CHAPTER VI

EXPANDING HORIZONS OF RIGHT TO LIFE AND PERSONAL LIBERTY
AND JUDICIAL ACTIVISM

Jawaharlal Nehru once said: ‘There should not be any lag between the development of law and the needs of a changing society. There should be the closest possible cooperation between jurists and economists or politicians whose object is to study the changing social fabric.’

Social life is a necessary cradle for human growth. One cannot concern his personhood without reference to his role as citizen and participant in a common life. Further, his role and rights as a citizen is governed by the governmental power. And the relationship between individual rights and governmental powers is to be gauged by the nature and role of the state. As of now, the modern state, which includes India, exist to enable men to enforce their basic human rights. The state’s protective function consists in upholding the rule of law norms, in providing a dependable legal procedure for determination of rights and obligations and in extending effective remedies for the enforcement of human rights.

Learned Hand has very succinctly described human life in the following words, “Man’s life like a piece of tapestry is made up of many strands, which interwoven, make a pattern; to separate a single one and look at it alone not only destroys the whole but gives the strand itself a false value.” That means that right to life does not mean that a man is allowed to breathe and stay alive. It involves a whole gamut of basic interests like dignified life (which does not end at the prison gate), liberty, pursuit of happiness and economic security. The legislatures laid down laws for the same.

---

1 Quoted from Nehru’s speech at the annual conference of the Indian branch of the International Law Association, New Delhi, 31 March 1951. From The Hindustan Times and National Herald, 1 April 1951.
The earlier notion or the view that was generally prevalent was that legislature made law, judges interpret it and the executive executes it. Thus, Francis Bacon in one of his essays remarked:4

Judges ought to remember that their office is *jus dicere* and not *jus dare*: to interpret law, and not to make law or give law. Else will it be like the authority claimed by the Church of Rome.

This notion was further reinforced by the legal positivism of Bentham, Dicey and Austin. Law, they held, was found in rules. Rules appeared in written constitutions, statutes and the like. The role of a judge was one of verbal analysis and application. They were the applicators not the creators.

However, this view was challenged in the nineteenth century. To a great extent the so-called ‘legal realists’ were responsible for this change in view. Rosoe Pound, his pupil in Australia Julius Stone, and their successors, taught the unsettling truth that law expressed in words, is often uncertain and ambiguous. And here the judge’s role as a creator comes into sharp focus to remove this uncertainty and ambiguity. But this is not to mean that judges have total freedom. On the contrary, a judge must operate within a complex world of rules, mostly made by others. The judicial function is, therefore, always tethered to a rule of principle of law.

The grafting onto the existing law the notions of fundamental human rights has introduced a new, and legitimate stimulus to creativity in judicial law making. And Indian judges are no behind. The constitutional creative genius of V.R.Krishna Iyer, J., found its expression in the genesis of liberal expansive interpretation of *locus standi* in 1976 in *Mumbai Kamgar Sabha* case.5 With emphasis on justice for the common man, P.N.Bhagwati, J., (as he then was) in *Judges Transfer Case*,6 five years later, started a

6 *S.P.Gupta v. Union of India*, AIR 1982 SC 149.
judicial movement in that direction. Ever since, there is no looking back and in the last decade, it reached a stage of hyper activism.  

The Indian Supreme Court took up the cudgels of judicial activism for the sake of upholding the rights of the poor and socially disadvantaged people. Since they do not have the money or resources to defend themselves by able lawyers, only the Supreme Court could ameliorate their condition. Under the umbrella of judicial activism, article 21 of the Constitution, which guaranteed ‘Right to life and personal liberty’, received the biggest boost. A strict interpretation would mean that a person would not be deprived of his life and personal liberty except by proper procedure established by law, which would further entail that if a proper procedure is followed a person’s life and personal liberty could be taken away and he be left to live a rotten life in the prison. But that was not to be. Ever since, Maneka Gandhi, Supreme Court not only has been giving wider meaning to the words ‘personal liberty’ but has also brought in the concept of procedural due process under the words ‘procedure established by law’. In Maneka Gandhi the Apex Court laid down a seminal principle of constitutional interpretation. It has now come to be firmly established that there cannot be a mere textual construction of the words of the Constitution. Those words are pregnant with meanings that unfold when situations arise.

Thereafter Indian Supreme Court has used social action litigation mainly as a counter-majoritarian check on democracy for the support of unpopular causes and the protection of politically powerful minorities. Bonded labour, prison inmates, accused criminals etc. belonged to this category.

