IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1784 OF 2010

Indian Harm Reduction Network,]
a Society registered under Societies Registration]
Act, 1860, Registration No. S/58430/2007,]
having its office at F 6/8A Vasant Vihar,]
New Delhi 110057] ...Petitioner

V/s.

1. The Union of India, through]
1A. Secretary, Department of Revenue,]
Ministry of Finance, North Block,]
New Delhi 110 001]

1B. Director General,]
Narcotics Control Bureau, Ministry of]
Home Affairs, West Block No.1, Wing No.V,]
R.K. Puram, New Delhi 110 066]

1C. Zonal Director]
Narcotics Control Bureau, Mumbai Zonal Unit,]
Exchange Building, 3rd Floor, Sprott Road,]
Ballard Estate, Mumbai 400 001]

2. State of Maharashtra]
Mantralaya, Mumbai] ...Respondents

WITH
CRIMINAL WRIT PETITION NO. 1790 OF 2010

Gulam Mohammed Malik]
Age 53 years, Indian National,]
R/o. Village Banzinara, Kashmir]
[at present in custody of Yeroda (sic) Central]
Prison as a convict in NDPS Special Case]
No. 60 of 2002] ...Petitioner

V/s.

1. Vipin Nair]
Intelligence Officer, Narcotics Control Bureau,]
Mumbai]

2. The State of Maharashtra]

3. Union of India through]
a) Secretary, Ministry of Law & Justice]
b) Secretary, Department of Revenue,]
Ministry of Finance] ...Respondents

Mr. Anand Grover with Ms. Tripti Tandon, Mr. Vijay Hiremath,
Mr. Amaritananda Chakravarty i/by Mr. Prakash Mahadik for
the Petitioner in Criminal Writ Petition No. 1784 of 2010

Mr. H.E. Mooman for the Petitioner in Criminal Writ Petition No. 1790 of 2010

Mr. D.J. Khambata, Additional Solicitor General with
Mr. S.K. Shinde and Mr. R.I. Chagla for Respondent No. 1 and Attorney General

Mr. D.P. Adsule, A.P.P., for the State

CORAM: A.M. KHANWILKAR AND
A.P. BHANGALE, JJ.
DATE: JUNE 16, 2011

JUDGMENT (Per A.M. Khanwilkar, J.)**:-**

By these petitions under Article 226 of the Constitution of India, the constitutional validity of Section 31-A of the Narcotic Drugs

and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act" or "the Act", for the sake of brevity) is challenged on the ground that the mandatory death sentence prescribed therein is violative of Articles 14 and 21 of the Constitution of India.

2. The first petition is filed by a Society registered under the Societies Registration Act, 1860, which claims to be working in the filed of drug related programmes and policies since 2007. It is stated that its constituent members are non-government organisations from different parts of the country that have been supporting efforts to reduce drug-related harms for the last thirty years. The said petitioner seeks to secure a just, rational and humane response to drug use and dependence. The said petitioner asserts that it works closely with the Government of India, the United Nations and international agencies such as the Global Fund to Fight AIDS, Tuberculosis and Malaria to promote the health and human rights of persons who use drugs. It has challenged the validity of Section 31-A of the NDPS Act, as it is vitally concerned with the issue of meting out of mandatory death penalty for drug offences, which is excessive, unscientific and inhumane.

3. The second petition is filed by the original accused No. 1 in NDPS Special Case No. 60 of 2002, which was tried and ended in finding of guilt recorded by the Special Judge under the NDPS Act. The said petitioner was also prosecuted and convicted in connection with offences under Sections 8(c), 20 (B) read with Section 29 of the NDPS Act by the Sessions Judge at Himmatnagar, Ahmedabad, in NDPS Special Case No. 1 of 2002 vide judgment dated 9th March, 2004, regarding the seizure of commercial quantity of charas from the premises occupied by the said petitioner. Accordingly, the Special Judge under the NDPS Act at Mumbai by his decision dated 6th February, 2008 convicted the said petitioner in respect of "repeat offence" covered by Section 31-A of the NDPS Act; and, therefore, imposed death penalty in terms of Section 31-A of the NDPS Act. Besides challenging the said decision of the Special Judge under the NDPS Act at Mumbai by way of appeal before this Court, being Criminal Appeal No. 528 of 2008, the petitioner / original accused No. 1 in NDPS Special Case No. 60 of 2002 has also filed the present writ petition, challenging the validity of Section 31-A of the NDPS Act on the ground that it is violative of Articles 14 and 21 of the Constitution of India.

4. Section 31-A of the NDPS Act was incorporated in the NDPS Act of 1985 in 1989. The said provision was amended in 2001, which, in turn, narrowed down the offences punishable with death.

5. The Statement of Objects and Reasons for introducing Section 31-A in 1989, vide Amendment Act 2 of 1989, reads thus:-

> "In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction.
>
> The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences.
>
> Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drugs offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.
>
> 2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, *inter alia*, provide for the following:-
>
> > (i) to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;
> >
> > (ii) to bring certain controlled substances which are used for manufacture of Narcotic Drugs and Psychotropic Substances under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;
> >
> > (iii) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted;
> >
> > (iv) to provide for pre-trial disposal of seized drugs;
> >
> > (v) to provide death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;

(vi) to provide for forfeiture of property and a detailed procedure relating to the same; and

(vii) to provide that the offences shall be cognizable and non-bailable." (emphasis supplied)

6. As aforesaid, the original Section 31-A has been amended in 2001 by Amendment Act 9 of 2001. The Statement of Objects and Reasons for the said amendment reads thus:-

> "The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.
>
> 2. The Act was amended in 1989, *inter alia*, to provide for tracing, seizing and forfeiture of illegally acquired property. The experience gained over the years reveals that the provisions have certain inadequacies due to which the implementation of the provisions has been tardy. Certain other inadequacies in the various provisions of the Act have been noticed. In order to remove those inadequacies it is necessary to amend the relevant provisions.
>
> 3. The provisions relating to certain procedural aspects like search and seizure have certain deficiencies due to which the law enforcement efforts against illicit drug trafficking

> have not proved very effective. A need has also been felt to confer powers of entry, search, seizure, etc., in respect of offences relating to Controlled Substances and for tracing, freezing, seizing and forfeiture of illegally acquired property upon the empowered officers.
>
> 4. Certain obligations, specially in respect of the concept of 'Controlled Delivery' arising from the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 to which India acceded, also require to be addressed by incorporating suitable provisions in the Act." (emphasis supplied)

7. Section 31-A, as amended in 2001, as is applicable to the case of the petitioner in the second petition, reads thus:-

> "**Death penalty for certain offences after previous conviction**.--
>
> (1) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under section 19, section 24, section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance, is subsequently convicted of the commission of or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to,-
>
> (a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table:

	Particulars of narcotic drugs/ psychotropic substances	Quantity
	(1)	(2)
(i)	Opium	10 kgs
(ii)	Morphine	1 kg
(iii)	Heroin	1 kg
(iv)	Codeine	1 kg
(v)	Thebaine	1 kg
(vi)	Cocaine	500 grams
(vii)	Hashish	20 kgs
(viii)	Any mixture with or without any neutral material of any of the above drugs	lesser of the quantity between the quantities given against the respective narcotic drugs or psychotropic sub-stances mentioned above forming part of the mixture
(ix)	LSD, LSD-25(+)-N, N-Diethyllysergamide (d-lysergic acid deithylamide)	500 grams
(x)	THC (Tetrahydrocannabinols, the following isomers: 6-a (10-a), 6-a(7), 7, 8, 9, 10, 9(11) and their stereochemical variants)	500 grams
(xi)	Methamphetamine (+) - 2- Methylamine-1-Phenylpropane	1,500 grams
(xii)	Methaqualone (2-Methyl-3-o-tolyl-4-(3-H)-Quinazolinone)	1,500 grams
(xiii)	Amphetamine (+)-2-amino-1-Phenylpropane	1,500 grams
(xiv)	Salts and preparations of the Psychotropic Substances mentioned in (ix) to (xiii)	1,500 grams;

(b) financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death.

(2) Where any person is convicted by competent Court of criminal jurisdiction outside India under any law corresponding to the provisions of section 19, section 24 or section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a Court in India.”

8. From the plain reading of Section 31-A of the Act, it is attracted only in cases where a person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable involving embezzlement of opium by a licensed cultivator (Section 19), unauthorised trade and external dealing in narcotic drugs and psychotropic substances (Section 24), financing illicit trafficking and harbouring offenders (Section 27-A) and for offences involving commercial quantity of any narcotic drug or psychotropic substance. If that person is subsequently convicted of the commission of or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to engaging in production, manufacture, possession, transportation, import into India, export from India or transshipment, of narcotic drugs and psychotropic substances specified in column (1) of the table in quantity equal to or more than the specified quantity in column (2) of the table or is subsequently convicted for offence of financing, directly or indirectly, with regard to activities specified in clause (a), such person is liable to be sentenced with death.

9. According to the petitioners, neither the first nor the second offence involves intentionally taking of life of any person. Besides, the said offences do not, directly or indirectly, result in killing or lethal

consequences, whereas the offending acts in respect of the first and the second offences are those which are carried out without or in contravention of a licence. Further, the first offence under Sections 19, 24 or 27-A is independent of any quantity of drugs. They are distinct and not akin or similar to the second offence. Notwithstanding this, the accused is sentenced to death, as capital punishment is the only penalty specified by Section 31-A, and there is no alternative sentence. It is in this backdrop the petitioners assert that the mandatory death penalty provided in Section 31-A renders the said provision unconstitutional and violative of Articles 14 and 21 of the Constitution of India.

10. The petitioners would also rely on the International Covenants which, according to them, are also enforceable by virtue of the protection of the Human Rights Act, 1993. According to the petitioners, Articles 6 and 7 of the International Covenants on Civil and Political Rights (hereinafter referred to as "ICCPR") can be read in and/or give effect for interpreting and enforcing fundamental rights, in particular Article 21. On this premise, the petitioners assert that Section 31-A is violative of Article 21 of the Constitution, more particularly on account of denial of procedural safeguards, amongst others, right of pre-sentence hearing on the question of sentence. Further, the imposition of standardised or

mandatory death penalty betrays the well-established principle that sentencing must be individualised, and ought to depend on the circumstances of the offence as well as the offender. Similarly, the requirement of recording special reasons by the Court for imposing death penalty is completely done away with and the exercise of judicial discretion on well-recognised principles, which is the highest safeguard for the accused, and is at the core of administration of criminal justice, is impaired. That capital sentence can be prescribed only when the alternative of life sentence is unquestionably foreclosed. In any case, considering the tenor of Section 31-A, the remedy of the accused to ask for judicial review of the death penalty before the superior Court is completely denied. According to the petitioners, breach of such safeguards guaranteed to the accused renders the procedure for capital sentencing under Section 31-A unfair, unjust and arbitrary.

11. According to the petitioners, taking away the judicial discretion in the matter of sentencing inevitably impinges upon the doctrine of separation of powers and the rule of law; for, sentencing is judicial function, centered on administration of justice. Section 31-A completely eliminates judicial discretion in sentencing. That violates the

constitutional norms of separation of powers and rule of law, for which reason, the provision is violative of Article 21 of the Constitution.

