MOHD. ARIF @ASHFAQ

v.

THE REGISTRAR, SUPREME COURT OF INDIA & ORS.

(Writ Petition (Crl.) No. 77 of 2014 etc.)

SEPTEMBER 02, 2014

[R.M. LODHA, CJI, JAGDISH SINGH KHEHAR, J. CHELAMESWAR, A.K. SIKRI AND R.F. NARIMAN, JJ.]

Supreme Court Rules, 1966 – Or. XL r.3 – Constitutionality of – Challenged – Seeking open court oral hearing of Review Petitions in death sentence cases – ***Held: Per majority****: Limited oral hearing at review stage in death sentence cases is mandated by Art. 21 of the Constitution, hence permissible –* ***Per Minority****: Not permissible – There is no obligation u/Art. 21 to grant oral hearing – The rule of audi alteram partem does not take within its sweep right to make oral submission – Constitution of India, 1950 – Arts. 21 and 137.*

Disposing of the writ petitions, the Court

HELD:

MAJORITY OPINION:

Per R.F. Nariman, J. (for himself and Lodha, Khehar and Sikri, JJ.) :

1. Crime and punishment are two sides of the same coin. Punishment must fit the crime. The notion of *'Just deserts'* or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing. The Judges exercise wide discretion

A within the statutory limits and the scope for deciding the amount of punishment is left to the judiciary to reach decision after hearing the parties. [Para 30] [1031-C-G]

2.1. The fundamental right to life and the irreversibility B of a death sentence mandate that oral hearing be given at the review stage in death sentence cases, as a just, fair and reasonable procedure under Article 21 mandates such hearing, and cannot give way to the severe stress of the workload of the Supreme Court. When it comes to C death penalty cases, the power of the spoken word has to be given yet another opportunity even if the ultimate success rate is minimal. [Paras 40, 35] [1034-B; 1036-C]

2.2. When on the same set of facts, one judicial mind can come to the conclusion that the circumstances do D not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of E "reasonable procedure". "Reasonable procedure" would encompass oral hearing of review petitions arising out of death penalties. [Paras 30, 31] [1032-D-F]

2.3. While awarding a death sentence, in most of the cases, this Court would generally be affirming the F decision on this aspect already arrived at by two Courts below namely the trial court as well as the High Court. After such an affirmation, the scope of review of such a judgment may be very narrow. At the same time, when it is a question of life and death of a person, even a remote G chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition. [Para 33] [1033-C-E]

2.4. Review Petitions are inartistically drafted and oral

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submissions by a skilled advocate can bring home a point which may otherwise not be succinctly stated, given the enlarged scope of review in criminal matters. The fact that the courts overcrowded docket would be able to manage such limited oral hearings in death sentence cases only, being roughly 60 per annum, is not a factor to which great weight need be accorded as the fundamental right to life is the only paramount factor in these cases. The justice of the situation in this class of cases demands a limited oral hearing. An outer limit of 30 minutes in all such cases may be provided. [Para 37, 41, 40] [1034-E-G; 1035-H; 1036-E, A]

2.5. The right of a limited oral hearing in review petitions where death sentence is given, shall be applicable only in pending review petitions and such petitions filed in future. It will also apply where a review petition is already dismissed but the death sentence is not executed so far. In such cases, the petitioners can apply for the reopening of their review petition within one month from the date of this judgment. However, in those cases where even a curative petition is dismissed, it would not be proper to reopen such matters. [Para 46] [1038-D, E]

P.N. Eswara Iyer v. Registrar, Supreme Court **(1980) 4 SCC 680 – relied on.**

Sher Singh v. State of Punjab **1983 (2) SCR 582 : (1983) 2 SCC 345;** *Shatrughan Chauhan v. Union of India* **2014 (1) SCR 609 : (2014) 3 SCC 1;** *V. Sriharan v. Union of India* **(2014) 4 SCC 242;** *Aloke Nath Dutta v. State of W.B.* **2006 (10) Suppl. SCR 662 : (2007) 12 SCC 230;** *Swamy Shraddananda (2) v. State of Karnataka* **2008 (11) SCR 93:(2008) 13 SCC 767;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **2009 (9) SCR 90: (2009) 6 SCC 498;** *Sajjan Singh vs. State of Rajasthan* **(1965) 1 SCR 933;** *Devender Pal Singh v. State,*

A *NCT of Delhi & Another* **2002 (5) Suppl.SCR 332 : (2003) 2 SCC 501; *Ram Deo Chauhan v. Bani Kanta Das* (2010) 14 SCC 209 – cited.**

3. The plea that all death sentence cases be heard by at least three Hon'ble Judges have been remedied by B **Supreme Court Rules, 2013, Order VI Rule 3. All cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon'ble Judges will hear the same. This is for the reason that at least three judicially trained** C **minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure.[Paras 38, 39] [1034-G, H; 1035-D-E]**

4. Time taken in court proceedings cannot be taken D **into account to say that there is a delay which would convert a death sentence into one for life. [Para 43] [1037-C]**

Triveniben v. State of Gujarat **1989 (1) SCR 509 :(1989) 1 SCC 678 –** E **relied on.**

5. Spending 13½ years in jail does not mean that the petitioner has undergone a sentence for life. [Para 43] [1037-D]

Swamy Shraddananda (2) v. State of Karnataka **2008 (11) SCR 93: (2008) 13 SCC 767 –** F **relied on.**

MINORITY OPINION:

Per Chelameswar, J.: (Dissenting)

1. Extinguishment of life of a subject by the State as G **a punishment for an offence is still sanctioned by law. Article 21 of the Constitution itself recognizes the authority of the State to deprive a person of his life. Though such authority is circumscribed by many constitutional limitations. Article 21 mandates that a** H **person cannot be deprived of his life, except according**

to procedure established by law. [Para 2] [1038-H; 1039-A, B] A

2. Death penalty results in deprivation of the most fundamental liberty guaranteed by the Constitution resulting in an irreversible situation. Therefore, such deprivation should be only in accordance with the law (both substantive and procedural) which is consistent with the constitutional guarantee under Articles 14 and 21 etc. But such an obligation does not extend so far as to compulsorily giving an oral hearing in every case where review is sought by a condemned convict.[Paras 21, 22] [1050-A-C] B C

3. The rule of *audi alteram partem* does not take within its sweep the right to make oral submissions in every case. It all depends upon the demands of justice in a given case. [Para 25] [1051-C] D

4. In the absence of any obligation flowing from Article 21 to grant an oral hearing, there is no need to grant an oral hearing. Review petitions are normally heard by the same Bench which heard the appeal. Therefore, the possibility of different judicial minds reaching different conclusions on the same set of facts does not arise. The possibility of the "remote chance of deviation" from the conclusion already reached is – though emotionally very appealing in the context of the extinguishment of life – equally applicable to all cases of review.[Para 26] [1051-E, F; 1052-A, B] E F

5. This Court, in exercise of its authority under Article 145 as a part of the Court management strategy, thought it fit to eliminate the oral hearings at the review stage while preserving the discretion in the Bench considering a review application to grant an oral hearing in an appropriate case.[Para 27] [1052-C, D] G

6. The question as to whether the "developments" subsequent to *Eswara Iyer's* case, either in law or in H

A **practice of this Court, demand a reconsideration of the rule, should be left to the Court's jurisdiction under Article 145. [Para 28] [1052-F, G]**

P.N. Eswara Iyer & Others v. Registrar, Supreme Court of India, **(1980) 4 SCC 680 –relied on.**