---

8 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
9 Ibid.
10 S.P.Sathe, Judicial Activism in India 19 (2002).
Hence it was held in *Francis Coralie Mullin v. Union of India*\(^ {11} \) by Bhagwati, J., (as he then was) that:

The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the wealth of the human person.

The right to life and personal liberty became a canvas for various other human rights some of which in the realm of criminal justice are taken up for discussion:

1. Right to free legal aid
2. Right to bail
3. Right against hand cuffing
4. Right against solitary confinement
5. Right to speedy trial
6. Right against inhuman treatment
7. Right against delay in execution of death sentence.

### A. Right to Free Legal Aid

Legal aid in the initial stage prior to independence was a concept that was limited to recognizing the need of an accused facing trial for an offence punishable with death sentence. In such cases he had to be defended at state expense. This was not a statutory right and depended on the discretion of the judge trying the case. However, after adoption of the Constitution, article 22(1) directs that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. Although section 340 of the Cr.P.C. 1898 gave every arrested person the right to be

\(^{11} \) AIR 1981 SC 746.
defended by a pleader, it was for the first time that under section 304\textsuperscript{12} of the Cr.P.C. 1973 that a provision was introduced recognizing the right of an indigent accused to legal representation at state expense in the sessions court. Under section 304(2) Cr.P.C., the High Courts are required to make rules regarding the selection of lawyers and fees payable to them for such work.

To understand the logic behind right to legal aid one has to traverse the path of article 14 and article 21 of the Constitution. The denial of legal assistance to a person on account of economic and social compulsions would be violation of article 14 – right to equality. Further “free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.”\textsuperscript{13} According to the Law Commission of India:\textsuperscript{14}

Equality before the law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the court and of presenting their cases to the court. But access to the courts is by law made dependent on the court fees, and the assistance of skilled lawyers as in most cases necessary for the proper presentation of a party’s case in a court of law. Unless some provision is made for assisting the poor man for the payment of court fees and lawyer’s fees and other incidental costs of litigation, he is denied equality of opportunity to seek justice.

Hence the concept of providing legal aid is of fundamental nature and not merely a procedural problem. However, when the Constitution was amended in 1976, the state

\textsuperscript{12} The relevant part of s.304 Cr.P.C. provided : “(1) where, in a trial before the court of sessions, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defense at the state expense.”

\textsuperscript{13} Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401.

was only prepared to recognize the right to free legal aid as a non-enforceable Directive Principle of State Policy, by inserting article 39-A.\textsuperscript{15} The Indian judiciary, however, has been efficiently using article 39-A to define the scope and content of right to legal aid but otherwise relying on article 21 of the Constitution as including the right to legal assistance at state expense to satisfying the equality clause of article 14. Since access to various facilities, services and opportunities are no more pegged to social stratifications and immutable personal characteristics, the doctrine of classification and reasonableness have to conform to these standards, and cannot obstruct the social justice orientation.\textsuperscript{16}

It is thus clear that legal aid must be recognized as a dynamic concept of socio-economic justice and rule of law. The National Conference on Legal Aid\textsuperscript{17} drew wide participation and became a launching pad for legal aid programmes in India. The Government of Gujarat constituted a Committee under the chairmanship of Justice P.N. Bhagwati.\textsuperscript{18} The Committee recommended that legal advise was not to be limited to consultation in a technical sense but should lead to negotiated compromises or settlements, drafting of documents as well as administrative assistance. The Committee further recommended that legal aid bodies should be autonomous and free from government control.

The Central Government appointed the first Expert Committee on Legal Aid in 1972 under the chairmanship of Justice Krishna Iyer. The Committee submitted a report titled 'Processual Justice to the Poor' wherein wide ranging proposals for overhauling the system of administration of justice with focus on legal services to the poor was recommended. An entire chapter of the Report\textsuperscript{19} was devoted to legal aid in criminal proceedings. It categorically rejected the applicability of the \textit{prima facie} test to criminal proceedings.\textsuperscript{20} It was strongly recommended that legal aid must be available at the very

\textsuperscript{15} Art. 39-A enjoins that the state shall secure that the operation of legal system promotes justice, on a basis of 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.


\textsuperscript{17} Organized by the Centre for the Study of Law and Society of the Institute of Constitutional and Parliamentary Studies, held in March 1970.

\textsuperscript{18} Notification of the Government of Gujarat under Government Resolution Legal Department No. LAC-1070-D.Dated 22 June 1970.

\textsuperscript{19} 1973 Report at 69.