12. According to the petitioners, the mandatory death sentence, without alternative punishment, is substantively unfair, unjust and unreasonable. Further, the mandatory death penalty constitutes cruel, inhumane and degrading punishment. As Section 32-A of the NDPS Act forbids suspension, remission or commutation of sentence awarded under the NDPS Act, including the death sentence awarded under Section 31-A, the inevitable effect is that the person sentenced to death by virtue of Section 31-A has no remedy, even if his sentence is not administered within a reasonable time. That would, inevitably, expose such person to Death Row Syndrome on account of prolonged delay in carrying out execution, which is considered worse than execution itself. The Death Row Syndrome, being dehumanising, violates Article 21 of the Constitution. The respondents have failed to discharge the burden to establish that Section 31-A does not infringe Article 21 of the Constitution. It has merely proceeded on denial and on the premise that specifying sentence is essentially a legislative policy.

13. The petitioners have also attacked the validity of Section 31-A on the touchstone of Article 14 of the Constitution of India, which postulates that classification for the purpose of legislation must be reasonable. According to the petitioners, the distinction between persons covered by law and those left out of it should be based on an intelligible differentia; and that differentia must have a rational nexus to the object sought to be achieved by law. Whereas, the repeat offenders can be sentenced under Section 31 or Section 31-A, as the case may be. Section 31 already provides for enhanced punishment for offences after previous conviction. The offence, which is not covered by Section 31-A, may be the second or successive offences committed, but, still, the person would not face the mandatory death penalty, as is provided in Section 31-A. Moreover, Section 31-A opens with *non-obstante* clause, which pre-supposes exclusion of application of Section 31 to person convicted for any of the offences under Sections 19, 24, or 27-A and offences involving commercial quantity, who is subsequently convicted for offences involving quantities specified in the table and for activities referred to in Section 31-A of the Act. The exclusion of such accused has no nexus with the object sought to be achieved by the Act. Accordingly, the classification so made is illogical, unfair, unjust and unreasonable.

14. The petitioners have also taken exception to the drug quantities specified in the table in Section 31-A of the Act. According to the petitioners, from the error which has crept in in the drug quantities specified in the table given in Section 31-A of the Act, it demonstrates the negligent and casual drafting by the Legislature, much less in respect of provision prescribing mandatory death penalty. Inasmuch as, the drug specified at item No. (iv) in the table, viz., Codeine, the commercial quantity thereof is specified as “1 kg” in the Act, and even under Section 31-A, the drug quantity is retained as “1 kg” for the repeat offences, unlike multiple drug quantity for other specified drugs under the same table. Moreover, the drugs listed in the table to Section 31-A, by definition, include mixture or preparation; and keeping in mind the Notification dated 18th November, 2009, which has amended the earlier Notification dated 19th October, 2001, the amount of narcotic drug or psychotropic substance involved in the offence will have to be calculated on the basis of the weight of the entire mixture or solution, and not just its pure drug content. Resultantly, it would contradict the legislative intent of imposing penalties according to the quantity of narcotic or psychotropic drug involved; and a person would be liable to death sentence under Section 31-A, even when the actual quantity of drugs,

such as opium, which can be a mixture, is less than the specified quantity of 10 kg. As a result, the application of Section 31-A would be arbitrary and violative of Article 14 of the Constitution.

15. According to the petitioners, the death penalty for drug crimes is disproportionate, for which reason, it is opposed to the tenets of Articles 14 and 21 of the Constitution. Mandatory death penalty is opposed to the constitutional obligation to protect the right to life of persons accused of drug crimes. According to the petitioners, the narcotic drugs and psychotropic substances are not abhorrent, *per se*. They serve genuine medical and scientific needs of the community, and, as such, are beneficial to society. Engaging in the production, manufacture, possession, transportation, import and export or transshipment of narcotic drugs and psychotropic substances, even in the quantities specified in the table to Section 31-A, is not, *per se*, illegal. Those activities are penalised, when they are carried out without a licence, or in contravention of the terms and conditions prescribed in the licence. According to the petitioners, the mere absence of, or derogation from a licence, cannot warrant the extreme penalty of capital sentence.

16. Further, trafficking of drugs, even in the quantities specified under Section 31-A, does not, directly or indirectly, cause loss of life. In that sense, it is not the most serious offence, which alone can be considered for providing death penalty. In addition, the consumption of drugs itself does not cause death. Even in the case of drug dependent, addiction itself does not cause death. The drug dependent person can recover from addiction after treatment, education, after care, rehabilitation and social re-integration, and the NDPS Act itself provides for such measures. Even for most serious crimes, such as under the provisions of the Unlawful Activities (Prevention) Act, 1967 and the Maharashtra Control of Organised Crime Act, 1999, which deal with terrorist activities and other serious crimes, the mandatory punishment of death sentence is not provided for. At any rate, the repeat drug crimes do not constitute rarest of rare case for justifying imposition of death penalty.

17. According to the petitioners, recidivism, *per se*, cannot be the basis for sending a person to gallows, and more so, in the context of the dictum of the Apex Court that even a second conviction for murder does not automatically qualify it as a rarest of rare crime deserving capital punishment. It is the case of the petitioners that a repeat

conviction for drug trafficking covered by Section 31-A of the Act resulting in a mandatory death sentence is unduly harsh and excessive, for which reason, it falls foul of the principle of proportionality under Article 14, read with Article 6 (2) of the ICCPR.

18. According to the petitioners, the State has not discharged the burden to justify that Section 31-A is not unfair and arbitrary under Article 14 of the Constitution.

19. In the second Writ Petition, attempt has been made by the petitioner to additionally persuade us to interpret Section 31-A of the Act so as to define the sweep and application of the said provision. Relying on the facts applicable to that case, it was argued that the petitioner has been convicted and sentenced under Section 31-A of the NDPS Act in respect of offence unravelled by the NCB officers on 13th February, 2002, when commercial quantity of charas was seized from the premises belonging to the petitioner. On that day, however, the petitioner / original accused No. 1 was not convicted of offence specified under Section 19, 24 or 27-A of the NDPS Act, with the result that Section 31-A was clearly inapplicable. In the present judgment, however, we would confine the discussion only on the question of validity of Section 31-A of the NDPS Act and not its application.

20. As constitutional validity of the Central Legislation was put in issue, notice was issued to the Attorney General of India, who is now represented by the learned Additional Solicitor General. These petitions are opposed by the respondents. Although it was argued that the Court should not decide the question pertaining to the constitutionality of Section 31-A of the NDPS Act in a petition filed by the first petitioner-Society, which is in the nature of Public Interest Litigation, however, it is fairly accepted that the said challenge, in any case, will have to be answered in the second petition filed by the original accused No.1 in NDPS Case No. 60 of 2002, who has been convicted and sentenced to death penalty under Section 31-A of the Act.

21. The substance of the argument canvassed on behalf of the respondents is that the death penalty, *per se*, is not unconstitutional. Relying on the decisions of the Apex Court, it was argued that the death penalty cannot be considered as “cruel and unusual punishment”. Further, the due process clause for free application is not relevant in the Indian context. The death penalty is justified as a social defence and for economic offences for private profit, such as that in the case of narcotics. Further, the collective conscience of the community is so shocked that it expects the holders of judicial power to inflict the death penalty. In

matters covered by Section 31-A, death penalty does not violate Article 21 of the Constitution. There are sufficient procedural safeguards which are observed before pronouncing the mandatory death penalty. The sentencing is, essentially, a legislative policy. Whether to grant the Courts any discretion in sentencing is also Legislature's prerogative. The mandatory death penalty provided in Section 31-A is in the nature of minimum sentence in respect of repeat offences by the same offenders of specified activities and for offences involving drugs quantity specified in column 2 of the table. It is not open to the Court to reduce the minimum sentence, when provided for by the Legislature.

22. Our attention was drawn to the fact that mandatory death sentence is also provided in other statutes, such as Section 27 (3) of the Arms Act, 1959 "for a first offence" and also the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. According to the respondents, the 1989 amendment contained a package of amendments designed to strengthen the NDPS Act, including insertion of Section 31-A. The legislative competence to enact Section 31-A of the Act has not been challenged by the petitioners. At the same time, the offences falling under the NDPS Act have been held to have deleterious effect and deadly impact on society as a whole. The Apex Court has, time and

again, held that narcotic crimes are more heinous than murder. It is then contended that the quantity of drugs specified in Section 31-A is in multiples of the commercial quantity specified in clauses (viia) and (xxiiia) of Section 2 of the NDPS Act.

23. Insofar as mixture at serial No. (iv) in the table in Section 31-A, i.e., Codeine, it is fairly accepted that the quantity specified is 1 kg., which is the same as commercial quantity provided for.

24. It is then contneded that the death sentence in Section 31-A provided for a second conviction is far less stringent than the mandatory death sentence for narcotics in several countries such as Bangladesh, Indonesia, Malaysia, Pakistan, Singapore and Thailand, where death sentence is provided for quantity of narcotics far less than the quantity of drugs specified in Section 31-A of the Act. It was argued that mandatory death penalty provided in Section 31-A is not violative of Articles 21 or 14 of the Constitution, as the same specifies the requirements of procedural due process. The classification made by Section 31-A is between first-time offender and repeat offender engaged in dealing with huge quantity of drugs. It is reasonable and is based on intelligible differentia. It has nexus with the objects of the Act, viz., stricter control and deterrence in relation to narcotic crimes – more

heinous than murder and anti-social in nature. The classification between Section 31 and 31-A is also rational, given the nature of repeat offences set out in Section 31-A. It is contended that the proportionality of punishment in cases of mandatory or minimum sentence is a matter for Legislature to decide as policy. The Court cannot sit in substantive judgment over Parliament's legislative determination of what punishment is appropriate. It is contended that there is no encroachment on the domain of the judiciary. It is the Parliament which gives the Judiciary a discretion that sentencing moves into the judicial domain.

25. Insofar as the International Conventions pressed into service by the petitioners, it is argued that all the Conventions have an article which expressly states that a party-State to the Convention may adopt more stricter or severe measures of control than those provided by the Convention, if such measures are desirable or necessary for the protection of public health and welfare. Similarly, the International Reports relied upon by the petitioners also contain the qualification that death should be provided only for the most serious crimes, apart from providing that no one shall be subject to cruel, inhumane or degrading punishment. According to the respondents, the jurisprudence in India differs from the foreign jurisdictions. In India, the death penalty is

provided even for economic, social or political crime. Moreover, death penalty has been held not to constitute "cruel and unusual punishment". It is contended that, for International Conventions and Treaties to be recognized as law, overriding any conflicting domestic law, Parliament has to legislate under Article 253 of the Constitution. The municipal law of India will always prevail over International Conventions in the case of any conflict, if there is no overriding law enacted by Parliament under Article 253. In other words, the enacted laws by Parliament can, in no way, be circumscribed by the International Conventions or Treaties. It is then submitted that there is a presumption in favour of the constitutionality of a statute; and the burden is always upon the person who attacks it to show that there has been a clear transgression of a constitutional provision. Further, the Court should, ordinarily, defer to the wisdom of the Legislature, unless it enacts a law about which there can be no manner of doubt about its unconstitutionality. The Legislature is the best judge of what is good for the community, by whose suffrage, it comes into existence. If two views are possible, one making the provision in the statute constitutional and the other making it unconstitutional, the former should be preferred. It was submitted that the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained

meaning or narrower or wider meaning than what appears on the face of it. The Court should declare a statute to be unconstitutional only when all efforts to uphold the constitutional validity fails. At the end, alternative argument is addressed that, in the event the Court were to hold that Section 31-A of the Act is unconstitutional, in that case, the expression 'shall' in Section 31-A, which is indicative of death penalty as mandatory, be read as 'may'. In that case, the legislation will be saved, and the Court will retain its sentencing discretion not to award death sentence in appropriate cases, and, instead, award sentence of imprisonment, as provided in Section 31 of the NDPS Act. Discretionary death sentence will preserve the judicial discretion in sentencing. The punishment provided in Section 31 can be read as alternative to death sentence under Section 31-A. It was submitted that, following the analogy, where a Court frames a charge on a major count, the law does not provide that it should also frame a charge under the minor count. Thus, even if the charge framed to be one under Section 31-A (major count) of the Act, there is no reason why the conviction and sentencing cannot be proceeded also under Section 31 (minor count) of the Act. Accordingly, the respondents contend that the petitions are devoid of merits, and be dismissed.

