CHAPTER VI

PRISON JUSTICE, LEGAL AID, AND RIGHT TO LIFE AND PERSONAL LIBERTY

(A) Prelude

Law is a means to an end, that is, justice. "Justice" is the recognition of dignity and divinity in every human being. The worth of a society comes into picture only when the dignity of its members is recognized. If a person commits any crime, it does not mean that by committing a crime, he ceases to be human being and that he can be deprived of all human dignity. Thus, law ultimately stands for life even for a dying man's life. And even the prisoners have human rights because the prison torture is not the "last drug in the Justice Pharmacopoeia" but "a confession of failure to do justice to living man". Therefore, the law provides that for a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment. Articles 14, 19 and 21 have been brought into the wake of this "law" by Maneka to repel the deadening impact of unconscionable incarceratory inflictions based on some lurid legislative text or untested tradition.

"Fair procedure" is the soul of article 21, "reasonableness of the restriction" is the essence of article 19(5) and sweeping discretion degenerating into arbitrary discrimination is anathema for article 14. Constitutional Karuna is thus injected into incarceratory strategy to produce prison justice.

It is the inhuman treatment meted out to the prisoners in the prison that the court which is last in the Indian pyramid of justice, is compelled

1. V.R.Krishna Iyer, Justice and Beyond, 141(1980).
to delineate the broad boundaries of judicial jurisdiction, *vis-a-vis*, prison justice. The province of prison justice, the conceptualization of freedom behind bars and the role of judicial power as constitutional sentinel in a prison setting, are of the gravest moment in a world of escalating torture by the minions of state, and in India, where this virgin area of jurisprudence is becoming painfully relevant. And the new expansion of article 21 in Maneka has led to the satisfaction that the Indian human has a constant companion—the court armed with the constitution, the weapon is the writ of *habeas corpus*, the scope of which has been expanded by this court only, and the power is hidden in Part III of the Constitution.

Thus, it can be found that the post-emergency especially post-Maneka Summit Court has taken rapid strides in claiming prison justice as its own province. It has begun to make not just rhetorical, but instrumental assault on prison conditions and thus, has taken upon itself the task of protecting the rights of prisoners; may be men, women or children. The court did not miss the chance of burying without honours the holdings of this very court in pre-emergency and during emergency era.

The post-internal emergency Supreme Court has applied "nuclear therapy" on the "cancerous-looking growths" in the administration of prison justice. This court, the treasurer of life and liberty of people, started a process which has resulted in spectacular decisions to release under-trial prisoners who have languished in prisons for terms longer than those which can be awarded as sentence. The court also vigorously sought extension of the legal aid programme and also began reading the right to speedy trial in article 21 as one of the ingredients of personal liberty.

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6. See supra note 3 at 1679.
7. See supra Chapter IV.
9. See also Upendra Baxi, *The Indian Supreme Court and Politics*, 233-234 (1980).
10. See also Id. at 123.
The judicial pen also recognized other rights of the prisoners, viz., protection against torture in the prison, right not to be put in solitary confinement and saving from handcuffing and bar fetters save in the cases provided by this protective organ of the state itself. The prisoners' right to bail and right to meet friends, relatives and lawyer are also considered by the Apex Court. Being conscious of human dignity, the court also granted the right to medical examination. Judicial conscience recognized the human rights of the prisoners because of its reformist approach and belief that convicts are also human beings and that the purpose of imprisonment is to reform them rather than to make them hardened criminals. Therefore, the Supreme Court suggested reforms in the prison functioning as well as prison rules. In this Chapter, the judicial role in prison justice has been anatomized and finally its impact has been evaluated.

(B) Prison Justice And Judicial Wisdom

The wave towards the improvement of the condition of the prisoners and recognition of their limited rights has been started throughout the world and in India this new horizon has attracted the attention of the highest court mainly in post-Maneka period. It can be found that the condition of prisoners was inhuman and degrading in the past.

The first Torture Trial of 1975 in Greece presents the dismaying picture of the tortured prisoners:

When a person was arrested and put in prison, he was told, "you know, it is possible that some part of your body, might be destroyed...." "You are in our hands, you would vomit blood, all your teeth will come out one by one".11

At that time, beating was the usual mode of torture of the victims.

In the words of one witness:

"General Blows" were those administered when prisoners were being taken to the punishment block. "Special blows" were administered during the ordeal. At this time there would always be two guards in the cell. The blows were administered on the buttocks and the shanks so that blood started to collect in the lower extremities and caused pain. The blows on the buttocks were with clubs alternatively vertical and horizontal. These cause a particular type of swelling.12

In a case decided in 1978, the court picturised the condition of Tihar Prison through the inspection notes left by Chief Justice Beg, who along with his two brother Justices on the bench, had visited the "condemned cell" where the prisoner (in question) was confined. The condition of the prison was very much clear from the picture of the cell:

[T]he prisoner was kept in some kind of a dungeon with only a small hole through which light could penetrate only when there was enough sunshine...the prisoner was living in a room with a cemented floor and with no bed, furniture, or windows in it. The light came from a ventilator with iron bars on the wall at the back of the room and the wide gate of iron bars in front.... there was no separate room for the petitioner to take a bath in or to answer calls of nature. But, in the very room, the site of which given on a diagram furnished by the jail authorities, water and sanitary fittings were installed in one corner of the room.13

After two years, the same picture was again drawn by the court in the following words:

[T]he Tihar prison is an arena of tension, trauma, tantrums and crimes of violence, vulgarity and corruption. And to cap it all, there occurs the contamination of pre-trial accused with habituials and "Injurious prisoners of international gang". The crowning piece is that the jail officials themselves are allegedly in league with the criminals in the cells. That is, there is a large network of criminals, officials and non-officials in the house of correction: Drug racket, alcoholism, smuggling, violence, theft, unconstitutional punishment by way of solitary cellular life and transfers to other jails are not uncommon.14

12. Ibid.
13. See supra note 3 at 1688–1689.
14. See supra note 8 at 1586.
The judicial approach towards prison justice moved from the narrow restricted view to the liberal, relevant and coherent approach of the prison justice which is not only the demanding task of the day but also in consonance with the constitutional spirit and new constitutional jurisprudence of "personal liberty" expounded by the Supreme Court in the post-internal emergency era.

In Gopalan, the question of personal liberty of a prisoner was answered in negative, that is, a person could exercise, his fundamental rights only when his "person" was free. In Pandurang, it was held that a prisoner could have personal liberty or other human rights only if the rules of the detention provided for, that is, if the rules did not lay down any condition for giving food, the prisoners could be starved to death. In Patnaik, the Supreme Court changed its views partially towards the condition of prisoners. The court held that the convicts were not "denuded of" all the fundamental rights by reason of their conviction but they were automatically deprived of certain fundamental rights. They were entitled to right guaranteed under article 21 that they would not be deprived of their life and liberty except according to "procedure established by law".

These cases show that there was limited freedom of prisoners and little recognition of their dignity in the pre-internal emergency era and the post-internal emergency Supreme Court became the sentinel of people's rights with the support of the Constitution. Preamble, Part III and Part IV of the Constitution ensure human freedom and dignity. Professor Balram

18. Id. at 2094.
19. Preamble ensures in the most sonorous words the dignity of the individual. Article 14 directs the state not to deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 19 guarantees fundamental freedoms. Article 21 lays down that no person shall be deprived of his life or personal liberty except according (conted.)
K. Gupta also expressed the view:

[All these provisions co-jointly speak of what the state is expected to do towards its citizens. A question of paramount importance arises: when a person happens to be in the custody of the state, is the state no more under the 'Constitutional obligation' to observe the rule of law towards him.20]

The new judicial activism, which took birth in the post-internal emergency era, inspired the Summit Court to observe in Charles Sobraj:

[Imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, courts will refuse to recognize the full panoply of Part III enjoyed by a free citizen....Art.21, read with Art.19(1) (d) and (5), is capable of wider application than the imperial mischief which gave it birth and must draw its meaning from the evolving standards of decency and dignity that mark the progress of a mature society.21]

In Sunil Batra(I), the Supreme Court stated:

[In our Constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree and as sentinels on the qui vive, courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law are beyond purchase by authoritarians glibly invoking, 'dangerness' of inmates and peace in prisons.22]

This view of the court was supported by the American cases. In a case, Justice Douglas observed:

[Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirement of due process.23]
In the case of Charles Wolf, the Supreme Court of America made emphatic statements to drive home this very point. Speaking for the court, Justice White stated:

[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no curtain drawn between the Constitution and the prisons of this country. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

The Indian Supreme Court also remarkably held:

Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.

Thus, it is evident that the Supreme Court was of the view that every fundamental right of the prisoner cannot be infringed. The procedure for restriction should have been found in article 21, its reasonableness should be tested under article 19(5) and if the "authority" is used arbitrarily, it would be an "anathema" by virtue of article 14. The court had rightly remarked that "karuna (Mercy) is a component of jail justice." The Supreme Court also believed that these rights enjoyed by prisoners under articles 14, 19 and 21 though limited were "not static" and these would rise to human heights as the situations change.

It is submitted that the views expressed by the Apex Court in these cases are somewhat coherent with the views laid down in Patnaik. In Sunil
Batra(II) also, the court affirmed the judgment in Patnaik that no prisoner should be deprived of his liberties unless "necessitated by the fact of incarceration" and the sentence of court. All the other rights, for example, to read and write, to enjoy and relax, to exercise, to meditate etc. belonged to him.28 Justice D.A.Desai29 also expressed the same view in Sunil Batra(I):

[A] prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards.30

The dynamism of the Summit Court beautifully expressed the admission of this court that "right jurisprudence" was important only if it was followed by remedial jurisprudence.31 The court was satisfied that "protection of the prisoner within his rights is part of the office of Art.32".32 After Sunil Batra(II),"the dynamic role of judicial remedies" painted the writ of habeas corpus as "a versatile vitality" and "operational utility" in order to make "the healing presence of the law live up to its reputation as bastion of liberty even within the secrecy of the hidden cell".33 The Court observed:

When prison trauma prevails, prison justice must investigate and hence we broaden our 'habeas' jurisdiction. Jurisprudence cannot slumber when the very campuses of punitive justice witness torture.34

28. Supra note 8 at 1593.
29. In Sunil Batra(I),Justice Krishna Iyer and Justice D.A.Desai delivered separate judgments. Justice D.A.Desai delivered judgment for himself and on behalf of Chandrachud C.J., S.Murtaza Fazal Ali and P.N.Shinghal, JJ. He delivered separate judgment not because other judges and he differed with Justice Krishna Iyer but because they wanted to express their views on certain aspects.
30. Supra note 3 at 1727.
31. Supra note 8 at 1593.
32. Id. at 1583.
33. Id. at 1582.
34. Ibid.
In Sunil Batra(II), the writ petition originated through a letter by a prisoner, Batra, to a judge of the Supreme Court in which it was complained that the head warder caused assault on another prisoner, Prem Chand. This letter was admitted as writ petition forsaking the formal procedure because the freedom of a prisoner was at stake. So this case changed the picture of habeas corpus. Previously, it used to be available to help the release of the person. But now it can be evoked even to save the prisoner from prison torture. And moreover, no formal procedure is needed now.

This view had been supported by an American case in which the court of appeal observed the uses of the writ of habeas corpus:

The Government has the absolute right to hold prisoners for offences against it but it also has the correlative duty to protect them against assault or injury from any quarter while so held. A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits.

It is submitted that the Supreme Court was justified in entertaining the letter in Sunil Batra(II) because the court must abandon the laissez faire approach in judicial process and must forge new tools and devise new methods and adopt new strategies by bidding farewell to the adverserial procedure and by making constitutional promises including the right to life and liberty meaningful not only for the have but also for have-nots. The entertainment of habeas corpus petition through letters has become the part of court's procedure under the emerging constitutional jurisprudence particularly in


the post-internal emergency era and the credit for all this goes to the Apex Court.\(^{37}\)

The court voted for the legal rights of the prisoners by holding in Hoskot that the service of a copy of the judgment must be made to prisoner so that he could file an appeal in time and that any jailor who by indifference or vendetta withheld the copy, violated article 21 and might pave the way for holding the further imprisonment illegal.\(^{38}\)

The activist Supreme Court had evolved different components of fair procedure ensuring prison justice which is basic to civilized jurisprudence.

(a) Judicial Ban On Solitary Confinement, Handcuffing And Bar Fetters And Protection From Torture In The Prison

The Summit Court favoured application of fair procedure in prisons and observed in a case decided in 1981, "whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods, "right, just and fair".\(^{39}\) The Supreme Court had held in different cases that fair procedure prohibited solitary confinement imposed by the jail authorities.

37. See Bandhua Mukti Morch v. Union of India, A.I.R.1984 S.C.841(Per R.S. Pathak, J.) where it was held that receiving of writ petition in the form of letter should not be a rule but he recognized the existence of special circumstances which justified the waiver of the rule, e.g., when habeas corpus jurisdiction was invoked, or when the authorship of the communication was so impeccable and unquestionable that the authority of its contents might reasonably be accepted prima facie until rebutted. Id. at 840-841. The expression of exceptional circumstances can be found in the observation of the Supreme Court in Sunil Batra(II) that "the resume of facts, foul on its face, reveals the legal issues raised, brings into focus the basics of prisoner's rights and helps the court forge remedial directives so as to harmonise the expanding habeas jurisprudence with dawning horizons of human rights and enlightened measures of prison discipline". Supra note 8 at 1583. See also Sudipt Mazumdar v. State of M.P. (1983) 2 S.C.C.258, in which the Supreme Court formulated ten questions, regarding filing writ petition in the form of letter, to be decided by the Constitution Bench. See also M.C.Mehta v. Union of India, A.I.R.1987 S.C.1086.(Per Bhagwati,C.J.).

38. Supra note 5 at 1554.

"Solitary Confinement" has been defined as "keeping the prisoners thoroughly isolated from any kind of intercourse with the outside world. It is inflicted in order that a feeling of loneliness may produce wholesome influence and reform the criminal." According to Black's Law Dictionary, it, in a general sense, means the separate confinement of a prisoner, with only occasional access of any other person, and that too only at the discretion of the jail authorities and in stricter sense, it means the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being or no employment or instruction.

Explanation to Paragraph 510 of the Jail Manual defined Solitary Confinement:

Solitary Confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

The Supreme Court stated that "segregation of one person all alone in a single cell is solitary confinement". But the court was against imposition of solitary confinement by the jail authorities because when sections 73 and 74 of the Indian Penal Code made solitary confinement a substantive punishment which could be inflicted only by a court of law, it could not be left to the discretion of the prison authorities.

The court raised a timely question when it stated:

Is solitary confinement or similar stressful alterantive, putting the prisoner beyond the zone of sight and speech and society and wrecking his psyche without decisive pro-phylactic or penological gains, too discriminatory to be valid under Art.14, too unreasonable to be intra vires Article 19 and too terrible to qualify for being human law under Art.21.

42. See supra note 3 at 1704.
43. Id. at 1701(Per Krishna Iyer J.)
44. Id. at 1692.
The Supreme Court rejected the plea of the state that solitary confinement was a compassionate measure to protect the prisoner because group life was bad for him as he might commit a murder and that solitary was a blessing for him because otherwise he would be murdered. The court responded to this argument by holding that to emphasise that a solitary cell was the only "barricade" against the condemned man, who might kill or be killed, was "straining credulity to snapping point". Because most murderers were first offenders and often were like their fellowmen once the "stress and pressure of motivation" were released. That is why the court questioned, "Are there prison studies of psychic perversions or lethal precedents probabilising homicidal or suicidal proclivities of death sentences, beyond the non-medical Jail Superintendent's ipse dixit."45

The court, while dealing with men under sentence of death, did not agree with the plea that the condemned prisoners were prone to commit suicide on the ground that whose cases were pending in appeal or before the clemency jurisdiction of Governor or President would, unless mad, have no motive to commit suicide.46 The facile statement that men in the death row were so desperate that they would commit more murders if facility was offered, was also ignored by the court that the man, who had invited that fate by one murder and was striving to protect himself from the gallows by frantic forensic proceedings and mercy petitions, would not make his hanging certain by committing any murder within the prison. The court expressed the view that instead of forwarding such arguments, the superintendent should have pleaded that he was an innocent agent of "inherited incarceration ethos", because the whole jail manual needed rewriting.47

45. Id. at 1693.
46. Ibid.
47. Ibid.
The Apex Court held that solitary confinement could be imposed only in exceptional cases where the convict was of such a dangerous character that he must be segregated from other prisoners. According to the court, if plurality of jail inmates were there the death sentencee would have to be kept separate from the rest in the same cell. And this segregation could be achieved by placing the prisoner under the charge of a guard by day and by night. So if discipline required it, the authority would be entitled to and the prisoner was liable to, keeping within the same cell. But if the condemned prisoner was docile and needed the attention of fellow prisoners, nothing prevented the jailor from giving him that facility.

The court rightly held that "functionally the separation is authorised, not obligated". The logic behind it was that the solitary confinement hardened the criminal, made him desperate, hurt his spirit and made him break out of there regardless of risk. The dehumanizing effect of solitary confinement was picturised by the court as follows:

To see a fellow being is a solace to the soul. Communication with one's own kind is a balm to the aching spirit. Denial of both with complete segregation superimposed is the journey to insanity.

The court also rightly quoted Charles Dickens' words:

"Very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment prolonged for years, inflicts upon the sufferers....I hold this slow and daily tampering with the mysteries of the brain, to be immesurably worse than any torture of the body..."

Britainica Book of the year explained:

So many convicts went mad or died as a consequence of the solitary regime.

48. Ibid.
49. Id. at 1701.
50. Ibid.
51. Id. at 1694.
52. Id. at 1704.
53. Id. at 1696.
54. See Britainica Book of the Year 1975-Events of 1974, 567.
Commenting on solitary cellular confinement, Jawahar lal Nehru observed that gaol department added to the sentence of the court an additional and very terrible punishment.\(^{55}\)

The Law Commission of India in the 42nd report expressed the view that solitary confinement was "out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court". The Commission proposed to keep it alive only as a disciplinary step.\(^{56}\)

In *Sunil Batra*\(^{(I)}\), it was contended that Batra was put in "statutory confinement" and not "solitary confinement" and the court rightly responded to this contention:

> If solitary confinement is a revolt against society's human essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy but a working technique of justice.\(^{57}\)

Justice D.A.Desai, while delivering separate judgment in *Sunil Batra*\(^{(I)}\)\(^{58}\) also held that if the prisoner was kept under solitary confinement not as a result of violating prison discipline but only on the ground of his being a death sentence it would be violative of articles 14, 19 and 20(2).