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A.K. Gopalan v. State of Madras **1950 SCR 88 : AIR 1950 SC 27;** *Subbaiah Ambalam v. State of Tamil Nadu* **AIR 1977 SC 2046;** *Surjit Singh & Others v. The State of Punjab*– **referred to.**

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Case Law Reference:

In the judgment of Nariman, J.:

1983 (2) SCR 582	**cited**	**Para 2**
2014 (1) SCR 609	**cited**	**Para 2**
(2014) 4 SCC 242	**cited**	**Para 2**
2006 (10) Suppl. SCR 662	**cited**	**Para 2**
2008 (11) SCR 93	**cited**	**Para 2**
2009 (9) SCR 90	**cited**	**Para 2**
(1965) 1 SCR 933	**cited**	**Para 10**
(1980) 4 SCC 680	**relied on**	**Para 10**
2002 (5) Suppl. SCR 332	**cited**	**Para 10**
(2010) 14 SCC 209	**cited**	**Para 10**
1989 (1) SCR 509	**relied on**	**Para 43**
2008 (11) SCR 93	**relied on**	**Para 43**

In the judgment of Chelameswar, J.:

1950 SCR 88	**Referred to**	**Para 2**

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AIR 1977 SC 2046	**Referred to**	**Para 9**	A
(1980) 4 SCC 680	**Referred to**	**Para 17**	

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 77 of 2014.

B

WITH

Writ Petition (Crl) No. 137 of 2011, 52 of 2011, 39 of 2013, 108 and 117 of 2014.

K.K. Venugopal, Jaspal Singh, Farook M. Razack, C Tripurari Ray, B.S. Billowria, Anil Kaushik, Rajinder Singh, (for Vishnu Sharma), Gopal Sankaranarayanan, Suhasini, Vikramaditya, Vikas Mehta, Yug Mohit Choudhary, Purushottam Sharma Tripathi, Mukesh Kumar Singh, Ravi Chandra Prakash, Filza Moonis, Narendra Kumar Goyal, Ankolekar Gurudatta, D Renjith. B. Marar, Lakshmi N. Kaimal, Vishnu Pazhanganat, Faisal Farook, Shubail Farook, Priya Puri, Siddhartha Sharma, P.S. Sudheer, Rishi Maheshwari, Anne Mathew, Bharat Sood, Rajkumar Kaushik for the Appellant.

Ranjit Kumar, S.G., Pinky Anand, ASG, Rajiv Dutta, E Siddharth Luthra, K. Ramamurthi, Binu Tamta, Rajiv Nanda, Deepali Dwivedi, Aayush Chandra (for B.V. Balramdas), C.D. Singh, Anshuman Shrivastava, Sakshi Kakar, M. Yogesh Kanna, Hemantika Wahi for the Respondents.

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The Judgments of the Court was delivered by

R.F. NARIMAN, J. 1. This group of petitions has come before the Constitution Bench by a referral Order dated 28th April, 2014. In each of them execution of the death sentence G awarded to the petitioners has been stayed. Two basic issues are raised by counsel appearing for the petitioners, (1) the hearing of cases in which death sentence has been awarded should be by a Bench of at least three if not five Supreme Court Judges and (2) the hearing of Review Petitions in death H

A sentence cases should not be by circulation but should only be in open Court, and accordingly Order XL Rule 3 of the Supreme Court Rules, 1966 should be declared to be unconstitutional inasmuch as persons on death row are denied an oral hearing.

B 2. Leading the arguments on behalf of the petitioners, Shri K.K. Venugopal, Senior Advocate appearing in Writ Petition (Crl.) No.137 of 2010 made a fervent plea that death sentence cases are a distinct category of cases altogether. According to the learned counsel, the award of the death penalty is a direct deprivation of the right to life under Article 21. The right to liberty C under Article 21 is a facet of the core right to existence itself, which, if deprived, renders all liberty meaningless. This right is available as long as life lasts. [*See*: Sher Singh v. State of Punjab, (1983) 2 SCC 345 at para 16; Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1 at para 35; V. Sriharan v. D Union of India, (2014) 4 SCC 242 at para 19-21. According to the learned counsel, Article 134 of the Constitution allows an automatic right of appeal to the Supreme Court in all death sentence cases. The death penalty is irreversible, as observed by Bhagwati, J. in his dissent in Bachan Singh vs. State of E Punjab, 1982 (3) SCC 24 at para 26. Further, Section 354(3) of the Cr.P.C. recognizes the fact that in death sentence cases special reasons have to be recorded, and case law has further embellished this to mean that it can be granted only in the rarest of rare cases. Death sentence cases are given priority F of hearing over other matters by the Supreme Court. The learned senior counsel further went on to add that the award of death sentence at present depends upon the vagaries of the judicial mind as highlighted in several Articles and by Bhagwati, J. in his dissent in *Bachan Singh* (at paras 70 and 71). Further, G the Supreme Court has itself commented on these vagaries in various judgments. [*See*: Aloke Nath Dutta v. State of W.B. (2007) 12 SCC 230 at paras 153-178; Swamy Shraddananda (2) v. State of Karnataka (2008) 13 SCC 767 at paras 48-52; and Santosh Kumar Satishbhushan Bariyar v. State of H Maharashtra (2009) 6 SCC 498 at para 130]

3. The 187th Law Commission Report of 2003 has recommended that at least 5 Judges of the Supreme Court hear all death cases. The Army, Air Force and Navy Acts all require that court martials involving the death sentence should be heard by at least 5 senior officers. An alternative submission was made, that even if death sentence cases are to be heard by Benches of three Hon'ble Judges, two additional Judges can be added at the review stage so that five learned Judges dispose of all reviews in death sentence cases.

4. A reference was made to Order XXXVIII of the 1950 Supreme Court Rules read with Order XI Rule 1 to show that all review cases should be heard by a bench of at least three learned Judges. This was reduced by the Supreme Court Rules 1966 to two Judges by Order VII Rule 1. Further, in 1978 a new sub-rule (3) was added to Order XL of the Supreme Court Rules providing that all review applications could now be disposed of and heard by circulation - that is without oral argument.

5. It was further submitted by learned counsel that AMNESTY Annual Reports show that not more than 100 death sentences are awarded in any given year. It was further submitted that ultimately the number of death sentences awarded by the Supreme Court would be only 60 per annum and that if limited oral arguments were allowed in these cases, the Supreme Court's overcrowded docket could easily bear the load. Also, under the law as it currently stands, the success of review in a capital case could potentially turn solely upon the skill of counsel who drafts the review petition. Considering the special gravity of the consequences that could follow from a mistake by counsel, an oral hearing would be desirable to ensure that no injustice is inadvertently done.

6. Learned counsel appearing in Writ Petition (Crl.) No.77/2014 argued before us that as in his case the petitioner had undergone over 13 years in jail, in substance the petitioner had already undergone the sentence of life imprisonment, and as

A in murder cases a sentence of life is alternative to a sentence of death, the petitioner having already undergone a sentence of life imprisonment could not be given the death penalty in addition. He referred to Sections 415, 418, 426 to 428 and 433-A of the Cr.P.C.; section 53 and 57 of the IPC and Article 20(1) B of the Constitution to bolster this argument.

7. Shri Jaspal Singh, learned senior Advocate appearing in Writ Petition (Crl.) No.108/2014 also supported Shri Venugopal in demanding a review in open Court and added one more reason for doing so. In all TADA cases, there is only C one appeal before the Supreme Court and since the judicial mind is applied only twice, a review being the third bite at the cherry should also be in open Court.

