



## A Critical Study on Abolition of Capital Punishment

Dr. S.D. Moharana, Principal, G.M. Law College, Puri, Odisha

### **Abstract**

*The present era is not that of barbarism and therefore, the death punishment should be punished. The society, illiteracy, unemployment and other reasons are responsible in turning ordinary human beings into criminals. Therefore an effort should be made by the lawyers, academicians, judges, N.G.O.s and other Government agencies to improve the social behaviour of the individuals. Even criminals possess some good traits in their personality and these traits can be fully exploited to ameliorate their behaviour so that they can be good citizens. Hence the death penalty is in no way to reform the criminals and bringing about harmony in the society. Constitutionally of death penalty is challenged as well as the question as to whether procedure established by Indian Penal Law both substantive and procedural for imposition of death penalty is not fair, just and reasonable is raised by abolitionist on the various ground. The present paper highlights these issues.*

**Key words:** Abolition, Capital Punishment, humanitarian sentiments, Supreme Court

### **Introduction:-**

Punishments are known to have existed throughout the history in every societies, capital punishment is one by which an offender is sentenced to death for committing heinous crime like murder, waging or attempt wage war against the Government of India, abetment of mutiny actually committed, giving or fabricating false evidence upon which an innocent person suffers death, murder by a life convict, abetment of suicide of a child or an insane or intoxicated person, attempt to murder by a life convict, dacoity with murder. The death punishment is based on the theory of punishment that life should go for life, eye for eye, hand for hand, tooth for tooth and foot for foot.

In the tragic gang rape case in December 2012 which came to be called as Nirbhaya rape case the Member

Committee headed by former Chief Justice of India Justice J.S. Verma, Justice Laila Seth & Mr. Gopal Subhramaniam, Sr. Advocate were the members did not recommended death sentence for sexual offences. The committee proposed "Life Imprisonment for the remainder of the convicts of natural life" as the punishment for repeat offenders.

These Supreme Court rulings have averted at least 19 imminent executions in all in the recent past. It is to be borne in mind that India before it executed Ajmal Kasab and Afzal Guru last year, had an execution free run for a period of 8 years. This de facto moratorium led many to believe and argue that India must consider the utility and desirability of retaining this most exceptional and absolute penalty.

These commutations affected by the Supreme Court have once again energized the debate on death penalty.



Once again, people have begun to speculate about the end goal of keeping a penalty such as death sentence on the statute book. The issue has also gathered considerable debate in the mainstream media.

Editorials in major newspapers have been published asking for a re-look at death penalty<sup>1</sup>. On January 21, 2014, the Supreme Court in the case of *Shatrughan Chauhan v. Union of India*<sup>2</sup>, commuted death sentences of 15 death row convicts to life sentence. These death row convicts approached the apex court as a final resort after their mercy petitions were dismissed by the President of India. The Court in this batch matter held that various supervening circumstances which had arisen since the death sentences were confirmed by the Supreme Court in the cases of these death row convicts had violated their Fundamental Rights to the extent of making the actual execution of their sentences unfair and excessive. Soon after this decision, the Supreme Court in *V. Sriharan v. Union of India*<sup>3</sup>, once again invoked this strand of death jurisprudence to commute the death sentences of all the three convicts in the Rajiv Gandhi Assassination case. Likewise, in the *Defender Pal Singh Bhullar's* case<sup>4</sup>, the Court commuted the death sentence of the convict on the ground of inordinate delay in the execution of sentence and mental health problems faced by the petitioner.

Capital punishment is one of the oldest forms of penal system. It is considered that capital punishment violates the humanitarian sentiments. As result of the humanizing impact of modern sociology and other science of human behaviour several countries of the world have abolished the capital punishment. The movement for the abolition of

capital punishment in India in the year 1956 when a bill was introduced in the Lok Sabha for this purpose. It was a matter of debate whether the death penalty be retained or stopped. The house rejected the Bill. Again in the year 1962 a Bill was introduced in opinion of Law commission was called for by the Government of this point. The Law Commission said that the risk involved in the abolition of capital punishment could not be undertaken in the present state of the country.

In the last decade death penalty has become a subject-matter of intense focus in the Supreme Court. The Apex Court on various occasions has wrestled with the disparate application of law on death penalty and constitutional fairness implications of the same. A systematic study which would address the queries and concerns of Courts and also presents an international perspective on the issue is much needed. The Court in some of these cases has specifically requested the Law Commission to undertake research in this behalf.

The Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*<sup>5</sup> has, in this regard, observed:

"112. We are also aware that on 18-12-2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. *Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-to-date and informed discussion and debate on the subject.*" Similarly, the Court in *Shankar*



*Kisanrao Khade v. State of Maharashtra*<sup>6</sup> was also concerned with another dimension of the issue of death penalty and rued lack of research on the issue. The Court held:

"148. It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. *Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.*

#### **Reports of Law Commission:-**

##### **35<sup>th</sup> Report-**

The Law Commission in its 35<sup>th</sup> Report also recommended retaining of section 303 of the Indian Penal Code, which provides for mandatory death penalty. The commission took the following view in this regard:

"Section 303, Indian Penal Code, under which the sentence of death is mandatory for an offence under the section, need not be amended by leaving the question of sentence to the discretion of the Court, or by confining the operation of the section to cases where the previous offence is an offence

for which the offender could have been sentenced to death."

It is to be noted that section 303 of the IPC was held to be unconstitutional by the Supreme Court in *Mithu v. State of Punjab*<sup>7</sup>. The court held:

"23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention."

Relying upon *Mithu*, the Supreme Court in *State of Punjab v. Dalbir Singh*, the Supreme Court struck down section 27(3) of Arms Act, 1959 providing for mandatory death penalty.

Death penalty has been a subject of an age old debate between Abolitionist and Retentionists all through the world. Both the groups firmly and sincerely believe in the righteousness of their respective stands with overtones of sentiment and emotion. Each of the camps is supported by eminent Thinkers, Penologists, Sociologists, Jurists, Judges, Legislatures, Administrators and Law enforcing agencies. However on the principles of ethics, morality and humanitarian points, capital punishment should be abolished.

##### **187<sup>th</sup> Report (2003)-**

Though the Law Commission presented its 187<sup>th</sup> report on the limited issue of



"Mode of Execution of Death Sentence and Incidental Matters" in 2003<sup>8</sup>, the substantial question of desirability of death penalty as a punishment was not part of the terms of this report and the Law Commission accordingly did not express any view on this matter. In the 35th report on capital punishment, the commission did not recommend changing the mode of execution from hanging and observed that "*(p)rogress in the science of anesthetics and further study of the various methods, as well as the experience gathered in other countries and development and refinement of the existing methods, would perhaps, in future, furnish a firm basis for conclusion on this controversial subject.*" This 187th report was taken up in 2003 *suo motu* by the commission keeping in mind the technological advances in the field of science, medicine and anesthetics. Keeping in mind the number of the years that have elapsed since the commission last took up the subject of capital punishment, it is imperative for the Law Commission to consider these fundamental questions relating to death penalty afresh and draw on the rich and still emerging scientific, academic and judicial opinion on many of these subjects.

#### **Reach of death Penalty Laws:-**

##### **Statutory Provisions-**

The Indian Penal Code, 1860 prescribes death penalty for a number of crimes. Some of the offences punishable by sentence of death under the Indian Penal Code are treason (section 121), abetment of mutiny (section 132), perjury resulting in the conviction and death of an innocent person (section 194), threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (section 195A), murder (section

302), kidnapping for ransom (section 364A) and dacoity with murder (section 396). Amongst these offences, death penalty continues to be used most commonly for section 302.

Additionally, many other special legislations such as the Air Force Act, 1950, the Army Act, 1950, the Navy Act, 1950, Commission of Sati (Prevention) Act, 1987 [section 4(1)], Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [section 3(2)(i)], Explosive Substances Act, 1908 [section 3(b)], Unlawful Activities Prevention Act, 1967 [section 16(1)] also provide for the death penalty.

#### **Global Scenario:**

A number of abolitionist states have felt inadequacy of their penological armour to combat politically motivated gangsterism. Despite their traditional abhorrence of death penalty, the Nor-we-gains executed Major Vedkum Quisling after World War – II. The Belgians executed no less than 242 collaborators and traitors after the liberation. In England, death penalty for high treason is in existence since 1956. In Srilanka, capital punishment for murder was reintroduced after assassination of Prime Minister Benernaike in 1959. Israel has sanctioned death penalty for crimes committed against Jewish people. After gap of thirty years U.S.A. has recently executed. Timothy mecvegh who was responsible for death of more than one hundred people by causing a bomb explosion. Just after eight days another criminal, murderer, smuggler Juan Raul Girja was awarded death penalty in U.S.A. by administering poisonous Chemical Injection.

The prevailing very conservative global senario on abolition



of death penalty. Since then, the abolitionist movement in the world has undergone real transformation. It is to be noted that worldwide, over 150 countries have abolished the death penalty and over 20 other countries though retentionists, have not executed capital sentences in ten years. Furthermore, there is also a category of countries that have abolished death penalty for ordinary crimes such as murder and retained it for exceptional crimes such as crimes under military law or under exceptional circumstances.<sup>9</sup> The international decline of death penalty as form of punishment began 1976 onwards much after the 35th report of the Law Commission of India on Capital Punishment. The issues relating to capital sentencing as well as the widespread abolition world over subsequent to the previous report on capital punishment require consideration and detailed examination. It is worth mentioning here that the death penalty was abolished in South Africa through a decision of the Constitutional Court in the case of *S v Makwanyane and Another*<sup>10</sup>.

