



## **TIGHT THE NOOSE!**

### **– IF NOT, WHY? IF NOT NOW, WHEN? –**

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**Abstract--**Death Sentence is part of our criminal justice system. The developing scenario has made death sentencing very narrower. The protection provided to the society cannot be suggested to be withdrawn for the sake of a set of people who surrender their protection desiring to enjoy by causing harm to the society. Keeping in view the present prevailing scenario in India, by no stretch of imagination, it can be said that we have reached at a stage where abolition of death sentence must be favoured. There is rather a need to fill the gap by streamlining the sentencing process by reasserting the guidelines laid down in *Bachan Singh* and *Machhi Singh*. There is a need to streamline death sentencing regime where no one can pin point “different decisions by different judges”.

On one hand, the Supreme Court has held that accused despite being convicted are not denuded of their human rights provided under Article 21 of the Constitution of India, and on the other hand, the Supreme Court has once again settled the legal position that the Courts should impose punishment befitting the crime so that it reflects public abhorrence of the crime. The Courts in India now must go ahead to tight the noose of the culprits. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. If we can't tight the noose of the accused now, then when?

To call for abolition or to suggest abolition for the sake of humanity may please one segment of the Society, but we must not forget that it is also a calling for causing inhumanity to other segment of the society. There is now need for soothing balm on the victims of crime and other citizens. Let's be more humane to the victims of inhumanity.

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#### INTRODUCTION:

Life is so dear to everyone that no one desires his soul to leave for the celestial world. Love towards life leads human mind to live in eternity. Everyone desires to achieve immortality. What a man thinks has been truly described by Shri Rabindranath Tagore<sup>1</sup> in his poetry as follows:

In this beautiful world, I do not want to die,  
I want to live amongst human beings.  
In this sunshine, in this garden full of flowers –  
Amidst thriving hearts – I wish I could find a place !

Rare indeed is this human birth. The human body is like a boat, the first and foremost use of which is to carry us across the ocean of life and death to the shore of immortality.<sup>2</sup> The web of our life is of a mingled yarn, good and ill together.<sup>3</sup> Affliction does not come from the dust nor does sprout from the ground but man is born to trouble as the sparks fly upward.<sup>4</sup> In the words of Sekai Kyusei Kyo, a person sins when he succumbs to the inclination to contravene the divine will by pursuing inordinate desires.<sup>5</sup> Such an inclination leads to suffer punishment. When a person lives peacefully, he gets love and affection and to live contravening the divine will brings hatredness into motion.

The author of this paper seeks to present a comparative story of Love against Hate and the vision of posterity that will become the history.

#### RULE OF DHARMA IN ABSENCE OF A 'STATE':

In ancient era, there was no State<sup>6</sup> and the people were acting according to Dharma<sup>7</sup> and thereby protecting each other. There was no necessity of any authority to compel obedience to the laws. The existence of such an ideal 'stateless society' is graphically described in the following verse:

<sup>1</sup> DEBIDAS RAY, LIFE, POEM NO.1, TAGORE AND ME : ENGLISH TRANSLATION OF SELECTED POEMS OF RABINDRANATH TAGORE, (PARTRIDGEINDIA, 2015)

<sup>2</sup> Srimad Bhagavatam XI. XIII

<sup>3</sup> William Shakespeare's 'All's well that Ends well' Act IV Scene III, available at <<http://shakespeare.mit.edu/allswell/allswell.4.3.html>> (Last visited on 15.12.2017).

<sup>4</sup> Bible Job 5: 6-7

<sup>5</sup> TEMPLETON, JOHN MARKS, WISDOM FROM WORLD RELIGIONS: PATHWAYS TOWARD HEAVEN ON EARTH (TEMPLETON FOUNDATION PRESS, 2008) p.305

<sup>6</sup> The 'State' is an association of human beings which is brought into existence by a morally self-possessed society to serve as its impartial agent for making its sense of justice prevail in the justiciable sphere of the social life, and with that end in view endowed with supreme legal authority (including the monopoly of legal force) on condition of exercising it in strict conformity with the moral standards of the society. [See: K.P. Mukherji, The State p.42]

<sup>7</sup> The Sanskrit word 'Dharma' is a word of the widest import. There is no corresponding word in any other language. Mahabharatha Shantiparva (109: 9-11) contains a discussion of this topic. On being questioned by Yudhistira about the meaning and scope of Dharma, Bhishma states:

तादृशोऽयमनुप्रश्नो यत्र धर्मः सुदुलर्भः । दुश्करः प्रतिसंख्यातुं तत् केनात्र व्यवस्थिति ॥ [109.9]  
धारणाद् धर्ममित्याहुधर्मेण विधृतः प्रजाः । यः स्याद् धारणस्युक्तः स धर्म इति निश्चयः ॥ [109.11]

तुम्हारा यह पिछला प्रश्न भी ऐसा ही है। इसके अनुसार धर्म के स्वरूप का विवेचन करना या समझना बहुत कठिन है, इसीलिये उसका प्रतिपादन करना भी दुश्कर ही है। अतः धर्म के विषय में कोई किस प्रकार निश्चय करें? धर्म का नाम 'धर्म' इसलिये पड़ा है कि वह सबको धारण करता है – अधोगति में जाने से बचाता है और जीवन की रक्षा करता है। धर्म ने ही सारी प्रजा को धारण कर रखा है, अतः जिससे धारण और पोषण सिद्ध होता हो, वही धर्म है, ऐसा धर्मवेत्ताओं का निश्चय है।

"It is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is surely Dharma" [See: Shantiparva, 109-9-11]



न वै राज्यं न राजाऽसीन च दण्डो न दण्डिकः ।  
धर्मेणैव प्रजाः सर्वा रक्षन्ति स्म परस्परम् ॥<sup>8</sup>

There was neither kingdom nor the king, neither punishment nor the guilty to be punished.

People were acting according to Dharma and thereby protecting one another.

The supremacy of Dharma prevailed in ancient Indian Rajadharma which reads thus:

तदेतत् – क्षत्रस्य क्षत्रं यद्वर्मः ॥ तस्माद्वर्मात्परम् नास्ति ।  
अथो अबलीयान बलियान्समाशन्स्ते धर्मेण । यथा राजा एवम् ॥<sup>9</sup>

Law is the king of kings; Nothing is superior to law; The law aided by the power of the king enables the weak to prevail over the strong.

This verse not only declares the supremacy of law but also the principle of rule of law. The Dharma was the ultimate authority and the authority of the king was only penultimate.

The basic philosophy that for the good of the greater number, interest of individuals or smaller groups should be sacrificed to the extent necessary was deeply embedded in and formed the foundation of *Dharma*. This aspect is evident from the following verse:

त्यजेदेकं कुलस्यार्थं ग्रामस्यार्थं कुलं त्यजेत्  
ग्रामं जनपदस्यार्थं आत्मार्थं पृथ्वीं त्यजेत् ॥<sup>10</sup>

Sacrifice the interest of individual for the sake of the family, sacrifice the interest of the family for the sake of the village, sacrifice the interest of the village for the sake of the country and lastly for the sake of securing *Moksha* (eternal bliss) of the *Atma* reject the World.

The above verses give a clear picture of an ideal stateless society, which appears to have been in existence in the hoary past. Such a society was the most ideal for the reason that every individual scrupulously acted according to the rules of right conduct by the force of his own culture and habit and not out of any fear of being punished by a powerful superior authority like the State. Consequently there was mutual co-operation and protection. The society was free from the evils arising from selfishness and exploitation by individuals. The sanction which enforced such implicit obedience to *Dharma* was the faith of the people in it as also the fear of incurring divine displeasure if *Dharma* was disobeyed. The source of all evil actions of human beings was traced to the desire for material pleasure which in turn gave rise to conflict of interests among individuals.<sup>11</sup> While man has the inherent capacity to control his desires and not to harm other human beings, when his desires go uncontrolled, he has also the mischievous propensity to cause injury and misery to his fellow men and women.<sup>12</sup>

### ORIGIN OF KINGSHIP/STATE IN ANCIENT INDIA:

The ideal society so beautifully described above did not last long. A situation arose when some persons began to flout *Dharma*. They were infatuated by their desire for pleasure and prompted by their own muscle power began to exploit and torment the weaker sections of society for their selfish ends. This situation forced the law abiding people to search for a remedy. This resulted in the discovery of the institution of king and establishment of his authority (kingship or the State).<sup>13</sup> According to Manu, the people were, once upon a time, without a

<sup>8</sup> Mahabharata Shantiparva 59 : 14

<sup>9</sup> Brihadaramyaka Upanishad 1-4-14.