8. In Writ Petition (Crl.) No.39/2013, it was pointed out by D learned counsel appearing for the petitioner that the Supreme Court can limit time for oral arguments under Order XLVII Rule 7 of its Rules, and a judgment from South Africa was pointed out which referred to the Indian law as well as the law on death penalties from various other nations. Similar arguments were E advanced in Writ Petition (Crl.) No.108 of 2014 and Writ Petition (Crl.) No. 52 of 2011.

9. Shri Luthra, learned Amicus Curiae made two submissions before us. In answer to Mr. Venugopal's alternative plea that even if three learned Judges and not five F learned Judges hear the original appeal, a review can go to three of the original Judges plus two Judges newly added on, he said that since a review by its very nature is a discovery by the same bench of an error committed by them, these (newly added Judges) not being part of the original bench had no G occasion to commit any error, and therefore, should not be added on. The second submission made before us is that very often review petitions are inartistically drafted consisting of many grounds. One good ground which is sufficient is drowned in many other grounds, and may miss the review court in H circulation, hence the need for oral argument.

10. Shri Ranjit Kumar, learned Solicitor General began his argument by referring to Section 362 of the Cr.P.C. and saying that ordinarily in all criminal matters no review is provided. When it was pointed out to him that the "court" in Section 362 could not possibly refer to the Supreme Court, and that the review power in criminal cases at the Supreme Court level is to be found in Art.137 of the Constitution and Order XL of the Supreme Court Rules, the learned Solicitor General did not seriously press this contention. He relied on Sajjan Singh vs. State of Rajasthan, (1965) 1 SCR 933 and various other judgments to bolster a submission made by an exhaustive reading of Krishna Iyer, J. judgment in P.N. Eswara Iyer v. Registrar, Supreme Court, (1980) 4 SCC 680, where the amendment in Order XL, Rule 3 of the Supreme Court Rules, 1966 disposing of review petitions by circulation was upheld by a bench of five Hon'ble Judges. Para 11 of the said judgment was read out together with para 14 to show that Judges do collectively apply their minds in Chambers to dispose of review petitions. In para 16 of the said judgment it was pointed out that the power of oral hearing is granted earlier when the main appeal is heard and is therefore a good answer to oral hearing being denied at a review stage. The important point made here is that the Supreme Court is presently under severe stress because of its workload and cannot have review petitions which become re-hearings of the same *lis* to further damage an already severely strained judicial system. Para 18 was pointed out to us showing that in the U.S. and in the U.K. written arguments are often substituted for oral arguments. In para 22, it was also pointed out that the working of the court would be disrupted if the two Judges who heard the appeal were to sit together again after their bench broke to hear a review petition. Interestingly, the learned Judge refers in para 19 to the justice of the situation including or excluding oral hearing and in para 25 to which class of cases should be excluded from oral hearing. It was also pointed out to us that in paras 34 and 35, the learned Judge enlarged the criminal review jurisdiction to error committed which is apparent from the record - and that

A the word "record" should include within it all cases where some new material which was not adverted to earlier now be taken into account. The learned Solicitor General also took us through various other judgments in which this statement of the law has since been followed. [*See*: Devender Pal Singh v. State, NCT
B of Delhi & Another, (2003) 2 SCC 501 at page 508, 509 and Ram Deo Chauhan v. Bani Kanta Das, (2010) 14 SCC 209 at para 35].

11. In rejoinder, Mr. K.K.Venugopal exhorted us to go into the facts of his case and told us that the Review Petition in his
C case has been pending since the year 2010. He, therefore, argued that the entire matter should be heard afresh by a bench of three Judges, as both the learned Judges who heard the original appeal have since retired.

D **DISCUSSION:**

12. In a case like this, we think it apposite to start our discussion with reference to the judgment of this Court in P.N. Eswara Iyer (supra), inasmuch as that judgment upheld the amendment in Order XL Rule 3 of the Supreme Court Rules,
E which amendment did away with oral hearing of review petitions in open Court. That is also a judgment of the Constitution Bench and, therefore, being a judgment of a co-ordinate Bench, is binding on this Bench. The petitioners in that case had raised two arguments to invalidate the amendment. The first argument
F was that oral presentation and open hearing was an aspect of the basic creed that public justice is to be rendered from Courts which are open to the public and not in Star Chambers reminiscent of the Stuart dynasty that ruled England. While answering this argument, though the Constitution Bench
G accepted the importance of oral hearing, generally it took the view that the Court, when it comes to deciding a review application, decides something very miniscule, and the amended rule sufficiently meets the requirement of the principle of audi alteram partem. The Court clarified that deciding a
H review petition by 'circulation' would only mean that there would

not be hearing in Court but still there would be discussion at judicial conference and the Judges would meet, deliberate and reach a collective conclusion. Thus, rejecting the argument of oral public hearing, the Court made *inter alia* the following observation:

> "15. The key question is different. Does it mean that by receiving written arguments as provided in the new rule, and reading and discussing at the conference table, as distinguished from the 'robed' appearance on the Bench and hearing oral submissions, what is perpetrated is so arbitrary, unfair and unreasonable a 'Pantomimi' as to crescendo into unconstitutionality? This phantasmagoric distortion must be dismissed as too morbid to be regarded seriously – in the matter of review petitions at the Supreme Court level.
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> 19. This Court, as Sri Garg rightly emphasised, has assigned special value to public hearing, and courts are not caves nor cloisters but shrines of justice accessible for public prayer to all the people. Rulings need not be cited for this basic proposition. But every judicial exercise need not be televised on the nation's network. The right to be heard is of the essence but hearing does not mean more than fair opportunity to present one's point on a dispute, followed by a fair consideration thereof by fair minded judges. Let us not romanticise this process nor stretch it to snap it. Presentation can be written or oral, depending on the justice of the situation. Where oral persuasiveness is necessary it is unfair to exclude it and, therefore, arbitrary too. But where oral presentation is not that essential, its exclusion is not obnoxious. What is crucial is the guarantee of the application of an instructed, intelligent, impartial and open mind to the points presented. A blank judge wearied by oral aggression is prone to slumber while an alert mind probing the 'papered'

A argument may land on vital aspects. To swear by orality or to swear at manuscript advocacy is as wrong as judicial allergy to arguments in court. Often-times, it is the judge who will ask for oral argument as it aids him much. To be left helpless among ponderous paper books without the B oral highlights of counsel, is counter-productive. Extremism fails in law and life."

13. The Court, in the process, also noted that in many other jurisdictions, there was exclusion of public hearing in such C cases. Further, the Court found justification in enacting such a rule having regard to mounting dockets and the mindless manner of filing review petitions in most of the cases.

14. The argument was also raised, predicated on Article 14 of the Constitution, that Order XL Rule 1 provides a wider D. set of grounds of review of orders in civil proceedings than in criminal proceedings. The Court dealt with this argument in paras 34 to 36, and since some of the observations made in those paras are very significant and relevant for our purposes, we reproduce verbatim those paras herein:

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"34. The rule (Order XL, Rule 1), on its face, affords a wider set of grounds for review for orders in *civil proceedings*, but limits the ground vis-a-vis *criminal proceedings* to 'errors apparent *on the face* of the record'. If at all, the F concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over the criminal orders or judgments. It is likely to be the other way about. Supposing an accused G is sentenced to death by the Supreme Court and the 'deceased' shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it H is equally wide in all proceedings. The rule merely

canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here 'record' means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the rule (Order 40, Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression 'record' is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47, Rule 1, CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source.