In 1822 the death penalty was removed in England. The Pennsylvania Legislature in 1886 reduced the capital punishment. At the beginning of twentieth century Europe experienced a strong authoritarian current of thought which was due to National Socialism and Italian Fascist, the development of civilization and scientific research caused change in the trend of thinking of people and the movement for the abolition of capital punishment spread all over the world. Thus capital punishment was abolished in Australia in 1950, Argentina in 1921, Belgium 1863, Brazil in 1946, Denmark in 1930, Finland in 1949, Greenland in 1954, Germany in 1949, Italy in 1944, Nepal in

1931, Netherland in 1881, Portugal in 1887, Rumania in 1861, Sweden in 1957, and Switzerland in 1937. Some countries out of these have, however again resorted this punishment. Russia abolished death sentence in 1981.

#### **National Scenario:**

In India capital punishment has not been abolished, yet it is awarded only in the rare case. The legality as well as constitutionality of death penalty has been upheld by the Apex court in India. Decision of the constitution Benches in *Jagmohan Singh v. State of Punjab*-A.I.R. 1973 S.C. 947, *Bachan Singh v. State of Punjab*- A.I.R. 1980 S.C. 848 and *Deena v. Union of India*-1983 CrI. L.J. 1602 are the authorities on the controversy of these decisions *Bachan Singh* case may be regarded as treatise on the subject.

#### **Judicial Comments of Death Penalty:**

While considering the question of constitutionality of death sentence, the Supreme Court in *Bachan Singh*, treated the penalty of death as belonging to a category of its own. But the Court in *Bachan Singh* also took notice of the fact that death penalty as a punishment has found mention in the Constitution in the section on mercy powers of the Governor and the President of India. Further, the Court observed that section 354(3) of the Code of Criminal Procedure, 1973 is part of due process framework on death penalty. In this regard, the Court held the following:

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



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

#### **Inconsistency and arbitrariness in Death Penalty Sentencing:-**

On multiple occasions, the Court has pointed that the rarest of rare dictum propounded in *Bachan Singh* has been inconsistently applied by courts. In *Bariyar*, the Court in this behalf has held that "*there is no uniformity of precedents, to say the least. In most*

*cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.*"

The Court relied on the decision in ***Swamy Shraddananda (2)*<sup>11</sup>**, wherein the Court observed:

"51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench.

***In Sangeet and Anr. v. State of Haryana*<sup>12</sup>**, the Court observed that "*it does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.*" The Court observed:

"33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh* [(1980) 2 SCC 684]. It appears to us that even though *Bachan Singh* [(1980) 2 SCC 684] intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in *Swamy Shraddananda* [(2008) 13 SCC 767 and *Bariyar* [(2009) 6 SCC 498]. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in *Bachan Singh* [(1980) 2 SCC 684] seems to have been lost in transition."

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there



appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

Since *Bariyar*, the Supreme Court has admitted on multiple occasions that *Ravji* has been rendered per-incurium *Bachan Singh*. The Court in *Dilip Tiwari v. State of Maharashtra*<sup>13</sup>, (para 67-68), *Rajesh Kumar v. State*<sup>14</sup>, (paras 66-70), *Sangeet v. State of Haryana*<sup>15</sup>, (para 37), *Mohinder v. State of Punjab*<sup>16</sup>, (para 37.3) observed that binding reliance on *Ravji* has led to deeply flawed sentencing by Courts. In these cases not even a single mitigating circumstance has been considered by the Court and only aggravating aspects of the have been given any emphasis which is in clear violation to the Constitution bench decision in *Bachan Singh*.

#### **A. Emergence of Alternate Punishment to Capital Sentencing:-**

It is also to be noted that in the last few years, Supreme Court has entrenched the punishment of "full life" or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddhanand (2)*

laid the foundation of this emerging penal option in following terms:

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalization of a special category of sentence, though for an extremely few number of cases, shall



have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684: 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.”

The observations in *Swamy Shraddhanand (2)* have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of W.B.*<sup>17</sup>, *State of U.P. v. Sanjay Kumar*<sup>18</sup>, *Sebastian v. State of Kerala*<sup>19</sup>, *Gurvail Singh v. State of Punjab*<sup>20</sup> where full life or sentence of determinate number of years has been awarded as opposed to death penalty.