<sup>10</sup> Udyoga Parva (Vidura Niti – Ch.37-17)

<sup>11</sup> JOIS, RAMA, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE, (LUCKNOW EASTERN BOOK COMPANY 1990) pp.5, 20

<sup>12</sup> Ibid, p.7

<sup>13</sup> Ibid, p.20



king and they were utterly perturbed through fear. The Lord (Prabhu) created the King for the protection of human beings.<sup>14</sup> Irrespective of the question of social contract or divine origin of State, the King enjoyed his authority partly by human consent as well as partly by divine decree.<sup>15</sup> The discovery of the institution of king and establishment of the Kingship/State started a new era.

A King was expected to protect the society. It is stated in Manusmriti and I quote:

ब्राह्मां प्राप्तेन संस्कारं क्षत्रियेण यथाविधि ।  
सर्वस्यास्य यथान्यायं कर्तव्यं परिरक्षणम् ॥<sup>16</sup>

The King, Kshatriya by birth, consecrated with the sacred-thread, has the duty to protect his subjects on paradigms of justice.

The Rajadharma incorporated innumerable functions to be discharged by the King. All these have been summed up in five fundamental duties:

दुष्टस्य दण्डः सुजनस्य पूजा न्यायेन कोषस्य च संप्रवृद्धिः ।  
अपक्षपातोऽर्थिषु राष्ट्ररक्षा पन्थैव यज्ञाः कथिता नृपाणाम् ॥<sup>17</sup>

To punish the wicked, to honour (protect) the good, to enrich the treasury (Kosha) by just methods, to be impartial the litigants and protection of the country. These are the five yajnas (selfless duties) to be performed by a king.

The object of inflicting the punishment under the Ancient Indian Penal law was both reformatory and deterrent. Rajadharma gave great importance to the administration of justice and declared that it was the personal responsibility of the King himself. It is evident from the above that ensuring the welfare of the people was the quintessence of the Rajadharma. The powers vested in the King (State) to punish a person found guilty of an offence has been praised by the Dharmashastras as a great gift to mankind.

Philosophers in all ages and of all countries have speculated on the origin of the State. The problem of obedience to one man has been raised by Yudhisthira. It indirectly refers to a form of government-monarchy. Shanti Parva (Chapters 59 and 67) informs about the state of nature which refers to the origin of State in different circumstances. The State was conceived to be the beneficent institution which was primarily brought into being for the welfare of its subjects. To be more precise, the State was the guardian of 'Dharma' which was an embodiment of justice. The State was a beneficent institution. It interfered to the minimum extent with the life of its citizens, but indirectly by ensuring security and justice for everyone. It sought to create conditions for the promotion of their all-round development.<sup>18</sup> It is stated that the theories of the origin of State have been coloured in the nineteenth century by the concept of the divinity of kingship.<sup>19</sup>

By advent of the State, a challenge came to regulate the man's desires and mischievous propensity causing misery to his fellow men. It gave birth to different laws which later came to be codified. By passage of time, the desires of man went uncontrolled leading towards division of the world into different regions and countries which led into historical wars to show one's power and desire to rule the world from one window. The

<sup>14</sup> Manusmriti VII .3

<sup>15</sup> TIWARI, DR. DIWAKAR, *Origin of State, THE CONCEPT OF STATE IN THE MAHABHARATA*, (1<sup>st</sup> EDN., VIDYANIDHI ORIENTAL PUBLISHERS, DELHI) p.54

<sup>16</sup> PATHAK, GANESH DUTT, *MANU SMRITI*, 7 : 2 (VARANASI, SHRI THAKUR PRASAD PUSTAK BHANDAR, 2002) p.208

यथाविधि यज्ञोपवित संस्कार पाये हुए क्षत्रिय राजा को न्यायपूर्वक सभी प्रजाओं की रक्षा करनी चाहिये ।

<sup>17</sup> Atri Smriti-28

<sup>18</sup> Supra Note 15

<sup>19</sup> Thapar, Romila, op.cit, p.334



holocaust of the wars on different occasions ultimately became once again responsible for the inclusion of promotion and encouragement of respect for human rights throughout the world which brought the nations worldwide together to respect human values. The right to life has achieved utmost attention worldwide contributing to the enhancement and progressive development of human rights.

#### **IMPORTANCE OF FEAR:**

Whether an individual behaves properly only on account of fear of punishment is defined in Shanti Parva 15-34 (Manu VII-22) as follows:

सर्वो दण्डजितो लोको दुर्लभो हि शुचिर्जनः ।  
दण्डस्य हि भयादभीतो भोगायैव प्रवर्तते ॥<sup>20</sup>

सारा जगत् दण्ड से विवश होकर ही रास्ते पर रहता है क्योंकि स्वभावतः सर्वथा शुद्ध मनुष्य मिलना कठिन है। दण्ड के भय से डरा हुआ मनुष्य ही मर्यादा पालन में प्रवृत होता है।

It is difficult to find a man in this world who is always pure in all respects. It is only on account of the fear of punishment that an individual behaves properly and is kept within bounds.

Shanti Parva defines the importance of punishment as follows:

दण्डः संरक्षते धर्मं तथैवार्थं जलाधिप ।  
कामं संरक्षते दण्डस्त्रिवर्गो दण्डं उच्यते ।

जनेश्वर ! दण्ड ही धर्म और अर्थ की रक्षा करता है, वही काम का भी रक्षक है, अतः दण्ड त्रिवर्गरूप कहा जाता है।

Punishment protects Dharma, Artha and Kama (the law, the lawful wealth and lawful desires of human beings) and hence it is called 'Trivargarupa' (symbol of Dharma, Artha and Kama).

From the foregoing discussion it is crystal clear that crime existed in all societies and it continued to emerge as a challenge for all the rulers and the society. Capital punishment being maximum punishment for any crime is an ancient sanction. One can find references of capital punishment in ancient scriptures and law books.

#### **CONCEPT OF 'CRIME':**

Crime is a dynamic concept and its denotative meaning changes with the growth of society both from the point of view of direction and dimension. What is not crime today may be 'crime' tomorrow, or what is a crime of insignificant gravity today may be of high gravity tomorrow. Naturally, the prescription of punishment also changes accordingly.<sup>21</sup>

Crime increase is deeply related to the fall in ethical and moral values of a society. The province of law is the establishment of rules for the regulation of human conduct amidst the diversity of inclinations and desires, so as to reconcile and harmonise the wishes of the individual with the interest of the community in which ultimately the interest of the individual is also involved.<sup>22</sup>

Crime, like sin, proceeds from the mind, though committed by the body, and it is obvious that if the mind can be altered so that the individual no longer wishes to do that which transgresses the law, the result will be more

<sup>20</sup> Shantiparva 15-3

<sup>21</sup> MITRA, N.L., *A New Question on Penal Law* in CRIMINAL LAW & CRIMINOLOGY, K.D. GAUR (2002 DEEP & DEEP PUBLICATIONS PVT. LTD.) p. 72

<sup>22</sup> SEN, PRIYANATH, THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE, (TAGORE LAW LECTURES 1909) p.1



satisfactory, so far as the individual is concerned, and so far as society as a whole is concerned, than any other possible treatment.<sup>23</sup>

#### WHAT IS PUNISHMENT:

Questions arise - Is 'punishment' in its varied forms an artificial danger for a convict? - Is it meant for creation of effective deterrence or re-education for a convict so as to make him a responsible person of the society? Is it a mean of repairing the wounds made upon collective sentiments? And/Or, Is it a decree of vengeance in favour of State necessary for maintaining the law and order?

