Supreme Court of India
Bachan Singh vs State Of Punjab on 9 May, 1980
Equivalent citations: AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145
Bench: Y Chandrachud, A Gupta, N Untwalia, P Bhagwati, R Sarkaria
JUDGMENT (for himself and on behalf of Chandrachud, C. I. and A.C. Gupta and N. L. Untwalia, JJ.) (Majority view)

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

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

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

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

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

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

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

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

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

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

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

(iii) In Rajendra Prasad, the plurality observed:

It is constitutionally permissible to swing a criminal out of corporal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6).

This view again, according to Kailsam, J., is inconsistent with the law laid down by the Constitution Bench in Jagmohan, wherein it was held that deprivation of life is constitutionally permissible if that is done according to "procedure established by law.

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

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

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

(v) In Rajendra Prasad, the majority has held that: "such extraordinary grounds alone constitutionally qualify as special reasons as leave no option to the court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing or pathetic the situation, unless the inherent testimony oozing from

that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a bloodthirsty tiger, be has to emit his terrestrial tenancy.

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

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

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

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

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

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

11. At the outset, Shri R. K. Garg submitted with some vehemence and persistence, that Jagmohan's case needs reconsideration by a larger Bench if not by the Full Court. Reconsideration of Jagmohan, according to the learned Counsel, is necessitated because of subsequent events and changes in law.

Firstly, it is pointed out that when Jagmohan was decided in 1972, the then extant CrPC, 1898 left the choice between death and life imprisonment as punishment for murder entirely to the discretion of the Court. This position has since undergone a complete change and under Section 354(3) of the CrPC, 1973, death sentence has ceased to be the normal penalty for murder. Secondly, it is argued, the seven-Judge decision of this Court in Maneka Gandhi v. Union of India has given a new interpretative dimension of the provisions of Articles 21, 19 and 14 and their inter-relationship, and according to this new interpretation every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three Articles. It is stressed that an argument founded on this expansive interpretation of these Articles was not available when Jagmohan was decided. Thirdly, it is submitted that India has since acceded to the International Covenant of Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force on December 16, 1976. By virtue of this Covenant, India and i". other 47 countries who are a party to it, stand committed to a policy for abolition of the 'death penalty'.

12. Dr. L. M. Singhvi submitted that the question of death penalty cannot be foreclosed for ever on the abstract doctrine of stare decisis by a previous decision of this Court. It is emphasised that the very nature of the problem is such that it must be the subject of review from time to time so as to be in tune with the evolving standards of decency in a maturing society.

13. The learned Solicitor-General, Shri Soli Sorabji opposed the request of Shri Garg for referring the matter to a larger Bench because such a course would only mean avoidable delay in disposal of the matter. At the same time, the learned Counsel made it clear that since the constitutionality of the death penalty for murder was now sought to be challenged on additional arguments based on subsequent events and changes in law, he would have no objection on the ground of stare decisis, to a fresh consideration of the whole problem by this very Bench.

14. In view of the concession made by Shri Sorabji we proceeded to hear the counsel for the parties' at length, and to deal afresh with the constitutional questions concerning death penalty raised in these writ petitions.

15. We have heard the arguments of Shri R. K. Garg, appearing for the writ-petitioners in Writ Petition No. 564/79 for more than three weeks and also those of Dr. L. M. Singhvi, Dr. Chitaley and Shri Mukhoty, Dave and R. K. Jain, appearing for intervenes or for the other writ-petitioners.

16. We have also heard the arguments of Shri Soli Sorabji, Solicitor-General, appearing for the Union of India and Shri Patel appearing for the State of Maharashtra and the other counsel appearing for the respondents.

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

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

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

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

Question No. (I):

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

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

21. Section 33 of the Penal Code enumerates punishments to which offenders are liable under the provisions of this Code. Clause Firstly of the section mentions 'Death' at one of such punishments. Regarding 'death' as a punishment, the authors of the Code say: "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed." Accordingly, under the Code, death is the punishment that must be awarded for murder by a person under sentence of imprisonment for life (Sec. 303). This apart, the Penal Code prescribed 'death' as an alternative punishment to which the offenders may be sentenced, for the following seven offences:

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

22. In the instant cases, the impugned provision of the Indian Penal Code is Section 302 which says: "Whoever commits murder shall be punished with death, or imprisonment for life, and also be liable to fine". The related provisions are contained in Sections 299 and 300. Section 299 defines 'culpable homicide'. Section 300 defines 'murder'. Its material part runs as follows:

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, of Secondly, - If it is done with me intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom

the harm is caused, or Thirdly, - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or Fourthly, - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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

24. Article 19, as in force today, reads as under:

19(1). All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) ...;

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in Sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restriction! on the exercise of the right conferred by the said sub-clause.

(4) Nothing in Sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing fan Sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause, shall affect me operation of any existing law in so far as it relates to, or prevent the State from-making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or sex-vice, whether to the exclusion, complete on partial, of citizens or otherwise.

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

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

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

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

29. As rightly pointed out by Shri Soli Sorabji, the condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises, must be within the purview and protection of Article 19(1). Thus considered, can any one say that he has a legal right of fundamental freedom under Article 19(1) to practise the profession of a hired assassin or to form associations or unions or engage in a conspiracy with the object of committing murders or dacoities? The argument that the provisions of the Penal Code, prescribing death sentence as an alternative penalty for murder have to be tested on the ground of Article 19, appears to proceed on the fallacy that the freedoms guaranteed by Article 19(1) are absolute freedoms and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition. Such an argument was advanced before the Constitution Bench in the State of Bombay v. R.M.D. Chamarbaugwala 1957 SCR 874 at p. 920. In that case the constitutional validity of certain provisions of the Bombay Lotteries and Prim Competition Control Act, 1952, as amended by Bombay Act No. XXX of 1952, was challenged on the ground, inter alia, that it infringes the fundamental rights of the promoters of such competitions under Article 19(1)(g), to carry on their trade of business and that the restrictions imposed by the said Act cannot possibly be supported at reasonable restrictions in the interest of the general public permissible under Article 19(b). It was contended that the words "trade" of "business" or "commerce" in Sub-clause (g) of Article 19(a) should be read in their widest amplitude as any activity which is undertaken or carried on with a view to earning profit, since there is nothing in Article 19(1)(g) which may qualify or cut down the meaning of the critical words; that there is no justification for excluding from the meaning of those words activities which may be looked upon with disfavour by the State or the Court as injurious to public morality or public interest. Speaking for the Constitution Bench, S. R. Das, C. J. repelled this contention, in these terms:

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

This approach to the problem still holds the field. The observations in Chamarbaugwala, extracted above, were recently quoted with approval by V.R. Krishna Iyer, J., while delivering the judgment of the Bench in Fatehchand Himmatlal v. State of Maharashtra .

30. In A.K. Gopalan v. The State of Madras , all the six learned Judges constituting the Bench held that punitive detention or imprisonment awarded at punishment after conviction for an offence under the Indian Penal Code is outside the cope of Article 19, although this conclusion was reached by them by adopting more of less different approaches to the problem.

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

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

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

(The underlined words within brackets supplied.) (At page 100 of the Report).

(ii) Judged by the test of direct and indirect effect on the rights referred to in Article 19(1), the Penal Code is not a law imposing restrictions on these rights. The test is that "the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, of his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life." (Pages 100-101).

(iii) "The contents and subject-matter, of Articles 19 and 21 are thus not the same..." (Page 105. "Article 19(5) not apply to a substantive law depriving a citizen of personal liberty," "Article 19(1) does not purport to cover all aspects of liberty of personal liberty. Personal liberty would primarily mean liberty of the physical body. The rights given under Article 19(1) do not directly come under that description. In that Article only certain phases of liberty are dealt with". (Page 106) "In my opinion therefore, Article 19 should be read as a separate complete Article". (Page 107)

33. Patanjali Sastri, J., also, opined that lawful deprivation of personal liberty on conviction and sentence for committing a crime, or by a lawful order of preventive detention is "not within the

purview of Article 19 at all, but is dealt with by the succeeding Articles 20 and 21." (Page 192). In tune with Kania, C. J., the learned Judge observed: "A construction which would bring within Article 19 imprisonment in punishment of a crime committed or in prevention of a crime threatened would, as it seems to me, make a reductio ad absurdum of that provision. If imprisonment were to be regarded as a 'restriction' of the right mentioned in Article 19(1)(d), it would equally be a restriction on the rights mentioned by the other Sub-clauses of Clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of Cls. (2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would on that view, fall to be justified under Clause (2) as a law sanctioning restriction of freedom of speech and expression," (Page 192).

Article 19 confers the rights therein specified only on the citizen of India, while Article 21 extends the protection of life and personal liberty to all persons-citizens and non-citizens alike. Thus, the two Articles do not operate in a conterminous field. (Page 193).

(Personal liberty) was used in Article 21 as a sense which excludes the freedoms dealt in Article 19....

34. Rejecting the argument of the Attorney General, the learned Judge held that Clauses (4) to (7) of Article 22 do not form a complete Code and that "the language of Article 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons." (Page 207).

35. Mahajan, J., however, adopted a different approach. In his judgment, "an examination of the provisions of Article 22 clearly suggests that the intention was to make it self-contained as regards the law of preventive detention and that the validity of a law on the subject to preventive detention cannot be examined or controlled either by the provisions of Article 21 or by the provisions of Article 19(5)." (Page 229).

36. Mukerjea, J. explained the relative scope of the Articles in this group thus: "To me it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised. In my opinion, the group of Articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as Well as to procedural law." (Page 255).

The only proper way of avoiding these anomalies is to interpret the two provisions (Articles 19 and 21) as applying to different subjects. It is also unnecessary to enter into a discussion on the question...as to whether Article 22 by itself is a self-contained Code with regard to the law of Preventive Detention. (Page 257).

37. S.R. Das, J., also, rejected the argument that the whole of the Indian Penal Code is a law imposing reasonable restriction on the rights conferred by Article 19(1), with these observations (at page 303):

To say that every crime undermines the security of the State and, therefore, every section of the Indian Penal Code, irrespective of whether it has any reference to speech or expression, is a law within the meaning of this clause is wholly unconvincing and betrays only a vain and forlorn attempt to find an explanation for meeting the argument that any conviction by a Court of law must necessarily infringe Article 19(1)(a). There can be no getting away from the fact that a detention as a result of a conviction impairs the freedom of speech far beyond what is permissible under Clause (2) of Article 19. Likewise, a detention on lawful conviction impairs each of the other personal rights mentioned in Sub-clauses (3) to (6). The argument that every section of the Indian Penal Code irrespective of whether it has any reference to any of the rights referred to in Sub-clauses (b) to (e) and (g) is a law imposing reasonable restriction on those several rights has not even the merit of plausibility. There can be no doubt that a detention as a result of lawful conviction must necessarily impair the fundamental personal rights guaranteed by Article 19(1) far beyond what is permissible under Clauses (2) to (6) of that article and yet nobody can think of questioning the validity of the detention or of the section of the Indian Penal Code under which the sentence was passed.