36. True, the review power vis-a-vis criminal matters was raised only in the course of the debate at the Bar. But when the whole case is before us we must surely deal comprehensively with every aspect argued and not piece-meal with truncated parts. That will be avoidance of our obligation. We have, therefore, cleared the ground as the question is of moment, of frequent occurrence and was mooted in the course of the hearing. This pronouncement on review jurisdiction in criminal proceedings set at rest a possible controversy and is as much binding on this Court itself (unless overruled) as on litigants. That is the discipline of the law of precedents and the import of Article 141."

15. It is, thus, clear from the reading of the aforesaid judgment that the very rule of deciding review petitions by 'circulation', and without giving an oral hearing in the open Court, has already been upheld. In such a situation, can the petitioners still claim that when it comes to deciding the review petitions where the death sentence is pronounced, oral hearing should be given as a matter of right?

16. We may like to state at this stage itself that we are going to answer the above question in the affirmative as our verdict is that in review petitions arising out of those cases where the death penalty is awarded, it would be necessary to accord oral hearing in the open Court. We will demonstrate, at the appropriate stage, that this view of ours is not contrary to P.N. Eswara Iyer (supra), and in fact, there are ample observations in the said Constitution Bench judgment itself, giving enough space for justifying oral hearing in cases like the present.

17. As the determination of this case has to do with the fundamental right to life, which, among all fundamental rights, is the most precious to all human beings, we need to delve into Article 21 which reads as follows:

> "21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

18. This Article has its origin in nothing less than the Magna Carta, (the 39th Article) of 1215 vintage which King John of England was forced to sign by his Barons. It is a little known fact that this original charter of liberty was faulted at the very start and did not get off the ground because of a Papal Bull issued by Pope Innocent the third declaring this charter to be void. Strangely, like Magna Carta, Art. 21 did not get off the ground for 28 years after which, unshackled, it has become the single most important fundamental right under the Constitution of India, being described as one of a holy trinity consisting of

a 'golden triangle' (see Minerva Mills v. Union of India 1981 (1) SCR 206 at 263), and being one of two articles which cannot be eclipsed during an emergency (Article 359 as amended by the Constitution 44th Amendment). A

19. It is to be noted that Article 21 as it originally stood in the Draft Constitution was as follows (Cl.15):— B

"No person shall be deprived of his life or liberty without due process of law."

20. The Drafting Committee introduced two changes in the Clause – (i) They qualified the word 'liberty' by the word 'personal' in order to preclude a wide interpretation of the word so as not to include the freedoms which had already been dealt with in Art.13 (corresponding to Art. 19 of the Constitution). (ii) They also substituted the words "due process of law" by the words "procedure established by law", following the Japanese Constitution (Art. XXXI), because they were more 'specific'. C D

21. Over the question whether the expression 'due process of law' should be restored in place of the words 'procedure established by law', there was a sharp difference of opinion in the Constituent Assembly, even amongst the members of the Drafting Committee. On the one side, was the view of Sri Munshi, in favour of 'due process'. E

22. On the other side, was Sri Alladi Krishnaswami Iyer, who favoured the taking of life and liberty by legislation. F

Dr. Ambedkar merely summed up the two views and left it to the House "to decide in any way it likes".

The House adopted the Clause as drafted by the Drafting Committee, rejecting "due process". The result, as stated by Dr. Ambedkar, at a subsequent stage, was that Art.21 gave "a carte blanche to make and provide for the arrest of any person under any circumstances as Parliament may think fit." G H

A 23. As was stated by the Supreme Court in A.K. Gopalan v. The State of Madras, 1950 SCR 88, Article 21 seems to have been borrowed from Article 31 of the then recently enacted Japanese Constitution. This was in keeping with B.N. Rau's view who, in his initial draft of the Fundamental Rights Chapter, B followed the advice of U.S. Supreme Court Justice Frankfurter not to incorporate "due process" from the 5th amendment to the U.S. Constitution. The result was that so far as property was concerned, a full blown 'due process' was introduced in Articles 19(1)(f) and 31 of the Constitution. The 5th amendment of the C U.S. Constitution was thus bifurcated – a full blown substantive due process qua property, and procedure established by law qua life and personal liberty. It took 28 years for India to remedy this situation. By the Constitution 44th amendment Act, even the truncated right to property was completely deleted, and in D the same year in Maneka Gandhi v. Union of India, (1978) 2 SCR 621, the Supreme Court held that the procedure established by law cannot be arbitrary but should be just, fair and reasonable.

24. A six Judge Bench of the Supreme Court in A.K. E Gopalan's case construed Art.21 linguistically and textually. Kania, J. held:

> "Four marked points of distinction between the clause in the American Constitution and Article 21 of the F Constitution of India may be noticed at this stage. The first is that in USA's Constitution the word "liberty" is used simpliciter while in India it is restricted to personal liberty. (2) in USA's Constitution the same protection is given to property, while in India the fundamental right in respect of G property is contained in Article 31. (3) The word "due" is omitted altogether and the expression "due process of law" is not used deliberately, (4) The word "established" is used and is limited to "Procedure" in our Article 21." (at page 109)

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In the picturesque language of Das, J. it was stated: A

"It is said that if this strictly technical interpretation is put upon Article 21 then it will not constitute a fundamental right at all and need not have been placed in the chapter on Fundamental Rights, for every person's life and personal liberty will be at the mercy of the Legislature which, by providing some sort of a procedure and complying with the few requirements of Article 22, may, at any time, deprive a person of his life and liberty at its pleasure and whim. ... Subject to the limitations, I have mentioned which are certainly justiciable, our Constitution has accepted the supremacy of the legislative authority and, that being so, we must be prepared to face occasional vagaries of that body and to put up with enactments of the nature of the atrocious English statute to which learned counsel for the petitioner has repeatedly referred, namely, that the Bishop of Rochester's cook be boiled to death. If Parliament may take away life by providing for hanging by the neck, logically there can be no objection if it provides a sentence of death by shooting by a firing squad or by guillotine or in the electric chair or even by boiling in oil. A procedure laid down by the legislature may offend against the Court's sense of justice and fair play and a sentence provided by the legislature may outrage the Court's notions of penology, but that is a wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court cannot question its wisdom or policy. The Constitution is supreme. The Court must take the Constitution as it finds it, even if it does not accord with its preconceived notions of what an ideal Constitution should be. Our protection against legislative tyranny, if any, lies in the ultimate analysis in a free and intelligent public opinion which must eventually assert itself." (at page 319-321)

B C D E F G

25. In Kharak Singh v. State of U.P., (1964) 1 SCR 332, H

A Gopalan's reading of fundamental rights in watertight compartments was reiterated by the majority. However, they went one step further to say that "personal liberty" in Art.21 takes in and comprises the residue after all the rights granted by Art.19.

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Justices Subba Rao and Shah disagreed. They held:

"The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the C State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so far as the attributes covered by Art. 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not D infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his E fundamental rights both under Art. 19(1)(d) and Art. 21 are infringed by the State." (at page 356-357)

26. The minority judgment of Subba Rao and Shah, JJ. eventually became law in R.C. Cooper (Bank Nationalisation) vs. Union of India, (1970) 1 SCC 248, where the 11-Judge F Bench finally discarded Gopalan's view and held that various fundamental rights contained in different articles are not mutually exclusive:

"We are therefore unable to hold that the challenge to the G validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal H compliance with the conditions under Article 31(2) is not

sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(f) and 31(2) are mutually exclusive." (para 53)

27. The stage was now set for the judgment in *Maneka Gandhi*. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [*See*: at page 646-648 per Beg, CJ., at page 669, 671-674, 687 per Bhagwati, J. and at page 720-723 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus:

"To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses." (at page 723)

28. Close on the heels of *Maneka Gandhi's case* came Mithu vs. State of Punjab, (1983) 2 SCC 277, in which case the Court noted as follows:

A "In Sunil Batra vs. Delhi Administration, (1978) 4 SCC 494 while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the B American Constitution; the same consequence ensued after the decisions in the Bank Nationalisation's case (1970) 1 SCC 248 and Maneka Gandhi's case (1978) 1 SCC 248. ...

