries of the Commonwealth<sup>2</sup>, excepting Canada, the right of appeal has not been widened, and broadly speaking, it is limited to questions of law except with the leave of the appellate Court. There is no absolute right of second appeal in a criminal case, on a question of fact, even where a sentence of death is passed.

Question of enlargement considered.

982. The question now is whether any change in the law is required. This question has so many aspects, and

<sup>1</sup> Sections 583A and 597A, Criminal Code (Canada).

<sup>2</sup> Comparative material is given separately.

much can be said on either side. On the one hand, the widening of the jurisdiction of the Supreme Court is, no doubt, bound to increase its work.

983. On the other hand, there are certain points, stated below, which require to be considered.

984. First, the replies<sup>1</sup> which we have received to our Questionnaire show that there is a considerable body of opinion in favour of proposed enlargement of the jurisdiction of the Supreme Court.

Secondly, the risk of an erroneous conviction is a fact which has to be considered. The law should make the utmost efforts to see that all safeguards that are *reasonably practicable* are made available for avoiding an erroneous conviction, in a case where the sentence of death has been awarded.

985. We have to consider this question not from any abstract theoretical point of view, but from the practical point of view. The jurisdiction of the Supreme Court to intervene where there is a miscarriage of justice in criminal matters has been provided for in the Constitution in an ample measure. Expense and enlargement of the work of the Supreme Court, it has been argued, should not stand in the way of giving relief to the persons convicted in criminal matters, as the life and liberty of human being are more important than property. But that cannot conclude the matter. Life and liberty are certainly more important than property, but an unrestricted right of appeal either in civil or in criminal matters will do incalculable harm to the society<sup>2</sup>.

The general principle behind article 134, is that a person who has been condemned to death ought to have at least one right of appeal<sup>3</sup>. This can be illustrated with reference to article 134(1)(a) and (b). Thus, the principle on which article 134(1)(a) proceeds is that where a person acquitted by the Court of Session (or, in the case of High Court exercising original criminal jurisdiction, at the High Court sessions) is, or an appeal against acquittal, convicted by the Appellate Bench, a right of appeal to the Supreme Court is needed, because the initial presumption of innocence is, in this case, further strengthened by the fact that the trial judge has found him innocent. If, against this double presumption, the Appellate Bench finds him guilty and sentence him to death, it is certainly a matter

<sup>1</sup> Replies to question 10 have been summarised separately. See paragraphs 926, 956, *supra*.

<sup>2</sup> *cf.* Dr. Bakshi Tek Chand's speech, Vol. 8, Constituent Assembly Debates, page 850 (14th June, 1949).

<sup>3</sup> Dr. Ambedkar's speech, 8 C.A.D. 853.

which requires further investigation<sup>1</sup>. Similarly, article 134(1)(b) provides a right of appeal to a person who has been acquitted for the first time and condemned to death by the High Court, and is based on the principle that a person who has been condemned to death ought to have at least one appeal<sup>2</sup>.

986. These considerations do not apply to the cases sought to be covered by the suggested enlargement of the Supreme Court's jurisdiction. In cases other than those covered by article 134(1)(a) and (b), the facts of the case would have received detailed consideration at the hands not only of the Court of Session but of the High Court, and, in effect, the High Court goes through the whole evidence over again in confirmation proceedings; and if it finds that the accused has been rightly convicted on the evidence, there are concurrent findings on facts. In such a case, it will be wrong to allow an appeal to the Supreme Court, as such appeal will amount to an appeal on grounds of facts.

987. Lastly, there is no reason to believe that the appellate jurisdiction of the Supreme Court is not a sufficient safeguard against the miscarriage of justice.

988. The fact that the Supreme Court had, in a majority of cases<sup>3</sup>, to refuse leave to appeal, further shows that that Court has not found any serious flaw in the present scheme. It is, no doubt, true that no human agency can be infallible, and it can be appreciated that a person sentenced to death may be desirous of having his case considered at the hands of the court of last resort. A line has, however, to be drawn somewhere; the existing law draws the line at the level of the High Court, and no convincing reasons have yet been made out to shift that line higher up.

989. Further, the existing law provides adequate safeguards against an error on facts.

For these reasons, no change is recommended.

#### TOPIC NUMBER 51

##### *Plea of guilty.*

Plea of guilty.

990. How far a plea of guilty should be accepted by the court in a capital case, is a question which may be discussed, in view of its importance. The present practice in India is not to accept a plea of guilty in such cases<sup>4,5</sup>. The

<sup>1</sup> Dr. Bakshi Tek Chand's speech, Vol. 8, Constituent Assembly Debates, page 851 (14th June, 1949).

<sup>2</sup> See Dr. Ambedkar's speech, 8 C.A.D. 853 (14th June, 1949).

<sup>3</sup> See figures relating to special leave to appeal to the Supreme Court, given separately.

<sup>4</sup> See analysis of case-law, Case No. 29 and foot notes thereto.

<sup>5</sup> See also *Achar Sanghar v. Emp.*, A.I.R., 1934 Sind 204, 205.

relevant provisions of the law as to a plea of guilty in trials before the High Courts and Courts of Sessions are contained in sections 271 and 272 of the Code of Criminal Procedure, 1898. These are quoted below:—

“271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

272. If the accused refuses to, or does not plead, or if he claims to be tried, the Court shall, in a case triable by jury, proceed to choose jurors as hereinafter directed and to try the case, but in any other case, the Judge shall proceed to try the case himself:

Provided that, in cases triable by jury, the same jury may, subject to the right of objection hereinafter mentioned, try as many accused persons successively as the Court thinks fit.”

991. It may be noted, that these provisions leave a discretion to the Court to accept a plea of guilty. Ordinarily, however, the plea is not accepted in a capital case, though there is nothing illegal in doing so if the Court is satisfied that the accused understands all the essential elements of the crime and the effect of the plea. It will not be a wise exercise of the discretion to accept the plea of guilty in a capital case. Charges of murder, it has been pointed out, frequently involve complicated questions as to the knowledge and intention with which the death of the victim was caused, and it is undesirable (unless the case is clear) to convict the accused on his plea<sup>1</sup>. For this reason, courts err on the side of caution, and the practice has grown up not to accept the plea of guilty<sup>2,3</sup>.

992. We quote from the judgment in an Allahabad case<sup>4</sup> which contains instructive observations on the subject:—

“Bhadu was convicted on his own plea without evidence being recorded in the Sessions Court. He was charged with the offence punishable under section 302 of the Indian Penal Code. The case against him was that he had murdered his wife. His plea as recorded is as follows:—

Guilty. I killed my wife. She had abused me. Called me ‘ware’. No one was present. I killed her with a Kulhari.”

<sup>1</sup> *Achar Saughar v. Emp.*, A.I.R. 1934 Sind 204, 205.

<sup>2</sup> *Queen Empress v. Chinna Pavuchi*, (1900) I.L.R. 23 Madras 151, 154.

<sup>3</sup> *Dalli v. Emp.*, A.I.R. 1922 Allahabad 233 (1).

<sup>4</sup> *Queen Empress v. Bhadu*, (1896) I.L.R. 19 All. 119, 120, 121 (Edge and Ellenrassett J.).

We are not clear whether the word "guilty" in the plea was Bhadu's or was the interpretation of the Judge of the meaning of Bhadu's plea. In any event it was not an unqualified plea of guilty, and although the words of abuse which Bhadu said had been used might not have effect to take the case out of section 302 of the Indian Penal Code, they put a qualification on his admission and made it necessary in our opinion that the trial should proceed and evidence should be taken. In this country it is dangerous to assume that a prisoner of this class understands what are the ingredients of the offence under section 302 of the Indian Penal Code, and what are the matters which might reduce the act committed to an offence under section 304. Even in England, it used to be the practice of some judges, and probably is still, although they were not bound to do so, to advise persons pleading guilty to a capital offence to plead not guilty and stand their trial. One of us had known that course followed in numerous cases."

(The case was sent back to the Court of Session, with a direction to the Judge to take evidence and proceed on the basis of the plea not being unqualified plea of guilty. The case was, subsequently, tried on evidence taken before the same Sessions Judge, and the accused convicted and sentenced to death. The sentence was confirmed by the High Court).

993. If a plea of guilty is accepted, the accused cannot appeal from the conviction<sup>1</sup>. He can appeal only on the ground of the extent or the legality of the sentence. By pleading guilty, he is considered to have waived his right of appeal. "The intention of the Legislature would appear to be to treat the plea of guilty as a waiver of the right of appeal except as to the justice and legality of the sentence<sup>2</sup>". The restriction, of course, does not apply to the High Court acting in revision under section 439. Code of Criminal Procedure<sup>3,4</sup>.

994. The practice in England is this: Generally, where an accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the sentence can be forthwith passed on him after recording his confession<sup>5</sup>. In a case of serious crime, the court is usually reluctant to accept the plea, and will advise the prisoner to retract it. But, if the prisoner still refuses to withdraw his confession, there is no alternative

<sup>1</sup> Section 412, Code of Criminal Procedure, 1898.

<sup>2</sup> *Emp. v. Jaffar M. Talab*, (1880) I.L.R. 5 Bombay 85, 87. (Case under section 167, Presidency Magistrates Courts Act, 1877).

<sup>3</sup> *Krishna Chanda v. Emp.*, A.I.R. 1943 Pat. 313 (Rowland J.).

<sup>4</sup> *Ali Hossein v. Emp.*, A.I.R. 193 Rangoon 349, 350.

<sup>5</sup> Archbold, Criminal Pleadings etc. (1962), paragraph 424.

but to accept it even in the case of murder, of which instances have occurred even in recent times<sup>1</sup>.

995. The matter was considered by the Canadian Committee. The Committee noted<sup>2</sup> that it was possible for an accused to plead guilty to a charge of murder. "On rare occasions, a person convicted of murder has insisted on entering a plea of guilty. In these cases, the courts have insisted on the production of sufficient crown evidence to assure that the charge was well founded." The Committee believed that it was extremely undesirable to admit pleas of guilty in capital cases, "because the capacity of the accused must always be taken as doubtful and the acceptance of the plea almost makes the court privy to a scheme for self-destruction"<sup>3</sup>. It, therefore, recommended, that the law be amended to provide that all murder trials should proceed as if a plea of *not guilty* were entered.

996. Accordingly, in 1961, section 515 of the Criminal Code of Canada<sup>4</sup> was amended. Section 515, sub-section (2a) and (2b), of that Code as amended, are quoted below:—

"(2a) An accused who is charged with an offence punishable by death and is called upon to plead may plead not guilty, or the special pleas authorised by this Part and no others.

(2b) Where an accused who is charged with an offence punishable by death does not plead not guilty or one of the special pleas authorised by this Part or does not answer directly, the court shall order the clerk of the court to enter a plea not guilty."

We have to consider whether any such mandatory provision is needed. Since, in India, a sentence of death has to be confirmed by the High Court<sup>5</sup>, which would certainly see that no injustice is caused, by the acceptance of a plea of guilty without very strong reasons. We do not therefore recommend the insertion of a specific provision.

#### TOPIC NUMBER 52

#### *Medical Examination of the accused*

997. The topic of medical examination of the accused in a capital case, which was considered by the Royal Commission<sup>6</sup>, may be dealt with, as it is of interest to our Medical Examination of the accused.

<sup>1</sup> Archbold, Criminal Pleadings, etc. (1962), paragraph 1127, citing *R. v. Vent.* (1935) 25 Criminal Appeal Reports, 55.

<sup>2</sup> Canadian Report, page 3, paragraph 6.

<sup>3</sup> Canadian Report, page 19, paragraph 8i.

<sup>4</sup> (Canada) Criminal Code, as amended in 1961, section 515.

<sup>5</sup> Section 374, Code of Criminal Procedure, 1898.

<sup>6</sup> R. C. Report, page 145, *et seq* and Appendix 9, page 416 *et seq*.

country also. The importance of ensuring full and reliable information about the mental state of an accused charged with murder, need not be emphasised. The existing provisions of the law may be referred to in this respect. Under the Code of Criminal Procedure<sup>1</sup>, if any person committed for trial before a Court of Session or a High Court appears to the court at the trial to be of "unsound mind and consequently incapable of making his defence", the jury or the court shall, in the first instance, try the fact of such unsoundness and incapacity; and if the jury or the court is satisfied of the fact, the Judge shall record a finding to that effect and shall adjourn further proceedings in the case. If such person is found to be of unsound mind and incapable of making his defence, then, under the same Code<sup>2</sup>, he can be released on security being given, etc., or may be ordered to be detained in safe custody.

998. Now, it will be noted that these provisions are dependent upon it "appearing to the court" that the accused is of unsound mind, etc. There is no *automatic* examination of the mental state of the accused. The Royal Commission<sup>3</sup> recommended that every person charged with murder should be specially examined as to his state of mind by two doctors, of whom one at least should be a psychiatrist of standing who is not a member of the Prison medical service, and the other usually an experienced member of that service. In making this recommendation, the Royal Commission had two objects, first, to recognise the fact that where a person is charged for a crime for which the fixed penalty is death, it is the duty of the State to obtain the best advice on his mental condition as a guide to the conduct of the case; and secondly, to ensure that the evidence presented on the point by the State, should have the weight that can be given only by authorities of "the highest skill, fullest experience and manifest impartiality".

999. In this connection, mention may also be made of what is known as the *Brigg's Law*, enacted in the State of Massachusetts, under which an accused charged with a capital offence (as well as an accused indicted for any other offence more than once or previously convicted of felony), *must be examined* by experts appointed by the State Department of Mental Health<sup>4</sup>.

1000. Provisions on the subject exist in the laws of certain other States of the United States of America, and also in certain countries of the Continent also<sup>5</sup>.

<sup>1</sup> Section 465, Code of Criminal Procedure, 1898.

<sup>2</sup> Section 466, Code of Criminal Procedure, 1898.

<sup>3</sup> R. C. Report, page 145, paragraph 422.

<sup>4</sup> R. C. Report, page 148, paragraph 426, contains a detailed discussion.

<sup>5</sup> See detailed discussion in R. C. Report, pages 416 to 424, paragraphs 17--20.



## CHAPTER XIV

## MERCY

## TOPIC NUMBER 53 (a)

*Existing powers of commutation*

1001. Coming to what is known as the "prerogative of mercy", we may note the provisions on the subjects contained in articles 72 and 161 of the Constitution and section 401, 402 and 402A of the Code of Criminal Procedure<sup>1</sup>. These are quoted below:—

Existing powers of commutation.

