the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code. As regards the punishment under Section 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant under Section 376.

29. In the result the appeal preferred by the appellant fails and is hereby dismissed.

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(BEFORE R.M. SAHAI AND B.L. HANSARIA, JJ.)

Writ Petition (Crl.) No. 409 of 1986

P. RATHINAM .. Petitioner;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

And

Writ Petition (Crl.) No. 419 of 1987

NAGBHUSAN PATNAIK .. Petitioner;

Versus

UNION OF INDIA .. Respondent.

Writ Petition (Crl.) Nos. 409 of 1986 and 419 of 1987†,
decided on April 26, 1994

A. **Penal Code, 1860 — S. 309 — Punishment for attempt to commit suicide — Held, provision void being violative of Art. 21 — It is a cruel and irrational provision as it provides punishment again to the person who is already afflicted and needs psychiatric counselling and caused no harm to others — Attempt to commit suicide not against morality, religion, society or public policy of preservation of human life and apprehension that invalidating S. 309 would affect monopolistic power of State to take life and would permit 'constitutional cannibalism' unfounded — S. 306 however, stands on a different footing — Constitution of India, Art. 21**

B. **Constitution of India — Art. 21 — Right to live includes right not to live a forced life i.e. to die — But this conclusion is not based on the analogy of negative aspects involved in freedoms under Art. 19 (e.g. freedom not to speak**

† Under Article 32 of the Constitution of India

or not to join association etc.) — Right not to live also does not indicate that the rights under Art. 21 can be waived — Waiver— Estoppel

C. **Constitution of India — Art. 21 — Law dealing with life and personal liberty if cruel, having regard to the object it seeks to serve, would be violative of Art. 21**

D. **Penal Code, 1860 — S. 309 — Held, not violative of Art. 14 on grounds of attempt to suicide being undefined and unguided and of treating all attempts to commit suicide by the same measure — Constitution of India, Art. 14**

E. **Criminology — Crime — Concept of — Meaning and characteristics of — Held, depends upon prevailing social values — Crime prevention measures to be moulded accordingly — Crime and Tort — Distinction — Tort Law**

F. **Penology — Punishment — Deterrent — Effect — Whether reduces crime, doubtful**

G. **Public Policy — Concept of — Not capable of precise definition — It is a varying and uncertain concept — Contract Act, 1872, S. 23 — Administrative Law — Administrative action — Words and phrases**

H. **Jurisprudence — Law and morality — Relationship between**

I. **Suicide — Meaning — Causes of — Who commits — Euthanasia compared — Words and phrases**

Held :

Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for. (Para 109)

It must therefore, be held that Section 309 violates Article 21, and so, it is void. This view would advance not only the cause of humanisation, which is a need of the day, but of globalisation also, as by effacing Section 309, this part of the criminal law would be attuned to the global wavelength. This view is also in consonance with the recommendation of the Law Commission of India in the 42nd Report (1971). This view has been taken on the basis of an attempt to "search for the social dynamics of criminal law, the functional theory of sentencing and the therapeutic reach of punitive arts, to catch up with social sciences relevant to criminal justice and to link up prison jurisprudence with constitutional roots". (Paras 110 and 112)

State v. *Sanjay Kumar Bhatia*, 1985 Cri LJ 931: (1985) 2 DMC 153 (Del); *Maruti Shripati Dubal* v. *State of Maharashtra*, 1987 Cri LJ 743: (1986) 88 Bom LR 589: 1986 Mah LJ 913 (Bom); *Court on its own Motion* v. *Yogesh Sharma*, Registered as Crl. Revision No. 230 of 1985, *approved*

Chenna Jagadeeswar v. *State of A.P.*, 1988 Cri LJ 549: (1987) 2 Andh LT 263: 1987 APLJ (Cri) 110 (AP), *overruled*

Article 21 has enough of positive content in it and is not merely negative in its reach. (Para 27)

Unnikrishnan v. *State of A.P.*, (1993) 1 SCC 645; *Munn* v. *Illinois*, (1877) 94 US 113 : 24 L Ed 77 (1877); *Board of Trustees of the Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124 : 1983 SCC (L&S) 61 : AIR 1983 SC 109; *Vikram Deo Singh Tomar* v. *State of Bihar*, 1988 Supp SCC 734 : 1989 SCC (Cri)

66 : AIR 1988 SC 1782; *Ramsharan Autyanuprasi* v. *Union of India*, 1989 Supp (1) SCC 251 : AIR 1989 SC 549; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68 : AIR 1986 SC 847; *C.E.S C. Ltd.* v. *Subhash Chandra Bose*, (1992) 1 SCC 441: 1992 SCC (L&S) 313, *relied on*

R.C. Cooper v. *Union of India*, (1970) 2 SCC 298 : AIR 1970 SC 1318; *Satwant Singh Sawhney* v. *D. Ramarathnam APO, New Delhi*, (1967) 3 SCR 525 : AIR 1967 SC 1836; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468 : (1975) 3 SCR 946; *Griswold* v. *Connecticut*, 381 US 479: 14 L Ed 2d 511 (1965); *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Charles Shobraj* v. *Supdt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542 : (1979) 1 SCR 512; *M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : (1979) 1 SCR 192; *Hussainara Khatoon (I)* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23 : (1979) 3 SCR 169; *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815 : (1980) 3 SCR 855; *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342 : AIR 1983 SC 361; *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353; *A.G. of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413 : AIR 1986 SC 467; *Paramanand Katra* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Shantistar Builders* v. *N.K. Totame*, (1990) 1 SCC 520, *referred to*

Dr M. Indira and Dr Alka Dhal : "*Meaning of Life, Suffering and Death*" as read in the International Conference of Health Policy, Ethics and Human Values held at New Delhi in 1986, *referred to*

However, challenge to Section 309 IPC on ground of being violative of Article 14 is not sustainable. The submission that want of plausible definition of attempt to suicide and even guidelines in that regard rendered Section 309 IPC arbitrary and violative of Article 14 is not sound, for, whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life. Further, on a prosecution being launched it is always open to an accused to take the plea that his act did not constitute suicide whereupon the court would decide this aspect also. Section 309 cannot also be held to be violative of Article 14 on ground that it treats different attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made. The nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment. In certain cases even Probation of Offenders Act can be pressed into service, whose Section 12 enables the court to ensure that no stigma or disqualification is attached to such a person. (Paras 17 and 18)

Chenna Jagadeeswar v. *State of A.P.*, 1988 Cri LJ 549: (1987) 2 Andh LT 263: 1987 APLJ (Cri) 110 (AP), *approved on this point*

Maruti Shripati Dubal v. *State of Maharashtra*, 1987 Cri LJ 743 (Bom), *overruled on this point*

Right to live of which Article 21 speaks can be said to bring in its trail the right not to live a forced life. Though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19 (e.g. freedom of speech and expression includes freedom not to speak, freedom of association and movement includes freedom not to join any association or move anywhere, freedom of business includes freedom not to do business), one may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather

choose not to live. In any case, a person cannot be *forced* to enjoy right to life to his detriment, disadvantage or disliking. (Paras 35 and 33)

Alan A. Stone: "*The Right to Die : New Problems for Law and Medicine and Psychiatry*" — *Jonas Robitscher Memorial Lecture in Law and Psychiatry, Emory Law Journal*, Vol. 37, 1988, pp. 627 to 643, *referred to*

However, this does not mean that the right encompassed or conferred by Article 21 can be waived. The *Olga Tellis case*, wherein the Court had observed that a fundamental right cannot be waived, dealt more with the question of estoppel by conduct about which it can be said that the same is a facet of waiver. The present cases are, however, not on the question of estoppel but of not taking advantage of the right conferred by Article 21. (Para 34)

Olga Tellis v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545 : AIR 1986 SC 180, *explained* and *distinguished*

There is no justification for the apprehension that if the negative aspect of right to life, i.e., to destroy it can be read in Article 21, the State can "easily embark upon a policy to encourage genocide on the plea that proper management of resources are vital and necessary for the upkeep of life with vigour and dignity in the wake of geometrical progression of population growth". The argument of 'constitutional cannibalism' based on such apprehension has no basis as there is a gulf of difference between taking of one's own life and allowing the State to go in for genocide. (Para 100)

If a person takes his life, he is taking his *own* life, and not the life of anybody else; and so, the argument that State's monopolistic power of taking life is taken away by the person who attempts to commit suicide has no legs to stand on. Nobody can claim to have monopoly over a human life. It is God alone who can claim such a power. (Para 99)

Law has many promises to keep including granting of so much of liberty as would not jeopardise the interest of another or would affect him adversely. For this purpose, law may have "miles to go". Then, law cannot be cruel, which it would be if persons attempting suicide are treated as criminals and are prosecuted to get them punished, whereas what they need is psychiatric treatment, because suicide basically is a "call for help". A law which is cruel violates Article 21 of the Constitution. (Para 48)

Deena v. *Union of India*, (1983) 4 SCC 645 : 1983 SCC (Cri) 879 : AIR 1983 SC 1155, *relied on*

M. Ruthnaswamy: *Legislation : Principles and Practice* (1st Edn., 1974) (Chapter "*Principles of Legislation in History*" and "*Contemporary Principles of Legislation*"); Kartar Singh Mann : "*Working of Legislatures in the Matter of Legislation*", pp. 491-95 *Journal of Parliamentary Information*, Vol. 33, 1987; Ian Temy, Q.C.: "*Euthanasia — Is it murder?*" [*Australian Journal of Forensic Sciences*, Vol. 21 (1), September 1988 pp. 2-7]; Ihering (1818-1892): "*Geist Des Romisches Rechts*" (*The Spirit of Roman Law*), *referred to*

As to why any particular act is treated as crime, any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interest, as endangering its safety, stability or comfort is usually regarded as heinous and it is sought to be repressed with severity and the sovereign power is utilised to prevent the mischief or to punish anyone who is guilty of it. Very often crimes are creations of government policies and the Government in power forbids a man to bring about results which are against its policies. The very definition of 'crime' depends on the values of a given society. Not only this, crimes can also be created or abolished with the passage of time. (Paras 49, 54 and 55)

Justice Krishna Iyer: *Perspectives in Criminology, Law and Social Change* (1980) pp. 7, 8; R S. Cavan's *Criminology* (2nd Edn., p. 7), *referred to*

In a way there is no distinction between crime and tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals, harm to an individual is ultimately harm to society. (Para 50)

A crime presents these characteristics: (1) It is a harm, brought about by human conduct which the sovereign power in the State desires to prevent; (2) among the measures of prevention selected is the threat of punishment; and (3) legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so. (Para 51)

Kenny's *Outlines of Criminal Law*, 19th Edn., pp. 1 to 5, *relied on*

Protection of society is the basic reason of treating some acts as crime. Indeed it is one of the aims of punishment. Where there is no feeling of security, there is no true freedom. (Para 52)

The difficult task of prevention of crime would not permit the solution to be put into a strait-jacket; it has to be modulated and moulded as per time and clime. (Para 61)

