Sentencing Policy, Victimology and compensation to the victims.

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I. INTRODUCTION

“त राजो न राजानि न दंडयो नव दंडीका।
धर्मैव प्रजा सदार्थक्षेत्र सम परत्यर्थ॥”

The ancient sages had a society in their mind and dream where neither the state nor the king would rule the kingdom by means of fine or penalty but every individual would protect others and the society as a whole by performing his duty. We have miles to go before we could achieve such an ideal society. Recently the delay in execution of convicts facing death sentence has shaken our conscious. Debate has again resumed, whether death sentence should remain in the statute books. Many consider the execution by hanging by neck till death to be a barbaric method. But repeatedly the Supreme Court of India has upheld the constitutional validity of death sentence and the method of execution by hanging.

2. According to Gorefello crime is to be eliminated for social good and at such times death penalty is a moral war. According to Lombraso death penalty is required for maintaining fear in the minds of habitual offenders and offenders who are beyond reformation. But according to Beckari state has no right to claim life of any individual as individual does not offer his life to society as a part of social contract. Khalil Gibran in his ‘Guard of Humanity’ says that society has no right to claim life of any individual as it would revive the barbaric state when tooth for tooth and life for life was a rule.

II. AIM OF PENAL SYSTEM – THEORETICAL BACKGROUND.

3. All these views compel us to go back to the basics of the ‘criminal law system’ to find out the object of punishment. As per the first ever codified law ‘Hammurabi’s Code’, retribution is the aim of criminal law system which can be achieved by an ‘eye for an eye’ approach. According to it punishment must match the wickedness of its offence. According to Aristotle, Punishment is required to maintain equilibrium in the society. According to Kant, we could not regard world as moral, if in it, virtue goes unrewarded or sin unpunished, therefore punishment is not only permissible but it is obligatory. As per Hindu Philosophy as reflected in the ‘Shanti Parva’ of Mahabharat, Punishment is a threefold restraint on criminal tendency,
People hesitate to commit crime for three reasons:

1. For fear of being punished by the King.
2. For the fear of being punished by ‘Yama’.
3. For the fear of adverse public opinion.

3.1 Some people say that the aim of penal system is to reduce crime by making people to obey the criminal Law. Fyodo Dostoyevsky, in ‘Crime and Punishment’ and Kafka in ‘Trial’ gave a new approach to criminology and penology.

3.2 The Committee appointed under the chairmanship of Justice Streatfield in England took review of all these views and in its report submitted in 1961 formulated the aims and justifications of sentencing such as “

1. To fit the punishment to the crime – Retributive Theory.
2. To deter potential offender
3. To deter particular offender.
4. To prevent particular offender from injuring the society again – i.e. Preventive Theory.
5. To enable the offender to take his place as a responsible and law abiding member of society i.e. Reformative or Rehabilitative Theory.

4.1 The retributive approach is criticised from time to time by various scholars. According to them in such a system the criminal serves as a ‘scapegoat’. Though we boast that we are moving towards more civilized society our society at times exhibit its Stone Age rudiments. In case of report of a heinous crime of larger social dimension, organizations, groups of people and media pressurise the community of lawyers to persuade them not to accept the brief of such criminal. Thus the pressure group in the society even deny the basic and fundamental right of an individual to defend him. As such retribution does not, in fact, serve the purpose of vengeance but it becomes an outlet for antisocial aggressiveness. According to Prof. Sutherland, ‘in punishing criminals society expresses the same urge which in expressed by the criminal in committing crime.’
4.2 There are two aspects in reformative theory: (a) reform through punishment and (5) reform as concomitant of punishment. The idea of rehabilitation is to return the offender to society. It has been recognized that many criminals who are emotionally disturbed or product of socio-economic environment, require thoughtful, individual and positive treatment.

III SENTENCING - MODERN APPROACH

5.1 In matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of the crime, three types of reactions many generate: the traditional reaction of universal nature which is treated as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from criminal assaults. The other approach is therapeutic approach. It regards the criminal as a sick person requiring treatment. While the third is the preventive approach which seeks to eliminate those conditions from society which were responsible for the crime causation.

5.2 Under the punitive approach, the rationalization of punishment is based upon retributive and utilitarian theories. Deterrent theory which is also part of punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community.

5.3 The therapeutic approach aims at curing the criminal tendencies which were the product of a psychological disease. There may be many factors, including family problems. Therapeutic approach has been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out by him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be heinous in nature, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. Under this theory the Supreme Court of India in a stream of decisions such as, (1) Sunil Batra v/s Delhi Administration AIR 1978 SC 1675 and AIR 1980 SC 1579 (2) Charles Shobharaj v/s Central Jail, Tihar AIT 1978 SC 1514 (3) Fransis Coarlie v/s Administrator Delhi AIT 1981 SC 746, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental right and that he must be treated with compassion and sympathy.

5.4 In some states in the U.S.A. emphasis was laid on psychotherapeutic treatment of the offender while he was under detention. For that purpose, even psychopath sexual offender laws have been enacted in certain states in the U.S.A. These laws treat the sex offenders as neurotic persons and psychotherapy treatment is given to them
during the period of their detention which may in some cases, be an indefinite period, in the sense that they would not be released till they are cured. This provision of indefinite detention was objected by group of lawyers; therefore, in many of the states, this provision was dropped from the statute.

5.5 In India, statutory provision for psychotherapy treatment during the period of sentence in jail is not available, but reformist activities are systematically held at many places with the intention of treating the offender psychologically so that he may not repeat the offence in future, and may feel repentant of having committed a crime.

5.6 In *Fulsing vs State of Harayana* (1979) 4 SCC 413 the Supreme Court observed that sentencing efficacy in case of lust loaded criminality cannot be simplistically assumed by award of long incarceration, for often that remedy aggravates the malady. Hyper sexed Homo sapiens cannot be rehabilitated by humiliating or harsh treatment. In this case Mr. Justice V.R. Krishna Iyer gave correctional course through meditational therapy and other measures hoping that the erotic aberrations of the offender may wither away particularly when the offender had a reasonable prospect of shaping into a balanced person. But this theory is not followed in the later decisions by the Apex Court as it was found that in spite of devices having been employed and adopted within Jail premises so as to reform offenders, there was negligible improvement in the commission of crime, crime instead of declining, had increased and today, it has assumed dangerous proportion. While one person is reformed and moves out of jail another offender is born. *The apex court in Jaikumar vs State of M.P.* (1999) 5 SCC 1 reminded that law courts exist for the society and ought to rise up to the occasion to do the needful and act in a manner so as to sub serve the basic requirement of society. The Law Courts have been consistent in the approach that a reasonable proportion has to be maintained between the seriousness of the crime and punishment. True it is that sentences disproportionately severe should not be passed but that does not give option to the courts to award sentences manifestly inadequate since inadequate sentences would fail to produce a deterrent effect on the society at large. Though undue harshness is not required but inadequate punishment may lead to sufferance of community at large.

IV. **SENTENCING: RELEVANT PROVISIONS** –

6.1 The prescription of punishment in each penal section is only the measure prescribed by law for dealing with offender who is proved to have committed that crime. But determination of right measure of punishment is of a great difficulty. Punishment is an authorization by the Legislature of employment of criminal sanctions while sentencing means application by the Judiciary of a criminal sanction
authorized. Magistrate is called upon to exercise wide discretion which involves an onerous, delicate and complex duty. Our ancient sages have prescribed best guideline “धर्मशास्त्राणुमानकालेकोणथथमविवेचतः॥” - It should be decided according to law without anger or greed. According to Justice Cardozo, “a judge even when he is free is still not wholly free, he is not to innovate at pleasure; he is not a knight, errant roaming at will in pursuit of his own ideal of beauty and goodness; he is to draw inspiration from consecrated principles. Where a judge’s values and those prevailing in society clash, the judge must in theory, give way to the “objective right”.