"72. (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends<sup>2</sup>;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends<sup>3</sup>.

401. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

<sup>1</sup> Sections 54 and 55 of the Indian Penal Code may also be seen.

<sup>2</sup> As to executive power of the Union, see article 73 of the Constitution.

<sup>3</sup> As to executive power of the State, see article 162 of the Constitution.

(2) Whenever an application is made to the (appropriate Government) for the suspension or remission of a sentence, the (appropriate Government) may require the presiding Judge of the court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion (and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists).

*N.B. (Remaining sub-sections not quoted).*

402. (1) The appropriate Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:—

death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.

(3) In this section and in section 401, the expression "appropriate Government" shall mean—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in other cases, the State Government.

402A. The powers conferred by sections 401 and 402 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government."

#### TOPIC NUMBER 54

#### [Replies to question 11 (a)]

Replies to  
question  
at (a).

1002. Question 11 (a) in our Questionnaire was as follows:—

"(a) Have you any suggestion to make with respect to the power of the President and the Governor to grant pardon, reprieve, respite or remission in respect of the punishment of death or to suspend, remit or commute the sentence of death under articles 72 and 161 of the Constitution and the power of the Government to suspend, remit or commute such sentence under sections 401-402, Criminal Procedure Code?"

A very large number of replies to this question express general satisfaction with the powers contained in the existing provisions.

But it must be noted that certain replies suggest restrictions on these powers in matters of detail, and since such replies have been received from various sources (including a few State Government and High Courts also), it would be desirable to state here the important points made in those replies.

1003. The principles on which these powers are exercised have been stated in a reply coming from a very knowledgeable source<sup>1</sup>, the gist of which is as follows:—

The exercise of power of the President to grant pardon to or commute the sentence of death, under article 72 of the Constitution, or that of the Governor under article 161 and sections 401 and 402, Criminal Procedure Code, depends upon certain extenuating circumstances such as the following:—

(i) where the murder was committed without premeditation, in a sudden quarrel, or without any intention to kill; or

(ii) under provocation, or *in furor brevis*, or

(iii) where the offender was a person of abnormal mind.

1004. One of the High Courts<sup>2</sup> has stated that the President and the Governor should not exercise these powers unless they receive satisfactory proof that the conviction is against facts, or that the courts have not properly exercised their discretion in awarding capital punishment. They should take the facts found by the courts as correct, and should not "sit in judgment" over the courts.

1005. A suggestion made by certain High Court Judges<sup>3</sup> is that some provision should be made laying down the conditions under which the President or the Governor can commute the sentence, etc. On legal aspects, it is stated, the decision of the court should be final, and a mercy petition should be entertained only on some other ground, e.g., changed circumstances.

1006. Some High Court Judges<sup>4</sup> have suggested that pardon or reprieve should be granted on very rare occasions on special grounds and in very hard cases, and not for political reasons and certainly not for cold-blooded murders.

<sup>1</sup> A retired District and Sessions Judge (Formerly Law Secretary to a State Government and Secretary to the President), S. No. 139.

<sup>2</sup> A High Court, S. No. 187.

<sup>3</sup> Two High Court Judges, S. No. 97.

<sup>4</sup> Two High Court Judges, S. No. 154.

1007. One suggestion<sup>1</sup> is to the effect that the judiciary should always be supreme, and the power of pardon should be taken away.

1008. A Bar Association<sup>2</sup> has stated that these powers should *no longer remain with the President or the Governor*, and that while the petition may be addressed to the President or the Governor, it should (if the executive so thinks fit) be referred to the last court which sentenced the person concerned (with a recommendation, if any), and the decision of that court in the matter should be final.

Certain other points have been made, which will be dealt with later<sup>3</sup>.

1009. An Inspector-General of Police<sup>4</sup> has suggested deletion of sections 401 and 402, Criminal Procedure Code, on the ground that in the interest of administration of justice, it is not necessary or desirable to empower the Government to exercise powers almost similar to those conferred by the Constitution on the President and the Governor.

1010. Another suggestion<sup>5</sup> is that the power should be exercised by the *President only* (who is elected as the supreme authority of the country), and that to avoid clash and confusion, it would be better if the Governor is *not given* the power. One Bar Council has stated that the provisions in sections 401 and 402, Criminal Procedure Code, need not be retained, and only the powers under the Constitution may be continued.

1011. The Judicial section of the Indian Officers' Association<sup>6</sup> in a State has stated:—

“The President, being the repository of the supreme temporal power and grace and the symbol of all that is best of the nation, should have unfettered discretion in the exercise of his power to grant pardon. The grant of pardon by the Governors, however, in respect of sentences of death should be limited to commutation to imprisonment for life. This is necessary to preserve the element of deterrence and (to prevent) chance of factors otherwise than strict compassion coming into play to render nugatory the decisions of the highest tribunals of the land.”

1 S. No. 117.

2 Supreme Court Bar Association, S. No. 110.

3 See discussion relating to question 11(b).

4 An Inspector-General of Police, S. No. 143.

5 A Bar Council, S. No. 132.

6 S. No. 562.

## TOPIC NUMBER 55

*Dual prerogative*

1012. In connection with the power to commute death sentences, reference must be made to one important point which requires discussion. Under article 72(1) of the Constitution, the President has a power to grant pardons, etc., to commute sentences, etc., (so far as is relevant) not only in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends,—

Dual power  
of commutation.

Paragraph (b)—but also in all cases where the sentence is a sentence of death—

Paragraph (c)—but the later power is not to affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under “any law” for the time being in force.

Under article 161, the Governor of a State shall have a power to grant pardon, etc., or to pardon, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The extent of the executive power of the Union is dealt with in article 73(1). The extent of the executive power of the State is regulated by article 163, under which it extends to all matters with respect to which the Legislature of the State has power to make laws—which would include criminal law. The proviso to article 163, however, states that in any matter with respect to which the Legislature of a State or Parliament has power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

1013. It would be obvious that, so far as the commutation of the sentence of *death* is concerned, it falls both within the power of the President and within the power of the Governor under the Constitution<sup>1</sup>; and none of the provisions of the Constitution cited above<sup>2</sup> seem to have the effect of taking away the power of the Governor.

1014. We may next refer to the provisions<sup>3</sup> of the Code of Criminal Procedure, 1898. Under section 401(1) of that Code, the “appropriate Government” may conditionally or unconditionally suspend the execution of sentence or remit the whole or any part of the sentence. Under section 402(1),

<sup>1</sup> Cf. *In re Channugadu*, A.I.R. 1957 Andhra Pradesh 249, 251, paragraph 4 (Subba Rao J.).

<sup>2</sup> Paragraph 1012, *supra*.

<sup>3</sup> Sections 401, 402A, Code of Criminal Procedure, 1898.

the "appropriate Government" may commute the sentence of death to imprisonment for life or other lesser sentence. The definition of "appropriate Government" is contained in section 402(3), but it is unnecessary to consider it, because, under section 402A, the powers conferred by these sections upon the State Government may, in the case of the sentence of death, also be exercised by the Central Government. The vesting of the power in two Governments, found in the Constitution, is thus reflected in the Code of Criminal Procedure also.

1015. Lastly, powers of commutation, etc., are conferred by section 54 read with section 55A of the Indian Penal Code, in respect of the sentence of death, and the same dual power exists under these provisions<sup>1-2</sup>. These sections are saved by section 402(2) of the Code of Criminal Procedure, 1898, which was inserted by the Amendment Act of 1923 in view of the fact that<sup>3</sup> doubts had been expressed whether section 402, Criminal Procedure Code was not in conflict with section 54, Indian Penal Code.

1016. This dual power<sup>4</sup> existed in section 295 of the Government of India Act, 1935 also<sup>5</sup>.

1017. Theoretically speaking, the vesting of this power in two authorities may be objectionable, because it may result in the following situations:—

(i) The petition may have been granted by one, but an independent petition may have been rejected by the other.

(ii) The petition may have been rejected by one, but granted by the other.

(iii) The petition may have been accepted by one and the sentence commuted for imprisonment for life, while it may have been accepted by the other and the sentence commuted to some *other* lesser sentence.

(iv) Where there is a petition by several persons, petitions of a few persons may have been accepted by one and the petitions of other persons rejected, while

<sup>1</sup> Section 54 Indian Penal Code authorises commutation *without consent* and to *any other* punishment.

<sup>2</sup> When the Indian Penal Code was enacted, provisions as to pardon, etc., were also contained in the Pardons and Reprieves Act (18 of 1855), repealed by the Repealing Act, 1874. In the Code of Criminal Procedure 1861, section 54 was narrower than present sections 401 and 402.

<sup>3</sup> See Gazette of India (Part V), March 28, 1914, page 125 (Bill No. 3 of 1914, Clause 93).

<sup>4</sup> Paragraphs 1012—1015, *supra*.

<sup>5</sup> Cf. the discussion of history of the power in *K. M. Nanavati v. State of Bombay*, (1961) 1 S.C.R. 497; A.I.R. 1961 S.C. 112, 127 (dissenting judgment of Kapur J.). That the power of the Governor to grant pardon, etc., under article 161 "to some extent overlaps the same power of the President, particularly in the case of sentence of death", was noted in the majority judgment also; see page 119, paragraph 13 in the A.I.R.

the petitions of the others may have been accepted by another authority.

These situations can cause practical embarrassment, and, further, where the commutation is granted differently under (iii) above, by the President and the Governor, legal complications can also arise.

1018. The suggestion of the Chief Minister of a State with reference to the dual power may be quoted<sup>1</sup>:—

“Governor should be left with this power when the crimes had been committed in his territory. If committed in the territory under the Central Government, President should be vested with this power. But in cases where the Governors reprieve or suspend or commute or remit the sentence, they should get the approval of the President.”

1019. It may not be necessary to go to the length of suggesting any modifications in the articles of the Constitution or the sections in the Criminal Procedure Code.

The matter is one which can be left to administrative instructions.

## CONCLUSION

### TOPIC NUMBER 56

#### *Need for retaining the Power*

1006. A question that is often put is whether the President and the Governor should have the power of commutation, and queries are raised as to whether the executive should be allowed to override the decisions of the judiciary. When the case of a person has reached the highest tribunal in the land, and the conviction and the sentence of death have been upheld by that tribunal, would it not, it is asked, be derogatory to the prestige of that tribunal to commute the sentence on whatever grounds?

Need for retaining the power.

1021. Answer to this question requires an understanding of the essential nature of this power. It is a “prerogative”, and an illustration of “that special pre-eminence”, which the head of the State possesses. Its existence and exercise are not, in any way, construed as interference with the judiciary. Secondly, the expression “mercy” indicates the scope of, as well as the justification for, the power. With the best precautions in the world, cases must occur where facts, not known to the court, exist which justify the exercise of

Essential nature of prerogative of mercy.

<sup>1</sup> S. No. 255, under question 11(a).

this prerogative. The following observations, in an American case<sup>1</sup>, express, in a beautiful language, the nature of this power:—

“Executive clemency exists to afford relief from undue *harshness* or *evident mistakes* in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts, power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full *discretion* to exercise it. Our Constitution confers this discretion on the highest officer in the nation. in confidence that he will not abuse it.”

1022. The meaning and significance of the prerogative of mercy has been very well described by Sir Frank Newsam, who was Permanent Under Secretary of State for the Home Department<sup>2</sup>, in these words:—

“MAINTENANCE of the Queen’s Peace demands careful and impartial enforcement of the law by the judiciary. But law is made for man; justice is more than codes and precedents; and there are occasions when justice and humanity demand that there shall be interference with the due course of law—that is, exercise by the Crown of the Prerogative of Mercy”.

Joseph Chitty put the matter thus—

“Human institutions are fallible, and must in many respects be imperfect. No human faculties can anticipate the various temptations which may urge a man to the commission of an offence; or foresee all the shades in the circumstances of a case which may extenuate the guilt of the accused. An offence may be within the letter, but foreign to the general scope and spirit of the law. . . .As, therefore, society cannot sufficiently provide for every possible transgression of its ordinances, and measure by anticipation the degree of guilt which may attach to the offender, it has entrusted the King with the power of extending mercy to him. The King is, in legal contemplation, injured by the commission of public offences; his peace is said to be

<sup>1</sup> *Ex parte Grossman*, (1924) 69 Law Ed. 527; 261 U.S. 287, cited *In re Channugadu*, A.I.R. 1954 Mad. 911, 916, 917.

<sup>2</sup> Sir Frank Newsam, *The Home-Office* (The New White-Hall Series), (1955), page 113.



violated thereby, and the right to pardon cannot be vested more properly than in the Sovereign."<sup>1</sup>

The use of the prerogative is not confined to mitigating unreasonable hardships. It extends also to righting wrongful convictions<sup>2</sup>.

1023. The observations of Holmes J. in an American case may also be referred to as explaining the true nature of the power. In that case, the death sentence of a convict had been commuted to life imprisonment by President Taft in 1909. After nearly two decades of prison life, the prisoner concluded that "he would be better off dead", and attacked President Taft's action as a pardon which he had not accepted<sup>3</sup>. Holmes J. observed<sup>4,5</sup>:—

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the *Constitutional scheme*. When granted, it is the determination of the *ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.*" (Life imprisonment was held to be less than death).

1024. As observed in a leading study of the American President<sup>6</sup>, it is demanded that the capacity to forgive shall be the strongest of his impulses.

1025. It may be argued that in a country like India, where the sentence of death is not mandatory and the court is free to consider the circumstances relevant to the question of sentence, this power is not needed. We are not, however, inclined to agree with this view. There are many matters which may not have been considered by the courts. The hands of the court are tied down by the evidence placed before it. A sentence of death, passed by a court after consideration of all the materials placed before it, may yet require re-consideration because of (i) facts not placed before the court; (ii) facts placed before the court, but not in the proper manner; (iii) facts discovered after the passing of the sentence; (iv) events which have developed after the passing of the sentence; and (v) other special features. Nor can one codify and select these special features, which would be too numerous to lend

Recommendation for retention of the power.

<sup>1</sup> Chitty's Prerogatives of the Crown, (1820), 88—89, cited in Sir Frank Newsam, The Home Office, (1955), page 113.

<sup>2</sup> Sir Frank Newsam, The Home Office, (1955), page 113.

<sup>3</sup> See Prichett, American Constitution, (1959), page 32.

<sup>4</sup> *Biddle v. Perovic*, (1927) 274 U.S. 480.

<sup>5</sup> Generally as to the position in U.S.A., see Corwin—Constitution of the U.S.A., Analysis and Interpretation (1952), page 389 (under Article 2, section 2, clause 1), and page 407 (case-law), and page 407, footnote 5 (literature).