As regards the question as to whether infliction of punishment can be said to have a direct relation with the reduction of criminal propensity, it is doubtful whether imposition of even death sentence has been able to reduce the number of murders. Sentencing has been regarded as a subtle art of healing. Moreover, a person attempting to commit suicide does get punished. The agony undergone by him and the ignominy to be undergone is definitely a punishment, though not a corporal punishment; but then, Section 309 has provided for a sentence of fine also. Agony and ignominy undergone would be far more painful and deterrent than a fine which too may not come to be realised if the person concerned were to be released on probation. (Para 65)

Bachan Singh v. *State of Punjab*, (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325, *referred to*

Various social forces like the economy, religion and socio-economic status are responsible for suicides. There are various theories of suicide, to wit, sociological, psychological, biochemical and environmental. The causes of suicides are many and varying inasmuch as some owe their origin to sentiments of exasperation, fury, frustration and revolution; some are the result of feeling of burden, torture, and sadness. Some are caused by loss of employment, reversal of fortune, misery due to illness, family trouble and thwarted love. Sometimes killing is in opposition to society and sometimes in opposition to particular persons. This happens when the person committing suicide nurses a feeling of unjust treatment, maltreatment and cruelty. (Paras 67 and 68)

Persons who attempt to commit suicide do not deserve prosecution. Suicide is a psychiatric problem and not a manifestation of criminal instinct. Suicide is really a 'call for help' and there is no 'call for punishment'. So what is needed to take care of suicide-prone persons are soft words and wise counselling (of a psychiatrist) and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor. Let us humanise our laws. It is never late to do so. (Paras 72, 76 and 74)

Suicide knows no barriers of race, religion, caste, age or sex. There is "secularisation of suicide" in our country also. There has been great increase in the number of commission of suicides. (Paras 69 and 70)

There is no non-religiosity in the act of suicide so far as our social ethos is concerned and it is this ethos, this social mores, which our law has to reflect and respect. (Para 81)

G.P. Tripathi : *Right to Die* (paper presented at the *World Congress on Law and Medicine* at New Delhi); *Encyclopaedia of Religion*, Vol. 8 (1987), pp. 541 to 547, *referred to*

It is the sanctity of human life which is said to be defaced when one commits suicide and the question of morality, therefore, arises. Law and morals often intersect. Historically at least law and morals were closely related and in many areas the law continues to look upon its function as the enforcement of morals, the reinforcement of moral standards in society, and the punishment of moral depravity. However, morality has no defined contours and it would be too hazardous to make a bold and bald statement that commission of suicide is per se an immoral act. If human beings can be treated inhumanly, as a very large segment of our population is, which in a significant measure may be due to wrong (immoral) acts of others, charge of immorality cannot be, and in any case should not be levied, if such human beings or like of them, feel and think that it would be better to end the wretched life instead of allowing further humiliation or torture. Those who demand virtue must do virtue and should see that others too do the same. (Paras 85, 82 and 88)

Burton M. Leiser's *Liberty, Justice and Morals* (1973) p. 19; Simon Lee's *Laws and Morals* (1986) p. 86; H.L.P. Hart's *Law, Liberty and Morality* (1982) particularly pp. 30 and 31, *referred to*

Solesbee v. *Balkcom*, 94 L Ed 604 : 339 US 9 (1949); *Ranjit D. Udeshi* v *State of Maharashtra*, AIR 1965 SC 881 : (1965) 1 SCR 65 : (1965) 2 Cri LJ 8, *referred to*

Though suicide may bring in miseries to the family members and thus it was urged that suicide has adverse effects on the social set-up, but then, it is a matter of extreme doubt whether by booking a person who had attempted to commit suicide to trial, suicides can be taken care of. Even imposition of death sentences has not been able to take care of commission of murders. Further, such adverse sociological effects are caused by the *death* of the person concerned, and not by one who had *tried* to commit suicide. Indeed, those who fail in their attempts become available to be more or less as useful to the family as they were. So the person to be punished is one who had committed suicide; but, he is beyond the reach of law and cannot be punished. This can provide no reason to punish a person who should not be punished. (Paras 89 and 90)

One of the objects of punishment to be inflicted when an offence is committed is protection of society from the depredations of dangerous persons, one of the interests of the State being preservation of human life. But insofar as suicide is concerned, this object does not get attracted because there is no question of protection of the society from depredation of dangerous persons, who by the very nature of things have to be those who cause harm to others and not to themselves. It cannot, therefore, be said with any degree of definiteness that commission of suicide is against public policy; and, as such, a person attempting to commit it acts against public policy. (Paras 91 and 98)

Burton M. Leiser's *Liberty, Justice and Morals*, p. 198, *referred to*

The concept of public policy is, however, illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc. The term public policy is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against

good morals can be said to be against public policy. The concept of public policy is capable of expansion and modification. (Paras 92 and 94)

Egerton v. *Brownlow*, (1853) 4 HLC 121; *Gherulal Parakh* v. *Mahadeodas Maiya*, AIR 1959 SC 781: 1959 Supp (2) S\406; *Bhagwant Genuji Girme* v. *Gangabisan Ramgopal*, AIR 1940 Bom 369: 42 BLR 750. 191 IC 806; *Mafizuddin Khan Choudhury* v *Habibuddin Sheikh*, AIR 1957 Cal 336; *Kolapartı Venkatareddi* v. *Kolaparti Peda Venkatachalam*, AIR 1964 AP 465: (1964) 1 Andh WR 248; *Ratanchand Hirachand* v. *Askar Nawaz Jung*, AIR 1976 AP 112: ILR (1975) AP 843: (1975) 1 APLJ (HC) 344; *Enderby Town Football Club Ltd.* v. *Football Association Ltd.*, (1971) Ch 591; *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : AIR 1986 SC 1571, *referred to*

Barwin v. *Reidy*, 307 P 2d 175, 62 N.M. 183; *Pendeleton* v. *Greever*, j 193 p. 885, j 80 Ok 1 : 17 ALR 317; *Franklin Fire Ins. Co.* v. *Moll*, 58 NE 2nd 947 : 115 Ind. App. 289; *Draughton* v. *Fox Pelletır Corpn.*, 126 SW 2d 329 : 174 Tenn 457; *Clough* v. *Gardıner*, 182 NYS 804 : 111 Mis. 244, *cited*

W. Friedman : *Legal Theory* (5th Edn.) at p. 479 et. seq. in Part III, Section 2 titled as "*Legal Theory, Public Policy and Legal Evaluation*"; *Words and Phrases* (Permanent Edn., Vol. 35, 1963, pp. 454 to 539), *referred to*

The view that distinction between 'suicide' and 'euthanasia' is logically inconsistent may not be quite incorrect, because in passive euthanasia, wherever it has been accepted as legally permissible, consent of the patient, if he be in a sound mental condition, has been regarded as one of the prerequisites. So, if one could legally commit suicide, he could also give consent for his being allowed to die. But then, the legal and other questions relatable to euthanasia are in many ways different from those raised by suicide. One would, therefore, be right in making a distinction logically and in principle between suicide and euthanasia, though it may be that if suicide is held to be legal, the persons pleading for legal acceptance of passive euthanasia would have a winning point. However, for the present case it is sufficient to say that the justification for allowing persons to commit suicide is not required to be played down or cut down because of any encouragement to persons pleading for legalisation of mercy-killing. (Paras 101 and 13)

Mckay v. *Bergstedt*, *referred to*

As regards the persons aiding and/or abetting suicide, the law can be entirely different. It is not possible to accept the view that if Section 309 were to be held bad, it is highly doubtful whether Section 306 could survive, as self-killing is conceptually different from abetting others to kill themselves. They stand on different footing, because in one case a person takes his *own* life, and in the other a third person is abetted to take his life. (Para 102)

Petitions allowed R-M/T/13044/CR

Advocates who appeared in this case :

R. Venkataramani, Advocate, in W.P. No. 409 of 1986, for the Petitioner;

Ranjan Dwivedi, Advocate, in W.P. No. 419 of 1987, for the Petitioner.

V.C. Mahajan, Senior Advocate (T.C. Sharma, P. Parameswaran, D.S. Mahra and Ms Sushma Suri, Advocates, with him) for the Union of India.

Raj Kumar Mehta, Advocate, for the Respondent in W.P. No. 419 of 1987.

The Judgment of the Court was delivered by

B.L. HANSARIA, J.— Gandhiji once observed:

> "Death is our friend, the trust of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties — a defeated man."

The English poet William Ernest Henley wrote:

"I am the master of my fate, I am the captain of my soul."

2. Despite the above, Hamlet's dilemma of "to be or not to be" faces many a soul in times of distress, agony and suffering, when the question asked is "to die or not to die". If the decision be to die and the same is implemented to its fructification resulting in death, that is the end of the matter. The dead is relieved of the agony, pain and suffering and no evil consequences known to our law follow. But if the person concerned be unfortunate to survive, the attempt to commit suicide may see him behind bars, as the same is punishable under Section 309 of our Penal Code.

3. The two petitions at hand have assailed the validity of Section 309 by contending that the same is violative of Articles 14 and 21 of the Constitution and the prayer is to declare the section void. The additional prayer in Writ Petition (Crl.) No. 419 of 1987 is to quash the proceedings initiated against the petitioner (Nagbhusan) under Section 309.

4. The judiciary of this country had occasion to deal with the aforesaid aspect; and we have three reported decisions of the three High Courts of the country, namely, Delhi, Bombay and Andhra Pradesh on the aforesaid question. There is also an unreported decision of the Delhi High Court. It would be appropriate and profitable to note at the threshold what the aforesaid three High Courts have held in this regard before we apply our mind to the issue at hand.

5. The first in point of time is the decision of a Division Bench of Delhi High Court in *State* v. *Sanjay Kumar Bhatia*[1] in which the Court was seized with the question as to whether the investigation of the case under Section 309 should be allowed to continue beyond the period fixed by Section 368 CrPC. Some loud thinking was done by the Bench on the rationale of Section 309. Sachar, J., as he then was, observed for the Bench:

> "It is ironic that Section 309 IPC still continues to be on our Penal Code. ... Strange paradox that in the age of votaries of Euthanasia, suicide should be criminally punishable. Instead of the society hanging its head in shame that there should be such social strains that a young man (the hope of tomorrow) should be driven to suicide compounds its inadequacy by treating the boy as a criminal. Instead of sending the young boy to psychiatric clinic it gleefully sends him to mingle with criminals.... The continuance of Section 309 IPC is an anachronism unworthy of a human society like ours. Medical clinics for such social misfits certainly but police and prisons never. The very idea is revolting. This concept seeks to meet the challenge of social strains of modern urban and competitive economy by ruthless suppression of mere symptoms — this attempt can only result in failure. Need is for humane, civilised and socially oriented outlook and penology.... No wonder so long as society refuses to face this reality its coercive machinery will

1 1985 Cri LJ 931 : (1985) 2 DMC 153 (Del)

invoke the provision like Section 309 IPC which has no justification to continue to remain on the statute book."