(ii) Das, J. then gave an additional reason as to why validity of punitive detention or of the sections of the Penal Code under which the sentence was passed, cannot be challenged on the ground of Article 19, thus:

Because the freedom of his person having been lawfully taken away, the convict ceases to be entitled to exercise...any of the...rights protected by Clause (1) of Article 19.

(iii) The learned Judge also held that "Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 as a compendious term including within its meaning all the varieties of rights which go to make op the personal liberties of men." (Page 299)

38. Fazal Ali, J. dissented from the majority. In his opinion: "It cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to be privation of personal liberty which is referred to in Article 19(1)(d)." (Page 148).

39. Fazal Ali, J. held that since preventive detention unlike punitive detention, directly infringes the right under Article 19(1)(d), it must pass the test of Clause (5). According to the learned Judge, only those laws are required to be tested on the anvil of Article 19 which directly restrict any of the rights guaranteed in Article 19(1). Applying this test (of direct and indirect effect) to the provisions of the Indian Penal Code, the learned Judge pointed out mat the Code "does not primarily or necessarily impose restrictions on the freedom of movement, and it is not correct to say that it is a law imposing

restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement The punishment may consist in imprisonment OF a pecuniary penalty. If it consists in a pecuniary penalty, it obviously involves no restriction on movement; but if it consists in imprisonment, mere is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement but under a law defining crime and making it punishable. The punishment is correlated with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, therefore, the Indian Penal Code does not come within the ambit of the words 'law imposing restriction on the right to move freely'." (Pages 145-146).

40. In applying the above test, which was the same as adopted by Kania, C. J., Fazal Ali, J. reached a conclusion contrary to that reached by the Chief Justice, on the following reasoning:

Punitive detention is however essentially different from preventive detention. A person is punitively detained only after trial for committing a crime and after his guilt has been established in a competent court of justice. A person so convicted can take his case to the State High Court and sometimes bring it to this Court also; and he can in the course of the proceedings connected with his trial take all pleas available to him to-eluding the plea of want of jurisdiction of the Court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under Article 19(1)(d) has been violated. But a person who is preventively detained has not to face such an obstacle whatever other obstacle may be in his way.(Page 146)

41. We have copiously extracted from the judgments in A.K. Gopalan's 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 Nationalization case or in Maneka Gandhi's case . For instance, the proposition laid down by Kania, C. J., Fazal 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. There are several offences under the Penal Code, such as theft, cheating, ordinary assault, which do not violate or affect 'public order,' but only 'law and order'. These offences injure only specific individuals as distinguished from the public at large. It is by now settled that 'public order' means 'even tempo of the life of the community'. That being so, even as murders do not disturb or affect 'public order". Some murders may be of purely private significance and the injury or harm resulting therefrom affects only specific individuals, and, consequently, such murders may not be covered by "public order" within the contemplation of Clauses (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say that

punishment of such murderers is not in the general public interest. It may be noted that genera] public interest is not specified as a head in Clauses (2) to (4) on which restriction on the rights mentioned in Clause (1) of the Article may be justified.

42. It is true, as was pointed out by Hidayatullah, J. (as he then was) in Dr. Ram Manohar Lohia's case and in several other decisions that followed it, that the real distinction between the areas of 'law and order' and 'public order' lies not merely in the nature or quality of the act, but in the degree and extent Violent crimes similar in nature, but committed in different contexts and circumstances might cause different reactions. A murder committed in given circumstances may cause only a slight tremor, the wave length of which does not extend beyond the parameters of law and order. Another murder committed in different context and circumstances may unleash a tidal wave of such intensity, gravity and magnitude, that its impact throws out of gear the even flow of lite. Nonetheless, the fact remains that tat such murders which do not affect "public order", even the provision for life imprisonment in Section 302, Indian Penal Code, as an alternative punishment, would not be justifiable under Cls. (2), (3) and (4) as a reasonable restriction in the interest of 'public order'. Such a construction must, therefore, be avoided. Thus construed, Article 19 will be attracted only to such laws, the provisions of which are capable of being tested under Cls. (2) to (5) of Article 19.

43. This proposition was recently (1975) reiterated in Hardhan Shah v. State of West Bengal . In accord with this line of reasoning in A.K. Gopalan's case a Constitution Bench of this Court in Hardhan Saha's case restated the principle for the applicability of Article 19 by drawing a distinction between a law of preventive detention and a law providing punishment for commission of crimes, thus:

Constitution has conferred rights under Article 19 and also adopted preventive detention to prevent the greater evil of elements imperilling the security, the safety of a State and the welfare of the nation. It is not possible to think that a person who is detained will yet be free to move or assemble or form association or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is convicted of an offence of cheating and prosecuted (and imprisoned) after trial, it is not open to say that the imprisonment should be tested with reference to Article 19 for its reasonableness. A law which attracts Article 19 therefore must be such as is capable of being tested to be reasonable under Clauses (2) to (5) of Article 19.

(emphasis and parenthesis supplied).

44. The last sentence which has been underlined by us, appears to lend implicit approval to the rule of construction adopted by the majority of the learned Judge's in A.K. Gopalan's case whereby they excluded from the purview of Article 19 certain provisions of the Indian Penal Code providing punishment for certain offences which could not be tested on the specific grounds embodied in Clauses (2) to (5) of that Article. This proposition enunciated in A.K. Gopalan's case is only a product of the application of the basic canon that a construction which would lead to absurdity, should be eschewed.

45. In R.C. Cooper v. Union of India (popularly known as Bank Nationalization case), the majority adopted the twofold test for determining as to when a law violated fundamental rights, namely: "(1) It is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim. (2) it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. The direct operation of the act upon the rights forms the real test".

46. In Maneka Gandhi v. Union of India (ibid), Bhagwati, J. explained the scope of the same test by saying that a law or an order made thereunder will be hit by Article 19, if the direct and inevitable consequence of such law or order is to abridge or take away any one or more of the freedoms guaranteed by Article 19(1). If the effect and operation of the statute by itself, upon a person's fundamental rights is remote or dependent upon "factors which may or may not come into play" then such statute is not ultra vires on the ground of its being violative of that fundamental right. Bhagwati, J. described this proposition as "the doctrine of intended and real effect"; while Chandrachud, J. (as he then was) called it "the test of proximate effect and operation of the statute".

47. The question is, whether R. C. Cooper and Maneka Gandhi have given a complete go-by to the 'test of direct and indirect effect,' sometimes described as 'form and object test' or 'pith and substance rule', which was adopted by Kania, C. J. and Fazal Ali, J. in A.K. Gopalan's case. In our opinion, the answer to this question cannot be in the affirmative. In the first place, there is nothing much in the name. As Varadachariar, J. put it in Subrahmanyan Chettiar's case, 1940 FCR 188, such rules of interpretation were evolved only as a matter of reasonableness and common sense and out of the necessity of satisfactorily solving conflicts from the inevitable overlapping of subjects in any distribution of powers. By the same yardstick of common sense, the 'pith and substance rule' was applied to resolve the question of the constitutionality of a law assailed on the ground of its being violative of a fundamental right.

48. Secondly, a survey of the decisions of this Court since A.K. Gopalan, shows that the criterion of directness which is the essence of the test of direct and indirect effect, has never been totally abandoned. Only the mode of its application has been modified and its scope amplified by judicial activism to maintain its efficacy for solving new constitutional problems in tune with evolving concepts of rights and obligations in strident democracy.

49. The test of direct and indirect effect adopted in A.K. Gopalan was approved by the Full Court in Ram Singh v. State of Delhi 1951 SCR 451. Therein, Patan-jail Sastri, J. quoted with approval the passages (i) and (ii) (which we have extracted earlier) from the Judgment of Kania, C. J. Although Mahajan and Bose, JJ. differed on the merits, there was no dissent on this point among all the learned Judges.

50. The first decision, which though purporting to follow Kania, C.J.'s. enunciation in A.K. Gopalan, imperceptibly added another dimension to the test of directness, was Express Newspapers (Private) Ltd. v. The Union of India 1959 SCR 12. In that case, the constitutional validity of the Working Journalists (Condition's of Service) and Miscellaneous Provisions Act, 1955, and the legality of the decision of the Wage Board, constituted thereunder, were challenged. The impugned Act, which had

for its object the regulation of the conditions of service of working journalists and other persons employed in newspaper establishments, provided,' inter alia, for the payment of gratuity to a working journalist who had been in continuous service for a certain period. It also regulated hours of work and leave and provided for retrenchment compensation. Section 9(1) laid down the principles that the Wage Board was to follow in fixing the rates of wages of working journalists.

51. One of the contentions of the petitioners in that case was that the impugned Act violated their fundamental rights under Articles 19(1)(a), 19(1)(g), 14 and 32 of the Constitution and that the decision of the Wage Board fixing the rates and scales of wages which imposed too heavy a financial burden on the industry and spelled its total ruin, was illegal and void. It was contended by the learned Attorney-General in that case that since the impugned legislation was not a direct legislation on the subject of freedom of speech and expression. Article 19(1)(a) would have no application, the test being not the effect or result of legislation but its subject-matter. In support of his contention, he relied upon the observations on this point of Kania, C. j. in A.K. Gopalan. It was further urged that the object of the impugned Act was only to regulate certain conditions of service of working journalists and other persons employed in the newspaper establishments and not to take away or abridge the freedom of speech or expression enjoyed by the petitioners and, therefore, the impugned Act could not come within the prohibition of Article 19(1)(a) read with Article 32 of the Constitution.

52. On the other hand, the petitioners took their stand on a passage in the decision of the Supreme Court of United States in Minnesota Ex Rel. Olson, (1930) 283 US 697 at p. 708, which was as under With respect to these contentions it is enough to say that in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect". It was further submitted that in all such cases, the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. Thus considered, proceeded the argument, the Act by laving a direct and preferential burden on the press, would tend to curtail the circulation, narrow the scope of dissemination of information and fetter the petitioners' freedom to choose the means of exercising their rights of free speech (which includes the freedom of the press). It was further submitted that those newspaper employers who were marginally situated may not be able to bear the strain and have to disappear after closing down their establishments.

53. N. H. Bhagwati. J. who delivered the unanimous Judgment of the Constitution Bench, after noting that the object of the impunged legislation is to provide for the amelioration of the conditions of the workmen in the newspaper industry, overruled this contention of the employers, thus:

That, however would be a consequence which would be extraneous and not within the contemplation of the legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized In this behalf by the petitioners, viz., the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioner' freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid; the imposition of penalty on the petitioners' right to choose the instruments for exercising the freedom or compelling them to seek

alternative media, etc., would be remote and depend upon various factors which may or may not come into play. Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation.

(emphasis added) The learned Judge further observed that the impugned Act could be "legitimately characterised as a measure which affects the press", but its " intention or the proximate effect and operation" was not such as would take away or abridge the right of freedom of speech and expression guaranteed in Article 19(1)(a), therefore, it could not be held invalid on that ground. The impugned decision of the Wage Board, however, was held to be ultra vires the Act and contrary to the principles of natural justice.