<sup>6</sup> Sidney Hyman, the American President (1954).

themselves to codification. For these reasons, we do not recommend any change in the scope of these powers<sup>1</sup>.

TOPIC NUMBER 57(a)

*Principles and procedure for exercise of prerogative of mercy*

Question  
11(b).

1026. Question 11(b) in our Questionnaire was as follows:—

“What, in your opinion, should be the principles which should guide and the procedure which should be followed in the exercise of these powers?”.

Principles—  
Replies re-  
garding.

1027. A number of replies have stated that these principles cannot be laid down or codified or stated precisely. Certain replies, while suggesting broad principles, make it clear, that these principles can be taken only as a good guide. Thus, one reply<sup>2</sup> states that the Home Secretary take into consideration not only the life history of the prisoner, but also the motives and mental condition. So, also, the state of the popular feeling is taken into account.

1028. The reply refers to the views expressed in 1907 by Herbert Gladstone, Home Secretary<sup>3</sup>, emphasising that numerous considerations are relevant and that it does not depend on principles of strict law and justice, still less of sentiment. It is a question of *policy and judgment* in each case.”

The reply also points out that if the scrutiny of evidence shows that there is a scintilla of doubt about the guilt of the prisoner, it would be a fit case for the exercise of clemency.

1029. Some of the considerations that may be taken into account have been thus enumerated by one State Government<sup>4</sup>—age, sex, mental deficiency of the accused, circumstances of the case, (e.g., whether the offence was committed under grave and sudden provocation, etc.).

Some High Court Judges<sup>5</sup> have stated that some of the principles which may be borne in mind seem to be these. The power may be exercised:—

(i) where there are mitigating circumstances which may not have received sufficient attention in the courts;

<sup>1</sup> Figures of mercy petitions are given separately.

<sup>2</sup> A retired District and Sessions Judge (Formerly Law Secretary to a State Government and Secretary to the President), S. No. 139.

<sup>3</sup> The reference seems to be to the speech of Mr. Herbert Gladstone (Home Secretary) on 11th April, 1907—Parliamentary Debates, Fourth Series, Vol. 172, col. 366. Also see his speech on 31st May, 1907 on the Criminal Appeal Bill, Parliamentary Debates, Fourth Series, Vol. 175, column 187.

<sup>4</sup> A State Government, S. No. 139.

<sup>5</sup> Two High Court Judges, S. No. 147.

(ii) when, after conviction, circumstances are brought to light indicating that the conviction was wrong;

(iii) speaking generally, to harmonise the dictates of law and justice where they may operate divergently, or, putting it in other words, to prevent a clear miscarriage of justice.

1030. Some High Court Judges<sup>1</sup> have suggested that no reprieve should be granted unless it is recommended by the High Court. That this limitation should *ordinarily* be recognised, is a suggestion made by another High Court Judge<sup>2</sup>. It has also been suggested by one State Government<sup>3</sup> that these powers should not be exercised to short-circuit the legal process of the court. "Regarding principles I am to suggest that some directive principles may be issued by the Central Government for the guidance of the State Governments. Such executive directive principles may include the circumstances which should be based on usual distinction between crime of murder involving personal disputes and crime involving security of the State."

1031. One of the State Government<sup>4</sup> has pointed out that powers relating to grant of pardon are co-related to the sentiments of mercy, and the principles cannot be codified.

1032. Another State Government<sup>5</sup> has suggested that while the procedure does not call for a change, it would be better if certain *principles* are indicated to serve as a guide in the disposal of such petitions, and states that there are no fixed principles in these cases—which is not a very happy state of affairs. The points made in the reply are:—

(a) a general principle may be laid down that the finding of fact recorded by the High Court or the Supreme Court, as the case may be, should be accepted as correct, (while dealing with the petition of mercy), and no attempt should be made at diluting the effect of the finding of fact recorded in the judgment;

(b) broadly speaking, a commutation may be permitted on the ground of—

(i) age;

(ii) provocation;

(iii) past conduct;

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<sup>1</sup> Two High Court Judges, S. No. 105.

<sup>2</sup> A High Court Judge, S. No. 147.

<sup>3</sup> A State Government, S. No. 129.

<sup>4</sup> A State Government, S. No. 154.

<sup>5</sup> A State Government, S. No. 182.

(iv) the fact whether the accused at the time of the commission of the offence acted under the influence of another in circumstances in which he could not possibly exercise his independent judgment; and

(v) similar other grounds.

1033. An eminent member of the Bar<sup>1</sup> has stated that the principles which should guide the President, etc., in the exercise of their powers should be either humanitarian or should enable the respective authorities to take into consideration what the courts, in the existing state of law, would not be entitled to consider.

1034. He has also expressed<sup>2</sup> the view—an opinion shared by a Bar Council<sup>3</sup>—that neither the President nor the Governor should have power to give pardon, reprieve, respite or remission in respect of the punishment of death or to suspend, etc., a sentence either under the Constitution or under the Criminal Procedure Code while the *ordinary judicial process is still incomplete*.

1035. It has also been stated<sup>4</sup> that in extremely revolting and heinous cases of murder, which are committed as a result of conspiracy, none should have the power to commute the sentence.

1036. One of the principles<sup>5</sup> suggested as a guide is whether the condemned person was, in the first instance, acquitted by the inferior court or whether there was any difference of opinion in the Judges in the High Court or the Supreme Court.

1037. The view of a State Government<sup>6</sup> is that the theory of "scintilla of doubt" in the matter of exercise of the prerogative right of pardon need not be introduced in this country. All relevant circumstances must be taken into consideration, but the doubt as to evidence *in the case* should not be taken into consideration, and must be left exclusively to the judges. If, however, there are factors which show that the evidence recorded did not accurately reflect the true state of facts, and these circumstances had been so manipulated that detection of such manipulation was not possible during the trial, then, according to that State Government, the power of pardon may be exercised.

<sup>1</sup> An eminent member of the Bar (through the Bar Council of India), S. No. 161.

<sup>2</sup> An eminent member of the Bar, S. No. 161.

<sup>3</sup> A Bar Council, S. No. 159.

<sup>4</sup> A Member of Parliament and Deputy Minister, h. No. 210.

<sup>5</sup> An Advocate, S. No. 207.

<sup>6</sup> S. No. 574.

1038. Another State Government<sup>1</sup> has expressed the view that it is not possible to state the principles and that the matter should be left to the "wise counsel and superintending authority" of the President, the Governors and the Government.

1039. According to another State Government<sup>2</sup>, there should be no fetters on the powers, as these powers are in the nature of prerogative and the Legislature need not transgress on these powers.

1040. According to the Chief Justice of a High Court<sup>3</sup>, the principles which should be observed by the President, the Governors and the Government in the exercise of these powers should be, that if no new facts and circumstances, not already on the record of the murder case, are alleged in the mercy petition, then the power of pardon, respite, and remission should not be exercised. Where new facts and circumstances are sought to be adduced, steps should be taken to record such evidence, and the record should be placed before the Judge who convicted the accused or confirmed the sentence, for his views as to whether, in view of the fresh evidence, he would recommend any remission, or pardon, etc; and action should be taken according to the view of the Judge. In this regard, no particular procedure is necessary so far as consultation with the Judge is concerned, but, where facts are alleged or certain evidence sought to be adduced which are not on the record of the murder case, it would be advisable for the Government to appoint a Commissioner or a Tribunal to record fresh evidence and submit its report, and this report should be sent to the Judges while consulting them in the matter of remission, pardon, etc.

1041. According to a High Court Judge<sup>4</sup>, these powers should not be fettered by a legislative enactment, but the principles which should guide the executive in the exercise of the powers are to correct possible judicial errors or to relieve a convict from a sentence which is mistaken, harsh, or disproportionate to the crime. In a proper case, it may also be guided by policy considerations so as to meet the justice of the case.

That the guiding principles should be to meet the justice of the case where it is pre-eminently necessary to do so, has been emphasised in the reply of another High Court Judge<sup>5</sup>.

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1 S. No. 560.

2 S. No. 232.

3 Chief Justice of a High Court, S. No. 393.

4 A High Court Judge, S. No. 394.

5 A High Court Judge, S. No. 395.

1042. A High Court Judge<sup>1</sup>, who is not in favour of the codification of the principles, has stated that as long as the executive acts in a *bona fide* manner, it will be acting correctly.

1043. The Law Minister of a State<sup>2</sup> has stated that it is not possible to state the principles, but generally the President or the Governor should exercise the power to grant pardon whenever there is evidence of some circumstance which could not be admissible in a court of law or when there are some over-riding circumstances which can outweigh the evidence on which the courts normally act. He has added that, as the circumstances cannot be anticipated, complete discretion should be left to the Executive.

1044. The Law Minister of a State<sup>3</sup> has stated that the existing provisions are adequate, but that if the penal law is to be changed so as to reduce the incidence of the capital punishment, then it will be proper to provide that the sentence of death confirmed by the Supreme Court should not be interfered with except in the larger interest of the society.

1045. A distinguished Member of the Rajya Sabha<sup>4</sup>, while expressing the view that the principles cannot be given off-hand, has stated that there is need for examining the principles which should guide, and the procedure which should be followed in, the exercise of these powers.

1046. A Member of Parliament<sup>5</sup> has stated that this power should be used very sparingly.

1047. A senior Advocate of the Bombay High Court<sup>6</sup> has stated that these powers are necessary to enable the Executive Government to take into account extra-judicial considerations of policy and humanity. He has, however, also stated that the Home Secretary in England is bound by certain rules, precedents and conventions, so that there is small scope for the free unfettered exercise of individual will, and that some such rules or conventions are necessary in India. He suggested that it may be useful to establish such conventions as the President consulting a high judicial or legal authority like the Chief Justice of India or the Attorney General, and reports from the original court as well as the High Court may also be called for.

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1 A High Court Judge, S. No. 262.

2 S. No. 313.

3 S. No. 253.

4 S. No. 245.

5 S. No. 275.

6 S. No. 318.

1048. A District and Sessions Judge<sup>1</sup> has stated that respect for public sentiment and safety of the society should be the guiding principles in the exercise of these powers.

1049. According to another District and Sessions Judge<sup>2</sup>, when it is felt that some loss to society would be caused or the family of the accused would suffer irreparable loss or when there are circumstances invoking a high degree of sympathy, or when it is felt that the death sentence has been passed in complicated legal circumstances but a practical view could be taken for lesser punishment, then the sentence should be commuted.

1050. One of the District and Sessions Judges<sup>3</sup> has stated that in cases where all the three courts have concurred in the sentence, there should be no interference.

1051. Important suggestions with reference to *principles* have been noted above<sup>4</sup>. Certain suggestions in matters of detail with reference to *procedure* are contained in some of the replies, which may now be summarised. Procedure—  
Replies  
regarding.

One group of suggestions consists of those replies, wherein it has been stated that the President or the Governor, etc., should refer every case to an *Advisory Board* or *Committee*.

1052. The Chief Justice of a High Court<sup>5</sup> has stated that the working convention would be that no such remission, suspension or commutation of sentence can be made except with the concurrence of the Attorney General (in the Union) or of the Advocate General (in the States). This, it is stated, may prevent misuse of the power of pardoning and reprieving conferred by law, and it may even be worthwhile to amend sections 401 and 402 of the Code of Criminal Procedure, 1898, so as to make the concurrence of the Advocate General mandatory. It has been further stated by him that the Advocate General's statutory power under the Code of Criminal Procedure is recognised under section 333 of that Code; hence, by making suitable amendments to sections 401 and 402, a new authority is not introduced in the scheme.

1053. It has been stated by a High Court Judge<sup>6</sup>, that the opinion of the Judge who passed the death sentence and of the Judge who confirmed the death sentence in

1 S. No. 329.

2 S. No. 347.

3 S. No. 419.

4 Paragraphs 1027—1050, *supra*.

5 Chief Justice of a High Court, S. No. 317.

6 S. No. 396, replies to questions 11(a) and (b).

appeal or at a later stage, should be invited by the executive authority as in England, before the final decision is taken.

1054. Another High Court Judge<sup>1</sup> has emphasised that some procedure of independent consultation would help a proper exercise of this high prerogative of mercy or clemency in suitable cases, to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law; or to ameliorate the deterrent effect of a particular judgment considering all mitigating circumstances all of which could not be considered or taken into account in a court of law.

1055. Some High Court Judges<sup>2</sup> have stated that there ought to be a Board of Advisers of a high calibre to advise the President or the Governor; the Board may partly consist of a retired Judge of the Supreme Court or of a High Court. Another High Court Judge<sup>3</sup> has expressed the opinion that this power should ordinarily be exercised only in cases in which the court makes recommendations in this behalf.

1056. The suggestion of a Member of a State Legislature<sup>4</sup> is that the powers should be exercised by the President on the basis of the advice given by an Ex-Chief Justice of the Supreme Court, and by the Governors, on the basis of the advice given by an Ex-Chief Justice of a High Court.

1057. Certain District and Sessions Judges<sup>5</sup> have stated that the approach should be judicial and objective, and that the High Court or the Supreme Court should be consulted.

1058. A District and Sessions Judge<sup>6</sup> has suggested, that while deciding the question of exercising of such powers, proper material on the point should be collected from the District Superintendent of Police and the District Magistrate of the district concerned, as the atrocity of the crime and the effect of remission of the sentence of death would be properly known to these officers.

1058. In one reply<sup>7</sup>, emphasis has been laid on the fact that the real agony is in the expectation of death, and it

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1 S. No. 397.

2 Chief Justice of a High Court, and a High Court Judge, S. No. 147.

3 A High Court Judge, S. No. 147.

4 S. No. 248.

5 S. Nos. 364, 366 and 372.

6 S. No. 387.

7 S. No. 420, under questions 11 and 12.



has been suggested that a mercy petition may be provided for in each case after the final verdict of the court has been given, and that the adverse result of the mercy petition should not be communicated to the condemned person till a few minutes before the sentence of death is carried out.

1060. In some of the replies<sup>1-3</sup>, it has been stated that there is some delay in disposing of the petitions.

1061. An eminent member of the Bar<sup>4</sup> states in his reply that the President or the Governor or the State Government should act *in consultation with* the Supreme Court or the High Court, as the case may be.