6.1.1 In a recent judgment, The Delhi High Court (W.P. (C) 8066/2013 Suo Motu Cognizance In Re: Order dated October 07, 2013 in SC No.34/2013 Date of decision: December 19, 2013) taking note of observation made in a judgment by a Sessions Judge observed:

“10. A Judge is supposed to analyze the facts and evidence appearing before him in an impartial and objective manner. While doing so, in the case of gender issues, a Judge is supposed to be sensitive regarding key points, which inter-alia, would be as under:
(i) Though women and girls comprise more than half the population, they remain disadvantaged in many areas of life.
(ii) Stereotypes and assumptions about women’s lives can unfairly impede them and might frequently undermine equality.
(iii) Care must be taken to ensure that our experiences and aspirations as women or of other women, are not taken as representative of the experiences of all women.
(iv) Factors such as ethnicity, social class, disability status and age affect women’s experience and the types of disadvantage to which they might be subject.
(v) Women may have particular difficulties participating in the Justice system, for example, because of child care issues.
(vi) Women’s experiences as victims, witnesses and offenders are in many respects different to those of men.

11. For this, Judges have to learn the language of equality and impartiality. The process of learning the language of equality may be slow, but a Judge has to encourage himself to learn the same. Otherwise, there will be no equality and therefore no justice.

12. In the words of Chief Justice Hilario G. Davide, Jr. in the foreword to the book “Gender Sensitivity in the Court System” by Marcia Ruth Gabriela, it was noted:-

“It is disconcerting when the courts that are expected to be the paradigms of equality, themselves display gender insensitivity or gender bias. The effect is the same when the insensitive act is made not by a Judge or a court employee but by a lawyer appearing in the Court but who, nevertheless, receives no chastisement for the insensitivity. Often the offensive acts are unconsciously committed, but there are times when gender slurs are deliberately made. Culture may be the culprit in both instances.

15. In the Indian society, the female is a victim of social and psycho flows. But she can find shelter in the books of law. When she beseeches the legal fraternity to hold her hand, she does so in the hope that she would be taken out of darkness to light. Hopefully there may come a day when we can all say proudly: Women rights are our rights because they are human rights.
16. The observations by the learned Judge which we have extracted hereinabove, are prima-facie insensitive observations and are capable of influencing the police to take up women harassment cases lightly, resulting in an insensitive investigation and complete evidence not being brought before the Court.

6.2 In case of an offender other than a Juvenile, a magistrate, under section 29 of Cr.P.C., may pass a sentence of imprisonment for a term not exceeding 3 years or fine not exceeding ten thousand rupees (fifty thousand as per Mah. State amendment) or of both. Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S. 325 Cr.P.C. to forward accused to the Chief Judicial Magistrate. A sentence of imprisonment in default, as per S.30 Cr.P.C., should not be in excess of power u/s 29 Cr.P.C. and should not exceed 1/4th of the term of imprisonment which the magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the magistrate u/s29. In case of conviction of several offences at one trial, as per S.31 Cr.P.C., the court may pass separate sentences, subject to the provisions of S.71 of the I.P.C. The aggregate punishment and the length of the period of imprisonment must not exceed the limit prescribed by S.71 I.P.C. S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts each of which is a offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law whereas S.31 Cr.P.C. is a procedural law.

In case of several sentences to run concurrently it is not necessary to sent offender for trial before higher court only for the reason that aggregate punishment for several offences is in excess of punishment which the magistrate is competent to inflict on conviction of single offence. However, proviso to S.31 Cr.P.C. Provides that (a) in no case shall such person be sentenced to imprisonment for a longer period that 14 years (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for single offence.

6.3 In the recent judgment the Bombay High Court while explaining s.427 CrPC observed (wp1437-13 C vs 2 decided on 22 July, 2013)

"9 A plain reading of Section 427 makes it clear that ordinarily subsequent sentence of imprisonment commences at the expiration of the imprisonment, not being life imprisonment, to which a person has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. It is obvious that sub-section
(1) of Section 427 confers power upon the Court to order concurrent running of subsequent sentence with the previous sentence of imprisonment for a term and this power being discretionary in nature, has to be exercised prudently in appropriate cases. So, when the power exists, it becomes a part of public duty of the Court to apply its mind to the question of exercise of the power one way or the other.

10 Performance of such a public duty becomes all the more necessary when there is a specific prayer made in that regard or the circumstances peculiar to that case demand it. In the instant case, the circumstances of the case, position of the petitioner and his prayer made before appellate Court required both Courts below to perform the public duty. But unfortunately that was not so. It may be stressed here that there were certain circumstances which could not have escaped attention of any prudent and diligent Court. The petitioner was already in custody when he had pleaded guilty before the trial Court and the trial Court, as it appears from the impugned judgments, had not even offered any legal aid to the petitioner. The petitioner had no way to know that sentences in all cases might run consecutively. In these circumstances, it fell upon the learned Metropolitan Magistrate to be particular in applying his mind to the necessity of making the subsequent sentences run concurrently with the previous sentences or otherwise. The fact that the judgments and orders of the convictions a same day of 11th June, 2012 could not have been the ground for non-exercise of such a power, for, they were so delivered one after another separately and, therefore, it could not have been said that none of them could be considered as either previous or subsequent convictions and sentences. It is well settled rule of criminal jurisprudence that when a person is convicted and sentenced to suffer imprisonment, the sentence of imprisonment commences immediately upon its pronouncement by the Court unless otherwise directed. It is nobody's case that after the first batch of sentences in Criminal Case No.664/PW/2011 came out, the operation of the sentences was stayed and the petitioner was directed to be released on bail. Therefore, the order of sentences passed in the first case has to be taken as the one of previous sentences in relation to orders of sentences passed in Criminal Case Nos.665/PW/2011 and 666/PW/2011. Therefore, we find that Section 427 power ought to have been considered by the learned Magistrate for its appropriate exercise in the present case."

7.1 Having considered the relevant substantive and procedural aspects of sentencing it is necessary to see as to how a judge or magistrate is expected to apply this provision. S.235(2) Cr.P.C. mandates that accused must be heard on the question of sentence. This provision is, in fact, a reflection of the new trend in penology. At such a stage judge is expected to consider question of sentencing in light of various factors such as prior criminal record, age, employment, educational background, home life, sobriety of the offender so also the factors such as social adjustment, emotional and mental condition and prospect of his returning to normal path. In “Shivmohansing Vs State of Delhi AIR 1977 SC 949, the Supreme Court (Mr. Justice V.R. Krishna Iyer) observed, “Hearing is obligatory at the sentencing stage. The humanist principle of individualizing punishment to suit the person and his circumstances is best served by hearing the culprit even on the nature and quantum of the penalty to be imposed.”
7.2 In case of question of liability to enhanced punishment in consequence of previous conviction S.236 Cr.P.C. comes in operation for sessions trial and S.248(3) in case of trial before magistrate. S.248(3) Comes into operation when previous conviction is charged u/s 211 (5) Cr.P.C. and the accused does not admit previous conviction.

7.3 S.354(3) Provides that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state, the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

As per S.354(4) when the conviction is for an offence punishable with imprisonment for a term of one year or more, but a court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till rising of the court or unless the case was tried summarily.

7.3 A Jail term should normally be enough to wipe out the stain of guilt. But the ignobility associated with Jail and social stigma attached to it often renders the remedy worse than the disease and the very purpose of sentence gets defeated. The ancient Indian Wisdom behind sentence was noble. It believed that soul of a convict becomes pure once he undergoes a sentence.

“राजमित्रः ध्रुवंदर्षातु कृत्या पापाणि मानवः।
बिर्मलः स्वर्गात्तालिनि रात्रि: सुकृतिनिमो यथा।।

(Men who have committed crime and have been punished go to heaven, being pure like those who performed meritorious deeds.)

Crimes are not rooted always in the criminal tendencies and their roots may lie in psychological factors induced by hunger, want and poverty. The law also believes that ‘if all saints have past all sinners must have future’.

7.5 Section 360 of the criminal P.C. Code and the Probation of Offenders Act recognize the importance of environmental influence in commission of crime and prescribe remedy whereby offenders can be reformed and rehabilitated in the society. By virtue of S.8 (1) of the General Clauses Act in States where provisions of the probation of offenders Act have been brought in force the provisions of S.360 Cr.P.C. need not be made applicable. S.3, 4 and 6 are the backbone of the Probation of offenders Act. S.3 empowers court to release after due admonition an offender found to be guilty of having committed offences punishable u/s 379, 380, 381, 404 and 420 I.P. Code or any other offence punishable with imprisonment for not more than two years or with fine or both. The term previous conviction includes previous order u/s 4
of the Act. Sec. 4 authorises a court to release an offender on probation of good conduct on his entering into a bond with or without surety to appear and receive sentence when called upon during such period not exceeding 3 years and meantime keep the peace and be of good behaviour, if the offence committed by him is not punishable with death or imprisonment for life. The factors relevant u/s 4 are (1) circumstances of the case (2) nature of offence (3) character of offender.