\textsuperscript{20} Id. at 71.
first stage of interrogation by the police. And thereby also at each of the stage prior to commencement of the trial there has to be a network of legal aid institutions at the national and state levels with complete autonomy from government interference.

Meanwhile the states also geared up and formulated certain schemes. Keeping in view that the 1973 Report and the various state reports, the Government of India appointed a two member “Juridicare Committee” with Justice P.N.Bhagwati as chairman and Justice Krishna Iyer as member. The idea was to introduce an adequate legal service in all states of India on a uniform basis. It submitted its Report in 1977 and significantly pointed out a lacuna in the traditional concept of legal aid that one to one relationship between a lawyer and client, can never provide effective and permanent legal services to the weaker classes qua other classes. The need of the hour was to spread awareness and consciousness among the poor and ignorant about their rights and benefits and voluntary organizations, social action groups, and legal aid clinics in universities and law-schools can play a major role in achieving this.

Instead of acting on the 1976 Report the Central Government (which was different from the one that set the Committee) set up CILAS – Committee for Implementing Legal Aid Scheme. CILAS formulated a Model scheme for legal aid and circulated it to the states. With its emphasis on civil legal aid and lok adalats, CILAS did not add much to what legal services already meant in the criminal justice sphere. In fact, by not specifically mentioning those in custody as being eligible to legal aid irrespective of means, CILAS perhaps sought to exclude criminal legal aid from its purview altogether.

Next came the Legal Services Authorities Act, 1987 (LSSA). A need was felt to have statutory legal service authorities at various levels to further the government’s commitment under article 39-A of the Constitution. The working of CILAS was found to be deficient and lacking in key areas. The Government of India as a sequel to this enacted

---

21 Id. at 76.
22 Tamil Nadu, Madhya Pradesh and Rajasthan.
24 S. Muralidhar, Law, Poverty and Legal Aid 110 (2004).
the Legal Service Authorities Act in 1987 which was enforced with effect from November 9, 1995. Under this Act, the National Legal Services Authority (NALSA) was set up as Central Authority at the apex. Since then, legal aid agencies are being set up at States and Union Territories levels, District levels and Taluk levels all over the country at the moment. The implementation of Legal Aid Programmes under the Legal Services Authorities Act, 1987, as amended, is the responsibility of the Central Authority constituted under section 3 of the Act. The Chief Justice of India is the Patron-in-Chief. The Government has been providing free legal aid services to the poor in two segments. The first segment relates to court oriented legal aid and the second segment covers preventive or strategic legal aid. Both the legal aids are provided under the aegis of the National Legal Services Authority, State Legal Services Authorities, District Legal Services Authorities, Supreme Court, High Court and Taluka Legal Services Committees. Under the preventive or strategic legal aid, legal aid has been provided on promotion of legal literacy, setting up of legal aid clinics in universities and law colleges, training of para-legals and holding of legal aid camps, Lok Adalats and public interest litigation.26 (For Legal Aid: High Court of Himachal Pradesh Legal Service Committee see Annexure-VI).

If a petition is received from the jail or in any other criminal matter, and if the accused is unrepresented, then an advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused.27

26 A person is entitled to free legal aid, if he/she falls within one or more of the following categories: - He/she belongs to the poor section of the society having annual income of less than Rs. 18,000/- per annum, or - he/she belongs to Scheduled Caste or Scheduled Tribe, or - he/she is a victim of natural calamity, or - he/she is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or - he/she is in custody including custody in protective home, free legal aid to such persons is provided by the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an advocate for preparing and arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her. Persons belonging to middle income group i.e. with income above Rs. 18,000/- but under Rs. 1,20,000/- per annum are eligible to get legal aid from the Supreme Court Middle Income Group Legal Aid Society, on nominal payments.
27 In civil matters also the Court can appoint an advocate as amicus curiae if it thinks it necessary in case of an unrepresented party. The Court can also appoint amicus curiae in any matter of general public
The implementation of legal aid programmes under the Legal Service Authorities Act is
the responsibility of Central Authority constituted under section 3 of the Act. As the
authorities were expected to be manned by officers and staff either borrowed from the
government or given the status of government servant, the main concern remained
regarding their terms and conditions of service. So rather the beneficiaries being the
main concern and receivers of budget allocated, the institution became prime. Further,
the scheme of the Act envisaged co-opting the judiciary into the administration of legal
aid hence a judge already bogged down with judicial and administrative responsibilities
has now to administer legal aid schemes as well.