1062. A Bar Association in a High Court<sup>5</sup> has expressed its anxiety about the delay in arriving at the final decision about sentences. It has found numerous instances where prisoners sentenced to death have been kept in the condemned cell for 2½ to 3 years, before a final decision is taken either to commute the sentences or to execute them. It has suggested that the judgment in a murder case must be given within a fortnight or three weeks, and the appeal in the High Court or in the Supreme Court and the subsequent exercise of the prerogative should be finished within three months.

1063. A District and Sessions Judge<sup>6</sup> has stated that the manner and processes of consideration and decision by the President, Governors and the Government in the exercise of these powers are hardly known, and published literature is not available in India. He has suggested that it would be better if research scholars deal with the subjects, and the files are made available to them.

1064. It has been suggested by a District and Sessions Judge in Gujarat<sup>6</sup> that the procedure should be defined by the Ministry of Law, that the remarks of the highest court which dealt with the case should be obtained and considered, and that the petitioner should be heard in person (and not through a lawyer or representative) by some authority or officer as representing the President, the Governor or the Government.

1065. One reply<sup>7</sup> suggests the creation of an Advisory Board, selected from the judiciary. Another reply<sup>8</sup> states

1 S. No. 434, reply of a Principal Judge of a City Civil Court in a Presidency Town.

2 A District Bar Association, S. No. 430.

3 An eminent member of the Bar (through the Bar Council of India) S. No. 167.

4 In reply to question 10, S. No. 493.

5 S. No. 487.

6 S. No. 488.

7 A Pleader, Calcutta, S. No. 128.

8 An Inspector-General of Police, S. No. 131.

that there should be an *ad hoc* enquiry committee comprising of a High Court Judge, a psychiatrist and a sociologist, and the committee should make a case-study of the offender and extenuating circumstances, if any.

1066. Another suggestion<sup>1</sup> is to the effect that the Attorney General of India should be consulted. Yet another suggestion is for the constitution of a committee consisting of laymen interested in prisoners' welfare, social welfare workers, religious leaders, and others, who can consider the humanitarian aspects of the case<sup>2</sup>.

1067. It has been suggested by a Bar Association<sup>3</sup> that the petition should be referred to the last court which sentenced the person concerned (with a recommendation, if any) and the court's decision should be final, and that this should apply to imprisonment as well. A retired High Court Judge<sup>4</sup> has made an elaborate suggestion, the gist of which is as follows:—

(i) The High Court concerned (or the Supreme Court, if it has finally dealt with the case on merits) should be consulted before action is taken under article 72 or article 161 of the Constitution or sections 401-402 of the Code of Criminal Procedure except where the President acts on grounds of high public policy.

(ii) When the opinion of the High Court or the Supreme Court is not accepted, the order passed should state the reasons, which should be suitably publicised.

(iii) This would operate as a wholesome check against Government interference on political grounds.

(iv) This safeguard should be there not only in case of death sentence but also in case of life imprisonment.

1068. An Inspector-General of Police<sup>5</sup> has also made an elaborate suggestion as follows:—

(i) The mercy petition should pass through the State Government with their comments on each points raised, if any, but without their recommendation for or against the said petitioner, together with other details.

(ii) There should not be any scope for simultaneous mercy petition both to the President and to the Governor.

1 S. No. 127.

2 S. No. 118.

3 The Supreme Court Bar Association, S. No. 110.

4 A retired Judge of the Bombay High Court, S. No. 95.

5 An Inspector-General of Police, S. No. 143.

(iii) Once the petition has been disposed of by the President, no petition should lie to the Governor.

(iv) Priority at all levels should be given to those petitions so as to ensure their expeditious disposal by the authorities concerned.

1069. The Government<sup>1</sup> of a Union territory has suggested that the recommendation of the court awarding the penalty, and of the State Government, and of any social body concerned with welfare, may be taken into account.

TOPIC No. 57 (b)

*Principles for mercy—whether codification desirable.*

1070. The principles on which the prerogative of mercy is exercised, may be considered. The grounds on which commutation is granted cannot, of course, admit of exhaustive categorisation. The circumstances in which a murder is committed vary infinitely. Certain types of murder, however, are considered as deserving special scrutiny, to see whether there are any extenuating circumstances.

Principles  
for mercy—  
whether co-  
dification  
desirable.

1071. The cases in which commutation is granted in England can be gathered from the discussion in the Report of the Royal Commission<sup>2</sup>. After stating that in cases of mercy killings, survivors of genuine suicide pacts and murder by a mother of her own child under the influence of strong emotion and distress of mind (where the case does not fall under the Infanticide Act), the commutation is almost invariably granted, the Report of the Royal Commission notes the cases which are regarded as fit for exercise of the prerogative, as follows:—

in Practice in  
England.

‘Among such cases are unpremeditated murders committed in some sudden excess of frenzy, where the murderer has previously had no evil animus towards his victim, especially if he is weak-minded or emotionally unstable to an abnormal degree; murders committed under provocation which, though insufficient to reduce the crime to manslaughter, may be strongly mitigating circumstances; murders committed without intent to kill, especially where they take place in the course of a quarrel; murders committed in a state of drunkenness falling short of a legal defence, especially if the murderer is a man of hitherto good character; and murders committed by two or more people with differing degrees of responsibility. No person under eighteen has been executed since 1887, or can now (since 1933) legally be sentenced to death; above that age youth, though not in itself a sufficient ground for reprieve in a heinous case, is always taken

<sup>1</sup> Government of a Union Territory, S. No. 164.

<sup>2</sup> R.C. Report, page 12, paragraph 39.

into account with other mitigating circumstances. There is a "natural reluctance" to carry out the death sentence on a woman, and "there have been occasions on which the Home Secretary of the day has expressly had regard to the prisoner's sex in deciding to recommend commutation". Finally there are three rare classes of cases in which reprieves may be granted. One is where the Home Secretary feels that despite the verdict of the jury there is a "scintilla of doubt" about the prisoner's guilt. Secondly, although there have been many cases in which the sentence of death has been carried out "despite strong and persistent agitation for clemency", it has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law. Lastly, it is occasionally, though very rarely, necessary to commute the sentence if the physical condition of the prisoner is such as to give ground for thinking that it could not be carried out expeditiously and humanely.'

1072. In this connection, we would also like to quote the reply which Mr. Herbert Gladstone gave in the House of Commons to a question by Mr. C. B. Harmsworth (Worcestershire, Droitwich)<sup>1</sup>.

*Mr. Gladstone:* It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the royal prerogative of mercy. Numerous considerations—the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case; and the decision depends on full review of a complex combination of circumstances; and often on the careful balancing of conflicting considerations. As Sir William Harcourt said in this House, "The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil". There are, it is true, important principles which I and my advisers

<sup>1</sup> Parliamentary Debates, Fourth Series, Vol. 172, column 366 (11th April, 1907).

have constantly to bear in mind; but an attempt to reduce these principles to formulas and to exclude all considerations which are incapable of being formulated in precise terms would not, I believe, aid any Home Secretary in the consideration of the difficult questions which he has to decide."

1073. The discussion in the Canadian Report shows that the practice followed in Canada is not substantially different from that in England<sup>1</sup>. Practice in Canada.

1074. The Ceylon Report<sup>2</sup> discusses this matter incidentally in connection with the possibility of erroneous convictions. It states that while in Ceylon the verdict of the jury of 7 persons divided 5 to 2 in favour of conviction is accepted, in exercise of the prerogative of mercy, the Minister of Justice, prior to April, 1956, took into account, as one factor on which his advice to the Governor-General would be based, the fact that the jury were divided. The Report adds that nevertheless there were cases where the convicted murderer was executed despite a 5 to 2 division in the jury. Practice in Ceylon.

1075. While dealing with the commutation of death sentences, various factors (age, sex, mental deficiency, grave and sudden provocation, absence of motive and premeditation and the like) would fall to be considered. Considerations that may be taken into account.

1076. Having regard to the fact that the circumstances of each case must differ from another, it would not be desirable to attempt to lay down any rigid and exhaustive principles on which the sentence of death may be commuted. Rigid rules not desirable.

In fact, it is the very nature of the prerogative that it is a discretionary authority<sup>3,4</sup>. The description given by Blackstone<sup>5</sup> shows that the essential characteristic of the royal prerogative is that it is "unique and pre-eminent".

As has been pointed out<sup>6</sup>, the prerogative of mercy is an executive power of a very special kind and is almost the

<sup>1</sup> Canadian Report, pages 4 and 5, paragraph 10—14.

<sup>2</sup> Report of the Commission of Inquiry on Capital Punishment (Ceylon), (Sessional Paper XIV—1959) pages 53—54, paragraphs 33—34, and page 55, paragraphs 39—40.

<sup>3</sup> Cf. Lord Parmoor in *Attorney General v. De Keyser's Royal Hotel, Ltd.*, (1920) A.C. 508; (1920) All E.R. Reprint 80, 105 (House of Lords).

<sup>4</sup> See also Halsbury, 3rd Edn., Vol. 7, pages 221 *et seq.*

<sup>5</sup> Blackstone's Commentary Vol. 1, page 239, cited in Hood Phillips, *Constitutional and Administrative Law*, (1962), pages 242 and 243.

<sup>6</sup> Kenneth Roberts Wray, *Commonwealth and Colonial Law*, (1966), page 347.

only permissible, and indeed, essential, means of intervention by the executive in the administration by the courts of criminal law.

Questions  
about exer-  
cise of pre-  
rogative.

1077. It may be stated, in England, the Home Secretary may not be questioned about the exercise of the prerogative of mercy, in cases where persons have been sentenced to death, before the execution or commutation of the sentence<sup>1,2,3</sup>.

1078. Halsbury gives these references on the subject<sup>4</sup>:—

(i) The Speaker's ruling of 10th March 1947 in 434 House of Commons, Official Report 959; and his statement of 1st May, 1947 in 436 House of Commons Official Report 2179 ("A Minister is responsible to the King, and not to the House, for the advice he proposes to tender to His Majesty, though he is responsible to the House for the advice once it has been tendered").

(ii) the discussion on a disallowed motion relating to the prerogative of mercy in the House on 27th January, 1953 (510 House of Commons, Official Report 845—864).

1079. The following extract from a recent study is also useful<sup>5</sup>:—

"On February 7, 1961, the Speaker ruled that a question sought to be put down by Mr. Sydney Silverman asking the Home Secretary to order an inquiry into whether a miscarriage of justice had occurred in the case of George Riley, a man convicted of capital murder, was not in order<sup>6</sup>". On February 16, 1961, a motion dissenting from the Speaker's ruling as imposing "new, unnecessary and undesirable limitation on the ability of Members to discharge their public duties" was defeated<sup>7</sup>. On February 28, 1961, the Prime Minister, in an oral answer, declined to take steps to transfer the responsibility for advising on the exercise of the Royal Prerogative from the Home Secretary to a Committee appointed by and responsible to Parliament<sup>8</sup>.

<sup>1</sup> R.A. Butler (Home Secretary), in the House of Commons Debates, dated 20-9-1960.

<sup>2</sup> Geoffrey Marshall, "Parliament and the Prerogative of Mercy", (1961) Public Law, page 3.

<sup>3</sup> See also Halsbury, 3rd Edn., Vol. 7, page 243, paragraph 27 and footnote.

<sup>4</sup> Halsbury, 3rd Edn., Vol. 7, page 243.

<sup>5</sup> From (1961) Public Law, pages 197—198.

<sup>6</sup> 634 H.C. Debates 214—222.

<sup>7</sup> 634 H.C. Debates 1773—1841.

<sup>8</sup> 635 H.C. Debates 1370—1371.

## TOPIC NUMBER 57(c)

*Procedure for exercise of mercy—whether any provisions needed*

1080. We may now consider whether any provisions are needed as regards the procedure for the exercise of the prerogative of mercy.

Procedure for exercise of mercy—whether any provisions needed.

1081. In the replies received<sup>1</sup> as to the procedure to be followed by the President and the Governor in the exercise of the prerogative of mercy, one of the suggestions made is that the court should be consulted as to whether the case is a fit one for the exercise of this prerogative. In this connection, it may be of interest to refer to the statutory provisions on the subject in *India* and in other countries.

Consultation with the Supreme Court or High Court

1082. So far as *India* is concerned, we may refer to the provisions of section 401(1) and (2) of the Code of Criminal Procedure<sup>2</sup>, whereunder, when an application is made for the suspension or remission<sup>3</sup> of a sentence by the appropriate Government, that Government *may require* the presiding Judge of the court before or by which a conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reason for such opinions and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

1083. In England, there is a provision in section 19(1) of the Criminal Appeal Act<sup>4</sup>, (as amended by the Administration of Justice Act, 1960<sup>5</sup>), which is quoted below:—

“19. Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on an application made to him by a person convicted on indictment or without any such application, may, if he thinks fit at any time, either—

(a) refer the *whole case* to the Court of Criminal Appeal and the case shall then be treated for all purposes as appeal to that court by the person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on *any point* arising in the case, refer that point to the Court of Criminal

<sup>1</sup> See paragraphs 1051—1069, *supra*.

<sup>2</sup> The Code of Criminal Procedure, 1898, section 401.

<sup>3</sup> As to the meaning of “remission” under section 401, see *D.I.G. Police v. Rajaram*, A.I.R. 1960 A.P. 259, 262, paragraphs 17—18.

<sup>4</sup> The Criminal Appeal Act, 1907, (Edw. 7, c. 23), as amended in 1960.

<sup>5</sup> The Administration of Justice Act, 1960 (8 & 9 Eliz. 2 c. 65).

Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.”

The use to which section 19(1) of the Criminal Appeal Act has been put can be gathered from a note, which we quote<sup>1</sup>—

“There have been a number of instances of reference of the whole case, including a murder case [*R. v. Gray* (1947) 12 Cr. App. Rep. 244; *Rs. v. Field* (1921) 15 Cr. App. Rep. 129]. Cases so referred are heard exactly as if they were appeals [*R. v. Dickman* (1910) 5 Cr. App. Rep. 135]. The object of the reference is to assist the Home Secretary in respect of the exercise of Royal Prerogative and any evidence which might achieve that object can be considered. [*R. v. McGrath* (1949) 2 All E.R. 495]”.

1084. It is understood that in one case heard on such a reference, Lord Goddard admitted further evidence on the merits, resulting in an acquittal at law, thus putting the matter beyond the necessity of further consideration by the Home Secretary<sup>2</sup>; Lord Hewart had a similar situation in the case of *R. v. Wm. Knighton* in 1927 or 1928 (unreported), in which evidence of the condemned man's young sister was led which, if believed, must have resulted in an acquittal on the merits. The evidence was not believed<sup>3</sup>.