It was also warned that if by imposing solitary confinement there was total deprivation of "comraderie amongst co-prisoners, comingling and talking", it would offend article 21.\(^{59}\) He remarked:

> Solitary confinement has a degrading and dehumanising effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Social isolation represents the most destructive abnormal

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56. See supra note 3 at 1700.
57. Ibid. (Per Krishna Iyer J.).
58. See supra note 3.
59. Id. at 1728 (Per Desai J.).
environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it.\textsuperscript{60}

In Sunil Batra(II), in spite of Sunil Batra(I) ruling on "solitary confinement", one Prem Chand was sent to a solitary cell. The court wondered "what sadistic delight is derived by the warders and wardens by such cruelty".\textsuperscript{61} The Solicitor General argued that some prisoners, for their own safety, might desire segregation. The court, solving this problem held that in such cases, written consent and immediate report to higher authority were necessary "if abuse is to be tabooed" because

\begin{quote}
Any harsh isolation from society by long, lonely, cellular detention is penal and so must be inflicted only consistently with fair procedure.\textsuperscript{62}
\end{quote}

In Kishore Singh\textsuperscript{63} again the court held keeping of petitioners in separate solitary rooms for long periods from eight months to eleven months as barbarous on the basis of what this court had decided in Sunil Batra. The court observed that "Flimsy grounds like 'loitering in the prison', 'behaving insolently and in an uncivilized manner', 'tearing off his lottery ticket' could not be the foundation for the torturesome treatment of solitary confinement."\textsuperscript{64} The court also held that "solitary confinement" could be imposed in "rarest of rare cases" and with strict adherence to the procedural safeguards contained in the decisions of this court relating to the punishment of prisoners. The court warned that the violation of article 21 as interpreted by this court in its recent decisions, if repeated, would be visited with serious consequences,\textsuperscript{65} because

\begin{itemize}
\item \textsuperscript{60} Ibid.
\item \textsuperscript{61} Supra note 8 at 1595.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{63} Kishore Singh Ravinder Dev v. State of Rajasthan, A.I.R.1981 S.C.625. In Rakesh Kaushik also, the court opposed any solitary or punitive cell. See supra note 39.
\item \textsuperscript{64} Id. at 628.
\item \textsuperscript{65} Id. at 629.
\end{itemize}
Human dignity is a dear value of our Constitution not to be bartered away for mere apprehensions entertained by jail officials.66

The court finally held:

If special restrictions of a punitive or harsh character have to be imposed for convincing security reasons, it is necessary to comply with natural justice as indicated in Sunil Batra case. Moreover, there must be an appeal not from Caesar to Caesar, but from a prison authority to a judicial organ when such treatment is meted out.67

Keeping in view the human rights and recognizing human dignity, the Apex Court forbade putting any prisoner in bar fetters. The picture of the prisoners subjected to fetters was pointed in the real colours of life by this court:

[A] large number of prisoners - a few hundred at times - minors and under-trial too - are shackled day and night for days and months on end by bar fetters - too shocking to contemplate with cultural equanimity. And this, prima facie, shows up the class character of jail injustice for an incisive sociologist.68

In Sunil Batra(I), the petition by Charles Sobraj, considered along with the petition of Batra, questioned the validity of section 5669 of the Prisons Act, 1894 under articles 14 and 21. Sobraj was fettered with iron on wrists, iron on ankles, iron in between welded strongly and these fetters had hampered his movement all through the day and the night for a period of two years.70

The court held that even though section 56 of the prisons Act was

66. Id. at 630.
67. Ibid.
68. Supra note 3 at 1712.
69. Section 56. Whenever the Superintendent considers it necessary(with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the local Government, so confine them". Id. at 1712.
70. Id. at 1680 and 1713.
a pre-Constitution measure, its application must be governed by the imperatives of articles 14, 19 and 21. According to the court, whatever was arbitrary in executive action was pregnant with discrimination and violated article 14 and whatever decision was the result of insufficient or inadequate material was unreasonable under article 19, especially when human freedom of helpless inmates behind prison walls was the crucial issue. The court felt that article 21 must obey the prescriptions of natural justice laid down in Maneka. Thus, the court found that reasonableness in this area included review of the action of an executive officer so that the prisoner might have satisfaction that the official concerned had satisfied himself about the necessity to fetter him. And the court held that such administrative fairness was far more productive of order in prison than the counter-productive alternative of requiring every security suspect to wear iron.71

Thus, the court observed:

Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14 or 19 or even by way of abundant caution.72

In this case, the Additional Solicitor General feared dangerousness of the prisoner in case he escaped. Therefore, he favoured bar fetters in order to prevent such escape. The activist court responded to this fear in the words:

Chaining all prisoners, amputing many, caging some, can all be fobbed off, if every under-trial or convict were painted as a potentially dangerous maniac. Assuming a few likely to escape, would you shoot a hundred prisoners or whip everyone everyday or fetter all suspects to prevent one jumping bail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the constitutional play.73

The Summit Court held that the power to confine in iron could be constitutional only if it was "hemmed in" with several restrictions like

71. Id. at 1715-16(Per Krishna Iyer J.).
72. Id. at 1715.
73. Id. at 1714. See also Id. at 1735(Per Desai J.).
security of the prison and the integrity of the person. The court also held that such a power could not be exercised in a grim prison setting where armed guards were available at instant notice and watch towers vigilantly observed. It could be exercised in cases of extreme urgency and that is also only after giving notice and hearing in an unbiased manner. The court made it essential to give reasons for such harsh action and that such reasons must be recorded in the history ticket of the prisoner as well as in the journal. It was expressed that the determination of the necessity to put a prisoner in bar fetters had to be made after application of mind to the peculiar and special characteristics of each individual prisoner and that the nature and length of sentence or the magnitude of the crime committed by the prisoner were not relevant for the purpose of determining that question.

The court rightly emphasised that continuously keeping a prisoner in fetters day and night reduced the prisoner from a human being to an animal and that the treatment was so cruel and unusual that the use of bar fetters was anathema to the spirit of the Constitution. Therefore, the court held that section 56 did not permit the use of bar fetters for an unusually long time and especially regarding the petitioners, keeping him in fetters for an unusually long time despite medical advice that these should be removed, was not justified under section 56. The court warned that if bar fetters were to be imposed in future, the safeguards laid down by it should be followed because

Article 21 forbids deprivation of personal liberty except in accordance with procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute

74. Id. at 1716(Per Krishna J.).
75. Ibid. Also Id. at 1734-1735(Per Desai J.).
76. Id. at 1734(Per Desai J.).
77. Id. at 1735.
78. Ibid.
deprivation. Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and, therefore, before such erosion can be justified it must have the authority of law.\footnote{79}{Id. at 1733.}

In Sunil Batra(II) also, the court expressed its concern over putting fetters in the words:

\[T\]o fetter prisoners in irons is an inhumanity unjustified save where safe custody is otherwise impossible. The routine resort to handcuffs and irons bespeaks a barbarity hostile to our goal of human dignity and social justice.\footnote{80}{Supra note at 1595.}

The human rights conscious Supreme Court took the matter of bar fetters to a logical extent in \textit{Prem Shankar}.\footnote{81}{Prem Shankar Shukla v. Delhi Administration, A.I.R.1980 S.C.1535. In this case, the bench consisted of Krishna Iyer, R.S.Pathak and O.Chinnappa Reddy, JJ. Justice Krishna Iyer delivered the judgment for himself and on behalf of Justice O.Chinnappa Reddy. Justice Pathak delivered separate judgment.} In this case, in spite of the decision in Batra(I), the petitioner, who was an undertrial, was handcuffed. The High Court had dismissed the petitioner's demand to be freed from fetters.\footnote{82}{Id. at 1536.} In the present case, the dilemma of human rights jurisprudence could be seen in the questions raised by Justice Krishana Iyer:

"Can the custodian fetter the person of the prisoner, while in transit, with irons, may be handcuffs or chains or bar fetters, When does such traumatic treatment break into the inviolable zone of guaranteed rights, When does disciplinary measure end and draconic torture begin, What are the constitutional parameters viable guidelines and practical strategies which will permit the peaceful co-existence of custodial conditions and basic dignity?"\footnote{83}{Id. at 1538.}

Justice Krishana Iyer emphasised that handcuffs should not be used in routine and they were to be used only when the person was "desperate", "rowdy" or the one who was involved in non-bailable offence.\footnote{84}{Id. at 1541.}
Krishna Iyer rightly observed:

Handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21.85

It was also observed that it being "sadistic, capricious, despotic and demoralising" was violative of article 14 and that the minimal freedom of movement which even a detainee was entitled to under article 19 could not be cut down cruelty through the handcuffs.86

In this case, Justice Iyer did not agree with the argument that handcuffing was insurance against escape because he felt that there were other measures whereby an escort could keep safe custody of a detenu without the indignity and cruelty implicit in handcuffs or other iron contraptions.87 According to him, this method could be resorted to only when there was no other practical way of forbidding escape, the prisoner being so dangerous and desperate and the circumstances so hostile to safe-keeping.88

He rightly observed:

Functional compulsions of security must reach that dismal degree that no alternative will work except manacles. We must realise that our Fundamental Rights are heavily loaded in favour of personal liberty even in prison, and so, the traditional approaches without reverence for the worth of the human person are absolute, although they die hard. Discipline can be exaggerated by prison keepers; dangerousness can be physically worked up by escorts...cruel and unusual treatment has an unhappy appeal to jail keepers and escorting officers, which must be countered by strict directions to keep to the parameters of the Constitution.89

According to him, the orders of superiors were no justification for this inhuman act because constitutional rights could not be kept in suspense

85. Ibid.
86. Id. at 1542.
87. Ibid.
88. Ibid.
89. Id. at 1542-1543.
by superior orders. He insisted that even in cases where handcuffs had to be put on the prisoner, the escorting authority must record contempo­neously the reasons for doing so because otherwise the procedure would be unfair under article 21.

In this case, Justice Pathak laid down that the power to decide whether the person should be handcuffed or not, remained in the hands of the court and the authority must give the reasons for handcuffing to the court. He agreed with Justice Krishna Iyer when he stated that the restraint like putting bar fetters could not be imposed to a degree greater than was necessary to prevent his escape.

Both Justice Iyer and Justice Pathak held that there should be no dich­otomy between poor and rich prisoners regarding handcuffing. Justice Pathak observed that the Punjab Police Rules, 1934 drew a distinction between "better class" under-trial prisoners and "ordinary" undertrial prisoners as a basis for determining who should be handcuffed and who should not be. According to him, the appropriate principle for a classification should be defined by the need to prevent the prisoner escaping from custody or becoming violent. He found it abhorrent to envisage a prisoner being handcuffed merely because it was assumed that he did not belong to "a better class", that he did not possess the basic dignity pertaining to every individual.

Justice Krishna Iyer held that once it became a constitutional mandate that no prisoner should be handcuffed or fettered routinely or merely for the convenience of the custodian or escort, the distinction between classes of prisoners became constitutionally obsolete. According to him, economic and social importance could not be the basis for classifying prisoners for purposes of handcuffs or otherwise because a rich criminal or undertrial was not different from a poor convict or undertrial in the matter of security risk.

90. Id. at 1543. 91. Ibid. 92. Id. at 1547.
93. Id. at 1546. 94. Ibid.
An affluent in custody might be as dangerous or desperate as an indigent, if not more. He might be more prone to be rescued than an ordinary person. Therefore, Justice Iyer held it arbitrary and irrational to classify prisoners for the purposes of handcuffs.  

In *Sunil Batra(I)* Justice Krishna Iyer had observed:

> [T]he better-off are able to buy the class justice current in the 'class system behind the bars—according to the rule, of course....Poverty cannot be regarded as 'dangerousness' except by subversion of our egalitarian ethos. How come that all the under-trials who are under bar fetters are also from the penurious? This, suspiciously, is 'soft' justice syndrome, towards the rich, not social justice response towards the poor.  

On the one hand, Justice Krishna Iyer held that there should be no distinction between poor and rich in the matter of handcuffing, on the other hand, he stated that there should ordinarily be no occasion to handcuff persons occupying a good social position in public life, or professionals like jurists, advocates, doctors, writers, educationists and well-known journalists. Normally the constitutional mandate issued by the Summit Court that no prisoner should be handcuffed or fettered, should be followed. In rare cases, where the prisoners had to be put in iron, the basis should be the security risk and gravity of the crime and not the status or financial position of the prisoner.  

In *Kishore Singh*, the Supreme Court held that bar fetters should be imposed only in "rarest of rare cases" and that is also for "convincing security reasons" and must comply with the principles of natural justice.  

In gross violation of the decision of the Summit Court in *Sunil Batra(I)*
the case of under-atrial prisoners, who were kept in leg irons again gave
a shock to the court in Kadra Pehadiya. The court ordered to immediately
remove leg irons from the feet of the four petitioners and also directed that
no convicted or under-trial prisoner would be kept in leg irons except in
accordance with the ratio of the Sunil Batra.

Despite the eye-opening judgements of the Supreme Court against hand­
cuffing, the question of alleged handcuffing of an advocate practising in
Delhi has been raised before the court in Aeltemesh Rein v. Union of India.
It was urged before the court that the Union Government and the Delhi admi­
nistration had not issued necessary instructions to the police authorities
with regard to the circumstances in which an accused, arrested in a crimi­
nal case, could be handcuffed or fettered in accordance with the judgement
of this court in Prem Shankar Shukla. In this case, the Attorney General
of India very fairly conceded that it was for the Union of India to issue
necessary instructions in this behalf to all the State governments and the
governments of Union Territories. The Supreme Court has directed the Union
of India to frame rules or guidelines regarding the circumstances in which
handcuffing of the accused should be resorted to in conformity with the
judgment of this court in Prem Shankar Shukla and to circulate them amongst
all the State governments and the governments of Union Territories.

Apart from protecting from inhuman and degrading acts of "solitary
confinement" and putting on bar fetters and handcuffs, this protective organ
of the state protected the prisoners from other tortures and excesses to
which they were submitted to in the jails. In Charles Sobraj and Sunil

102. Id. at 941.
102b. Supra note 81.
102c. Id. at 1769.
103. Supra note 4 at 1518.
Batra(II), the Supreme Court held that the practice of keeping under-trials with convicts in prisons, offended the test of reasonableness under article 19 and fairness in article 21 because the under-trials, who were presumably innocent until convict, would be made criminals by contamination. The court gave a timely warning:

How cruel would it be if one went to a hospital for a check-up and by being kept along with contagious cases came home with a new disease. We sound the tocsin that prison reform is now a constitutional compulsion and its neglect may lead to drastic court action.

The court also found that sex excesses and exploitative labour were the vices adolescents were subjected to by adults and ordered that the young inmates must be separated and freed from exploitation by adults. The court held that it was inhuman and unreasonable to throw young boys to the "sex-starved" adult prisoners or to do "menial jobs" for the affluent or tough prisoners and it would be violative of article 19.

Keeping in mind that "sense and sympathy are not enemies of penal asylums", the court protected the prisoners from doing "harsh and degrading jobs" because punishments of rigorous imprisonment led the prisoners to do "hard labour" and not "harsh labour". The expression "Hard labour" must have a humane meaning, for example, no prisoner should be asked to carry night soil or a girl student or a male weakling sentenced to rigorous imprisonment might not be forced to break stones for nine hours a day. The court logically summarised the whole thing in the words:

The prisoner cannot demand soft jobs but may reasonably be assigned congenial jobs.

104. Supra note 8 at 1586.
105. Ibid.
107. Id. at 1594. In Kadra Pehadiya, the Court ordered to desist from taking work from the petitioner so long as they were under-trial prisoners. Supra note 101 at 941.
In Mohammad Giasuddin v. State of A.P., the court also held the long period of imprisonment must be converted into "a spell of healing spent in an intensive care ward of the penitentiary" and this can be achieved by giving him "congenial work" which gives "job satisfaction and not "jail frustration" and further "criminalisation". Therefore, the court directed that the appellant must be assigned work not of a monotonous, mechanical, degrading type, but of a mental, intellectual or like type mixed with a little manual labour.

In Rakesh Kaushik, the court expressed its concern towards protection of the prisoners from physical assault by fellow-prisoners or warders, from moral stress by being forced to assist in falsification and manipulation for canteen sales misappropriation, from discrimination in being subjected to "hard labour of a harsh type", if he did not oblige the 'B' class bosses or senior officers. It also protected them from pressure against transmitting grievances to the Sessions Judge through the grievance box, or directly to this court by post. Emphasising the need of touch sympathy not only for the present petitioner but also for all the prisoners, the court observed:

\[\text{The human canvas has to be spread wider, the diagnosis has to be deeper and the recipe must sensitize the environ.}\]

It is submitted that the prisoners cannot be denied of the fundamental rights to the extent these are to be recognized, merely because of the fact that they are prisoners. When any prisoner is cruelly submitted to certain restrictions, which serve no relevant purpose, they must be protected by the judiciary through the protective umbrella of Part III, especially article 21 of the Constitution. The reformist and activist court banned imposition of "solitary confinement", which would be an additional and inhuman punishment.

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108. Supra note 101 at 1774.
except when it is permitted under the constitutional mandate prescribed
by this court only, that is, when no other alternative is left with the
authorities regarding security purposes. The human rights saviour Apex
Court secured the human existence out of the "zoological existence" by
forbidding the subjection of the prisoners to bar fetters and handcuffs.
The court wanted to reform them instead of converting them into beastly
hardened criminals. The court reserved the scope of exceptional cases where
escape of prisoners cannot be prevented save by adopting this method. But
in both the cases, where either solitary confinement is to be imposed or
fetters are to be prescribed, the court has rightly laid down reasonable
restrictions that before prescribing this poisonous medicine, the autho-
rities must apply their mind judiciously, must given reasons for that and
must comply with the principles of natural justice. Protecting from all type
of torture, it has been beautifully observed:

The humane thread of jail jurisprudence that runs right
through is that no prison authority enjoys amnesty for un-
constitutionality, and forced farewell to fundamental rights
is an institutional outrage in our system where stone walls
and iron bars shall bow before the rule of law. Since life
and liberty are at stake the gerontocracy of the Jail Manual
shall have to come to working terms with the paramountcy of
fundamental rights.¹⁰⁹

(b) Special Protection For Women And Children Prisoners

Neither the Constitution nor the judiciary protecting the Constitution
shows discrimination towards the women and children. Rather there has been
evolved a concept of protective discrimination in favour of women and child-
ren. It means that to whatever possible extent the fundamental rights of the
prisoners are recognized in case of male prisoners, the same protection shall
be available to the women and children prisoners. But some special protection
¹⁰⁹. Supra note 3 at 1713.
is also needed in case of women and children.

In Hussainara Khatoon v. State of Bihar,\(^{109a}\) the court found that there were quite a few women prisoners who were in jail without even being accused of any offence, merely because they happened to be victims of an offence or they were required for the purpose of giving evidence or they were in "protective custody". The court held that the so called "protective custody" was in truth nothing but imprisonment and that it was nothing short of a blatant violation of article 21 of the constitution because the court was not aware of any law under which any women could be kept in jail by way of "protective custody" or merely because she was required for the purpose of giving evidence. The court was surprised over the statement of the Government of Bihar that they were constrained to keep women in "protective custody" in jail because a welfare home maintained by the state was shut down. The court directed that all women and children who were in the jails in the state of Bihar under "protective study" or who were in jail because their presence was required for giving evidence or who were victims of offence should be released and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked after.