#### **B. Arbitrary Exercise of Mercy Powers leading to Violation of Fundamental Rights:-**

In *Shatrughan Chauhan*, while commuting the death sentence of fifteen convicts due to inordinate delay in disposal of their mercy petition, the Court observed:

“244. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right

and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.”

While awarding relief to the petitioners, the Supreme Court relied upon a long line of cases where the Supreme Court has recognized that inordinate delay in disposal of mercy petitions by the Governor or the President violate Article 21 rights of the death row prisoners which in turn makes him entitled for the relief of commutation of death sentence to life imprisonment.

Another landmark study titled as “Lethal Lottery: The Death Penalty in India” brought out jointly by Amnesty International, India and the People’s Union for Civil Liberties charted the gaps and weaknesses in the administration of death penalty in India since 1950. The report in its analysis of Supreme Court decisions on death penalty recorded that “the death penalty in India has been an arbitrary, imprecise and abusive means of dealing with crime and criminals.” This report has been referred to by the Supreme Court in *Bariyar, Mohd. Farooq Abdul Gafur*, and *Swamy Shraddananda (2)*.

A recent study which was commissioned by the American Law Institute (ALI) has concluded that the defects and unfairness inherent in the American death penalty system are so intractable and intrinsic to its structural design that its reform is unachievable.<sup>21</sup> The Steiker Committee report as it came to be called has made the ALI withdraw the stipulation on capital punishment from its Model Penal Code.



**Conclusion:**

The present era is not that of barbarism and therefore, the death punishment should be punished. The society, illiteracy, unemployment and other reasons are responsible in turning ordinary human beings into criminals. Therefore an effort should be made by the lawyers, academicians, judges, N.G.O.s and other Government agencies to improve the social behaviour of the individuals. Even criminals possess some good traits in their personality and these traits can be fully exploited to ameliorate their behaviour so that they can be good citizens. Hence the death penalty is in no way to reform the criminals and bringing about harmony in the society.

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It is to be noted that aspects of "the rarest of rare" doctrine as propounded in *Bachan Singh* were also inspired by the ALI Model Penal Code provision on death penalty. Now that the Model Penal Code provision itself stands withdrawn, it is imperative that a similar study to assess the fitness of Indian system of death penalty against the constitutional standards is also undertaken.

As observed by the London based amnesty International Stockholm in 1977 Capital punishment is the ultimate cruel inhuman and degrading punishment and violates the right to life – basic right of man – In this connection it will be pertinent to quote the observations of Mr. Justice V.R. Krishna Iyer of supreme court, "Taking a human life even with subtle rites and sanction of the law is retributive barbarity and violent futility, travesty of dignity and violation of divinity, bankrupt of deterrent dividends, reactive of correctional possibilities, myopically unscientific in its focus on the effect not the cause, and macabrely devoid of moral alibi.....".

Therefore in the considered view of jurists, academicians and civilized society such blood thirsty punishment are no more in tune with the present civilized society in recent time when all human beings enjoy equal rights and privileges and every man is respected as a human being.



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<sup>1</sup> See Indian Express Editorial, "*Justice more humane*", January 22,2014 available at

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<sup>2</sup> (2014) 3 SCC 1

<sup>3</sup> (2014) 4 SCC 242

<sup>4</sup> *Navneet Kaur v. State (NCT Of Delhi)*, Curative Petition (Criminal) No. 88 of 2013 (Decided on March 31, 2014).

<sup>5</sup> (2009) 6 SCC 498

<sup>6</sup> (2013) 5 SCC 546

<sup>7</sup> (1983) 2 SCC 277

<sup>8</sup> This Law Commission report is available on Law Commission website - [lawcommissionofindia.nic.in/reports/187th-report.pdf](http://lawcommissionofindia.nic.in/reports/187th-report.pdf). (Last visited on 14.05.2014)

<sup>9</sup> As per death penalty related statistics available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>. (Last visited on 14.05.2014)

<sup>10</sup> (CCT 3/94)

<sup>11</sup> (2008) 13 SCC 767

<sup>12</sup> (2013) 2 SCC 452

<sup>13</sup> (2010) 1 SCC 775

<sup>14</sup> (2011) 13 SCC 706

<sup>15</sup> (2013) 2 SCC 452

<sup>16</sup> (2013) 3 SCC 294

<sup>17</sup> (2009) 15 SCC 551

<sup>18</sup> (2012) 8 SCC 537

<sup>19</sup> (2010) 1 SCC 58

<sup>20</sup> (2013) 2 SCC 713

<sup>21</sup> Report of the Council to the Membership of the American Law Institute on the matter of the Death Penalty, 4 (2009), available at [http://www.ali.org/doc/Capitar/o20Punishment\\_web.pdf](http://www.ali.org/doc/Capitar/o20Punishment_web.pdf). (Last visited on 14.05.2014)

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