C In Bachan Singh which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that:

D > No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law." (at para 6)

The wheel has turned full circle. Substantive due process E is now to be applied to the fundamental right to life and liberty.

Application of Art.21 to these Writ Petitions:

29. We agree with Shri K.K.Venugopal that death sentence cases are a distinct category of cases altogether. F Quite apart from Art.134 of the Constitution granting an automatic right of appeal to the Supreme Court in all death sentence cases, and apart from death sentence being granted only in the rarest of rare cases, two factors have impressed us. The first is the irreversibility of a death penalty. And the second G is the fact that different judicially trained minds can arrive at conclusions which, on the same facts, can be diametrically opposed to each other. Adverting first to the second factor mentioned above, it is well known that the basic principle behind returning the verdict of death sentence is that it has to be H awarded in the rarest of rare cases. There may be aggravating

as well as mitigating circumstances which are to be examined by the Court. At the same time, it is not possible to lay down the principles to determine as to which case would fall in the category of rarest of rare cases, justifying the death sentence. It is not even easy to mention precisely the parameters or aggravating/mitigating circumstances which should be kept in mind while arriving at such a question. Though attempts are made by Judges in various cases to state such circumstances, they remain illustrative only.

30. Deflecting a little from the death penalty cases, we deem it necessary to make certain general comments on sentencing, as they are relevant to the context. Crime and punishment are two sides of the same coin. Punishment must fit the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing. In many countries, there are laws prescribing sentencing guidelines, but there is no statutory sentencing policy in India. The IPC, prescribes only the maximum punishments for offences and in some cases minimum punishment is also prescribed. The Judges exercise wide discretion within the statutory limits and the scope for deciding the amount of punishment is left to the judiciary to reach decision after hearing the parties. However, what factors which should be considered while sentencing is not specified under law in any great detail. Emanuel Kant, the German philosopher, sounds pessimistic when he says "judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for the society, but must always be inflicted on him for the sole reason that he has committed a crime". A sentence is a compound of many

A factors, including the nature of the offence as well as the circumstances extenuating or aggravating the offence. A large number of aggravating circumstances and mitigating circumstances have been pointed out in Bachan Singh v. State of Punjab, (1980) 2 SCC 684 at pages 749-750, that a Judge B should take into account when awarding the death sentence. Again, as pointed out above, apart from the fact that these lists are only illustrative, as clarified in Bachan Singh itself, different judicially trained minds can apply different aggravating and mitigating circumstances to ultimately arrive at a conclusion, on C considering all relevant factors that the death penalty may or may not be awarded in any given case. Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not necessary to dwell upon this aspect elaborately, at the same time, it needs to be emphasised that when on the same set of D facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of E oral hearing in such a review petition becomes an integral part of "reasonable procedure".

31. We are of the opinion that "reasonable procedure" would encompass oral hearing of review petitions arising out F of death penalties. The statement of Justice Holmes, that the life of law is not logic; it is experience, aptly applies here.

32. The first factor mentioned above, in support of our conclusion, is more fundamental than the second one. Death penalty is irreversible in nature. Once a death sentence is G executed, that results in taking away the life of the convict. If it is found thereafter that such a sentence was not warranted, that would be of no use as the life of that person cannot be brought back. This being so, we feel that if the fundamental right to life is involved, any procedure to be just, fair and reasonable should H

take into account the two factors mentioned above. That being so, we feel that a limited oral hearing even at the review stage is mandated by Art.21 in all death sentence cases. A

33. The validity of no oral hearing rule in review petitions, generally, has been upheld in P.N. Eswara Iyer (supra) which is a binding precedent. Review petitions arising out of death sentence cases is carved out as a separate category as oral hearing in such review petitions is found to be mandated by Article 21. We are of the opinion that the importance of oral hearing which is recognised by the Constitution Bench in P.N. Eswara Iyer (supra) itself, would apply in such cases. We are conscious of the fact that while awarding a death sentence, in most of the cases, this Court would generally be affirming the decision on this aspect already arrived at by two Courts below namely the trial court as well as the High Court. After such an affirmation, the scope of review of such a judgment may be very narrow. At the same time, when it is a question of life and death of a person, even a remote chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition. To borrow the words of Justice Krishna Iyer in P.N. Eswara Iyer (supra): B C D E

> "23. The magic of the spoken word, the power of the Socratic process and the instant clarity of the bar-Bench dialogue are too precious to be parted with"

34. We feel that this oral hearing, in death sentence cases, becomes too precious to be parted with. We also quote the following observations from that judgment : F

> "29A. The possible impression that we are debunking the value of oral advocacy in open court must be erased. Experience has shown that, at all levels, the bar, through the spoken word and the written brief, has aided the process of judicial justice. Justicing is an art even as advocacy is an art. Happy interaction between the two makes for the functional fulfillment of the court system. No G H

A judicial 'emergency' can jettison the vital breath of spoken advocacy in an open forum. Indeed, there is no judicial cry for extinguishment of oral argument altogether."

35. No doubt, the Court thereafter reminded us that the time B has come for proper evaluation of oral argument at the review stage. However, when it comes to death penalty cases, we feel that the power of the spoken word has to be given yet another opportunity even if the ultimate success rate is minimal.

C 36. If a pyramidical structure is to be imagined, with life on top, personal liberty (and all the rights it encompasses under the new doctrine) immediately below it and other fundamental rights below personal liberty it is obvious that this judgment will apply only to death sentence cases. In most other cases, the D factors mentioned by Krishna Iyer, J. in particular the Supreme Court's overcrowded docket, and the fact that a full oral hearing has preceded judgment of a criminal appeal on merits, may tilt the balance the other way.

E 37. It is also important to advert to Shri Luthra, learned Amicus Curiae's submission. Review Petitions are inartistically drafted. And oral submissions by a skilled advocate can bring home a point which may otherwise not be succinctly stated, given the enlarged scope of review in criminal matters, as stated in P.N. Eswara Iyer's case. The fact that the courts F overcrowded docket would be able to manage such limited oral hearings in death sentence cases only, being roughly 60 per annum, is not a factor to which great weight need be accorded as the fundamental right to life is the only paramount factor in these cases.

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38. With reference to the plea that all death sentence cases be heard by at least three Hon'ble Judges, that appears to have been remedied by Supreme Court Rules, 2013, Order VI Rule 3, which has been recently notified, reads thus:

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ORDER VI

CONSTITUTION OF DIVISION COURTS AND POWERS OF A SINGLE JUDGE

3. Every cause, appeal or other proceedings arising out of a case in which death sentence has been confirmed or awarded by the High Court shall be heard by a Bench consisting of not less than three Judges.

4. If a Bench of less than three Judges, hearing a cause, appeal or matter, is of the opinion that the accused should be sentenced to death it shall refer the matter to the Chief Justice who shall thereupon constitute a Bench of not less than three Judges for hearing it.

39. Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon'ble Judges will hear the same. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure outlined above. At present, we are not persuaded to have a minimum of 5 learned Judges hear all death sentence cases. Further, we agree with the submission of Shri Luthra that a review is ordinarily to be heard only by the same bench which originally heard the criminal appeal. This is obviously for the reason that in order that a review succeeds, errors apparent on the record have to be found. It is axiomatic that the same learned Judges alleged to have committed the error be called upon now to rectify such error. We, therefore, turn down Shri Venugopal's plea that two additional Judges be added at the review stage in death sentence cases.

40. We do not think it necessary to advert to Shri Jaspal Singh's arguments since we are accepting that a limited oral review be granted in all death sentence cases including TADA cases. We accept what is pointed out by the learned counsel for the petitioner in Writ Petition No.39/2013 and provide for

A an outer limit of 30 minutes in all such cases. When we come to P. N. Eswara Iyer's case which was heavily relied upon by the learned Solicitor General, we find that the reason for upholding the newly introduced Order XL Rule 3 in the Supreme Court Rules is basically because of severe stress of the B Supreme Court workload. We may add that that stress has been multiplied several fold since the year 1980. Despite that, as we have held above, we feel that the fundamental right to life and the irreversibility of a death sentence mandate that oral hearing be given at the review stage in death sentence cases, C as a just, fair and reasonable procedure under Article 21 mandates such hearing, and cannot give way to the severe stress of the workload of the Supreme Court. Interestingly, in P.N. Eswara Iyer's case itself, two interesting observations are to be found. In para 19, Krishna Iyer, J. says that D "...presentation can be written or oral, depending upon the justice of the situation." And again in para 25, the learned Judge said that "...the problem really is to find out which class of cases may, without risk of injustice, be disposed of without oral presentation."

E 41. We are of the view that the justice of the situation in this class of cases demands a limited oral hearing for the reasons given above.

42. Insofar as Shri Venugopal's plea in his writ petition, F that since his review petition is pending since the year 2010 and since the two learned Judges who heard the appeal on merits have since retired, the entire matter should be heard afresh by a bench of three Hon'ble Judges, we feel that the review petition that is pending since the year 2010 should be G disposed of as soon as possible by a bench of three Hon'ble Judges after giving counsel a maximum of 30 minutes for oral argument. This matter, therefore, be placed before a bench of three Hon'ble Judges by the Registry as soon as possible.

43. Turning now to the facts of W.P.No.77/2014, we find H that the petitioner was arrested on 25.12.2000 and convicted

by the learned Sessions Judge on 31-10-2005. The High Court dismissed his appeal on 13.9.2007 and the Supreme Court dismissed the appeal from the High Court's judgment on 10.8.2011. The Review Petition of the petitioner was, thereafter, dismissed on 28.8.2012. We are informed at the bar that a curative petition was thereafter filed sometime in 2013 which was dismissed on 23.1.2014. All along, the petitioner has been in jail for about 13½ years. Since the curative petition also stands dismissed after the dismissal of review petition, we would not like to reopen all these proceedings at this stage. Also, time taken in court proceedings cannot be taken into account to say that there is a delay which would convert a death sentence into one for life. [*See*: Triveniben v. State of Gujarat, (1989) 1 SCC 678, at paras 16, 23, 72]. Equally, spending 13½ years in jail does not mean that the petitioner has undergone a sentence for life. It is settled by Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 that awarding a sentence of life imprisonment means life and not a mere 14 years in jail. In this case, it was held as follows:

> "75. It is now conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life. [See the decisions of this Court in Gopal Vinayak Godse v. State of Maharashtra (Constitution Bench), Dalbir Singh v. State of Punjab, Maru Ram v. Union of India (Constitution Bench), Naib Singh v. State of Punjab, Ashok Kumar v. Union of India, Laxman Naskar v. State of W.B., Zahid Hussein v. State of W.B., Kamalanantha v. State of T.N., Mohd. Munna v. Union of India and C.A. Pious v. State of Kerala.]
>
> 76. It is equally well settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. (*See*: Gopal

A Vinayak Godse and Ashok Kumar). The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code."

44. Regard being had to this, it is not necessary to refer B to the various sections of the Cr.P.C. and the Penal Code argued before us. Equally, Article 20(1) has no manner of application as the writ petitioner is not being subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

C 45. This petition is therefore dismissed.

46. We make it clear that the law laid down in this judgment, viz., the right of a limited oral hearing in review petitions where death sentence is given, shall be applicable only in pending D review petitions and such petitions filed in future. It will also apply where a review petition is already dismissed but the death sentence is not executed so far. In such cases, the petitioners can apply for the reopening of their review petition within one month from the date of this judgment. However, in those cases E where even a curative petition is dismissed, it would not be proper to reopen such matters.

47. All the writ petitions are disposed of accordingly.

CHELAMESWAR, J. 1. I have had the privilege of reading F the draft judgment prepared by my esteemed brother Rohinton Fali Nariman, J. With utmost respect, I am unable to agree with the view taken by him that a review petition filed by a convict whose death penalty is affirmed by this Court is required to be heard in open Court but cannot be decided by circulation. The G background facts and the submissions are elaborately mentioned by my learned brother. I do not propose to repeat them.

2. Extinguishment of life of a subject by the State as a punishment for an offence is still sanctioned by law in this H

country. Article 21 of the Constitution itself recognizes the authority of the State to deprive a person of his life. No doubt, such authority is circumscribed by many constitutional limitations. Article 21 mandates that a person cannot be deprived of his life except according to procedure established by law. Whether Article 21 is the sole repository of the constitutional guarantee against the deprivation of life and whether it is sufficient for the State to merely prescribe a procedure for the deprivation of life by a law, or whether such a law is required to comply with certain other constitutional requirements are questions which have been the subject matter of debate by this Court in various decisions starting from ***A.K. Gopalan*** v. ***State of Madras***, AIR 1950 SC 27. The history of such debate and the historical background in which such constitutional protections are felt necessary have been very elaborately discussed by my learned brother. Therefore, I do not propose to deal with the said aspect of the matter.

3. Section 53[1] of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") prescribes various punishments to which offenders are liable under the provisions of the IPC. Death is one of the punishments so prescribed. Provisions of the IPC prescribe death penalty for various offences as one of the alternative punishments for these offences[2]. For example,

1. **53. Punishments-** The punishments in which offenders are liable under the provisions of this Code are-

   First - Death;

   Secondly - Imprisonment for life;

   Thirdly - [Omitted by Act 17 of 1949, sec. 2 (wef 6.4.1949)]

   Fourthly - Imprisonment, which is of two descriptions, namely -

   (1) Rigorous, that is, with hard labour;

   (2) Simple;

   Fifthly - Forfeiture of property;

   Sixthly- Fine.

2. The offences for which death is one of the alternative punishments under IPC are under Sections 121, 132, 194, 302, 305, 307(3), 364A and 376A, 376E and 396..

A Section 302 prescribes death or imprisonment for life as alternative punishments for a person who commits murder. Similarly, Section 121 prescribes death penalty as one of the alternatives for an offence of waging or attempting to wage or abetting to waging of war against the Government of India.

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4. Apart from the Penal Code, some other special enactments also create offences for which death penalty is one of the punishments. Unless, a special procedure is prescribed by such special law, all persons accused of offences are tried in accordance with the procedure prescribed under the Code C of Criminal Procedure, 1973 (hereinafter referred to as "the CrPC"). Under the scheme of the CrPC, only the High Court and the Court of Sessions are the courts authorized to award punishment of death. The other subordinate courts such as Chief Judicial Magistrates and Magistrates are expressly D debarred to award death penalty. Sections 28[3] and 29[4] of the

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3. **28. Sentences which High Courts and Sessions Judges may pass:**

(1) A High Court may pass any sentence authorised by law

E (2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years

F 4. **29. Sentences which Magistrates may pass**

(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding G five thousand rupees, or both

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan H Magistrate, the powers of the Court of a Magistrate of the first class

CrPC prescribe the punishment which the various courts in the hierarchy of the criminal justice administration system can pass.