In Sheela Barse v. State of Maharashtra,\(^{110}\) Sheela Barse, a journalist filed a writ petition in the form of letter in which there was complaint of custodial violence to women prisoners while confined in the police lock up in the city of Bombay. It was contended that the women prisoners were assaulted in the prison lock-up. The court directed, Director of College of Social Work, Nirmala Niketan, Bombay to visit Bombay Central Jail, interview women prisoners lodged there, ascertain whether they were subjected to any torture and submit a report to this court. The report highlighted the


deplorable conditions in which the women prisoners were living in the jails. On the basis of the report submitted, the court considered the steps which were necessary to improve the conditions of the jails in State of Maharashtra and to make life for women prisoners more easily bearable by them. Stress was given to providing of legal aid to the prisoners.

In this case, the court gave detailed directions in order to provide adequate protection to women in particular. These directions were:

(i) Four or five police lock-ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female guards. Female suspects should not be kept in a police lock up in which male suspects were detained.

(ii) Interrogation of females should be carried out in the presence of female police officers.

(iii) Any person arrested without warrant must be immediately informed of the grounds of his arrest and that he was entitled to apply for bail. A pamphlet must be prepared setting out the rights of an arrested person in Marathi, Hindi and English and should be widely circulated.

(iv) Whenever a person was arrested by the police and taken to the police lock-up, the police would immediately inform about such arrest to the nearest Legal Aid Committee and such committee

\[111\] Id. at 379-380.

\[112\] See infra head (c) where the question of legal aid has been elaborately discussed.

\[113\] Supra note 110 at 382. The State of Maharashtra intimated to the court that there were already three cells where female suspects were kept and were guarded by female constables and also assured the court that two more cells with similar arrangements would be provided exclusively for female suspects.
would take immediate steps for the purpose of providing legal assistance to the arrested person at state cost provided he was willing to accept such legal assistance. The state Government would provide necessary funds to the concerned Legal Aid Committee for carrying on this direction.

(v) A city Sessions Judge, to be nominated by the principal Judge of the City Civil Court, preferably a lady judge, if there was one, would make surprise visits to police lock ups in the city periodically in order to give the arrested persons an opportunity to air their grievances and to ascertain the conditions in the police lock-ups and whether the requisite facilities were being provided and the provisions of law were being observed and the directions given by this court were being carried out. If any lapses were found, then the City Sessions Judge would bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if this approach also failed, the City Sessions Judge might draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses.

(vi) As soon as a person was arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest.

(vii) The Magistrate, before whom an arrested person was produced, would enquire from the arrested person whether he had any complaint of torture or mal-treatment in police custody and inform him that he had right under section 54 of the Code of Criminal Procedure, 1973 to
be medically examined.\textsuperscript{114}

Thus, the court recognized right to medical examination of an arrested person by virtue of section 54 of Code of Criminal Procedure. Under this section, this facility was available only at the request of the arrested person. But the arrested person was very often unaware of this right and on account of this ignorance, he was unable to exercise this right even though he might have been tortured or maltreated by the police in police lock-up. Due to this reason, the court in \textit{Sheela Barse} directed the Magistrate to inform the arrested person about this right of medical examination if he had any complaint of torture or maltreatment in police custody.\textsuperscript{115}

In \textit{Charles Sobhraj}, also, the court had held that if medical facilities and basic elements of care and comfort necessary to sustain life were refused, then the "humane jurisdiction" of the court would become operational based on article 19\textsuperscript{th}.\textsuperscript{116}

S.P. Sathe has observed that there was nothing new and original in what the court had stated through these directions and that the Supreme Court decisions have not changed the attitude of subordinate judiciary and bureaucracy. He remarked:

\begin{quote}
Unless a strong contingent of social activists taking up cudgels on behalf of the poor grows, the decisions like \textit{Sheela Barse} are unlikely to make any meaningful impact.\textsuperscript{117}
\end{quote}

In 1986, the doors of the highest court were knocked to awaken the court to protect the life and liberty of the children in prisons in \textit{Sheela Barse v. Union of India}.\textsuperscript{118} Some years ago, a National Policy for the welfare of children in prisons was notified.
of children contained the following preambulatory declaration:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skill and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice.119

In Sheela Barse, the court also observed:

If a child is a national asset, it is the duty of the state to look after the child with a view to ensuring full development of its personality.120

In this case, the court expressed a deep concern about the freedom and dignity of childhood and youth by protecting them against exploitation and degradation. Sheela Barse, a freelance journalist, moved the court under article 32 for the release of children below the age of 16 years detained in jails within different states of the country. She asked for the production of complete information of children in jails, information as to the existence of juvenile courts, homes and schools for a direction that the District Judges should visit jails or sub-jails within their jurisdiction to ensure that children were properly looked after when in custody. She also prayed for a direction to the state legal Aid Boards to appoint duty counsel to ensure availability of legal protection for children as and when they were involved in criminal cases and were proceeded against.121

The court directed the district judges to visit the jails, investigate and report through the Registrars of the respective High Courts within ten weeks about the conditions of the children in jails and about the existence of the juvenile courts and observation homes within their jurisdiction.

119. See National Policy for Children, Resolution No.1-14/74 CDD.
120. Supra note 118 at 1777.
121. Id. at 1774.
The court also directed the State Legal Aid and Advice Board in each state or any other Legal Aid Organisation existing in the state concerned, to send two lawyers to each jail within the state once in a week in order to provide legal assistance to children below the age of 16 years who were confined in the prison. 122

The directions given by the Apex Court were not complied with by the subordinate judiciary and the court expressed its anguish over the inefficient working of the subordinate judiciary:

We are both concerned and surprised that a direction given by the apex court has not been properly carried out by the District Judges who are an effective instrumentality in the hierarchy of the judicial system. Failure to submit the reports within the time set by the Court has required adjournment of the hearing of the writ petition on more than one occasion. We are equally surprised that the High Courts have remained aloof and indifferent and have never endeavoured to ensure submission of the reports by the District Judges within the time indicated in the order of this Court. 123

It is a very disturbing as well as discouraging phenomenon that even the lower courts sometimes do not take the directions issued by the Supreme Court seriously. 124

The court admired the steps taken by the petitioner to make the court aware of this social problem and directed the Union Government to deposit a sum of rupees ten thousand for the time being in the Registry of this court which the petitioner could use to meet her expenses and also directed each state to extend every assistance she needed during her visit to jails, children's homes, remand homes, observation homes, borstal schools and all institutions connected with housing of delinquent or destitute children. The Director General of Doordarshan as well as the Director General of All India Radio were also directed to given publicity seeking co-operation of non-

122. Id. at 1775.
123. Id. at 1776.
governmental social service organisations in the task of rehabilitation of these children.\textsuperscript{125}

It is submitted that such admiration and co-operation by the court would encourage the intellectual class and the social workers to come forward and bring before the court, which is a panacea for cancerous growth eating into the roots of the society and destructing the life and liberty of the people, different problems which are still undiscovered due to negligence, ignorance and indolence of the people.

The Summit Court expressed deep pain and extreme disappointment over the fact that the children were kept in jail instead of being properly looked after, given adequate medical treatment and imparted training in various skills which would make them independent and self-reliant.\textsuperscript{126} The court recalled that article 39(f) mandated that the children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.\textsuperscript{127} Therefore, the court held that the children should not be confined to jails because incarceration in jail had dehumanising effect on the children\textsuperscript{128} and all the statutes dealing with children provide that a child should not be kept in jail. The court rightly observed:

\begin{quote}
Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society.\textsuperscript{129}
\end{quote}

The Supreme Court regretted that although, except the state of Nagaland, every state had enacted a Children's Acts, these Acts had not yet been brought into force.\textsuperscript{130} The court felt that "this piece of legislation is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} Supra note 118 at 1777.
\item \textsuperscript{126} Ibid.
\item \textsuperscript{127} Id. at 1776.
\item \textsuperscript{128} Id. at 1775.
\item \textsuperscript{129} Id. at 1777.
\item \textsuperscript{130} The Court quoted by way of instance the case of the state of Orissa (contd)
\end{itemize}
\end{footnotesize}
for the fulfilment of a constitutional obligation and is a beneficial statute”. And the state legislatures must have enacted it because it was necessary in the interest of the society particularly the children. In spite of the fact that this matter was for the state Government to decide as to when any statute should be brought into force, the Summit Court directed that every state, where the Act existed, should bring it into force and administer the cases according to the provisions contained therein. The court also fixed a date and directed such states to file a proper affidavit, as to why the Act was not brought into force in case by then the Act was still not in force. 131

The court not only took a timely step to direct the states to enforce the children's Act but also gave a timely suggestion at that crucial juncture that instead of each state having its own Children's Act different in procedure and content from the Children's Act in other states, it would be better if the Central Government initiated legislation on the subject, so that there should be complete uniformity with regard to the various provisions relating to children in the entire territory of the country. The court also proposed that the Children's Act which might be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who were either accused of offences or were abandoned or destitute or lost. 132

Accepting the clarion call given by one organ of the state, the judiciary, another organ of the state, the legislature, passed the Juvenile

131. Ibid.
132. Id. at 1779.
Justice Act, 1986. Now the requirement is that the third organ of the state, the executive, should also become one circle of the chain and implement the Act wholeheartedly. The court had also observed:

"[I]t is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on ground of lack of finances on the part of the state. The greatest recompense which the state can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation."

The court was shocked to state that despite statutory provisions and frequent exhortations by social scientists, a large number of children were still in jail as was reported by the District Judges. The court did not agree with the plea of the state that it had not got sufficient number of remand homes or observation homes or other places where Children could be kept and therefore they were sent to jails. The argument of the state, that the ward in the jail where the children were kept was separate from the ward in which other prisoners were detained, was also rejected by the court because the atmosphere of the jail had injurious effect on the prisoners. The court directed the State Governments to set up necessary remand homes and observation homes where children could be lodged pending investigation and trial. At the same time, the court emphasised that if there was not sufficient accommodation in the remand homes, then the children should be released on bail instead of being sent to jail.

Following Hussainara Khatoon v. Home Secretary, State of Bihar, where right to speedy trial was recognized as a fundamental right under article 21, the court directed for the speedy trial of the cases of the

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133. This Act received the assent of the President on 1 December 1986. This Act would replace the corresponding laws on the subject such as the Children Act, 1960 and other state enactments on the subject. See statement of Objects and Reasons, Juvenile Justice Act, 1986.
134. Supra note 118 at 1779. 135. Id. at 1778. 136. A.I.R.1979 S.C.1360.
children. It was held that where a complaint was filed or first information report was lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation should be completed within a period of three months from the date of filing of the complaint or lodging of the First Information Report and if the investigation was not completed within this time, the case against the child must be treated as closed. If within three months, the charge-sheet was filed against the child in case of an offence punishable with imprisonment of not more than 7 years, the case must be tried and disposed of within a period of 6 months. 137

The Apex Court also directed the state Government to set up Juvenile Courts, one in each district because it was found by the court that in many of the states there were no Juvenile Courts functioning at all and even where there were Juvenile Courts, they were nothing "but a replica of the ordinary criminal courts, only the level being changed". The same magistrates who set in the ordinary criminal court, worked in the Juvenile Courts. Therefore, the court directed that there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children. The court did not prohibit such magistrates from doing work in other criminal courts, if the work of the Juvenile Court was not sufficient to engage them fully. 138

Sheela Barse, after making a study of the Bombay Juvenile Court gave a different picture that the magistrate dealt with 45 to 100 cases a day. She wrote:

On October 1, 1984, the police told me that they produced 54 children from the Mankhurd Home before the magistrate and were asked to take 32 additional

137. Supra note 118 at 1778.
138. Ibid.
cases decided in the court that day. That would be a neat tally of 86 cases dealt within 270 minutes. Which magistrate can get away giving just three minutes to each case, the exit and entry time included.139

After observing the analysis of the study made by Sheela Barse, it can be submitted that the court rightly directed for the creation of Juvenile Courts and of a different cadre of magistrates, having special training, so that the children's cases can be dealt with properly.

Once again Sheela Barse brought before the Apex Court the matter of children in Sheela Barse v. Secretary, Children Aid Society.140 In this case, the petitioner contended that the High Court failed to consider some contentions advanced by her while giving directions relating to running of the Remand Homes and Observation Homes for the children.141

In this case, the Summit Court gave certain directions. It was laid down that dedicated workers should be found out, proper training should be given to them and they should be introduced in the children homes for the supervision of these homes.142

The court also impressed upon the creation of Juvenile Courts and that the Juvenile Court must be manned by a judicial officer with special training. According to the court merely creating a court with usual judicial officer and labelling it as Juvenile Court was not sufficient because the statutory scheme contemplated "a judicial officer of a different type with a more sensitive approach-oriented outlook".143

Thus, the court rightly gave the directions in this case because the

141. See Id. at 657-658.
142. Id. at 659.
143. Ibid.
problem of children is of such magnitude that much more attention is needed. And "if there be no proper growth of children of today, the future of the country will be dark". 144

In Vikram Deo Singh Tomar v. State of Bihar, 144a the Supreme Court focussed on the constitutional protection to women and children by laying down that the Constitution shows a particular regard for women and children and notwithstanding the pervasive ethos of the doctrine of equality it contemplates special provision being made for them by law. The court reiterated its emphasis in the earlier decisions protecting the women and children prisoners by holding that right to live with human dignity is a fundamental right under article 21 and to abide by the constitutional standards recognized by well-accepted principle, it is incumbent upon the state when assigning women and children to these establishments, euphemistically described as "Care Homes", to provide at least the minimum conditions ensuring human dignity. According to the court, the name of "Care Home" given to these establishments is an ironic mishomer. The primitive conditions in which the inmates are compelled to live shock the conscience. 144b

The Court has issued directions to the State government to provide suitable alternative accommodation expeditiously for housing the inmates of the present "Care Home" and to put, in the meanwhile, the existing building, in which the inmates are presently housed, into proper order immediately, and for that purpose to renovate the building and provide sufficient amenities by way of living rooms, bathrooms and toilets within the building, and also to

144. Id. at 1785.
144b. Id. at 1783-1784. The "Care Home" in the instant case is a crowded hovel, in which a large number of human beings have been thrown together, compelled to subsist in conditions of animal survival, conditions which blatantly deny their basic humanity. Id. at 1784.
provide adequate water and electricity. A suitable range of furniture, including cots must be provided at once, and an adequate number of blankets and sheets, besides clothing, must be supplied to the inmates. The court went to the extent of stating that in the event of no, or insufficient compliance being made with this order, the court would have no hesitation in reopening the case for such farther steps as may be considered necessary for enforcing this order.

It is submitted that the activist court has saved itself from anathema by recognizing special rights of the women and children prisoners. This court had already started the move to take prisoners as human beings first and offenders afterwards and to recognize their fundamental rights to the possible and logical extent. After giving a general observation of prisoners, the court also concentrated on women and children prisoners, to protect motherhood, children and youth from exploitation and dehumanizing effect of the prisons. The court directed for special lock-ups in good localities and for other special facilities for the women prisoners. The court also prohibited to put children in jails it being unfair punishment having no parity with the child's non-criminal behaviour. In fact the court has tried to overhaul the whole juvenile justice system by asking the Juvenile Courts manned by specially trained officers and observation homes for the children offenders where they can be reformed instead of being victimised by the contagious atmosphere of the jail. The court also left no stone unturned to improve the conditions of "Care Homes".

In all these cases, whether the question was of women prisoners or children prisoners, the court awakened from the slumber of internal emergency period and pre-internal emergency era, was made more activist and conscious about the human rights by the same freelance journalist. It has been

144c. Id. at 1784.
144d. Id. at 1785.
pointed out that through these efforts nothing new is created by the court and these efforts cannot bring fruit unless and until the executive and subordinate judiciary join hands. The fact cannot be denied that since 1978 this court has been giving directions for reforming processual justice system but without achieving the best results.\textsuperscript{145} The indifferent attitude of the subcreinate judiciary is evident from the facts of the decision of the Summit Court in 1986.\textsuperscript{146} If one organ of the state fails to perform its duties, does the wisdom advise that other organ should also refrain from making efforts which may ultimately bear fruits. The clouds of passimism should not cover the sky of hopes and realities as is shown by the creative organ of the state, the legislature, which has enacted Juvenile Justice Act, 1986 only after responding to the call of this court only. Thus, the efforts made by the highest court must be respected and faith must be imposed in the executive that one day it would also awaken from the slumber.

(c) Right To Meet Family Members And Friends, To Consult Lawyer And To Give Interview To Press

Prisoners' Rights have been recognized not only to protect them from physical discomfort or torture in the prison but also to save them from mental torture. Therefore, the Supreme Court in Sunil Batra\textsuperscript{(II)} recognized the right of the prisoners to be visited by their friends and relatives. The court favoured their visits but subject to "search and discipline and other security criteria". It was observed:

\begin{quote}
Visits to prisoners by family and friends are a solace in insulation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity.\textsuperscript{147}
\end{quote}

\textsuperscript{145} See infra sub-head (h).
\textsuperscript{146} See supra note 118.
\textsuperscript{147} Supra note 8 at 1595.
Thus, the court allowed the visit by friends and relatives because it favoured rehabilitative purpose of the punishment which could reform the prisoner and this purpose could be promoted by such meetings. The court rightly remarked, "A sullen, forlorn prisoner is a dangerous criminal in the making and the prison is the factory."  

In Francis Coralie Mullin, the Summit Court again stressed upon the need of permitting the prisoners to meet their friends and relatives. The court held that the prisoner or detenu could not move about freely by going outside the jail and could not socialise with persons outside the jail. But the right to have interview with family and friends was part of the right to live with human dignity and also a necessary component of the right to life. The court also held that if any prison regulation or procedure laid down by it regulating the right to have interviews with family and friends was arbitrary and unreasonable, it would be liable to be struck down as unconstitutional under articles 14 and 21. It was rightly stated:

"[P]ersonal liberty' would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Arts. 14 and 21, such prison regulations must be reasonable and non-arbitrary."