6. Soon came the Division Bench decision of Bombay High Court in *Maruti Shripati Dubal* v. *State of Maharashtra*[2] in which the Bench speaking through Sawant, J., as he then was, on being approached for quashing a prosecution launched against the petitioner under Section 309 of the Penal Code on the ground of unconstitutionality of the section, took the view and that the section was ultra vires being violative of Articles 14 and 21 and was therefore struck down. We would note the reasons for the view taken later.

7. Close on the heels was the decision of a Division Bench of Andhra Pradesh High Court in *Chenna Jagadeeswar* v. *State of A.P.*[3] in which on the High Court being approached against the conviction of the appellants under Section 309, inter alia, on the ground of the section being violative of Articles 14 and 21 of the Constitution, the Bench held that the section was valid as it did not offend any of these articles. The Bombay view was dissented to; the reasons of which also we shall advert to later.

8. The unreported decision of the Delhi High Court has been noted in the articles of Shri B.B. Pande, Reader in Law, University of Delhi, as published in *Islamic and Comparative Law Quarterly* [Vol. VII(1), March 1987 at pp. 112 to 120] and of Shri Faizan Mustafa, Lecturer, Department of Law, Aligarh Muslim University [(1993) 1 SCJ — Journal Section at pp. 36 to 42]. That decision was rendered in a suo motu proceeding titled as *Court on its own Motion* v. *Yogesh Sharma*[4]. The decision was rendered by Sachar, C.J. The Court once again pointed out the futility of creating criminal liability in suicide cases, but instead of striking down the section or declaring it invalid, what the learned Chief Justice did was to quash all the 119 proceedings pending in the trial courts on the ground that dragging of the prosecutions for years when the victims have had enough of misery and the accused also belonged to poorer section which added further insult to the injury, would be abuse of the process of the court. Being of this view, each of the accused was directed to be acquitted.

9. Striking down of the section by the Bombay High Court has come to be criticised by the aforesaid Shri Pande and Shri Mustafa, so also by Shri D.C. Pande, Research Professor, Indian Law Institute, in his article on "*Criminal Law*" [of Annual Survey of Indian Law, Vol. 23 (1987) at pp. 260 to 270 of published by the Indian Law Institute]. In the 'Editorial Note' titled '*Taking One's Life*' [(1986-87) 91 CWN (Journal Section) at pp. 37 to 40] the Bombay decision received some criticism.

10. Before dealing with the points raised in these writings, it would be worthwhile to note that Shri V.S. Deshpande after his retirement as Chief Justice of Delhi High Court had expressed his view on this question in his

2 1987 Cri LJ 743 : (1986) 88 Bom LR 589 : 1986 Mah LJ 913 (Bom)
3 1988 Cri LJ 549 : (1987) 2 Andh LJ 263 : 1987 APLJ (Cri) 110 (AP)
4 Registered as Crl. Revision No. 230 of 1985

article titled "*To be or not to be*" [(1984) 3 SCC (Journal) at pp. 10 to 15] Shri Deshpande, after referring to what had been held by this Court regarding the scope of Article 21, took the view that if Section 309 is restricted in its application to attempts to commit suicide which are cowardly and which are unworthy, then only this section would be in consonance with Article 21, because, if a person having had no duties to perform to himself or to others when he is terminally ill, decides to end his life and relieve himself from the pain of living and the others from the burden of looking after him, prosecution of such a person would be adding insult to injury and it was asked : "Should a Court construe Section 309 IPC to apply to such cases?"

11. Sometime afterwards appeared an article of Justice R.A. Jahagirdar of Bombay High Court in the *Illustrated Weekly of India* (September 29, 1985) in which the learned Judge took the view that Section 309 was unconstitutional for four reasons: (1) neither academicians nor jurists are agreed on what constitutes suicide, much less attempted suicide; (2) mens rea, without which no offence can be sustained, is not clearly discernible in such acts; (3) temporary insanity is the ultimate reason of such acts which is a valid defence even in homicides; and (4) individuals driven to suicide require psychiatric care.

12. Apart from the aforesaid judicial and legal thinking on the subject relating to justification and permissibility of punishing a man for attempting to commit suicide, there are proponents of the view that euthanasia (mercy-killing) should be permitted by law. We do not propose to refer to the thinking on this subject, principally because the same is beyond the scope of the present petitions and also because in euthanasia a third person is either actively or passively involved about whom it may be said that he aids or abets the killing of another person. We propose to make a distinction between an attempt of a person to take *his* life and action of some others to bring to an end the life of a third person. Such a distinction can be made on principle and is conceptually permissible.

13. Though what we propose to decide in these cases would, therefore, relate to the offence of attempted suicide, it is nonetheless required to be stated that euthanasia is not much unrelated to the act of committing suicide inasmuch as wherever passive euthanasia has been held to be permissible under the law, one of the requirements insisted upon is consent of the patient or of his relations in case the patient be not in a position to give voluntary consent. The relationship between suicide and euthanasia has come to be highlighted in a decision of the Supreme Court of Nevada (one of the States of United States of America) in *Mckay* v. *Bergstedt*[5] where a patient filed a petition to the court for permitting disconnection of his respirator. The district court, on the facts of the case, granted permission. The State appealed to the Supreme Court of Nevada which, after balancing the interest of the patient against the relevant State interest, affirmed the district court's judgment. The court took the view that the desire of the patient for

withdrawal of his respirator did not tantamount to suicide — the same was rather an exercise of his constitutional and common law right to discontinue unwanted medical treatment. This was the view taken by the majority. One of the Judges expressed a dissenting view.

14. A comment has been made on the aforesaid decision [at pp. 829 to 838 of *Suffolk University Law Review*, Vol. 25 (1991)] by stating that the distinction made by the majority between suicide and euthanasia because of differences in motive and mental attitude, is not tenable and the commentator referred to the dissenting opinion in which it was observed that the patient was in fact requesting the court to sanction affirmative act which was entirely consistent with the court's definition of suicide, inasmuch as the majority had defined suicide as "an act or instance of taking one's own life voluntarily and intentionally; the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind; one that commits or attempts his self-murder". (This was indeed the definition given in *Webster's Third New International Dictionary*, 1968.)

15. We may now note the reasons given by the Bombay High Court in *Shripati case*[2] for striking down the section as violation of Article 21. These reasons are basically three: (1) Article 21 has conferred a positive right to live which carries with it the negative right not to live. In this connection it has been first stated that the fundamental rights are to be read together as held in *R.C. Cooper* v. *Union of India*[6]. Mention was then made of freedom of speech and expression, as to which it was observed that the same includes freedom not to speak and to remain silent. Similarly, about the freedom of business and occupation, it was stated that it includes freedom not to do business. (2) Notice was then taken of the various causes which lead people to commit suicide. These being mental diseases and imbalances, unbearable physical ailments, affliction by socially-dreaded diseases, decrepit physical condition disabling the person from taking normal care of his body and performing the normal chores, the loss of all senses or of desire for the pleasures of any of the senses, extremely cruel or unbearable conditions of life making it painful to live, a sense of shame or disgrace or a need to defend one's honour or a sheer loss of interest in life or disenchantment with it, or a sense of fulfilment of the purpose for which one was born with nothing more left to do or to be achieved and a genuine urge to quit the world at the proper moment. (3) The Bench thereafter stated that in our country different forms of suicide are known. These being: *Johars* (mass suicides or self-immolation) of ladies from the royal houses to avoid being dishonoured by the enemies; *Sati* (self-immolation by the widow on the burning pyre of her deceased husband); *Samadhi* (termination of one's life by self-restraint on breathing); *Prayopaveshan* (starving unto death); and *Atmarpana* (self-sacrifice). It was also observed that the saints and savants, social, political and religious leaders have immolated themselves in the past and do so even today by one method or the other and society has not only

6 (1970) 2 SCC 298 : AIR 1970 SC 1318

not disapproved of the practice but has eulogised and commemorated the practitioners. It may be pointed out that the Bench made a distinction between "suicide" and "mercy-killing"; so also, between suicide and aiding or abetting the same.

16. The Bombay High Court held Section 309 as violation of Article 14 also mainly because of two reasons. First, which act or acts in series of acts will constitute attempt to suicide, where to draw the line, is not known — some attempts may be serious while others non-serious. It was stated that in fact philosophers, moralists and sociologists were not agreed upon what constituted suicide. The want of plausible definition or even guidelines, made Section 309 arbitrary as per the learned Judges. Another reason given was that Section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made.

17. The first of the aforesaid reasons is not sound, according to us, because whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life, as stated at p. 1521 of *Encyclopaedia of Crime and Justice*, Vol. IV, 1983 Edn. Of course, there still exists difference among suicide researchers as to what constitutes suicidal behaviour, for example, whether narcotic addiction, chronic alcoholism, heavy cigarette smoking, reckless driving, other risk-taking behaviours are suicidal or not. It may also be that different methods are adopted for committing suicide, for example, use of firearms, poisoning especially by drugs, overdoses, hanging, inhalation of gas. Even so, suicide is capable of a broad definition, as has been given in the aforesaid *Webster's Dictionary*. Further, on a prosecution being launched it is always open to an accused to take the plea that his act did not constitute suicide whereupon the court would decide this aspect also.

18. Insofar as treating of different attempts to commit suicide by the same measure is concerned, the same also cannot be regarded as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. It is worth pointing out that Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment. It is this aspect which weighed with the Division Bench of Andhra Pradesh High Court in its aforesaid decision to disagree with the Bombay view by stating that in certain cases even Probation of Offenders Act can be pressed into service, whose Section 12 enables the court to ensure that no stigma or disqualification is attached to such a person. (*See* para 32 of the judgment.)

19. We agree with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14. But the Bombay Bench itself was more involved with Article 21 and violation of it by Section 309, the reasons whereof have been noted. Whether these are sound and tenable, would be our real consideration.

20. The Bombay High Court's decision[2] led some thinkers to express their own views. We have noted who they were. The broad points of their

objection/criticism were these: (1) suicide is an act against religion; (2) it is immoral; (3) it produces adverse sociological effects; (4) it is against public policy (This has also been the main argument of the counsel of Union of India before us.); (5) it damages monopolistic power of the State, as State alone can take life; and (6) it would encourage aiding and abetting of suicide and may even lead to 'constitutional cannibalism'.

21. We shall in due course see whether the aforesaid objections raised against the Bombay judgment are valid. Concerned as we are with the broad contention that Section 309 is violative of Article 21, we shall first inform ourselves as to the content and reach of this article and then answer in a general way as to whether a person residing in India has a right to die. Section 309 being a part of our enacted law, we would desire to know what object a law seeks to achieve. This section having made attempt to commit suicide an offence, we shall ask the question as to why is a particular act treated as crime and what acts are so treated. We shall then apply our mind to the purposeful query as to how a crime can be prevented. Being seized with the crime of 'attempted suicide', we shall apprise ourselves as to why suicides are committed and how can they be really prevented. We would also desire to know what type of persons have been committing suicides and what had been their motivations. We would then view the act of committing suicide in the background of our accepted social ethos. Having done so, we shall take up the points of criticism noted above one by one and express our views on the same.