26. The counsel for the parties have relied on reported decisions and other material in support of their respective arguments. Reference thereto shall be made at appropriate places.

27. Indubitably, the petitioners have not challenged the validity of Section 31-A of the NDPS Act on the ground of lack of legislative competence as such. Whereas, the challenge is limited to the said provision, being violative of Articles 14 and 21 of the Constitution of India. The Constitution Bench of the Apex Court in ***Bachan Singh v. State of Punjab***, reported in (1980) 2 SCC 684 dealt with the challenge to Section 302, prescribing death penalty, being violative of the Constitution. The said decision has considered the earlier two Constitution Bench decisions in ***Jagmohan Singh v. State of Uttar Pradesh***, reported in (1973) 1 SCC 20 and ***Rajendra Prasad v. State of Uttar Pradesh***, reported in (1979) 3 SCC 646. As ***Bachan Singh*** (supra), being later in point, it may be useful to elaborate on the principle expounded therein.

28. One of the argument in ***Bachan Singh's*** *case* (supra) was that the provision of death penalty in Section 302 of the Indian Penal Code offended Article 19 of the Constitution. In that, death penalty serves no

social purpose and its value as a deterrent remains unproven and defiles the dignity of individual so solemnly vouchsafed in the Preamble of the Constitution, its imposition must be regarded as "unreasonable restriction" amounting to total prohibition on the freedom guaranteed in Article 19 (1). The Court after analysing its earlier decision in ***Banks' Nationalisation Case***, reported in (1970) 1 SCC 248, and ***Maneka Gandhi v. Union of India***, reported in (1978) 1 SCC 248 observed thus:-

> "41. We have copiously extracted from the judgments in *A.K.Gopalan* case, to show that all the propositions propounded, arguments and reasons employed or approaches adopted by the learned Judges in that case, in reaching the conclusion that the Indian Penal Code, particularly those of its provisions which do not have a direct impact on the rights conferred by Article 19(1), is not a law imposing restrictions on those rights, have not been overruled or rendered bad by the subsequent pronouncements of this Court in *Bank Nationalisation* case or in *Maneka Gandhi's* case. For instance, the proposition led down by Kania, C.J., Fazl Ali, Patanjali Sastri, and S.R.Das, JJ. that the Indian Penal Code particularly those of its provisions which cannot be justified on the ground of reasonableness with reference to any of the specified heads, such as "public order" in clauses (2), (3) and (4), is not a law imposing restrictions on any of the rights conferred by Article 19(1), still holds the field. Indeed, the reasoning, explicit or implicit, in the judgments of Kania, C.J., Patanjali Sastri and S.R.Das, JJ. that such a construction which treats every section of the Indian Penal Code as a law imposing `restriction' on the rights in Article 19(1), will lead to absurdity is unassailable........."

29. On further analysing the other decisions, the Apex Court proceeded to observe in paragraphs 58 and 60 as follows:-

> "58. From the above conspectus, it is clear that the test of direct and indirect effect was not scrapped. Indeed, there is no dispute that the test of 'pith and substance' of the subject-matter and of direct and of incidental effect of legislation is a very useful test to determine the question of legislative competence, i.e., in ascertaining whether an Act falls under one Entry while incidentally encroaching upon another Entry. Even for determining the validity of a legislation on the ground

of infringement of fundamental rights, the subject-matter and the object of the legislation are not altogether irrelevant. For instance, if the subject-matter of the legislation directly covers any of the fundamental freedoms mentioned in Article 19(1), it must pass the test of reasonableness under the relevant head in Clauses (2) to (6) of that Article. If the legislation does not directly deal with any of the rights in Article 19(1) that may not conclude the enquiry. It will have to be ascertained further whether by its direct and immediate operation, the impugned legislation abridges any of the rights enumerated in Article 19(1)."

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

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

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

30. Having said this, the Apex Court proceeded to apply the test to consider the validity of Section 302 of the Penal Code which prescribes death or imprisonment for life for murder. In paragraphs 61

and 62, the Court observed thus, which is of some significance to consider the challenge:-

> “61. Now, let us apply this test to the provisions of the Penal Code, in question. Section 299 defines 'culpable homicide' and Section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of course, say that the object of penal laws is generally such as not to involve any viola-Bon of the rights conferred by Article 19(1) because after the decision of this Court in the Bank Nationalisation case the theory, that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental, right of the individual is irrelevant, stands discredited. But the point of the matter is that, in pith and substance, penal laws do not deal with the subject matter of rights enshrined in Article 19(1). That again is not enough for the purpose of deciding upon the applicability of Article 19 because as the test formulated by us above shows, even if a law does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Article 19(1) shall have been attracted. It would then become necessary to test the validity of even a penal law on the touchstone of that Article. On this latter aspect of the matter, we are of the opinion that the deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Considering therefore the test formulated by us in its dual aspect, we are of the opinion that Section 302 of the Penal Code does not have to stand the test of Article 19(1) of the Constitution.”

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

(See Words and Phrases, Permanent Edition, Vol. 10). While crimes mala in se do not per se, or in operation directly and inevitably impinge on the rights under Art 19(1), cases under the other category of crimes are conceivable where the law relating to them directly restricts or abridges such rights. The illustration given by Shri Sorabji will make the point clear. Suppose, a law is enacted which provides that it shall be an offence to level any criticism, whatever, of the Government established by law and makes a further provision prescribing five years' imprisonment as punishment for such an offence. Such a law (i.e. its provision defining the offence) will directly and inevitably impinge upon the right guaranteed under 'clause' (a) of Article 19(1). Therefore, to be valid, it must pass the test of reasonableness embodied in Clause (2) of the Article. But this cannot be said in regard to the provisions of the Penal Code with which we are concerned."

31. The offences referred to in Section 31-A of the NDPS Act cannot be classified as crimes *mala in se*. Those offences, however, are crimes *mala prohibita*, as it embraces things prohibited by statute. Inasmuch as the enactment of the NDPS Act is intended to make provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, which is evident from the Preamble of the Act itself.

32. In paragraph 67 of the same judgment, the Court observed thus:-

"67. Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to

> interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. "The job of a Judge is judging and not law-making" In Lord Devlin's words: "Judges are the keepers of the law and the keepers of these boundaries cannot, also, be among outriders."

33. The Court then proceeded to examine the age-old debate between Abolitionists and Retentionists. The Court noted that, while dealing with the procedural aspects of the problem, in India, ample safeguards have been provided by law and the Constitution which almost eliminate the chances of an innocent person being convicted and executed for a capital offence. In paragraph 101, the Court opined that, whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murder, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they may remain hidden in the innermost recesses of their mind. The Court then noticed that it is a common phenomenon in all the civilized countries that some murders are so shockingly offensive that there is a general outcry from the public for infliction of the ultimate penalty on the criminal.

34. On detailed analysis of the debate on the two opposite views in paragraph 132 of the reported judgment, the Court concluded thus:-

> "132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light Of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the CrPC, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19."

35. In the case of ***Bachan Singh*** (supra), while analysing the dictum in the case of ***Jagmohan***, the Constitution Bench, in paragraph 197, had noted thus:-

> "197. In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also."

36. Indeed, in ***Bachan Singh's case*** (supra), the dictum in the case of ***Rajendra Prasad*** has been explained on two aspects. Firstly, the Court noted in paragraph 201 that, on conjoint reading of Section 354 (3) and 235(2) and other related provisions of the Code of 1973, it is quite clear that, for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. Secondly, in paragraph 204 in ***Bachan Singh***'s case, the Court noted that it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide 'special reasons' to justify

the imposition of the extreme penalty on the person convicted of such a heinous murder. But it was not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible.

37. In paragraph 209, the majority view in ***Bachan Singh's case*** (supra) summed up thus:

> “209. .... "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

38. In ***Rajendra Prasad***'s case, the Apex Court, in paragraphs 59 and 60, observed thus:-

> “59. Thus, we are transported to the region of effective social defence as a large component of social justice. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned

and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated.

60. When, then, does a man hold out a terrible and continuing threat to social security in the setting of a developing country? He does so if, by his action, he not only murders but by that offence, poses, a grave peril to societal survival. If society does not survive, individual existence comes to naught. So, one test for impost of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. To illustrate, if an economic offender who intentionally mixes poison in drugs professionally or willfully adulterates intoxicating substances injuriously, and knowingly or intentionally causes death for the sake of private profit, such trader in lethal business is a. menace to social security and is, therefore, a violator of social justice whose extinction becomes necessary for society's survival. Supposing a murderous band of armed dacoits intentionally derails a train and large number of people die in consequence, if the ingredients of murder are present and the object is to commit robbery inside the train, they practise social injustice and imperil social security to a degree that death penalty becomes a necessity if the crime is proved beyond doubt. There may be marginal exceptions or special extenuations but none where this kind of dacoity or robbery coupled with murder becomes a contagion and occupation, and social security is so gravely imperilled that the fundamental rights, of the defendant become a deadly instrument whereby many are wiped out and terror strikes community life. Then he 'reasonably' forefeits his fundamental rights and takes leave of life under the law. The style of violence and systematic corruption and deliberately planned economic offences by corporate top echelons are often a terrible technology of knowingly causing death on a macro scale to make a flood of profit. The definition of murder will often apply to them. But because of corporate power such murderous depradations are not charged. If prosecuted and convicted for murder, they may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain."

(emphasis supplied)

39. In paragraph 83 of the same decision, the Court summarised the guidelines to facilitate easier application and to inject scientific formulation. What is relevant for our consideration is that the Court has noticed that in the post-constitution, the penal provisions have to be read in the humane light of parts III and IV, further illumined by the preamble

to the Constitution. That deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea. The personal and social, the motivational and physical circumstances, "of the criminals" are relevant factors in adjudging the penalty. So also the intense suffering already endured by prison torture or agonising death penalty hanging overhead consequent on the legal process. It is also held that offences such as train dacoity and bank robbery bandits, reaching menacing proportions, "economic offenders profit – killing in an intentional and organised way", are some exceptional ones validating death penalty. The Court may take into account the factum of planned motivation that goaded the accused to commit the crime. The Court noted that with the development of the complex industrial Society, there has come into existence a class of murderers who indulge in a nefarious activity solely for personal monetary or property gain. These white-collar criminals in appropriate cases do deserve capital punishment as the law now stands, both as deterrent and as putting an end to an active mind indulging in incurably nefarious activities. It is held that in certain class of cases, social justice to defend the Society would validate death penalty. To wit, the crime may be less shocking than other murders and yet the callous criminal, e.g. a lethal economic offender, may be jeopardizing societal existence

by his act.