54. It may be observed at this place that the manner in which the test of direct, and indirect effect was applied by N. H. Bhagwati, J., was not very different from the mode in which Fazal Ali. J. applied it to punitive detention as punishment after conviction for an offence under the Indian Penal Code. H. N. Bhagwati,. J., did not discard the test adopted by Kania, C.J., in A.K. Gopalan, in its entirety: he merely extended the application of the criterion of directness to the operation and effect of the impugned legislation.

55. Again, in Sakal Papers (P). Ltd. v. The Union of India . this Court, while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956, and Daily Newspaper (Price and Page) Order, 1960. held that the "direct and immediate" effect of the impugned Order would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19(1)(a) and, therefore, the Order was violative of the right of the newspapers guaranteed by Article 19(1)(a), and as such, invalid. In this case, also, the emphasis had shifted from the object and subject-matter of the impugned State action to its direct and immediate effect.

56. In Naresh Shridhar Mirajkar v. State of Maharashtra . an order prohibiting the publication of the evidence of a witness in a defamation case, passed by a learned Judge (Tarkunde, J.) of the Bombay High Court, was impugned on the ground that it violated the petitioners' right to free speech and expression guaranteed by Article 19(1)(a). Gajendragadkar, C. J., (Wanchoo, Mudholkar. Sikri and Ramaswami. JJ., concurring) repelled this contention, with these illuminating observations:

The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to

decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1).

It is well settled that in examining the validity of legislation, it is legitimate to consider whether the impugned legislation is a legislation directly in respect of the subject covered by any particular article of the Constitution, or touches the said article only incidentally or indirectly.

If the test of direct effect and object which is sometimes described as the pith and substance test, is thus applied in considering the validity of legislation, at would not be inappropriate to apply the same test to judicial decisions like the one with which we are concerned in the present proceedings. As we have already indicated, the impugned order was directly concerned with giving such protection to the witness as was thought to be necessary in order to obtain true evidence in the case with a view to do Justice between the parties. If, incidentally, as a result of this order, the petitioners were not able to report what they heard in court, that cannot be said to make the impugned order invalid under Article 19(1)(a).

57. We have already mentioned briefly how the test of directness was developed and reached its culmination in Bank Nationalization's case and Maneka Gandhi's case.

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).

59. In Bennett Coleman, . Mathew, J. in his dissenting judgment referred with approval to the test as expounded in Express Newspapers. He further observed that "the 'pith and substance' test, though not strictly appropriate, must serve a useful purpose in the process of deciding whether the provisions In question which work some interference with the freedom of speech, are essentially regulatory in character".

60. From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under Does the impugned law, in its pith and substance, whatever may be its form, and object, deal with any of the fundamental rights conferred by Article 19(1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of

the fundamental rights conferred by Article 19(1) is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights ?

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

61. Now, let us apply this test to the provisions of the Penal Code, in question. Section 299 defines 'culpable homicide' and Section 300 defines culpable homicide amounting to murder. Section 302 prescribes death or imprisonment for life as penalty for murder. It cannot, reasonably or rationally, be contended that any of the rights mentioned in Article 19(1) of the Constitution confers the freedom to commit murder or, for the matter of that, the freedom to commit any offence whatsoever. Therefore, penal laws, that is to say, laws which define offences and prescribe punishment for the commission of offences do not attract the application of Article 19(1). We cannot, of course, say that the object of penal laws is generally such as not to involve any viola-Bon of the rights conferred by Article 19(1) because after the decision of this Court in [he 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.

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

64. With regard to onus, no hard and fast rule of universal application in all situations, can be deduced from the decided cases. In some decisions, such as, Saghir Ahmad v. State of Uttar Pradesh and Khyerbari Tea Co. v. State of Assam , it was laid down by this Court that if the writ petitioner succeeds in showing that the impugned law ex facie abridges or transgresses the rights coming under any of the Sub-clauses of Clause (1) of Article 19, the onus shifts on the respondent-State to show that the legislation comes within the permissible limits imposed by any of the Clauses (2) to (6) as may be applicable to the case, and, also to place material before the court in support of that contention. If the State does nothing in that respect, it is not for the petitioner to prove negatively that it is not covered by any of the permissive clauses.

65. A contrary trend, however, is discernible in the recent decisions of this Court, which start with the initial presumption in favour of the constitutionality of the statute and throw the burden of rebutting that presumption oh the party who challenges its constitutionality on the ground of Article 19.

66. In B. Banerjee v. Anita Pan this Court, speaking through V.R. Krishna Iyer, J., reiterated the ratio of Ram Krishna Dalmia's case. 1959 SCR 279, 297- Propositions (b) and (c) that:

there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; and that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

It was emphasised that "Judges act not by hunch but on hard facts properly brought on record and sufficiently strong to rebuff the initial presumption of constitutionality of legislation. Nor is the Court a third Chamber of the House to weigh whether it should draft the clause differently." Referring, inter alia, to the decision of this Court in R. M. D. Chamarbaugwala (ibid), and Seervai's

'Constitutional Law of India'. Vol. I, page 54. it was recalled; "Some courts have gone to the extent of holding that there is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt: and to doubt the constitutionality of a law is to resolve it in favour of its validity". Similar view was taken by a Bench of seven learned. Judges of this Court in Pathumma v. State of Kerala .

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.

68. A similar warning was echoed by the Supreme Court of the United States in Dennis v. United States in these terms:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independents of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

69. In Gregg v. Georgia one of the principal questions for consideration was, whether capital punishment provided in a statute for certain crimes was a "cruel and unusual" punishment. In that context, the nature of the burden which rests on those who attack the constitutionality of the statute was explained by Stewart. J., thus:

We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the Judgment of the representatives of the people. This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative Judgment weighs heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.

70. Even where the burden is on the State to show that the restriction imposed by the impugned statute is reasonable and in public interest, the extent and the manner of discharge of the burden necessarily depends on the subject-matter of the legislation, the nature of the inquiry, and the scope and limits of Judicial review. (See the observations of Sastri, J. in State of Madras v. V.G. Rao 1952 SCR 597 at p. 607 reiterated in Jagmohan).

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

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

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

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

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

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

74. Death penalty has been the sue-Jeet of an age-old debate between Aboiltionists and Retentionists, although recently the controversy has come in sharp focus. Both the groups are deeply anchored in their antagonistic views. Both firmly and sincerely believe in the righteousness of their respective stands, with overtones of sentiment and emotion. Both the camps can claim among them eminent thinkers, penologists, sociologists, Jurists, Judges, legislators, administrators and law enforcement officials.

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

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

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

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

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

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

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

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

Regarding (a): It is true that death penalty is irrevocable and a few instances, can be cited, including some from England of persons who after their conviction and execution for murder, were discovered to be innocent. But this, according to the Retentionists is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theoretically, such errors of judgment cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. We will presently see, while dealing with the procedural aspect of the problem, that in India, ample safeguards have been provided by law and the Constitution which almost eliminate, the chances of an innocent person being convicted and executed for a capital offence.

Regarding (b): Whether death penalty serves any penological purpose.

77. Firstly, in most of the countries in the world, including India, a very large segment of the population, including notable penologists, judges, jurists, legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serve as a deterrent, and a greater deterrent than life imprisonment. We will set out very briefly, by way of sample, opinions of some of these distinguished persons.

78. In the first place, we will notice a few decisions of Courts wherein the deterrent value of death penalty has been judicially recognised.

79. In Paras Ram v. State of Punjab S.L.P. (Crl.) Nos. 698 & 678 of 1973, decided on October 9, 1973, the facts were that Paras Ram, who was a fanatic devotee of the Devi, used to hold Satsangs at which bhajjans were sung in praise of the Goddess. Paras Ram ceremonially beheaded his four year old boy at the crescendo of the morning bhajan. He was tried, convicted and sentenced to death for the murder. His death sentence was confirmed by the High Court. He filed a petition for grant of special leave to appeal to this Court under Article 136 of the Constitution. It was contended on behalf of Paras Ram that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender under Section 84, Indian Penal Code, or material for mitigation of the sentence of death. V.R. Krishna Iyer, J., speaking for the Bench, to which one of us (Sarkaria, J.) was a party, refused to grant special leave and summarily dismissed the petition with these observations:

The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a bloodcurdling butchery of one's own beloved son was perpetrated, aided by other 'nious' criminals, to propitiate some blood-thirsty deity. Secular India, speaking through the Court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilsing role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

(emphasis added)

80. In Jagmohan, also, this Court took due note of the fact that for certain types of murders, death penalty alone is considered an adequate deterrent:

A large number of murders is undoubtedly of the common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders cannot simply be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society." Examining whether life imprisonment was an adequate substitute for death penalty, the Court observed:

In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of punishment, and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.

81. In Ediga Anamma v. State of Andhra Pradesh , V.R. Krishna Iyer, J., speaking for the Bench to which one of us (Sarkaria, J.) was a party, observed that "deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime." It was further observed that "horrendous features of the crime and the hapless and helpless state of the victim steel the

heart of law for the sterner sentence.

82. In Shiv Mohan Singh v. State (Delhi Administration) (1977) 3 SCR 172 the same learned Judge, speaking for the Court, reiterated the deterrent effect of death penalty by referring to his earlier judgment in Ediga Annamma's case, as follows:

In Ediga Annamma this Court, while noticing the social and personal circumstances possessing an extenuating impact, has equally clearly highlighted that in India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful areas of barbarous murder.

83. Again, in Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi , the same learned Judge, speaking for a Bench of three learned Judges of this Court reiterated that deterrence was one of the vital considerations of punishment.

84. In Trop v. Dulles (1958) 356 US 86, Brennan, J. of the Supreme Court of the United States, concurring with the majority, emphasised the deterrent end of punishment, in these words:

Rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution.

85. In Furman V. Georgia, Stewart, J. took the view that death penalty serves a deterrent as well as retributive purpose. In his view, certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only penalty of death will provide maximum deterrence,

86. Speaking for the majority, in Greg v. Georgia, Stewart, J. reiterated his views with regard to the deterrent and retributive effect of death penalty.

87. Now, we may notice by way of specimen, the views of some jurists and scholars of note. Sir James Fitzjames Stephen, the great jurist, who was concerned with the drafting of the Indian Penal Code, also, was a strong exponent of the view that capital punishment has the greatest value as a deterrent for murder and other capital offence. To quote his words.

No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result.... No one goes to certain inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die. would refuse the offer of commutation of his sentence for the severest secondary punishment.

Surely not. Why is this ? It can only be because 'All that a man has will he give for his life'. In any secondary punishment, however terrible, there is hope; but death is death: its terrors cannot be described more forcibly.