22. Having known that the Law Commission of India had in its 42nd Report of 1971 recommended deletion of Section 309, we shall put on record as to why was this recommendation made and how was the same viewed by the Central Government; and what steps, if any, were taken by it to implement the recommendation. What is the present thinking of the Union of India shall also be taken note of.

23. Finally, we shall open our mental window a little to allow breeze to come from other parts of the world, inter alia, because Gurudev (Rabindranath Tagore, the Nobel Laureate) wanted us to do so. Globalisation has, in any case, been accepted by us in some other fields of our activities. We have stated opening of this window "a little" because we propose to confine ourselves to know whether attempt to commit suicide is presently a crime only in two other countries of the globe — they being United Kingdom and United States of America. The reasons for our selecting these two countries shall be indicated when we shall advert to our 'global view' query. It may only be stated here that we are opening the window only a little, as, the little air that would pass through the little aperture would be enough, in our view, to enable us to have broad knowledge of global view on the subject under consideration.

24. The aforesaid mental odyssey would take us through a long path before we would reach our destination, our conclusion. Finale would, however, come after we have answered or known the following:

(1) Has Article 21 any positive content or is it merely negative in its reach?

(2) Has a person residing in India a right to die?

(3) Why is a law enacted? What object(s) it seeks to achieve?

(4) Why is a particular act treated as crime/What acts are so treated?

(5) How can crimes be prevented?

(6) Why is suicide committed?

(7) Who commits suicide? Secularisation of suicide.

(8) How suicide-prone persons should be dealt with?

(9) Is suicide a non-religious act?

(10) Is suicide immoral?

(11) Does suicide produce adverse sociological effects?

(12) Is suicide against public policy?

(13) Does commission of suicide damage the monopolistic power of the State to take life?

(14) Is apprehension of 'constitutional cannibalism' justified?

(15) Recommendation of the Law Commission of India and follow-up steps taken, if any.

(16) Global view. What is the legal position in other leading countries of the world regarding the matter at hand?

25. The aforesaid questions, which have been framed keeping in mind the information we thought necessary to enable us to decide the important matter at hand to our satisfaction, have been listed as above keeping in view their comparative importance for our purpose — the most important being the first and so on; and we propose to answer them in the same sequence.

(1) *Has Article 21 any positive content or is it merely negative in its reach*?

26. This question is no longer res integra inasmuch as a Constitution Bench of this Court in *Unnikrishnan* v. *State of A.P.*[7] [in which right to receive education up to the primary stage has been held to be a call of Article 21] has virtually answered this question. This would be apparent from what was stated by Mohan, J. in paragraph 19 and by Jeevan Reddy, J. in paragraph 170. In paragraph 30, Mohan, J. has mentioned about the rights which have been held to be covered under Article 21. These being:

(1) The right to go abroad. *Satwant Singh Sawhney* v. *D. Ramarathnam APO, New Delhi*[8].

(2) The right to privacy. *Gobind* v. *State of M.P.*[9] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut*[10].

7 (1993) 1 SCC 645

8 (1967) 3 SCR 525 : AIR 1967 SC 1836

9 (1975) 2 SCC 148 : 1975 SCC (Cri) 468 : (1975) 3 SCR 946

10 381 US 479, 510 : 14 L Ed 2d 511 (1965)

(3) The right against solitary confinement. *Sunil Batra* v. *Delhi Admn.*[11]

(4) The right against bar fetters. *Charles Shobraj* v. *Supdt., Central Jail*[12].

(5) The right to legal aid. *M.H. Hoskot* v. *State of Maharashtra*[13].

(6) The right to speedy trial. *Hussainara Khatoon(I)* v. *Home Secretary, State of Bihar*[14].

(7) The right against handcuffing. *Prem Shankar Shukla* v. *Delhi Admn.*[15]

(8) The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.*[16]

(9) The right against custodial violence. *Sheela Barse* v. *State of Maharashtra*[17].

(10) The right against public hanging. *A.G. of India* v. *Lachma Devi*[18].

(11) Doctor's assistance. *Paramanand Katra* v. *Union of India*[19].

(12) Shelter. *Shantistar Builders* v. *N.K. Totame*[20].

27. The aforesaid is enough to state that Article 21 has enough of positive content in it. As to why the rights mentioned above have been held covered by Article 21 need not be gone into, except stating that the originating idea in this regard is the view expressed by Field, J. in *Munn* v. *Illinois*[21] in which it was held that the term 'life' (as appearing in the 5th and 14th amendments to the United States Constitution) means something more than 'mere animal existence'. This view was accepted by a Constitution Bench of this Court in *Sunil Batra* v. *Delhi Admn.*[22] (SCC paras 55 and 226 : AIR paras 56 and 226), to which further leaves were added in *Board of Trustees of the Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni*[23] (SCC para 13 : AIR para 13); *Vikram Deo Singh Tomar* v. *State of Bihar*[24] (SCC para 5 : AIR para 5); and *Ramsharan Autyanuprasi* v. *Union of India*[25] (SCC para 13 : AIR para 13). In these decisions it was held that the word

11 (1978) 4 SCC 494, 545 : 1979 SCC (Cri) 155
12 (1978) 4 SCC 104 : 1978 SCC (Cri) 542 : (1979) 1 SCR 512
13 (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : (1979) 1 SCR 192
14 (1980) 1 SCC 81 : 1980 SCC (Cri) 23 : (1979) 3 SCR 169
15 (1980) 3 SCC 526 : 1980 SCC (Cri) 815 . (1980) 3 SCR 855
16 (1983) 2 SCC 68 : 1983 SCC (Cri) 342 · AIR 1983 SC 361
17 (1983) 2 SCC 96 : 1983 SCC (Cri) 353
18 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413 : AIR 1986 SC 467
19 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
20 (1990) 1 SCC 520
21 (1877) 94 US 113 : 24 L Ed 77 (1877)
22 (1978) 4 SCC 494 : 1979 SCC (Cri) 155 : AIR 1978 SC 1675
23 (1983) 1 SCC 124 : 1983 SCC (L&S) 61 : AIR 1983 SC 109
24 1988 Supp SCC 734 : 1989 SCC (Cri) 66 : AIR 1988 SC 1782
25 1989 Supp (1) SCC 251 : AIR 1989 SC 549

'life' in Article 21 means right to live with human dignity and the same does not merely connote continued drudgery. It takes within its fold "some of the finer graces of human civilization, which makes life worth living", and that the expanded concept of life would mean the "tradition, culture and heritage" of the person concerned.

28. It would be relevant to note the decision in *State of H.P.* v. *Umed Ram Sharma*[26]. It was observed there in paragraph 11 that the right to life embraces not only physical existence but the quality of life as understood in its richness and fullness by the ambit of the Constitution; and for residents of hilly areas access to road was held to be access to life itself, and so necessity of road communication in a reasonable condition was held to be a part of constitutional imperatives, because of which the direction given by the Himachal Pradesh High Court to build road in the hilly areas to enable its residents to earn livelihood was upheld. *What can be more positive and kicking*?

29. We may also refer to the article of Dr M. Indira and Dr Alka Dhal under the caption "*Meaning of Life, Suffering and Death*" as read in the International Conference on Health Policy, Ethics and Human Values held at New Delhi in 1986. This is what the learned authors stated about life in their article:

> "Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality — the feeling of wholeness with a capacity for continuous intellectual and spiritual growth. Physical, social, spiritual and psychological well-being are intrinsically interwoven into the fabric of life. According to Indian philosophy that which is born must die. Death is the only certain thing in life."

30. May it be said that in *C.E.S.C. Ltd.* v. *Subhash Chandra Bose*[27] it has been opined by Ramaswamy, J. (who is, of course, a minority Judge) that physical and mental health have to be treated as integral part of right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed.

(2) Has a person residing in India right to die?

31. If a person has a right to live, question is whether he has right not to live. The Bombay High Court stated in paragraph 10 of its judgment that as all the fundamental rights are to be read together, as held in *R.C. Cooper* v. *Union of India*[6] what is true of one fundamental right is also true of another fundamental right. It was then stated that it is not, and cannot be, seriously disputed that fundamental rights have their positive as well as negative aspects. For example, freedom of speech and expression includes freedom not to speak. Similarly, the freedom of association and movement includes freedom not to join any association or move anywhere. So too, freedom of business includes freedom not to do business. It was, therefore, stated that

26 (1986) 2 SCC 68 : AIR 1986 SC 847
27 (1992) 1 SCC 441 : 1992 SCC (L&S) 313

logically it must follow that the right to live will include right not to live, i.e., right to die or to terminate one's life.

32. Two of the abovenamed critics of the Bombay judgment have stated that the aforesaid analogy is "misplaced", which could have arisen on account of superficial comparison between the freedoms, ignoring the inherent difference between one fundamental right and the other. It has been argued that the negative aspect of the right to live would mean the end or extinction of the positive aspect, and so, it is not the suspension as such of the right as is in the case of 'silence' or 'non-association' and 'no movement'. It has also been stated that the right to life stands on different footing from other rights as all other rights are derivable from the right to live.

33. The aforesaid criticism is only partially correct inasmuch as though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19, one may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be *forced* to enjoy right to life to his detriment, disadvantage or disliking.

34. From what has been stated above, it may not be understood that according to us the right encompassed or conferred by Article 21 can be waived. Need for this observation has been felt because it has been held by a Constitution Bench in *Olga Tellis* v. *Bombay Municipal Corpn.*[28] that a fundamental right cannot be waived. A perusal of that judgment, however, shows that it dealt more with the question of estoppel by conduct about which it can be said that the same is a facet of waiver. In the present cases, we are, however, not on the question of estoppel but of not taking advantage of the right conferred by Article 21.

35. Keeping in view all the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

36. In this context, reference may be made to what Alan A. Stone, while serving as Professor of Law and Psychiatry in Harvard University stated in his 1987 Jonas Robitscher Memorial Lecture in Law and Psychiatry, under the caption "*The Right to Die : New Problems for Law and Medicine and Psychiatry*". (This lecture has been printed at pp. 627 to 643 of *Emory Law Journal*, Vol. 37, 1988). One of the basic theories of the lecture of Professor Stone was that right to die inevitably leads to the right to commit suicide.

28 (1985) 3 SCC 545 : AIR 1986 SC 180

(3) Why is a law enacted? What object(s) it seeks to serve?