S.6 prohibits court from sentencing an offender under 21 years of age to imprisonment unless satisfied that it would not be desirable to deal with him u/s 3 or S.4. The court has to record reasons in case where it passes any sentence of imprisonment on an offender below 21 years of age. S.6(2) makes it obligatory for a court to call for report of probation officer and consider the same as well as any other information available to it relating to character and physical and mental condition of the offender.

7.6 Here it is relevant to consider the provisions of Juvenile Justice Act, 1986 in general and S.21 and 22 in particular which provide for order which may be and which may not be passed against juvenile delinquent. Similar provision with more child friendly approach find place in S.15 & 16 of The Juvenile Justice (care and protection of children) Act 2000. The speciality of the New Act is reflected in the change of approach towards the problem which is reflected in the terminology used ‘juvenile in conflict with law’ rather than the old ‘Juvenile delinquent’.

8. S.361 Cr.P.C. provides that when the court could have dealt with S.360 Cr.P.C. or the provisions of The Probation of offenders Act or any Act for the time being in force for treatment training and rehabilitation of youthful offenders but has not done so, it shall record special reasons for not having done so. This section was incorporated in the Cr.P.C. 1973 for the first time in order to avoid rendering such offenders hardened criminals by keeping them along with other criminals in regular prison.

9.1 Punishment is the penalty for the transgression of law. The punishments to which offenders are liable are specified in S.53 I.P. Code which is (i) Death (ii) Imprisonment for life (iii) Imprisonment of two descriptions (a) rigorous (b) simple. (iv) Forfeiture of property (v) fine. The I.P. Code has prescribed death sentence as maximum punishment. The lowest term is 24 hours as is prescribed u/s 510 I.P.Code. Minimum term of sentence of imprisonment to be necessarily awarded is prescribed under sections 397, 298, 304-B, 376(1) 376(2) etc. A sentence of imprisonment till rising of the court is also a sentence according to law. Fine is pecuniary penalty. Forfeiture is a penalty by which one loses his rights and interest in his property. Forfeiture is meant for persons found guilty of
high political offences, generally. The punishment of forfeiture is provided u/s 126, 127 & 167 of the I.P. Code.

9.2 The Indian Penal Code sanctions either a term of imprisonment or fine or both and it is left to the discretion of the court whether to inflict a sentence of imprisonment or a fine or both. If the law permits a sentence of fine as an alternative there is no need of sentence of imprisonment unless the gravity of the offence or the antecedent of the offender demand it. While deciding the question of quantum of sentence of fine the court should always bear in mind that there should be some sort of nexus between the amount of fine imposed and the potentiality of the accused to pay it. Fine is the only punishment in following cases (i) Unlimited – S. 155, 156, 171 G IPC (2) Limit to Rs. 1000/- - S. 154, 294-A IPC (3) Limit to Rs. 500/- - S. 137, 278, 171H, 171-I IPC (4) Limit to Rs. 200/- - S. 263-A, 283, 290 IPC.

Where no sum is expressed, S. 63 IPC expects that the fine imposed shall not be excessive.

9.3 The 42nd Law commission recommended new forms of punishment such as -
(1) Community service (2) Disqualification from holding office (3) Order of payment of compensation (4) Public censure.

V SENTENCING: DIFFERENT APPROACHES AND EXPECTATIONS.

10.1 The court is expected to strike balance between too harsh and too lenient view while awarding sentence. Through crime rate has increased abnormally as compared to it actual sentencing his decreased to a considerable extent. Judicial decisions tilting towards benefit of doubt many time invite criticism from the society. The apex court responding to this criticism observed in 'S.C. Bahri vs State of Bihar AIR 1994 SC 2420 :

“Crime and punishment have a moral dimension of considerable complexity that must guide sentencing in any enlightened society. The criticism of Judicial sentencing has raised its head in various forms, that it is inequitable as evidenced by desperate sentences, that it is ineffective; or that it is unfair being either inadequate or in some cases harsh. It has been often expressed that there is a considerable disparity in sentencing an accused found to be guilty for same offence. This sentencing variation is bound to reflect because of the varying degrees of seriousness in the offences and/ or verifying characteristics of the offender himself. Moreover, since no two offences or offenders can be identical the charge or label of variation as disparity in sentencing necessarily involves a value based judgment.”

10.2 In Rajeev vs. State of Rajasthan AIR 1996 SC 787 the Supreme Court cautioned,
“The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which crime is perpetrated, the enormity of crime warranting public abhorrence and it should respond to society's cry for justice against criminal”.

11.1 While awarding any sentence a judge must visualise the effect of sentence on the offender. Generally in all cases excepting offence of immense gravity, a judge should ask himself whether he can avoid sentencing of sending offender to prison. He must keep in mind that short sentences expose an offender to all bad influences of imprisonment without enabling him to any benefit from it. A Judge while sentencing is confronted with twofold problems, firstly he must try to match the sentence to the gravity of the offence and secondly he must try to find the sentence which offers the best prospect of ensuring that the offender does not commit further crime. In order to answer these two problems the Judge should be able to know the exact effect of sentence which he is going to pass. In order to anticipate such an effect the judge must be equipped with adequate information about the offender and their statistics. Judicial visits to Jails and correction homes from time to time, is a welcome step which may enable a judge to see the actual effect of sentences passed. Apart from it a judge is required to have (a) an informed outlook on life & (b) live approach to the needs of society in the context of changing social and economic needs & (c) ability to respond to advance intendment of legislation within the framework of law.

11.2 Sentencing is a neglected aspect as compared to the aspect of finding of guilt. Negel Walkar has put this reality in apt words saying, ‘if the criminal law as a whole is Cinderella of jurisprudence then the law of sentencing is Cinderella's illegitimate baby’. Sentencing generally passes a complex problem which requires working compromise between reformative, deterrent and retributive views about punishment. Still a broad object of punishment should not be forgotten that it is necessary to impress upon the guilty person that crime does not pay and that sentence is necessary for his individual interest as well as in the interest of society.

11.3 Impressing the reformatory object of punishment Chief Justice Gajendragadkar observed in 'Indochina Navigation Company Ltd. v/s Jusjeetsing AIR 1964 SC 1146, - “It must be remembered that ordinary offences with which the normal criminal law of the country deals, are committed by persons either under the pressure of provoked or unbalanced emotions, or as a result of adverse environment and circumstances and so while dealing with these criminals who is many cases deserve a sympathetic treatment & in a few cases, are more sinned against than sinners, criminal law treats punishment more as reformative or corrective than as a deterrent or punitive measure”.

11.4 Mr. Justice V.R. Krishna Iyer in his address to National Correctional Conference held in 1971 emphasised that the orthodox and ignorant approach of the judiciary must be changed. He further emphasized the need for national training or refresher programme for the criminal judiciary.

12. The 47th report of the Law commission of India has identified the standards of sentencing. “7.44 – A proper sentence is a composite of many factors, including the nature of the offence, the circumstances – extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional or social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for rehabilitation of the offender, the possibility of a return of offender to normal life, the possibility of treatment or a training of the offender, the possibility that the sentence may serve as deterrent to crime by this offender or by others and the present community need.

VI) SENTENCING: APPROACH TOWARDS DIFFERENT TYPES OF OFFENCES AND NATURE OF PUNISHMENT.

13.1 Sentencing requires a deep thought because while sentencing there cannot be any precedent as each case is unique in its features Basic factors which constitute circumstances of a case may be (1) Gravity of the offence (2) Degree of participation of the convict in the offence (3) His subsequent attitude towards the case. For the purpose of sentencing offenders can be classified as (1) The casual (2) The habitual (3) the professional.