1085. Somewhat similar provisions would be found in section 596 of the Criminal Code of Canada, and section 406 of the Crimes Act, New Zealand.

We do not, however, think that any statutory provision is needed requiring the President or the Governor to consult the Supreme Court or the High Court. Such a provision would not, strictly speaking, be in harmony with the essential nature of the prerogative<sup>4</sup>.

Advisory  
Board.

1086. We now consider the question whether there should be a Board of Advisers to advise the President or the Governor in the exercise of these powers. Various suggestions have been made as to the composition of such a Board<sup>5</sup>. We are not, however, inclined to recommend any provision requiring the constitution of such Board and

<sup>1</sup> Note in (1959), 109 Law Journal 563.

<sup>2</sup> J.A. Wharton in a letter to the Editor, (1959), 109 L.J. 724.

<sup>3</sup> J.A. Wharton, in a letter to the Editor, (1959) 109 L.J. 724.

<sup>4</sup> As to essential nature of the prerogative, see paragraphs 1021—1024, *supra*.

<sup>5</sup> For a summary of replies received to question 11(b), see paragraphs 1026—1069, *supra*.



consultation with it. Consultation with the Judges is a matter which we have dealt with elsewhere<sup>1</sup>. In so far as the Board is to consist of persons other than sitting Judges, it may, in the first place, be embarrassing for the Board to re-consider and review matters already considered by the High Court or the Supreme Court. Secondly, often it may not be considered advisable, in the public interest or for reasons of State, to communicate to many persons the facts of the case and the reasons for the proposed exercise of the prerogative. In such a case, if the matter is referred to such an advisory Board, and a particular advice is given by the Board, it will be embarrassing both for the Board and for the President or the Governor, if a different decision is ultimately taken. What is essentially a prerogative should not be converted into a matter on which a controversy would arise. Not much difficulty has been caused by the absence of any such provision. We do not therefore think that any new provisions are necessary.

1087. It may be noted that the Royal Commission also considered a similar suggestion, and rejected it<sup>2</sup>. The Royal Commission observed, "The Home Secretary is now free to consult the trial Judge and anyone else he thinks fit. But the exercise of the Royal Prerogative is an administrative, not a judicial act".

1088. In some of the African countries, Advisory Boards have been created. We quote from a recent book<sup>3</sup>:—

"Only in Malaysia and Jamaica is the advice tendered by a body with an unofficial and potentially non-political majority, in Malaysia a Pardons Board<sup>4</sup>, and in Jamaica the Privy Council<sup>5</sup>. In Sierra Leone the Prime Minister assumes responsibility; he is obliged to consult an advisory committee of Cabinet Ministers in capital cases and is empowered to consult them in other cases, but he is not obliged to follow their advice<sup>6</sup>. A similar pattern is followed in other constitutions, except in so far as the "responsibility is usually confided in a Minister other than the Prime Minister

1 See paragraphs 1081—1085, *supra*.

2 R.C. Report, pages 209 and 210, paragraphs 600—601.

3 S.A. de Smith, *The New Commonwealth and its Constitutions* (1964), page 146.

4 Art. 42. The members are the Federal Attorney-General, the Chief Minister of the State concerned and three other persons who are not to be members of a legislature; the State Ruler presides.

5 Sections 90—91. The Governor-General must act on the Privy Council's recommendation in all cases. The Council consists of six members, appointed and removable by the Governor-General after consultation with, but not necessarily on, the advice of the Prime Minister; at least two of them must be present or past holders of public offices (sections 82 to 89). It would be more accurate, therefore, to say that the Privy Council has potentially an unofficial majority.

6 Sections 70 to 72.

and the advisory Committee will include the Attorney-General and will exclude other Ministers and politicians. In Nigeria and Uganda the unofficial members of the advisory committee hold office for a fixed term and are removable only for inability or misbehaviour; in Nigeria one of the members must be a medical practitioner<sup>1</sup>. Tanganyika has retained an advisory committee on what the republican Constitution still calls the "prerogative" of mercy"<sup>2</sup>.

The composition of the Advisory Board or similar bodies in some of the countries is dealt with in another recent publication<sup>3</sup>.

1089. The provision in the Ceylon Constitution<sup>4,5</sup> is also of interest.

"We do hereby direct and enjoin that the Governor-General in the exercise of the powers conferred upon him by article 10 of the Letters Patent shall not grant a pardon, respite or remission to any offender without first receiving, in every case, the advice of one of his Ministers. Where any offender shall have been condemned to suffer death by the sentence of any court, the Governor-General shall cause a report to be made to him by the Judge who tried the case; and he shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent, together with the Attorney-General's advice, to the Minister whose function it is to advise the Governor-General on the exercise of the said powers."

Publication  
of reasons.

1090. We have carefully examined the question whether the reasons for granting commutation of sentence in capital cases should be required to be published. We appreciate the argument that when a sentence of death is commuted to a lesser one, as a result of the exercise of this prerogative, it may be regarded by many as an interference with or reversal of the decision of the highest court in the country or in the State, and that such interference or reversal must be based on strong reasons.

The suggestion for publication of reasons, which is sometimes made, may be an expression of this feeling. We are, however, afraid that the adoption of such a practice may do more harm than good. It would start a controversy in

<sup>1</sup> Nigeria, Federal Constitution, sections 94 to 96; Uganda, sections 84 to 86.

<sup>2</sup> Article 19, Presidential Affairs Act, 1962 (C.A. Act, No. 4). In Ghana (see article 48) the President may seek advice from the Supreme Court (Courts Act, 1960 C.A., s. 24).

<sup>3</sup> Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, (1966), pages 345, *et seq.*

<sup>4</sup> Paragraph 3, Royal Instructions, 1947; Jennings, *The Constitution of Ceylon*, (1953), page 251.

<sup>5</sup> See also sections 328 and 329, Ceylon Criminal Procedure Code.

each case whether the decision granting or rejecting the petition for commutation was justified, and whether the President or the Governor should or should not have agreed with the final verdict of the court in the particular case. Moreover, adopting the exposition of the subject made by Sir John Anderson in his evidence before the Royal Commission,<sup>1</sup> we may point out, first, that it would be extremely difficult to give, in what would necessarily have to be a comparatively short statement, "an adequate impression of the cumulative effect of the considerations which the Home Secretary has to take into account"; and secondly, that there are, not infrequently, cases where the reasons which rightly weigh with the Home Secretary, involve grave reflections, amounting to accusations of criminal "conduct, against third parties", where an adequate, well-balanced and truthful statement of reasons could not be made without bringing into the light of the day the conduct of people not directly concerned. We apprehend that there must be many other situations wherein an explanation of the reasons, if given in the public, might lead to controversies which may be prolonged and wasteful, and may injure not only the persons involved but also bring the highest dignitary into an arena where he should not be brought.

1091. We have also considered the suggestion that commutation should not be granted unless it is recommended by the court. So far as commutation from the sentence of death to one of imprisonment for life is concerned, we believe that cases of such recommendation by the court would be infrequent, as courts themselves have the power to substitute the lesser sentence in view of the discretion enjoyed by them in the matter. So far as commutation of a sentence of life imprisonment to one of imprisonment for a specified period is concerned, a recommendation of the court would certainly be of the greatest value, and, where such a recommendation is made<sup>2</sup>, it will always be taken into account. *We do not, however, think that the making of such a recommendation should be made a condition precedent to the exercise of the power of commutation.* Facts not known at the time of trial, or events which took place subsequently, would be ruled out from the consideration of those concerned, if such a condition precedent is laid down.

Recommendation of the court whether to be a prerequisite.

1092. One of the replies received on the subject<sup>3</sup> makes the suggestion, that the Attorney-General should be consulted in these matters. The power to consult him is already there under the Constitution<sup>4</sup>, whereunder it is "the

Consultation with the Attorney-General.

1 See R.C. Report, page 211, paragraph 603.

2 See Analysis of the Case Law, Cases No. 4 (Footnotes), 33, 34, 36, 46, 47, 52, 53, 57 and 93.

3 See paragraph 1066, *supra*.

4 Article 76(2) of the Constitution.

duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President". It is unnecessary to go beyond that.

## CHAPTER XV

### EXECUTION OF SENTENCES

#### TOPIC NUMBER 58(a)

##### *Method of execution of death sentence*

Method of execution of death sentence. 1093. We now come to the question of the method of execution of the sentence of death. At present, the sentence of death is carried out by hanging. The Code of Criminal Procedure, 1898, requires<sup>1</sup> that when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

1094. In the great majority of countries, there are three methods of carrying out the death sentence, namely, hanging, electric chair and gas-chamber. Hanging is used in the United Kingdom, certain countries on the Continent, Canada, Australia and generally throughout the Commonwealth, six States of the United States of America and some countries in Asia.<sup>2</sup>

1095. Electrocutation is used in 24 States of the United States of America, and in Philippines<sup>3</sup> and in Cuba.<sup>4</sup>

1096. Gas-chamber is used to carry out the sentence of death in eleven States of the United States of America<sup>5</sup>. In Spain, strangulation is used<sup>6</sup>.

1097. The modes of execution in the various states of the United States of America as in 1960 were as follows<sup>7</sup>:—

*By electrocution*—Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia (21).

<sup>1</sup> Section 368(1), Code of Criminal Procedure, 1898.

<sup>2</sup> For details, see U.N. Publication, Capital Punishment (1962), page 23, paragraph 59.

<sup>3</sup> In Philippines, provision is made for hanging if the necessary equipment for electrocution is not available.

<sup>4</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraph 61.

<sup>5</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraph 62.

<sup>6</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraph 62.

<sup>7</sup> See U.S. News and World Report, March 7, 1960, page 52, reproduced in Mc Clellan, Capital Punishment, (1961), page 11.

*By lethal gas*—Arizona, California, Colorado, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma (using electrocution until gas chamber is completed), Oregon, Wyoming (12).

*By hanging*—Idaho, Iowa, Kansas, Montana, New Hampshire, Washington. (6).

*By Hanging or shooting* (condemned man's choice)  
—Utah.

Since 1960, three more States appear to have adopted electrocution<sup>1</sup>. Decapitation seems to be the method in force in France, and in some other countries<sup>2-3</sup>. Execution by firing squad is practised by some countries, important amongst which are Morocco, the Central African Republic, Chile, Thailand, Indonesia, Cambodia, Greece, U.S.S.R., and Yugoslavia; and in Utah (U.S.A.) the person sentenced to death has the choice—between hanging and firing squad<sup>4</sup>.

(In Canada, the Attorney-General or the Governor can, it appears, order execution by the firing squad in cases of treason or crimes against national defence)<sup>5</sup>.

Though hanging still remains the most prevalent method, it must be noted that the course of events in other countries shows that it is being slowly abandoned. Thus, while in 1930, 17 States of the United States of America used to employ it, only six States have now retained it. Again, while it was in force in Yugoslavia before 1950, it was replaced by firing squad in 1950.

1098. In England, the Royal Commission went into this question in great detail. The Commission stressed the criteria which had to be taken into account (in deciding which method should be adopted), namely, humanity, certainty and decency<sup>7</sup>. Under "humanity", further, there were two essential requirements, namely, first, that the preliminaries to the act of execution should be as quick and as simple as possible and free from anything that unnecessarily sharpens the poignancy of the apprehension of the person; and secondly, that the act of execution should produce immediate unconsciousness, passing quickly into death<sup>8</sup>. After studying the actual time taken at various

<sup>1</sup> U.N. Publication, Capital Punishment, (1962), page 23, paragraph 61 gives the number as 24.

<sup>2-3</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraph 60.

<sup>4</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraphs 60—62.

<sup>5</sup> See U.N. Publication, Capital Punishment (1962), page 23, paragraph 59.

<sup>6</sup> R. C. Report, pages 246 to 260, and conclusion at page 261, paragraph 749.

<sup>7</sup> R.C. Report, page 248, paragraph 707.

<sup>8</sup> R.C. Report, page 253, paragraph 724.

places in carrying out the process of hanging and other methods of execution, the Royal Commission came to the conclusion that so far as experience in the United Kingdom went, hanging took less time than the time taken elsewhere in other methods and caused immediate unconsciousness, and was followed quickly by death. The Royal Commission had not full evidence about electrocution and lethal gas, but there was nothing in the evidence placed before it to justify the conclusion that either of these two methods was less humane than hanging, in terms of the speed and painlessness with which unconsciousness is induced. As regards "certainty", the Royal Commission stated that the equipment required for hanging was simpler than that required for electrocution or lethal gas, and no mishaps had taken place in England during the last 50 years. Lastly, regarding "decency", the Commission stated that because of the distortion caused to the body, the pain caused to the relatives on seeing it, would be more severe in the case of hanging than that caused by other methods. But, while hanging was tainted by the memory of its barbarous history, "gassing" was tainted by more recent but not less barbarous associations.<sup>1</sup>

1099. We may now refer to the discussion in the Canadian Report. The Canadian Committee<sup>2</sup> considered the merits of four different methods of execution, namely, hanging, electrocution, gas-chamber and lethal injection. The last mentioned method, which was stated to ensure instantaneous and painless death, could only be accomplished by intravenous injection, for which skill was required, and the Committee considered that it would not be reasonable to expect a medical doctor to perform a task so repugnant to the traditions of the medical profession. Moreover, an intravenous injection could not be administered unless the condemned person was entirely acquiescent. Hence it was rejected. As regards hanging, the Committee noted that hangings in Canada were not conducted with the same degree of precision as in the United Kingdom, and that sometimes there was no way of knowing how death was caused and whether the loss of consciousness had been instantaneous. Moreover, the Committee sensed from the evidence given before it that hanging was regarded generally as an obsolete, if not a barbaric method. It, therefore, proceeded to consider electrocution and gas-chamber. In its opinion, which was based on the evidence of independent medical experts, *electrocution* was the most satisfactory method, and the Committee recommended that the law be amended to replace hanging by electrocution. This was based on the premise that modern methods of electrocution could produce instantaneous unconsciousness and painless death, without the evil effects traditionally

1 R.C. Report, page 255, paragraph 732.

2 Canadian Report, pages 21 and 22, paragraphs 89-94.

associated with the electric chair (like burning and mutilation). However, if further investigation created doubt as to possibility of employing electrocution, then, the Committee considered, it would be preferable to substitute the gas-chamber.