In this case, the court went a step ahead from Sunil Batra(II) when it recognized the prisoner's right to consult legal adviser also. The court held that this right could be included in the right to live with human dignity and it was part of "personal liberty". A prison regulation might regulate the right to have interview with a legal adviser in a manner which was reasonable, just and fair but it could not prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it was so done, it would be vic-

148. Ibid.
150. Id. at 753-754. The court recognized this right in case of undertrials also.
151. Id. at 754.
ative of articles 14 and 21. In the present case, the legal adviser could have interview with a detenu only by prior appointment after obtaining permission of the District Magistrate, Delhi. The court found that it would cause great hardship and inconvenience because the legal adviser would have to apply to the District Magistrate well in advance and then also the time fixed by the District Magistrate might not suit the legal adviser, who would be a busy practitioner and as a result, the right to consult the legal adviser, from practical point of view, would be rendered illusory. Another requirement to meet the prisoner in the presence of an officer was also found to be unreasonable procedural requirement because it might become difficult to synchronise the time which suited the legal adviser with the time convenient to the concerned officer and if, for any reason, the nominated officer could not attend at the fixed time, the meeting could not be held and the entire procedure for applying for an appointment to the District Magistrate would have to go through once again. This had so happened in the case of petitioner many a time. Therefore, the court held sub-clause(i) of clause 3(b) of the conditions of Detention Order, which regulated the right of a detenu to have interview with a legal adviser of his choice as violative of articles 14 and 21.153

In Prabha Dutt v. Union of India,154 the Supreme Court went to the extent of allowing the prisoners who were death sentencees to give interview to the press. The court also held that any person, who wanted to interview a prisoner, might have to subject himself or herself to the search in accordance with the rules and regulations governing the interviews and that such interview might be refused in appropriate cases, if there were "weighty reasons" for doing so and such reasons must be recorded in writing.155

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152. Ibid.
153. Id. at 754-755.
155. Id. at 6-7.
It is submitted that the Apex Court rightly gave momentous to the prisoners' right to meet family and friends, to have interview with the legal adviser and to give interview to the press. But while recognizing these rights, the court never went out of the track to give unbound liberty in these areas also. The court permitted this right within the limits of the jail regulations but subject to the condition that any restriction on such right must be "fair, just and reasonable" under article 21. It is said that man is a social animal and if socialisation is not allowed, he ceases to be a man and has only animal existence. Thus, the court rightly included this right to socialise to the extent imprisonment permits in the right to life and personal liberty. And the reformist and activist court took another step towards recognizing human rights by perscribing nutritious mental food.

(d) Right To Donate Organs

While the process is going on to fill up prisoners' treasury with fundamental rights, a controversial question arises whether right to donate organs forms part of the right to life and personal liberty under article 21?

Many prisoners facing life sentence or condemned to death wanted to donate their organs to atone for their mis-deeds. In Gujarat, the Sadavi-char Parivar, a social work organization, had appealed to the convicts in the Sabarmati jail to donate their kidneys. Similar appeals had been made to prison inmates in other parts of the country and the response was believed to be encouraging. Ranga, who killed Chopra children, had also expressed his desire to donate his eyes. The authorities had, however, refused permission to the inmates to donate their organs. 156

A convict awaiting execution in Rajkot jail in Gujarat wanted to donate one of his kidneys to an ailing patient. He requested the authorities concerned to permit him to do so but he was denied permission because the rules under the Jail Manual did not permit. The rules under the Jail Manuals of almost all the states provided that the person to be hanged must be medically examined and found medically fit. The authorities had rejected the request due to the fear that lose of one of his kidneys might endanger his health and would violate the Jail Manual Provision.\(^{157}\)

The question arises, what is the criterion of medical fitness that a convict has to have, The Rajkot prisoner was refused permission to donate his kidney because it was feared that his health might be endangered and he might not be medically fit to go to the gallows. Whether only physical fitness is the criterion or mental fitness is also relevant. If the latter was also considered, then a majority of those serving a long sentence or those who were condemned prisoners were shattered, depressed and sick. It is rightly warned that "if medical or physical fitness is a criterion, the absence of which might save or postpone a person from going to the gallows, is there not a likelihood of prisoners resorting to self-infliction, After all, it is not impossible to smuggle or procure offensive weapons. Also would handicapped offenders convicted to death be saved too?" \(^{158}\) Moreover, the donation of organs does not necessarily make a person medically unfit. Many persons have long lived with one kidney or with one eye or with damaged ear drums.\(^{159}\)

Once any person is hanged, it means that he is punished. The rights of living may be curtailed by a "procedure established by law" but not of the dead, especially when there are no risks involved like disturbance of peace.

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\(^{158}\) Supra note 156.
\(^{159}\) Ibid.
The question arises, what are the rights of a dead convict? Obviously, he can make a will and specify the course of his property. Why he should not be allowed to donate his organs. These organs are of no use once he has breathed his last. It is rightly suggested that after his death, his wishes should be honoured in the same way as the wishes of any other deceased person.\footnote{160}

In the west, prisoners are regularly approached for the donation of eyes and kidneys. Therefore, Professor Balram K.Gupta has suggested that our country also should follow this practice. This will be a good way of building positive feelings in the hearts of criminals. The aim of punishment is to make the criminal realise that he once committed a crime and that he must not repeat such an act. The fact that he is inclined to help somebody speaks of the reformation of the criminal.\footnote{161}

In 1985, a prisoner awaiting execution, whose appeal before the President was rejected, donated one of his kidneys and saved the life of another person. The recipient emotionally stated:

He may be a convict in the eyes of the world, but for me he is an angel.\footnote{162}

Recently, Satwant Singh who was convicted in Indira Gandhi assassination case, donated his eyes and other organs of the body.\footnote{162a}

It is submitted that after a long controversy, the authorities by permitting the prisoner, to donate kidney, have recognized the prisoner's right to donate organs and thus have nourished article 21. We are ushering in the times when the trend is towards reformation of the criminal and the penological purpose of the punishment is not to deter but to give the

\footnote{160. \textit{Ibid.}}
\footnote{161. \textit{Supra note 157.}}
\footnote{162. See "Tripple Murderer Saves Life", \textit{Indian Express,9, 24 May 1985.}}
\footnote{162a. See \textit{The Tribune,1, 6 January 1989.}}
criminal a chance to atone and finally to rehabilitate him as a man who would not recollect and recommit the past mis-deeds. Thus, the purpose is to awaken human consciousness which is at the core of the human heart. If any person, undergoing punishment, repents and wants to atone by donating his organs, he must be allowed to do so. As Professor Balram K. Gupta has raised a question by giving an example, "take the case of a life convict who killed the husband of young mother of two infants. The woman is in need of a kidney and doctors approach him. He is moved and feels that this way he will at least be able to save the life of a widow and thereby overcome the guilt in his mind. Can he be denied an opportunity to do so,"\textsuperscript{163} This consciousness is the point where the penological purpose to reform is fulfilled. Justice Krishna Iyer has beautifully explained in one of his writings:

He who habituates himself to the higher consciousness looses the ability to be criminal and gains the tendency to good conduct. This is not faith but fact, not pleasing surmise but empirical finding. The shift of emphasis from the gross to the subtle and from cruelty to thereby, the switch from a wild life setting to a hospital setting, from external fetters to internal release and bleeding the flesh to healing the soul - this is a long haul from legal terrorism to jural humanism. But this is the answer.\textsuperscript{164}

(e) Right to Bail

Right to bail is a part of processual justice and sensitised judicial system has granted it creating a new vista under article 21.

In Kashmir Singh v. The State of Punjab,\textsuperscript{165} the Supreme Court observed that the practice in this court had been not to release on bail a person who was sentenced to life imprisonment. And the question was whether, this practice should be departed from? The court held that "no practice howsoever

\begin{footnotes}
\item 163 Supra note 157.
\item 164 V.R. Krishna Iyer, Justice And Beyond, 142(1980).
\end{footnotes}
sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice."  

In Babu Singh v. State of U.P., the Apex Court, recognizing right to bail as a part of "personal liberty" under article 21, held:

Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Art.21 that the crucial power to negate it is a great trust exercisable, not casually, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Art.21 are the life of that human right.

Thus, the significance and sweep of article 21 make the deprivation of liberty a matter of grave concern and it is permitted only when the "procedure established by law" provides so but law authorising it must be "reasonable, even-handed and geared to the goals of community good and state necessity spell out in Art.19" and reasonableness provided that deprivation of freedom by refusal of bail was not for punitive purpose but for individual as well as social justice.

The court found that a man on bail had a better chance to prepare or present his case than one remanded in custody. This was the demand of public justice. And if public justice was to be promoted, mechanical detention should be demoted. Thus, deprivation of liberty was validated only by "social defence" and "individual correction". The court felt that whatever restrictions might be there under the bail law, they should be imposed "to protect" and

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166. Id. at 2148.  
168. Id. at 529.  
169. Id. at 531.
"not to cripple" because

Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.¹⁷⁰

Realism was a component of humanism which was the heart of the legal system. Therefore, the state must take up flexible attitude for permitting long duration of parole under controlled conditions so that the experiment, that the full freedom if bailed out, should be successful. The court favoured experimentation due to dehumanizing effect of the prisons:

Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system.¹⁷¹

The judiciary must take sympathetic attitude towards poor, therefore, the court did not favour taking of heavy bail from poor.¹⁷² In Moti Ram v. State of M.P.,¹⁷³ this factor turned the focus of the court on the "aspect of liberty bearing on bail jurisprudence". The court felt that when heavy sums were demanded by way of bail from the weaker segments of the society, and the court was powerless to dispense with surety, the grant of bail would become "stultified" and "impossibly inconvenient".¹⁷⁴ The court finding this problem as one of human rights, especially "freedom vis-a-vis the lowly", observed that the best guarantee of presence in court was "the reach of the law and not the money tag".¹⁷⁴ᵃ Therefore, the court held that if the poor were to be betrayed by the law including bail law, rewriting of many processual laws was an urgent desideratum but left this task to the Parliament.¹⁷⁵

¹⁷⁰. Ibid.
¹⁷¹. Id. at 531-532.
¹⁷². Id. at 532.
¹⁷⁴. Id. at 1595.
¹⁷⁴ᵃ. Ibid.
¹⁷⁵. Id. at 1601.
In Hussainara Khatoon v. State of Bihar, while dealing with undertrial prisoners, Justice Bhagwati (as he then was) held that the courts must abandon the antiquated concept that pretrial release would be ordered only against bail with sureties. This concept was outdated and it had done more harm than good. Therefore, the court held that if the court was satisfied on a consideration of the relevant factors that the accused had his ties in the community and there was no substantial risk of non-appearance, the accused might, as far as possible be released on his personal bond. Justice Pathak (as he then was) also held that there was an urgent need for a clear provision enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any requirement of monetary obligation.

In another case of Hussainara Khatoon, the court again held that when an undertrial prisoner was produced before a Magistrate and he had been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he was entitled to be released on bail. It was also held that the State Government must also provide at its own cost a lawyer to the undertrial prisoner with a view to enable him to apply for bail.

It is submitted that the judiciary has added another gem in the prisoners' rights by recognizing their right to bail. The reformist court wants to give the prisoner proper time and facility to prepare his defence. Moreover, during the time the person is bailed out, he would be away from the

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176. A.I.R.1979 S.C.1360. In this case, the bench consisted of Justice P.N. Bhagwati (as he then was), Justice R.S. Pathak (as he then was) and Justice A.D. Koshal. Justice Bhagwati delivered the judgment for himself and on behalf of Justice A.D. Koshal, Justice Pathak delivered separate judgment. See also Hussainara Khatoon v. State of Bihar, A.I.R.1979 S.C.1369 and Mantoo Majimdar v. State of Bihar, A.I.R.1980 S.C.846.
177. Id. at 1363-1364.
178. Id. at 1366–1367.
180. Id. at 1379.
dehumanizing effect of the prison and his even limited socialisation with his family and friends would be an humanising factor towards the reformation of the prisoner.

(f) Right To Demand Reasonable Wages For Work In Prison

During imprisonment, the prisoners are made to work in the prisons and they are paid wages for work. The question is whether only nominal wages should be paid or the wages should be reasonable. In Mohammad Giasuddin, the Supreme Court held that the wage rates should be reasonable and not trivial. It also directed the Andhra Pradesh State to take into account this factor, while finalising the rules for payment of wages to prisoners, as well as to give retrospective effect to the wage policy.\(^\text{181}\)

The Kerala High Court\(^\text{182}\) went to the extent of holding that labour taken from prisoners, which was not properly remunerated was forced labour and directed the government to pay Rs 8/- per day instead of Rs 1.60 per day.

In P.Bhaskara Vijaya Kumar v. State\(^\text{182a}\) the Andhra Pradesh High Court held that imposition of rigorous imprisonment with hard labour attached to it, does not amount to extracting forced labour from the prisoners. It is not contrary to article 23 as well. However, the prisoners would be entitled to be paid adequate wages for their labour under article 21 of the Constitution.

It is submitted that the prisoners should be paid the same wages which a free man gets for the same type of work.

(g) Right To Speedy Trial

Article 21 has been revolutionized by the Summit Court and the concept

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181. Supra note 107a at 1935.
of life and personal liberty has been widened but the subordinate judiciary and the executive could not be revolutionized. The shocking and dismaying picture of administration of justice was depicted by Hussainara Khatoon\textsuperscript{183} in which the writ petition filed before the Supreme Court disclosed that a large number of men and women, including children, were behind prisons for years awaiting trial in courts of law. They had languished in jail for a period for which they would have been detained had they been tried for the offences committed by them. The highest judiciary was shocked that while it was climbing the steps of activism, such anguishing state of affairs still existed:

It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from house tops about the protection and enforcement of human rights....But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed.\textsuperscript{184}

The humane court was feeling shame that it was "a travesty of justice" that these "little Indians" had no more remained human beings but were reduced to merely "ticket-numbers". Therefore,

What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars...\textsuperscript{185}

The human rights protector Supreme Court again came for the rescue of these "forgotten specimens of humanity"\textsuperscript{186} when, while evoking reasonableness, fairness and justness under article 21 as interpreted by Maneka, it held that "procedure established by law" for depriving a person of his liberty could not be reasonable, fair and just unless that procedure ensured a speedy

\textsuperscript{183.} Supra note 176.
\textsuperscript{184.} Id. at 1361.
\textsuperscript{185.} Ibid.
\textsuperscript{186.} Ibid.
trial for determination of the guilt of such person. Thus, the court made "speedy trial" which meant "reasonable expeditious trial" as an integral part of fundamental right to life and personal liberty under article 21. As a consequence of inclusion of "speedy trial" as a fundamental right under article 21, a question arose, whether a person would be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under article 21. The court left this question to be decided on merits on the adjourned date but gave a timely warning:

The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy.

In this case, Justice Pathak refrained from making any final comment or observation on the legality and propriety of the continued detention of the undertrial prisoners whether on the ground of infringement of article 21 of the constitution or on other grounds till the final determination of the petition.

In Hussainara II, the court asked the Government of Bihar whether the undertrials were produced before magistrates under section 167(2) of the Code of Criminal Procedure, which required the permission of a magistrate every 5 days for the detention of a person. The court also inquired whether the investigation in offences triable as summon cases was completed within six months, as required under section 167(5) of the Code of Criminal Procedure. Under section 468 of the code, no court could take cognizance of an

187. *Id.* at 1365.
188. *Id.* at 1361.
189. *Id.* at 1366.
190. *Supra* note 109(a). In this case, the bench was constituted by Justice P.N.Bhagwati (as he then was) and Justice A.P.Sen.
offence if a charge-sheet was filed after the period of limitation. And the court held that detention of persons covered by section 468 was against article 21 of the Constitution. Therefore, the court ordered to release them.\footnote{191}

In Hussainara III\footnote{192}, the court found that continued detention of the under-trial prisoners could not be justified as they had already been in jail for a period longer than what they would have been sentenced to suffer, if convicted. It was observed:

\begin{quote}
This discloses a shocking state of affairs and betray complete lack of concern for human values. It exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty.\footnote{193}
\end{quote}

Therefore, the court directed to release the undertrials as continuance of their detention was violative of their fundamental right under article 21.\footnote{194}

As this court had included "speedy trial" as a fundamental right under article 21, so this court held that it was the obligation of the state to devise such a procedure as would ensure speedy trial to the accused and refused to permit the state to deny this constitutional right of speedy trial to the accused on the ground that the state had no adequate financial resources to incur necessary expenditure needed for improving "the administrative and judicial apparatus" in order to ensure speedy trial.\footnote{195}

In Hussainara IV,\footnote{196} the court found that some under-trials were released but still there were under-trials who were not released.\footnote{197} Therefore, it ordered for their release. But the court could not help remarking:

\begin{quote}
\footnote{191. Id. at 1368-69.}
\footnote{192. Hussainara Khatoon v. State of Bihar, A.I.R.1979 S.C.1369. In this case, the bench consisted of Justice Bhagwati(as he then was) and Justice D.A.Desai.}
\footnote{193. Id. at 1372-1373. (conted.)} \end{quote}
We would be failing in our duty if do not express our sense of amazement and horror at the leisurely and almost lethargic manner in which investigation into offences seems to be carried on in the state of Bihar. It is high time that the state of Bihar took steps to overhaul and streamline its investigative machinery so that no investigation may take more than the bare minimum time required for it and the judicial process may be set in motion without any unnecessary delay.198

In Hussainara V,199 the court held that the under-trial prisoners, who were accused of multiple offences and who had already been in jail for the maximum term for which they could be sentenced on conviction, even if the sentences awarded to them were consecutive and not concurrent, should be released because the continuance of detention would be clearly violative not only of human dignity but also of their fundamental right under article 21 of the Constitution.200

The judicial decisions in Hussainara cases proved to be a Magna Carta to the 1,20,000 undertrials languishing in jails for years without trial. These are thunderbolt of judicial condemnation of the indifferent attitude of the judiciary and the lethargic and indolent behaviour of the government. The court became an angel for these undertrials, whose cup of misery was full. It further enlarged the scope of article 21 so as to include right to speedy trial in its ambit. If the court’s action has to be made a reality, there is a need of organic change in the government departments, police stations, trial courts and prisons. It has been rightly observed that a somnolent social conscience and a political process without social affections and ready.

194. Id. at 1373.
195. Id. at 1376.
196. Hussainara Khatoon v. State of Bihar, A.I.R.1979 S.C.1377. In this case, the bench was constituted by Justice P.N.Bhagwati(as he then was),Justice O.Chinnappa Reddy and Justice A.P.Sen.
197. Id. at 1378.
198. Id. at 1380.
199. Hussainara Khatoon v. State of Bihar, A.I.R.1979 S.C.1819. In this case, the bench consisted of Justice P.N.Bhagwati(as he then was) and Justice O.Chinnappa Reddy.
200. Ibid.
to exploit any misery or calamity for political purposes can hardly remedy these maladies in the administration of justice. Therefore, it has to be seen how far Hussainara galvanizes the insensitive policy maker into meaningless action to build bulwarks against such concentrated, colossal injustice.\textsuperscript{201}

In Mantoo Majumdar v. State of Bihar,\textsuperscript{202} the court again found that the two petitioners had spent six years in jail without trial. The court was shocked to see the indifferent attitude of the state when it was found unwilling even to furnish the basic facts about the imprisonment of the petitioners, the offences for which they were kept in judicial custody, for how long and at what stage were the proceedings and the like. The court felt that it was "an unconscionable aspect of that State's unconcern for human rights."\textsuperscript{203}

The Apex Court was even more upset to find that "even the magistracy have bid farewell to their primary obligation, perhaps, fatigued by overwork and uninterested in the freedom of others". Under section 162(2) of the Criminal Procedure Code, the Magistrates concerned were mechanically authorising repeated detentions unconscious of the provisions which obligated them to monitor the proceedings which warrant such detention.\textsuperscript{204}

\begin{footnotes}
\item[202] A.I.R.1980 S.C. 847. In this case, Justice Krishna Iyer, Justice A.C. Gupta and Justice R.S. Pathak (as he then was) constituted the Bench.
\item[203] Ibid.
\item[204] In an observation of the operation of section 167 of the Criminal Procedure Code by a magistrate in Andhra Pradesh, it was found that he generally disposed of remand cases sitting in the chamber only without even looking at the person he remanded to custody. Section 167 requires him to communicate to his chief judicial magistrate the reasons for remanding a person to custody. A chief judicial magistrate confessed that, for want of time, he never even looked into his magistrate's reasons. See Mohammad Ghouse, "Constitutional Law-I", XVI, A.S.I.L. 156 at 186 (1980).
\end{footnotes}
talk of the Magistrates only, it was found that the whole of the machinery was not working properly. The police did not investigate promptly and the prison staff did not bother to know how long these internees should be continued in their custody. The activist court, which was on the path of enlivening human rights, wondered at such state of affairs:

'If the salt hath lost its savour, wherewith shall it be salted'. If the law officers charged with the obligation to protect the liberty of persons are mindless of constitutional mandates and the Code's dictates, how can freedom survive for the ordinary citizen.