13.2 Socio-economic offences
It is believed that in case of socio-economic offences rehabilitative measures are hardly appropriate. For example the provisions of probation of offenders Act though may be technically applied to offences under prevention of Food Adulteration Act, their application would not be an appropriate measure. In 'Ishardas v/s St. of Punjab AIR 1972 SC 1295 the apex court observed that the prevention of food Adulteration Act is enacted with aim of eradicating antisocial evil against public health and court should not lightly resort to the provisions of probation of offenders Act. The 47th report of the Law Commission has recommended the exclusion of the probation Act to social and economic offences. In Pyarali K. Tejani vs Madhav R. Dange, AIR 1974 SC 228 the Supreme Court has cautioned that 'The kindly application of the probation principle is negatived by the imperatives of social defence. No chances can be taken by society with a man whose antisocial operations disguised as a respectable trade, imperil numerous innocents'.
13.3 Habitual Offenders:
In case of Habitual offender, his past conduct shows that he intends to adopt criminal career, hence while sentencing him 3 thing should be taken into consideration (i) It is necessary to pass a sentence which will make him realise that a life of crime has become increasingly hard and does not pay (ii) sentence should serve as a warning to others who may be thinking of adopting criminal career (iii) Public must be protected against the people who show that they are going to ignore the rules framed for protection of society.

13.4 Offences against Women: Our society in its hypocrisy puts women on higher pedestal saying ‘यच्छ जार्यस्य पूज्यते सम्बले तत्र देवता’ but in practice it adopts “न स्त्री स्वातंत्र्यमहत्ति” It therefore becomes the bounden duty of the judiciary not to extend benefit of probation provision to the offender where honour and dignity of a woman is concerned. The Law commission of India in its 172nd report has recommended incorporation of new provision in the criminal laws to provide for stringent punishment for the offence of rape and sexual offences of abuse of children. The Supremenc Court in two decisions (i) Bodhisattva Gautam vs Subhara Chakrobarty (1996) 1 SCC 490 & (ii) T.K. Gopal alias Gopi vs State of Karnataka (2000) 6 SCC 168, has emphasized the victim oriented approach to be considered while considering the question of sentence.

13.5 Accident Cases:
In Ratansing vs State of Punjab AIR 1980 SC 84 the Supreme Court observed that in accident case when life is lost and when driving is rash no compassion can be shown. The Supreme Court further observed that sentencing must have a policy of correction. The driver if has to become a good driver must have a better training of traffic laws and moral responsibility. Punishment in this area must therefore, be accompanied by these components. The state should attach a course for better driving together with greater sense of responsibility. The the Supreme Court in Dalbirsingh case observed “Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal court cannot treat the nature of offence u/s 304-A IPC As attracting the benevolent provisions of probation. Such driver must always keep in mind the fear psyche that if he is convicted of offence for causing death of human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accident due to callous driving of automobiles.”
13.6 Nature of imprisonment to be specified:
Home department circular (Resoln No.4 Jails dt 4th APR 1939) prescribe guideline for specifying nature of imprisonment to be awarded which reads “It is a common practice for the courts to pass a sentence of simple imprisonment not because a minor degree of moral turpitude is involved in the crime committed, but in view of the prisoner's presumed unfitness for labour. The courts should not take into consideration any question of physical fitness of a convict to labour; It is for the jail authorities to ascertain what labour is appropriate to a prisoner's strength and to put it to that only; the courts have merely to consider the amount and nature of the imprisonment appropriate to the offence and character and status of the offender and they would realise that by selecting simple instead of rigorous imprisonment they make a very essential difference in the way in which prisoner will be treated on his admission to Jail”.

VII SENTENCING: CAPITAL PUNISHMENT

14.1 The justification of capital punishment was in question in various matters before the apex court especially in the seventies and early eighties. The main reason which kicked the controversy was the question whether state has right to take life. The people opposing capital punishment have a sound argument with them that it is irrevocable. If later on it is found that there was error in the decision, the life lost cannot be recalled. This argument is not merely hypothetical. The famous case on this point is of Dreyfus who was convicted by court martial for treason in France in 1884. For allegedly supplying secret information to the enemy country Germany. There was a public movement against conviction and capital sentence of Dreyfus which was led by famous writer Emile Zola. Finally he was cleared by the Appeal Court in 1906. Later on in 1930 papers of a German major proved the innocence of Dreyfus which showed that the documents on the basis of which court martial found Dreyfus guilty were all forged documents.

14.2 A change in judicial approach is also vital in many cases. This fact can be well exemplified by case of Attappa Couden v/ St of Madras AIR 1937 Mad 618 (F.B.) In this case the Madras High Court held Attappa and others guilty of murder and sentenced them to death. They were executed. 10 years later the Privy Council in its landmark decision of Pulkori Kottayya (AIR 1947 PC 67), overruled the full bench decision of the Madras High Court and laid down correct law. Had this decision preceded Attpa's case Attappa and others may not have to die. To quote words of Mr. Justice V.R. Krishna Iyer, “But dead men tell no tales and judicial guilt has no temporal punishment”.
14.3 The Supreme Court India has upheld the constitutional validity of capital punishment primarily for the reason that so long as it is in the statute book it shall remain there. Judiciary normally hesitates to lay down any sentencing guide. The Superior Court requires the trial courts to exercise discretion while sentencing along with judicial line. It is always insisted that discretion should be used according to principle and not according to humour of the judge arbitrarily and fancifully. Trial court is not expected to be influenced by public feelings state of public feelings is not admissible reason for refraining from passing severe sentence and vice versa. But the recent trend shows that public outcry plays significant role in deciding sentences.

14.4 In Jagmohan Sing vs St. of U.P. AIR 1973 SC 847 the apex court felt its inability to eliminate capital punishment from Indian penology and held that deprivation of life is constitutionally permissible provided it is done according to the procedure established by law. However in Ediga Anamma vs State of A.P. AIR 1974 SC 799 the apex court came closer to achieve this goal by means of statutory interpretation. In this case the convict Ediga Annamma was a young woman of the age of 24 years having one infant. Her conviction was confirmed, but the Lordship faced, to quote his own words 'punitive dilemma'. His Lordship Mr.J.V.R. Krisna Iyer was humane to consider the ethos of rural area where the murders occurred and was moved by the pathetic position of a young woman who was sex starved and was thrown out by her husband and father-in-law and who was living with her parents along with her child. His lordship also considered human significance in the sentencing context by appreciating the boarding horror of hanging haunting the prisoner in her condemned cell for over two years.

14.5 The significant feature of Rajendra Prasad vs State of U.P. AIR 1979 SC 916 is the aperture of its angle. The apex court, in this case observed while considering the nature of special reasons required to be stated, “Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserve death penalty. The crime may be less shocking and yet the callous criminal e.g. a lethal economic offender may be jeopardizing societal existence by his acts of murder.” The apex court went a step forward and further observed, “But if the legislative understanding is not in sight, judges who have to implement the code, cannot fold up their professional hands but must make provisions viable by evolution of supplementary principle, even if they may appear to possess the flavour of the law making.”

14.6 Bachansing vs State of Punjab AIR 1980 SC 898: (1980)2 SCC 684, is a landmark judgment in the truest sense, as it stabilized the use of discretion while sentencing within the tangible framework. The apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be
inflicted only in grarest cases of extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also. The court laid down aggravating circumstances such as – (1) If the murder has been committed after previous planning and extreme brutality (2) The murder involves exceptional depravity (3) The murder is of a member of armed forces of the union or of any police force or of any public servant and was committed – (i) while such member or public servant was on duty (ii) in consequence of anything done or attempted to be done by such member or public servant in discharge of his duty (4) If the Murder is of a person who had acted in the lawful discharge of his duty u/s 43 Cr.P.C. Or S.37, 129 Cr.P.C.

The apex court also noted relevant circumstances which must be given weight in determination of sentences such as – (1) That the offence was committed under the influence of extreme mental or emotional disturbance (2) The age of the accused (3) The probability that the accused would not commit criminal acts of violence as would constitute continuing threat to society (4) The probability that the accused can be reformed and rehabilitated. The state shall by evidence prove that the accused does not satisfy condition No.(3) & (4).