40. Thus, there is hardly any doubt that death penalty, *per se*, in the Indian context, is not at all impermissible and the Legislature is competent to provide for such penalty within the framework of our Constitution. The petitioners have, therefore, advisedly restricted their challenge to Section 31-A of the NDPS Act, being violative of Articles 14 and 21 of the Constitution of India.

41. Reverting to the challenge that the standardised, mandatory death penalty stipulated by Section 31-A of the NDPS Act being violative of Article 21 of the Constitution, the argument is that the said provision is unfair, unjust and unreasonable. Article 21 of the Constitution guarantees that no person shall be deprived of his right to life and personal liberty, except according to procedure established by law. The expression "procedure established by law" pre-supposes that the law must itself be substantively fair, just and reasonable.

42. Reliance has been placed on Article 6 of the ICCPR which, according to the petitioners, grants protection against the arbitrary extinction of the right to life. It provides that every human being has the

inherent right to life. That right shall be protected by law. Further, no one shall be arbitrarily deprived of his right. According to the petitioners, the Indian Constitution is ingrained by humanistic values that respect the sanctity and dignity inherent in life, whereas capital punishment puts an end to life, which is final and irreversible. For that reason, the death penalty must be only an exceptional measure, as it is cruel, inhuman and degrading punishment and affronts human dignity. In support of this submission, reliance is placed on the following authorities:-

(i) Indian judgments :

- Francis Coralie (supra), para 8 at pg 618-619
- Smt.Selvi v. State of karnataka [(2010) 7 SCC 263 at para (9) at pg 359

(ii) International case law :

- Woodson v. North Carolina [428 U.S.280 (1976)], paras 7 and 8 at pgs 16-17
- Roberts v. Louisiana [428 U.S. 325 (1976)]
- Kafantayeni v. Attorney General [Constitutional Case No.12 of 2005 (2007) MWHC 1 (Malawi)]
- Attorney General v. Susan Kigulaand and 417 others [Constitutional Appeal No.03 of 2006, Uganda: Supreme Court 21 January 2009])
- Godfrey Ngotho Mutiso v. Republic [Criminal Appeal No.17 of 2008 Kenya: Court of Appeal at Mombasa in its judgment dated 30th July 2010], para 36 at pgs 35-36.

(iii) Privy Council decisions:

- Reyes v. the Queen [(2002) 2 AC 235 (Belize)], paras 10, 11, 17, 25, 26, 29, 34, 36, 40, 43
- R v.Hughes [(2002) UKPC 12 (Saint Lucia)]
- Fox v. Queen [(2002) UKPC 13 (Saint Christopher and Nevis)]

- Forrester Bowe (Junior) & Trono Davis v The Queen [(2006) UKPC 10 (Bahamas)], paras 28, 29 and 30 at pgs 14-16, para 36 at pgs 21-22, paras 41, 42 and 43 at pgs 26-28

(iv) Inter American Court of Human Rights judgments:

- Rudolph Baptiste v Grenada, [Report No 38/00 of the Inter-American Commission on Human Rights, April 13, 2000] paras 23, 64, 74-97

- Downer, Alphonso Tracey & Others v Jamaica [Report no.41/00 of the Inter-American Commission on Human Rights, dated 13 April 2000], paras 169, 194-209

- Michael Edwards, [Case 12.068], Omar Hall [Case 12.086], Brisn Schrorer And Jeronimo Bowleg v. The Bahamas, [Report No 48/01, April 4, 2001], paras 109-110 and 130-153

- Dave Sewell v. Jamaica, Case 12.347, [Report No.76/02, dated 27 January 2002], paras 79, 88-93

- Dacosta Cadogan v. Barbados [Series C No.204, Inter-American Court of Human Rights (IACrtHR) Judgement of September 24, 2009], paras 41-58

(v) Decisions of the United Nations Human Rights Committee

- Thompson v. St.Vincent and Grenadines (Communication No. 806/1998, CCPR/C/70/D/806/1998, 12/05/2000), para 3.1 at pgs 2-3 and para 8.2 at pg 7

- Pagdayawon Rolando v.Philippines [Communication No.1110/2002, UN Doc.CCPR/C/82/D/1110/2002, 8th December, 2002], para 3.1 at pg 4 and para 5.2 at pg 7

43. It is further argued that the Constitution permits deprivation of life, subject to observance of procedure such as pre-sentence hearing - giving right to the accused person to be heard on the question of sentence, which is a salutory condition for a fair trial. Further, the sentencing of accused must be individualised and ought to depend on facts of each

case. The Courts are obliged to consider the aggravating and mitigating factors associated with the offence as well as the offender. The offenders are of what circumstances, whether young or old, sick or mentally infirm, socially or economically disadvantaged or acting under duress or pressure, are relevant factors for determining the punishment to be imposed. On account of standardised, mandatory death penalty provided by Section 31-A of the NDPS Act, these factors would be rendered irrelevant. In a given case, the person may be a drug carrier, in another, an intermediary or the organiser of the crime. They cannot be pulled together so as to apply the standardised, mandatory death penalty sentence merely because he happens to be a repeat offender of the specified activities and dealing in stated quantity of the drugs. As a result of mandatory death penalty under Section 31-A, the Court is not required to assign any reason, much less special reasons, for awarding capital punishment which ought to apply only in rarest of rare cases. The provision such as Section 31-A renders the mandate under Section 235 (2) and Section 354 (3) of the Criminal Procedure Code, which apply to all other cases under the ordinary law, as well as other crimes under the NDPS Act as otiose. As a matter of fact, the possibility of enhanced punishment for repeat offenders is already provided for in the form of Section 31 of the NDPS Act. It is not as if the sentence provided in

Section 31 of the NDPS Act for repeat offenders may not be sufficient, or subserve the object sought to be achieved by the said Act.

44. It is further argued that the remedy of review of death sentence by the superior Court is completely snapped by virtue of Section 31-A of the Act, as the enquiry to be made by the superior Court would be limited to the finding of guilt recorded by the subordinate Court. If the superior Court were to affirm that finding, then, it would have no option but to confirm the mandatory death penalty awarded by the subordinate Court. Thus, neither the trial Court nor the superior Court has any judicial discretion to consider whether awarding death penalty in the facts and circumstances of the case after giving due weightage to aggravating and mitigating factors associated with the offence as well as the offender would be warranted at all or otherwise.

45. To buttress the above submission, the learned counsel for the petitioners relied on the following decisions:-

Rameshbhai C. Rathod v. State of Gujarat, reported in (2009) 5 SCC 740 – *para 106;* ***Jagmohan Singh*** (supra) – *paras 24 and 26;* ***Santa Singh v. State of Punjab***, reported in (1976) 4 SCC 190 – *paras 2 to 4, 6 and 7;* ***Rajendra Prasad*** (supra) – *paras 3, 5, 10 and 13;* ***Bachan Singh***

(supra) – *paras 160, 166, 197 and 209;* ***Mithu v. State of Punjab***, reported in (1983) 2 SCC 277 – *paras 1 to 3, 5 to 9, 11 to 13, 15 to 18, 24 and 25;* ***Allauddin Mian & Ors. v. State of Bihar***, reported in (1989) 3 SCC 5 – *paras 9 and 10;* ***Jumman Khan v. State of U.P.***, reported in (1991) 1 SCC 752 – *para 7;* and ***Santosh Kumar Satishbhushan Biriyar v. State of Maharashtra***, reported in (2009) 6 SCC 498 – *para 138.*

46. The respondents, however, would contend that there are sufficient procedural safeguards in the Criminal Procedure Code, and the death penalty, *per se*, does not violate Article 21 of the Constitution at all. Instead, the said Section 31-A of the NDPS Act specifies the requirement of procedure due process. According to the respondents, the argument of the petitioners regarding non-compliance of certain procedure is essentially in respect of substantive due process, which is not part of our Constitution. Moreover, it has been repeatedly held by the Apex Court that death penalty, *per se*, under Section 31-A does not inflict a cruel and unusual punishment, nor does it degrade or lower the dignity of the individual.

47. Having given thoughtful consideration, it appears that the abovesaid contention regarding Section 31A of the NDPS Act being

violative of Article 21 of the Constitution pressed into service on behalf of the petitioners deserves acceptance. In the case of ***Mithu***, the provision of Penal Code containing similar standardised, mandatory death penalty was put in issue. The validity of Section 303 of the Indian Penal Code was challenged, inter alia, being violative of Article 21 of the Constitution. Even in that case, the argument was that Section 303 creates an absolute liability in ignorance of several important aspects of cases which attracts the application of that section and all questions which are bound to arise under it. The sum and substance of the argument was that the provision contained in Section 303 was wholly unreasonable and arbitrary, and thereby, it violated Article 21 of the Constitution, which affords the guarantee that no person shall be deprived of his right to life and personal liberty, except in accordance with the procedure established by law. The Court noted that, since the procedure by which Section 303 authorised the deprivation of life was unfair and unjust, the section was unconstitutional. For recording this opinion, the Court adverted to the development of law as expounded in ***Maneka Gandhi's case*** (supra). The larger Bench (7 Judges) of the Apex Court has held that a statute, which merely prescribes "some kind of procedure" for depriving a person of his life and liberty, cannot ever meet the requirements of Article 21. Instead, the procedure prescribed

by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The Court also adverted to the dictum in ***Sunil Batra v. Delhi Administration,*** reported in (1978) 4 SCC 494, which had considered the question as to whether a person awaiting death sentence can be kept in solitary confinement. In that decision, it was noted that, though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions in the ***Banks' Nationalisation Case*** (supra) and ***Maneka Gandhi*** (supra). The Court also referred to the dictum in ***Bachan Singh*** (supra), which upheld the constitutional validity of the death penalty. It proceeded to hold that these decisions have expanded the scope of Article 21 in a significant way, and it is now too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Courts to follow it; that it is for the Legislature to provide the punishment and for the Courts to impose it. The Court, in paragraph 6, observed thus:-

> "6. ...... But these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.........."