1100. The relevant section of the Criminal Code of Canada is<sup>1</sup> section 642, which provides that the sentence of death should direct that the person sentenced should be hanged by the neck until he is dead. The section does not appear to have been amended to carry out the recommendation of the Committee.<sup>2</sup>

TOPIC NUMBER 58(b)

Replies to question 12

1101. Question No. 12 in our Questionnaire was as follows:-- Method of execution.

"At present, the sentence of death is carried out by hanging. Have you any suggestions to make with respect to the manner in which a sentence of death may be carried out?"

Divergent views have been expressed as to the method of execution. A broad classification of these views is presented below.

1102. (1) The first group comprises those who would like to replace hanging by electrocution.

A large number of replies belong to this group<sup>3,12</sup>.

1 Section 642, Criminal Code of Canada.

2 Certain other recommendations of the Committee have been carried out by the amendments made in 1961 in the Criminal Code of Canada.

3 A High Court, S. No. 167; Chief Justice of a High Court and Judge of that High Court, S. No. 130; Majority of the Judges of a High Court, S. No. 187

4 A State; S. No. 143; Government of a Union territory S. No. 164

5 A State Law Commission (Electrocution or gas chamber), S. No. 101.

6 A Deputy Minister in the Union, S. No. 210; Member of the Rajya Sabha, S. No. 2075; Revenue Minister of a State, S. No. 216; M.L.As., S. Nos. 102 and 213.

7 Senior Deputy Advocate-General of a State, S. No. 146; Inspector-General of Police in a State, S. No. 131

8 S. No. 139, S. No. 122, S. No. 117.

9 Bar Councils, S. Nos. 159, 115 and 116.

10 A District Bar Association, S. No. 125.

11 An eminent member of the Bar, S. No. 111; A Member of a Bar Council, S. No. 104.

12 A cross-section of Delhi citizens (Hindustan Times, dated 3-4-1973), No. 89.

1103. The Chief Justice of a High Court<sup>1</sup> is in favour of electrocution, provided facilities can be provided.

1104. Some High Court Judges are in favour of electrocution<sup>2</sup>.

1105. A High Court Judge<sup>3</sup> has stated that modern methods, such as electrocution, should be followed.

1106. The Chief Minister of a State<sup>4</sup> is in favour of electrocution. So also is the Home Minister of a State<sup>5</sup>. A Minister of another State is in favour of electrocution<sup>6</sup>.

1107. The Law Minister of a State<sup>7</sup> is of the view that the sentence of death may be carried out by some method which is more instantaneous, like electrocution, than by hanging whenever possible.

1108. The Administration of a Union territory<sup>8</sup> is of the view that electrocution may be a better way.

1109. A Member of Parliament<sup>9</sup> has suggested that electrocution may take time, but a beginning may be made with one chair in each State at least in bigger States. Another Member of Parliament is in favour of electrocution<sup>10</sup>.

1110. Some Members of State Legislatures are in favour of electrocution<sup>11</sup>.

1111. The Principal Judge of a City Civil Court<sup>12</sup> is of the view that hanging is rather crude, and electrocution should be substituted.

1112. Certain City Civil Court Judges have suggested electrocution<sup>13</sup>.

1113. A Judge of City Civil Court has suggested<sup>14</sup> that the condemned person be given some drug to make him unconscious, and then the sentence can be executed by electrocution.

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1 S. No. 316.

2 S. No. 394.

3 S. No. 262.

4 S. No. 255.

5 S. No. 258.

6 S. No. 221.

7 S. No. 313.

8 S. No. 303.

9 S. No. 273.

10 S. No. 224.

11 S. Nos. 225, 243, 244.

12 S. No. 434.

13 S. Nos. 376, 377, 379 and 381.

14 S. No. 378.



1114. A Judicial Officers' Association<sup>1</sup> has suggested that the gas-chamber or electric chair may be introduced.

1115. Certain District and Session Judges favour electrocution<sup>2</sup>.

1116. An Advocate<sup>3</sup> has stated, that with the spread of education, youngmen are getting "tender in body, mind and habits", and that it is quite possible that hangmen may not be available; he suggests electrocution are more scientific and less expensive than hanging.

1117. A District and Sessions Judge<sup>4</sup> has suggested that it is necessary to substitute an electric chair in place of hanging, and if that is not possible a firing squad may be resorted to.

1118. Several District and Sessions Judges<sup>5</sup> are of the view that electrocution may be considered. One Sessions Judge<sup>6</sup> has suggested that the electric chair may be provided, but the choice should rest with the convict whether he will prefer hanging to electrocution.

1119. The substitution of the electric chair has been suggested by a Bar Association<sup>7</sup>.

1120. The reasons given are that hanging is crude and cruel, while electrocution is instantaneous and humane. One of the replies quotes<sup>8</sup>, from the Royal Commissioner's Report<sup>9</sup>, observations to the effect that hanging was invented more for its advertisement value than as a more effective way of taking life, and suggests that it should be replaced by electrocution, which is used in several States of the U.S.A. and in the District of Columbia. It is stated that (in electrocution) a current of 8 to 10 amperes is passed through the body, and unconsciousness results in less than 240th of a second, before the nervous system of the body can record any sensation of pain.

1121. It may be stated here that some of the replies which suggest electrocution in place of hanging do not rule out any *other* painless method.

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1 S. No. 374.

2 District and Sessions Judges, S. Nos. 384, 386, 389, 415, 418, 423, 427, 431, 433, 437, 442, 444, 459, 473, 478, 521, 522, 524 and 553.

3 An Advocate. S. No. 474.

4 S. No. 330.

5 S. Nos. 347, 348, 349, 355, 358, 360, 362, 364, 370, 372 and 375.

6 S. No. 353.

7 S. No. 220.

8 S. No. 122.

R.C. Report, page 246, paragraph 701.

1122. Some of the replies suggest substitution of the gas-chamber.<sup>1,2,3,4.</sup>

1123. According to the Law Minister of a State<sup>5</sup>, while hanging is a most barbarous way of executing a death sentence, electrocution is no less revolting to human conscience. He suggests gas-chamber.

1124. A Judicial Officers' Association<sup>6</sup> has suggested electrocution or gas chamber. A District and Sessions Judge<sup>7</sup> is of the same view.

1125. Some of the replies suggest lethal injection. Their number is not very large.

1126. It has also been suggested<sup>8</sup> that some kind of euthanasia on the advice of medical doctors be adopted. Electrocution or poisoning, as far as possible in a manner which the victim may not be able to anticipate, has been suggested by a District and Sessions Judge<sup>9</sup>.

1127. A group of replies<sup>10-13</sup>, while not committing themselves to any particular method, make a general suggestion that hanging should be replaced by a less painful and more humane method. Most of these replies would like the matter to be decided after ascertaining medical and other expert opinion.

1128. A State Government<sup>14</sup> has suggested that the mode of carrying out the death sentence should be carefully examined by doctors or experts in this direction, and that method which is least inhuman should be adopted.

1 A State Government, S. No. 129.

2 A State Law Commission, (Electrocution or gas chamber), S. No. 101.

3 Bharat Sewak Samaj, New Delhi, S. No. 145 (electrocution or gas-chamber).

4 Law Secretary to a State Government, S. No. 162.

5 S. No. 253.

6 S. No. 374.

7 S. No. 370.

8 S. No. 552 (Meeting held by Indian Conference of Social Work, West Bengal Branch on 29th April, 1965 in Calcutta).

9 S. No. 490.

10 A State Government, S. No. 182 (Hanging should be replaced by electrocution or gas-chamber or other less painful method. It is not possible to say which would be the least painful method).

11 The Indian Federation of Women Lawyers, S. No. 121.

12 S. No. 118.

13 A Member, Bar Council of Madras, S. No. 104.

14 S. No. 574.

1129. Another State Government<sup>1</sup> is of the view that there is need to have some more humane and instantaneous process than hanging, where possible.

1130. A District and Sessions Judge<sup>2</sup> has suggested that the question should be decided on the advice of experts and such manner of carrying out the death sentence should be adopted which involves no or minimum possible physical, nervous and psychological pain and torture.

1131. Some of the replies<sup>3</sup> merely state that the matter relates to medical opinion, and that death sentence should be carried out in a way least painful.

1132. Some replies are in favour of the retention of hanging<sup>4,5,6,7</sup>. Some of these replies point out, that hanging is quick, has no complications and is not more painful than any other method. A few of the replies belonging to this group also emphasise that the deterrent effect of capital punishment could be achieved *only by hanging*. It is also stated<sup>8</sup> that the really agonising part of death sentence is the knowledge that one is going to die, and that there is not much to choose as to the manner in which execution is carried out.

1133. Two other State Governments<sup>9</sup> would like to retain hanging.

1134. The Chief Justice of a High Court<sup>10</sup> has expressed the view that, according to the available information, the sentence of death carried out by hanging is practically instantaneous, and it is not shown that any other method of execution prevailing in any other country is more humane.

1135. In the opinion of a High Court Judge<sup>11</sup>, the mode of carrying out the sentence of death (by hanging) is, in the light of the present knowledge of science, the best possible and the most humane method, and no other known method is as quick, efficient or painless as the present one.

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1 S. No. 580.

2 S. No. 487.

3 Two High Court Judges, S. No. 105.

4 Two High Court Judges, S. No. 97.

5 A State Government, S. No. 154; Home Secretary to a State Government, S. No. 13; Administration of a Union Territory, S. No. 106.

6 Bar Association of India, S. No. 183.

7 Supreme Court Bar Association, S. No. 110; A Reader in Criminal Law, S. No. 107.

8 Administration of a Union Territory, S. No. 106.

9 State Governments, S. Nos. 261 and 311

10 S. No. 399.

11 S. No. 396.

1136. A High Court Judge<sup>1</sup> has stated that when all is said and done, hanging does not seem to be in any manner more distressing than the guillotine or the electric chair, and therefore, this form of execution may continue.

1137. Several High Court Judges<sup>2</sup> are in favour of retaining hanging.

1138. A distinguished member of the Rajya Sabha<sup>3</sup>, while not suggesting a particular method, has emphasized that if capital punishment must remain on the statute book, it must be mercifully given in the quickest and least painful form.

1139. According to a senior Advocate<sup>4</sup> of the Bombay High Court, a certain degree of terror is inevitable and indispensable in "the grim paraphernalia of judicial execution", and as far as his knowledge goes, according to expert medical opinion, death by regulated drop from the gibbet is as instantaneous as that by electric shock.

1140. A member of a State Legislature<sup>5</sup> (who is also an Advocate) has stated that he had himself seen in a Central jail the arrangements for hanging, and he was told that if hanging is properly executed, there is probably only a few moments' difficulty.

1141. Retention of hanging has been favoured in many other replies<sup>6-7</sup>.

1142. The majority of Presidency Magistrates in a Presidency Town<sup>8</sup> are in favour of retaining hanging, because, "apart from the stigma involved in the idea of hanging acting as a deterrent, it is also said to be the quickest means of ending life."

1143. According to a gentleman<sup>9</sup> who is a social worker and a State Jail Visitor, the present position may continue, since even in modern techniques the preliminary preparations do not in any way mitigate the mental agony.

1144. Apart from the actual method of execution, suggestions have been received on a few other points pertaining to the mode of execution.

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1 S. No. 251.

2 S. No. 262.

3 S. No. 245.

4 S. No. 318.

5 S. No. 226.

6 A District and Sessions Judge, S. No. 526.

7 A Bar Association in a High Court, S. No. 493.

8 S. No. 549.

9 S. No. 357.

1145. Thus, it has been stated that the dread of the sentence of death should be given wide publicity, to minimise crimes.<sup>1</sup> One reply<sup>2</sup> has suggested pre-publication of execution.

1146. It has been suggested<sup>3,4</sup> that the law should provide for an autopsy to be performed immediately after the execution, to provide complete assurance.

1147. It is stated<sup>5</sup> that the sentence should be executed publicly, to give a lesson to the public in general.

1148. It has been suggested<sup>6</sup> that execution should be given wide publicity.

#### TOPIC NUMBER 58(c)

##### *Conclusion as to method of execution*

1149. We find that there is a considerable body of opinion which would like hanging to be replaced by something more humane and more painless. Quite a number of replies, received to our questionnaire on the subject are in favour of substitution of electrocution<sup>7</sup> for hanging, on the ground that the former is instantaneous and humane, while the latter is crude and cruel. The gas-chamber has been suggested in some other replies,<sup>8</sup> while a few suggest lethal injection or euthanasia.<sup>9</sup> On the other hand, some of the replies are in favour of the retention of hanging<sup>10</sup>, and a few belonging to this group are of the view that the deterrent effect of the capital punishment could be achieved only by hanging.

Conclusion  
as to method  
of execution.

1150. The matter is, to a certain extent, one of medical opinion. That a method which is certain, humane, quick and decent should be adopted, is the general view, with which few can quarrel. It is true that the really agonizing part is the *anticipation* of impending death. But society owes it to itself that the agony at the exact point of execution be kept to the minimum. It is, however, difficult to express an opinion positively as to *which* of the three methods satisfied these tests most, particularly when the

1 An Inspector-General of Prisons, S. No. 166.

2 A District Bar Association, S. No. 218.

3 S. No. 122.

4 See, in this connection, (i) Section 5, Capital Punishment Amendment Act, 1868; (ii) R.C. Report, page 250, paragraph 714.

5 An M.L.A., Lucknow, S. No. 102.

6 A Bar Council, S. No. 116.

7 See paragraphs 1102—1121, *supra*.

8 Paragraphs 1122—1124, *supra*.

9 Paragraphs 1125—1126, *supra*.

10 Paragraphs 1132—1143, *supra*.

two other methods are still untried. *We are not, at present, in a position to come to a firm conclusion on this point.* Progress in the science of anaesthetics and further study of the various methods, as well as the experience gathered in other countries and development and refinement of the existing methods, would perhaps, in future, furnish a firm basis for conclusion on this controversial subject.

1151. *We do not therefore recommend a change in the law on this point.* We should, however, state here that we do not subscribe to the view that the substitution of any other method of death will reduce the deterrent effect of the penalty of death.

TOPIC NUMBER 58(d)

*Execution in public, and publicity to be given to execution.*

Execution in public, and publicity to be given to execution.

1152. We have considered the question whether executions should be held in public<sup>1</sup>. This was the practice in England until it was altered in 1868. There were several unsatisfactory features associated with execution in public, which led to its abolition in England<sup>2</sup>.

Disorderly behaviour of the public, attempts to interfere with the execution, and unhealthy expression of a feeling of rejoicing, were the principal evils which were associated with this practice. Instead of enhancing the deterrent influence of the death penalty—which was their main supposed justification<sup>3</sup>—they became the parent, and not the destroyer, of crime.