37. Section 309 being a part of our enacted law, let it be known as to why a law is framed or is required to be framed. To put it differently, what objects are sought to be achieved by framing laws. For our purpose it would be enough if what has been stated by Shri M. Ruthnaswamy in Chapters 5 and 6 of his book *Legislation: Principles and Practice* (1st Edn., 1974) (the Chapter headings being "*Principles of Legislation in History*" and "*Contemporary Principles of Legislation*"), is noted. The learned author has within a short compass brought home the different principles which had held sway in different parts of the world at different points of time. Ruthnaswamy starts in Chapter 5 by saying that it is from the time of the Renaissance and the Reformation when men, as a result of these great revolutionary movements broke away from rule of custom and tradition, that legislation began its career as an instrument of social and political, and even religious, change. The readers are then informed as to what Richard Hooker (1554-1600) thought on the question of law which, according to him, has to be influenced by experience and supported by reason.

38. The next important thinker of England after Hooker was the famous Francis Bacon (1561-1626). In his *Essays* (the most popular of his works) we find his views on legislators and legislation. Bacon stood out for progress and utility and was of the view that it was not good to try experiments in legislation. As against Bacon there was Sir Edward Coke, who was a defender of the rights of the Parliament. Mention is then made about John Locke (1632-1704) according to whom the laws made must respect the right to liberty and property; and laws must be made for the good of the people.

39. Ruthnaswamy then takes the reader to France and mentions about Montesquieu (1689-1755), who in his famous *Spirit of Laws* published in 1748, which has been regarded as a great classic of political and legal literature, rendered immemorial service to legislation and legislatures. In this monumental work, he insists that laws and legislation should be in conformity with the spirit of the people, if its traditions, its philosophy of life, even the physical surroundings of the people, including the climate. The journey is then to Germany, where Leibnitz (1646-1717), a philosopher, mathematician and adviser of kings and princes in Germany and Europe, took the view that greatness of law is proved by the fact that great rulers were also great law-givers. Names of Augustus, Constantine and Justinian are mentioned in this regard. The German philosopher further said that the law must serve morality, because what is against morals is bad law.

40. Readers then find themselves in Italy and they are acquainted with Beccaria (1739-1794), who through his pamphlet under the title *Delict and Crimes* published in 1766 brought a revolution in the theory and practice of punishment, because, according to him, punishment of crime must be used only for the defence of the State and the people and not for retribution and revenge which principles were holding the field then.

41. As per sequence of time, the next writer to be mentioned is Edmund Burke (1727-1797), who was a parliamentarian, statesman and political

thinker. According to him the main essential of good laws and legislation is that the same should be fit and equitable, so that the legislature has a right to demand obedience. He would say there are two fundamental principles of legislation — equity and utility.

42. Blackstone is a name which is immortal in the world of legal jurisprudence. It is his *Commentaries on the Laws of England* (1765) which has made him so. He emphasised on the inviolability of common law, freedom of persons and property. After Blackstone, came Bentham (1748-1832) and the Utilitarians.

43. Ruthnaswamy has also acquainted the readers about the views of Plato, Aristotle, Cicero and Thomas Aquinas, so also what Voltaire (1694-1773) had to say. We do not propose to burden this judgment with their views; but what was said by Macaulay (1800-1859) has to be noted, because it is he who had drafted our Penal Code. Macaulay believed in the efficacy of law in improving people and their character. He wrote:

> "When a good system of law and police is established, when justice is administered cheaply and firmly, when idle technicalities and unreasonable rules of evidence no longer obstruct the search for truth, a great change of the better may be expected which shall produce a great effect on the national character."

44. In Chapter 6 of the book, Runthnaswamy has stated that after the principles of Benthamism and utilitarianism, reason, utility and individual liberty had exhausted themselves, humanitarianism occupied the field and it is this principle which has seen the enactments of statutes like Workmen's Compensation Act, Factories Act and various other statutes dealing with public health, sanitation and weaker sections.

45. We do not propose to dive further and would close this discussion by referring to what was stated by Ihering (1818-1892) in his "*Geist Des Romisches Rechts*" (*The Spirit of Roman Law*), which has been accepted as a legal classic. According to Ihering, law is a means to an end. He laid down the following general principles of legislation:

"1. Laws should be known to be obeyed.
2. Laws should answer expectations.
3. Laws should be consistent with one another.
4. Laws should serve the principle of Utility.
5. Laws should be methodical.
6. Laws must be certain to be obeyed, must not become a dead letter.
7. Laws are necessary to ward off the danger of the operations of egoism or self-interest, the ordinary motives of human action.
8. Law and legislation must aim at justice which is that which suits all.
9. Laws are interconnected "laws like human beings lean on one another."

46. That humanitarianism is the throbbing principle of legislation presently has also been highlighted by Kartar Singh Mann in his article "*Working of Legislatures in the matter of Legislation*" appearing at pp. 491 to 495 of the *Journal of Parliamentary Information*, Vol. 33, 1987. What has been stated by Mann at p. 493 is relevant for purpose — the same being:

> "In the historical perspective, one can easily appreciate the complexities and intricacies of legislation which the present legislatures are to face. Besides the ordinary laws which safeguard the rights and liberties of the individual, there are certain fundamental laws which ordinary legislation may not change. In countries like France, Germany and India which are having their written Constitutions their fundamental laws are embodied there itself. The fundamental principles on which the political life of the people is based are individuality, equality and justice. After securing the life and liberty of the State and of the individual, laws and legislations take on the task of serving and promoting the good life of the State and the people. For good life, morality is necessary and to maintain morality legislation is a must. Legislation is the framework which is required to be made for good life."

47. What was opined by Ian Temy, Q.C., Director of Public Prosecution in his article "*Euthanasia — Is it murder?*" [as printed at pp. 2 to 7 of *Australian Journal of Forensic Sciences*, Vol. 21 (1), September 1988] is also relevant for our purpose. That article was concluded at p. 7 in these words:

> "I have necessarily spoken about the law as it is. There is nothing immutable about it. To the extent it does not meet social needs and a strong consensus emerges to that effect, the law can and should be changed ...."

48. The aforesaid show that law has many promises to keep including granting of so much of liberty as would not jeopardise the interest of another or would affect him adversely, i.e., allowing of stretching of arm up to that point where the other fellow's nose does not begin. For this purpose, law may have "miles to go". Then, law cannot be cruel, which it would be because of what is being stated later, if persons attempting suicide are treated as criminals and are prosecuted to get them punished, whereas what they need is psychiatric treatment, because suicide basically is a "call for help", as stated by Dr (Mrs) Dastoor, a Bombay Psychiatrist, who heads an organisation called "Suicide Prevent". May it be reminded that a law which is cruel violates Article 21 of the Constitution, *a la, Deena* v. *Union of India*[29].

(4) Why is a particular act treated as crime? What acts are so treated?

49. Earliest reference to the word "crime" dates back to 14th century when it conveyed to the mind something reprehensible, wicked or base. Any conduct which a sufficiently powerful section of any given community feels

29 (1983) 4 SCC 645 : 1983 SCC (Cri) 879 : AIR 1983 SC 1155

to be destructive of its own interest, as endangering its safety, stability or comfort is usually regarded as heinous and it is sought to be repressed with severity and the sovereign power is utilised to prevent the mischief or to punish anyone who is guilty of it. Very often crimes are creations of government policies and the Government in power forbids a man to bring about results which are against its policies.

50. In a way there is no distinction between crime and tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals, harm to an individual is ultimately harm to society.

51. A crime presents these characteristics: (1) it is a harm, brought about by human conduct which the sovereign power in the State desires to prevent; (2) among the measures of prevention selected is the threat of punishment; and (3) legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so. (*See* pp. 1 to 5 of Kenny's *Outlines of Criminal Law*, 19th Edn., for the above propositions.)

52. Protection of society is the basic reason of treating some acts as crime. Indeed it is one of the aims of punishment. Where there is no feeling of security, there is no true freedom. What is the effect of the same cannot be described better than what was stated by Hobbes in *Leviathan*, which is:

> "There is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instrument of moving and removing such things as require much forces; no knowledge of the face of the earth; no account of time; no arts, no letters; no society; and which is worst of all continual fear and danger of violent death; and the life of a solitary, poor, nasty, brutish and short."

53. As constitutionality of Section 309 has been assailed as being violative of Article 21 which protects life and personal liberty, it would be in fitness of things to note what J.S. Mill had to say about making an act relatable to personal liberty punishable. This is what Mill had said in this connection in his famous tract *On Liberty* :

> "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that *the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of

others to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society is that which concerns others. *In the part which merely concerns himself, his independence is, of right, absolute.* Over himself, over his own body and mind, the individual is sovereign." (emphasis supplied)

54. The very definition of 'crime' depends on the values of a given society. To establish this what has been stated by Justice Krishna Iyer in his book *Perspectives in Criminology, Law and Social Change* (1980) at pp. 7 and 8 may be noted:

> "What is a sex crime in India may be sweetheart virtue in Scandinavia. What is an offence against property in a capitalist society may be a lawful way of life in a socialist society. What is permissible in an affluent economy may be a pernicious vice in an indigent community. Thus, criminologists must have their feet all the time on terra firma."

55. Not only this, crimes can also be created or abolished with the passage of time, as stated at p. 7 of R.S. Cavan's *Criminology* (2nd Edn.). This has been elucidated by the author by stating that in democracy where individual opinion can express itself freely through speaking, writing and elections, public opinion becomes the final arbiter in placing the opprobrium of crime upon a specific type of behaviour and when a law is not accepted the police may attempt to enforce it against public opinion, but gradually the police yield to the pressure of public opinion, which they perhaps share. The law may remain on the statute books but be ignored by all. Whereas when the public opinion supports the law, many pressures of an informal nature are brought against the violators to aid and lessen the police action.

(5) How can crimes be prevented ?

56. The aforesaid subject is too wide and cannot be discussed meaningfully within the parameters available to us in this judgment. The treatise on *Crime and its Prevention* edited by Stephen Lewin, Editor, World Week Magazine, would show how complicated the subject is. At p. 217 of the 3rd printing (1973) mention has been made about seven steps for combating a crime. We may not go into the details. Sufficient to say that the steps relate to different disciplines.

57. Professor Dr N.V. Paranjape, Professor and Head of the Department of Postgraduate and Research in Law and Dean Faculty of Law, Jabalpur University, in his book *Criminiology and Penology* has something to say in Chapter VI about causes of crime, knowledge of which is necessary to combat and prevent the same. Dr Paranjape states that in the absence of a single theory of crime-causation, criminologists have offered different explanations to justify their own theory as an explanation of delinquent behaviour. There are, however, some writers who seem to be convinced that

no single theory of crime can fully explain the causes of crime. They therefore prefer a multiple approach to criminal behaviour which suggests that crime is generated not as a result of one solitary factor but as a consequence of a combination of such factors.

58. Justice Krishna Iyer also in his aforesaid book has dealt with this aspect in Chapter 2 captioned "*The Pathology of Indian Criminology*". In his usual inimitable style, he has painted the crime scenario on a broad canvas and has mentioned about various factors which lead to commission of crimes.