One major achievement of LSAA has been organizing of lok adalats. No appeal lies
from the decisions of lok adalats that record a compromise. It is empowered to even
dispose criminal cases which are compoundable. However lok adalats have not been
able to fulfil the expectation because of its limited capacity.

Judicial response

The moot point whether article 22(1) of the Constitution envisages the right of an accused
to be supplied with a lawyer by the state was discussed in Ranjan Dwivedi v. Union of
India. The Court said:

The traditional view expressed by this court on the
interpretation of Article 22(1) of the Constitution in
Janardhan Reddy v. State of Hyderabad (AIR 1951 SC

28 S. 3. The Central Authority consist of:
   a) The Chief Justice of India who shall be the Patron-in-Chief.
   b) A serving or retired judge of the Supreme Court, nominated by the President, in consultation with
      the Chief Justice of India, who shall be the Executive Chairman; and
   c) Such other members, in possession of such experience and qualifications as may be prescribed and
      nominated by the Central Government.
29 S. 2(1)(d) LSAA defines ‘Lok adalat’ to mean a Lok adalat organized under Chapter VI LSAA. A Lok
adalat is intended to be a mechanism to encourage a consensual resolution of a dispute.
30 Ranjan Dwivedi v. Union of India, AIR 1983 SC 624.
31 Ibid.
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 does not guarantee an absolute right to be supplied with a lawyer by the state, has now undergone a change by the introduction of this Directive Principle of State Policy.

When the accused is unable to engage a counsel owing to poverty or similar circumstances, 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.

Hence Ranjan Dwividi freed article 22(1) from the shackles of Janardhan Reddy\(^32\) and Tara Singh\(^33\) wherein a very restricted view of the right to legal representation was taken by the Supreme Court and was held that the right of an accused does not extend to provide him with a lawyer by the state or by the police or by the Magistrate. Keeping up this narrow view the court was of the view that legal aid was “a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one... The only duty cast on the magistrate is to afford him the necessary opportunity.”\(^34\)

Hussainara Khatoon v. Home Secretary\(^35\) was a landmark case wherein it was laid down by the Apex Court in clear terms that every Magistrate or the Session Judge before whom an accused appears is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state, unless he is not willing to take advantage of it. And every state has to make provisions for such free legal aid services if it would result in a sentence of imprisonment and is of such nature that the circumstance of the

\(^{33}\) Tara Singh v. State, AIR 1951 SC 441.
\(^{34}\) Tara Singh, id at 443. However, in Bashira v. State of U.P. their was a slight shift in attitude when the Supreme Court interpreted the High Court Rules regarding the appointment of amicus curiae in a criminal trial of a serious kind as being mandatory in nature.
\(^{35}\) AIR 1979 SC 1377.
case and the needs of social justice require that he should be given free legal representation.

The things have since turned for the better. The court reiterated in *Suk Dass v. Union Territory of Arunachal* that free legal aid at state cost is a fundamental right of a person accused of an offence and it is the duty of the judge to inform the accused that he is entitled to the services of a lawyer in the court. The Supreme Court reversed the decision of the High Court which had held that the trial was not vitiated for want of legal aid since no application for legal aid was made by the appellant, and observed: "It would... make a mockery of legal aid if it were to be left to the poor ignorant and illiterate accused to ask for free legal services."38

Keeping up the spirit of judicial activism the courts have categorically stated that justice demands that legal aid which is provided by the state must match that of the special public prosecutor. Krishna Iyer, J., in *R.M.Warawa v. State of Gujarat* observed:39

> 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 patronizing gestures to raw entrants to the Bar.

Legal aid programmes are not a benefit scheme for briefless lawyers but a provision of assistance through counsel and of other facilities for effective defence.40 In *Ranjan Dwivedi*41 it was held that it was impossible for a person facing a session trial on a capital charge to get a competent professional lawyer under High Court Rules which stipulated a payment of twenty four rupees per day to a lawyer appearing as *amicus curiae* in the

---

36 Supra note 13.
37 Id. at 406
38 Id. at 407-408.
39 AIR 1974 SC 1134 at 1143-44.
41 Supra note 30.
Court of Session. The Court by its interim order directed the State to pay rupees five hundred per day to the senior counsel and rupees two hundred and fifty per day to the junior counsel for representing the petitioner.\textsuperscript{42}

The legal position in regard to the right of undertrials to legal aid could be summed up thus: \textsuperscript{43}

1) The state is 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 is first produced before the magistrate as also when he is remanded from time to time.\textsuperscript{44}

2) It is the duty of every judge of a criminal court before whom such prisoner is produced to inform the undertrial prisoner that he is entitled to be released on bail and to legal aid.