5. Some special enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987, Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities Prevention Act, 1967 etc. also create offences for which death penalty is one of the alternative punishments prescribed. Though some of the offences are triable by special courts constituted under these Acts, generally the CrPC is made applicable to the proceedings before the special courts and such special courts are generally manned by persons who are either Sessions Judges or Addl. Sessions Judges.

6. Legislature, as a matter of policy, entrusted the trial of serious offences for which death penalty is one of the possible penalties, to relatively more experienced members of the subordinate judiciary.

7. Even though Sessions Courts are authorized to award punishment of death in an appropriate case, the authority of the Sessions Court is further subjected to two limitations:-

(i) Under sub-section (3) of Section 354 of the CrPC, the judgment by which the punishment of death is awarded, is required to give special reasons for such sentence .

354. Language and contents of judgment.— (1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—

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

A sentence of death, the special reasons for such sentence.

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(ii) The second limitation is contained in chapter XXVIII of the CrPC. Section 366(1) thereof mandates that
B a Court of Session passing a sentence of death shall submit the proceedings to the High Court and the sentence so imposed by the Sessions Court shall not be executed unless the High Court confirms the punishment awarded.

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8. Section 367 of the CrPC authorises the High Court to make a further enquiry into the matter or take additional evidence. Under Section 368 of the CrPC, the High Court is precluded from confirming the sentence until the period allowed
D for preferring an appeal (by the accused) has expired or if an appeal is already presented within the period of limitation prescribed under law, until such appeal is disposed of. In other words, before confirming the award of death sentence, the High Court is required to examine the correctness of the finding of
E the guilt of the accused recorded by the Sessions Court, if the accused chooses to challenge the correctness of the finding of the guilt by the Sessions Court. In theory, the role of the High Court in confirming or declining to confirm the sentence of death awarded by the Sessions Court is limited to the examination
F of the correctness or the appropriateness of the sentence. The correctness and legality of the finding of guilt recorded by the Sessions Court, is required to be examined in the appeal, if preferred against such finding by the accused. Hence, the requirement under Section 368 is to await the decision in the appeal preferred by the accused against the finding of guilt.

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9. However, in practice when a reference is made under Section 366, the High Court invariably examines the correctness of the finding of the guilt recorded by the Sessions Court. In fact such a duty is mandated in ***Subbaiah Ambalam***
H *v.* ***State of Tamil Nadu***, AIR 1977 SC 2046–

"It is well settled that in a Reference under S.374 of the Code of Criminal Procedure for confirming death sentence, the High Court has to consider the evidence afresh and to arrive at its independent finding with regard to the guilt of the accused."

and in ***Surjit Singh & Others v. The State of Punjab***, Criminal Appeal No.77 of 1968 decided by this Court on 15th October, 1968–

"It is clear from a perusal of these provisions that on a reference under s.374, Criminal Procedure Code, the entire case is before the High Court. In hearing such a reference the High Court has to satisfy itself as to whether a case beyond a reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In other words, in hearing the reference, it is the duty of the High Court to reappraise and to reassess the entire evidence and to come to an independent conclusion as to the guilt or innocence of each of the accused persons mentioned in the reference."

10. Section 369 CrPC further stipulates that every case referred under Section 366 to the High Court shall be heard and decided by at least two judges of the High Court, if that High Court consists of two or more judges.

11. In a case where the penalty of death is confirmed by the High Court in accordance with the CrPC, the decision is final except for two categories of cases. Under Article 134[5], a

5. **134. Appellate jurisdiction of Supreme Court in regard to criminal matters.-**

(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate

A right of appeal to this Court is created in criminal cases where the High Court on appeal reverses an order of acquittal of an accused person recorded by the Sessions Court and sentences him to death or where the High Court withdraws for trial before itself any case pending before a court subordinate B to it and convicts the accused person and awards death sentence to such an accused person. I may also state that apart from such a constitutional right of appeal, as a matter of practice, this Court has been granting special leave under Article 136 in almost, as a matter of course, every case where C a penalty of death is awarded.

12. In this Court, appeals, whether civil or criminal, have always been heard by at least two judges.

13. The authority of the courts to examine and adjudicate D the disputes between the sovereign and its subjects and subjects *inter se* is conferred by law, be it the superior Law of Constitution or the ordinary statutory law. Such jurisdiction can be either original or appellate. A court's jurisdiction to review its own earlier judgment is normally conferred by law. The E jurisdiction of this Court to review its own judgments is expressly conferred under Article 137 of the Constitution.

137. Review of judgments or orders by the Supreme Court:- Subject to the provisions of any law made by

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to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies under article 134A that the case is a fit one for appeal to the Supreme Court:

G Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to H such conditions and limitations as may be specified in such law.

Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

14. The question on hand is as to the procedure to be followed in exercising such jurisdiction. Article 145 of the Constitution authorizes the making of rules by this Court regarding the practice and procedure of the court, of course such authority of this Court is made subject to the provisions of any law made by Parliament. Article 145(1)(e) expressly authorizes this Court to make rules as to the conditions subject to which a judgment or order made by this Court be reviewed and the procedure for such review.

Article 145 : Rules of Court, etc.— (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including;

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(e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

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15. In exercise of such power, this Court made Rules from time to time. The Rules in vogue are called the Supreme Court Rules, 1966[6]. Order XL of the said Rules occurring in Part VIII deals with the subject of review. Rule 1 thereof stipulates that

6. For the sake of clarity, it needs to be mentioned that the Supreme Court Rules, 1966 have been dealt with as it existed during the course of hearing of these matters. W.e.f. 19th August 2014, the Supreme Court Rules, 2013 have come into force.

A no application for review in a criminal proceeding be entertained by this Court except on the ground of an error apparent on the face of the record.

Rule 1. The Court may review its judgment or order, but
B no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

C 16. Rule 3 stipulates that an application for review shall be disposed of by circulation without any oral arguments.

Rule 3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation
D without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench
E of Judges that delivered the judgment or order sought to be reviewed.

Rule 3 as it exists today was added on 9th August, 1978 with effect from 19th August, 1978.

F 17. The constitutionality of the said rule was promptly challenged and repelled by a Constitution Bench of this Court in ***P.N. Eswara Iyer & Others v. Registrar, Supreme Court of India***, (1980) 4 SCC 680.