88. Even Marchese De Cesare Bonesana Beccaria, who can be called the father of the modern Abolitionist movement, concedes in his treatise, "Dei Delitti a della Pana" (1764) that capital punishment would be justified in two instances Firstly, if an execution would prevent a revolution against popularly established Government; and, secondly, if an execution was the only way to deter others from committing a crime. The adoption of double standards for capital punishment in the realm of conscience is considered by some scholars as the biggest infirmity in the Abolitionists' case.

89. Thersten Sellin is one of the penologists who has made a scientific study of the subject of capital punishment and compiled the views of various scholars of the 19th and 20th centuries. In his book "Capital Punishment", he has made an attempt to assemble the arguments for and against the death penalty. He has also given extracts from the Debetes in the British House of Commons in 1956 and, also, in March and April 1966. In the Canadian House of Commons. In the last part of his book, the learned Editor summarises his ideas about capital punishment. In his opinion. Retribution seems to be outdated and unworkable. It is neither efficient nor equitably administered. "Justice is a relative concept that changes with the times". A retributive philosophy alone is not now socially acceptable. "In the last ahalysis, the only utilitarian argument that has to be given attention is the one that defends capital punishment as being a uniquely powerful means of protecting the community." He ends his book with the observation: "I have attempted to show that, as now used, capital punishment performs one of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions. It is an archaic custom of primitive origin that has disappeared in most civilized countries and is withering away in the rest.

90. Recently, in "Criminology Review Year-Book" (1979) Vol. I, Sheldon L. Messenger & Egon Bittner1, after surveying the past literature on the relation between capital, punishment and capital crimes have pointed out the following shortcomings in the thesis of Sellin:

The principal shortcoming of the work by Sellin and others using his methodology is that the approach taken and the methods applied do not permit a systematic examination of the main implications emanating from the general theory, of deterrence. The shortcoming is basic, because the implications following from the general deterrence hypothesis are what Sellin was challenging. Yet his work neither develops nor tests the full range of implications following from the theory he attempts to reject; nor does he develop or test a competing theory. In addition, to my knowledge, Sellin never reported in any of his studies the results of any systematic (parametric or non-parametric) statistical tests that could Justify his strong and unqualified inferences.

Another fundamental shortcoming of Sellin's studies is their failure to account systematically for other factors that are expected by the deterrence hypothesis to affect the frequency of murder in the population, apart from the relevant risk of execution. These are variables such as the probability of apprehension, the conditional probability of conviction given apprehension, the severity of alternative punishments for murder, the distribution of income, the probability of unemployment,

and other indicators of differential gains from criminal activities occurring jointly with murder. Since, as I, shall argue later, some of these variables are expected to be highly correlated with the conditional probability of execution given conviction of murder, their exclusion from the statistical analysis can seriously bias estimates of the partial deterrent effect of capital punishment. Aware of the problem. Sellin attempted to compare states that are as alike as possible in all other respects. However, his "matching procedure", based on the assumption that neighbouring states can satisfy such pre-requisites without any. explicit standardization, is simply insufficient for any valid inferences. Pairs of states, such as New York, and Rhode Island, Massachusetts and Maine, or Illinois and Wisconsin all included in his comparisons, differ in their economic and demographic characteristics, in their law enforcement activities, and in the opportunities they provide for the commission of other crimes. Moreover, the direction of the causal relationship between the murder rate and the overall risk of punishment - be it the death penalty or any other sanction - is not self-evident because, for example, states with high murder rates are expected to and, in fact do devote more resources to apprehend, convict and execute offenders than do states with lower rates. Specifically, variations in the legal or practical status of the cause for, changes in the murder rate, and thus may give rise to an apparent positive association between these two variables. The same general point applied in connection with the identification of the effect of any other variable which is a product of law enforcement activity of private protection against crime. For these reasons, the true deterrent effect of a section such as the death penalty cannot be readily inferred from simple comparisons of the sort performed by Sellin.

90. A The learned authors then arrive at this conclusion:

If investigations indicate that probability and length of imprisonment do impart significant deterrent effects, then failure of the research to demonstrate specifically the deterrent efficacy of capital punishment may be taken more as evidence for short comings in the research design and methodology or in the measures of the theoretically relevant variables used than as a reflection on the validity of the deterrence theory itself.

91. These scholars then stress another purpose of capital punishment, namely, incapacitation of the offender, which, in fact, is another aspect of its deterrent effect. To quote their words:

There is an additional point worth stressing. Even if punishment by execution or imprisonment does not have any deterrent effect, surely it must exert some incapacitative effect on punished offenders by reducing or eliminating the possibility of recidivism on their part.

92. Another well-known penologist, Isaac Ehrlich has also made a study of the deterrent effect of capital punishment. The result of his study was published in the American Economic Review in June, 1975. He includes a specific test for the presence of a deterrent effect of capital punishment to the results of earlier studies. Messenger and Bittner in. their Review Year-Book (ibid) have mentioned that Ehrlich has in his study2 claimed to identify a significant reduction in the murder rate due to the use of capital punishment. A version of his study is said to have been filed with the United States Supreme Court, in the case of Fowler v. North Carolina.

93. In 1975. Robert Martinson, a sociologist, published the results of a study he had made in New York regarding the rehabilitation of prisoners. Among the conclusions he drew: "The prison which makes every effort at rehabilitation succeeds no better than the prison which leaves its inmates to rot.... The certainty of punishment, rather than the severity, is the most effective crime deterrent. We should make plain that prisons exist to punish people for crimes committed.

(quoted in Encyclopaedia Britannica 1978 Book of the Year, pp. 593-594)

94. Many judges - especially in Britain and the United States, where rising crime rates are the source of much public concern - have expressed grave doubts about the wisdom of the view that reform ought to take priority in dealing with offenders. "They have argued that the courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime.

(Encyclopaedia Britannica, ibid.)

95. Professor Jean Graven, Judge of the Court of Appeal of Geneva, and a distinguished jurist, maintains in his learned analysis, (see the Postscript in reply to A World View of Capital Punishment by James Avery Joyce), of the views of Camus and Koestler, that neither of these two authors has faced up to the really basic objection to the abolitionist's case. According to Graven, there are two groups of people, which are not covered by the abolitionist's case, and Camus and Koestler have therefore left their cause open to attack at its weakest point "The true problem" as Graven sees it. "is the protection of the organized, civilized community", the legitimate defence of society against criminal attacks made upon it by those antisocial elements which can be stopped only by being eliminated, in the "last resort". For such, the death penalty should be preserved, and only for such,

96. Professor Craven's second challenge is, which the abolitionist must accept, the existing division between civil and military protection. According to him, in doing so, the abolitionist cannot avoid applying double standard and two mutually destructive criteria to their approach to the death penalty. "For if the death penalty is accepted as protective in principle to society, then it should be so in all cases and in all circumstances in troubled times as well as in peaceful times, in respect of the traitor, the spy, the deserter, or the hostage, as well as of the brigand, the "gangster", or the professional killer. We must be logical and just at the same time. In the realm of conscience and of 'principles', there cannot be two weights and measures. There cannot be a morality for difficult times and another morality for easy times: one standard for military justice and another for civil justice. What then should be done with those individuals who have always been considered proper subjects for elimination? If the capital sentence is objectionable and illegal.... If the death penalty must be absolutely repudiated because it 'degrades man' (quoting Camus) then we accept the position. But, in that case, no right to kill exists any longer...the greatest war criminals. those responsible - conscious of what they have done and intended to do - for the worst crimes of genocide, who gassed, incinerated in ovens or buried in quicklime a million innocent victims, or allowed them to perish in mines and marsher.... Society has not the right then to kill even these "Monsters".

(Quoted in A World View of Capital Punishment, by James Avery Joyce).

97. J. J. Maclean, a parliamentarian, articulated his views with regard to the deterrent value of capital punishment in the Canadian House of Commons in the March-April debate 1966, as follows:

Whether it (capital punishment) is a greater or lesser deterrent than life imprisonment. This is an argument that cannot be proven on either side but 1 would not like to have to try to convince any one that capital punishment is not a deterrent. Statistically this cannot be proven because the deterrent effect on both capital punishment and life imprisonment is obscured by the fact that most criminals plan a crime on the basis that they are going to avoid any penalty.... I say, the deterrent value is with respect to people who did not commit crimes, who were deterred from becoming murderers by the fact that capital punishment or some other heavy penalty would be meted out to them if caught. (Quoted in Sellin's Capital Punishment).

98. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows: "In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of Capital punishment is a matter of doubt.

(f) Statistics of other countries are in conclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

Views of the British Royal Commission:

99. The British Royal Commission, after making an exhaustive study of the issue of capital punishment and its deterrent value, in their Report (1949-53), concluded.

The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible.

100. We may add that whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved either way, because statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind. Retribution in the sense of reprobation - whether a totally rejected concept of punishment:

101. Even retribution in the sense of society's reprobation for the worst of crimes, i. e., murder, is not an altogether outmoded concept. This view is held by many distinguished sociologists, jurists and judges.

102. Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

Punishment is the way in which society expresses its denunciation of wrong-doing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it. irrespective of whether it is a deterrent or not.

That retribution is still socially acceptable function of punishment, was also the view expressed by Stewart, J., in Fur-man v. Georgia at page 389, as follows:

...I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man. and channelling that instinct, in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law.

103. Patrick Devlin, the eminent jurist and judge, in his book, "The Judge" emphasises the retributive aspect of the purpose of punishment and criminal justice, thus:

I affirm that justice means retribution and nothing else. Vindictiveness is the emotional out flow of retribution and justice has no concern with that. But it is concerned with the measurement of deserts. The point was put lucidly and simply by the Vicar of Longton in a letter to The Times, from

which with his permission I quote; Firstly, far from pretending that retribution should have no place in our penal system, Mr. Levin should recognize that it is logically impossible to remove it. If it were removed, all punishments should be rendered unjust. What could be more immoral than to inflict imprisonment on a criminal for the sake of deterring others, if he does not deserve ft? Or would it be justified to subject him to a compulsory attempt to reform which includes a denial of liberty unless, again he deserves it?

104. Retribution and deterrence are not two divergent ends of capital punishment They are convergent goals which ultimately merge into one. How these ends of punishment coalesce into one was described by the Law Commission of India, that:

The retributive object of capital punishment has been the subject-matter of sharp attack at the hands of the abolitionists. We appreciate that many persons would regard the instinct of revenge as barbarous. How far it should form part of the penal philosophy in modem times win always remain a matter of controversy. No useful purpose will be served by a discussion as to whether the instinct of retribution is or is not commendable. The fact remains, however, that whenever mere is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct the feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence. (Para 265 (18), 35th Report)

105. Earlier in 1949-1953, the British Royal Commission in Para. 59 of its Report spoke in a somewhat similar strain:

We think it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. The fact that men are hung for murder is one great reason why murder is considered so dreadful a crime. This widely diffused effect on the moral consciousness of society is impossible to assess, but it must be at least as important as any direct part which the death penalty may play as a deterrent in the calculations of potential murderers.