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence (6) That the accused acted under duress or domination of another person. (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

The apex court in its prophetic observation said, “A real and abiding concern for the dignity of the human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

VII SENTENCING DISCRETION:

14.7 In Machhi Sing vs State of Punjab, AIR 1983 SC 957, the apex court made an attempt to formulate as to what constitutes a 'rarest of rare' case. The apex court laid down specific circumstances under which 'the collective conscience' of the community may receive shock so as to constitute a rarest of rare case. The circumstances are (1) manner of commission of murder (2) motive for commission of murder (3) magnitude of crime (4) personality of victim. The apex court after formulating the modalities stated that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.
14.8 While considering the question of laying down of standards and norms restricting the area of imposition of death penalty the apex court in 'Mohammad Chaman vs State (NCT Delhi) (2001) 2 Supreme Court case 28 observed, “by laying down standards it is meant that murder should be categorized beforehand according to the degree of culpability and all the aggravating and rigidly enumerated so as to exclude all free play of discretion, the argument merits rejection such standardization is well nigh impossible firstly, degree of culpability cannot be measured in each case, secondly, criminal cases cannot be categorized there being infinite unpredictable and unforeseen variations; thirdly on such categorization the sentencing process will cease to be judicial and fourthly, such standardization of sentencing discretion is a policy matter belonging to the legislature beyond courts function.” In this judgment the apex court even referred its own earlier decision in Gurubaksha Sing vs State of Punjab AIR 1980 SC 1632.

15.1 Sections 235, 248, 325, 360 and 361 Cr.P.C. deal with the power of the Court relating to sentencing. However, CrPC does not provide any guidelines for sentencing and gives an absolute discretion to the Judge to award any sentence within given parameters.

15.2 The Committee on Reforms of the Criminal Justice System, 2003 established by the Government of India to recommend changes in the Criminal Justice System in India, had observed that the Judges were granted wide discretion in awarding the sentence within the statutory limits. The Committee was also of the opinion that as there was no guidance in selecting the most appropriate sentence in the given factual situation thereof, there was no uniformity in awarding of sentence as the discretion was exercised according to the judgment of every Judge. Thus, the Committee emphasised the need for having sentencing guidelines to minimise uncertainty in awarding sentences. It recommended the appointment of a statutory committee to lay down the sentencing guidelines.

15.3 In USA, several States have introduced guidelines which indicate sentencing ranges according to the type and seriousness of offence and criminal history/antecedents of the offender. There is a permanent Sentencing Commission to monitor sentencing practice and an appellate review is provided to determine the propriety of departure from the guidelines. In United Kingdom, Criminal Justice Act, 2003 provides the necessary guidelines on Crl.Rev.P.No.338/2009 Page 46 of 112 sentencing. In India, the Government has not yet evolved a sentencing policy and there is no legislation that provides guidelines in sentencing. The only guidelines available to Trial Courts are through judgments of the High Court and Supreme Court.

15.4 In Soman v. State of Kerala, 2012 (12) SCALE 719, the Supreme Court laid down principles and guidelines for determination of sentence. The relevant portion of the judgment is reproduced hereunder:-

“12. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In State
of Punjab v. Prem Sagar, (2008) 7 SCC 550, this Court acknowledged as much and observed as under -

“2. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines.”


14. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. The question is whether the consequences of the offence can be taken as the measure for determining its harmfulness? In addition, quite apart from the seriousness of the offence, can the consequences of an offence be a legitimate aggravating (as opposed to mitigating) factor while awarding a sentence. Thus, to understand the relevance of consequences of criminal conduct from a Sentencing standpoint, one must examine: (1) whether such consequences enhanced the harmfulness of the offence; and (2) whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence.

15. In Sentencing and Criminal Justice, 5th Edition, Cambridge University Press, 2010, Andrew Ashworth cites the four main stages in the process of assessing the seriousness of an offence, as identified in a previous work by Andrew Von Hirsch and Nils Jareborg. (See Pages 108 - 112)

1. Determining the interest that is violated (i.e. physical integrity, material support, freedom from humiliation or privacy/autonomy)
2. Quantification of the effect on the victim's living standard.
3. Culpability of the offender.
4. Remoteness of the actual harm.

18. Ashworth also examines the impact of unintended consequences on sentencing. He notes that there is a tendency to take those into account in manslaughter and for causing death by bad driving. The extent to which unintended consequences may be taken into account would depend, for instance, on the extent to which the offender was put on notice of the risk of death. Thus, where it is known that driving dangerously or under the influence of alcohol creates risk for the safety of others, there would be a greater emphasis on resulting death while determining the sentence.”
In *State of Uttar Pradesh v. Sanjay Kumar*, (2012) 8 SCC 537, the Supreme Court reiterated general principles of sentencing reflecting the objective and need of a sentencing policy and the duty of Courts while sentencing. The relevant portion of this judgment is reproduced hereunder:

“21. **Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing.**

Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.

22. Ultimately, it becomes the duty of the courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed, etc. The courts should impose a punishment befitting the crime so that the courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise.

23. The survival of an orderly society demands the extinction of the life of a person who is proved to be a menace to social order and security. Thus, the courts for the purpose of deciding just and appropriate sentence to be awarded for an offence, have to delicately balance the aggravating and mitigating factors and circumstances in which a crime has been committed, in a dispassionate manner. In the absence of any foolproof formula which may provide a basis for reasonable criteria to correctly assess various circumstances germane for the consideration of the gravity of the crime, discretionary judgment, in relation to the facts of each case, is the only way in which such judgment may be equitably distinguished. The Court has primarily dissected the principles into two different compartments--one being the “**aggravating circumstances**”, and, the other being the “**mitigating circumstance**”. To balance the two is the primary duty of the court. The principle of proportionality between the crime and the punishment is the principle of **just deserts**, that serves as the foundation of every criminal sentence that is justifiable. In other words, the **doctrine of proportionality**" has valuable application to the sentencing policy under the Indian criminal jurisprudence."

In *Guru Basavaraj v. State Of Karnataka*, (2012) 8 SCC 734, the Supreme Court has expressed its concern on the need for adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. It observed:
30. From the aforesaid authorities, it is luminous that this Court has expressed its concern on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. That apart, the concern has been to impose adequate sentence for the offence punishable under Section 304-A IPC. It is worthy to note that in certain circumstances, the mitigating factors have been taken into consideration but the said aspect is dependent on the facts of each case. As the trend of authorities would show, the proficiency in professional driving is emphasised upon and deviation therefrom that results in rash and negligent driving and causes accident has been condemned. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Be it noted, grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) CrPC with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence.

32. We may note with profit that an appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like “flies to the wanton boys” They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.”

15.7 In United Kingdom, the judgment of the Court of Appeal in R. v. Cooksley, [2004] 1 Cr App(S) 1 gave a list of various aggravating and mitigating factors in road accident cases. The sentencing guidelines were framed in U.K. on the basis of this judgment. The relevant aggravating and mitigating factors given in the said judgment are reproduced hereunder:

"Aggravating Factors Highly culpable standard of driving at time of offence (a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl' (b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off' (c) disregard of warnings from fellow passengers (d) a prolonged, persistent and deliberate course of very bad driving (e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking) (f) driving while the driver's attention is avoidably distracted, for eg. by reading or by use of a mobile phone (especially if hand-held) (g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills (h) driving when knowingly deprived of adequate sleep or rest (i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns .Driving habitually below acceptable standard (j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle (k) previous
convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving. Outcome of offence (l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable) (m) serious injury to one or more victims, in addition to the death(s) Irresponsible behaviour at time of offence (n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape (o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension (p) offence committed while the offender was on bail.

Mitigating Factors

"(a) a good driving record; (b) the absence of previous convictions; (c) a timely plea of guilty; (d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend); (e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and (f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving."

15.8 The Sentencing Guidelines Council has issued guidelines for sentencing in road accident matters in U.K. under the Criminal Justice Act, 2003. The offences are graded into three levels of seriousness and different sentences are prescribed for each level.