59. Reference may also be made to the White Paper presented to the Parliament by Her Majesty's Government in 1990 on the subject of "*Crime, Justice and Protecting the Public*", published as Cm. No. 965. The White Paper has summarised main proposals as below:

> "A coherent legislative framework for sentencing with the severity of the punishment matching the seriousness of the crime and a sharper distinction in the way the courts deal with violent and non-violent crimes;
>
> New powers for the Crown Court to impose longer sentences for violent and sexual offences, if this is necessary to protect the public from serious harm;
>
> New powers for all courts to combine community service and probation and to impose curfews on offenders so that more offenders convicted of property crimes can be punished in the community;
>
> Reducing the maximum penalties for theft and burglary, except burglaries of people's homes, which can be a very serious matter;
>
> Requiring the courts to consider a report by the probation service before giving a custodial sentence and to give reasons for imposing a custodial sentence, except for the most serious offences;
>
> Encouraging more use of financial penalties, especially compensation to victims and fines which take account of offenders' means;
>
> Making the time actually served in prison closer to the sentence ordered by the court, replacing the present system of remission and parole by new arrangements which ensure that all prisoners serve at least half their sentences in custody; prisoners serving sentences of 4 years or more would not get parole if this would put the public at risk;
>
> New powers for the courts to return released prisoners to custody up to the end of their sentence, if they are convicted of a further imprisonable offence;
>
> All prisoners serving sentences of a year or more to be supervised by the probation service on release, with new national standards for supervision;
>
> Wider powers for the courts to make parents take more responsibility for crimes committed by their children;

More flexible powers for the courts to deal with 16 and 17 year old offenders;

Changing the juvenile courts to youth courts, to deal with defendants under the age of 18."

60. It would be of some interest in this connection to point out that as late as 1991 a need was felt by the British Government to issue a Royal Warrant for issuing a commission to examine the effectiveness of the criminal justice in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who were innocent. For this purpose, the Royal Warrant wanted the commission to make its recommendation on various aspects of the criminal justice. The commission submitted its report in July 1993 and it contains recommendations which number 352 and have been mentioned at pp. 188 and 219 of the Report issued by Her Majesty's Stationery Office.

61. The difficult task of crime prevention would not therefore permit the solution to be put into a strait-jacket; it has to be modulated and moulded as per time and clime.

Effect of Punishment

62. The aforesaid is not enough for our purpose. We have also to know as to whether infliction of punishment can be said to have a direct relation with the reduction of criminal propensity. It would be enough in this context to state that it has been seriously doubted whether imposition of even death sentence has been able to reduce the number of murders. Bhagwati, J. as he then was, in his dissenting judgment in the case of *Bachan Singh* v. *State of Punjab*[30] has brought home well this aspect of the matter.

63. While on the question of sentencing it would be rewarding to note that sentencing has been regarded as a subtle art of healing, and the legal and political people uninstructed in the humanist strategy of reformation, fail even on first principles. Justice Iyer in his aforesaid book has further stated at p. 47 that it puzzles a Judge or a Home Secretary to be told in Shavian paradox:

"If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries."

64. What was said by Victor Hugo in his *Les Miserables* is instructive:

"We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall replace the scaffold, reason is on our side, feeling is on our side and experiment is on our side."

65. This is not all. It would be wrong to think that a person attempting to commit suicide does not get punished. He does. The agony undergone by him and the ignominy to be undergone is definitely a punishment, though not a corporal punishment; but then, Section 309 has provided for a sentence

30 (1982) 3 SCC 24 : 1982 SCC (Cri) 535 : AIR 1982 SC 1325

of fine also. Agony and ignominy undergone would be far more painful and deterrent than a fine which too may not come to be realised if the person concerned were to be released on probation.

(6) Why is suicide committed?

66. "Suicide, the intentional taking of one's life, has probably been a part of human behaviour since pre-history. Many ancient texts including the Bible, the Koran and the Rig Veda, mention suicide. Because the act of self-destruction represents an attack on some of our presumptions — that life is to be lived and death feared — responses to suicide have involved a variety of emotionally-charged attitudes. These have ranged from approbation accorded to it by the ancient Greek stoics to, more typically, the fear and superstitution that led 18th century Europeans to drive stakes through the hearts of those who had committed suicide."

[*Encyclopaedia of Crime and Justice* (1983), Vol. 4, p. 520]

The change in social thinking in this regard can be best illustrated by the view taken by the conservative English society where to start with suicide itself was regarded as a felony requiring burial in a public highway, followed by forfeiture of all the properties of the deceased to the Crown. Presently, the Suicide Act, 1961 does not even regard attempt to suicide as an offence.

67. Various social forces like the economy, religion and socio-economic status are responsible for suicides. There are various theories of suicide, to wit, sociological, psychological, biochemical and environmental (*Ibid*, pp. 1523-24).

68. The causes of suicides are many and varying inasmuch as some owe their origin to sentiments of exasperation, fury, frustration and revolution; some are the result of feeling of burden, torture, and sadness. Some are caused by loss of employment, reversal of fortune, misery due to illness, family trouble and thwarted love. Sometimes killing is in opposition to society and sometimes in opposition to particular persons. This happens when the person committing suicide nurses a feeling of unjust treatment, maltreatment and cruelty. [*See* the *Causes of Suicide* by Maurice Halbwacks (translated by Harold Goldblatt).] The Bombay judgment has mentioned many causes in paragraph 12 of its judgment which have been noted in paragraph 15 above. The same may not be repeated.

(7) Who commits suicide? Secularisation of suicide.

69. Suicide knows no barriers of race, religion, caste, age or sex. In a study undertaken in United States, to which reference has been made at p. 14 of *Suicidology: Contemporary Developments* by E.S. Scheneidman, (1976), it was found that both Roman Catholics and Protestants were equally susceptible to commission of suicide. It is because of this that it has been felt in the United States that there is "secularisation of suicide". In our country also Hindus, Muslims, Sikhs, Christians, Buddhists, Jains and Parsis are known to have been committing or attempting suicides. Though there has been no particular study as to the religious faith of the persons committing

suicide or attempting to commit suicide, it can safely be stated that there is "secularisation of suicide" in our country also.

70. While on the question "Who commits suicide?", it would be relevant to state that there has been great increase in the number of commission of suicides. In his aforementioned article, Shri Faizan Mustafa pointed out that the number of suicides by the youths below 18 in 1986 was 7545. But out of about 60,000 persons who committed suicide in 1990 nearly half of them were aged between 18 to 25, which is generally considered to be the best period of a person's life.

71. As per the report published in *Indian Express* of 31-10-1984, in Ahmedabad city 5 suicide cases had occurred during 24 hours immediately preceding 30th October. In a write-up as published in *India Today* of 15-10-1984 under the caption "*Bangalore: The Suicide City*", it has been stated that Bangalore which had earned the title of "Boom City" nearly a year ago, could more appropriately be described as "Doom City" by last month. The figures collected for the first half of the year shocked the members of the State Legislature because of incredible 664 suicidal deaths over a six-month period, which was higher than the total combined figures for Calcutta and Hyderabad in the last three years.

(8) How suicide-prone persons should be dealt with?

72. We now come to the question relating to the treatment to be given to the persons who attempt to commit suicide. Do they deserve prosecution because they had failed? — is the all important question. The answer has to be a bold **NO**. The reasons are not far to seek. Let us illustrate this first by referring to the case of those 20 persons who committed suicide in Tamil Nadu distressed as they felt because of prolonged illness of Chief Minister, M.G. Ramachandran. That this had happened was published in the *Indian Express* of 28-10-1984. Question is whether these persons would have deserved prosecution had they failed in their attempt? The answer has to be that there can be no justification to prosecute such sacrificers of their lives. Similar approach has to be adopted towards students who jump into wells after having failed in examinations, but survive. The approach cannot be different qua those girls/boys who resent arranged marriages and prefer to die, but ultimately fail.

73. Let us come to the case of a woman who commits suicide because she had been raped. Would it not be adding insult to injury, and insult manifold, to require such a woman in case of her survival, to face the ignominy of undergoing an open trial during the course of which the sexual violence committed on her which earlier might have been known only to a few, would become widely known, making the life of the victim still more intolerable. Is it not cruel to prosecute such a person?

74. We would go further and state that attempt to commit suicide by such a woman is not, cannot be, a crime. What is crime in such a case is to prosecute her with a view to get her punished. It is entirely a different matter that at the end of the trial, the court may impose a token fine or even release

the convict on probation. That would not take care of the mental torture and torment which the woman would have undergone during the course of the trial. Such a prosecution is, therefore, par excellence persecution. And why persecute the already tormented woman? Have we become soulless? We think not. What is required is to reach the soul to stir it to make it cease to be cruel. Let us humanise our laws. It is never late to do so.

75. Suicide, as has already been noted, is a psychiatric problem and not a manifestation of criminal instinct. We are in agreement with Dr (Mrs) Dastoor that suicide is really a "call for help" to which we shall add that there is no "call for punishment" in it. Mention may also be made about what was observed in "*The Attitudes of Society towards Suicide*", a xerox copy of which is a part of written submissions filed on behalf of Respondent 2 (State of Orissa) in W.P. No. (Crl.) 419 of 1987. It has been stated in this article at p. 9 that shortly after passing of the Suicide Act, 1961 (in England), the Ministry of Health issued recommendation advising all doctors and authorities that attempted suicide was to be regarded as a "medical and social problem", as to which it was stated that the same was "more in keeping with present-day knowledge and sentiment than the purely moralistic and punitive reaction expressed in the old law".

76. So what is needed to take care of suicide-prone persons are soft words and wise counselling (of a psychiatrist) and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.

(9) Is suicide a non-religious act?

77. Every individual enjoys freedom of religion under our Constitution, vide Article 25. In a paper which Shri G.P. Tripathi had presented at the World Congress on Law and Medicine held at New Delhi under the caption "*Right to die*", he stated that every man lives to accomplish four objectives of life: (1) *Dharma* (religion and moral virtues); (2) *Artha* (wealth); (3) *Kama* (love or desire); and (4) *Moksha* (spiritual enjoyment). All these objectives were said to be earthly, whereas others are to be accomplished beyond life. When the earthly objectives are complete, religion would require a person not to cling to the body. Shri Tripathi stated that a man has moral right to terminate his life, because death is simply changing the old body into a new one by the process known as *Kayakalp*, a therapy for rejuvenation.

78. Insofar as Christians are concerned, reference may be made to what Pope John Paul II stated when he gave his approval to the document issued by the sacred congregation stating:

> "... when inevitably death is imminent in spite of the means used, it is permitted in conscience to take decision to refuse forms of treatment that would only secure precarious and burdensome prolongation of life, so long as the normal care due to sick person in similar cases is not interrupted ...."