These dismaying factors led the court to hold that putting a man in prison forgetting his personhood thereafter, depriving a man of his personal liberty for an arbitrary period without monitoring by the law and keeping a man in continued custody unmindful of just, fair and reasonable procedure, "shake the faith in the rule of law and militate against the mandates of Part III of the Constitution". As, in this perspective, article 21 of the Constitution and section 167(2) of the Criminal Procedure Code had become dead letter for the petitioners, so the Supreme Court, being at the end of their patience, ordered for the release of the petitioners on their own bond and without sureties.

It is submitted that Mantoo Majumdar echoes what was held in Hussainara but did not refer to Hussainara. Deciding a vital matter like this without citing a previous decision, if followed in future, would be a wrong trend.

In Sunil Batra(II), there was no direct question of release of under-trials but the Supreme Court expressed its opinion that the under-trials, who are presumable innocent until convicted, should not be sent to jail because

205. Supra note 202 at 848-849.
206. Id. at 849.
207. Id. at 848-849.
208. See also supra note 204.
by being sent to jail, they were, by contamination, made criminals and it was "a custodial perversity" which violated the test of reasonableness in article 19 and of fairness in article 21.\textsuperscript{209}

While the Supreme Court was already giving reminders regarding the unfolding of a new dimension of article 21, that is, recognizing rights of the under-trials also, the Bhagalpur blinding of suspected prisoners came before the court in a number of cases.\textsuperscript{210} At Bhagalpur, a number of suspected criminals were allegedly blinded while they were in prison. The court found that the facts disclosed disturbing state of affairs and asked the Inspector-General of prisons as to who was the individual or which was the department of the state government to whose notice the matter was brought and what steps were taken by the government? The court also inquired whether the blindings which took place in October 1980 could have been prevented by the state government by taking appropriate steps on receipt of information regarding the complaint of the blinded prisoners.\textsuperscript{211}

In this case, the court, brought into light certain irregularities. In a few cases, the accused persons were not produced before the nearest magistrate within 24 hours of their arrest as required by article 22. In some cases, the accused persons were not produced before the judicial magistrates subsequent to their first production and they continued to be in jail without any remand orders being passed by the judicial magistrate.

According to the court, the provision inhibiting detention without remand was a very healthy provision which enabled the magistrates to keep check over the police investigation and that it was necessary that the magistrates should try to enforce this requirement carefully. The court

\textsuperscript{209}\textit{Supra} note 8 at 1586.
\textsuperscript{211}\textit{Id.} at 933.
also expressed its unhappiness at the lack of concern by the judicial magistrate in not enquiring from the blinded prisoners when they were first produced before them and thereafter from time to time for the purpose of remand as to how they had received injuries in the eyes. This gave rise to two inferences: either the prisoners were not physically produced before the magistrates or the magistrates mechanically signed the remand orders. The court also regretted that no inspection of the central jail, Bhagalpur, was carried out by the district and sessions judge at any time during the year 1980.

This Bhagalpur Blinding case depicted a very sad picture of undertrials. The judiciary again came for the protection of human rights. But the question remains how far judiciary can be successful in preventing such torture to meet "lynch justice" in future.

In spite of the fact that "speedy trial" was made part of the fundamental right under article 21 and continued to be so recognized in other cases, this fundamental right remained a paper promise and was grossly violated in case of four boys languishing in a Bihar jail as under-trial prisoners for over 10 years, whose story was narrated in Kadra Pehadiya v. State of Bihar. The Apex Court observed that this case "represents one more instance of the utter callousness and indifference of our legal and judicial system to the under-trial prisoners languishing in the jails". These four young boys belonging to the Pehadiya tribe were arrested on 26 November 1972 and 19 December 1972. They were not committed to the court of session until 2 July 1974 and the trial did not commence till 30 August 1977 and even this commencement was merely symbolic. The court felt that it was obvious that after so many years of incarceration awaiting trial, their conditions...
spirit must be totally broken and they must be seething with anger and resentment against the society. And the Constitution and significance of human rights had no meaning and relevance for them. The court observed:

    We fail to understand why our justice system has become so dehumanised that lawyers and judges do not feel a sense of revolt at caging people in jail for years without a trial.214

The court was astonished how the sessions judge could have forgotten that he had called the petitioners to the court for commencement of the trial on 30 August 1977 and thereafter did nothing in the matter. Therefore, the court asked the sessions judge to proceed with the case immediately.215

Thus, the court continued to impress upon that right to speedy trial was a part of fundamental right under article 21 but State of Maharashtra v. Champalal Shah216 went a step ahead when it was held that the facts and circumstances of such cases would decide whether an accused person was entitled to "the dismissal of the indictment or the dismissal of the sentence".217

In this case, the court laid down a formula to decide whether the accused person should be given benefit of the delay in trial or not. The court observed that in deciding the question whether there was a denial of the right to a speedy trial, the court was entitled to take into consideration whether the defendant himself was responsible for a part of the delay and whether he was prejudiced in the preparation of his defence by reason of the delay.218 The Court was also entitled to take into consideration whether the delay was unintentional caused by over-crowding of the Court's

214. Ibid.
215. Id. at 940-941.
216. A.I.R.1981 S.C.1675. See also Champalal Poonjaji Shah v. State of Maharashtra, A.I.R.1982 S.C.791 at 792. In this review petition "prejudice" test was again questioned. The court dismissed the review petition by holding that "we see no merit in these contentions".
217. Id. at 1677.
218. Id. at 1678.
Docket or under-staffing of the Prosecutors. The court stated:

While a speedy trial is an implied ingredient of a fair trial, the converse is not necessarily true. A delayed trial is not necessarily an unfair trial. The delay may be occasioned by the tactic or conduct of the accused himself. The delay may have caused no prejudice whatsoever to the accused.

Thus, the court held that the conviction would be quashed being violative of right to life and personal liberty under article 21 if the accused was found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself, otherwise there would be no justification to quash the conviction on the ground of delayed trial only.

Prof. Upendra Baxi has observed that Champalal placed this right to speedy trial on a sounder footing than the interminable nature of the Hussainara proceedings would otherwise allow. According to him, the fact that Justice Bhagwati (as he then was) was not on the Champalal Bench enabled one to say that the court as a whole, as distinct from a senior judge who led Hussainara proceedings, had accepted an interpretation of article 21 as conferring a right, to a reasonable expeditious trial. He felt that after Champalal, the right to speedy trial did not merely mean the Hussainara right to reasonably expeditious trial. It was not sufficient to show that the trial took 10, 15 or 20 years but it had to be demonstrated that the delay caused prejudice to the accused. In some cases, where the accused was exposed to long pre-trial detention without any contribution by himself to the time taken by trial, the court would readily, as in Hussainara, prejudice to him. Also, when the prosecution was somnolent or deliberately used slow motion techniques to harass the accused, the right to reasonably expeditious trial was violated.

219. Ibid.
220. Id. at 1677-1678.
221. Upendra Baxi, "Right to Speedy Trial: Geese, Gander and Judicial Sauce (conted.)
He criticised the present formulation of the "prejudice" test which had reached intolerable and unjust proportions as was clear from one small sentence in the judgment which read that "the court is also entitled to take into consideration whether the delay was unintentional caused by over-crowding of the Court's Docket or under-staffing of the Prosecutors". This clearly meant that even when the defendant might successfully show prejudice on preparation of his defence and his conduct on it, the state could argue back that this prejudice was the unintentional result of overcrowding and understaffing. And the court was entitled to take that into consideration. He questioned,"what then remained of the right to reasonably expeditious trial".221a

In Kadra Pehadiya v. State of Bihar,222 the Supreme Court again recognizing "speedy trial" as a fundamental right implicit in the guarantee of life and personal liberty enshrined in article 21 of the constitution, held that any accused who was denied of this right of speedy trial was entitled to approach this court for the purpose of enforcing such right and the court, in discharge of its constitutional obligation, had the power to give necessary directions to the State Governments and other appropriate authorities for securing this right to the accused. In the exercise of this power, the Apex Court asked the High Court to inform how many sessions judges, additional sessions judges were in each district of the state of Bihar and what was the number of cases yearwise pending before each of them. The Supreme Court also inquired what norms were fixed by the High Court for the disposal of cases and what steps were taken by the High Court to ensure conformity with the norms. The Supreme Court also wanted to know whether there was any need

(State of Maharashtra v. Champalal)". 221a.Id. at 101-102.
for any additional courts in any of the districts and if there was such need what steps were taken by the High Court and if no steps were taken the High Court might immediately request the state Government to create additional courts and appoint judges to man such courts. And it entrusted faith in the state Government and the subordinate judiciary that necessary steps would be taken.223

In Sant Bir v. State of Bihar,224 the court declared the detention of a prisoner as criminal lunatic illegal. He had become perfectly sane and fit for discharge and yet had been kept in detention for a period over 16 years without any justification. The court directed that he should be released from jail forthwith. The Supreme Court observed:

It is shocking to our conscience that a perfectly sane person should have been incarcerated within the walls of a prison for almost 16 years without any justification in law whatsoever.225

In 1984, the Apex Court had to order again for the release of large number of people found in jail without trial for petty offences.226

In 1987, in Raghubir Singh v. State of Bihar,227 another question arose whether the delay in police investigation was sufficient ground for the court to hold it as infringement of right to speedy trial which formed part of the fundamental right to life and liberty guaranteed by article 21. The court observed that it was ultimately a question of fairness in the administration of criminal justice and a fair and reasonable procedure was what was contemplated by the expression "procedure established by law" in article 21.

223. Id. at 1169.
225. Id. at 1471.
Several questions could be asked in this connection. Was there delay? How long was the delay? Was the delay inevitable having regard to the nature of the case and other circumstances? Was the delay unreasonable? Was any part of the delay caused by the willfulness or the negligence of the prosecuting agency? Was any part of the delay caused by the tactics of the defence? Was the delay due to causes beyond the control of the prosecuting and defending agencies. Did the accused have the ability and the opportunity to assert his right to a speedy trial? Was there likelihood of the accused being prejudiced in his defence? Irrespective of any likelihood of prejudice in the conduct of his defence, was the very length of the delay sufficiently prejudicial to the accused?^{228}

Keeping in mind these questions, the Supreme Court held that the investigating agency could not be blamed for the slow progress that they made in investigating a case of this nature. The court stated that "it is true that there were what appeared to be lulls in investigation for fairly long spells but we are unable to see anything sinister in the lulls". The courts emphasised that the police was not only in charge of the investigation into crimes, but they were also incharge of law and order. The court was satisfied that the delay in the investigation of the present case was not wanton and that it was the outcome of the nature of the case and the general situation passing in the country. The court also observed that the accused in this case did not belong to the category of persons who could not take care of themselves. They were capable of asserting their rights and they had asserted their rights. The court finally gave the direction that the trial should start soon.^{229}

It is submitted that the Apex Court rightly held that it depends upon the facts and circumstances of each and every case whether the delay in

^{228} Id. at 155.
^{229} Id. at 156.
police investigation would infringe the right to speedy trial. The ques-
tions imposed by the Court are sufficient guidelines which must be taken
into consideration before deciding any case in future.

In 1986 and 1987, the full bench of Patna High Court also gave rema-
rkable decisions on the question of "speedy trial". In State v. Maksudan
Singh, Chief Justice Sandhawalia delivering the majority judgment held that the constitutional right of the accused to a speedy and public
trial in all criminal prosecutions now flowing from article 21 of the constitu-
tion by virtue of precedential mandate was identical in content with the
express constitutional guarantee inserted by the Sixth Amendment in the
American Constitution. He found that inordinate prolonged and callous
delay of ten years or more occasioned entirely by the prosecution's default,
in the context of reversal of clean acquittal on a capital charge, would be
per se prejudicial to the accused. It was also held that once the consti-
tutional guarantee of speedy trial and the right to a fair, just and reason-
able procedure under article 21 was violated, then the accused was entitled
to an unconditional release and the charges levelled against him would fall
to the ground.

Justice P.S.Sahay, giving the minority view, held that while deciding
a case of such a far-reaching consequence, the court should better confine to
the four corners of the Constitution and the law relating to the procedure
to be followed in deciding criminal cases. According to him, article 21 of
the Constitution of India laid stress on "procedure established by law" and
even after acquittal by the trial court, appeals were admitted and if this

231. Justice S.Shamsul Hasan, while delivering separate judgement, agreed
    with Chief Justice Sandhawalia.
232. Id. at 44.
233. Id. at 47.
234. Id. at 45.
was not disposed of according to the procedure laid down, then, there would be clear violation of the "procedure established by law". He held that in that view of the matter, fixing of ten years would be contrary to the provisions of the Constitution as well as the Code of Criminal Procedure.

It is surprising as well as shocking that despite the judgments of Summit Court in different cases, the judges sitting in a High Court bench can think of giving dissenting opinion. It is blatant disrespect to the sacred document, the Constitution. What is the standing of article 141 which lays down that the decision of the Supreme Court shall be binding on all the subordinate courts. The majority judges, in this case, trod the path of activism under the influence of the highest court only. So diverting from that path means doing descretion of the temple of justice.

In Madheshwardhari Singh v. State, Chief Justice Sandhawalia stated that both on principal and precedent, the fundamental right to a speedy trial extended to all criminal prosecution for all offences generically, irrespective of the nature and that it was not confined or constricted to either serious or capital offences only. It was held that the right to a speedy public trial was applicable not only to actual proceedings in the court but also included within its sweep the preceding police investigation in a criminal prosecution as well.

It was also held that a callous and inordinately prolonged delay of seven years or more (which did not arise from the default of the accused or was otherwise not occasioned by any extraordinary or exceptional reason) in investigation and original trial for offences other than capital ones would

235. Id. at 51.
237. Id. at 334.
238. Id. at 335.
plainly violate the constitutional guarantee of a speedy public trial under article 21.\textsuperscript{239}

Justice S. Shamsul Hasan, delivering a separate but concurrent judgment, observed that even without relying on the principles of American Constitution, speedy investigation and trial was the right of all persons accused of having committed an offence. According to him, it was a fundamental and inherent right and that it had become more so by the adoption of the 6th Amendment of the American Constitution by the precedential mandate of the Supreme Court. He also gave a call to the state:

\begin{quote}
The sooner the state authorities realise the situation and take necessary steps in this regard the better it would be. ... The talk of rule of law and social justice in regard to those, who are consigned to jails, pending trials or those who are facing protracted trials, the protraction being due to no fault of theirs will become fantasy and a myth.\textsuperscript{240}
\end{quote}

In order to achieve speedy justice, following suggestions are made. All the vacancies in the courts should be filled up at the earliest and if need be the number of judges may be increased. Separate benches should be made in the courts to decide different cases simultaneously. And only specialised judges should be appointed to specialised benches, for example, to decide tax cases, so that no time should be wasted in understanding the basic principles of the special branch of law by the judges. The dialatory procedure of different adjournments of cases should be reformed and few adjournments should be allowed, in order to decide the case speedily. The party must mention all the rulings on which he wanted to rely upon in the concluding paragraph of his petition/counter affidavit so that the judge as well as the opposite party's counsel should come prepared with the case law. It would also help in avoiding at least one adjournment. The judges must read

\begin{itemize}
\item \textsuperscript{239} Id. at 342.
\item \textsuperscript{240} Id. at 344.
\end{itemize}
briefs at home, so as to save time in knowing the facts and law points involved. If this scheme be adopted, the judge can directly come to the point and decide the case soon. Just like the practice in U.S. Supreme Court, each judge of our Supreme Court should also be provided with at least one advocate clerk, who can do lot of spadework for the judge and in turn, the precious time of the judge would be saved and the ultimate result would be the speedy trial of the cases.241

(h) Reform of Prison Justice And Its Impact

When prison trauma prevails, prison justice must invigilate, the court must broaden its jurisdiction to take reformative measures because "jurisprudence cannot slumber when the very campuses of punitive justice witness torture".242 And the court believed that the idea of prison reform emerged from the constitutional recognition of personhood of every prisoner which if unfolded would make "a robber a valmiki and a sinner a saint".243

In Mohammad Giassudin, the Court favoured the importance of "therapeutic" goal of imprisonment and stated:

"The state has to rehabilitate rather than avenge. The sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturisation.... We, therefore, consider a therapeutic, rather than an in 'terrorem' outlook, should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind.244"

The court took offenders as patients and prisons as "hospitals" or "correctional houses" and "not cruel iron aching the soul". It believed that the prisoners should not be made "more hardened, more brutal, more cunning and dangerous to society",245 therefore, instead of segregating

242. Supra note 8 at 1582.
243. Supra note 39 at 1775.
244. Supra note 107a at 1929.
245. Supra note 39 at 1768.
from the community, they should be reformed by making part of it so that upon his return to the society the offender must not only be willing but also able to live a "law-abiding" and "self-supporting" life. In Sunil Batra(II), the court encouraged the social workers to do their duty and rehabilitate the prisoners but emphasised that all this should be done within the limits of law, "civil interests", "social security" and "social benefits of prisoners".

"Statement of twenty-two Principles of American Prison Administration" laid down:

Reformation not vindicative suffering, should be the purpose of the penal treatment of prisoners. The prisoner should be made to realize that his destiny is in his own hands.

The Apex Court was greatly influenced by this statement. This court also laid stress on rehabilitation of prison laws and reorientation of prison staff:

Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in Raj past, need reorientation; prison house and practices, a hangover of the die-hard retributive ethos, reconstruction; prisoners, those noiseless, voiceless human heaps, cry for therapeutic technology; and prison justice, after long jurisprudential gestation, must now be reborn through judicial midwifery, if need be. No longer can the constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity....So...there is urgency for bridging the human gap between prison praxis and prison justice...