1153. We think that an execution in public would be repulsive, and that is a sufficient argument against its introduction in this country. Nor do we recommend the giving of any publicity before or after the event to an execution. There are certain provisions on the subject in England<sup>4</sup> regarding the affixation of notices, etc. on the prison gate of impending execution, and of execution having taken place. The Royal Commission<sup>5</sup> considered these provisions, and recommended that while public notification before execution should continue, the pasting of notices on the prison gate was unnecessary and should be

<sup>1</sup> Replies suggesting public executions are summarised in paragraph 1145, *supra*.

<sup>2</sup> For a description of the various unsatisfactory features, see Radzinowicz, *History of England Criminal Law* (1948) Vol. I, pages 171 to 178, 201 to 202, 211 to 212, 411, 465 and 466.

<sup>3</sup> Report of the Select Committee on Capital Punishment, page 15, paragraph 1, cited in Radzinowicz, *History of English Criminal Law* (1948), Vol. 1, page 165.

<sup>4</sup> Sections 4, 6 and 10, Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24).

<sup>5</sup> R.C. Report, pages 272 and 273, paragraphs 786—789.

replaced by the issue of Press notice, before and after execution of the date fixed for execution and of the execution having taken place respectively.

The announcement of execution dates in England is now governed by the Homicide Act<sup>1</sup>.

In a reply to a question, the Home Secretary stated<sup>2</sup> that every execution date fixed since the Homicide Act received the Royal assent had been announced by means of a Press notice issued by the Home Office, and the pasting of notices outside the prisons had been discontinued.

We do not, however, consider any such provisions to be necessary in India.

## CHAPTER XVI MISCELLANEOUS

### TOPIC NUMBER 59

#### *Other points made in the replies to Questionnaire*

1154. Besides replies to the specific questions in the Questionnaire, some of the replies express views on other matters arising in connection with capital punishment. General suggestions made in the replies.

1155. Thus, one suggestion is that of a State Law Commission<sup>3</sup> to the effect that the question of restitution to the victims of crime should receive attention along with that of abolition. The restitution, it is suggested, may be from the property of the accused, or from the State funds. This question, however, does not seem to be vitally connected with the abolition or retention of capital punishment as such. Whether or not capital punishment is retained, a provision for such restitution can be considered independently. The question is not confined to capital offenders; the commission of a crime may cause damage justifying restitution, even where the crime is not a capital one. Certain provisions for restitution are contained in the Code of Criminal Procedure, 1898<sup>4</sup>. The matter is one of policy, not arising out of abolition. Restitution

1156. A suggestion<sup>5</sup> for rehabilitation of the families of criminals condemned to death has been received. It is stated that this is essential, lest a murderer's children should themselves become delinquents.

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<sup>1</sup> Section 11, Homicide Act, 1957.

<sup>2</sup> House of Commons, Debates, April 8, 1957.

<sup>3</sup> A State Law Commission, S. No. 101.

<sup>4</sup> Section 545, Code of Criminal Procedure, 1896.

<sup>5</sup> Opinion of a medical man, quoted in the "Hindustan Times" dated the 3rd April, 1963, S. No. 29.

1157. The question<sup>1</sup> of engagement of counsel to help the court in criminal cases has been raised. This is a matter which is usually dealt with the rules made for criminal courts. We have dealt with the matter separately<sup>2</sup>.

1158. A suggestion has been made<sup>3</sup> that, on conviction for murder, the property of the person convicted should vest in the Collector, and should be disposed of in favour of the heirs of the person murdered. It is stated that this will act as a great deterrent. Present provisions for fine are, it is stated, not adequate, because a fine is not imposed when the sentence of death or imprisonment of life is awarded. In this connection, it may be noted that sections 61 and 62 of the Indian Penal Code contained limited provisions for forfeiture, but these were repealed by Act 16 of 1921.

#### TOPIC NUMBER 60

##### *Interval to be allowed between death sentence and execution.*

Intervals to be allowed between death sentence and execution.

1159. The question—how much interval should be allowed between the pronouncement of the death sentence and the actual execution—may be considered<sup>4</sup>. Usually, on receipt of confirmation by the High Court of a capital sentence, the Court of Session specifies in the warrant, addressed to the jailor, that the execution is not to be carried out until a day therein named. Thus, according to the instructions issued in the erstwhile State of Bombay<sup>5</sup>, the Court of Session has to fix the period, between the date of the receipt by it of the order confirming the sentence of death, and the date of the execution, as from 21 to 28 days.

1160. The matter was considered by the Royal Commission<sup>6</sup>. In England, the date of execution is fixed by the Sheriff for a day (other than Monday) in the week following the third Sunday after the day on which the sentence is passed. If there is an appeal and it is unsuccessful, the Sheriff appoints a new date of execution, which is so fixed as to allow a period of not less than 14 and not more than 18 clear days to elapse between the determination of the appeal and the date of execution. In Scotland, the date and place of execution are appointed by the Court while passing the sentence of death. Details of the Scottish provision need not detain us here. The Royal

1 A Pleader (Legal aid and advice Service), Madras, S. No. 105.

2 See paragraphs 1166—1175 *infra*.

3 A District and Sessions Judge in Gujarat, S. No. 212.

4 At present, there are no statutory provisions on the subject, and the matter seems to be governed by Criminal Rules.

5 See Criminal Manual issued by the High Court of Bombay (1948), paragraph 148.

6 R.C. Report, paragraphs 752 and 758.



Commission suggested certain changes in the Scottish provision, but no change in this respect so far as England was concerned. The Commission specifically considered the question whether the length of the period between the sentence of death and execution should be reduced in order to shorten the period of strain on the prisoner and those about him. But the Commission felt that this might amount to running the risk of handicapping the prisoner and his advisers in arranging for an appeal and bringing forward information that might justify a reprieve. It also pointed out that the Secretary of the State should have enough time to make necessary inquiries before deciding whether the sentence should be carried out.

1161. In practice, the interval between the confirmation of the sentence by the *High Court* and the actual carrying out of the sentence may be much longer than that contemplated in the rules, because of an appeal or a petition for mercy<sup>1</sup>. The question is linked up with the general question of speedy disposal of criminal appeals, though, of course, in the case of a capital crime, lapse of long time is naturally undesirable, because the convicted man "dies a thousand deaths".

1162. We do not suggest any statutory provision on the subject in this Report.

#### TOPIC NUMBER 61

##### *Conduct of prisoners after release, and rules regarding remission.*

1163. The after-care of prisoners, sentenced to imprisonment for life and released from prison, is a subject which requires separate study, and we do not propose to deal with the whole subject<sup>2</sup>. As has been observed in the Report of a Committee that dealt with the subject<sup>3</sup>,—

Conduct of  
prisoners  
after release

"The after-care of prisoners refers to a set of services and programmes that are organised for the care, supervision and guidance of the prisoner and also to the various activities that are directed towards his acceptance by the family and the community."

<sup>1</sup> For a study of the position in the United States and Canada, see the article "Time-lapse between sentence and execution—U.S.A. and Canada compared" in (1962) *American Bar Association Journal* page 1043.

<sup>2</sup> The position in England is dealt with in R.C. Report, pages 236 to 239, paragraphs 672—680. For figures, see R.C. Report, page 486, Appendix 15 and also page 229, paragraph 651, end.

<sup>3</sup> Government of India, Central Social Welfare Board, Report of the Advisory Committee on After-care Programmes (1955), Vol. I, page 214.

But one point of some importance deserves to be noted. A prisoner sentenced to imprisonment for life<sup>1</sup>, for a capital offence may, after his release from the prison, commit again a capital crime or a crime involving violence. The figures of such "recidivism" would be of interest in assessing how far the sentence of *imprisonment* has worked as a deterrent. We recommend that these figures be published and made available in a convenient form, or included in the official publication "Crime in India" which is brought out annually, as the figures would prove to be very useful.

Rules regarding remission.

1164. Where a person is sentenced to imprisonment for life, then the detailed rules as to the periods for which he earns remission are laid down in the Jail Manual of each State<sup>2</sup>. These comprise rules made under the Prisons Act, 1894<sup>3</sup>, and administrative instructions. But the *legal sanction* for the remission has to be issued in the form of an order under section 401 of the Code of Criminal Procedure, 1898, as has been made clear by a decision of the Supreme Court<sup>4</sup>.

1165. It is *unnecessary to consider* here the question whether any amendments are needed to the rules regarding remission of life sentences of imprisonment.

#### TOPIC NUMBER 62

##### *Legal aid to persons concerned in capital cases.*

Legal aid to persons concerned in capital cases.

1166. We may now consider the question of legal aid to persons accused of capital offences<sup>5</sup>. In all States of India, provision is made for the employment of counsel in the Court of Session and in the High Court for the defence of persons accused of offences punishable with death<sup>6</sup>. By way of example, we may refer to the rules issued in the State of Bombay<sup>7</sup>. The salient features of the Bombay rules are as follows:—

1. In all cases committed for trial in a criminal sessions of the High Court or in the Court of Session,

1 As to English law, relating to imprisonment for life, *see*—

(i) section 57, Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58);

(ii) section 27, Prisons Act, 1952 (15 & 16 Geo. 6, c. 52);

(iii) section 20, Criminal Justice Administration Act, 1961 (9 & 10 Eliz. 2, c. 39) (for persons other than those sentenced to imprisonment for life).

2 As to England, *see* Royal Commission's Report, pages 226, *et seq.* and page 316.

3 The Prisons Act, 1894 (9 of 1894).

4 *G. V. Godse v. The State*, A.I.R. 1961 S.C. 600, 603, paragraph 7.

5 The whole question of legal aid has been examined in the Fourteenth Report of the Law Commission, Vol. I, pages 587 to 599, particularly paragraph 17.

6 *See* Fourteenth Report, Vol. I, page 593, middle, and page 615, paragraph 1.

7 Criminal Manual issued by the High Court of Bombay, (1948), page 41, paragraph 75, and amendments of 11th January, 1949 and 6th July, 1954.

and in confirmation cases, references from the verdict of the jury, appeals from acquittals and enhancement proceedings in revision, in which any person is liable to be sentenced to death, the accused shall be informed by the committing magistrate at the time of committal, or if the accused has already been tried by the court, by the trial court, that unless he intends to make his own arrangement for legal assistance, the higher court will engage a pleader at Government expense to appear before it on his behalf.

2. If he so desires, a pleader shall be so engaged.

3. The fees prescribed by the relevant rules shall be paid to the pleader so engaged.

4. The pleader is appointed in sufficient time to enable him to take copies of the depositions and other necessary papers, which are furnished free of cost before commencement of the trial. He is also allowed to make copies of these papers during the trial, without fees.

5. Copies required by the pleader for defence are prepared by the copyist in the establishment of the Public Prosecutor of the District, who may, if necessary, even employ an extra copyist for the purpose.

6. Fees chargeable under the Court Fees Act on the copies have been remitted.

1167. The subject has engaged attention in detail in U.S.A. For the purposes of this topic a detailed consideration of the position in the United States of America regarding counsel in criminal cases is unnecessary<sup>1,2</sup>. There are provisions in the Federal and State constitutions relating to due process and also specifically relating to counsel, which are different from the provisions in India. Position in  
America.

1168. The Sixth Amendment to the Constitution of the United States of America (so far as is relevant) provides "In all criminal prosecutions the accused shall enjoy the right . . . . to have the assistance of counsel for his defence". Adequate compensation to counsel has been regarded as necessary to make this right satisfactory in practice<sup>3</sup>.

<sup>1</sup> For a detailed study, see Beane, Right to Counsel in American Courts (University of Michigan Publication), (1955), pages 36, 80, 87 and 142 and Brownell in (1961) American Bar Association Journal "Decade of progress".

<sup>2</sup> For a summary of four recent cases, see (1963) American Bar Association Journal, 587—589.

<sup>3</sup> See, Ervin, "Uncompensated counsel. They do not meet the constitutional mandate", (1963) American Bar Association Journal, 435.

1169. In the U.S.A., the right to counsel in criminal cases is derived from various sources. These sources are statutory as well as constitutional. It is unnecessary to refer to those provisions and the prolific case-law thereon. Stating the position very broadly, one may say that this right is derived—

- (a) in the Federal field—
  - (i) for capital cases, from statute, and
  - (ii) for capital as well as non-capital cases, from the Sixth Amendment<sup>1</sup>;
- (b) in the State field—
  - (i) for capital cases, from State enactments, and
  - (ii) for capital as well as non-capital cases, from the “due process of law”, clause in the Fourteenth Amendment.<sup>2,3</sup>

1170. So far as the Sixth Amendment is concerned, the interpretation based on “assistance of counsel” has been a wide one, so as to embrace the right to have the effective assistance of counsel—what is known as the right to “appointed counsel.”

1171. So far as the due process of law is concerned, the leading cases are *Powell v. Alabama*<sup>4</sup> and the recent case of *Gideon*<sup>5</sup>. The former was a capital crime; the latter related to a non-capital crime. The effect of the leading cases (stated very roughly) is that failure to furnish counsel to an indigent person, accused of a crime, is a deprivation of due process, and may be regarded as fatal if the trial has been prejudiced.

1172. In another case<sup>6</sup>, failure to furnish counsel, on appeal from a conviction for felony, has been held to be a denial of the *equal protection of laws*<sup>7</sup>. Thereafter, several cases dealing with pre-trial right to counsel have been decided<sup>8</sup>.

<sup>1</sup> *Johnson v. Zerbst*, (1938) 304 U.S. 458.

<sup>2</sup> *Hamilton v. Alabama*, (1961) 368 U.S. 52.

<sup>3</sup> *Gideon v. Wain Wright* (1963) 372 U.S. 335.

<sup>4</sup> *Powell v. Alabama*, (1932) 287 U.S. 45.

<sup>5</sup> *Gideon v. Wain Wright* (March 18, 1963), 372 U.S. 335, overruling *Betts v. Brady*.

<sup>6</sup> *Douglas v. California*, (March 18, 1963), 372 U.S. 353.

(These and other cases are discussed in 1963 American Bar Association Journal 587 and 1192).

<sup>7</sup> For a review of the position, see Spies, “Due Process and the American Criminal Trial”, (1964) 38 Aust. Law Journal, 223, 234, 235 and Note (1963) 77 Harvard Law Review, 103—108 “Supreme Court 1962 Term”.

<sup>8</sup> See “Developments in the Law—Confessions” (1966) 79 Harvard Law Review, 935, 996 to 998, 1022 and 1110 (Indian position compared).