Ideally, a Criminal Law is a command, usually a prohibition, against anti-social conduct; that is to say, against conduct which will interfere with the order and smooth and satisfactory running of the society, and any such explanation of the law demonstrates the necessity that there should be such laws, otherwise chaos would come again. It is of the nature of such a law that practically everybody is ordered to obey it.<sup>24</sup>

What, then, is to happen if an individual disobeys the law? And the first answer to this surely must be that something must be done to demonstrate that the law is a law, and not a mere request, or pious opinion of what conduct is appropriate. Law is not a law, at any rate in modern times, without a sanction. This we may call punishment. Punishment is required to vindicate the law.<sup>25</sup>

Crime being a dynamic concept changes with the growth of society, the prescription of punishment also changes. Punishment, on some occasions, may seem an artificial danger so as to deter potential offenders, sometimes it creates effective deterrence; sometimes it re-educates a convicted offender to make him a responsible person of the society; sometimes by convicting an offender it seems to be giving solace to the public; and it seems to be armoury of the State for maintaining law and order. Different societies have adopted different theories of punishment which have interrelationship and should not be considered separately and independently of one another. As on date, punishment being art involves balancing of each and every theory of punishment emphasizing the changing need of the society.

The purpose of punishment is to extinguish the rising flame of criminal tendency in a human being. By inflicting a just punishment, a civilized society usually tries to re-educate the criminal so as to make him a responsible member of the society. While the battle rages loud and long, as a perennial process, the generations have never given up recovering a worst criminal out of criminal vices by varied means of punishment for protection of the mankind.

According to Enrico Ferri, in social life penalties have the same relation to crime that medicine has to disease. After a disease has developed in an organism, we have recourse to a physician.<sup>26</sup> To cure the disease in criminals, we need to adopt therapeutic attitude like medical professionals. According to Karl Menninger<sup>27</sup>, "there is another element in the therapeutic attitude i.e. the quality of hopefulness. If no one believes that the patient can get well, if no one – not even the doctor – has any hope, there probably won't be any recovery. Hope is just as important as love in the therapeutic attitude." Social interest in a civilized society lies in a peaceful and secure atmosphere, which is governed by rule of law. A man possesses free choice to follow either good or evil. If he chooses evil, he is responsible for his choice thereby inviting appropriate punishment. This theory of "Love and Hope" seems to be the guiding factor running in the background of punishment to a convict.

<sup>23</sup> CODDINGTON, F.J.O , *Problems of Punishment* in THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), (LONDON INDIANA UNIVERSITY PRESS 1971) p. 347

<sup>24</sup> Ibid pp. 333, 336

<sup>25</sup> Ibid, p. 337

<sup>26</sup> FERRI, ENRICO, *The Positive School of Criminology*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), (LONDON INDIANA UNIVERSITY PRESS 1971) p. 119

<sup>27</sup> MENNINGER, KARL, *Love Against Hate*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ED), (LONDON INDIANA UNIVERSITY PRESS 1971) p. 248



A reference to the snapshots of crime in India (1953-2015)<sup>28</sup> will show that for the period 1953 to 2015 there has been increase in cognizable crimes (in total 389.96%) under the Indian Penal Code e.g., murder has increased by 227.75%; kidnapping & abduction by 1477.62%; robbery by 330.45%; riots by 217.86%; and in cases of rape, for the period 1971-2015 there has been an increase of 1293.28%.

The above statistics clearly show that increase in crime is at alarming stage and is directly affecting the living condition of people at large and also the economy of India. The infrastructure which the public at large requires is being utilized to maintain the law and order situation. Deterrence by way of appropriate and prompt punishment is required at all levels so as to ensure decline in crime at all levels.

A lightning bolt is necessary to stop a ferocious lion that turns upon the shot of a rifle. But to the extent that spirits are softened in the social state, sensibility increases and, as it increases, the force of punishment must diminish if the relation between object and sensory impression is to be kept constant.<sup>29</sup> Since people fear death more than anything else, the death penalty has been provided as one of the punishments in the statutes to effectively deter people from committing crimes. Deterrence is intended to operate by fear. The idea is that the sentence imposed shall be so unpleasant – so terrible, if the word be understood without exaggeration – that the offender will hereafter be afraid to repeat similar offences, and that others will be afraid to imitate his crime.<sup>30</sup> The purpose of punishment is ultimately to protect the society against crime. The term ‘capital punishment’ stands for the most severe form of punishment which is awarded for the most heinous and detestable crimes against humanity.

#### CASE OF ABOLITIONISTS:

Abolitionists argue that capital punishment is violation of basic human rights and an affront to the dignity of man. It is nothing short of killing by the State. It is discriminatory and is often used disproportionately against poor people. It legitimizes an irreversible act of violence by the State and will inevitably claim innocent victims. As long as human justice remains fallible, the risk of executing the innocent can never be eliminated, therefore, it will be in the interest of justice to abolish the death penalty.<sup>31</sup>

#### CASE OF RETENTIONISTS:

Retentionists argue that in our judicial system 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.<sup>32</sup> The humanistic approach should not obscure our sense of realities. When a man commits a crime against the society by committing a diabolical, cold-blooded, pre-planned murder, of an innocent person the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life.<sup>33</sup> In a society like ours where terrorism is increasing day by day, if the extreme penalty is abolished, the fear that comes in the way of people committing murders will be removed. They contend that the prevailing socio-economic conditions of one part of the world cannot be equated with other part of the world. We should not equate the condition of European countries with the condition prevailing in our country. It is stated that we have a transparent legal process and capital punishment is inflicted with greater care and caution

<sup>28</sup> CRIME IN INDIA 2015 COMPENDIUM, *SNAPSHOTS (1953-2015)*, NATIONAL CRIME RECORDS BUREAU (MINISTRY OF HOME AFFAIRS) available at: <http://www.ncrb.nic.in/> (Lastly accessed on 9 May 2017)

<sup>29</sup> BECCARIA, CESARE, *On Crimes and Punishments*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ED), (LONDON INDIANA UNIVERSITY PRESS 1971) p. 117 at 127

<sup>30</sup> Supra Note 23, pp. 343

<sup>31</sup> Amnesty International, available at <<https://www.amnesty.org/en/latest/news/2014/03/five-death-penalty-myths-debunked/>> (Last visited on 15.12.2017)

<sup>32</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 para 77

<sup>33</sup> *Rajendra Prasad v. State of UP*, (1979) 3 SCC 646 para 120



in rarest of rare cases only where heinous crimes shocked the society. Furthermore, Indian law provides for all the requisite safeguards including the right to fair trial and the presumption of innocence. Each State has a sovereign right to determine its legal system and punish criminals accordingly. In addition, there are specific legal provisions suspending capital punishment for pregnant women and prohibiting it for juvenile offenders; death sentences are confirmed by a superior court, and the accused has the right of appeal. The President of India and State Governors are empowered to grant pardon or to suspend, remit or commute any sentence. The issue should not be held hostage to create an artificial consensus for abolition. India is proud of its record of sustained democracy, good governance and respect for the rule of law as well as the promotion and protection of the fundamental and human rights of its people. Given the diversity of public opinion, it would be unwise to abolish the same contrary to the wishes of the public at large.

#### PARLIAMENTARY DEBATES AND CONCEPT OF “RAREST OF RARE”:

“To Hang” or “Not to Hang” has continued to be a debate in full swing for many decades not only in our pre-independence era but post-independence too. A perusal of parliamentary debates of both the times shows serious debates on the issue in question. A bare perusal of the parliamentary debates shows that the Parliamentarians were the first to suggest evolving of Rarest of Rare formula in capital punishment cases. In post-independence era, Shri M.L. Agarwal, Member of Parliament, brought a Bill, in the year 1956, seeking abolition of capital punishment. During debate on the said Bill, Pandit Thakur Dass Bhargav observed as follows<sup>34</sup>:

मैं श्री मुकन्द लाल अग्रवाल को मुबारकबाद देता हूं कि उन्होंने एक ऐसे मजमन को इस बिल के अन्दर लाकर हाउस के सामने रखा है जो निहायत जरूरी था और जो डिबेटेबुल (वादविवाद के योग्य) भी है।

मैं इस चीज़ को मानता हूं कि रेआर केसेज (किंचित मामलों) में फांसी की सजा होनी चाहिए क्योंकि इन्सान के जजमेंट ने हमेशा ही सर्टेन्टी (निश्चितता) नहीं हो सकती। इसलिये इस सजा को उन केसेज के लिये ही होना चाहिए जिस से सर्टेन्टी हो।

मैं अन्त में इतना ही कहना चाहता हूं कि रेस्ट केसिस में ही पनिशमेंट आफ डेथ (मृत्युदंड) रखा जाय लेकिन इसको ऐबोलिश करना लीगली जायज (विधि की दृष्टि से उचित) नहीं होगा, पोलिटिकली (राजनीतिक दृष्टि से) जायज नहीं होगा। और न ही मारल प्वाइंट आफ व्यू (राजनीतिक दृष्टि से) जायज होगा।

In the same debate, Shri Raghubir Sahai<sup>35</sup> observed that “if any punishment in India has got a deterrent effect, it is the capital punishment. We find that the High Courts and the Supreme Court are very very cautious and they are very reluctant to maintain the capital punishment. Only in extreme cases, they would award that punishment. The present state of society does not permit us to say that the abolition of the capital punishment will be to the good of the country and to the society in which we live. To say that capital punishment should be abolished, I think, will be something very indiscreet”.