G 18. This Court took note of the fact that in a departure from the existing system, the new rules eliminate oral hearing in a review application and mandate that a review application shall be disposed of by circulation. The Court also noticed that even the new Rules do not totally eliminate the possibility of an oral hearing, the discretion is preserved in the Court to grant an oral
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hearing in an appropriate case. The Court negated the submission that "the scuttling of oral presentation and open hearing is subversive of the basic creed that public justice shall be rendered from the public seat, not in secret conclave ....." A

19. Such a conclusion is reached by the Court on the ground that a review is not the original proceeding in this Court. It is preceded by an "antecedent judicial hearing", therefore, such a second consideration need not be "plenary". This Court categorically recorded, rejecting the challenge that the rule of *audi alteram partem* demands a hearing in open court; B C

> "19.....The right to be heard is of the essence but hearing does not mean more than fair opportunity to present one's point on a dispute, followed by a fair consideration thereof by fair minded judges. Let us not romanticize this process nor stretch it to snap it. Presentation can be written or oral, depending on the justice of the situation....." D

It further held;

> "20. .....Granting basic bona fides in the judges of the highest court it is impossible to argue that partial foreclosure of oral arguments in court is either unfair or unreasonable or so vicious an invasion of natural justice as to be ostracized from our constitution jurisprudence." E

This Court held that the purpose behind amendment of the rule eliminating oral hearing is that the demands of court management strategies require this Court to examine from time to time the procedure to be followed in various classes of cases brought before it and make suitable rules. F

> "25. .... The balancing of oral advocacy and written presentation is as much a matter of principle as of pragmatism. The compulsions of realities, without compromise on basics, offer the sound solution in a given situation. There are no absolutes in a universe of relativity. G H

A The pressure of the case-load on the Judges' limited time, the serious responsibility to bestow the best thought on the great issues of the country projected on the court's agenda, the deep study and large research which must lend wisdom to the pronouncements of the Supreme Court
B which enjoy awesome finality and the unconscionable backlog of chronic litigation which converts the expensive end-product through sheer protraction into sour injustice - all these emphasise the urgency of rationalising and streamlining court management with a view to saving court
C time for the most number of cases with the least sacrifice of quality and turnover. If, without much injury, a certain class of cases can be disposed of without oral hearing, there is no good reason for not making such an experiment. If, on a close perusal of the paper-book, the Judges find
D that there is no merit or statable case, there is no special virtue in sanctifying the dismissal by an oral ritual. The problem really is to find out which class of cases may, without risk of injustice, be disposed of without oral presentation. This is the final court of provisional infallibility, the summit court, which not merely disposes of cases
E beyond challenge, but is also the judicial institution entrusted with the constitutional responsibility of authoritatively declaring the law of the land. Therefore, if oral hearing will perfect the process it should not be dispensed with. Even so, where issues of national moment
F which the Supreme Court alone can adequately tackle are not involved, and if a considerable oral hearing and considered order have already been rendered, a review petition may not be so demanding upon the Judge's "Bench" attention, especially if, on the face of it, there is
G nothing new, nothing grave at stake. Even here, if there is some case calling for examination or suggestive of an earlier error, the court may well post the case for an oral hearing. (Disposal by circulation is a calculated risk where no problem or peril is visible.)"

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The Bench also observed: A

"37. ...We do not claim that orality can be given a permanent holiday. Such an attitude is an over-reaction to argumentum ad nauseum. But we must importantly underscore that while lawyer's advocacy cannot be made to judicial measure especially if judges are impatient, there is a strong case for processing argumentation by rationalisation, streamlining, abbreviation and in, special situations, elimination. Review proceedings in the Supreme Court belongs to the last category. There is no rigidity about forensic strategies and the court must retain a *flexible* power in regard to limiting the time of oral arguments or, in exceptional cases, eliminating orality altogether, the paramount principle being fair justice....." B C

20. The reasons given by my learned brother in support of his conclusion that a limited oral hearing should be granted to the accused are: D

(i) that there is a possibility of (given the same set of facts) two judicial minds reaching different conclusions either to award or decline to award death sentence. E

(ii) that the death penalty once executed becomes irreversible and therefore every opportunity must be given to the condemned convict to establish that his life ought not to be extinguished. The obligation to give such an opportunity takes within its sweep, that an oral hearing be given in a review petition, as a part of a "reasonable procedure" flowing from the mandate of Article 21. F G

(iii) that even a remote chance of deviating from the original decision would justify an oral hearing in a review petition.

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A 21. I agree with my learned brother that death penalty results in deprivation of the most fundamental liberty guaranteed by the Constitution resulting in an irreversible situation. Therefore, such deprivation should be only in accordance with the law (both substantive and procedural) B which is consistent with the constitutional guarantee under Articles 14 and 21 etc.

22. But, I am not able to agree with the proposition that such an obligation extends so far as to compulsorily giving an oral hearing in every case where review is sought by a C condemned convict.

23. I have already explained the various safeguards provided by the Constitution and the law of this country against awarding death penalty. Barring the contingency contemplated D under Article 134, the makers of the Constitution did not even think it fit to provide an appeal to this Court even in cases of death penalty. In cases other than which are brought before this Court as of right under Article 134, this Court's jurisdiction is discretionary. No doubt, such discretion is to be exercised on E the basis of certain established principles of law. It is a matter of record that this Court in almost every case of death penalty undertakes the examination of the correctness of such decision.

24. Article 137 does not confer any right to seek review of any judgment of this Court in any person. On the other hand, F it only recognizes the authority of this Court to review its own judgments. It is a settled position of law that the Courts of limited jurisdiction don't have any inherent power of review. Though this Court is the apex constitutional court with plenary jurisdiction, the makers of the Constitution thought it fit to expressly confer G such a power on this Court as they were aware that if an error creeps into the judgment of this Court, there is no way of correcting it. Therefore, perhaps they did not want to leave scope for any doubt regarding the jurisdiction of this Court to review its judgments in appropriate cases. They also authorized

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this Court under Article 145(1)(e)[7] to make rules as to the conditions subject to which a judgment of this Court could be reviewed and also make rules regarding the procedure for such review. Both Articles 137 and 145 give this Court the authority to review its judgments subject to any law made by the Parliament.

25. As observed by this Court in ***Eswara Iyer's*** case, it has never been held, either in this country or elsewhere, that the rule of *audi alteram partem* takes within its sweep the right to make oral submissions in every case. It all depends upon the demands of justice in a given case. ***Eswara Iyer's*** case clearly held that review applications in this Court form a class where an oral hearing could be eliminated without violating any constitutional provision. Therefore, I regret my inability to agree with the conclusion recorded by my learned brother Justice Nariman that the need for an oral hearing flows from the mandate of Article 21.

26. In my opinion, in the absence of any obligation flowing from Article 21 to grant an oral hearing, there is no need to grant an oral hearing on any one of the grounds recorded by my learned brother for the following reasons –

1. That review petitions are normally heard by the same Bench which heard the appeal. Therefore, the possibility of different judicial minds reaching different conclusions on the same set of facts does not arise.

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7. **Article 145. Rules of Court, etc.- (1)** Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered.

A 2. The possibility of the "remote chance of deviation" from the conclusion already reached in my view is – though emotionally very appealing in the context of the extinguishment of life – equally applicable to all cases of review.

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27. Prior to the amendment of Order XL of the Supreme Court Rules in 1978 (which was the subject matter of challenge in ***Eswara Iyer's*** case) this Court granted oral hearings even at the stage of review. It was by the amendment that the oral hearings were eliminated at the review stage. As explained by C ***Eswara Iyer's*** case, such an amendment was necessitated as a result of unwarranted "review baby" boom. This Court, in exercise of its authority under Article 145 as a part of the Court management strategy, thought it fit to eliminate the oral hearings at the review stage while preserving the discretion in the Bench D considering a review application to grant an oral hearing in an appropriate case. The Constitution Bench itself, while upholding the constitutionality of the amended rule of Order XL, observed;

> "All that we mean to indicate is that the mode of 'hearing', E whether it should be oral or written or both, whether it should be full-length or rationed, must depend on myriad factors and future developments. 'Judges of the Supreme Court must be trusted in this regard and the Bar will ordinarily be associated when decisions affecting F processual justice are taken'." (para 37 page 696)

28. I do not see any reason to take a different view - whether the "developments" subsequent to ***Eswara Iyer's*** case, either in law or practice of this Court, demand a reconsideration of the rule, in my opinion, should be left to the G Court's jurisdiction under Article 145.

Kalpana K. Tripathy Writ Petitions disposed of.