Even in the pre-internal emergency era, when the prisoners' rights were not so deeply recognized, this court advocating for the extension of article 42 to living conditions in jails had observed:

246. Supra note 8 at 1601.
247. Supra note 39 at 1769.
248. Supra note 8 at 1601.
249. Quoted in Id. at 1603.
250. Supra note 3 at 1726.
251. Article 42 lays down that the state shall make provision for securing just and humane conditions of work and for maternity relief.
There are subtle forms of punishment to which convicts and undertrial prisoners are sometimes subjected but it must be realised that these barbarous relics of a by gone era offend against the letter and spirit of our constitution.252

Social justice, dignity of the individual, equality before the law, procedure established by law and the six lamps of freedom(article 19) are the constitutional lamp posts showing light to introduce reforms in the prison houses keeping every factor in view. Professor Balram K. Gupta has rightly responded:

[T]he difficulty is that even when the path is shown and the law is clearly laid down by the justices of the Supreme Court(which according to Article 141 is binding) and yet it is not observed. It remains confined to law reports. No positive steps are taken by the state to bring the law to the notice of those who are supposed to apply it. It is in this context, the courts and the judges are required to play the ombudsmanic role.253

The Summit Court has observed:

Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life-style within the carcers.254

In Hosokot, the court observed that the "iatrogenic prison terms" were bad because these dehumanize and if the courts do not punish the "deviants" it would be "functional failure".255 In Charles Sobraj, the court held that it must interfere if there was violation of legal prison practices and that it was not beyond the reach of its constitutional jurisdiction.256 If the rights were available to the prisoners, the courts would not interfere. But undue harshness in the name of discipline and security gained "no immunity from court writ".257 In Sunil Batra(I), the Summit Court emphatically

252. Supra note 17 at 2096.
253. Supra note 20 at 4.
254. Supra note 3 at 1690.
255. Supra note 5 at 1552.
256. Supra note 4 at 1516.
257. Id. at 1517.
stated:

Prisons are built with stones of law... and so when human rights are hashed behind bars, constitutional justice impeaches such law... Courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the constitution, freedom from torture belongs to the detenu.258

Functionally speaking, it is the foremost duty of this reformist court to reform prison practices by injecting constitutional consciousness into the system. In Sunil Batra(II) also, the court reminded that this court would never lag behind in protecting prisoners' rights:

Prison houses are part of Indian earth and the Indian constitution cannot be held at bay by jail officials 'dressed in a little, brief authority' when Part III in invoked by a convict. For when a prisoner is traumatized, the constitution suffers a shock. And when the court takes cognizance of such violence and violation, it does, like the hound of Heaven.259

The court, while recognizing its duty as well as power to bring reform in the prisons, drew attention to this need of the hour and suggested:

Indeed, a new chapter of offences carrying severe punishments when prison officials become delinquents is an urgent item on the agenda of prison reform; and lodging of complaints of such offences together with investigation and trial by independent agencies must also find a place in such a scheme.260

The Punjab Prison Manual required the Districts Magistrates to visit and inspect, jails situated within the limits of their district from time to time.261 Elaborating on this point, the court explained in Sunil Batra (II) that the District Magistrate should meet the prisoners separately to know if they had any grievances. The presence of warders and officials would

258. Supra note 3 at 1691.
259. Supra note 8 at 1583.
260. Id. at 1596.
be inhibitive and must be avoided and he must ensure that his enquiry was confidential although subject to natural justice and did not lead to reprisals by jail officials. He would record the result of each visit and inspection. This meant that he would enquire and pass orders which need to be immediately complied with. In the event of non-compliance, the Magistrate should immediately inform disobedience and advise the prisoner to forward his complaint to the High Court under article 226 together with a copy of his own report to help the High Court exercise its habeas corpus power. In this context, the Summit Court also ordered the placing of Grievance Boxes in jails so that the inmates could put in their complaints and the District Magistrates could take care of them.

Professor Balram K. Gupta has expressed doubt whether it could be implemented in letter and spirit because it was inhibited with hurdles. District Magistrates were too pressed for time and the prison officials might not co-operate. And visits by Magistrate once in a while would not be sufficient. A regular independent agency was needed to exercise constant vigilence. Therefore, he suggested that there was urgent need to provide for "Prison Ombudsman".

The Constitution also entitles everyone to submit a representation for the redress of grievances under article 350 which reads:

Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a state in any of the languages used in the union or in the state as the case may be. (emphasis added)

262. Supra note 8 at 1597.
263. Id. at 1598.
264. Supra note 20 at 5.
265. The Declaration of the protection of all persons from torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly also reads:
   Article 8: Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain (conted.)
The need for a "Prison Ombudsman" has become acuter in view of the changed meaning given by the Supreme Court to the right to life and personal liberty under article 21. In Francis Coralie Mullin also the court held:

[...]ny form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman and degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 & 21.

The Summit Court took initiative, made the planning and gave the plot to the executive and legislature to do the task of construction. It observed:

Prison reform is burgeoning in the administrative thinking and, hopefully one may leave it to legislative and executive effort to concretise, with feeling for 'insiders' and concern for societal protection, with accent on perimeter security and correctional strategy, the project of prison reform.

It is submitted that the Supreme Court, while giving directions for the reform of the prisons, could pass the test of "Justice" as laid down by Blaise Pascal:

Justice without power is inefficient, power without justice is tyranny...justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just...to, and to have his case impartially examined by the competent authorities of the state concerned.

Article 9: Whenever there is reasonable ground to believe that an act of torture...has been committed, the competent authorities of the state concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint(emphasis added). See Resolution 3452 of 9 December 1975.

266. Supra note 149 at 753.
267. Supra note 3 at 1720.
Thus, the court has given a new turn to the attitude towards prisoners and proved that the Indian human has a constant companion, the court armed with the constitution. When from day to day experience, it is found that man can be so cruel to man, the companionship of the court is the main hope of the tortured. But the fact cannot be denied that it is only the microscopic number of cases which find communion with the court. The rest slumber and suffer in their cages. It speaks for the need of ombudsman who could not only receive the complaints but also act as the channel of communication with the court.

It is further submitted that this reformistic approach may give rise to a question whether the improved conditions of the prisoners would encourage those, who are economically similarly situated, to commit crime. And in that case, the humanistic and reformistic approach of the Summit Court would have an unfortunate effect. But at the same time, it can be said that the society has not succeeded in ridding itself of crime by prison torture. Thus, the humane view should be such that the assured minimum existence should be at a middle level rather than not to have it. Moreover, the court also did not forbid the curtailment of fundamental rights and liberties to some extent.

Since 1978, the Supreme Court has been trying hard to improve the conditions in the prisons. But the question is how far it has succeeded. Professor Upendra Baxi has very well evaluated the role of the Supreme Court:

The Supreme Court has ended the era of exile for prisoners from its well-nurtured constitutional paradise.

Evaluating Patra I, he observed that this decision of the court was bound to have good impact on the administration and the politics of jail reform and it laid down the law binding on all courts throughout India. He

269. Supra Note 8 at 1591.
270. Upendra Baxi, supra note 9 at 245.
went to the extent of remarking:

*Batra* is as fundamental a decision for administration of criminal justice as *Kesavananda* is for constitutional development.271

He imposed faith in the judiciary and hoped that the Supreme Court would, sooner rather than later, constrain the executive to respect its many-sided ruling in *Batra* and the Bar and jurists would join the court in the slow and painful march towards prison reform.272

In order to know the impact of the judgments of the Supreme Court on prison reform and, in turn, the reform of the prisoners, the educated convicts of the open air jail at Anantpur were interviewed by a law academic. They did not show any sign of repentence. So it appeared that the correctional therapy, "Transcendental Meditation", which was prescribed by Justice Krishna Iyer in most of the judgments, would have no therapeutic effect on the prisoners.273

Whether the prisoners would be or would not be reformed is a secondary question. The primary problem is how far the directions given by the Apex Court are followed by the authorities. Once the prisons are made the heavens, only then the question arises of offenders becoming angels.

In the twilight world of prisons, the common tenets of human decency are still flung aside to moulder in a corner.274 The prisoners with clout and money lead a cushioned existence, the less fortunate have to live in inhuman conditions.275 The primitive law of survival of the fittest, of the boldest, of those with enduring links with authorities is still prevailing in the prisons.276 The authorities rule the prisons with iron hand and the

prisons give no better picture than a butcher shop.277

A positive step towards the prison reform emerged due to the permission given by the authorities of Chanchalguda prison to the prisoners to appear for the eligibility test for admission to the three year B.A. and B.Com., course of the Andhra Pradesh Open University. The authorities told that all relevant books and lessons despatches were supplied free of cost by the open University. The convicts were also allowed to listen radio lessons in the office of the Prison Welfare Officer. It was also disclosed that on successful completion of the course the convicts would earn "literacy remission" of 30 days in their studies and if they continued to successfully pursue their studies, the Inspector-General of Prisons was empowered to grant 60 days remission every year.278

Thus, it can be evident from the day to day experience that there is laxity on the part of the executive in maximum cases and reformative steps are only exception. The court itself warned the judges of such possibility when it stated:

Judges must warn themselves against this possibility because the nation's confidence in the exercise of discretionary power affecting life and liberty has been rudely shaken especially when the Court trustingly left it to the Executive.279


279. Supra note 3 at 1714.
No doubt, the judicial armoury should be ever ready to defend human rights, but amrit would also be poison if taken in excess. The doctrine of separation of powers, even though not rigidly applied, demands that every organ of the state must work within its boundary and in coordination with other organs of the state. The judiciary is also not unaware of this factor. That is why, it has always imposed faith in the executive and legislature (may be in vain) and has also warned the courts not to trespass in the jurisdiction of other organs of the state:

The court must not rush in where the jailor fears to tread. While the country may not make the prison boss the sole sadistic arbiter of incarcerated humans, the community may be in no mood to hand over central prisons to be run by courts. Each instrumentality must function within its province.280

(C) Legal Aid Ethos And Personal Liberty Jurisprudence

The punitive arm of the legal order is criminal law and to sensitize its process to the wave-length of the poor is the strategy whereby the life and liberty of the people can be guaranteed through law.281 And this strategy is equal access to justice for all. Equal access to justice is not possible unless every person is provided with legal assistance in order to protect his life and liberty wherever it is infringed.

Legal services ordinarily mean the professional lawyer's skilled labour sold to his client. The litigant client has to pay fees to his lawyer just as a patient has to pay fees to his doctor. Rich patient can but poor-patient cannot afford costly treatment with highly priced doctors, nursing homes, medicines etc. but still the medical system in any civilized country provides for treatment of the poor at no cost or token cost, for example,

280. Supra note 4 at 1518.
hospitals, health centres etc. Similarly any human society governed by
Rule of Law but not by Rule of Thumb or Jungle must provide in its legal
system the facilities for a poor litigant to avail freely or on a token
cost the legal care of his problem to vindicate his right. It is not a
mere constitutional obligation but a social imperative also. It should not
be viewed as charity but it should be conceived as an integral part of our
legal system.\textsuperscript{282}

The objectives of legal aid are to promote the knowledge of law among
the indigent and to provide them equal access to courts.\textsuperscript{283} And the urgent
need for legal aid movement is because rocketing cost of the litigations
hanging over the heads of teeming millions, sustaining themselves below
poverty line, has for them removed the justice far beyond the reach of their
tiny hands and has thrown them into the merciless jaws of tyranny, inequality,
silent sufference and unheard condemnation.\textsuperscript{284} The rule of equality before the
law and equal protection of law under article 14 would only remain consti­
tutional shibboleth if a person cannot secure legal protection because he is
poor. Legal aid offers a challenging opportunity to a society to redress
grievances of the poor and thereby lay the foundation of Rule of Law.\textsuperscript{285}

(a) Constitutional Commitments And
Legal Aid Jurisprudence

The clientele of the Constitution, the people at large, look at the
Constitution as their haven against the many injustices of life.\textsuperscript{286} Therefore, the founding fathers of the Indian Constitution insisted in article 21
that no person shall be deprived of his life or personal liberty except ac­
cording to procedure established by law, which, imaginatively understood, means

\textsuperscript{282} Danesh Chander Mukherjee, "Legal Education for Services to the poor", A.I.R.1982 Journal 65.
\textsuperscript{284} S.M. Johri,"Programme and Movement of Legal Aid to Poor", A.I.R.1981 Journal 27.
\textsuperscript{285} Supra note 283.
fair legal procedure. And the wide ambit of the right to counsel written into the Constitution is apparent from article 22(1) which obligates intimation of the grounds of arrest to every arrested person and allows him right to counsel of his own choice.287 This right is also available in the equalitarian background of article 14 which ensures equality before law and equal protection of law.

Apart from these fundamental rights, there are certain directive principles which also serve the same purpose.288 Under article 38(1), the state is obligated to promote welfare of the people by securing a social order in which justice, social, economic and political shall inform all institutions of life. The state is also under an obligation to minimise the inequalities in income and eliminate inequalities in opportunities and status facilities under article 38(2). Article 39-A directly ensures legal aid. It lays down:

The state shall secure that the operation of the legal system promotes justice, on the basis of the equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

By virtue of these constitutional provisions, the constitutional status of legal aid is recognized and the remaining game is to be played by the judiciary. Krishna Iyer has remarked:

Keeping faith by sacred civil liberties, not legalistically, but conscientiously the judge has to search for the spiritual essence of the text and read the flexible words expansively - words are not dead wood but the embodiment of living ideas.289

289. Supra note 281 at 140.
The Constituent Assembly idealized the courts because, as guardians of the constitution, they would be the expression of the new law created by Indians.\(^{290}\) And this was so realized by the Court in the post-internal emergency period. Before that it did not open the constitutional umbrella to give shade of legal aid to the poor. In Janardhan Reddy v. State of Hyderabad,\(^{291}\) the Apex Court stated:

> It cannot be laid down as a rule of law that in every capital case when the accused is unrepresented, a trial should be held to be vitiated but the court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount negation of fair trial.\(^{292}\)

Janardhan Reddy was followed in Tara Singh v. State\(^{293}\) but the court liberalised its approach a little bit in Bashira v. State of U.P.\(^{294}\) when it was held that the High Court rules regarding the appointment of amicus curiae in a criminal trial of serious kind was mandatory.

The judicial approach changed in the post-internal emergency era, especially in the post-Maneka period and in Hussainara Khatoon v. State of Bihar,\(^{295}\) the court held that it was the constitutional right of every accused person, who was unable to engage a lawyer and secure legal services on account of reasons such as poverty, to have free legal services and the state was under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so required. According to the court, if law was not only to speak justice but also deliver justice, legal aid was an "absolute imperative", "equal justice in action" and "delivery system of

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292. Id. at 222.
293. A.I.R. 1951 S.C. 441.
294. A.I.R. 1968 S.C. 1313
295. Supra note 179 at 1380-1381.
social "justice". It was also warned that if free legal services were not provided to such an accused, the trial might run the risk of being vitiated as contravening article 21.

In Ranjan Dwivedi v. Union of India, the question whether the right to have counsel of one's own choice under article 22(1) includes the right to be assigned a lawyer by the state was considered by the Supreme Court. It was observed:

The traditional view expressed by this court on the interpretation of Article 22(1) of the Constitution in Janardhan Reddy v. State of Hyderabad that the right to the defended by a legal practitioner of his choice could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the state, has now undergone a change by the introduction of the Directive Principle of State Policy embodied in Article 39-A by the Constitution (Forty-second) Amendment Act, 1976 and the enactment of subsection(1) of Section 304 of the Code of Criminal Procedure.

The court held that when the accused was unable to engage a counsel due to poverty or similar circumstance, the trial would not be vitiated unless the state offered free legal aid for his defence to engage a lawyer whose engagement the accused did not object.

In Suk Das v. Union Territory of Arunachal Pradesh, the court again held that free legal assistance at state cost was fundamental right of a person accused of an offence which might involve jeopardy to his life or personal liberty.

It is submitted that these decided cases show that the judiciary took rigid approach in the pre-internal emergency era and did not recognize

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297. Id. at 626-627.
298. Id. at 627.
300. Id. at 993.
right to free legal aid as a fundamental right. The reason was perhaps at that time right to life and personal liberty under article 21 could be infringed merely by "procedure established by law" which might not be "fair, just and reasonable". Moreover, article 39A, which is now considered a part of article 21 for granting legal aid, came into existence when the internal emergency was going to die. And in the post-internal emergency era, the Apex Court issued constitutional mandate to the state to give free legal assistance to the poor, it being adopted as a fundamental right under article 21 and as a part of fair, just and reasonable procedure.

(i) Free Legal Aid As a Part of Just, Fair And Reasonable Procedure

The Summit Court expanded the scope and ambit of article 21 in Maneka by holding that procedure under article 21 should be fair, just and reasonable. This had lasting impact on the future judgments of this court as is evident from post Maneka decisions.

In Hoskot, the Supreme Court held that every step that made the right of appeal fruitful was obligatory and every action or inaction which stultified it was unfair and unconstitutional under article 21. According to the court, one such step was provision of free legal service to a prisoner who was indigent or otherwise disabled from securing legal assistance where the ends of justice demanded for this service.302

The court, taking article 39-A as an interpretative tool of article 21, observed that the power to assign counsel to the indigent person "for doing complete justice" was implicit in the court by virtue of article 142 read with articles 21 and 39-A.303 But the court felt that free legal ser-

301. Supra note 2.
302. Supra note 5 at 1554.
303. Id. at 1556.
vices could be available in those cases where it found that public justice suffered. It was observed:

Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case.304

In spite of Maneka revolution and Hoskot inclusion of right to free legal aid as a fundamental right under article 21, the court feeling sorry for the undertrials had to state in Hussainara Khatoon v.State of Bihar:

[T]his unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme...305

In this case, the court admitted that free legal service was an essential element of reasonable, fair and just procedure. Interpreting the provision differently would mean that a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. Therefore, it was held that the right to free legal aid was implicit in the guarantee of article 21.306 The court stated:

We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation wide service programme to provide free legal service to them. It is now well settled, as a result of the decision of this court in Maneka Gandhi v. Union of India,(1978) 1 SCC 248:(AIR 1978 SC 597) that....a procedure which does not make available legal services to an accused person who is poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance,cannot possibly be regarded as 'reasonable, fair and just'.