48. In the context of the stand taken by the respondents in that case that the ratio of ***Bachan Singh*** would apply; and the question as regards validity of Section 303 must be treated as concluded by that decision, the Court noted that the same suffered from two defects: firstly, because it is founded on misunderstanding of the decision in ***Bachan Singh***, and secondly, there was an essential distinction between the provisions of Sections 302 and 303. The Court went on to observe that the majority decision in ***Bachan Singh*** did not lay down any abstract proposition that "death sentence is constitutional", that is to say, that "it is permissible under the Constitution to provide for the (mandatory) sentence of death". Instead, the question which arose for consideration in ***Bachan Singh*** was: whether Section 302 of the Indian Penal Code, which provides for the sentence of death as one of the two alternative sentences is valid? While answering the said issue, the Court opined that the majority in ***Bachan Singh***'s case concluded that Section 302 of I.P.C. is valid for three main reasons: firstly, that the death sentence provided for by Section 302 "is an alternative" to the sentence of life imprisonment; secondly, that special reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled, under Section 235 (2) of the Code of Criminal Procedure, to be heard on the question of sentence. The Court

then noticed that the last of these three reasons becomes relevant, only because of the first of these reasons. The Court re-stated that it is because the Court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence; and, if the law provides a mandatory sentence of death, neither Section 235 (2) nor Section 354 (3) of the Code of Criminal Procedure can possibly come into play. For, the Court can have no option, except to impose the sentence of death. In such a situation, it would be meaningless to hear the accused on the question of sentence, and it becomes superfluous to state the reasons for imposing the sentence of death. In paragraph 7 of the reported decision, the Court opined as follows:-

> "The ratio of ***Bachan Singh***, therefore, is that, death sentence is Constitutional if it is prescribed as an alternative sentence for the offence of murder *and* if the normal sentence prescribed by law for murder is imprisonment for life." (emphasis supplied)

49. Having explained the ratio of ***Bachan Singh***'s case, in ***Mithu***'s case, the Constitution Bench opined that there was a fundamental distinction between the provisions of Sections 302 and 303 of the Code; and for which reason, the ratio of ***Bachan Singh*** will not

govern the question as regards the validity of Section 303, whereas the validity of Section 303 was *res integra.*

50. Having said this, the Court, in paragraph 9, proceeded to articulate the questions that would arise for its consideration. Paragraph 9 reads thus:-

> "9. The question which We had posed for our consideration at the beginning of this judgment was somewhat broad. In the light of the aforesaid discussion, that question narrows itself to a consideration of certain specific issues. The first and foremost issue which arises specifically for our consideration is whether there is any intelligible basis for giving differential treatment to an accused who commits the offence of murder whilst under a sentence of life imprisonment. Can he be put in a special class or category as compared with others who are found guilty of murder and be subjected to hostile treatment by making it obligatory upon the court to sentence him to death? In other words, is there a valid basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment, separately from those who commit murders whilst they are not under the sentence of life imprisonment, for the purpose of making the sentence of death obligatory in the case of the former and optional in the case of the latter? Is there any nexus between such discrimination and the object of the impugned statute? These questions stem principally from the position that Section 303 makes the sentence of death mandatory. That position raises certain side issues which are equally important. Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the Court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?" (emphasis supplied)

51. Accordingly, the Court, in the first place, proceeded to analyse as to whether there is any rational justification for making a distinction in the matter of punishment between persons who commit

murders while they are under the sentence of life imprisonment as distinguished from those who commit murders while they are not under the sentence of life imprisonment. The Court opined that the test of reasonableness of classification was not fulfilled. As a result, it held that it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness.

52. One of the crucial facet which is relevant for our purpose that weighed with the Court, while answering the controversy before it (highlighted portion in paragraph 9 of the reported decision as reproduced above), as can be discerned from paragraph 12 of this reported decision, is that, it held that the provision, which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed, and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. This is not a casual observation made by the Court or in the nature of *obiter dicta*. The statement of law that can be culled out from this exposition is that a provision of law, which takes away the judicial discretion for sentencing the convict after reckoning aggravating and mitigating circumstances in which the offence was committed and of the offender as well,

particularly in a matter of life and death, would necessarily be harsh, unjust and unfair. In other words, it would violate the guarantee provided in Article 21 of the Constitution that the procedure established by law must be a just and fair procedure. In the same paragraph, the Court noted that the measure of punishment for an offence is not afforded by the label which that offence bears. But the gravity of the offence furnishes the guidelines for punishment, and one cannot determine how grave the offence, without having regard to the circumstances in which it was committed, its motivation and its repercussions. The Court opined that the Legislature cannot make relevant circumstances irrelevant, deprive the Courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. It also held that equity and good conscience are the hallmarks of justice. This statement of law is still holding the field. At the end of paragraph 12, the Court opined as under:-

> "12. ....The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it

> compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

. Again in paragraph 16, the Court opined thus:-

> "16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each would make general standards either meaningless 'boiler plate' or a statement of the obvious...." Dennis Councle Mcgautha v. State of California, 28 L. Ed. 711. As observed by Palekar J., who spoke for a Constitution Bench in Jagmohan Singh v. State of U.P. : [SCC para 26, p.35: SCC (Cri) p.184]
>
> > The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.... The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused." (emphasis supplied)

53. The Court went on to observe, in paragraph 18, that the convict must get an opportunity to show cause why he should not be sentenced to death. And on accepting that plea, the Court would be relieved from its obligation to record special reasons for awarding death sentence. Further, deprivation of these rights and safeguards will inevitably result in injustice and harsh, arbitrary and unjust.

54. Be that as it may, the observation in paragraph 23 leaves no manner of doubt that besides the question as to whether Section 303 bears any nexus with the object of the statute for imposing of a mandatory sentence of death, which was relevant for testing the validity of the provision on the touchstone of Article 14 of the Constitution. The Constitution Bench struck down Section 303 also on the ground that it violated Article 21 of the Constitution, as it took away the wise and beneficent judicial discretion in a matter of life and death by providing for standardised, mandatory death penalty, without regard to the gravity of the offence or the circumstances in which the offence was committed by the offender.

55. While delivering separate but concurring opinion, Justice Chinnappa Reddy pithily observed as follows:-

> "23. Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune, with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened Constitution like ours. It particularly offends Article 21 and the new jurisprudence which has sprung around it ever since the Banks Nationalisation case freed it from the confines of Gopalan. After the Banks Nationalisation case, no article of the Constitution guaranteeing a Fundamental Right was to lead an isolated existence. Added nourishment was to be sought and added vigour was to be achieved by companionship. Beg, C.J., said it beautifully in Maneka Gandhi:
>
>> Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their

> waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, Which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual, and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

Maneka Gandhi carried Article 21 to nobler rights and made it the focal point round which must now revolve to advantage all claims to rights touching life and liberty. If Article 21 declared, "No person shall be deprived of his life or liberty except according to procedure established by law," the Court declared, without frill or flourish, in simple and absolute terms:

> The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary", (Chandrachud, J, as he then was).

The question whether Section 302 which provides for a sentence of death as an alternative penalty was constitutionally valid was raised in Bachan Singh. Bachan Singh sustained the validity of Section 302 because the sentence of imprisonment for life and not death was the normal punishment for murder, and the sentence of death was an alternative penalty to be resorted to in the most exceptional of cases and the discretion to impose or not to impose the sentence of death was given to the Judge. The ruthless rigour of the sentence of death, even as an alternative penalty, was thought to be tempered by the wide discretion given to the Judge. Judicial discretion was what prevented the outlawing of the sentence of death even as an alternative penalty for murder. Even so the Court took care to declare that it could only be imposed in the 'rarest of rare' cases.

25. Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord

> Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional." (emphasis supplied)

56. In the recent decision of the Apex Court in the case of ***Rameshbhai Rathod*** (supra), the Apex Court (bench of two Judges) in paragraph 106, re-stated the legal position as follows:-

> "106. Therefore fairness, justice and reasonableness which constitute the essence of guarantee of life and liberty epitomised in Article 21 of the Constitution also pervades the sentencing policy in Sections 235(2) and 354(3) of the Code. Those two provisions virtually assimilate the concept of "procedure established by law" within the meaning of Article 21 of the Constitution. Thus, a strict compliance with those provisions in the way it was interpreted in *Bachan Singh* having regard to the development of constitutional law by this Court, is a must before death sentence can be imposed."(emphasis supplied)

57. Relying on the dictum in paragraph 174 in ***Bachan Singh***'s case, it was argued on behalf the respondents that the quantum of punishment, including the question as to whether discretionary jurisdiction should be provided for considering the issue of sentence is a policy matter, which belongs to the sphere of legislation. It was argued that the death penalty prescribed in Section 31-A was in the nature of minimum sentence for the offences referred to in the said provision. If so, it was not open to the Court to disregard the said legislative intent. The argument, though attractive, is founded on misunderstanding of the ratio of ***Bachan Singh***'s case. The ratio of ***Bachan Singh***'s case has been restated in ***Mithu***'s case. Besides, the dictum in paragraphs 174

and 175 in ***Bachan Singh***'s case is in the context of the question considered as to whether it was possible to standardise the punishment, instead of leaving it to the judicial discretion. That question arose on the argument that the provisions containing alternative death penalty did not provide for any guidelines for the Court to be observed before awarding extreme penalty. In ***Jagmohan***'s case, the Constitution Bench addressed the said issue, and was of the opinion that standardisation of sentencing is wellnigh impossible. That opinion has been quoted with approval in ***Bachan Singh***'s case. In paragraph 172 in ***Bachan Singh***'s case, the Court further observed that criminal cases do not fall into set behaviouristic patterns. Even within a single-category offence, there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. The Court went on to observe that a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. The Court further observed that there is a real danger of such mechanical standardisation

degenerating into a bed of procrustean cruelty. Having said this, the Court, even in paragraph 174 of the same judgment on which emphasis was placed by the respondents, went on to observe that it was "sound legislative policy" of the Parliament of not providing for standardised mandatory punishment. This means that judicial discretion in sentencing in the matter of life and death is the hallmark of a just and fair procedure within the meaning of Article 21 of the Constitution. It is, therefore, difficult to agree with the submission of the respondents that the observation in this decision validates the provision providing for mandatory death penalty, such as Section 31-A of the NDPS Act. Suffice it to observe that the opinion in ***Bachan Singh***'s case, as understood in ***Mithu***'s case, is that equity and good conscience are the hallmarks of justice, and no discretion left to the Court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In other words, the use of wise and beneficent discretion by the Court in a matter of life and death after reckoning the circumstances in which the offence was committed and that of the offender is indispensable; and divesting the Court of the use of such discretion and scrutiny before pronouncing the preordained death sentence cannot but be regarded as harsh, unjust and unfair, thereby violative of the tenets of Article 21 of the Constitution. ***Bachan Singh***'s

case has quoted the opinion in ***Jagmohan***'s case with approval that impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is to be exercised by the judge judicially, after balancing all the aggravating and mitigating circumstances of the crime. The discretion is liable to be corrected by the superior Court. These are the safest possible safeguards for the accused guaranteed by Article 21 of the Constitution of India.

58. We may here usefully revisit the dictum in paragraph 209 of ***Bachan Singh***'s case (as extracted in paragraph 37 above), which sums up the opinion that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality and which ought not to be done, save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

59. As aforesaid, the opinion of ***Bachan Singh***, as understood in the subsequent decision of the Apex Court in ***Mithu***'s case, is the governing exposition to answer the argument of the respondents. *A priori*, neither the argument of standardisation nor sentencing being a

legislative policy matter, which exclusively belongs to the sphere of legislation or that the punishment specified in Section 31-A is in the nature of minimum sentence, can be countenanced to sustain the mandatory death penalty provision. As observed in ***Mithu***'s case, it is too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Courts to follow it; that it is for the Legislature to provide the punishment and for the Courts to impose it. Whereas, the mandate of Article 21 of the Constitution predicates that the last word on the question of justness and fairness of the procedure prescribed by law does not rest with the Legislature, but it is for the Courts to decide whether the prescription of mandatory death penalty by law depriving the person of his life and liberty is fair, just and reasonable.