106. According to Dr. Ernest Van Den Haaq, a New York psychologist and author, and a leading proponent of death penalty, "a very strong symbolic value" attaches to executions. "The motives for the death penalty may indeed include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed". (See The Voice (USA) June 4, 1979.)

107. The views of Lloyd George, who was the Prime Minister of England during the First World War, have been referred to in the book "Capital Punishment" (1967) by Thorsten Sellin at page 65, as below:

The first function of capital punishment is to give emphatic expression to society's peculiar abhorrence of murder.... It to important that murder should be regarded with peculiar horror.... I believe that capital punishment does, in the present state of society, both express and sustain the sense of moral revulsion for murder.

108. This view is not without respectable support in die jurisprudential literature of today, despite an opinion to the contrary. (See also the Royal Commission's Report, 1949-53). In relying, inter alia, upon the evidence before it,-including that of Lord Denning, the Royal Commission recognised a strong and wide-spread demand for retribution. It is a common phenomenon in all the civilised countries that some murders are so shocking an offence that there is a general outcry from die public for infliction of the ultimate penalty on the criminal.

109. In regard to the retributive aspect of capital punishment, we may cite one recent illustration showing how demand for retribution, in the sense of society's instinctive disapproval of the outrageous conduct of the murderer is indelibly ingrained in contemporary public opinion even in advanced countries.

110. In November, 1978, George Moscone (Mayor) and Harvey Milk (Supervising Officer) of San Francisco were cruelly assassinated by Dan White, a police-man. Six months later, on May 22, 1979, a jury of seven men and five women rejected the charge of first-degree murder, and in consequence, did not award capital punishment to Dan White for this heinous double murder. Public opinion reacted sharply. Public protest against this decision spontaneously manifested itself in a burst of flame and fury. Thousands of outraged demonstrators rampaged through the Civic center, smashing windows, burning police cars, chanting: "We want justice". Writing in The Voice', a local paper from San Franscisco, in its issue of June 4, 1979, Lawrence Mullen, fired at the jury a volley of questions, to which the agitated public would demand answers:

What comment did the jury make on the value of life ? Was the tragedy of the execution-style murders the central issue, or was the jury only concerned with technicalities, absurdities and loopholes of the law? Was justice considered - not revenge - but justice? High irony, Dan White's strong belief in capital punishment has found thousands of new converts. From now on, a lot of people will die because Dan White lives. Are we so insensitive, callous and inhuman that we accept or excuse violence and brutality? Consider White's defence lawyer, Douglas Schmidt's reference to that tragic Monday in November: "It was a tragedy. Now it's behind us.

For those who loved and still miss George Moscone and Harvey Milk, for those who were cast into darkness and cried for justice, for those who still seek answers, the lawyer's words are a chilling reminder that we must not forget - that we must not 'put it behind us'.

The former cop, a law and order and capita] punishment advocate driven by his passion, by his lack of reason, to destroy those who he disagreed with, and by doing so demonstrated the greatest human failure - the inability to co-exist.

Dan White symbolizes the violence and brutality that is undermining civilization.

111. Dan White's case and the spontaneous reaction of the public opinion that followed, show that opposition to capital punishment has (to use the words of Raspberry)*(Raspberry, Death Sentence, the Washington Post, March 12, 1976, p. 27, cols. 5-6), 'much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, to cold-blooded that anything short of death seems an inadequate response".

112. The Editor of 'Capital Punishment', Thorsten Sellin has noted at page 83 of his compilation, the following views of an outstanding Justice of the Ontario Appeal Court:

The irrevocable character of the death penalty is a reason why all possible measures should be taken against injustice - not fop its abolition. Now a days, with the advent of armed criminals and the substantial increase in armed robberies, criminals of long standing if arrested, must expect long sentences. However, if they run no risk of hanging, when found guilty of murder, they will kill policemen and witnesses with the prospect of a future no more unhappy, as one of them put it, than being fed. lodged, and clothed for the rest of their lives. In addition, once in prison, such people who are capable of anything could kill their guards and their fellow inmates with relative impunity.

113. J. J. Maclean, the Canadian Parliamentarian justifies, from another angle, the right of the State to award capital punishment for murder:

If the State has the right and the duty to defend the community against outside aggression, such as in time of war, and within the country, for instance, in case of treason, crimes against the State, etc., and that to the extent of taking the life of the aggressors and guilty parties, if the citizen wants to protect his own life by killing whoever attacks him without any reason, the State can do the same when a criminal attacks and endangers the life of the community by deciding to eliminate summarily another human being.... Capital punishment must be retained to prove the sanctity of that most precious thing which is the gift of life; it embodies the revulsion and horror that we feel for the greatest of crimes.... For most people, life is priceless and they will do anything and suffer the worst privations to preserve it, even when life itself does not bold many consolations or bright prospects for the future.... As a deterrent, the death penalty is playing its part for which there is no substitute.... I suggest that statistics do not prove much, either on one side or the other.... There are too many variations, too many changes as regards circumstances, conditions, between one period and the other, to enable us to make worthy comparisons. (See page 84 of Sellin's Capital Punishment.)

114. Some penologists justify capital penalty and life imprisonment on the 'isolation' or 'elimination' theory of crime and punishment. Vernon Rich in his "Law & The Administration of Justice" (Second Edition, at page 10), says:

The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole, so that they cannot commit other anti-social acts. The isolation theory is used to justify the. death penalty and long-term imprisonment. Obviously, this theory is effective in preventing criminal acts by those executed or permanently incarcerated.

115. While the Abolitionists look upon death penalty as something which is per se immoral and inhuman, the Retentionists apprehend that if we surrender even the risk of the last remaining horrifying deterrent by which to frighten the toughs of the underworld, we may easily tip the scales in favour of the anti-social hoodlums. They fear that abolition of capital punishment, will result in increase of murders motivated by greed, and in affable "crime passionelle".

116. "It is feared", wrote George A. Floris**(Sunday Tribune, December 8, 1963), "the most devastating effects of the abolition will, however, show themselves in the realm of political murder. An adherent of political extremism is usually convinced that the victory of his cause is just round the corner. So, for him long term imprisonment holds no fear. He is confident that (he coming ascendancy of his friends will soon liberate him." To prove this proposition, Floris cites the instance of Von Papen's Government who in September, 1932, reprieved the death sentence passed on two of Hitler's storm-troopers for brutal killing of one of their political opponents. The Retentionists believe that the dismantling of the gallows will almost everywhere enhance the hit and run attacks on political opponents. On this premise, they argue that capital punishment is the most formidable safeguard against terrorism.

117. The argument cannot be rejected out of hand. A number of instances can be cited where abolitionist States feeling the Inadequacy of their penological Armour to combat politically motivated gangsterism, have retrieved and used their capital weapon which they had once thrown away. Despite their traditional abhorrence of death penalty, the Norwegians executed Major Vedkun Quisling after World War 11. The Belgians, too, executed no less than 242 'collaborators' and traitors after the liberation, although in their country, the death penalty was otiose since 1880.

118. In England, death penalty was retained for high treason in the Silverman Bill of 1956. Even at present, for that offence, death penalty is a valid sanction in England. In the aftermath of assassination of Prime Minister Bandernaike in 1959, Ceylon hurriedly reintroduced capital punishment for murder. Owing to similar considerations, Israel sanctioned death penalty for crimes committed against the Jewish people, and executed the notorious Jew-baiter, Adolf Eichmann in 1962. Recently, on April 9, 1979, confronted with a wave of violent incidents after the signing of Egypt-Israel Peace Treaty, Israel sanctioned the use of death penalty "for acts of inhuman cruelty".

119. In India, very few scientific studies In regard to crime and punishment in genecal, and capital punishment, in particular, have been made. Counsel for the petitioners referred us to Chap. VI, captioned Capital Punishment, in the book, "Quantum of Punishment in Criminal Law in India', written by Dr. Kirpal Singh Chhabra, now on the staff of G. N. University, Amritsar. In this article, which was primarily meant as LL. D. thesis, the learned author coo-eludes:

On the basis of statistics both of India and abroad, U. N. O. findings and other weighty arguments, we can safely conclude that death penalty is not sustainable on merits. Innately it has no reformative element. It has been proved that death penalty as operative carries no deterrent value and crime of murder is governed by factors other than death penalty. Accordingly, I feel that the death penalty should be abolished.

120. It will be seen, in the first place, that the analysis by Dr. Chhabra in coming to the conclusion, that death penalty is of no penological value, is based on stale, incomplete and inadequate statistics. This is more particularly true of the data relating to India, which does not cover the period subsequent to 1961. Secondly, the approach to the problem adopted by him, like the other Abolitionists referred to by him, is mainly, if not merely, statistical

121. As already noticed, the proponents of the opposite view of capital punishment, point out mat statistics alone are not determinative of the question whether or not death penalty serves any deterrent or other penological purpose. Firstly, statistics of deterred potential murderers are hard to obtain. Secondly, the approach adopted; by the Abolitionists is oversimplified at the cost of other relevant but imponderable factors, the appreciation of which is essential to assess the true penological value of capital punishment The number of such factors is infinitude, their character variable, duration transient and abstract formulation difficult. Conditions change from country to country and time to time. Due to the inconstancy of social conditions, it is not scientifically possible to assess with any degree of accuracy, as to whether the variation in the incidence of capital crime is attributable to the presence or absents of death penalty in the penal law of that country for such crimes. That is why statistical attempts to assess the true penological value of capital punishment, remain inconclusive.

122. Pursued beyond a certain point, both the Abolitionists and the Retentionists retreat into their own conceptual bunkers firmly entrenched in their respective "faiths". We need not take sides with either of mem. There is always a danger in adhering too rigidly to concepts. As Prof. Brett has pointed out "all concepts are abstractions from reality, and that in the process of abstraction something of the reality is bound to be lost".3 We must, therefore, view the problem against the perspective of the hard realities of the time and the conditions prevailing in the world, particularly in our own country.

123. A review of the world events of the last seven or eight years, as evident from Encyclopaedia Britannica Year Books and other material referred to by the learned Counsel, would show that most countries in the world are in the grip of an ever-rising tide of violent crime. Murders for monetary gain or from misdirected political motives, robbery, rape, assault are on the increase. India is no exception. The Union of India has produced for our perusal a statement of facts and figures showing the incidence of violent crime, including murder, dacoity and robbery, in the various States of India, during the years 1965 to 1975. Another statement has been furnished showing the number of persons convicted of murder and other capital offences and sentenced to death in some of the States of India during the period 1974 to 1978. This statement however, is incomplete and inadequate. On account of that deficiency and for the general reasons set out above, it cannot, even statistically, show conclusively or with any degree of certainty, that capital punishment has no penological worth. But the first statement does bring out clearly the stark reality that the crimes of murder, dacoity and robbery in India are since 1965 increasing.