In Bhagalpur Blindings case, again the court held that the right to free legal services was clearly an essential ingredient of reasonable,fair
and just procedure for a person accused of an offence and it was implicit in the guarantee of article 21.\textsuperscript{308}

The court emphasised that the state was bound to provide free legal services to an indigent accused person and could not plead financial and administrative inability. The state might have its financial constraints and its priorities in expenditure but the state could not escape this liability.\textsuperscript{309} It is relevant to quote Justice Blackmun's observation in \textit{Jackson v. Biskop}:\textsuperscript{310}

\begin{quote}
[H]umane considerations and constitutional requirements are not in this day to be measured by dollar considerations.
\end{quote}

The court held that the state was under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he was first produced before the magistrate as also when he was remanded from time to time because no procedure could be said to be reasonable, fair and just which denied legal assistance at these stages.\textsuperscript{311}

The court did not miss the chance to remind the subordinate judiciary of their contribution in the legal aid movement. The court made it obligatory for the Magistrate or the Sessions Judge, before whom the accused appeared, to inform the accused that if he was unable to engage the services of a lawyer on account of poverty or indigence, he was entitled to obtain free legal services at the cost of the state. This duty was assigned to the Magistrates due to lack of legal awareness among the people. And this cause led the court to vote for making promotion of legal literacy as one of the principal items of the legal aid movement.\textsuperscript{312}

\begin{itemize}
\item \textsuperscript{308} Supra note 210 at 930.
\item \textsuperscript{309} Id. at 931.
\item \textsuperscript{310} 404 F Supp.2d, 571.
\item \textsuperscript{311} Supra note 210 at 931.
\item \textsuperscript{312} Ibid.
\end{itemize}
It is submitted that the court has made both the judiciary as well as the executive conscience of their duties. Life and liberty of the people cannot be put at stake merely because the state has financial problem. Unfairness is, prima facie, evident from such a plea of financial constraints. The subordinate judiciary also cannot take the benefit of the legal restriction, that is, "ignorance of law is no excuse". It is now bound to inform the accused of his right to have free legal assistance from the state wherever he is indigent or otherwise incapable of defending himself. In order to avoid such a situation, the court rightly suggested for promoting legal literacy also.

After two years, the court had to sing the same song in Sheela Barse that legal assistance to a poor or indigent accused who was arrested and put in jeopardy of his life or personal liberty was a constitutional imperative mandated by articles 14, 21 and 39-A. The court stated:

> It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law...313

What the court stated was an echo of what Justice Brennan had expressed:

> Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.314

In Sheela Barse, the court gave a clarion call to the lawyers to rise for the help of those sections of humanity who were poor, illiterate

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313. Supra note 110 at 380.
314. Quoted in supra note 5 at 1555.
and ignorant and who did not know what to do and where to go when they were involved in the accusation of crime or arrest or imprisonment. They could not impress upon them in better words than used by it.

Lawyers must realise that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualties of this traffic and it is the function of the legal profession to help these casualties in a spirit of dedication and service.315

It is submitted that lawyers are as much instrument of the processual justice as the legislature which enacts, the executive which implements and the judiciary which protects. In fact they are the key which moves the whole machinery and unless the whole of the machinery moves to bring processual justice, procedural fairness, justness and reasonableness cannot even peep into the room allotted to "life and liberty".

After a gap of three years, in Suk Das v. Union Territory of Arunachal Pradesh,316 the court dittoed the previous judgments. It was held that free legal assistance at state cost was a fundamental right of a person accused of an offence which might involve jeopardy to his life or personal liberty. According to the court, this fundamental right was implicit in the requirement of reasonable, fair and just procedure prescribed by article 21.317

The court also held that the exercise of this fundamental right was not conditional upon the accused applying for free legal assistance so that if he did not make an application for free legal assistance, the trial might lawfully proceed without adequate legal representation being afforded to him. On the other hand, the court made it obligatory on the Magistrate

315. Supra note 110 at 380.
317. Id. at 993.
or Sessions' Judge to inform him that he was entitled to free legal services at the cost of the state. It was also held that the conviction reached, without informing the accused that they were entitled to free legal assistance and inquiring from them whether they wanted a lawyer to be provided to them at state cost which resulted in the accused remaining unrepresented by a lawyer in the trial, was clearly a violation of the fundamental right of the accused under article 21 of the Constitution. The court observed:

It would in these circumstances make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail of its purpose.319

In this case, also the court emphasised the role of lawyers in the society and legal literacy as part of the legal aid movement.320

It is submitted that this decision gives further teeth to the right to legal aid. Its importance is in reminding the state that if comprehensive legal aid programme is not provided, convictions in criminal cases may be held unconstitutional.321

It is further submitted that there is no doubt that the judiciary has succeeded in making right to legal aid as an integral part of "just, fair and reasonable" procedure under article 21 but the dismaying factor cannot be ignored that the judiciary failed to wake up the executive from its slumber and it had to be given warning time and again.

Another aspect of "fair, just and reasonable" procedure is that while granting free legal aid, professional competence of the lawyer must be

318. Ibid.
319. Id. at 994.
320. Ibid.
considered. If the lawyer provided by the state to the accused is not of equal competence as that of public prosecutor, there is no question of procedure being "fair, just and reasonable" because the accused does not have the equal opportunity of defending himself.

The question is of legal assistance to poor accused to help him to defend himself and not of financial assistance to the poor lawyers to help them to earn their livelihood. Krishna Iyer has also opined that the legal aid programme is not a benefit scheme for briefless lawyers but provision of assistance through counsel and of other facilities for effective defence. In R.M. Wasawa v. State of Gujarat, the Supreme Court observed:

Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar.

Krishna Iyer also observed:

Lawyers' services, not of tyros, but competent men lest the scheme be discredited. Legal aid must not only be given but appear to be given and the legal aid litigant must have some freedom of choice, the lawyer assigned being not a gift horse not to be looked in the mouth. The practice of patronising lawyers instead choosing talent according to the case, needs to be condemned, even if the selection were made by judicial officers.

The Apex Court held in Kadra Pehadiya that the petitioners would be provided legal representation by a fairly competent lawyer at the cost of the state, because legal aid in criminal case had been declared a fundamental right under article 21.

322. See also B. Sivaramayya, Inequalities And The Law, 144 (1984).
323. Supra note 281 at 141.
325. Id. at 1143-1144.
326. Supra note 281 at 143.
327. Supra note 101.
In Ranjan Dwivedi, the Supreme Court again considered the question of professional competence of the lawyer provided by the state to the accused. The court found that by virtue of High Court rules, which provided for the payment of rupees twenty four only per day to the lawyer appearing in the court as amicus curiae, it was impossible to get a equally competent lawyer as that who was representing the state. Therefore, the Supreme Court increased the sum to rupees five hundred per day to the senior counsel and rupees two hundred and fifty per day to the junior counsel, who were representing the petitioner by issuing an interim order. The court rightly made it incumbent upon the state to provide him with a counsel of equal standing "as a matter of processual fair play".

It is submitted that if legal aid is recognized as a fundamental right on papers only and no equally competent lawyer as that representing the state is provided, the promise of processual justice and, in turn, equal justice cannot be fulfilled. And processual justice cannot be achieved unless there is processual fairness which is a constitutional imperative mandated in article 21.

(ii) Enforceability of Article 39-A And Judicial Attitude

Right to legal aid has been recognized as a part of "fair, just and reasonable" procedure but the question remains how far the state agrees to provide a lawyer to the needy.

In Ranjan Dwivedi, it was contended that suitable directions be made in conformity with the interim orders passed by the court for payment of a

327a. Supra note 296.
328. In this case, the state was represented by a special public prosecutor assisted by a galaxy of lawyers specially engaged by the state and large amounts were being paid as their fees.
329. Supra note 296 at 625.
330. Id. at 626.
reasonable amount as fees to the amicus curiae who appeared for the petitioner. The court, impressed by the objections made by the Additional Solicitor General held that the petition was virtually for the enforcement of the directive principle of state policy enshrined in article 39-A of the Constitution and that a writ of mandamus could not be issued under article 32 for the enforcement of directive principle under article 39-A. According to the court, by virtue of article 39-A, the social objective of equal justice and free legal aid had to be implemented by suitable legislation or by formulating schemes for free legal aid. Thus, the remedy of the petitioner, if any, was of making an application before the learned Additional Sessions Judge under sub-section(1) of section 304 of the Code of Criminal Procedure 1973 and not by a petition under article 32 of the Constitution.

In spite of the observations of this very court in Kesavananda Bharti v. State of Kerala, which was referred to by this court in this case also, the court took a rigid view regarding enforceability of article 39-A. The court observed:

[T]here is no disharmony between the Directives and the Fundamental Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state which is envisaged in the Preamble. The courts therefore have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonise the social objective underlying the Directives, with the individual rights. Primarily, the mandate in Art.39-A is

331. Ibid.
332. The Additional Solicitor General contended that the petitioner had no legal right to be supplied with a lawyer by the state nor was there any corresponding obligation cast on the state to give financial assistance to him to engage a counsel of his choice. According to him, the remedy of the petitioner was to make an application before the Additional Sessions Judge under sub-section(1) of section 304 of the Code of Criminal Procedure 1973 and not a writ petition under article 32 of the Constitution. Ibid.

333. Ibid.
addressed to the Legislature and the Executive but in so far as the courts of Justice can indulge in some judicial law-making within the interstices of the Constitution or any statute before them for construction, the courts too are bound by this mandate.335

The court also admitted that article 39-A had brought a tremendous change in the legal aid movement when it stated:

The traditional view expressed by this court on the interpretation of Article 22(1) of the Constitution in Janardhan Reddy v. State of Hyderabad...that 'the right to be defended by a legal practitioner of his choice' could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the state, has now undergone a change by the introduction of the Directive Principle of the State policy embodied in Article 39-A by the Constitution(Forty-second)Amendment Act, 1976, and the enactment of sub-section(1) of Section 304 of the Code of Criminal Procedure.336

Moreover, in Hoskot, this very court called article 39-A as interpretative tool of article 21 for doing "complete justice".337 In this case, the court itself admitted:

Read with Art.21, the Directive Principle in Art.39-A has been taken cognizance of by the Court in M.H.Hoskot v. The State of Maharashtra(1979) 1 SCR 192:(AIR 1978 SC 1548), State of Madya Pradesh v. Darshana Devi(1979)3 SCR 184: (AIR 1979 SC 855) and Hussainara Khatoon v. Home Secretary, State of Bihar, Patna(AIR 1979 SC 1369) to lead to certain guidelines in the administration of justice. One of these is that when the accused is unable to engage a counsel owing to poverty or similar circumstance, the trial would be vitiated unless the state offers free legal aid for his defence to engage a lawyer whose engagement the accused does not object.338

In A.B.S.K.Sangh(Rly) v. Union of India339 also the Supreme Court held that the directive principles should serve the courts as a code of interpretation. Fundamental rights should, thus, be interpreted in the light

335. Supra note 296 at 627(Emphasis added).
336. Id. at 626-627(Emphasis added).
337. See supra note 303.
338. Supra note 296 at 627.
of the Directive Principles and the later should, whenever and wherever be possible, be read into the former. 340

Above all, there has been a definite shift in the stance adopted by the court by its decision in Maneka Gandhi 341 where the court gave new wings to article 21 and due to Maneka decision in recent cases, right to legal aid has become a fundamental right under article 21. It is submitted that once it has become a fundamental right, the writ of mandamus can be issued for its enforcement. Writ petition under article 32 should have been allowed by the court. It is unfortunate that in the era of judicial activism, the court showed such a passivist approach. Article 21, one of the gems of Magna Carta of India has been covered with dark clouds. It is a retrogressive step by the court to unfold the pages of past so quickly and obstruct the golden path of future. This decision is self-conflicting. On the one hand, the court agreed that it was difficult to hold that the substance of the American doctrine of "due process" had not still been infused into the conservative text of article 21, 342 on the other hand, access to justice, which is fairness, justness and reasonableness under article 21, through the grant of a competent lawyer, free movement of "due process" is openly denied.

It is heartening to note that Delhi High Court in Jackson v. Union of India, 343 heard the clarion call of the post internal emergency Supreme Court and joined the activist revolution of the judiciary when it allowed the writ of mandamus to enforce the directive enshrined in article 39-A of the Constitution. The court observed:

Legal aid is one of the directive principles of the Constitution. The object of this directive is that nobody should be denied access to courts....In this

340. Id. at 335.
341. Supra note 2.
342. Supra note 296 at 627. See infra Chapter IV.
circumstance of the present case the petitioners are entitled to the mandamus sought for by them.344

It is submitted that when the subordinate judiciary is respecting article 141, which makes the decisions of the Supreme Court binding on all the subordinate courts, the Apex Court itself would also not desecrate its own premises in future by not adopting contradictory approach unless it is the need of the time. Even if the Constitution makers made the directive principles of state policy enshrined in Part IV of the Constitution as unenforceable in the court of law, it is the duty of the court to enforce them where the life and liberty of any person is at stake. These principles are directives to the state to ensure social justice but social justice would cry in one corner if individual justice is not done by protecting life and liberty of the individuals and at the same time, procedure which is applied while doing justice would not be "fair, just and reasonable" but only arbitrary, oppressive and fanciful345 if collective justice is sacrificed at the altar of individual justice.

(iii) Equal Justice And Free Legal Aid:
A Plea For Abolition of Court Fee

Access to justice equally through legal aid movement has become part of the Magna Carta of India, the Constitution of India.346 But another requirement is that the justice should be cheap, handy, speedy and substantial. The maximum number of people are unable to approach the courts of justice and have to suffer because they cannot pay court fee.347 And thus right to equal justice is denied despite the provisions under Civil Procedure Code.348

344. Id. at 560.
345. It has been strictly prohibited in Maneka that procedure should not be arbitrary, oppressive and fanciful. See supra note 2.
346. Section 40 of Magna Carta of 1215 of England provided:"To no one will we refuse, or delay the right of justice..."
which make it obligatory on the state to provide legal aid. Krishna Iyer was rightly pointed out:

Legal care broadly understood and widely applied gives the vast masses a stake in the social order. Law is an equaliser, in the long run, but legal aid is a tranquiliser, in the short run. The summons of India to men engaged in the law is to put through 'Operation Legal Aid Destination Equal Justice'.

In order to reach the destination, that is, equal justice through equal access to courts, the practical step of abolition of court fees has to be taken. Many efforts have been made for this purpose. The judiciary also realised that the time was there when the courts must become the courts for the poor and the struggling masses of the country.

In State of Haryana v. Darshana Devi, a widow and a daughter claimed compensation for the killing of the sole bread-winner by a state transport bus, and the Haryana government, instead of acting on social justice and generously settling the claim, fought like a "cantankerous litigant" even by avoiding adjudication through the device of asking for court fee from the pathetic plaintiffs. The court held that it was distressing that the state

353. Id. at 856.
mindless of the mandate of equal justice to the indigent under the "Magna
Carta of our Republic" expressed in article 14 and stressed in article 39-A
of the Constitution, had behaved in such a manner. The court observed:

We should expand the jurisprudence of Access of Justice... and examine the constitutionalism of court-fee as a fact
of human rights highlighted in our constitution. If the
state should travesty this basic principle, in the teeth
of Articles 14 and 39-A, where an indigent widow is invol­
ved, a second look at its policy is overdue. The court
must give the benefit of doubt against levy of a price to
enter the temple of justice until one day the whole issue
of the validity of profit making through sale of civil
justice, disguised as court fee, is fully reviewed by this
court.

It is submitted that this case demonstrated with cruel clarity that
the social ethos has not imbibed the legal aid values woven into a funda­
mental right under article 21. Therefore, the human values conscious court
rightly pleaded that the judges should now try to review the validity of
the sale of justice by the State at rates too exorbitant for the poor, who
happen to be easy targets of the escalating lawlessness in law enforcement.

This perspective had been rightly projected by M. Cappelletti also:

The right of effective access to Justice has emerged with
the new social rights. Indeed, it is of paramount impor­
tance among these new rights since, clearly, the enjoyment
of traditional as well as new social rights presupposes
mechanisms for their effective protection. Such protection,
moreover, is best assured by a workable remedy within the
framework of the judicial system. Effective access to justice
can thus be seen as the most basic 'human right' - of a
system which purports to guarantee legal right.

In Central Coal Fields v. Jaiswal Coal Co. the Apex Court held
that this court was competent to adopt any procedure for achieving quick
justice and that every honest suitor must readily consent to a fair proce-

354. Ibid.
355. Ibid.
356. See supra note 201 at 392 and 406.
357. Quoted in supra note 352 at 856.
dure which will produce quick justice. Therefore, it was held that court fee should not affect the right to equality before law and access to justice. It was observed:

While it is deplorable that some speculators gamble in litigation using the strategem of pauperism, it is more deplorable that the culture of the magna carta notwithstanding the anglo-Indian forensic system - and currently free India's court process - should insist on payment of court fee on such profiteering scale without correlative expenditure on the administration of civil justice that the levies often smack of sale of justice in the Indian Republic where equality before the law is a guaranteed constitutional fundamental right and the legal system has been directed by Art. 39-A "to ensure that opportunities or securing justice are not denied to any citizen by reason of economic...disabilities".

It is submitted that article 14 and article 21 being not exclusive but mutually inclusive free and effective access to justice and equality before law are part of "fair, just and reasonable" procedure which is mandatory for protection of right to life and personal liberty and the post internal emergency. Supreme Court came forward with this assurance.

(iv) Legal Aid, Public Participation And Role of The Supreme Court

The post internal emergency Supreme Court made right to free legal aid a fundamental right under article 21. But this fundamental right can become a living reality only if people are vigilant about the protection of their life and liberty. One of the aspects of public vigilance is public participation in the legal aid movement.

In Rakesh Kaushik, the court, in order to make its jurisdiction

359. Id. at 2126.
360. Id. at 2125.
361. For relationship, see Chapter III.
362. Supra note 39.
viable, observed that free legal services to the prisoners programmes must be promoted by professional organisations recognized by the court such as, Free Legal Aid(Supreme Court)Society.\textsuperscript{363}

In Centre of Legal Research v. State of Kerala,\textsuperscript{364} the court observed:

It is absolutely essential that people should be involved, in the legal aid programme because the legal aid programme is not charity or bounty but it is social entitlement of the people and those in need of legal assistance cannot be looked upon as mere beneficiaries of the legal aid programme but they should be regarded as participants in it. If we want to secure people's participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organisation and social action groups.\textsuperscript{365}

Therefore, the court expressed the view that voluntary organisations and social action groups must be encouraged and supported by the state in operating the legal aid programme. The court clearly laid down that such voluntary organization or social action group would not be under the control or direction or supervision of the state government.\textsuperscript{366}

It is submitted that the Supreme Court has given a wisely and timely call to the public, the social organizations to come forward and join legal aid movement. The court, realising that these organizations would not be able to function freely if remained under political pressure, rightly favoured their total freedom from any governmental control.

In Centre of Legal Research v. State of Kerala,\textsuperscript{367} the Summit Court stated that the state could not be asked to encourage and support any and every voluntary organisation and social action groups in the country. The court preferred to lay down norms which should guide the state in lending its encouragement and support to voluntary organisations and social action

\textsuperscript{363} Id. at 1770.
\textsuperscript{364} A.I.R.1986 S.C.1322. This case was decided on 2.5.1986.
\textsuperscript{365} Id. at 1323.
\textsuperscript{366} Ibid.
\textsuperscript{367} A.I.R.1986 S.C.2195. This case was also decided on 2.5.1986.
groups in operating legal aid programmes and organising legal aid camps and Lok Adalats or Niti Melas. The court directed that the state government would, in compliance with its obligations under article 39-A of the constitution, extend its co-operation to only following categories of voluntary organisations and social action groups:

1. Voluntary organisations and social action groups which were recognized by the Committee for implementing Legal Aid Schemes set up by the Government of India or whose programmes were supported by way of grant or otherwise by the Union Government or the state government or the Committee for Implementing Legal Aid Schemes or the State Legal Aid and Advice Board.