60. As aforesaid, the legal position expounded in the case of ***Bachan Singh*** and ***Mithu*** is still holding the field. The deficiency regarding the fairness and reasonableness noticed by the Apex Court in the case of ***Mithu*** squarely apply to Section 31-A of the NDPS Act. Even in Section 31-A of the NDPS Act, there is no option to the Court, but to award preordained death penalty. The death penalty provided for is not an alternative sentence for the repeat offence of specified type. The sentencing under Section 31-A is standardised, mandatory death penalty,

and not individualised sentencing, after giving due weightage to the aggravating and mitigating factors associated with the offence and the offender. Further, even though the sentence provided under Section 31-A is of death penalty, the Court is not required to record special reasons, unlike the other crimes under the ordinary law or, for that matter, other offences under the provisions of the NDPS Act, as is required under Section 354(3) of the Code. Similarly, the pre-sentence hearing as required by Section 235(2) of the Criminal Procedure Code has been rendered irrelevant and an empty formality only in so far as the offence covered by Section 31 A of the NDPS Act. Notably, there is no express provision in the NDPS Act to override the mandate of Sections 235(2) and 354(3) of the Code. Indeed, Section 31-A is a *non-obstante* clause, but it is limited to Section 31 of the NDPS Act. It does not impact the procedure prescribed by the Code, much less the mandatory provision prescribing the procedure to be followed before pronouncing the sentence such as death penalty, epitomised in Article 21 of the Constitution, which implicitly guarantees judicial discretion in the matter of sentencing, keeping in mind the facts of each case concerning the circumstances in which the offence took place and also of the offender.

61. Suffice it to observe that the purport of Section 31-A of the NDPS Act, which provides for mandatory death penalty fails to fulfill the cardinal procedure and safeguards of legitimate exercise of judicial discretion for sentencing the convict after reckoning the aggravating and mitigating circumstances in which the offence was committed and of the offender. Considering the mandate of Section 31-A of the Act, it would necessarily follow that there would be no review of death sentence. In that event, the jurisdiction of the superior Court will be circumscribed only to examine the finding of guilt recorded against the convict, and nothing more. This has the inevitable effect of infracting the guarantee under Article 21 of the Constitution of India. It is common ground that, except the decision in the case of ***Mithu***, there is no other judgment of the Indian Court on the point of validity of a provision containing mandatory death penalty. We, therefore, do not think it necessary to dilate on the dictum of other authorities on the point under consideration.

62. The respondents would, however, argue that the enactment of the NDPS Act, and more particularly, Section 31-A, will have to be considered, keeping in mind the oft-repeated observations of the Supreme Court that narcotic offences cause a deleterious effect and deadly impact on the society as a whole; and that narcotic crimes were

more heinous than murder [see ***Union of India v. Kuldip Singh***, reported in 2004 (2) SCC 590, paragraphs 7 to 9 and 17; ***Union of India*** **v. Ramsingh** reported in (1999) 9 SCC 429, paragraphs 6 and 7; ***Intelligence Officer, NCB v. Sambhu Sonkar***, reported in (2001) 2 SCC 562, paragraph 9; ***Jasbir Singh v. Vipin Kumar Jaggi*** reported in AIR 2001 SC 2734. It was argued that death sentence under Section 31-A is provided for a second conviction, which is far less stringent than mandatory death sentence for narcotics in several countries such as Bangladesh, Indonesia, Malaysia, Pakistan, Singapore and Thailand. In those countries, mandatory death sentence is provided where the quantity of narcotics is far less than the quantity of narcotics provided for in Section 31-A of the Act.

63. There is no reason to doubt that the offences relating to narcotic drug or psychotropic substances are more heinous than culpable homicide. For, the latter affects only an individual, while the former affects and leaves its deleterious effect on the society, besides crippling the economy of the nation as well. At the same time, we cannot be oblivious of the scheme of the NDPS Act. It was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the

forfeiture of property derived from or used in illicit traffic in narcotics drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances, to which India was a party. Thus, it is an enactment to regulate and control the cultivation, production, manufacture, possession, transportation, import into India, export outside India and transshipment, of narcotic drugs and psychotropic substances, except for medical and scientific reasons. The Act, however, permits/authorises the specified activities through licence. It makes the activities of dealing in excessive quantity of drugs unlawful. The offences so committed may pertain to small quantity or greater than small quantity, but less than commercial quantity or commercial quantity, as the case may be. The quantity of drugs has been specified in the Act covered within the three sets of categories. The Act provides for structured punishment, depending on the quantity of drugs. The Act makes the attempt to commit offence as well as accessory to crime and aiding and abetting and criminal conspiracy punishable in the same manner as in the case of principal offence. Even preparation to commit certain offences is made punishable. Notably, Section 31 of the Act provides for enhanced penalty in respect of repeat crimes. For offences where the minimum penalties are prescribed, a Court can take into consideration factors that it may deem important as

well as additional factors enlisted in the statute. Suffice it to observe that the standardised mandatory death penalty specified in respect of cases covered under Section 31-A of the Act completely takes away the judicial discretion, nay, abridges the entire procedure for administration of criminal justice of weighing the aggravating and mitigating circumstances in which the offence was committed as well as that of the offender. Moreover, considering the cases covered by Section 31-A of engaging in production, manufacture, possession, transportation, import into India, export from India or transshipment, of narcotic drugs and psychotropic substances referred to in column (1) of the table contained therein and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance as specified in column (2) of the said table or of financing, directly or indirectly, any of the activities specified in clause (a) is made punishable with death. It is incomprehensible as to why the offences covered by Section 31-A of the NDPS Act cannot be suitably dealt with under the alternative enhanced punishment under Section 31 of the Act, which also applies to repeat offenders. As held in ***Mithu***'s case, it is too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Courts to follow it; that it is for the Legislature to provide the punishment and for the Courts to impose it. If the law made by the Legislature divests

the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and that of the offender, and without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. The fact that Section 31-A deals with specific cases for offences involving quantity which is equal to or more than the quantity indicated against the specified drugs or substances does not make the requirement of weighing the aggravating and mitigating circumstances of the offence and also of the offender, less relevant.

64. Our attention was also invited to mandatory death sentence provided in other statutes such as Section 27(3) of the Arms Act, 1957 for a first offence and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. That however, does not take the matter any further. In that, the legal position stated in ***Mithu***'s case is clearly attracted to Section 31A of the NDPS Act.

65. An attempt was made by the learned Additional Solicitor General to persuade us to hold that ***Mithu***'s case, essentially, dealt with the efficacy of Section 303 of Penal Code in contradistinction to the provision in Section 302 of the Penal Code. We do not think that the

opinion in ***Mithu***'s case is of such limited import. The judgment deals with the development of law, in view of the expansive requirements of Article 21, and opines that the decisions on the point have expanded the horizon of Article 21 in a significant way. The exposition in ***Mithu***'s case is, thus, not limited to the consequences arising from or flowing from Section 303 of the Penal Code alone, but also govern the requirements of Article 21 of the Constitution. Indeed, we may not agree with the argument of the petitioners that death penalty, *per se*, constitutes cruel, inhuman and degrading punishment. That argument is no more *res integra*, as the Apex Court has, time and again, negatived that argument.

66. Reliance was placed on Article 7 of the ICCPR, which provides that no one shall be subjected to cruel, inhuman or degrading punishment. That argument need not detain us, in view of the well-established position expounded by the Supreme Court that, as per the municipal law and the constitutional scheme as applicable in India, providing for death penalty is within the domain of the Legislature. Further, the International Covenants and judicial decisions cannot be the basis to overlook the express provision in the municipal law. Even the argument of the petitioners that the provisions of the International

Covenants are enforceable, *per se,* in India, will have to be negatived for the same reason. Further, the definition of expression "human rights" occurring in Section 2(d) of the Protection of Human Rights Act, 1993 would not take the matter any further. In that, it plainly provides that the rights embodied in the International Covenants and enforceable by Courts in India alone encompass the expression "human rights" within the meaning of Section 2(d) of that Act. As aforesaid, in matters of express provision in the Municipal law, the same shall prevail.

67. It is then contended that even if the Court were to convict and award death penalty, invariably, in India, the execution thereof does not take place within a reasonable time. That results in the accused suffering the agony of Death Row Syndrome. Moreover, in the NDPS Act, the suspension, remission or commutation of sentences awarded under the NDPS Act, including the death sentence awarded under Section 31-A of the Act, is forbidden. Relying on the exposition in ***Ediga Anamma v. State of Andhra Pradesh***, reported in (1974) 4 SCC 443, paragraph 15; ***T.V. Vatheeswaran v. State of Tamil Nadu***, reported in (1983) 2 SCC 68, paragraphs 10, 11 and 20; ***Triveniben v. State of Gujarat***, reported in (1988) 4 SCC 574, paragraph 2; and ***Catholic Commission for Justice and Peace in Zimbabve v. Attorney General &***

Ors., reported in (1993) 4 S.A. 2439, paragraphs 34 to 36, 49 to 57 and 120, it was contended that penalty provided in Section 31-A would subject the convicts to cruel and inhuman treatment and encroach upon protection accorded under Article 21 of the Constitution. In the first place, delay in execution of death penalty is essentially on account of the successive attempts made by the accused and his relatives by way of representation for commutation of the death penalty to life sentence. As commutation of sentence even in respect of death penalty awarded in respect of offence under the NDPS Act has been forbidden, there would be no occasion for delay in execution thereof. At any rate, this argument cannot be the basis to test the validity of the procedure prescribed by Section 31-A of the Act. In a given case, due to unreasonable and inexplicable delay in execution of death penalty awarded under Section 31-A of the NDPS Act whether it impinges upon any of the constitutional rights of the concerned convict is a matter to be addressed independently. We do not intend to traverse the said argument as it is not relevant to the point in issue. For, we are presently called upon to consider the question only of constitutional validity of Section 31-A of the Act being violative of Article 21 of the Constitution.

68. In the context of challenge that Section 31-A is violative of Article 21 of the Constitution, it was argued on behalf of the petitioners that the State has failed to discharge its burden that the impugned law does not impinge Article 21 of the Constitution. For the reasons already noticed, it is unnecessary to elaborate on this argument.

69. That takes us to the challenge to Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution. The argument is that the classification for the purpose of legislation has to be reasonable, in that (i) the distinction between persons covered by law and those left out of it be based on intelligible differentia and (ii) that differentia have a rational nexus to the object sought to be achieved by law. To buttress this submission, reliance is placed on the exposition of the Apex Court in the cases of ***D.S. Nakara v. State***, reported in (1983) 1 SCC 305, paragraphs 15 and 16; and ***E.P. Royappa v. State of Tamil Nadu***, reported in (1974) 4 SCC 3, para 85. According to the petitioners, the classification of repeat offenders covered by Section 31-A is arbitrary. Inasmuch as, Section 31-A of the NDPS Act deals with recidivism strictly. In cases where the offender has engaged himself in successive crimes, under other provisions of the NDPS Act, is already dealt with

under Section 31 of the Act. The penalty upon subsequent conviction extends to one half of the maximum term of imprisonment and one half of the maximum amount of fine for that offence. Whereas, the penalty under Section 31-A is death. According to the respondents, however, the classification made by Section 31-A between first-time offenders and repeat offenders is reasonable, based on intelligible differentia, and has a nexus with the object of the NDPS Act, viz., stricter control and deterrence in relation to narcotic crime – more heinous than murder and anti-social in nature. Further, the classification is also rational, given the nature of repeat offences covered by Section 31-A of the Act. Besides, the proportionality of punishment is a matter for Parliament to decide as policy, and the Courts cannot sit in substantive judgment over the Parliament's legislative determination of what punishment is appropriate. In that sense, there is no encroachment on the domain of the Judiciary, as is sought to be contended.