124. Now, looking around at the world during the last decade, we may recall that in Furman v. Georgia (decided on June 29, 1976), the Supreme Court of the United States held by a majority, that the imposition and carrying out of the death penalty constitutes 'cruel and unusual' punishment, in

violation of the Eighth and Fourteenth Amendments. Brennan and Marshall, JJ. (differing from the plurality) went to the extent of holding that death penalty was per se unconstitutional as it was a cruel and unusual punishment In so holding, these learned Justices purported to adopt the contemporary standards of decency prevailing among the enlightened public of the United States. Justice Marshall ruled that "it was morally unacceptable to the people of the United States". This opinion of the learned Justices was sharply rebuffed by the people of the United States through their chosen representatives. Soon after the decision in Furman, bowing to the thrust of public opinion, the Legislatures of no less than 32 States, post-baste revised their penal laws and reinstituted death penalty for murder and certain other crimes. Public opinion polls then taken show that approximately 70 per cent of Americans have been in favour of death penalty. (See The Voice', supra). In 1976, a Gallup Poll taken in the United States showed that more than 65 per cent of those polled preferred to have an operative death penalty.

125. Incidentally, the rejection by the people of the approach adopted by the two learned Judges in Furman, furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the same time, it is a reminder that Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.

126. Coming back to the review of the world crime situation, during the last decade, Saudi Arabia and some other countries have reinstated death penalty or enacted harsher punishments not only for murder but for some other crimes, also. In America, apart from 32 States which reinstated death penalty under revised laws after Furman, the legislatures of some of the remaining 15 States have either reinstituted or are considering to reintroduce death penalty. Currently, a federal legislation for reinstituting or prescribing capital punishment for a larger range of offences of homicide is under consideration of United States' Congress. According to the report of the Amnesty International, hi U.S.A., as on May 1, 1979, death penalty can be imposed for aggravated murder in 35 States. Attempts have been made in other countries, also to reintroduce death penalty. In Britain, in the wake of serious violent incidents of terrorism, a Bill was moved in Parliament to reintroduce capital punishment for murder and certain other offences. It was defeated by a free vote on April 19, 1979. Even so, no less than 243 members of Parliament had voted in favour of this measure. We have noted that Israel has also recently reintroduced death penalty for certain criminal 'acts of inhuman cruelty'. In People's Republic of China, a new legislation was adopted on July 1, 1979 by China's Parliament, according to Article 43 of which, death penalty can be imposed "for the most heinous crimes". In Argentina, the death penalty was reintroduced in 1976. Similarly, Belgium reintroduced death penalty and increased the number of crimes punishable with death. In France, in 1978, a movement in favour of abolition initiated by the French bishops failed to change the law under which death penalty is a valid sanction for murder and certain other offences. In Japan, death penalty is a legal sanction for 13 crimes. In Greece and Turkey, death penalty can be imposed for murder and other capital offences. In Malaysia and the Republic of Singapore under the Drugs Act of May, 1979, misuse of drugs is also punishable with death. Cuba introduced a new penal code in Feb., 1978, which provides punishment of death by shooting for crimes ranging from some types of murder and robbery to hijacking and rape.

127. In the U.S.S. R. (Russia), as many as 18 offences are punishable with death. In Russia, at present, the following offences committed in peacetime are punishable with death under the RSFSR Criminal Code:

Treason (Article 64); espionage (Article 65); terrorism (if the offence includes the killing of an official (Article 66); terrorism against representative of foreign State (if the offence includes the killing of such a representative "for the purpose of provoking War or international complications") (Art. 67); sabotage (Article 68); organizing the commission of any of the above-named offences (Article 72); commission of any of the above-named offences against other Working People's State (Article, 73); banditry (Article 77); actions disrupting the work of corrective labour institutions (Article 77(1); making or passing counterfeit money or securities (when the offence is committed as a form of business) (Article 87); violation of rules for currency transactions (when committed as a, form of business or on a large scale, or by a person previously convicted under this Article) (Article 88); stealing of State properly on an especially large scale, regardless of the manner of stealing (Article 93(1); intentional homicide with aggravating circumstances (Article 102); rape, when committed by a group of persons or by an especially dangerous recidivist, or resulting in especially grave consequences, or the rape of a minor (Article 117); taking a bribe, with especially aggravating circumstances (Article 173); infringing the life of a policeman or People's Guard, with aggravating circumstances (Article 19(2); hijacking an aircraft, if the offence results in, death or serious physical injuries (Article 213(2); resisting a superior or compelling him to violate official duties, an offence applicable only to military personnel, and carrying the death penalty in peace-time if committed in conjunction with intentional homicide of a superior or any other person performing military duties (Article 240).

(vide, Report of Amnesty International, 1979).

Our object in making the above survey is to bring out the hard fact that in spite of the Abolitionist movement, only 18 States (as on 30th May, 1979) in the world have abolished the death penalty for all offences, while 8 more have retained it for specific offences committed in time of war, only. (See Amnesty International Report (1979), page 92). This means, most of the countries in the modern world still retain death penalty as a legal sanction for certain specified offences. The countries which retain death penalty in their penal laws, such as, Russia, U.S.A., France, Belgium, Malaysia, China and Japan, etc., cannot, by any standard, be called uncivilized nations or immature societies.

128. Surveyors and students of world events and current trends believe that the reversal of the attitudes towards criminals and their judicial punishments in general, and capital punishment in particular, in several countries of the world, is partly due to the fact that milder sanctions or corrective processes, or even the alternative of imprisonment, have been found inadequate and wanting to stem the mounting tide of serious crime. Writing in Encyclopaedia Britannica, 1978 Book of the Year under the caption, 'Changing Attitudes Towards Criminals", Richard Whittingham sums up the cause that has led to the adoption of this New Hard Line, thus:

Horror story after horror story of dangerous criminals sent back into society on bail or parole from a penitentiary or (in many cases) release from a mental institution to commit further crimes nave

forced people to say that enough is enough. The consensus seemed to be that there must be no repetition of such situations as the one described by Chicago some time Columnist Roger Simon in a Sep. 4, 1977, article about a man who had just been convicted of a particularly despicable crime.

129. Faced with the specter of rising crime, people and sociologists alike, have started questioning the rehabilitation policy.

In California another study from the Rand Co-operation, suggests that keeping habitual criminals locked up would do more to reduce crime than any rehabilitation efforts. Despite treatment or preventive measures, habitual criminals commonly go back to crime after they are released from prison, the study showed. In addition, the study found that deterrence to crime was in direct proportion to the relative certainty of going to jail, after being caught.

130. According to Encyclopaedia Britannica Year Book 1979, in 1978 also penologists were seriously divided in their views about the end of punishment. Some penologists argued that "It is not possible to punish and reform simultaneously"; while "others would prefer to strip punishment of its moral overtones". "While many legislators and most penologists have supported the idea that reform ought to take priority in dealing with offenders, many Judges - especially in Britain and the United States. where rising crime rates are the source of much public concern - have expressed grave doubts about the wisdom of this view. They have argued that the courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime".

131. India also, as the statistics furnished by the respondent (Union of India) show, is afflicted by a rising rate of violent crime, particularly murder, armed robbery and dacoity etc., and this has been the cause of much public concern. All attempts made by individual members to move Bills in the Parliament for abolition or restriction of the area of death penalty have ended in failure. At least four of such unsuccessful attempts were made after India won Independence, in 1949, 1958, 1961 and 1978. It may be noted that the last of these attempts was only to restrict the death penalty to a few types of murders specified in the Bill. Though it was passed by the Rajya Sabha after being recast, it has not been passed by Lok Sabha.

131. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light Of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's

representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the! framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the CrPC, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19.

133. We will now consider the issue whether the impugned limb of the provision in Section 302, Penal Code contravenes Article 21 of the Constitution.

134. Before dealing with the contentions canvassed on the point, it will be proper to notice briefly the principles which should inform the interpretation of Art 21.

135. In Maneka Gandhi's case, which was a decision by a Bench of seven learned Judges, it was held by Bhagwati, J. in his concurring judgment, that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights under Article 19. it was further observed that Articles 14, 19 and 21 are not to be interpreted in water-tight compartments, and consequently, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, exhypothesi it must also be liable to be tested with reference to Article 14. The principle of reasonableness pervades all the three Articles, with the result, that the procedure contemplated by Article 21 must be 'right and just and fair' and not 'arbitrary, fanciful or oppressive", otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.

136. Article 21 reads as under:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows:

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by Valid law.

In the converse positive form, the expanded Article will read as below:

A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by Valid law.

Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the Founding Fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications, also, in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in List in - Concurrent List - of the Seventh Schedule, specifically refer to the Indian Penal Code and the CrPC as in force at the commencement of the Constitution. Article 72(1)(c) specifically invests the President with power to suspend, remit as commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, inter alia, the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial Court Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under Section 302, Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.

137. Before we pass on the main Question No. II, we may dispose of another contention canvassed by Dr. L. M. Singhvi.

138. It is pointed out that India, as a member of the International Community, was a participating delegate at the international conference that made the Stockholm Declaration on December 11, 1977, that India has also accepted the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations, which came into force on March 23, 1966, and to which some 47 countries, including India, are a party. This being the position, it is stressed, India stands committed to the abolition of the death penalty. It is contended that the constitutional validity and interpretation of the impugned limb of Section 302, Penal Code, and the sentencing procedure for capital cases provided in Section 354(3) of the CrPC, 1973, must be considered in the light of the aforesaid Stockholm Declaration and the International Covenant, which represent the evolving attitudes and standards of decency in a maturing world.

139. Let us examine this contention. The European Convention of Human Rights came into force on September 1, 1953, and 18 countries had signed this Convention on November 4, 1950. India acceded to this Resolution of the Convention on March 27, 1979. The International Covenant on Civil and Political Rights, inter alia, provides:

Article 6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime....

It will be seen that Clauses (1) and (2) of Article 6 do not abolish or prohibit the imposition of death penalty, in all circumstances. All that they require is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ex post facto legislation. Thus the requirements of these clauses are substantially the same as the guarantees or prohibitions contained in Articles 29 and 21 of our Constitution. India's commitment therefore does not go beyond what is provided in the Constitution and the Indian Penal Code and the Criminal Procedure Code. The Penal Code prescribes death penalty as an alternative punishment only for heinous crimes which are not more than seven in number. Section 354(3) of the Criminal Procedure Code, 1973, as we shall presently discuss, in keeping with the spirit of the International Covenant, has further restricted the area of death penalty. India's penal laws, including the impugned provisions and their application, are thus entirely in accord with its international commitment

140. It will be pertinent to note that most of the countries including those who have subscribed to this International Covenant, retain death penalty for murder and certain other crimes even to the present day in their penal laws. Neither the new interpretative dimensions given to Articles 19 and 21 by this Court in Maneka Gandhi and Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi nor the acceptance by India of the International Covenant on Civil and Political Rights, makes any change in the prevailing standards of decency and human dignity by which counsel require us to judge the constitutional validity of the impugned provisions. The International Covenant, as already noticed, does not outlaw capital punishment for murder, altogether.

141. For all the foregoing reasons, we would answer the first main question in the negative. This takes us to Question No, II. Question No. II.