79. In the *Encyclopaedia of Religion*, Vol. 8 (1987), mention has been made at pp. 541 to 547 as to how "life" has been understood by different

religions. After discussing the subject as understood by the primitive societies, Judaism, Christianity, Hinduism and Buddhism, the discussion has been included by stating that the very act of posing the question "What is life?" produces an initial sense of bafflement and perplexity. It has been stated thereafter that a precise, distinct and universally acceptable concept does not accompany the use of the word "life"; and that posing of the above query brings in its wake a sense that life is an "inexhaustible storehouse of mysteries, a realm of endlessly self-perpetuating novelties, in which the solution to any given problem gives rise to a plethora of other questions that beckon the always restless, never contended mind of Homo Sapiens to seek further for additional answers or, at least, to search out more intellectually refined, morally elevating, and spiritually salutary ways of pursuing the quest". So, life does not end in this world and the quest continues, may be after the end of this life. Therefore, one who takes life may not really be taken to have put an end to his whole life. There is thus nothing against religion in what he does.

80. Insofar as our country is concerned, mythology says Lord Rama and his brothers took *Jalasamadhi* in river Saryu near Ayodhya; ancient history says Buddha and Mahavira achieved death by seeking it; modern history of Independence says about various fasts unto death undertaken by no less a person than Father of the Nation, whose spiritual disciple Vinoba Bhave met his end only recently by going on fast, from which act (of suicide) even as strong a Prime Minister as Indira Gandhi could not dissuade the Acharya.

81. The aforesaid persons were our religious and spiritual leaders; they are eulogised and worshipped. Even the allegation against them that they indulged in a non-religious act, would be taken as an act of sacrilege. So, where is non-religiosity in the act of suicide so far as our social ethos is concerned? And it is this ethos, this social mores, which our law has to reflect and respect.

(10) Is suicide immoral?

82. Law and morals often intersect and there can be no doubt that historically at least law and morals were closely related and that in many areas the law continues to look upon its function as the enforcement of morals, the reinforcement of moral standards in society, and the punishment of moral depravity, as noted at p. 19 of Burton M. Leiser's *Liberty, Justice and Morals* (1973). The Constitution of United States contains a number of provisions embodying moral judgments, one of which is prohibition against "cruel and unusual punishment". As to due process clause, it was stated by Justice Frankfurter in *Solesbee* v. *Balkcom*[31] that it "embodies a system of rights based on moral principles ... which comports with the deepest notions of what is fair and right and just".

83. If, however, the law be unjust would a person not be entitled to disobey it? The civil disobedience movement organised by leaders like Gandhiji shows that there can be clash of law and morality, which can be on

31 94 L Ed 604 : 339 US 9 (1949)

the battlefield of man's conscience. It is this which agitated the mind of Socrates when he was in jail. He was advised to escape and was assured that it would be a safe escape. He refused saying that having devoted his life to teach the importance of doing justice and respecting the laws, it would be rank hypocrisy for him to violate his principles when the laws had been turned against him. Being of this view, instead of breaking law, he took poison. But then, at times an individual would be between two horns of dilemma when confronted with the question of obeying an unjust and pernicious law. The theories of Divine Law and Natural Law were evolved to take care of this dilemma and French Declaration of Rights of Men and American Declaration of Independence are based on these laws.

84. In the aforesaid work of Burton, this aspect of the matter has been concluded at p. 353 by stating as below:

> "It is right to be law-abiding. But there may be times when it is not wrong to break the law. There are no easy rules or recipes to guide us in making our choices. Some people, who allow themselves to be governed by expediency and narrow self-interest when they choose to disobey traffic, are indignant when their neighbours violate laws because their religious and moral convictions do not permit them to do otherwise. Anarchy is a terrible thing. It is all that Hobbes said it was. It is more likely to come from motives like those of the speeder, the drunken driver, and the one who cheats on his income tax, *rather than from those of men like Gandhi, King* (meaning Martin Luther King) ...."
>
> (emphasis supplied)

85. Though the question of morality normally arises with laws relating to sex and acts evincing moral depravity like cheating, but as the question of birth and death has also moral significance, as opined by Mary Warnock, whose views in this regard have been noted at p. 86 of Simon Lee's *Laws and Morals* (1986), we may briefly advert to the moral aspect as well relating to suicide. It is the sanctity of human life which is said to be defaced when one commits suicide and the question of morality, therefore, arises. We would have occasion later to refer to the enactment of Suicide Act, 1961 by the British Parliament, when the related Bill was taken up for consideration in the House of Lords, the Lord Bishop of Carlisle had raised objection on the ground of morality by saying that sanctity of human life was being destroyed. But the Bill was passed, nonetheless.

86. A reference to Simon Lee's above work shows there is no unanimity regarding the moral object which law should try to achieve. Simon Lee has mentioned at p. 90 about three theories prevalent in England in this regard, one of whose propounder was Mill, according to whom "harm-to-others" is what ought to be prevented by law. Devlin would have liked that law should aim to establish minimum and not maximum standards of behaviour showing respect for tolerance and privacy. Hart's approach was that only "the universal values" merited legal support and not those which fluctuate according to fashion, unless harm is caused to others. [*See* H.L.P. Hart's *Law, Liberty and Morality* (1982) also particularly pp. 30 and 31.]

87. It would be apposite, while on the question of morality, to refer to the Constitution Bench decision of this Court in *Ranjit D. Udeshi* v. *State of Maharashtra*[32] in which the question examined was whether the novel of D.H. Lawrence *Lady Chatterley's Lover* could be regarded as "obscene" within the meaning of Section 292 of the Penal Code. The Constitution Bench speaking through Hidayatullah, J., as he then was, stated in paragraph 9 that the question of obscenity depends upon the mores of the people and it is always a question of degree and where the line is to be drawn. After going through the case law and what Lawrence might have had in mind in writing the book, the Bench unanimously came to the conclusion that Lawrence was probably unfolding his philosophy of life and the urges of the unconscious, which caused no loss to the society if there was a message in the book. After examining the contents of the book from this standard it was held it contained no obscenity. The importance of this decision for our purpose is that the aforesaid book was regarded as morally objectionable at one point of time even in England, where moral standard relating to sex is on a lower key compared to ours.

88. The above shows that morality has no defined contours and it would be too hazardous to make a bold and bald statement that commission of suicide is per se an immoral act. If human beings can be treated inhumanly, as a very large segment of our population is, which in a significant measure may be due to wrong (immoral) acts of others, charge of immorality cannot be, and in any case should not be, levied, if such human beings or like of them, feel and think that it would be better to end the wretched life instead of allowing further humiliation or torture. Those who demand virtue must do virtue and should see that others too do the same.

(11) Does suicide produce adverse sociological effects?

89. One of the points raised against suicide is that the person who had so done might have been the sole bread-earner of the family, say a husband, a father, because of whose death the entire family might have been left in lurch or doldrums, bringing in its wake untold miseries to the members of his family. It is therefore stated that suicide has adverse effects on the social set-up. No doubt, the effects of suicide in such cases are quite hurting; but then, it is a matter of extreme doubt whether by booking a person who had attempted to commit suicide to trial, suicides can be taken care of. Even imposition of death sentences has not been able to take care of commission of murders, as mentioned earlier.

90. Further, the aforesaid adverse sociological effects are caused by the *death* of the person concerned, and not by one who had *tried* to commit suicide. Indeed, those who fail in their attempts become available to be more or less as useful to the family as they were. So the person to be punished is one who had committed suicide; but, he is beyond the reach of law and cannot be punished. This can provide no reason to punish a person who should not be punished.

32 AIR 1965 SC 881 : (1965) 1 SCR 65 : (1965) 2 Cri LJ 8

(12) Is suicide against public policy?

91. The basic argument of Shri Sharma, learned counsel for the Union of India, was that allowing persons to commit suicide would be against public policy. Though which public policy would be so affected was not spelt out by the learned counsel, we presume that the public policy to be so jeopardised is one which requires preservation of human life. One of the objects of punishment to be inflicted when an offence is committed is protection of society from the depredations of dangerous persons, as mentioned at p. 198 of Burton M. Leiser's *Liberty, Justice and Morals*. But insofar as suicide is concerned, this object does not get attracted because there is no question of protection of the society from depredation of dangerous persons, who by the very nature of things have to be those who cause harm to others and not to themselves. Of course, we would concede that one of the interests of the State has to be preservation of human life.

92. The concept of public policy is, however, illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc. The leading judgment describing the doctrine of public policy has been accepted to be that of Parke, B. in *Egerton* v. *Brownlow*[33] in which it was stated as below at p. 123, as quoted in paragraph 22 of *Gherulal Parakh* v. *Mahadeodas Maiya*[34]:

> " 'Public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything

33 (1853) 4 HLC 121

34 AIR 1959 SC 781 : 1959 Supp (2) SCR 406

which we may think for the public good, and prohibit everything which we think otherwise."

93. In the aforesaid case a three-Judge Bench of this Court summarised the doctrine of public policy by stating at p. 795 that public policy or policy of law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse" etc.

94. Different High Courts of the country have had also occasion to express their views on this concept in their judgments in *Bhagwant Genuji Girme* v. *Gangabisan Ramgopal*[35]; *Mafizuddin Khan Choudhury* v. *Habibuddin Shekh*[36]; *Kolaparti Venkatareddi* v. *Kolaparti Peda Venkatachalam*[37] and *Ratanchand Hirachand* v. *Askar Nawaz Jung*[38]. In *Kolaparti case*[37] it was stated that the term public policy is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against good morals can be said to be against public policy. These decisions have also pointed out that the concept of public policy is capable of expansion and modification. In *Ratanchand case*[38] a Bench of Andhra Pradesh High Court speaking through Chinnappa Reddy, J. as he then was, quoted at p. 117 a significant passage from Professor Winfield, "*Essay on Public Policy in the English Common Law*" (42 *Harvard Law Review* 76). The same is as below:

> "Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another but even in the same generation. Further it may vary not merely with respect to the particular topics which may be included in it, but also with respect to the rules relating to any one particular topic.... This variability of public policy is a stone in the edifice of the doctrine and not a missile to be flung at it. Public policy would be almost useless without it."

95. As to how the "unruly horse" of public policy influenced English law has been narrated by W. Friedman in his *Legal Theory* (5th Edn.) at p. 479 et seq in Part III, Section 2 titled as "*Legal Theory, Public Policy and Legal Evaluation*". As to the description of public policy as "unruly horse", it may be stated that there have been judges not to shy away from unmanageable horses. Lord Denning is one of them. What this noble judge stated in *Enderby Town Football Club Ltd.* v. *Football Association Ltd.*[39] at p. 606 is "With a good man in the saddle, the unruly horse can be kept in control. It can take jump over obstacles." (*See* para 93 of *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*[40].) But how many judges can be anywhere near Lord Denning? He is *sui generis*.