It is also pertinent to note that after constant debates from time to time, the Parliament finally referred the matter in issue to the Law Commission of India. This progress led to the consideration of the issue in question by the Law Commission of India in its Thirty-Fifth Report wherein the Commission came to the conclusion that “having regard to the conditions in India, to the variety of the social-upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its

<sup>34</sup> Lok Sabha Debates, Criminal Law Amendment Bill (Reg.: Abolition of Capital Punishment), 23<sup>rd</sup> November 1956  
Volume 9 p. 915 at p. 939

<sup>35</sup> Ibid, p. 922



population and to the paramount need for maintaining law and order in the country at the present juncture, we do not think that the country can risk the experiment of abolition of capital punishment".<sup>36</sup>

### TIGHT THE NOOSE : IF NOT, WHY?

The debate on the issue in question between various stake holders inside or outside the Parliament, as indicated above, has always provided a platform to abolitionists to exhort creating an embargo on hanging a death row convict. Despite all efforts, the irresistible decision came in favour of the retentionists but it could not desist the abolitionists to raise their voice. The following survey provides a glimpse of the development of Indian judicial system dealing with death sentencing regime after the 35<sup>th</sup> Report of the Law Commission of India. Though the abolitionists have failed to get their demand accepted but they have been successful to mark their presence strongly.

### JUDICIAL TRENDS:

After six years of the 35<sup>th</sup> report of the Law Commission of India, unsuccessful challenge was made to the constitutional validity of capital punishment before the Supreme Court in *Jagmohan Singh v. State of UP*<sup>37</sup>. Subsequent to the decision in *Jagmohan Singh's case*, three developments took place. *Firstly*, the 1973 Cr.P.C. Amendment came into existence that required special reasons [under Section 354(3)] for inflicting death sentence. *Secondly*, in *Maneka Gandhi v. Union of India*<sup>38</sup>, the Supreme Court of India held that every law of punitive detention both in its procedural and substantive aspects must pass the test of reasonableness on a collective reading of Articles 14, 19 and 21 of the Constitution of India. In *Rajendra Prasad v. State of U.P.*<sup>39</sup>, the Court held that the special reasons necessary for imposing the death penalty must relate not to the crime but to the criminal. It could be awarded only if the security of the state and society, public order and the interests of the general public compelled that course. *Thirdly*, there was a development at international level. The International Covenant on Civil and Political Rights, 1966 came into force in 1976 and India being signatory to this covenant committed itself to the progressive abolition of death penalty. Therefore, a need had arisen for consideration of the constitutional validity of the death penalty.

Finally, in 1980, all the above aspects came to be considered by a five-Judge Bench of the Supreme Court in *Bachan Singh v. State of Punjab*<sup>40</sup>. The majority view of judges in this case affirmed the decision in *Jagmohan Singh* and overruled *Rajendra Prasad* insofar as it sought to restrict the imposition of death penalty only in cases where the security of the state and society, public order and the interests of the general public were threatened. The Court held that the provision of death penalty as an alternative punishment for murder is not unreasonable and is in public interest. The impugned provision in section 302 Indian Penal Code violates neither the letter nor ethos of Articles 19 or 21 of the Constitution. The normal sentence for murder is life imprisonment and the sentence of death can be passed only in gravest cases of extreme culpability.

It is pertinent to mention here that in *Bachan Singh*, Hon'ble Mr. Justice P.N. Bhagwati (as His Lordship then was) gave his dissenting judgment<sup>41</sup>. Hon'ble Bhagwati, J. held that Section 302 IPC read with Section 354(3) CrPC to choose between life and death by providing a totally vague, indefinite and *ad hoc* criterion of "special reasons" renders the death penalty for murder arbitrary and unreasonable and hence violative of Articles 14 and 21 of the Constitution. Where uncontrolled and unregulated discretion is conferred on the court without any standards or guidelines provided by the legislature, so as to permit arbitrary and uneven imposition of death penalty, it would be violative of both Articles 14 and 21.

<sup>36</sup> LAW COMMISSION OF INDIA, REPORT No.35, CAPITAL PUNISHMENT IN INDIA (1967), p.354

<sup>37</sup> *Jagmohan Singh v. State of UP*, (1973) 1 SCC 20

<sup>38</sup> *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621

<sup>39</sup> *Rajendra Prasad v. State of U.P.*, (1979) 3 SCC 646

<sup>40</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

<sup>41</sup> *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24



In 1983, the “rarest of the rare” formula emerged in *Bachan Singh* once again engaged attention of the Court in *Machhi Singh v. State of Punjab*<sup>42</sup>, and the Court held that if upon taking an overall global view of all the circumstances and taking into account the answers to the questions posed by way of the test for the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so. Despite there being very articulated decisions in *Bachan Singh* and *Machhi Singh*, the constitutional validity of death penalty has been challenged time and again in the Supreme Court of India. In the year 1992, one such challenge came for consideration in *Shashi Nayar v. Union of India*<sup>43</sup> and it was urged that the view taken in *Jagmohan Singh* and *Bachan Singh* is incorrect and therefore it requires reconsideration by a larger bench. The appeal was dismissed.

After the decisions in *Bachan Singh* and *Machhi Singh*, it was supposed that the law relating to capital punishment stood streamlined. However, it is true that the decisions in both these cases have not been followed uniformly in subsequent decisions thereby giving room for disparity in sentencing by different Benches in similar cases. It is also true that when both the above cases were heard and guidelines were laid down, certain crimes prevailing in the present day were not discussed having regard to their minimum effect on the scale of deteriorating map of the society.

There are series of cases wherein the guidelines laid down in *Bachan Singh* and *Machhi Singh* have not been followed. The reasons may be many, one of which is that no straitjacket formula has been prescribed, being neither possible nor prudent, thereby leaving the Courts to consider the factors to the sentencing calculus on facts of case to case with other attendant circumstances, of course, in the light of the said celebrated decisions. In this milieu, with different decisions or based on the disparity in sentencing on similar cases, the sentencing aspect in Indian criminal justice system has become discretionary or judge-centric. The debate on the issue in question has survived over the years.

It is pertinent to mention here that there have been very few cases where the Supreme Court has put the guidelines in the abovementioned celebrated decisions into the dock. In *Aloke Nath Dutta v. State of W.B.*<sup>44</sup>, the Supreme Court noticed different decisions by different Bench on similar facts and also growing demand in the international fora for abolition of death sentence. The Court also put a question that in absence of a sentencing policy in clear cut terms, what would constitute a rarest of rare case.

In *Swamy Shraddananda (2) v. State of Karnataka*<sup>45</sup>, the Supreme Court observed that the inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results and the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. The Court further found it necessary to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* besides being in accord with the modern trends in penology.

In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*<sup>46</sup>, the claim of sentencing to being a principled exercise is very important to the independent and unpartisan image of judiciary. The Court further noticed international development on death penalty and desired to have a credible up-to-date research by Law Commission of India or National Human Rights Commission.

<sup>42</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470

<sup>43</sup> *Shashi Nayar v. Union of India*, (1992) 1 SCC 96

<sup>44</sup> *Aloke Nath Dutta v. State of W.B.*, (2007) 12 SCC 230

<sup>45</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767

<sup>46</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498



In *Mohd. Farooq Abdul Gafur v. State of Maharashtra*<sup>47</sup>, the Supreme Court once again noted the disparity in capital sentencing and observed that there has to be an objective value to the term “rarest of rare”, otherwise it will fall foul of Article 14.

In *Sangeet v. State of Haryana*<sup>48</sup>, the Supreme Court observed that though *Bachan Singh* intended “principled sentencing”, sentencing has now really become Judge-centric and this aspect of the sentencing policy seems to have been lost in transition, therefore, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*. The Court further dealt with the provisions of Section 432 and held that the appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.