16 In State of Punjab v. Balwinder Singh, (2012) 2 SCC 182, the Supreme Court again reminded the criminal courts dealing with the offences relating to motor accidents that they cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958 and endorsed the view expressed in Dalbir Singh (supra). The relevant portion of the said judgment is reproduced hereunder:

“13. It is settled law that sentencing must have a policy of correction. If anyone has to become a good driver, must have a better training in traffic laws and moral responsibility with special reference to the potential injury to human life and limb. Considering the increased number of road accidents, this Court, on several occasions, has reminded the criminal courts dealing with the offences relating to motor accidents that they cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958. We fully endorse the view expressed by this Court in Dalbir Singh [(2000) 5 SCC 82 : 2004 SCC (Cri) 1208].

14. While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The persons driving motor vehicles cannot and should not take a chance thinking that even if he is convicted he would be dealt with leniently by the court. 15. For lessening the high rate of motor accidents due to careless and callous driving of vehicles, the courts are expected to consider all the relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence if the prosecution is able to establish the guilt beyond reasonable doubt.”
17 In Satyaprakash vs State Delhi High Court prescribed mandatory VICTIM IMPACT REPORT to be filed in each case under s. 304A IPC.

18 It is relevant to refer to latest decision of apex court. Relevant portion of which is thus:

{WRIT PETITION (CRIMINAL) NO. 55 OF 2013
Shatrughan Chauhan & Anr. Versus
Union of India & Ors..21 Jan 2014.. }

Supervening Circumstances
24) The petitioners herein have asserted the following events as the supervening circumstances, for commutation of death sentence to life imprisonment.
(i) Delay
(ii) Insanity
(iii) Solitary Confinement
(iv) Judgments declared per incuriam
(v) Procedural Lapses

32) This Court is conscious of the fact, namely, while Article 21 is the paramount principle on which rights of the convicts are based, it must be considered along with the rights of the victims or the deceased’s family as also societal consideration since these elements form part of the sentencing process as well. The right of a victim to a fair investigation under Article 21 has been recognized in State of West Bengal vs. Committee for Democratic Rights, West Bengal, (2010) 3 SCC 571

......... Chinnappa Reddy, J. in Vatheeswaran (supra) said that prolonged delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution. Chinnappa Reddy, J. quoted the Privy Council’s observation in a case of such an inordinate delay in execution, viz., “The anguish of alternating hope and despair the agony of uncertainty and the consequences of such suffering on the mental, emotional and physical integrity and health of the individual has to be seen.” .......

39) Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime.

......... 51) It is true that the question of sentence always poses a complex problem, which requires a working compromise between the competing views based on reformative, deterrent and retributive theories of punishments. As a consequence, a large number of factors fall for consideration in determining the appropriate sentence. The object of punishment is lucidly elaborated in Ram Narain vs. State of Uttar Pradesh (1973) 2 SCC 86.

The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration.

It is useful to refer a Constitution Bench decision of this Court in Mithu vs. State of Punjab (1983) 2 SCC 277, wherein this Court held Section 303 of the IPC as unconstitutional and declared it void when sentences are being decided.

It is the stand of few of the petitioners herein that the guidelines issued in Machhi Singh (supra) are contrary to the law laid down in Bachan Singh (supra). Therefore, in three decisions, viz., Swamy Shraddananda (2) vs. State of Karnataka (2008) 13 SCC 767, Sangeet and Another vs. State of Haryana (2013) 2 SCC 452 and Gurvail Singh vs. State of Punjab (2013) 2 SCC 713 the verdict pronounced by Machhi Singh (supra) is held to be per incuriam.

Except the above observations, the three Judge Bench has nowhere discarded Machhi Singh (supra). In other words, we are of the view that the three Judge Bench considered and clarified the principles/guidelines in Machhi Singh (supra). It is also relied by the majority in Triveniben (supra). As regards other cases, in view of the factual position, they must be read in consonance with the three Judge Bench and the Constitution Bench.

Certainly, a series of Constitution Benches of this Court have upheld the Constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the Constitutional mandate and not in violation of the constitutional principles.

Remember, retribution has no Constitutional value in our largest democratic country. In India, even an accused has a de facto protection under the Constitution and it is
the Court’s duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Article 72/161 but only to uphold the de facto protection provided by the Constitution to every convict including death convicts.

IX VICTIMOLOGY AND COMPENSATION TO VICTIMS OF CRIME

Victimology

19 Victims are unfortunately the forgotten people in the criminal justice delivery system. The criminal justice system tends to think more of the rights of the offender than that of relief to the victims. The anxiety shown to highlight the rights of the offender is not shown in enforcing law relating to compensation which too has a social purpose to serve. The Court has to take into consideration the effect of the offence on the victim's family even though human life cannot be restored, nor can its loss be measured by the length of a prison sentence. No term of months or years imposed on the offender can reconcile the family of a deceased victim to their loss, nor will it cure their anguish but then monetary compensation will at least provide some solace.

19.1 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly, 1985), provides the basic framework of principles Which are converted as victims’ rights by some of the developed countries. The international standards expected of the countries in the treatment of victims by the CJS agencies at different stages of the criminal process have been elaborately detailed in the UN Handbook on Justice for Victims (United Nations Office for Drugs and Crimes, 1999, chapter III, pp.56-76).

The Basic Principles included in the UN Declaration for Victims are:
1. Access to justice and fair treatment;
2. Restitution; 3. Compensation; and
4. Assistance

19.2 Subsection (wa) has been inserted in Section 2 of the amended CrPC as below:
“(wa) ‘victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir”.

19.3 As per United Nations Declaration of the Basic Principle of Justice for the Victims of Crime and Abuse of Power:
“Victim includes, any person who, individually or collectively, has suffered harm, including physical or mental injury, emotitional suffering, economic loss or substantial impairment of his fundamental rights, through acts or omissions that are in violation of criminal laws operating within the member States including those laws prescribing criminal abuse of power. A person would be considered a victim, irrespective of whether the perpetrator is identified apprehended, prosecuted or convicted and irrespective of familiar relationship between the perpetrator and
the victim. The term victim includes, where appropriate, the immediate family of the dependents of the direct victim and the persons who have suffered harm in intervening to assist victim in distress or to prevent victimization. The provisions are applicable to everyone irrespective of race, age, cultural belief or practices, property, birth or family status, ethnic or social origin disability and nationality.”

19.4 Sub-section (1) of Section 357A of the CrPC discusses the preparation of a scheme to provide funds for the compensation of victims or his dependent who have suffered loss or injury as a result of a crime and who require rehabilitation. Sub-section (2) states that whenever the Court makes a recommendation for compensation the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the above-mentioned scheme. It is significant that the Legal Services Authority, comprising of technical experts, has been entrusted the task of deciding the quantum of compensation, since they are better equipped to calculate/quantify the loss suffered by a victim. In sub-section (3) the trial court has been empowered to make recommendations for compensation in cases where-

Either the quantum of compensation fixed by the Legal Services Authority is found to be inadequate; or,

Where the case ends in acquittal or discharge of the accused and the victim has to be rehabilitated.

Sub-section (4) of Section 357A states that even where no trial takes place and the offender is not traced or identified; but the victim is known, the victim or his dependents can apply to the State or the District Legal Services Authority for award of compensation. Sub-section (5) says that on receipt of the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. It is pertinent that a time frame has been provided within which the Legal Services Authority should conduct its enquiry and award compensation. A period of two months, would ensure speedy delivery of justice to the victim and specification of a time period would create accountability and prevent dilatory measures. The section speaks of ‘adequate compensation'; thus ensuring the quantum of compensation awarded should be just and fair. Further, sub-section (6), states that, in order to alleviate the suffering of the victim, the State or District Legal Services Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief as the appropriate authority deems fit. It is a positive that the section speaks of “alleviating the suffering” of the victim and seeks to help the victim recover in the after-math of the crime and ensure that the victim does not have to wait till the end of the trial to recover these costs. The statutory recognition of the right to interim relief is an important step and an urgent need of the hour.

19.5 Section 372 of the CrPC has been amended, containing the following proviso:

“Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.”

The section provides a victim a specific right of appeal in the following circumstances:
1. Acquittal of the accused,
2. Conviction for a lesser offence, and;
3. Inadequate compensation.

19.6 An aspect of victimology, the doctrine of victim protection, victim representation and victim rehabilitation was the subject matter of the appeals before Bombay High Court in Balasaheb Rangnath Khade vs The State Of Maharashtra & Ors on 27 April, 2012 (Per Hon’ble Roshan Dalvi, J.)