70. These arguments will have to be tested in the context of the sweep of Sections 31 and 31-A, respectively. Insofar as Section 31, it deals with persons who have been convicted of the commission of, or abetment to commit or abetment of, or criminal conspiracy to commit, any of the offences punishable under the NDPS Act is subsequently convicted of

the commission of, or attempt to commit or abetment or, criminal conspiracy to commit, an offence punishable under the same Act that the same amount of punishment shall be given for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one half of the maximum term of imprisonment and also be liable to fine, which shall extend to one half of the maximum amount of fine. Whereas, Section 31-A deals with the person who has been convicted of specified activities for offence punishable under Sections 19, 24 and 27-A and for offences involving commercial quantity of narcotic drugs or psychotropic substances is subsequently convicted of the commission for attempt to commit or abetment of, or criminal conspiracy to commit an offence referred to in clause (a) in respect of narcotic drugs or psychotropic substances specified in Column (1) of the table in the said section and involving quantity which is equal to or more than the quantity indicated against each such drug or substance as specified in column (2) of the table or for financing, directly or indirectly, with regard to activities specified in clause (a) is punishable with death penalty. The classification is therefore, based on intelligible differentia. For, in the latter provision, a person, besides being found to be involved in specified activities, must in the past also be convicted in respect of commercial quantity of the narcotic drugs or psychotropic substances.

It is not *simpliciter* a repeat offender, as is the case under Section 31 of the Act. The legislative intent is not only to structure the penalty in the context of the different offences under the Act, but also to introduce stringent provision for controlling and regulating the operations relating to narcotic drugs and psychotropic substances. The fact that Section 31-A is limited to offences for embezzlement of opium by cultivator (Section 19) or for external dealings in narcotic drugs or psychotropic substances in contravention of Section 12 (Section 24) or for financing illicit traffic and harbouring offenders (Section 27A) and not other offences, does not take the matter any further. The Legislature has thought it appropriate to introduce stringent provisions to control the activities referred to in Sections 19, 24 and 27-A of the Act, as the case may be, which are the root cause for the unabated trade in narcotic drugs and psychotropic substances. Suffice it to observe that there is not only intelligible differentia but the differentia has a rational nexus to the object sought to be achieved by the law. It cannot be overlooked that the quantity of drugs specified in column (2) of the table under Section 31-A for the repeat offence is in multiples of the commercial quantity specified by the Act. That pre-supposes that the offender is incorrigible and is unabatedly indulging in the prohibited activities, which would have deleterious effect on the society as a whole. The fact remains that the

sweep of Section 31-A of the Act has been limited to the crimes referred to in clauses (a) and (b) of sub-section (1) thereof.

71. It was further argued that the death penalty provided in Section 31-A for crimes in relation to the drugs quantity specified in column (2) of the table in the said section is disproportionate. On the doctrine of proportionality which is implicit in Articles 14 and 21 of the Constitution, it will necessarily follow that Section 31-A is *ultra vires*. While answering the challenge of the petitioners in the context of Article 14 of the Constitution, we have already opined that the distinction between persons covered by law (Section 31A) and those left out of it is based on an intelligible differentia; and that differentia has a rational nexus to the object sought to be achieved by law. For the same reasons, we will have to negative the argument that the death penalty provided in Section 31-A of the Act is disproportionate as such.

72. No doubt, the petitioners have pressed into service the decisions in the cases of ***Om Kumar and Others v. Union of India*** [2000 (7) SCALE 524, paras 30-31 at pg 227, ***Union of India and Another v. G.Ganayutham (Dead) by L.Rs. [(***1997) 7 SCC 463, para 16 at pg 474], ***R v.Oakes,*** [(1986) 1 S.C.R. 103], para 70, at pg 43, ***R v. Smith*** [(1987) 1

S.C.R. 1045, paras 55-58 at pgs 35-37, ***S. v. Makwanyane,*** [Case no.CCT/3/94, Date of Judgment 06/06/1995 (Constitutional Court of South Africa), para 104 at pg 69.

73. However, as aforesaid, the persons engaged in the offence covered by Section 31-A ought to be proceeded sternly. In that, they have been already convicted for the specified offences under Sections 19, 24 and 27-A and for offences involving commercial quantity of narcotic drugs or psychotropic substances, and have been subsequently convicted for activities referred to in clauses (a) and (b) of sub-section (1) of Section 31-A. The offending activities are in respect of quantity of drugs which are in multiples of the commercial quantity specified in the Act (except in respect of drug at item No.(iv) in table given in Section 31-A).

74**.** It will be useful to reproduce the table describing the drug, definition, commercial quantity and quantity specified in Section 31-A qua the stated drug. The same discloses that the offence under Section 31-A is attracted in relation to quantity of drugs which are in multiples of the commercial quantity specified by the Act (except the item No.iv). The table reads thus:-

Entry	Drug	Definition	Commercial Quantity S.2(viia)	S.31A Quantity
(i)	Opium	2 (xv) a) coagulated juice of the opium poppy; and b) any mixture; with or without any neutral material of the coagulated juice of opium poppy	2.5 kg	10 kg
(ii)	Morphine	2(xvi) opium derivative means- (c) phenenthrene alkaloids, namely morphine, codeine, thebaine and their salts; (e) all preparations containing more than 0.2% of morphine or containing diacetylmorphine	250 gms	1 kg
(iii)	Heroin	2 (xvi) opium derivative means- (d) diacetylmorphine, alkaloid also known as diamorphine or heroin and its salts; and (e) all preparations containing more than 0.2% of morphine or containing diacetylmorphine	250 gms	1 kg
(iv)	Codeine	2(xvi) opium derivative means- (c) phenenthrene alkaloids, namely morphine, codeine, thebaine and their salts;	1 kg	1 kg
(v)	Thebaine	2(xvi) opium derivative means- (c) phenenthrene alkaloids, namely morphine, codeine, thebaine and their salts;	100 gm	1 kg
(vi)	Cocaine	2 (v) coca derivative means- (c) cocaine, that is, methylester or benzoyl-ecgonine and its salts and (d) all preparations containing more than 0.1% cocaine	100 gm	500 gm
(vii)	Hashish	2(iii) cannabis hemp means- (a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish; (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;	1 kg	20 kg

(viii)	Any mixture with or without any neutral material of any of the above drugs			Lesser of the quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture
(ix)	LSD	2 (xxiii) psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;	0.1 gm	500 gms
(x)	THC	2 (xxiii) psychotropic substance means any substance, natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;	50 gms	500 gms
(xi)	Metham-phetamine	2(xxiii) psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;	50 gms	1500 gms
(xii)	Metha-qualone	2(xxiii) psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;	500 gms	1500 gms
(xiii)	Ampheta-mine	2(xxiii) psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;	50 gms	1500 gms
(xiv)	Salts and preparations of the psychotropic substances mentioned above			1500 gms

75. Considering the gravity of the said offence and the repeated involvement of the person in relation to specified offence under the NDPS Act, the argument that the punishment of death penalty is disproportionate cannot be countenanced, having regard to the oft-repeated observations of the Apex Court that offence relating to narcotic drug or psychotropic substance is even more heinous than culpable homicide, because the latter affects only an individual, while the former affects and leaves its deleterious effect on the society, besides crippling the economy of the nation as well.

76. The only argument that needs some attention is of quantity of drugs specified in column (2) of the table, in particular with regard to drug at serial No. (iv), i.e., Codeine. It is common ground that the commercial quantity of the said drug, Codeine, is specified as 1 kg. Even in Section 31-A of the Act, the quantity specified against the said drug is also 1 kg. To re-assure ourselves that, unlike in other cases, the drug quantity specified in column (2) to the table is in multiples of the commercial quantity, we perused the Government publication of the Act. Even there, the quantity against drug at serial No. (iv) is mentioned as "1 kg.". In this context, it was argued by the counsel for the petitioners that it reflects the casual and negligent approach of the Legislature in drafting and enacting Section 31-A of the Act. Besides, it was argued

that, as per the Notification issued by the Ministry of Finance, Department of Revenue, dated 18th November, 2009, it may result in a piquant situation in that, admittedly, the drug Codeine is a mixture. By definition 2(xx), the drugs listed in the table to Section 31-A would include mixture or preparation. As a result of the Notification dated 18th November, 2009, the entire mixture or solution will have to be reckoned, and not just its pure drug content.

77. We may place on record the fair stand taken by the learned Additional Solicitor General that, insofar as drug at serial No.(iv), i.e., Codeine, as the quantity, 1 kg., specified in column (2) in the table given under Section 31-A, the content of the narcotic drug or psychotropic substance be taken into consideration, and not the weight of the mixture as such. This, however, would be in conflict with the Notification dated 18th November, 2009. Even if we were to accept this argument of the petitioners, it would result in striking down only entry (iv) in the table pertaining to drug Codeine. However, what is relevant to note is that, when Section 31-A of the Act was introduced by amendment of 1989, subsequent thereto, Notification S.O. 101E dated 19th October, 2001 came to be issued. On the basis of the said Notification, the challenge was considered by the Apex Court in ***E. Micheal Raj v. Intelligence***

Officer, Narcotic Control Bureau, reported in (2008) 5 SCC 161. The position has now been altered by Notification dated 18th November, 2009. At any rate, this argument cannot be the basis to strike down the provision of Section 31-A, much less as a whole. Suffice it to observe that the challenge of the petitioners regarding the validity of Section 31-A, being violative of Article 14 of the Constitution of India on the stated grounds, is devoid of merits.

78. The argument of the petitioners that the legislative policy of reducing illicit drugs must be balanced with constitutional obligation to protect the right to life of persons accused of drug crimes ought to be answered, keeping in mind the principle underlying the dictum of the Apex Court in ***Rajendra Prasad***'s case that the offences which affect the social security, the fundamental rights of the defendant become a deadly instrument, whereby many are wiped out and terror strikes community life. Then he reasonably forfeits his fundamental rights and takes leave of life under the law (see paragraph 60 of the reported decision). The Court further observed, if such accused is prosecuted and convicted, he may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain. The fact that if a person engages in repeated activities involving drug quantity of less than specified in column (2) of the table given in Section 31-A of the Act is

left out, it does not come in the way of proceeding against a person, who has indulged in activities concerning quantity of drugs or substances, which is equal to or more than the quantity indicated against the concerned drugs or substances as specified in column (2) of the table in Section 31-A of the Act. It is also possible that the person has acted against the licence or without the licence. The argument that such activity is not abhorrent, *per se*, or that the drugs and psychotropic substances serve genuine medical and scientific needs of the community is also totally misplaced. That does not mean that "in a given case" keeping in mind the circumstances in which the offence has been committed and that of the offender, the stated activity should be visited with lighter punishment or only enhanced sentence, particularly when it is a case of repeat offence under the NDPS Act in relation to quantity of drugs equal to or more than the quantity specified in column (2) of the table.