It is pertinent to mention here that the ruling of the Supreme Court in *Sangeet* disagreeing with *Swamy Shraddananda* (2) and holding that the Court cannot prohibit the State from granting remission came to be overruled by the Supreme Court in *Union of India v. V. Sriharan*<sup>49</sup>

In *Shankar Kisanrao Khade v. State of Maharashtra*<sup>50</sup>, the Supreme Court observed that while the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. This may also need to be considered by the Law Commission of India.

In *Ashok Debbarma v. State of Tripura*<sup>51</sup>, the Supreme Court observed that arbitrariness, discrimination and inconsistency often loom large when we analyse some of the judicial pronouncements awarding sentence. Of course, it is extremely difficult to lay down clear-cut guidelines or standards to determine the appropriate sentence to be awarded. Even the ardent critics only criticise, but have no concrete solution as such for laying down a clear-cut policy in sentencing.

Poverty, socio-economic, psychic compulsions and undeserved adversities in life are some additions to the mitigating factors. Such grounds have also been considered in certain other cases while commuting death sentence to life imprisonment. In *Mulla & Another v. State of Uttar Pradesh*<sup>52</sup>, the Supreme Court dealt with a case wherein abduction and murders took place for ransom. While commuting death sentence to life imprisonment, the Supreme Court observed that “another factor which unfortunately has been left out in much judicial decision-making in sentencing is the socio-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognise that in the real world, such factors may lead a person to crime. The 48th Report of the Law Commission also reflected this concern. Therefore, we believe, socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors lead us to another related mitigating factor i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This Court on many previous occasions has held that this ability to reform amounts to a mitigating factor in cases of death penalty”.

In *Sunil Damodar Gaikwad v. State of Maharashtra*<sup>53</sup>, the Court once again reasserted the ratio laid down in *Bachan Singh* and *Machhi Singh* by observing that “when there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict

<sup>47</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641

<sup>48</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452

<sup>49</sup> *Union of India v. V. Sriharan*, (2014) 11 SCC 1

<sup>50</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546

<sup>51</sup> *Ashok Debbarma v. State of Tripura*, (2014) 4 SCC 747

<sup>52</sup> *Mulla & Another v. State of Uttar Pradesh*, (2010) 3 SCC 508

<sup>53</sup> *Sunil Damodar Gaikwad v. State of Maharashtra*, (2014) 1 SCC 129



with the ratio of the larger Bench decisions or where there is anything to be added to and explained, it is always permissible to introduce the same. Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in *Bachan Singh* and *Machhi Singh* cases.”

The decisions in *Bariyar* and *Khade* led the Law Commission of India to once again study the issue of the death penalty in India for an up-to-date and informed discussion and debate on the subject. The Law Commission also examined the observations of the decisions in *Aloke Nath Dutta*, *Swamy Shraddananda* (2), *Gafur*, *Sangeet* and *Debbarma*.

On an analysis of the above, it transpires that the Supreme Court had desired to restrict use of death penalty. The decision in *Swamy Shraddananda* (2) has greatest impact on death sentencing regime in Indian Courts as in this case the Court found it necessary to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

The above developments provided a great sigh of relief to death-row convicts. There are numerous decisions where the hangman’s noose has been taken off the accused’s neck by the Supreme Court by altering death sentence to life imprisonment on the ground of delay in disposal of appeals<sup>54</sup> and also on the grounds of delay in disposal of mercy petitions; solitary confinement and mental illness<sup>55</sup>.

In *Shatrughan Chauhan v. Union of India*<sup>56</sup>, the Supreme Court considered the ratio laid down in *Devender Pal Singh Bhullar*<sup>57</sup> that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The Court while declared the said ratio *per incuriam* and held that there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.

In *Shatrughan Chauhan*, the Supreme Court further went on to lay down certain guidelines required to be followed before hanging a death row convict.

The Law Commission of India in its 262<sup>nd</sup> Report has recommended abolition of death penalty for all crimes other than terrorism related offences and waging of war against the State. The Law Commission of India completely failed the aspiration of the Supreme Court of India in the aforementioned decisions wherein an up to date report with empirical research was expected. The methodology applied for research in the report is questionable. The Law Commission didn’t deem it fit to examine the cases for a considerable period where death sentences were awarded by the Supreme Court. The Law Commission while questioning the 35<sup>th</sup> Report on the basis of some new statistics didn’t take into notice the new emerging crimes in Indian society. Therefore, the debate remains at the same footing. It is need of the hour that the 262<sup>nd</sup> report be recalled by the

<sup>54</sup> *Neti Sreeramulu v. State of A.P.*, (1974) 3 SCC 314, *State of Punjab v. Jagir Singh*, (1974) 3 SCC 277, *State of Bihar v. Pashupati Singh*, (1974) 3 SCC 376, *Chawla v. State of Haryana*, (1974) 4 SCC 579, *Bhoor Singh v. State of Punjab*, (1974) 4 SCC 754, *Raghbir Singh v. State of Haryana*, (1975) 3 SCC 37, *Sadhu Singh v. State of UP*, (1978) 4 SCC 428, *Maya Kaur Baldevsingh Sardar v. State of Maharashtra*, (2007) 12 SCC 654, *State of UP v. Munesh*, (2012) 9 SCC 742, *Swamy Shraddananda v. State of Karnataka*, (2007) 12 SCC 288 : (2008) 13 SCC 767, *State of UP v. Munesh*, (2012) 9 SCC 742

<sup>55</sup> List of cases with citation of earlier main order/judgment - *Suresh v. State of U.P.*, (2001) 3 SCC 673, *Praveen Kumar v. State of Karnataka*, (2003) 12 SCC 199, *Simon v. State of Karnataka*, (2004) 2 SCC 694, *Gurmeet Singh v. State of UP*, (2005) 12 SCC 107, *Jafar Ali v. State of UP*, Unreported – SLP (Cr) 1129/04, *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713, and *Ram Singh v. Sonia*, (2007) 3 SCC 1.

<sup>56</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1

<sup>57</sup> *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195



Law Commission of India and be looked into afresh. The Law Commission of India must consider all perspectives and thereafter its recommendation must be considered by a Full Court or a larger Bench of appropriate strength of the Supreme Court of India.

Another bigger boost to anti-death sentence debate came in *State of Maharashtra v. Nisar Ramzan Sayyed*<sup>58</sup> wherein the accused was sentenced, by the trial court, to death for burning his pregnant wife and a minor child but acquitted by the High Court. The Supreme Court though restored the conviction order of the trial court but commuted death sentence to life imprisonment holding that “A life is at stake subject to human error and discrepancies and therefore the doctrine of ‘rarest of rare cases’, which is not *res-integra* in awarding the death penalty, shall be applied while considering quantum of sentence in the present case. Not so far but too recently, the Law Commission of India has submitted its Report No.262 titled “The Death Penalty” after the reference was made from this Court to study the issue of Death Penalty in India to “allow for an up-to-date and informed discussion and debate on this subject”. We have noticed that the Law Commission of India has recommended the abolition of death penalty for all the crimes other than terrorism related offences and waging war (offences affecting National Security). Today when capital punishment has become a distinctive feature of death penalty apparatus in India which somehow breaches the reformative theory of punishment under criminal law, we are not inclined to award the same in the peculiar facts and circumstances of the present case”.

It is pertinent to mention here that the report of the Law Commission of India is pending acceptance by the Government of India. The latest decision of the Supreme Court of India in *Nisar Ramzan Sayyed*, in absence of any discussion on the principles laid down in numerous earlier cases, does not inspire any confidence to follow it as a landmark decision. Further, subsequent decisions of the Supreme Court inflicting death sentences cripple such a humanistic approach.

### HEARING OF DEATH SENTENCE CASES BY THREE-JUDGE BENCH AND OPEN COURT HEARING OF REVIEW PETITIONS IN DEATH SENTENCE CASES:

There has been a demand from various corners at the Supreme Court of India for hearing of death sentence cases at least by a bench of Three Judges and that the review petitions in cases of death sentence may be heard in the open Court instead of hearing in Chambers. A five-Judge Constitution Bench of the Supreme Court in *Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others*<sup>59</sup> has accepted both the pleas. The newly enacted the Supreme Court Rules, 2013 also provided for hearing of death sentence cases by a three-Judge Bench, therefore, the Court directed that “Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon’ble Judges will hear the same”. The Court also accepted the plea for hearing of review petitions in cases of death sentence in open Court by providing an outer limit of 30 minutes hearing.