35 AIR 1940 Bom 369 : 42 BLR 750 : 191 IC 806
36 AIR 1957 Cal 336
37 AIR 1964 AP 465 : (1964) 1 Andh WR 248
38 AIR 1976 AP 112 : ILR (1975) AP 843 : (1975) 1 APLJ (HC) 344
39 (1971) Ch 591, 606
40 (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : AIR 1986 SC 1571

96. The magnitude and complexity of what is or is not public policy or can be a part of public policy, would be apparent from bird's eyeview of what has been stated regarding this at pp. 454 to 539 of *Words and Phrases* (Permanent Edn., Vol. 35, 1963). To bring home this a few excerpts would be enough. It has been first stated under the sub-heading "In general" as below at pp. 455 and 456:

> " 'Public policy' imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations, of the people. *Barwin* v. *Reidy*[41].
>
> 'Public policy' is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. *Pendeleton* v. *Greever*[42].
>
> 'Public policy' is a term that is not always easy to define and it may vary as the habits, opinions and welfare of a people may vary, and what may be the public policy of one State or country may not be so in another. *Franklin Fire Ins. Co.* v. *Moll*[43].

97. In the aforesaid work under the sub-heading "Government by Constitution, laws or judicial decisions", the following finds place at p. 481 under the further sub-heading "In general":

> "'Public policy' is a variable quantity and is manifested by public acts, legislative and judicial, and courts will not hold a contract void. *Draughton* v. *Fox Pelletir Corpn.*[44]
>
> In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a State established for the public weal, either by law, by courts, or general consent. *Clough* v. *Gardiner*[45]."

98. From the above, it can safely be said that it would be an uninformed man in law who would say with any degree of definiteness that commission of suicide is against public policy; and, as such, a person attempting to commit it acts against public policy.

(13) Does commission of suicide damage the monopolistic power of the State to take life?

99. The aforesaid point is not required to be gone into detail, because nobody can claim to have monopoly over a human life. It is God alone who can claim such a power. If a person takes his life, he is taking his *own* life, and not the life of anybody else; and so, the argument that State's

41 307 P 2d 175, 181 : 62 N.M. 183
42 j 193 p. 885, 887, j 80 Ok 1, 35 : 17 ALR 317
43 58 NE 2nd 947, 950, 951 : 115 Ind. App. 289
44 126 SW 2d 329, 333 : 174 Tenn 457
45 182 NYS 804, 806 : 111 Mis. 244

monopolistic power of taking life is taken away by the person who attempts to commit suicide has no legs to stand on.

(14) Is apprehension of "constitutional cannibalism" justified?

100. This is one of the criticisms which has been advanced in one of the aforesaid articles relating to the Bombay judgment[2]. This contention has been advanced because if the negative aspect of right to life, i.e., to destroy it can be read in Article 21, the State can "easily embark upon a policy to encourage genocide on the plea that proper management of resources are vital and necessary for the upkeep of life with vigour and dignity in the wake of geometrical progression of population growth". The critic has stretched this argument so much to come to the conclusion of "constitutional cannibalism" that we may almost leave it unanswered, as there is a gulf of difference between taking of one's own life and allowing the State to go in for genocide. They are not only poles apart but miles apart.

101. The Editor of *Calcutta Weekly Notes* in his comments at pp. 37 to 40 [of (1986-87) 91 CWN (Journal Section)] has observed that the distinction made by the Bombay High Court between "suicide" and "euthanasia" appears logically inconsistent. According to the Editor, the rationale of the judgment would necessarily permit euthanasia as legal. This comment may not be quite incorrect, because in passive euthanasia, wherever it has been accepted as legally permissible, consent of the patient, if he be in a sound mental condition, has been regarded as one of the prerequisites. So, if one could legally commit suicide, he could also give consent for his being allowed to die. But then, the legal and other questions relatable to euthanasia are in many ways different from those raised by suicide. One would, therefore, be right in making a distinction logically and in principle between suicide and euthanasia, though it may be that if suicide is held to be legal, the persons pleading for legal acceptance of passive euthanasia would have a winning point. For the cases at hand, we would remain content by saying that the justification for allowing persons to commit suicide is not required to be played down or cut down because of any encouragement to persons pleading for legalisation of mercy-killing.

102. May we hasten to observe that as regards the persons aiding and/or abetting suicide, the law can be entirely different, as indeed it is even under the Suicide Act, 1961 of England. Bombay judgment[2] has rightly made this distinction. It is for this reason that the apprehension raised by the Andhra Pradesh High Court in its judgment in *Jagadeeswar*[3] does not seem to be justified. We do not agree with the view of the Andhra Pradesh High Court in that if Section 309 were to be held bad, it is highly doubtful whether Section 306 could survive, as self-killing is conceptually different from abetting others to kill themselves. They stand on different footing, because in one case a person takes his *own* life, and in the other a third person is abetted to take his life.

(15) Recommendation of the Law Commission of India and follow-up steps taken, if any.

103. The Law Commission of India in its 42nd Report (1971) recommended repeal of Section 309 being of the view that this penal provision is "harsh and unjustifiable" (*see* paragraph 16.33 of the Report). In taking this view, the Law Commission quoted the following observations made by H. Romilly Fedden in *Suicide* (London, 1938) at page 42:

> "It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation."

104. After the aforesaid Law Commission's Report became available, the recommendation was accepted by the Government of India and the Indian Penal Code (Amendment) Bill, 1972 was introduced in the Rajya Sabha to repeal Section 309. The Bill was referred to a Joint Committee of both the Houses and after receipt of its report, the Bill was passed with some changes by the Rajya Sabha in November 1978. The Bill so passed was pending in the Sixth Lok Sabha when it was dissolved in 1979, because of which the Bill lapsed.

105. In the counter-affidavit filed by the Union of India in Writ Petition (Crl.) No. 409 of 1986, it has been further stated that a proposal for reintroducing legislation in Parliament on the lines of the lapsed Bill is under consideration. It has been admitted in this affidavit that Section 309 is harsh, and so, the intention of the Government is more or less to repeal that section.

(16) Global view: What is the legal position in other leading countries of the world regarding the matter at hand?

106. We propose to refer to two leading countries only in this regard — they being United Kingdom and United States of America. We have selected them because the first is a conservative country and the second a radical; the first is first in point of time as regards democratic functioning and the second is being regarded as a serious human rights' protagonist. At English Common Law suicide was taken as felony as much so that a person who had met his end after committing suicide was not allowed Christian burial, but would have to be so done in a public highway. Not only this, the property of the person concerned used to get forfeited to the Crown. [*See* pages 290 to 207 of *Law and Morality* edited by Louis Bloom Cooper and Gravin Drewry (1976), which pages also contain the speeches made by the Lord Bishop of Carlisle and Lord Denning in the House of Lords during second reading of The Suicide Bill, 1961.]

107. Times changed, notions changed and presently, even attempt to commit suicide is not a criminal offence, as would appear from Suicide Act, 1961. Though Section 1 of this Act has only stated that the "rule of law whereby it is a crime for a person to commit suicide is hereby abrogated", it

has been made clear in the second para of '*General Note*' below this section, as finding place in the xerox copy of this Act enclosed with the written submissions filed on behalf of the State of Orissa, Respondent 2 in Writ Petition (Crl.) No. 419 of 1987 that attempted suicide is not a crime. This note reads as below:

> "*Attempted Suicide*
>
> An attempt to commit suicide was a common law misdemeanour. Section 1 does not specifically say that attempted suicide is no longer a crime, but it must follow irresistibly from the fact that the completed act is no longer a crime...."

In the United States by early 1970's comparatively small number of States (9) listed suicide as a crime, although no penalties (such as mutilation of bodies or forfeiture of estates) were exacted. In such States suicide attempts were either felonies or misdemeanours and could result in jail sentences, although such laws were selectively or indifferently enforced. Two of such States repealed such laws, stating in effect that although suicide is "a grave social wrong", there is no way to punish it. Eighteen States had no laws against either suicide or suicide attempts, but they specified that to aid, advise or encourage another person to commit suicide is a felony. In more than 20 other States, there were no penal statutes referring to suicide. [*See* pp. 16 and 17 of *Suicidology: Contemporary Developments* by E.S. Scheneidman (1976).]

108. The latest American position has been mentioned as below at p. 348 of *Columbia Law Review*, 1986:

> "Suicide is not a crime under the statutes of any State in the United States. Nor does any State, by statute, make attempting suicide a crime. In twenty-two States and three United States territories, however, assisting suicide is a crime. If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or administering a fatal dose of drugs, courts agree that the appropriate charge is murder."

Conclusion

109. On the basis of what has been held and noted above, we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.

110. We, therefore, hold that Section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanisation, which is a need of the day, but of globalisation also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wavelength.

111. The writ petitions stand allowed by declaring Section 309 of the Penal Code as unconstitutional and hence void. The proceedings in GR Case No. 177 of 1984 (*State* v. *Nagbhushan Patnaik*) pending in the Court of Sub-Judge, Gunpur in the District of Koraput, Orissa stands quashed.

112. Before parting, we should like to observe that what we have sought to do through this judgment may be said to be an attempt to "search for the social dynamics of criminal law, the functional theory of sentencing and the therapeutic reach of punitive arts, to catch up with social sciences relevant to criminal justice and to link up prison jurisprudence with constitutional roots", of which Justice Krishna Iyer has mentioned in his preface (styled Krishna Iyerishly as '*A Word in Confidence*') to his aforementioned book. Whether we have succeeded or not; and, if so, to what extent is for others to judge.

113. I desire to place on record (though it would sound unusual to some and may be to many) my appreciation for the assistance I had received from Shri Satish Chandra, Joint Registrar (Library) of the Court, in supplying me promptly very useful and varied materials for preparing this judgment, as and how required by me.

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(BEFORE R.M. SAHAI AND B.L. HANSARIA, JJ.)

DR JACOB GEORGE .. Appellant;

Versus

STATE OF KERALA .. Respondent.

Criminal Appeal Nos. 638-39 of 1990†, decided on April 13, 1994

A. **Penal Code, 1860 — S. 314 — Causing death of the woman while causing miscarriage with consent — Quack (Homeopathic doctor) while performing surgical operation for abortion of a pregnant lady with her consent causing perforation of her uterus which resulted in her death — Case not covered by any exception under S. 3 of Medical Termination of Pregnancy Act, 1971 — On facts, conviction under S. 314 upheld — But sentence of four years' RI imposed by High Court reduced to two months' imprisonment already undergone and instead fine of Rs 5000 awarded by it (out of which Rs 4000 was to be paid to the deceased's minor son) enhanced to Rs 1 lakh — Amount of fine directed to be deposited in the name of deceased's son in a nationalised bank which would allow the child's guardian to withdraw the interest for the child's maintenance till the child becomes major — Sentence thus modified having regard to the purposes of punishment — Penology — Prayer for release on probation refused having regard to nature of the offence and character and conduct of the accused — Probation of Offenders Act, 1958, Ss. 4 and 5**

B. **Penal Code, 1860 — S. 314 — To be read subservient to S. 3 of Medical Termination of Pregnancy Act, 1971**

† From the Judgment and Order dated 16/19-10-1990 of the Kerala High Court in Crl. A. No. 415 of 1989 in Crl. R.C. No. 44 of 1989