1173. Any provision, however, on the subject, will remain an idle formula, securing no practical benefit, unless steps are taken to ensure that the representation provided to the accused is effective. It is commonplace that the particular counsel who is assigned to the accused would not be able to render assistance to the best of his ability unless he gets sufficient time and facilities for preparation, and is adequately paid. Poor payment will not attract counsel of reasonable talent. The quality of counsel will also depend upon the appointing agency. Having regard to these considerations, we think that the main factors on which the adequacy of assistance in the shape of counsel depends, would be—

1. The time at which counsel is provided.
2. The time up to which counsel is provided.
3. The agency by which counsel is appointed.
4. The agency by which counsel is paid.
5. The facilities allowed to counsel for preparation.
6. The remuneration allowed to counsel.
7. The awareness of the accused that he is entitled to counsel.

1174. At first sight, a provision for appointing counsel would seem to be a matter of sympathy, or a gratuitous concession allowed on grounds of compassion. A close study will, however, show, that such a facility is not a luxury; it seems to go to the root of the matter. Without the "guiding hand of counsel", laymen cannot present their case properly. Cross-examination, which still remains the most effective tool for testing the veracity of a witness, is a weapon which no layman, however intelligent he may be, can ordinarily employ in the atmosphere of a courtroom and with efficient counsel pitched on the other side. It is from this point of view that we attach the greatest importance to the assistance of counsel in capital cases.<sup>1</sup>

1175. We would, therefore, recommend<sup>2</sup> very strongly, Recommendation. that all State Governments and High Courts should review the provisions regarding the assistance of counsel in capital cases, in order to consider—

(a) whether the right is effective in practice, with reference to the criteria which we have indicated above, and

(b) particularly, whether the fees allowed to counsel are adequate to attract good talent.

<sup>1</sup> For the purpose of this Report, it is unnecessary to discuss how far this right should be available in non-capital cases also.

<sup>2</sup> See Fourteenth Report of the Law Commission, (Reform of Judicial Administration), Vol. I, pages 587 to 599.

The general question of legal aid has been examined more than once in India by various Committees, and we need not repeat what is already contained in the reports of those committees.<sup>1</sup>

SUMMARY  
OF  
MAIN CONCLUSIONS  
AND  
RECOMMENDATIONS

1. 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.<sup>2</sup>

It is difficult to rule out the validity of, or 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 upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the 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<sup>3</sup>.

Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts<sup>4</sup>.

On a consideration of all the issues involved, the Commission is of the opinion, that capital punishment should be retained in the present state of the country<sup>5</sup>.

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<sup>1</sup> See Fourteenth Report of the Law Commission (Reform of Judicial Administration), vol. I, pages 587 to 599.

<sup>2</sup> See paragraph 262.

<sup>3</sup> See paragraph 263.

<sup>4</sup> See paragraph 263.

<sup>5</sup> Paragraph 264.

2. (a) The deterrent object of capital punishment is the most important object. Indeed, it would seem to constitute its strongest justification<sup>1</sup>. Even if all the other objects were to be kept aside, the deterrent object would, by itself, furnish a rational basis for its retention.

The retributive object cannot, however, be totally ruled out. "Retribution", as used here, does not mean the primitive concept of "eye for an eye", but connotes the expression of public indignation at a shocking crime, which can better be described as "reprobation"<sup>2</sup>.

The retributive object is also reflected in its negative aspect. Where the circumstances of a crime are such that they excite not a sense of shock but a feeling of pity, the "reprobation" is off-set by the "extenuating circumstances". A subdued sympathy takes the place of reprobation; public feeling sides itself in favour of the offender; the law bows down to this feeling, whether through the court or through the prerogative of mercy or by express provision in some cases<sup>3</sup>.

Even after all the arguments advanced to support the abolition of capital punishment are taken into account, there does remain a *residuum* of cases where it is absolutely impossible to enlist any sympathy on the side of the criminal, or to postulate any mental abnormality on his part, or to assert that the deterrent effect is counter-balanced by any external factors i.e., factors other than will and determination of the criminal<sup>4</sup>.

(b) Punishment as a deterrent has various aspects, namely, to stop the offender from offending again (particular deterrence), to deter other potential offenders (general deterrence), and to protect the society from the persistent offender (protection)<sup>5</sup>.

After a discussion in detail of the various arguments pertaining to the deterrent effect of capital punishment, the Commission has reached the conclusion that capital punishment does act as a deterrent<sup>6</sup>.

3. (a) On the footing that capital punishment is to be retained, no material changes as regards the sentence of death are recommended in respect of the offences which are, at present, punishable with death under the Indian

1 See paragraphs 295—296.

2 Paragraph 297.

3 Paragraph 298.

4 Paragraph 300.

5 Paragraph 294.

6 Paragraphs 370—372.

Penal Code, sections 121, 132, 194, (second paragraph) 302, 303<sup>1</sup>, 305, 307, 396<sup>2</sup>.

(b) The Commission does not recommend, in the present report, that any other offences under the Indian Penal Code or any other law should be punishable with death<sup>3-15</sup>.

4. The relevant provisions in the Indian Penal Code which vest in most cases a discretion in the court to award the sentence of death or the lesser sentence of imprisonment for life have been considered. The vesting of such discretion is necessary, and the provisions conferring such discretion are working satisfactorily<sup>16</sup>.

Section 303, Indian Penal Code, under which the sentence of death is mandatory for an offence under the section, need not be amended by leaving the question of sentence to the discretion of the Court, or by confining the operation of the section to cases where the previous offence is an offence for which the offender could have been sentenced to death<sup>17</sup>.

5. The considerations which weigh or should weigh with the court in awarding the lesser punishment of imprisonment for life, (in respect of offences for which the prescribed punishment is death or imprisonment for life), cannot be codified. The circumstances which should or should not be taken into account, and the circumstances which should be taken into account along with other circumstances, as well as the circumstances which may, by

1 See also point No. 4, in this summary, regarding section 303, Indian Penal Code.

2 See paragraph 395 (general) read with paragraphs 77, 78, 83, 84 (for murder—s. 302), paragraphs 396—397 (sections 121 and 132), paragraphs 398—404 (section 194) paragraph 405 (section 303), paragraph 407 (section 305), paragraph 410 (section 307), paragraphs 411—412 (section 396).

3 Paragraph 463 (Adulteration).

4 Paragraph 464 (Armed Forces).

5 Paragraph 465 (Arson).

6 Paragraph 473 (Espionage).

7 Paragraph 476 (Hoarding, Profiteering and Blackmarketing).

8 Paragraph 477 (Kidnapping).

9 Paragraphs 481—501 (Negligence—Homicide by).

10 Paragraph 522 (Rape).

11 Paragraph 528 read with paragraph 471 (Sabotage).

12 Paragraph 529 (Secession—preaching of).

13 Paragraph 530 (Smuggling).

14 Paragraph 531 (Train Robbery and Wrecking).

15 Paragraph 539 (Treason).

16 Paragraphs 580—585.

17 Paragraphs 587—591.



themselves, be sufficient, in the exercise of the discretion regarding sentence, cannot be exhaustively enumerated.<sup>1</sup> Further, the exercise of the discretion may depend on local conditions, future developments, evolution of the moral sense of the community, the state of crime at a particular time or place, and many other unforeseeable features. Codification of these considerations may, if attempted, be too wide and too narrow at the same time<sup>2</sup>. No change in the law is, therefore, recommended on this point<sup>3</sup>.

6. It is not desirable to divide murder into different categories for the purpose of regulating the punishment for murder, or to divide murders into capital and non-capital. The crime of murder is one of infinite variety. Many factors have to be taken into consideration, and not infrequently, a careful balancing of conflicting considerations has to be undertaken. No amount of verbal dexterity can surmount these difficulties<sup>4-5</sup>.

7. The Commission does not recommend any provision—

(a) that the normal sentence for murder should be imprisonment for life but in aggravating circumstances the court may award the sentence of death<sup>6</sup>, or

(b) that the normal sentence for murder should be death but in case of extenuating circumstances the court may award the sentence of imprisonment for life<sup>7</sup>.

8. *There should be a provision in the law requiring the court to state its reasons for imposing a sentence of death or the lesser sentence of imprisonment for life, in respect of any offence which is punishable with death or imprisonment for life in the alternative.*

The Code of Criminal Procedure, 1898, be amended accordingly<sup>8</sup>.

9. Assuming that the sentence of death is to be retained, the question of exempting certain classes of persons from

1 Paragraph 629.

2 Paragraphs 630—631.

3 Paragraphs 632—634.

4 Paragraphs 700—705 (General discussion).

5 For specific points, see paragraph 516 (Pre-meditation); paragraph 21 (Scheme in Penal Code of Burma); paragraph 725 (intent to kill).

6 Paragraph 790.

7 Paragraph 791.

8 Paragraphs 820—822.

the sentence of death was considered. The conclusion reached with respect to each class of persons is as follows:—

(i) *Children*—Persons below 18 years of age at the time of the commission of the offence should not be sentenced to death.<sup>1</sup> A provision to that effect can be *conveniently inserted* in the Indian Penal Code, as section 55B.

(ii) It is not necessary to exempt women generally from the sentence of death.<sup>2</sup>

(iii) Regarding pregnant women sentenced to death, the existing provisions are discussed. It is not necessary to add to the existing provisions by inserting elaborate provisions regarding medical examination of the woman, or appeal by her as to the a finding that she is not pregnant<sup>3</sup>.

(iv) It is not necessary to add any *provision* in the law for exempting from the sentence of death, cases of a mother killing her infant child within a certain period after the delivery<sup>4</sup>.

(v) It is unnecessary to insert a statutory provision as to cases of “diminished responsibility”<sup>5</sup>.

(vi) It is unnecessary to exempt, from the sentence of death, the other classes of persons mentioned in some of the suggestions<sup>6</sup>.

10. Enlargement of the appellate jurisdiction of the Supreme Court, so as to provide that an appeal shall lie to the Supreme Court as a matter of right in all cases in which a sentence of death has been passed, confirmed or upheld by the High Court, is not recommended<sup>7</sup>.

11. (a) No changes are suggested with respect to the power of the President and the Governor to grant pardon, reprieve, respite or remission in respect of the punishment of death or to suspend remit or commute the sentence of death under articles 72 and 161 of the Constitution, or with respect to the power of the Government to suspend, remit or commute such sentence under sections 401 and 402, Code of Criminal Procedure, 1898<sup>8</sup>.

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1 Paragraphs 878—887.

2 Paragraphs 888—890.

3 Paragraph 893.

4 Paragraph 898.

5 Paragraph 924.

6 Paragraph 925.

7 Paragraphs 982—985.

8 Paragraph 1025 read with paragraphs 1001 and 1002.

(b) (i) Having regard to the fact that the circumstances of each case must differ from another, it would not be desirable to attempt to lay down any rigid and exhaustive provisions as to the *principles* which should guide the exercise of these powers<sup>1</sup>.

(ii) As regards the *procedure* which should be followed in the exercise of these powers, it is not necessary to have any statutory provisions for—

- (1) compulsory consultation with the Judges<sup>2</sup>;
- (2) an Advisory Board<sup>3</sup>;
- (3) requiring publication of the reasons for exercise of the power, in a particular case<sup>4</sup>;
- (4) requiring prior recommendation of the court, before grant of commutation<sup>5</sup>;
- (5) compulsory consultation with the Attorney General<sup>6</sup>.

12. (a) The opinions received on the subject of the method of execution of the sentence of death are considered. A method which is certain, humane, quick and decent should be adopted. But a positive opinion cannot be expressed (in the present state of knowledge on the subject), and it is not possible to recommend any change in the present method of hanging<sup>7</sup>.

(b) The question, whether executions should be held in public, is considered. An execution in public would be repulsive, and that is a sufficient argument against its introduction in India<sup>8</sup>. It is not necessary to give prior or subsequent publicity to an execution<sup>9</sup>.

(c) The present position as to the interval between the sentence of death and the actual execution is discussed<sup>10</sup>.

(No statutory provision recommended).

1 Paragraph 1075, read with paragraph 1026.

2 Paragraph 1085.

3 Paragraphs 1086—1089.

4 Paragraph 1090.

5 Paragraph 1091.

6 Paragraph 1092.

7 Paragraphs 1149—1150.

8 Paragraphs 1152—1153.

9 Paragraph 1153.

10 Paragraphs 1161 and 1162.

13. Some of the other related topics discussed are—

(i) Plea of guilty in a trial for a capital offence.

(No specific provision recommended).<sup>1</sup>

(ii) Medical examination of the accused in a capital case, for determining his sanity.<sup>2</sup>

(iii) Restitution to the victim of crime. (The matter is one of policy, not arising out of abolition)<sup>3</sup>.

(iv) Rehabilitation<sup>4</sup> of families of criminals, condemned to death (Suggestion noted. No change in law recommended).

(v) Forfeiture of property of the offender—and its disposal in favour of heirs of the person murdered. (No recommendation made for change—Suggestion noted<sup>5</sup>.)

(vi) After-care of prisoners (sentenced to life imprisonment), after their release from prison. Recommendation made<sup>6</sup> that figures of recidivism may be published and made available in a convenient form or included in the official annual publication "Crime in India". Figures of recidivism (i.e., a capital crime or crime involving violence committed by a prisoner sentenced to imprisonment for life, after his release) would be of interest in assessing how far the sentence of imprisonment has worked as a deterrent.

(vii) Rules relating to remission of period of imprisonment in case of persons sentenced to imprisonment for life, referred to (The question of amendment to rules is not considered in this Report)<sup>7</sup>.

(viii) *Legal aid*—All State Governments and High Courts may review the provisions regarding the assistance of Counsel in Capital Cases, in order to consider<sup>8</sup>—

(a) whether the right (to be provided with counsel) is *effective* in practice, with reference to the criteria indicated in the Report<sup>9</sup>, and

(b) particularly, whether the fees allowed to counsel are adequate to attract good talent.

1 Paragraphs 990—996.

2 Paragraphs 997—1000.

3 Paragraph 1155.

4 Paragraph 1156.

5 Paragraph 1160.

6 Paragraph 1163.

7 Paragraph 1164.

8 Paragraph 1175.

9 Paragraphs 1171—1173.

1. J. L. KAPUR—*Chairman.*

2. K. G. DATAR

3. S. S. DULAT

4. T. K. TOPE

5. RAMA PRASAD MOOKERJEE

} *Members.*

P. M. BAKSHI.

*Joint Secretary and  
Legislative Counsel.*

*Secretary.*

NEW DELHI,  
*The 30th September, 1967.*