3) If an accused is not so informed the trial would be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the accused is liable to be set aside.

4) Release on personal bond of indigent undertrials could be resorted to in many cases where there is no substantial risk of non-appearance of the accused.

5) An accused who is assigned a counsel at state expense may not have a choice of counsel but the state is expected to assign a competent lawyer. And if the accused remains unrepresented during the trial, the trial would stand vitiated.

B. Right to Bail

Bail means "to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day at a place certain ... because the party arrested of imprisoned is delivered into the hands of those who laid themselves or become bail for his due

\textsuperscript{42} \textit{Id.} at 625-26.

\textsuperscript{43} Supra note 24 at 207-208

\textsuperscript{44} There appears to be a conflict of decisions on whether an accused is entitled to free legal aid at the stage of recording his confession by the Magistrate under section 164 of Cr.P.C.
appearance when required, in order that he may be safely protected from prison.45 There
is no definition of bail in the Criminal Procedure Code, although the terms ‘bailable
offence’ and ‘non-bailable offence’ have been defined in section 2(a) Cr.P.C. Further
sections 436, 437, 438 alongwith sections 50(2) and 167 of the Cr.P.C. provide for the
procedure for release on bail.
• Bail on production of proper surety/bond, is a matter of right in case of bailable
offences.46
• In non bailable cases, the arrested person or his counsel can move the appropriate
court for bail, which may be granted or denied keeping in view the provisions and the
facts and circumstances of the case.

The right to bail is concomitant of the accusatorial system, which favours a bail system
that ordinarily enables a person to stay out of jail until a trial has found him/her guilty.47
The principal aim of bail is removal of restrictive and punitive consequences of pre-trial
detention of an accused. This is achieved by delivering him to the custody of his surety
who may be a third party. Such custody may also be given to one’s own self by way of
his furnishing a bond that on demand made upon him to attend, he will readily attend the
court. It is an obligation of law enforcement agencies that if a criminal process is
initiated by the alleged action of a wrongdoer, it is to be accomplished. Therefore, this
aspect assumes substantial significance in the operation of bail. Accordingly, the grant of
bail for release may be allowed with appropriate conditions, which may resultantly cover
three types of situations namely, (a) where the custody is deemed safe with the accused
himself, (b) where it is delivered to the surety, (c) where it may be delivered to the state
for safe custody. The mechanism of bail is thus meant for manoeuvring a best
arrangement for custodial control of the accused in the system. The bail is a matter of
right for safe keeping of the accused to answer a charge. In order to implement this right,
the mechanism of bail has been designed to deliver the custody of the accused either to

46 S. 436 Cr.P.C.
47 Mohammad Ghouse, “The Pre-trial Criminal Process and the Supreme Court” Vol. 13 Indian Bar Review
22 (1986).
self, to a surety, or to the state, but in each case the accused is to be assured of the beneficial enjoyment of regulated freedom.\textsuperscript{48}

Speaking on the issue of bail in \textit{Gudikanti Narasimhula v. Public Prosecutor},\textsuperscript{49} Krishna Iyer, J., remarked that the issues of bail:

\begin{quote}
[B]elong to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process.
\end{quote}

\textit{Hussainara Khatoon}\textsuperscript{50} has contributed substantially to the right to bail to be read under article 21 of the Constitution. Since majority of the accused are not able to furnish bonds for bail the Apex Court held that “it would be more consonant with the ethos of our Constitution that instead of risk of financial loss the system should take into consideration other relevant factors such as family ties, roots in the community, job security, membership of stable organisations etc.” The court emphasized that these ought to be the determinative factors and laid down that primarily the pre-trial release should be obtained on ‘personal bond without monetary obligation.’\textsuperscript{51}

It has been held that a person who is detained shall be speedily tried which comes under the preview of procedure established by law. It is inhuman to let him languish in jail for want of expeditious disposal of cases due to heavy backlog of cases or understaffing of

\textsuperscript{49} AIR 1978 SC 429 at 430.
\textsuperscript{50} 1979 Cr.LJ 1036 (SC).
\textsuperscript{51} \textit{Ibid}.
judiciary. And if speedy trial for determination of guilt or innocence cannot be granted the state cannot let an accused languish in jail. He must necessarily be enlarged on bail.\(^{52}\)

The rule is that a person is not to be kept even for a moment longer than what is required under the law. A scrutiny of recent judicial *dicta* reveals that the consideration of delay in the proceedings has indeed influenced the courts in granting bail in many cases.\(^{53}\)

However, these are just few instances. In practical reality though right to bail is read into article 21 of the Constitution, personal liberty as operating within the domain of the criminal justice system remains the cherished prerogative of the rich.