The High Court observed:

“61. The victims’ rights are considered alongside and on par with that of the accused. Whereas the accused appeals from an order of conviction, the victim appeals from an order of acquittal, lesser offence or inadequate compensation. Since the right of the accused to appeal is absolute, (though denoted by the word 'may') so has been made the right of the victim (in fact, denoted by the word 'shall'). Both would be equally prejudiced from an order of acquittal or an order of conviction as the case may be. Both are the parties who have been harmed or prejudiced by the order of the trial Court. They prosecute their personal rights as human beings. Their’s are, therefore, human rights which are to be considered. The power balancing which is required to be done by the State has been done albeit at only the appellate stage. Consequently a victim of crime is not left to the arbitrariness or the vagaries of the State officials and not left to accept any verdict in which he/she does not play an effective part for its final determination at least in the appeal.”

In the result, it was held that the victim is not required to apply for or obtain leave of the Court to file any of the appeals under the proviso to section 372.

20 Despite initial absence of special legislation to render justice to victims in India, the Supreme Court has taken a proactive role and resorted to affirmative action to protect the rights of victims of crime and abuse of power. The concept of restorative justice was adopted to award compensation or restitution or enhanced the amount of compensation to victims, beginning from the 1980s. (Sukhdev Singh vs. State of Punjab (1982 SCC (Cr) 467), Balraj vs. State of U.P. (1994 SCC (Cr) 823), Giani Ram vs. State of Haryana (AIR 1995 SC 2452), Baldev Singh vs. State of Punjab (AIR 1996 SC 372).

21 In Bodhisattwa Gautam vs. Subhra Chakraborty (AIR 1996 SC 922), the Supreme Court held that if the court trying an offence of rape has jurisdiction to award compensation at the final stage, the Court also has the right to award interim compensation. The court, having satisfied the prima facie culpability of the accused, ordered him to pay a sum of Rs.1000 every month to the victim as interim compensation along with arrears of compensation from the date of the complaint. It is a landmark case in which the Supreme Court issued a set of guidelines to help rape victims who cannot afford legal, medical and psychological services, in accordance with the Principles of UN Declaration of Justice for Victims of Crime and Abuse of Power, 1985:

(i) The complainants of sexual assault cases should be provided with a victim’s Advocate who is well acquainted with the CJS to explain to the victim the proceedings, and to assist her in the police station and in Court and to guide her as to how to avail of psychological counselling or medical assistance from other agencies;
(ii) Legal assistance at the police station while she is being questioned;
(iii) The police should be under a duty to inform the victim of her right to representation before any questions are asked of her and the police report should state that the victim was so informed;
(iv) A list of Advocates willing to act in these cases should be kept at the police station for victims who need a lawyer;
(v) The Advocate shall be appointed by the Court, in order to ensure that victims are questioned without undue delay;
(vi) In all rape trials, anonymity of the victims must be maintained;
(vii) It is necessary, having regard to the Directive Principles contained under Art. 38 (1) of the Constitution of India, to set up a Criminal Injuries Compensation Board. Rape victims frequently
incur substantial financial loss. Some, for example, are too traumatized to continue in employment;
(viii) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Legal
Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of childbirth if this occurred as a result of the rape.

22 Supreme Court recognized the need for state compensation in cases of abuse of power by the State machinery. In the landmark case of Rudul Sah vs. State of Bihar (AIR 1983 SC 1086), the Supreme Court ordered the Government of Bihar to pay to Rudul Sah a further sum of Rs.30,000 as compensation, which according to the court was of a “palliative nature”, in addition to a sum of Rs.5,000, in a case of illegal incarceration of the victim for long years. Similarly in Saheli, a Women’s Resources Centre through Mrs. Nalini Bhanot vs. Commissioner of Police, Delhi Police (AIR 1990 SC 513), the Court awarded a sum of Rs.75,000 as state compensation to the victim’s mother, holding that the victim died due to beating by the police. In the case of D. K. Basu vs. State of West Bengal (AIR 1997 SC 610), the Supreme Court held that state compensation is mandatory in cases of abuse of power and said that “To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience”.

23 The Law Commission, in its report in 1996, stated that, “The State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals; or (ii) where the offender is not traceable, but the victim is identified; and (iii) also in cases when the offence is proved.”

24 The Justice V. S. Malimath Committee has made many recommendations of far-reaching significance to improve the position of victims of crime in the CJS, including the victim’s right to participate in cases and to adequate compensation. Some of the significant recommendations include:

- The victim, and if he is dead, his or her legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years’ imprisonment or more;
- In select cases, with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings;
- The victim has a right to be represented by an advocate and the same shall be provided at the cost of the State if the victim cannot afford a lawyer;
- The victim’s right to participate in criminal trial shall include the right:
  - to produce evidence; to ask questions of the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; and to advance arguments after the submission of the prosecutor’s arguments;
  - The right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation;
  - Legal services to victims may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization;
  - Victim compensation is a State obligation in all serious crimes. This is to be organized in separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration;
  - The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority.

25 The Code of Criminal Procedure, 1973 has recognized the principle of victim compensation. Section 250 authorizes magistrates to direct complainants or informants to pay compensation to people accused by them without reasonable cause. Again Section 358 empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully. Finally, Section 357 enables the court imposing a sentence in a criminal proceeding to grant compensation to the victim and order the payment of costs of the prosecution. However, this is on the discretion of the sentencing court and is to be paid out of the fine recovered. Though the principle underlying Section 357 of the Code of Criminal Procedure, 1973 is very much
the same sought to be achieved by the UN Basic Principles of Justice for Victims of Crime, its scope is extremely limited as:

1. The section applies only when the accused is convicted;
2. It is subject to recovery of fine from the accused when fine is part of the sentence;
3. When fine is not imposed as part of the sentence, the magistrate may order any amount to be paid by way of compensation for any loss or injury by reason of the act for which the accused person has been so sentenced (Sec. 357(3)); and
4. In awarding the compensation, the magistrate is to consider the capacity of the accused to pay.

26 Significant judgments

26.1 The first landmark judgment where compensation to the victim ordered by the Madras High Court and upheld with some modifications by the Supreme Court of India was *Palaniappa Gounder v. State of Tamil Nadu* (AIR 1977 SC 1323). In this case, the High Court after commuting the sentence of death on the accused to one of life imprisonment, imposed a fine of Rs.20,000 on the appellant and directed that out of the fine, a sum of Rs.15,000 should be paid to the son and daughters of the deceased under Section 357(1)(c) of the Code of Criminal Procedure, 1973. The Supreme Court while examining the special leave petition of the appellant observed that there can be no doubt that for the offence of murder, courts have the power to impose a sentence of fine under Section 302 of the IPC but the High Court has put the “cart before the horse” in leaving the propriety of fine to depend upon the amount of compensation. The court further observed, “the first concern of the court, after recording an order of conviction, ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and sentence including the sentence of fine must not be unduly excessive.” In fact, the primary object of imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realized, which can happen fine is not unduly excessive having regard to all the circumstances of the case, including the means of the offender. The Supreme Court thus reduced the fine amount from Rs.20,000 to a sum of Rs.3,000 and directed that the amount recovered shall be paid to the son and daughters of the deceased who had filed the petition in the High Court. This is a case wherein the Supreme Court reduced the amount of fine and achieved a proper blending of offender rehabilitation and victim compensation. The important point, which emerged in the case, was the Supreme Court upholding the order of compensation.

26.2 In the case of *Hari Krishnan and the State of Haryana v. Sukhbir Singh and others* (AIR 1988 SC 2127) the apex court observed:

“The power under Section 357 Criminal Procedure Code is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a recompensatory measure to rehabilitate to an extent the beleaguered victims of the crime, a modern constructive approach to crime, a step forward in our criminal justice system ... The payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case.”

26.3 In *Rattan Singh v. State of Punjab*, (1979) 4 SCC 719, Krishna Iyer J., held that it is a weakness of our jurisprudence that the victims of the crime do not attract the attention of law. The relevant portion of the judgment is reproduced hereunder:

“6. The victimisation of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the
prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the legislature. We can only draw attention to this matter. Hopefully, the welfare State will bestow better thought and action to traffic justice in the light of the observations we have made.”