142. Are the provisions of Section 354(3) of the CrPC, 1973 unconstitutional? That is the question. The constitutional validity of Section 354(3) is assailed on these grounds:

(i) (a). Section 354(3) of the CrPC, 1973, delegates to the Court the duty to legislate in the field of 'special reasons' for choosing between life and death, and

(b) permits imposition of death penalty in an arbitrary and whimsical manner inasmuch as it does not lay down any rational principles or criteria for invoking this extreme sanction. (Reliance has been placed on Furman v. Georgia (Ibid.))

(ii) If Section 354(3) is to be saved from the vice of unconstitutionality, the Court should so interpret it and define its scope that the imposition of death penalty comes to be restricted only to those types of grave murders and capital offences which imperil the very existence and security of the State. (Reliance for this argument has been placed on Rajendra Prasad's case (Ibid).)

143. As against this, the learned Solicitor-General submits that the policy of the law in the matter of imposition of death sentence is writ large and dear in Section 354(3), namely, that life imprisonment is the rule and death sentence an exception; that the correct approach should be to apply this policy to the relevant facts of the particular case, bearing on the question of sentence, and to find out if there are any exceptional reasons justifying imposition of the death penalty, as a departure from the normal rule.

144. It is submitted that conferment of such sentencing discretion on the courts, to be exercised judicially, in no sense, amounts to delegation of the legislative powers by Parliament

145. Sari Sorabji further submits that there is no inherent impossibility in formulating broad guidelines consistent with the policy indicated by the legislature, for the exercise of the judicial functions under Section 354(3). He emphasises that only broad guidelines, as distinct from rigid rules, can be laid down by the Court. Since the discretion proceeds the argument is to be exercised judicially after taking into consideration all the aggravating and mitigating circumstances relating to the crime and the criminal in a particular case, and ample safeguards by way of appeal and reference to the superior courts against erroneous or arbitrary exercise of the sentencing discretion have been provided, Section 354(3) cannot be said to be violative of Articles 14, 19 and 21 or anything else in the Constitution.

146. Before embarking upon a discussion of the arguments advanced on both sides, it is necessary to have a peep into the history and legislative background of the procedural provisions relating to sentencing in the CrPC.

147. Under the CrPC, 1898, as it stood before its amendment by Act No. 26 of 1955, even for the seven offences mentioned earlier, which are punishable in the alternative with death, the normal sentence was the death sentence, and if the Court wanted to depart from this rule, it had to give reasons for doing so. This requirement was embodied in Sub-section (5) of Section 367, which, as it then stood, was as follows: "If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

148. The Law Commission in its 35th Report (Vol. I), made the following comments on this provision:

...a considerable body of opinion is in favour of a provision requiring the Court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt.... It would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death) or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life)" In deference to this recommendation, Section 66 of the CrPC (Amendment) Act, 1955 (XXVI of 1955) deleted old Sub-section (5) of Section 367 with effect from January 1, 1956, and thereafter, for such capital offences, it was left to the Court, on the facts of each case, to pass, in its discretion, for reasons to be recorded, the sentence of death or the lesser sentence. This led to some difference of opinion whether, even after the Amendment of 1955, in case of murder the normal punishment was death or imprisonment for life; (See A.I.R. Commentaries on the CrPC, Vol. 3, page 565, by D. V. Chitaley and S. Appu Rao). Overruling its earlier decision, the Bombay High Court in the State v. Vali Mohammad , held that death is not a normal penalty for murder. As against this, the Division Bench of the Madras High Court in Valuchami Thevar AIR 1965 Mad 48 at p. 49 held that death was the normal punishment where there were no extenuating circumstances. The third set of cases held that both the sentences were normal but the discretion as regards sentence was to be exercised in the light of facts and circumstances of the case.

149. This view appears to be in accord with the decision of this Court in Iman All v. State of Assam . In that case, there was a clear finding by the Court of Session which had been upheld by the High Court, that each of the two appellants therein, committed a cold-blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by them. Those persons were shot and killed even though they had not tried to put up any resistance. It was held by this Court (speaking through Bhargava, I.) that in these circumstances where the murders were committed in cold-blood with the sole object of committing dacoity, the Sessions Judge had not exercised his discretion judicially in not imposing the death sentence, and the High Court was justified in enhancing the sentence of the appellants from life imprisonment to death.

150. Jagmohan Singh's case, which we shall notice presently in further detail, proceeds on the hypothesis that even after the deletion of Sub-section (5) of Section 367 in the Code of 1898, both the alternative sentences provided in Section 302, Penal code are normal punishment for murder, and the choice of either sentence rest, in the discretion of the Court which is to be exercised judicially, after taking into account all the relevant circumstances of the case.

151. Section 354(3) of the CrPC, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report,

stated the object and reason of making this change, as follows:

A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.

Accordingly, Sub-section (3) of Section 354 of the current Code provides:

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

152. In the context, we may also notice Section 235(2) of the Code of 1973, because it makes not only explicit, what according to the decision in Jagmohan's case was implicit in the scheme of the Code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provision of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

The Law Commission in its 48th Report had pointed out this deficiency in the sentencing procedure:

45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background at the offender.

The aims of sentencing:- Themselves obscure become all the more so in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.

We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to co-operate in the process." By enacting Section 235(2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although Sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course", as was pointed out by this Court in Santa Singh v. State of Punjab AIR 1976 SC 2386 "care would have to be taken by the Court to see that this hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.

153. We may also notice Sections 432, 433 and 433-A, as they throw light as to whether life imprisonment as currently administered in India, can be considered an adequate alternative to the capital sentence even in extremely heinous cases of murder.

154. Sections 432 and 433 of the Code of 1973 continue Sections 401 and 402 of the Code of 1898, with necessary modifications which bring them in tune with Articles 72 and 161 of the Constitution. Section 432 invests the "appropriate Government" as (defined in Sub-section (7) of that section) with power to suspend or remit sentences. Section 433 confers on the appropriate Government power to commute sentence, without the consent of the person sentenced. Under Clause (a) of the section, the appropriate Government may commute a sentence of death, for any other punishment provided by the Indian Penal Code.

155. With effect from December 18, 1978, the CrPC (Amendment) Act, 1978, inserted new Section 433-A which runs as under:

433A. Restriction on power of remission or commutation in certain cases.- Notwithstanding anything contained in Section 432, where a sentence of imprisonment foe life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

156. It may be recalled that in Jagmohan this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433-A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433, so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years.

157. We may next notice other provisions of the extant Code (corresponding to Sections 374, 375, 376 and 377 of the repealed Code) bearing on capital punishment. Section 366(i) of the Code requires the Court passing a sentence of death to submit the proceedings to the High Court, and further mandates that such a sentence shall not be executed unless it is confirmed by the High Court. On such a reference for confirmation of death sentence, the High Court is required to proceed in accordance with Sections 367 and 368. Section 367 gives power to the High Court to direct further inquiry to be made or additional evidence to be taken. Section 368 empowers the High Court to confirm the sentence of death or pass any other sentence warranted by law; or to annul or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such court consists of two or more Judges, be made, passed and signed by at least two of them. Section 370 provides that where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be referred to a third Judge.

158. In this fasciculus of sections relating to confirmation proceedings in the High Court, the Legislature has provided valuable safeguards of the life and liberty of the subject in cases of capital

sentences. These provisions seek to ensure mat where in a capital case, the life of tide convicted person if at stake, the entire evidential material bearing on the innocence as guilt of the accused and the question of sentence must be scrutinised with utmost caution and care by a superior Court

159. The High Court has been given very wide powers under these provisions to prevent any possible miscarriage of justice. In State of Maharashtra v. Sindhi this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge.

160. Similarly, where on appeal, the High Court reverses an acquittal, and convicts the accused person and sentences him to death, Section 379 of the Code of 1973, gives him a right of appeal to the Supreme Court Finally, there is Article 136 of the Constitution under which the Supreme Court is empowered, in its discretion, to entertain an appeal on behalf of a person whose sentence of death awarded by the Sessions Judge is confirmed by the High Court.

161. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan's case. These propositions may be summed up as under:

(i) The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment. With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where me maximum punishment is the death penalty.

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to McGantha v. California (1971) 402 US 183). (b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un-guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in out Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of

transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an un-guided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v) (a) Relevant facto and circumstances Impinging on the nature and circumstances of the crime can be brought before the Court at the pre-conviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facto and circumstances had been specifically provided. When counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, "the Court is principally concerned with the facts and circumstances Whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance With the provisions of the Indian Evidence Act in a trial regulated by the Cr. P. C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), Cr. P. C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not tin-constitutional under Article 21.

(emphasis added).

162. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan's case. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv) (a) which postulates, that according to the then extant CrPC both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its

discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to ins-pose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only hi extreme cases.

163. In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab , wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the Court, summed up the scope and implications of Section 354(3), thus:

Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case.

While applying proposition (iv) (a), therefore, the Court has to bear in mind this fundamental principle of policy embodied in Section 354(3).

164. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302, Penal Code, the Court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3) a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.

165. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in Jagmohan, shall have to be recast and may be stated as below:

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence,

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

166. The soundness or application of the other propositions in Jagmohan. and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary, these changes reinforce the reasons given in Jagmohan, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354(3) given a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder - a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

167. The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, re-affirm the view taken by this Court in Jagmohan, and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution.

168. Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders.

169. Dr. Chitale contends that the wide observations in Jagmohan as to the impossibility of laying down standards or norms in the matter of sentencing are too sweeping. It is submitted that soon after the decision in Furman, several States in U.S.A. amended their penal statutes and brought them in conformity with the requirements of Furman. Support has also been sought for this argument from Greg v. Georgia wherein the Supreme Court of the United States held that the concerns expressed in Furman decision that death penalty may not be imposed in as arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentencing proceeding being preferable as a general proposition.

170. If by "laying down standards", it is meant that 'murder' should be categorised beforehand according to the degree of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free-play of discretion, the argument merits rejection.

171. As pointed out in Jagmohan. such "standardisation" is well-nigh impossible.

172. Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crimes are only to be measured by the Injury done to society'. But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done for risked) by the act and degree of the actor's culpability". But how is the degree of that culpability to be measured ? Can any thermometer be devised to measure its degree ? This is very baffling, difficult and intricate problem.

173. Secondly, criminal cases do not fall into set-behavioristic patterns. Even within a single-category offence there are Infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blame-worthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated".*(Messenger and Bittner) This is particularly true of murder. "There is probably no offence'. observed Sir Ernest Gowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this Court in Jagmohan by citing the instance of the Model Penal Code which was presented to the American Supreme Court in Me Goutha.

174. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there Is a real danger of

such mechanical standardisation degenerating into a bed of Procrustean cruelty.

175. Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the Court would not by over-leaping its bounds rush to do what Parliament, in its wisdom, warily did not do,

176. We must leave unto the legislature, the things that are Legislature's. "The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits." As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted. judicial "made-to-order* standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting; down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may very from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people. In Furman, the Hon'ble Judges claimed to articulate the contemporary standards of morality among the American people. But speaking through public referenda, Gallup polls and the state legislatures, the American people sharply rebuffed them. We must draw a lesson from the same.

177. What the learned Chief Justice, who is amongst us in this case, has said recently in Gurbaksh Singh Sibbia v. State of Punjab Criminal Appeals Nos. 335 etc. of 1977 and 81 and 82 of 1978, to the context of laying down standards In the discretionary area of anticipatory bail, comes in as a timely reminder. In principle, these observations aptly apply to the desirability and feasibility of laying down standards in the area of sentencing discretion, also. Let us therefore, hark to the same:

Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power Is to be meaningful. There Is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because,

discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application. Earl Loreburn L. C. said in Hyman v. Rose 1912 AC 623:

I desire in the first instance to point out that the discretion given by the section is very wide.... Now it seems to me that when the Act is so express to provide a wide discretion,...it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament, It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand.

Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises.

Therefore, even if we were to frame a 'Code for the grant of anticipatory bail'. which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence.

178. From what has been extracted above, it is clear that this Court, should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature in Section 354(3) can be laid down. Before we come to this aspect of the matter, it will be fair to notice briefly the decisions of the Supreme Court of U.S.A. in Gregg v. Georgia and companion cases.

179. Soon after the decision in Fur-man, the Georgia Legislature amended its statutory scheme. The amended statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the

extreme penalty of death, as provided in that statute, are:

(1). The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions), (2). The offence of murder, rape armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree, (3). The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4). The offender committed the offence of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(6). The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7). The offence of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8). The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9). The offence of murder was committed by a person in, or who has escaped from, the lawful confinement.

(10). The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

180. The Supreme Court of Georgia in Arnold v. State (1976) 236 Ga 534, 540, 224 SE 2d 386, 391 held unconstitutional the portion (within brackets) of the first circumstance encompassing persons who have a "substantial history of serious assaultive criminal convictions" but did not set clear- and objective standards.

181. The amended statute, also, provided for a bifurcated trial and a pre-sentence hearing. It also provides for an automatic appeal of death sentence to the Supreme Court of Georgia, which may or may not affirm the death sentence. The appellate court is also required to include reference to similar, cases that the court considered.

182. The defendant (accused) in that case was convicted of two counts of armed robbery and two counts of murder. The accused had committed the murders for the purpose of receiving money and an automobile of one of the victims. After reviewing the trial record, the Georgia Supreme Court

affirmed the convictions and the imposition of death sentences for murder, only. The constitutional validity of the amended statutory scheme of Georgia was challenged before the Supreme Court of U.S.A. on the ground that the imposition of the death penalty for the crime of murder under the Georgia statute violated the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

183. Likewise, in the companion case Profit v. Florida , the Florida Legislature adopted new statutes that authorise the imposition of the death penalty on those convicted of first-degree murders. Under the new Florida statutes, if a defendant (accused) is found guilty of first-degree murder, a separate pre-sentence hearing is held before the jury where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence. The actual sentence is, however, determined by the trial judge, who is also directed to. weigh the statutory aggravating and mitigating circumstances. If a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances. Just as in the Georgia statute, a death sentence is to be automatically reviewed by the Supreme Court of Florida. Under this new statutory scheme, the Florida Court found Profit (defendant) guilty of first-degree murder and sentenced him to death on the finding that these aggravating circumstances were established:

(1) The murder was premeditated and occurred in the course of a felony (burglary);

(2) the defendant had the propensity to commit murder;

(3) the murder was especially heinous, atrocious, and cruel; and (4) the defendant knowingly, through his intentional act, had created a great risk of serious bodily harm and death to many persons.

The trial judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed the death sentence. Before the Supreme Court of U.S.A., the constitutional validity of the imposition of death penalty for the crime of murder under the Florida statutes was challenged on the same ground as in Gregg v. Georgia. The Supreme Court of U.S.A. in both the aforesaid cases negatived the challenge to the statutes and upheld their validity.

184. It may be recalled that in Furman, that Court had held that if clear, definite and articulate standards channeling the sentencing discretion for imposition of the death penalty are not laid down in a statute, it would violate the Eighth and Fourteenth Amendments. It may be noted that the aggravating circumstance No. (7) is couched in a very wide and elastic language. The expressions "outrageously or wantonly vile", "horrible or inhuman" employed therein are of the widest amplitude and give this aggravating circumstance the character of an omnibus clause. Likewise, in the Florida statute, the scope of the words "especially heinous, atrocious and cruel" was equally large and imprecise.

185. It can be seriously questioned whether these extremely elastic standards really exclude the uncontrolled exercise of sentencing discretion so as to meet the requirements of Furman.

186. In Gregg v. Georgia, the petitioner attacked the seventh statutory aggravating circumstance which authorises imposition of the death penalty if the murder was "outrageously, or wantonly vile, horrible or inhuman" on the ground that it was so broad that capital punishment could be imposed by its application in any murder case. Stewart, J., speaking for himself and for Powell and Stevens, JJ., got over this attack, in three ways:

Firstly, by reading down the concerns expressed in Furman. In this connection, Stewart, J. said, all that Furman mandates is that discretion in so grave a matter must be suitably directed "so as to minimize the risk of wholly arbitrary and capricious action". This was, if we may say so with respect, an admission of the fact that a considerable range of sentencing discretion has perforce to be left with the sentencing body to be exercised by it according to its own good sense and reason: and that no standards howsoever meticulously drafted can totally exclude scope for arbitrary and capricious action.

The second reason given to parry this attack was of a general nature. It was observed:

As a general proposition these concerns (expressed in Furman) are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

The third course adopted to foil the attack was:

It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

187. White, J. with whom the Chief Justice and Rehnquist, J. joined, negatived the charge of these standards being vague and incomplete, with these observations:

The argument is considerably overstated.... The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed became more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate as they are in Georgia by reason of the aggravating circumstance requirement, it becomes reasonable to expect...that Georgia's current system would escape the infirmities which invalidated its previous system under Furman.... Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences...imposed wantonly or freakishly for any given category of crime will be set aside.

188. Similarly, in Profit v. Florida, it was contended that the enumerated aggravating and mitigating circumstances in the Florida statute are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty". In particular, the petitioner attacked the eighth and third statutory aggravating circumstances which authorise the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel" or if "the defendant knowingly created a great risk of death to many persons

189. Agreeing with the Supreme Court of Florida, the Supreme Court of U.S.A. recognised that "while it is arguable that all killings are atrocious, still we believe that the Legislature intended something especially heinous, atrocious, or cruel" when it authorise the death penalty for first-degree murder. As a consequence, the Court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim".

190. It appears to us that in Gregg v. Georgia and the companion cases, the Supreme Court of U.S.A. was obliged to read down the requirements of Furman and to accept these broadly worded, loose-ended and not-all-inclusive "standards' because in the area of sentencing discretion, if it was to retain its judicial character, exhaustive standardisation or perfect regulation was neither feasible nor desirable.

191. Moreover, over-standardisation of the sentencing process tends to defeat its very purpose, and may actually produce opposite results.

192. Messenger and Bittner highlight this danger, by taking inter alia, the example of the guided-discretion capital punishment statutes favoured by the Supreme Court in Gregg v. Georgia and its companion cases, as follows;

A defendant convicted of capital murder might wish to make the following speech to the jury about to consider whether capital punishment should be Imposed:

I am deeply sorry for my crime which I recognize was about as bad as any that can be imagined. I did, in fact, go to the police station shortly after the killing to surrender and make a full confession. Although I have done some terrible things in my life you may wish to know, before deciding whether I should live or die, that I have also done some good. I once risked my life in combat to save five comrades - an action for which I was awarded the Silver Star - and for the last 10 years I have personally cared for my invalid mother while supporting 5 younger brothers and sisters.

The mitigating factors listed in today's capital punishment statutes are sometimes quite general, but none that I have seen in any statute would permit a jury to consider any of the circumstances mentioned in this defendant's speech (or, for that matter any other evidence of pre-crime remorse). Apparently the Florida statute upheld in Profit v. Florida would not; yet the Supreme Court plurality, seemingly oblivious to the statutes, limitations declared in a companion case, 'A' jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. (Jurek v. Texas), (1976) 428 US 262, 271.

193. Critically examined, it is clear that the decisions in Greg v. Georgia and Its companion cases demonstrate the truth of what we have said earlier, that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards, Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from ironcased standards, which will minimise the risk of arbitrary imposition of death penalty for murder and some other offences under the Penal Code.

194. This takes us to the question of indicating the broad criteria which should guide the Courts in the matter of sentencing a person convicted of murder under Section 302, Penal Code. Before we embark on this task, it will be proper to remind ourselves, again that "while we have an obligation to ensure that the constitutional bounds are not over-reached, we may not act as judges as we might as legislatures."[Per Stewart. J. in Greg v. Georgia]

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

196. We will first notice some of the aggravating circumstances which. In the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms:

The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.

198. It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the CrPC, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ham's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2:1) has completely reversed the view that had been taken in Ediga Anamma regarding the application of

Section 354(3) on this point. According to it, after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the 'man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other,

202. In Rajendra Prasad, the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)." Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its 'ethos'; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302, Penal Code, fully apply to the case of Section 354(3), CrPC, also. The same criticism applies to the view taken in Bishnu Deo Shaw v. State of West Bengal , which follows the dictum in Rajendra Prasad (ibid).

203. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

204. Dr. Chitaley has suggested these mitigating factors:

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

205. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a 'child' that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

206. According to some Indian decisions, the post-murder remorse, penitence or renentence by the murderer is not a factor which may induce the Court to pass the lesser penalty (e. g. Mominuddin Sardar), . But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of Messenger and Bittner (ibid), which are in point.

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207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since 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.

208. For all the foregoing reasons, we reject the challenge to the constitutionality of the impugned provisions contained in Sections 302 Penal Code and 354(3) of the CrPC, 1973.

209. The writ petitions and the connected petitions can now be heard and disposed of, on their individual merits, in the light of the- broad guidelines and principles enunciated in this judgment.

Bhagwati, J. (Minority view)

210. I have had the advantage of reading the careful judgment prepared by my learned brother Sarkaria. but I find myself unable to agree with the conclusions reached by him. I am of the (view that Section 302 of the Indian |Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Articles 14 and 21 of the Constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.

211. I would therefore strike down Section 302 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life. I shall give my reasons for this view on the day on which the Court reopens after the summer vacation.

ORDER

212. In accordance with the majority opinion the challenge to the constitutionality of Section 302 of the Penal Code in so far as it provides for the death sentence as also the challenge to the constitutionality of Section 354(3) of the CrPC, 1973 fails and is rejected.

213. The Writ Petitions and other connected matters may now be placed for hearing, in the usual course, before the Division Bench for consideration of the individual cases on merits, in the light of the principles enunciated in the majority judgment.