In some earlier cases, the Supreme Court had refused to interfere within the jurisdiction<sup>60</sup> of the President of India but in some cases, the Supreme Court either went on to review some decisions of the President of India or indicated to subject such decisions to judicial review.<sup>61</sup> The scenario has now completely changed in the criminal justice system where rights of the accused have been given great importance.

<sup>58</sup> *State of Maharashtra v. Nisar Ramzan Sayyed*, (2017) 5 SCC 673

<sup>59</sup> *Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others*, (2014) 9 SCC 737

<sup>60</sup> *Nachhittar Singh v. State of Punjab*, (1975) 3 SCC 266, *Bishan Dass v. State of Punjab*, (1975) 3 SCC 700, *Shanker v. State of UP*, (1975) 3 SCC 851, *G. Krishta Goud v. State of Andhra Pradesh*, (1976) 1 SCC 157, *Mohinder Singh v. State of Punjab*, (1977) 3 SCC 346, *Amrit Bhushan Gupta v. Union of India*, (1977) 1 SCC 180, *Shiv Mohan Singh v. State (Delhi Admn.)*, (1977) 2 SCC 238, *Joseph Peter v. State of Goa, Daman & Diu*, (1977) 3 SCC 280

<sup>61</sup> *Maru Ram v. Union of India*, (1981) 1 SCC 107, *Kehar Singh v. Union of India & Another*, (1989) 1 SCC 204, *Swaran Singh v. State of U.P.*, (1998) 4 SCC 75 at 79, *Satpal v. State of Haryana*, (2000) 5 SCC 170, at 174, *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634, at 637, *Epru Sudhakar & Another v. Govt. of A.P. & Others*, (2006) 8 SCC 161, *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353



The foregoing survey gives ample strength to the abolitionists' movement and the said crusade has been in practice and theory for many decades. Willy-nilly, the crusade of saving the skin of accused stands zeroed down, by various decisions, despite there being strongest plea of abolition of death sentence and being reasserted from time to time. In such scenario, what's the way forward? The following arguments will make this issue more clear.

#### **TIGHT THE NOOSE : IF NOT NOW, WHEN?**

During last four decades, the humanistic approach concerning the rights of the death-row convicts has made incredible progress in our country. The judiciary is now very much concerned about the rights of the accused and has repeatedly held that the accused despite being convicted are not denuded of their human rights. The highway of humanistic approach also adjoins the road undertaken for stamping out criminal proclivity. The sentencing process may be stern but tempered with mercy wherever warranted.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.<sup>62</sup>

A survey of few decisions of the Supreme Court will help us to understand the approach of the judiciary concerning protection of society and stamping out criminal proclivity.

#### **JUDICIAL TRENDS:**

In *Paras Ram v. State of Punjab*<sup>63</sup>, the Supreme Court held that 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.

In *Machhi Singh v. State of Punjab*<sup>64</sup>, the Supreme Court held that the reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine.

In *Earabhadrappa v. State of Karnataka*<sup>65</sup>, the Supreme Court held that it is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders. Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the Penal Code.

<sup>62</sup> *Shailesh Jasvantbhai & Another v. State of Gujarat & Others*, (2006) 2 SCC 359

<sup>63</sup> *Paras Ram v. State of Punjab*, (1981) 2 SCC 508

<sup>64</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470

<sup>65</sup> *Earabhadrappa v. State of Karnataka*, (1983) 2 SCC 330



In *Kehar Singh & Others v. State (Delhi Admn.)*<sup>66</sup>, the Supreme Court dealt with a case of assassination of Prime Minister and held that it is the most foul and senseless assassination. The preparations for and the execution of this egregious crime do deserve the dread sentence of the law.

In *Sevaka Perumal v. State of TN*<sup>67</sup>, the Supreme Court held that Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. *The compassionate grounds viz. accused being young men and the breadwinners of their family each consisting of a young wife, minor child and aged parents would always be present in most cases and are not relevant for interference.*

In *Dhananjoy Chatterjee v. State of West Bengal*<sup>68</sup>, the Supreme Court held that it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it.

In *Surja Ram v. State of Rajasthan*<sup>69</sup>, the Supreme Court held that murders and attempt to commit murders in a cool and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. Punishment must also respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime.

In *Govindaswami v. State of TN*<sup>70</sup>, the Supreme Court held that if we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy.

In *Jai Kumar v. State of M.P.*<sup>71</sup>, the Supreme Court held that it is true that a sentence disproportionately severe ought not to be passed but that does not even clothe the law courts with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on the society at large. Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for a tooth, rather having its due impact on the society: while undue harshness is not required but inadequate punishment may lead to sufferance of the community at large.

In *Ramdeo Chauhan v. State of Assam*<sup>72</sup>, the Supreme Court held that it is true that in a civilised society a tooth for a tooth, and a nail for a nail or death for death is not the rule but it is equally true that when a man becomes a beast and a menace to the society, he can be deprived of his life according to the procedure established by law, as the Constitution itself has recognised the death sentence as a permissible punishment for which sufficient constitutional provision for an appeal, reprieve and the like have been provided under the law. It is true that life sentence is the rule and death sentence is an exception.

In *Ramdeo Chauhan v. State of Assam*<sup>73</sup>, the Supreme Court held that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable

<sup>66</sup> *Kehar Singh & Others v. State (Delhi Admn.)*, (1988) 3 SCC 609

<sup>67</sup> *Sevaka Perumal v. State of TN*, (1991) 3 SCC 471

<sup>68</sup> *Dhananjoy Chatterjee v. State of West Bengal*, (1994) 2 SCC 220

<sup>69</sup> *Surja Ram v. State of Rajasthan*, (1996) 6 SCC 271

<sup>70</sup> *Govindaswami v. State of TN*, (1998) 4 SCC 531

<sup>71</sup> *Jai Kumar v. State of M.P.*, (1999) 5 SCC 1

<sup>72</sup> *Ramdeo Chauhan v. State of Assam*, (2000) 7 SCC 455

<sup>73</sup> *Ramdeo Chauhan v. State of Assam*, (2001) 5 SCC 714



under law. Any effort which weakens the system and shakes the faith of the common man in the justice dispensation system has to be discouraged.

In *Lehna v. State of Haryana*<sup>74</sup>, the Supreme Court held that a convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

In *Devender Pal Singh v. State of NCT of Delhi*<sup>75</sup>, the Supreme Court held that the terrorists who are sometimes described as “death merchants” have no respect for human life. Innocent persons lose their lives because of mindless killing by them. Any compassion for such persons would frustrate the purpose of enactment of TADA, and would amount to misplaced and unwarranted sympathy.

In *Subhash Ramkumar Bind v. State of Maharashtra*<sup>76</sup>, the Supreme Court held that ours being a civilised society - a tooth for a tooth and an eye for an eye ought not to be the criterion and as such the question of there being acting under any haste in regard to the capital punishment would not arise. While it is true punishment disproportionately severe ought not to be passed but that does not even clothe the law courts, however, with an option to award the sentence which would be manifestly inadequate having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society.

In *Maya Kaur Baldevsingh Sardar v. State of Maharashtra*<sup>77</sup>, the Supreme Court held that judges applying the law must also be alive to the needs of society and the damage which can result if a ghastly crime is not dealt with in an effective and proper manner.

In *Ahmed Hussein Vali Mohammed Saiyed & Another v. State of Gujarat*<sup>78</sup>, the Supreme Court held that the object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to (sic break the) law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

In *Ankush Maruti Shinde v. State of Maharashtra*<sup>79</sup>, the Supreme Court held that imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise.