79. The argument that the drugs do not involve taking of life also does not commend to us. We are more than bound by the dictum of the Apex Court that offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide.

80. According to the petitioners, the offence falling under Section 31-A of the NDPS Act, by no stretch of imagination, meets the threshold of most serious crime or the parameter specified by the Apex Court of rarest of rare cases. Reliance was placed on Article 6, paragraph 2, of the ICCPR, which stipulates that the State-Parties may retain the death penalty to the most serious crime. As per the International Human Rights' norms, the phrase "most serious crime" refers to crime involving intentional taking of life. For that, reliance was placed on materials, including pertaining to the International Conventions. However, it is well-established position that the International Conventions cannot be the governing law. It is the Municipal law which ought to prevail. Further, the Legislature is competent to provide for the extreme death penalty within the framework of our Constitution. As has been observed by the Apex Court that, even in respect of white collar criminals, who indulge in various activities solely for personal monetary and property gain, in appropriate cases, they deserve capital punishment as the law now stand both as policy and putting an end to an active mind indulging in nefarious activities. Such death penalty would stand the test of social justice for the protection and survival of the society. The activities falling under the NDPS Act cannot but jeopardise the societal fabric. This crime may be less shocking than

the crime of murder, but it is more heinous than the latter. The offence under Section 31-A, therefore, legitimately fits into the legislative scheme of structuring the punishments for different offences, including for the rarest of rare cases. The Parliament is competent to provide for extreme death penalty for specified offences. Suffice it to observe that the challenge regarding the validity of Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution on the above-mentioned arguments, cannot be countenanced. Whereas, Section 31-A is a provision which makes distinction between persons covered by the law and those left out of it on an intelligible differentia and that differentia has a rational nexus to the object sought to be achieved by law.

81. That takes us to the last aspect as to the nature of relief to be granted. We have rejected the challenge to Section 31-A of the NDPS Act, being violative of Article 14 of the Constitution. However, as we find merits in the challenge to the said provision, being violative of Article 21 of the Constitution, as it provides for mandatory death penalty, the appropriate relief would be to declare Section 31-A as unconstitutional and *void ab initio*. Upon such declaration, the said provision would cease to be on the statute book. As a necessary consequence thereof, the decision of the trial Court of convicting the

petitioner in the second petition for offence under Section 31-A of the NDPS Act and awarding death penalty therefor would become *non est* in the eyes of law, in spite of the finding of guilt recorded by the trial Court against the petitioner for having indulged in activities covered by Section 31-A of the Act. Concededly, the activities of the petitioner-convict would also constitute offence under other provisions of the Act and could be proceeded as per law, including for imposing enhanced punishment for offences after previous conviction. We are conscious of the fact that we should not be concerned about the consequences of the declaration.

82. However, we may have to consider the alternative argument canvassed on behalf of the respondents that the provision contained in Section 31-A be read down to be a discretionary death sentence. That is possible by reading the words "shall be punishable with death" at the end of Section 31-A as "may be punishable with death". In other words, by way of alternative argument, the respondents submit that the expression 'shall' occurring in Section 31-A be read as 'may', so that the provision is saved from being unconstitutional and in which case, the Court can retain its sentencing discretion not to award the death sentence in appropriate cases, and instead, award sentence of enhanced punishment for offences after previous conviction under Section 31 of the NDPS Act. In other words, upon such construction, there would be alternative

punishment for the repeat offences covered by Section 31-A of the NDPS Act. To buttress this contention, it is further argued that it may be open to the Court, which has framed charge under Section 31-A (a major punishment), to proceed to impose punishment under Section 31 (lesser punishment than death penalty). Reliance is placed on the decision of the Apex Court in **State of Maharashtra v. Vinayak Tukaram Utekar** reported in 1997 Cri.L.J. 3988, paragraphs 33 to 36.

83. The petitioners, however, would contend that the Court having held that Section 31-A is unconstitutional, ought to strike it down, more so because the argument of reading down Section 31-A to save it from being declared unconstitutional is unavailable because of the language of Section 31-A itself. For, the said provision uses expression 'shall' which pre-supposes that it is a mandatory provision, and the Legislature's intention to make it mandatory cannot be lightly brushed aside by the Court. Further, the impugned section does not provide for a substitute to the death penalty. Thus, if the Court were to consider the expression 'shall' as 'may', it will have to add the penalty of life imprisonment or its equivalent into the impugned section. That is plainly impermissible. The petitioners further contend that, as Section 31-A opens with the *non-obstante* clause, upon accepting the alternative plea of the respondents of reading down the said provision, it would result in a

clumsy and distorted interpretation of the said provision. That cannot be countenanced in view of the exposition of the Apex Court in ***Delhi Transport Corporation v. DTC Mazdoor Congress***, reported in (1991) Supp (1) SCC 600, paras 120 and 249. According to the petitioners, instead of reading down Section 31-A as suggested by the respondents, the appropriate course would be to remand the cases against the concerned accused convicted and sentenced under Section 31-A to the trial Court for re-hearing only on the question of sentence under Section 31 of the NDPS Act.

84. Having considered the alternative argument, we find merits in the submission of the respondents that the provision contained in Section 31A can be treated as discretionary provision, instead of mandatory death penalty. In that, the expression 'shall' be read as 'may'. That would save the provision from being unconstitutional and such a course would be legitimate. On such interpretation, the Court can exercise its judicial discretion to impose punishment of death penalty depending on the facts and circumstances of each case. Inasmuch as, in spite of finding of guilt with regard to the activities indulged by the concerned accused covered by Section 31-A of the Act, if the Court were to be convinced that the enhanced punishment specified in Section 31 for offences after previous conviction would subserve the ends of justice, can proceed to award

sentence against the concerned accused under that provision. On the other hand, if the Court were to be of the opinion that the death penalty would be the appropriate penalty to be imposed in the facts and circumstances of a given case, may proceed to impose such punishment, as is provided under Section 31-A of the Act. Indeed, that judicial discretion will have to be exercised, keeping in mind the settled parameters for imposing death penalty.

85. The moot question is: whether it is possible for us to consider the expression ‘shall’ appearing in Section 31-A as ‘may’, even though the legislative intent was to make the said provision mandatory and provide for standardised death penalty for the offence covered by Section 31-A? We have already held that considering the tenets of Article 21 of the Constitution, such a provision cannot be sustained. Therefore, the provision will have to be read in conformity with the requirements of Article 21 of the Constitution. Only if it were to be a directory provision, the exercise of judicial discretion for awarding death penalty would be available, and not otherwise. Thus, the provision would be constitutional if alternative sentence to death penalty is also in place. As aforesaid, Section 31 already covers the field to punish the accused, who has been subsequently convicted of the stated offences. Section 31-A, however, deals with such accused, who are otherwise covered by Section 31 of the

NDPS Act, but have indulged in specified activities in relation to huge quantity of narcotic drugs / psychotropic substances, which is in multiples of the commercial quantity specified by the Act for the same narcotic drugs / psychotropic substances. Notably, it is common ground that the accused, who engage themselves in commission of offences otherwise covered by Section 31-A of the NDPS Act, if are in a position to persuade the Court that the death penalty provided for by Section 31-A is avoidable or not appropriate in their case, considering the circumstances in which the offence was committed, as also of the offender, they can be still proceeded with under Section 31 of the Act. But, if the Court is not convinced with the said stand of the accused, it must be open to the Court to impose death penalty provided for in Section 31-A by recording special reasons therefor. We have, therefore, no hesitation in accepting the alternative argument of the respondents that the provisions contained in Section 31-A of the NDPS Act providing for mandatory death penalty be, instead, read as directory to save the same from being unconstitutional.

86. The argument of the petitioners is, however, that the language of Section 31-A would not permit such interpretation. There is no merit in this submission. Indeed, the section opens with the phrase "Notwithstanding anything contained in Section 31", which pre-supposes

that, if the offence is covered by Section 31-A of the Act, the regime provided in Section 31 will be inapplicable. However, the effect of this *non-obstante* clause is to empower the Court to impose death penalty in respect of offences specified in Section 31-A, even though the same may be in the nature of repeat offences, and could ordinarily be dealt with under Section 31 of the Act. Thus understood, reading down the expression 'shall' in Section 31-A as aforesaid, it would not and cannot be an impediment to proceed against the accused guilty of offence specified by Section 31-A of the Act by imposing punishment specified in Section 31 of the Act, instead of death penalty. Whereas, if the Court is disinclined to accept the explanation or the defence of the accused regarding the circumstances in which the offence was committed or of the offender, it would be competent to impose death penalty as provided in Section 31-A of the Act. That could be done, notwithstanding the punishment provided for the stated offence also under Section 31 of the Act.

87. Indeed, Section 31 of the Act does not provide for punishment of life sentence, which is ordinarily treated as alternative to death penalty. However, as is noticed from Section 31, for the successive conviction for the specified offence, the same is made punishable with rigorous imprisonment, which may extend to one half of the maximum term of

imprisonment and also liable to fine, which shall extend to one half of the maximum amount of fine. In a given case, the punishment can be up to 30 years. As has been noticed, in view of Section 32-A of the NDPS Act, such punishment is forbidden from being suspended, remitted or commuted. If so, even the enhanced punishment, if awarded under Section 31 of the Act, would act as a deterrent, and can deal sternly with the offender. *Stricto senso*, there is no law which stipulates that only life sentence can be an alternative to death sentence. Moreover, even Section 354(3) of the Code refers to the alternative punishment not only with imprisonment for life but also "imprisonment for a term of years". Further, imposition of punishment of actual imprisonment, which is above fourteen years or up to 30 years, and which cannot be suspended, remitted or commuted, is no less than life sentence. In that, under ordinary law, the life sentence is amenable to remission or commutation. In which case, the convict can be considered for being released on completion of fourteen years' sentence, including remission period. Thus understood, the decision of the Apex Court in the case of ***Delhi Transport Corporation*** (supra), pressed into service by the petitioners, will be of no avail.

88. Suffice it to observe that there is no impediment in accepting the alternative argument of the respondents that Section 31-A

of the NDPS Act may be construed as directory; and death penalty specified in Section 31-A of the NDPS Act may be considered as alternative punishment with regard to offences covered by Section 31-A of the Act, if the normal sentence prescribed by Section 31 of the Act for the stated offences is found to be inadequate or would not meet the ends of justice.

89. To conclude, we hold that Section 31-A of the NDPS Act is violative of Article 21 of the Constitution of India, as it provides for mandatory death penalty. We, however, reject the challenge to the said provision on the stated grounds, being violative of Article 14 of the Constitution of India. Further, instead of declaring Section 31-A as unconstitutional, and *void ab initio*, we accede to the alternative argument of the respondents that the said provision be construed as directory by reading down the expression "shall be punishable with death" as "may be punishable with death" in relation to the offences covered under Section 31-A of the Act. Thus, the Court will have discretion to impose punishment specified in Section 31 of the Act for offences covered by Section 31-A of the Act. But, in appropriate cases, the Court can award

death penalty for the offences covered by Section 31-A, upon recording 1reasons therefor.

90. While parting, we may place on record our deep sense of appreciation for the able assistance given by the counsel appearing for the parties.

91. For the reasons stated hereinabove, both the petitions are partly allowed on the above terms, with no order as to costs.

A.P. BHANGALE, J. **A.M. KHANWILKAR, J.**