26.4 In Maru Ram v. Union of India, (1981) 1 SCC 107, Krishna Iyer J., held that while social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty. Victimology must find fulfilment, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn.

26.5 In Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263, the Supreme Court held that the criminal trial is meant for doing justice to all - the accused, the society and the victim. Then alone can law and order can be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that the guilty man does not escape.

26.6 In State of Gujarat v. Hon’ble High Court of Gujarat, (1998) 7 SCC 392, the Supreme Court observed that the State should make a law for setting apart a portion of wages earned by prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in another feasible mode. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. The Court further held that an honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace. The relevant portion of this judgment is reproduced hereunder:-

“46. One area which is totally overlooked in the above practice is the plight of the victims. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of direct victims, i.e., those who are alive and suffering on account of the harm inflicted by the prisoner while committing the crime. The second type comprises of indirect victims who are dependants of the direct victims of crimes who undergo sufferings due to deprivation of their breadwinner.

47. Restorative and reparative theories have developed from the aforesaid thinking. In the Oxford Handbook of Criminology, Andrew Ashworth, Professor of Oxford University Centre for Criminological Research has contributed the following instructive passage:

“Restorative and Reparative Theories.--These are not theories of punishment rather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centred (see e.g., Wright 1991), although in some versions they encompass the notion of reparation to the community for the effects of crime. They envisage less resort to custody, with onerous community-based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counselling for offenders to reintegrate them into the community. Such theories therefore tend to act on a behavioural premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notions of just punishment on behalf of the State.

Legal systems based on a restorative rationale are rare, but the increasing tendency to insert victim-orientated measures such as compensation orders into sentencing systems structured to impose punishment provides a fine example of Garland’s observation that â€. institutions are the scenes of particular conflicts as well as being means to a variety of ends, so it is no surprise to find that each particular institution combines a number of often incompatible objectives, and organizes the relations of often antagonistic interest groups.’”

48. Section 357 of the Criminal Procedure Code, 1973 provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But in practice, the said provision has not proved to be of much effectiveness. Many
persons who are sentenced to long-term imprisonment do not pay the compensation and instead they choose to continue in jail in default thereof. It is only when fine alone is the sentence that the convicts invariably choose to remit the fine. But those are cases in which the harm inflicted on the victims would have been far less serious. Thus the restorative and reparative theories are not translated into real benefits to the victims.

99. In our efforts to look after and protect the human rights of the convict, we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to earn his livelihood because of the criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. The subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

101. Reparation is taken to mean the making of amends by an offender to his victim, or to victims of crime generally, and may take the form of compensation, the performance of some service or the return of stolen property (restitution), these being types of reparation which might be described as practical or material. The term can also be used to describe more intangible outcomes, as where an offender makes an apology to a victim and provides some reassurance that the offence will not be repeated, thus repairing the psychological harm suffered by the victim as a result of the crime.

Section 357 Cr.P.C. empowers the Court to award compensation to the victim(s) of the offence in respect of the loss/injury suffered. The object of the section is to meet the ends of justice in a better way. This section was enacted to reassure the victim that he is not forgotten in the criminal justice system. The amount of compensation to be awarded under Section 357 Cr.P.C. depends upon the nature of crime, extent of loss/damage suffered and the capacity of the accused to pay for which the Court has to conduct a summary inquiry. However, if the accused does not have the capacity to pay the compensation or the compensation awarded against the accused is not adequate for rehabilitation of the victim, the Court can invoke Section 357A to recommend the case to the State/District Legal Services Authority for award of compensation from the State funded Victim Compensation Fund under the Delhi Victim Compensation Scheme, 2011. Section 357 Cr.P.C. is mandatory and it is the duty of all Courts to consider it in every criminal case. The Court is required to give reasons to show such consideration.

27.1 Apex Court in Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551, had to issue a mild reprimand while exhorting the Courts for liberal use of this provision to meet the ends of justice as a measure of responding appropriately to the crime, and reconciling the victim with the offender. The relevant portion of the said judgment is reproduced hereunder:-

... Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. ... It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We,
therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way”

27.2 In Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528, the Supreme Court explained the scope and purpose of grant of compensation as under:-

“The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefore in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub- section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a judge.”

27.3 In Manish Jalan v. State of Karnataka, (2008) 8 SCC 225, the Supreme Court observed that the Courts have not made use of the provisions regarding award of compensation to the victims as often as they ought to be. The relevant portion of the said judgment is reproduced hereunder:-

“12. Though a comprehensive provision enabling the court to direct payment of compensation has been in existence all through but the experience has shown that the provision has rarely attracted the attention of the courts. Time and again the courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not very heartening.”

27.4 In K.A. Abbas H.S.A. v. Sabu Joseph, (2010) 6 SCC 230, the Supreme Court again noted that Section 357 Cr.P.C. is an important provision but the Courts have seldom invoked it, perhaps due to the ignorance of the object of it. The relevant portion of the said judgment is reproduced hereunder:-

“18. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but the courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. It may be noted that this power of the courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all the courts to exercise this power liberally so as to meet the ends of justice in a better way.”

27.5 In Roy Fernandes v. State of Goa, (2012) 3 SCC 221, the Supreme Court again observed that the Criminal Courts do not appear to have taken significant note of Section 357 Cr.P.C. or exercised the power vested in them there under. The relevant portion of the said judgment is reproduced thus “41. The provision of payment of compensation has been in existence for a considerable period of time on the statute book in this country. Even so, the criminal Courts have not, it appears, taken significant note of the said provision or exercised the power vested in them thereunder.”

27.6 In Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770, the Supreme Court again noted with despair that Section 357 Cr.P.C. has been consistently neglected / ignored by the Courts despite series of pronouncements to that effect. The Supreme Court cited with approval Sarwan Singh (supra), Maru Ram (supra), Hari Singh (supra), Balraj (1994) 4 SCC 29, Baldev Singh v. State of Punjab, (1995) 6 SCC 593 and Dilip S. Dahanukar (supra). The Supreme Court held that Section 357 Cr.P.C. is mandatory and has to be applied in every criminal case and the Courts are required to record reasons for such application. The relevant portions of the judgment are reproduced hereunder:-
28. The only other aspect that needs to be examined is whether any compensation be awarded against the appellant and in favour of the bereaved family under Section 357 of the Code of Criminal Procedure, 1973. This aspect arises very often and has been a subject-matter of several pronouncements of this Court. The same may require some elaboration to place in bold relief certain aspects that need to be addressed by the courts but have despite the decisions of this Court remained obscure and neglected by the courts at different levels in this country...

48. The question then is whether the plenitude of the power vested in the courts under Sections 357 and 357-A, notwithstanding, the courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the courts. In other words, whether courts have a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them? xxx xxx

54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.

61. Section 357 CrPC confers a duty on the court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the court must disclose that it has applied its mind to this question in every criminal case.

66. To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 CrPC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family”

In para 68 of the said judgment, the Supreme Court directed the copy of this judgment be forwarded to the Registrars of all the High Courts for circulation among Judges handling criminal trials and hearing appeals.

28 Roscoe pound in 'An Introduction to the philosophy of law has observed,” Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates.'
29 Last but not the least, the court while exercising discretion while sentencing and rights of victim should never ignore the 'human factor'. I would not refer to any authority of any court on this point but would refer to an Urdu couplet instead,

ये भी नहीं कोई देवता, भजाया मर गया।
मता शहेबशाह ना सुलेमान मर गया॥
हिंदु कोई मरा न भी मुसलमान मर गया।
इतनी सी बात है, एक इकसान मर गया।

30 To summarize all the considerations in case of sentencing and victimology one may turn to our ancient wisdom which says,

“यथायो यथाकालं यथा प्राणं व ब्राह्मणं।
प्रायहिंतं प्रदातवं ब्राह्मणेषु धर्मव गाढः॥
देव शुलधमवाच्लोति न व प्राणरतिविविहयते।
आरि व गौहि यति न वै प्रत्येकत्वं दिषेत॥

The person dispensing justice as per Dharmashastra should prescribe a penance appropriate to the age, the time and strength of the sinner, the penance being such that he may not lose his life and yet he may be purified. A penance causing distress should not be prescribed.