2. Voluntary organisations and social action groups which organised legal aid camps or Lok Adalats or Niti Melas in conjunction with or with the support of the Committee for Implementing Legal Aid Schemes or State Legal Aid and Advice Board.

3. Voluntary organisations and social action groups which were recognized by the state government or the State Legal Aid and Advice Board on an application being made in that behalf.

In this case also, the court emphasised that such voluntary organisations and social action groups should not be under the control of the government. The court also pointed out that the legal aid programmes must "adopt a more dynamic posture and take within its sweep...Strategic legal aid programme consisting of promotion of legal literacy, organisation or legal aid camps, encouragement of public interest litigation and holding of Lok Adalats or Niti Melas for bringing about settlements of disputes..."
whether pending in courts or outside."\textsuperscript{370}

It is submitted that the court has rightly boasted the legal aid movement through public participation.

In Shri Sachidanand Pandey v. State of W.B.,\textsuperscript{371} the court expressed the view that the traditional litigation had to be tackled by other effective methods like decentralising the judicial system and entrusting, majority of traditional litigation to "village courts" and "Lok Adalats" without the usual populist stance and by a complete restructuring of the procedural law which is the villain in delaying disposal of cases.\textsuperscript{372}

It is submitted that this case is another step in ensuring speedy and cheap justice through other institutions like Lok Adalats.

The Lok Adalat movement has, in fact, origin in the old nyaya panch-svata system.\textsuperscript{373} Its purpose is to give quick, inexpensive and impartial justice.\textsuperscript{374} The complexity of procedure, high cost of litigation and inordinate delay which has become a feature of 'traditional judicial courts, is the reason for the birth of the institution of Lok Adalats. But these Lok Adalats are additional to law courts and not substitute for them.\textsuperscript{375}

In order to give authority of law to these Lok Adalats, the Parliament passed "Legal Services Authorities Act, 1987". The aim of the Act is to provide free and competent legal services to the weaker sections ensuring that opportunities for securing justice are not denied to any citizen by reason of economic disability.\textsuperscript{376}

\textsuperscript{370} Id. at 2196-2197.
\textsuperscript{371} A.I.R.1987 S.C.1109.
\textsuperscript{372} Id. at 1136.
\textsuperscript{373} See M.B.Shah and Lalita Shah,"Justice outside the Courts", Indian Express(Sunday edition)6, 6 May 1984.
\textsuperscript{374} See also "As Lok Adalat grows",Indian Express 6 March 1986 and H.D. Shourie, "Close look at Lok Adalats", The Tribune 4, 5 March 1986.
\textsuperscript{376} See Statement of Objects and Reasons of the Act.
It is submitted that at this juncture when the call is for speedy and cheap justice and equal access to justice, processual fairness demands that to solve this problem some effective method must be there. Public participation through social organisations or these Lok Adalats can become a boon in disguise. Krishna Iyer had also observed that any scheme of legal aid must summon the maximum technically competent and socially committed human resources because "the spiritual essence of the legal aid movement consists in investing law with a human soul".377

This aspect of processual justice, which is an integral part of article 21 of the Constitution can be very well summed up in Krishna Iyer's words:

Re-structuring the justice system, streamlining the justice process, re-orienting the social perspective of justices, re-educating the lawmen, are important aspects of the Legal Aid Operation.378

(D) An Appraisal

Prison justice and the legal aid jurisprudence came out of the embryonic stage in the post internal emergency era as a result of the activist role of the Supreme Court which gave impetus to the fulfilment of the requirement of "just, fair and reasonable procedure" of article 21 dealing with "life" and "personal liberty".

The judicial approach towards prison justice moved from the restricted view of internal emergency and pre-internal emergency period to the libertarian view of post internal emergency era. In Charles Sobraj and Sunil Fatra(I) the Supreme Court did not allow the Constitution to part company

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378. Supra note 1 at 24.
with the prisoners at prison gate because prison laws did not swallow up their fundamental rights, even though, in practice, these were restricted to some extent as a result of incarceration. Sunil Batra(I) rightly did not agree that any person became non person as a result of imprisonment. Even if some punishment was to be inflicted within the prison system, it is subject to fulfilment of procedural safeguards. The humanistic court was bent upon decriminalization and felt that "to torture legally through prison terms is to strengthen chronicity in criminality-progress in reverse gear."

The right jurisprudence adopted by the Summit Court could bear fruit only if it was fed by remedial jurisprudence. Therefore, Sunil Batra(II) widened the scope of the writ of habeas corpus by admitting only a letter as writ petition. Once a person is arrested, the first question arises whether he is detained legally. If he is not arrested legally, it would be the duty of the court to release him by the writ of habeas corpus. But it would be an anathema on the court not to protect the prisoner from the torture in the prison, even if his detention is legal. Therefore, the Apex Court rightly abandoned the laissez faire approach and forged new devices and made constitutional promises including the right to life and liberty meaningful not only for Haves but also for Have-nots. The entertainment of habeas corpus petition through a letter and for protecting from the brutal behaviour the prisons have become the part of court's procedure under the emerging constitutional jurisprudence particularly in post-internal emergency era. It is evident from the fact that telegram as writ petition was accepted in Kishore Singh and Prem Shankar and letter was admitted as writ petition in Sheela Barse. Even though, some objection was raised in Bandhua Mukti Morcha, it cannot be denied that when lawless law enforcement has run amuck, this is a boon in disguise for the small man. Now this very court has to decide in future.
whether to take back this karuna of the court or only to restrict it by "fair, just and reasonable" procedure.

The activist and reformist Supreme Court had evolved different components of fair procedure ensuring prison justice. Hoskot invoked the jurisdiction to deliver the copy of the judgement of the High Court to the accused and applied the principle of natural justice which is an integral part of "fair, just and reasonable" procedure under article 21.

The brutality of our prisons is a negation of humanism. It breeds more vices, pollutes in added ways and rarely aims at restoring human dignity. Therefore, the Summit Court condemned imposition of solitary confinement in Sunil Batra(I), Sunil Batra(II), Kishore Singh and Rakesh Kaushik. In Sunil Batra(I), the court forbade imposition of solitary confinement, it having dehumanising and degrading effect on the prisoners and it being a revolt against society's human essence. The court allowed it only in exceptional cases where the convict was of such a dangerous character that he must be segregated from other prisoners. But this method should not be adopted where safety could be maintained by posting more guards. It is an unhealthy impact of the unabated judicial activism, that once in 1978 in Sunil Batra(I), the Apex Court put a barricade on imposing solitary confinement, it had to cry in the same tune after two years in Sunil Batra(II) and again after a gap of one year in Kishore Singh and Rakesh Kaushik when the court held that human dignity should not be sacrificed at the altar of mere apprehensions of jail authorities and wherever solitary confinement was to be imposed, it must be in consonance with fair procedure.

Human dignity is the dear value of the Constitution but the torturous treatment in the jail converts it into a paper reality only. The court banned putting bar fetters and handcuffs in Sunil Batra(I), Sunil Batra(II), Prem

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380. Id. at 98.
Shankar, Kishore Singh, Kadra Pehadiya holding that it was an inhuman act which should not be resorted to unless no other alternative was there to prevent the escape of the prisoner and that is also after following procedural safeguards. It is again shocking to remark that in spite of the ruling of Sunil Batra(I) in 1978, cases of putting prisoners in bar fetters were brought before the court. In Aeltemesh Reip, the court had to issue direction again against handcuffing.

The human rights protector Supreme Court sensitized the prison environment and secured the human existence out of zoological existence in prisons by protecting the prisoners from other tortures and excesses in the court. In Charles Sobraj and Sunil Batra(II) the Summit Court directed not to keep undertrials and convicts together in the prison because it offended fairness in article 21 which ensured life and liberty. In Sunil Batra(II), the Apex Court came for the rescue of the young inmates of the jail who were sexually exploited by the adult prisoners. In Sunil Batra(II) and Mohammad Giasuddin, the court assured congenial labour in the prison to the prisoners and saved them from harsh jobs. Since life and liberty of the prisoners was at stake, the court rightly became life giver for them because if their life and liberty was restricted for the purpose which had no relevance, the judiciary must step in.

Women are our sacred source and children our line of immortality. These vulnerable categories need specialised and sensitive measures of protection through the law.\textsuperscript{381} But the "women's prisons, rescue homes after-care institutions do not have the healing touch or winsome sympathy".\textsuperscript{382} And the highest court knitted the human thread of prison jurisprudence to give special protection to women prisoners in Sheela Barse. Since 1978, they

\textsuperscript{381} Id. at 102.
\textsuperscript{382} Id. at 103.
continued to climb up the steps of activism in the sphere of prisoners' rights and this song of 1983 had no new tune. The question is how long the judiciary will continue imposing faith in the authorities?

In 1986 and 1987, in Sheela Barse cases, the court faced the problem of child prisoners. The court held that the children should not be confined to jails because incarceration in jail had dehumanising effect on the children. Therefore, they should be sent to children homes, remand homes and observation homes where they should be properly looked after and they should be given facilities and opportunities to develop in a healthy manner and in conditions of freedom and dignity. The court gave direction to all the states, which have Children Acts, to enforce those acts. At the same time, the court favoured the enactment of Uniform Children Act for whole of the country. It is heartening that the efforts of the judiciary bore fruit and the legislature attending to the clarion call of the judiciary passed the Juvenile Justice Act, 1986. The court had always vested faith in the executive and subordinate judiciary that they would also join hands with it. But this case gave a clear dismaying picture of indolent and negligent attitude of the executive as well as the subordinate judiciary. It is shameful that the subordinate judiciary can desecrate the sacred document, the Constitution by disobeying the orders of the court which is highest in the pyramid of justice.

As the children are the future of our country, the court directed for the creation of juvenile courts manned by specially trained judicial officers for speedy and effective trial of cases of children. The court rightly directed for the overhauling of the juvenile justice system. In Vikram Deo Singh Tomar, the Supreme Court focussed on the constitutional protection
to women and children and directed to improve the conditions of Patna Care Home. Thus, the court saved itself from anathema by protecting motherhood, childhood and youth from the exploitation and dehumanising effect of the prisons.

The Apex Court not only protected the prisoners from physical torture in the prisons but also from the mental torture. This court rightly gave momentus to the prisoners' right to meet family and friends in Sunil Patra(II) and Francis Coralie Mullin, to have interview with the legal adviser in Francis Coralie and to give interview to the Press in Prabha Dutt. But while recognizing these rights, the court never went out of the track to give unbound liberty in these areas. It rightly permitted this right within the limits of the jail regulations but subject to the condition that any restriction on such right must be "just, fair and reasonable" under article 21.

Now the authorities have permitted the prisoners even to donate organs and, thus, have nourished article 21. The purpose of punishment by way of imprisonment is to awaken human consciousness which is at the core of the human heart and if any person, undergoing imprisonment, repents and wants to atone by donating the organs, he must be allowed to do so. Satwant Singh, convicted in Indira Gandhi murder case, has donated his eyes and other organs of the body.

The Summit Court recognized right to bail as a part of processual justice and, thus, expanded the ambit of article 21. The reformist court wants to give the prisoner proper time and facility to prepare his defence. Above all, during the time the person is bailed out, he would be away from the dehumanizing effect of the prison and his even limited socialization with his family and friends would be humanising factor towards the reformation of the prisoner.
The prisoners should be paid the wages for working in the prisons which should be equivalent to what is paid to a free man. In Mohammad Giasuddin, the court directed the state to fix reasonable wages for the prisoners. And the Kerala High Court showed an immediate reaction by fixing the rate of wages.

Hussainara cases brought the dismaying and shocking picture of the undertrials languishing in jails for offences which perhaps they might ultimately be found not to have committed. It is a crying shame that the Supreme Court had created a new vista under article 21 but it did not mean anything to the executive and the subordinate judiciary. It is a travesty of justice that these poor souls became forgotten specimens of humanity. The court, while evoking "fair, just and reasonable" procedure under article 21 as interpreted by Maneka rightly held that "procedure established by law" for depriving a person of his "life and personal liberty" could not be "just, fair and reasonable" unless that procedure ensured a speedy trial for determination of the guilt of such person. Thus, the court made "speedy trial" an integral part of fundamental right to "life" and "personal liberty" under article 21. And the court ordered for the release of undertrials. The court admonished the state by refusing to permit it to deny this constitutional right of speedy trial to the accused on the ground that the state had no adequate financial resources to incur necessary expenditure needed for improving the administrative and judicial apparatus in order to ensure speedy trial.

The judicial decisions in Hussainara cases proved to be a Magna Carta to the 1,20,000 undertrials languishing in jails for years without trial. They are thunderbolt of judicial condemnation of the indifferent attitude of the judiciary and the lethargic and indolent behaviour of the government.

But despite Hussainara, the Court in Mantoo Majumdar, Khatri, Kadra Pehadiya, Sant Bir had to release more undertrials. In Champalal Shah, the
court developed a "prejudice test" for quashing the conviction of the accused, that is, the conviction would be quashed only if the accused was found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself otherwise there would be no justification to quash the conviction on the ground of delayed trial only. But this "prejudice test" would not serve the purpose as the court was entitled to take into consideration whether the delay was unintentional caused by over-crowding of the court. Thus, even if the defendant showed the prejudice, the state was entitled to take the defence of over-crowding of the court. Then where lies the right to "speedy trial"?

In Rehubir Singh, the court dealt with another aspect of "speedy trial" and held that it would depend upon the facts and circumstances of each case whether the delay in police investigation would infringe the right to speedy trial. The court also laid down certain guidelines, like, was there delay? Was it reasonable? Was it due to the fault of the accused? Did the accused have the ability and opportunity to assert his right to a speedy trial etc.? The full bench of Patna High Court also gave remarkable decisions on "speedy trial" and nourished article 21. It can be concluded from these cases that if right to "speedy trial" has to be made a living reality, there is a need of organic change in the government departments, police stations, trial courts and prisons.

When prison trauma prevails, prison justice must invigilate and the court must broaden its jurisdiction to take reformative measures because the jurisprudence cannot slumber when the prisons have become torture homes. The purpose of the punishment is to reform and rehabilitate rather than to avenge. Barnard Shaw rightly stated: "If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And, men are
not improved by injuries". Therefore, the court directed for reformation of prisoners through rehabilitation of prison laws and reorientation of prison staff in Sunil Batra(I). Other cases also talk of making these prisons heaven so that prisoners should come out becoming angels. No doubt, the Indian human has constant companion, the court armed with the Constitution but there is a need of some other agency like Ombudsman to receive complaints and act as the channel of communication with the court.

It is shocking that in spite of these judgments, the activities in the prison and by the police show unhealthy impact of these decisions.

The activist movement of the Supreme Court continued when it found that for the poor and destitute the Supreme Court or even a High Court was as inaccessible as a five star Hotel and it had reduced the Constitution to a paper promise only. It articulated the rights of the small man, which had so far remained unattended, and facilitated equal access to justice by making right to free legal aid a fundamental right under article 21.

In the pre internal emergency period, the court in Janardhan Reddy and Tara Singh did not open constitutional umbrella to give shade of legal aid to the poor. The judicial approach changed in the post internal emergency era especially in the post Maneka period. Hoskot, Hussainara spoke for adequate and comprehensive legal aid programme after recognizing right to free legal aid as an essential ingredient of "fair, just and reasonable" procedure under article 21. Khatri, following these footsteps, again made the judiciary as well as the executive conscience of their duties. It warned the state that life and liberty of the people could not be sacrificed merely because the state had financial problems. It also made it obligatory on the judicial officers to inform the accused, if he was poor or otherwise incapable of defending himself, that he was entitled to have free legal assistance. It was not essential that the accused had only to make application for free legal

383. Quoted in id. at 83.
aid. Sheela Barse even gave a clarion call to the lawyers also to help these sections of humanity who are poor and who do not know what to do and where to go when they are imprisoned. The court rightly encouraged the lawyers because they are as much instrument of the processual justice as the legislature, executive and judiciary are. And above all this is the demand of "fair, just and reasonable" procedure by which life and liberty has to be protected. Suk Das was an echo of Khatri.

Another aspect of "fair, just and reasonable procedure" is that the lawyer provided to the accused should be of equal competence as that of the state. Kadra Pehadiya urged for providing a fairly competent lawyer. Ranjan Dwivedi also by its interim order increased the sum to be paid to the lawyer provided at state's cost. Thus, processual justice cannot be achieved unless there is processual fairness, which is possible only if equally competent lawyer is provided to the accused by the state. Otherwise, right to legal aid, which has been included in the Constitutional right under article 21, would become only a paper parchment.

In spite of the fact that article 39-A has been considered as interpretative tool of article 21, and right to legal aid has become part of right to life and personal liberty under article 21, the court in Ranjan Dwivedi did not issue mandamus for the enforcement of article 39-A. It is unfortunate that in the era of judicial activism, the court gave such a passivist expression. This decision is self-conflicting. On the one hand, the court admitted that there had been tremendous change after the inclusion of article 39-A and recognized its relationship with article 21 as prescribed by the previous decisions of this court only, on the other hand, it took such a retrogressive step. On the one hand, it agreed that American "due process" had been included in the Indian Constitution by this court, on the other hand, it obstructed the way of due "process" by not allowing mandamus to be issued.
to the state for the grant of competent lawyer. It is heartening that Delhi High Court joined the activist movement and issued the writ of mandamus to enforce article 39-A and thus gave full respect to article 141 of the Constitution.

Darshna Devi demonstrated with cruel clarity that the social ethos had not imbibed the legal aid values woven into a fundamental right under article 21. Therefore, in this case and in Central Coal Fields the Apex Court voted for the abolition of court fee.

At this juncture, when the call is for speedy and cheap justice and equal access to justice, processual fairness demands that to solve this problem some effective method must be there. One of the effective methods is public participation in legal aid movement. In Rakesh Kaushik, the court favoured the promotion of legal aid movement through professional organizations. In Central Legal Research, the court gave boast to voluntary organizations, social action groups and lok adalats. Shri Sachidanand Pandey also joined hands by voting for justice through Lok adalats. This is a wise step taken by the judiciary because re-structuring of the judicial system is an important aspect of the legal aid movement.

It is finally submitted that this judicial activism shows that the Summit Court has succeeded in bringing out nectar out of the blooming article 21 but it could not awaken the executive and subordinate judiciary to distribute it among masses so that it should become panacea for their suffering. But the Apex Court is bound to trustingly leave this task to them because it cannot also, in the name of judicial activism, cross the boundaries of its provicne and trespass in the province of other organs of the state.