In *Jameel v. State of U.P.*<sup>80</sup>, the Supreme Court held that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

<sup>74</sup> *Lehna v. State of Haryana*, (2002) 3 SCC 76

<sup>75</sup> *Devender Pal Singh v. State of NCT of Delhi*, (2002) 5 SCC 234

<sup>76</sup> *Subhash Ramkumar Bind v. State of Maharashtra*, (2003) 1 SCC 506

<sup>77</sup> *Maya Kaur Baldevsingh Sardar v. State of Maharashtra*, (2007) 12 SCC 654

<sup>78</sup> *Ahmed Hussein Vali Mohammed Saiyed & Another v. State of Gujarat*, (2009) 7 SCC 254

<sup>79</sup> *Ankush Maruti Shinde v. State of Maharashtra*, (2009) 6 SCC 667

<sup>80</sup> *Jameel v. State of U.P.*, (2010) 12 SCC 532



In *Vikram Singh v. State of Punjab*<sup>81</sup>, the Supreme Court held that the theory which is widely accepted in India is that as the death penalty is on the statute book it has to be awarded provided the circumstances justify it. Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed. Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive. But just because the sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it *per se* inhuman or barbaric. But, short of death in such extreme and rarest of rare cases, imprisonment for life for a proved case of kidnapping or abduction will not qualify for being described as barbaric or inhuman so as to infringe the right to life guaranteed under Article 21 of the Constitution.

In *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*<sup>82</sup>, the Supreme Court held that it is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law as that is in the domain of the legislature.

In *State of Maharashtra v. Goraksha Ambaji Adsul*<sup>83</sup>, the Supreme Court held that awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty.

In *Ramnaresh & Others v. State of Chhattisgarh*<sup>84</sup>, the Supreme Court held that while determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar in imposition or otherwise of the death sentence. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death. Wherever, the case falls in any of the exceptions to the “rarest of rare” cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence.

In *Alister Anthony Pareira v. State of Maharashtra*<sup>85</sup>, the Court held that sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

In *Guru Basavaraj v. State of Karnataka*<sup>86</sup>, the Supreme Court held that it is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored.

In *Gopal Singh v. State of Uttarakhand*<sup>87</sup>, the Supreme Court held that just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of

<sup>81</sup> *Vikram Singh v. State of Punjab*, (2015) 9 SCC 502

<sup>82</sup> *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*, (2011) 14 SCC 401

<sup>83</sup> *State of Maharashtra v. Goraksha Ambaji Adsul*, (2011) 7 SCC 437

<sup>84</sup> *Ramnaresh & Others v. State of Chhattisgarh*, (2012) 4 SCC 257,

<sup>85</sup> *Alister Anthony Pareira v. State of Maharashtra*, (2012) 2 SCC 648

<sup>86</sup> *Guru Basavaraj v. State of Karnataka*, (2012) 8 SCC 734



proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

In *Hazara Singh v. Raj Kumar & Others*<sup>88</sup>, the Supreme Court held that the cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence.

In *Oma alias Om Prakash & Another v. State of T.N.*<sup>89</sup>, the Supreme Court held that a Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises. A Judge, while imposing sentence, should not be swayed away with any kind of sensational aspect and individual predilections. If it is done, the same would tantamount to entering into an area of emotional labyrinth or arena of mercurial syllogism.

In *Maheboobkhan Azamkhan Pathan v. State of Maharashtra*<sup>90</sup>, the Court held that despite the changes in the criminologist thought and movement and the extent of clemency in penal laws, it has not been possible to put to rest the conflicting views on the sentencing policy. The sentencing policy, as a significant and inseparable facet of criminal jurisprudence, continues to remain a great subject of social and judicial discussion and it is neither possible nor prudent to state a “straitjacket” formula which would be applicable to the cases where capital punishment has been prescribed.

In *Sushil Sharma v. State*<sup>91</sup>, the Supreme Court held that we must also bear in mind that though the judicial proceedings do take a long time in attaining finality, that would not be a ground for commuting the death sentence to life imprisonment.

In *Mohd. Jamiludin Nasir v. State of West Bengal*<sup>92</sup>, the Supreme Court held that sentencing is a delicate task requiring an interdisciplinary approach and calls for special skills and talents. A proper sentence is the amalgam of many factors. The sentence to be awarded should achieve twin objectives: (a) Deterrence; and (b) Correction. The court should consider social interest and consciousness of the society for awarding appropriate punishment. Graver the offence longer the criminal record should result severity in the punishment. Undue sympathy to impose inadequate sentence would do more harm to the public. Imposition of inadequate sentence would undermine the public confidence in the efficacy of law and society cannot endure such threats.

In *Sumer Singh v. Surajbhan Singh*<sup>93</sup>, the Supreme Court held that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the

<sup>87</sup> *Gopal Singh v. State of Uttarakhand*, (2013) 7 SCC 545

<sup>88</sup> *Hazara Singh v. Raj Kumar & Others*, (2013) 9 SCC 516

<sup>89</sup> *Oma alias Om Prakash & Another v. State of T.N.*, (2013) 3 SCC 440

<sup>90</sup> *Maheboobkhan Azamkhan Pathan v. State of Maharashtra*, (2013) 14 SCC 214

<sup>91</sup> *Sushil Sharma v. State*, (2014) 4 SCC 317

<sup>92</sup> *Mohd. Jamiludin Nasir v. State of West Bengal*, (2014) 7 SCC 443

<sup>93</sup> *Sumer Singh v. Surajbhan Singh*, (2014) 7 SCC 323



oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society.

In *State of Punjab v. Saurabh Bakshi*<sup>94</sup>, the Supreme Court endorsed the statement of an eminent thinker and author Sophocles that “Law can never be enforced unless fear supports them”. The Court observed that though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today’s society. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised.

In *Mofil Khan & Another v. State of Jharkhand*<sup>95</sup>, the Supreme Court held that the doctrine of the “rarest of rare” does not classify murders into categories of heinous or less heinous. The difference between the two is not in the identity of the principles, but lies in the realm of application thereof to individual fact situations. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purpose - punitive, deterrent and protective. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. It would be the paramount duty of the court to provide justice to the incidental victims of the crime - the family members of the deceased persons. We cannot remain oblivious to the substantial suffering of the victims. It stands as a fact that criminal justice reform and civil rights movement in India has historically only paid considerable attention to the rights of the accused and neglected to address to the same extent the impact of crime on the victims. It is not only the victims of crime only that require soothing balm, but also the incidental victims like the family, the co-sufferers and to a relatively large extent the society too. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. We are mindful that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society.

In *Vasanta Sampat Dupare v. State of Maharashtra*<sup>96</sup>, the Court observed that when the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation at the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away by any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to the rarest of the rare case.

In *Shabnam v. State of U.P.*<sup>97</sup>, the Supreme Court observed that having regard, however, to the conditions in India, to the variety of social upbringing of its citizens, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, in evaluating a crime and apportioning the most appropriate punishment, one of the most important functions court performs while making a selection between life imprisonment and death is to maintain a link between contemporary community values and the

<sup>94</sup> *State of Punjab v. Saurabh Bakshi*, (2015) 5 SCC 182

<sup>95</sup> *Mofil Khan & Another v. State of Jharkhand*, (2015) 1 SCC 67

<sup>96</sup> *Vasanta Sampat Dupare v. State of Maharashtra*, (2015) 1 SCC 253

<sup>97</sup> *Shabnam v. State of U.P.*, (2015) 6 SCC 632



penal system. Criminal jurisprudence indicates that society's perceptions of a crime with respect to appropriate penalties are not conclusive. Concurrently, it also stands that the said standards have always been progressive and acquire meaning as public opinion becomes enlightened by a humane justice. The scope of determining the standards is never precise and rarely static. The courts must thus draw its meaning from the evolving standards of public morality and consciousness that mark the progress of a maturing society.

In *State of Himachal Pradesh v. Nirmala Devi*<sup>98</sup>, the Supreme Court observed that there is a wide discretion given to the Court to impose any imprisonment which may be from one day (or even till the rising of the court) to ten years/life. However, at the same time, the judicial discretion which has been conferred upon the Court, has to be exercised in a fair manner keeping in view the well established judicial principles which have been laid down from time to time, the prime consideration being reason and fair play. When it comes to sentencing a person for committing a heinous crime, the deterrence theory as a rationale for punishing the offender becomes more relevant. In such cases, the role of mercy, forgiveness and compassion becomes secondary. While considering as to what would be the appropriate quantum of imprisonment, the Court is empowered to take into consideration mitigating circumstances, as well as aggravating circumstances.

In *Mukesh & Another v. State for NCT of Delhi & Others*<sup>99</sup>, (popularly known as *Nirbhaya's case*), the Supreme Court dealt with a brutal, barbaric and diabolic nature of the crime demonstrating the mental perversion and inconceivable brutality – sounding like a story from a different world where humanity has been treated with irreverence, and confirmed death sentences on accused of gang rape. The Court examined and endorsed opinions of some earlier decisions as follows:

“A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. [*State of U.P. v. Anil Singh*, 1988 (Supp.) SCC 686]

The courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be. [*Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat*, (1994) 4 SCC 353]

So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit, to find out the truth. It means on one hand, no innocent man should be punished but on the other hand, to see no person committing an offence should get scot-free. ... So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.” [*Mohan Singh and another v. State of M.P.* (1999) 2 SCC 428]

These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim “let hundred guilty persons be acquitted, but not a single innocent be convicted” is, in

<sup>98</sup> *State of Himachal Pradesh v. Nirmala Devi*, (2017) 7 SCC 262

<sup>99</sup> *Mukesh & Another v. State for NCT of Delhi & Others*, (2017) 6 SCC 1



practice, changing the world over and courts have been compelled to accept that “society suffers by wrong convictions and it equally suffers by wrong acquittals”. I find that this Court in recent times has conscientiously taken notice of these facts from time to time”. [*Krishna Mochi v. State of Bihar* (2002) 6 SCC 81]

The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.” [*Dhananjay Chatterjee v. State of West Bengal*, (1994) 2 SCC 220]

The Court (per Hon’ble Banumathi, J.) held thus:

“The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In *Mofil Khan*, this Court specifically observed that ‘it would be the paramount duty of the Court to provide justice to the incidental victims of the crime – the family members of the deceased persons.

To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim’s family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case - ‘death sentence’, life sentence commutable to 14 years’ or ‘life imprisonment for the rest of the life’.

Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of “rarest of rare cases”.”

## CONCLUSION:

In view of the foregoing, it is crystal clear that in the changing scenario, we have strengthened the humanistic approach and the sentencing structure reflects the evolving standards of decency that mark the progress of a maturing democracy. On one hand, the Supreme Court has reiterated the well settled legal position that the accused despite being convicted are not denuded of their human rights protected under Article 21 of the Constitution of India, and on the other hand, the Supreme Court has now once again settled the legal position that “the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime”.

The jurisprudence of the Supreme Court towards inflicting of death sentences is very clear. In *Mukesh Kumar*, the Supreme Court has clearly laid down that “*imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of “rarest of rare cases”.*”



*statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "rarest of rare cases".*

In *Mofil Khan*, the Supreme Court observed that "in the context of these turbulent social times, we cannot remain oblivious to the substantial suffering of the victims. It stands as a fact that criminal justice reform and civil rights movement in India has historically only paid considerable attention to the rights of the accused and neglected to address to the same extent the impact of crime on the victims. It is not only the victims of crime only that require soothing balm, but also the incidental victims like the family, the co-sufferers and to a relatively large extent the society too. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. We are mindful that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society".

Analysis of the cases leads to an irresistible conclusion that though the guidelines in *Bachan Singh* and *Machhi Singh* thought to introduce *principle sentencing* yet the Courts in subsequent decisions did not follow the guidelines uniformly thereby leading to disparity in decisions in similar cases. Further, at the time of issuance of the guidelines in the said two celebrated decisions, crime against women (including Rape, Matrimonial Disputes, Dowry Deaths, Honour Killing and Illicit Relationship) was not at an alarming stage which has prevailed after the decision in the said two cases. In half of the cases, women have been found either victims or co-accused. Cases relating to kidnapping/abduction with ransom, terrorism, financial disputes, contract killing, economic offences, professional enmity, murder of witnesses, political murders, mental illness etc. were either not prevalent or were very negligible during the period when the above cases fell for consideration of the Supreme Court of India. By passage of time, the socio-economic condition of our country has been on changing track. Now people have been indulging in crimes because of economic disparity in society. In any criminal justice system, the sentencing regime is supposed to be based on principle sentencing where accused are sentenced notwithstanding any special criteria on case to case basis. Principle sentencing is a reasonable expectation in any criminal justice system. Principle sentencing provides safeguards to the accused against unjust sentencing. Discretion of judges in sentencing process in criminal cases play a great role but such discretionary power is not expected to create disparity in sentencing. These issues were expected in several cases to be answered by the Law Commission of India in its 262<sup>nd</sup> report but the Law Commission having failed to answer all these questions, it is need of the hour that the decisions in *Bachan Singh* and *Machhi Singh*, may be revisited at least by a seven-Judge Bench, as the decision in *Bachan Singh* was delivered by a five-Judge Bench, to streamline the much needed *Principle Sentencing* free from individual predilection.

The author has examined 578 decisions of the Supreme Court of India relating to the questions in debate. The detailed examination of 578 cases provides a sketch of death sentences awarded by the Supreme Court of India. The Supreme Court has awarded a total number of 315 death penalties which include 162 death penalties in rural area cases, 128 death penalties in urban area cases and 25 death penalties pertain to the cases where area is not specified. It is also noteworthy to mention that out of total 315 awarded death penalties, 306 death penalties pertained to the cases where the High Court had confirmed the sentence and 9 death penalties belonged to the cases where the Supreme Court awarded death sentence by reversing the High Court's judgments of life imprisonment or acquittal.

A survey of the 578 cases shows that 290 cases (50.17%) pertain to the Rural Areas; 257 cases pertain to the Urban Area (44.46%). In the remaining 31 cases (5.36%) there was no mention of the area to which the cases pertained. From 1950 till 1990, majority of the crime was in rural areas. After 1990, the ratio of crime increased in urban area. The total figure of the cases for the period 1991 to 2015 comes to 276 (rural + urban), which is 47.75% of the total cases. This was the period when due to liberalization of economy, money flow started rising and people started moving to the cities. During the period 2006-2015, the cases in urban area were double in comparison to rural area. During the years 1991-2015, a substantial increase has been seen in



crime against women, that includes the categories of Rape and Matrimonial Disputes/Dowry Deaths/Honour Killing. An increase has also been seen in certain other categories of crime, viz., Kidnapping/Abduction & Ransom, Robbery, Dacoity & Theft, Revenge/Personal Enmity, Communal Riots, Terrorism, Financial Matters and Murder of Public Servants. The crime relating to land and property dispute has been seen at the same pace for years together. The crime concerning professional enmity and murder of witnesses has been a new introduction in post liberalization regime.

When we see from the angle of the victims of crime, it transpires that to call for abolition or to suggest abolition for the sake of humanity may please one segment of the Society, but we must not forget that it is also a calling for causing inhumanity to other segment of the society. There is no need to make investment on those bringing disrepute to the humanity. There is now need for soothing balm on the victims of crime and other citizens. Let's be more humane to the victims of inhumanity.

Death sentence is part of our criminal justice system. No doubt, the developing scenario has made death sentencing very narrower. On the other hand, the rising crime and advent of new crimes, there is always a need to ensure protection to the public at large. The protection provided to the society cannot be suggested to be withdrawn for the sake of a set of people who surrender their protection desiring to enjoy by causing harm to the society. Keeping in view the present prevailing scenario in India, by no stretch of imagination, it can be said that we have reached at a stage where abolition of death sentence must be favoured.

In view of the foregoing discussion, what are we waiting for? The latest decisions of the Supreme Court of India, referred to above, have settled all the questions on the debate in issue. The Courts in India now must go ahead to tight the noose of the culprits. This is the appropriate time when no more arguments are required to do the ultimate justice to the incidental victims of the crime. Now we need to pay considerable attention to the rights of the victims. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. If we can't tight the noose of the accused now, then when? One must not forget that *the punishment of offenders promotes the solidarity of conformists. When a member of the society sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices were made in a good cause. If the good die young and the wicked flourish as the green bay tree, the moral scruples which enable conformists to restrain their own deviant inclinations lack social validation.*<sup>100</sup>

Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to subserve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability; it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day.<sup>101</sup>

Let's consult our heart as to what we require in the prevailing scenario of our society and we shall surely find the true answer.

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<sup>100</sup> TOBY, JACKSON, *Is Punishment Necessary?* GRUPP, STANLEY E. (ed), THEORIES OF PUNISHMENT (FIRST EDITION, INDIANA UNIVERSITY PRESS 1971) P.106

<sup>101</sup> *Jai Kumar v. State of M.P.*, (1999) 5 SCC 1