The travails of illegal detainees languishing in prisons, who were uninformed, or too poor to avail of their right to bail under section 167 Cr. P.C. was brought to light in letters written to Bhagwati, J., by the Hazaribagh Free Legal Aid Committee in *Veena Sethi v. State of Bihar*\(^{54}\) and *Sant Bir v. State of Bihar*.\(^{55}\) The Court recognized the inequitable operation of the law and condemned it:

> The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of status quo... but it exists also for the poor and the downtrodden... and it is the solemn duty of the Court to protect and uphold the basic human rights of the weaker sections of society.

The provision for anticipatory bail was not present in the original code. It was only done after the 41\(^{st}\) Report of the Law Commission.\(^{56}\) In *Balchand Jain v. State of M.P.*\(^{57}\) the court held that manifestly there is no question of bail unless there is arrest and so it is

\(^{52}\) 1992 Cr.LJ 164.  
\(^{54}\) (1982) 2 SCC 583.  
\(^{56}\) Law Commission of India, 41\(^{st}\) Report, 1969.  
\(^{57}\) AIR 1977 SC 366.
only after the arrest that such an order comes into play. So section 438 does not provide for anticipatory bail, but a mere order, in anticipation of bail, that in event of such an arrest the person shall be released on bail. Bail under section 438 is anticipatory to the extent that it gives pre-arrest security that there would be no detention after arrest.

Section 438, at the very outset is based on a clear nexus of personal liberty of the individual with the protection granted under article 21 of the Constitution. The law presumes an accused to be innocent till the guilt is proved and this is important component of the right to fair trial which is an essential ingredient of right to life and personal liberty enshrined in article 21.

It was further held in Hitendra Vishnu Thakur v. State of Maharashtra\textsuperscript{58} that:

There is yet another obligation which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application on that behalf. So once the period for filing the charge sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub section (4) of Section 20 TADA read with section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnished the requisite bail.

A situation very often arises that the prosecution is not able to complete the investigation and file the challan within the maximum period prescribed.\textsuperscript{59} But this “default” of the prosecution cannot weigh against granting bail.\textsuperscript{60} The court categorically held:\textsuperscript{61}

\textsuperscript{58} (1994) 4 SCC 602.
Hence an application for grant of bail under Section 20(4) has to be decided on its own merits for the default of the prosecuting agency to file the charge-sheet within the prescribed period or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. The court has no power to remand an accused to custody beyond the period prescribed by clause(b) of section 20(4) or extended under clause (bb) of the said section, as the case may be, if the challan is not filed, only on the ground that the accusation against the accused is of a serious nature or the offence is very grave. These grounds are irrelevant for considering the grant of bail under section 20(4) of TADA.

In Kartar Singh v. State of Punjab\(^62\) the validity of section 20(8) and (9) of TADA was attacked. The two sub-sections stated as follows:

\begin{quote}
(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless-

\begin{quote}
(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
\end{quote}
\end{quote}

\(^{60}\) S. 20(8) of TADA does not control the grant of bail under section 20(4) of TADA. Both the provisions operate in separate and independent fields.

\(^{61}\) Supra note 58 at 608.

\(^{62}\) (1994) 3 SCC 569.
The limitations on granting of bail specified in subsection (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail."

These provisions were attacked to be most obnoxious and unfair infringing the underlying principles of articles 21 and 14. Dealing at length with the matter the Court was of the view that the “last portion of clause (b) of sub section (8) of section 20 of the Act, which reads – ‘and that he is not likely to commit any offence while on bail’ along ... is ultra vires.”

C. Right against Handcuffing

The term ‘handcuffing’ is not defined either in the Code of Criminal Procedure or in the Indian Penal Code. It is also not defined in the Prison Act. However, the word ‘handcuff’ is a pair of lockable linked metal rings for securing prisoners wrists. Encyclopedia Britannica explains handcuffs and fetters “as an instrument for securing the hands or feet of prisoners under arrest, or as a means of punishment.”

It was a common practice to put handcuffs on the person arrested to prevent his further escape. There was no controversy on the point. However, with the changing concept of personal liberty, handcuffing came to be regarded as barbaric and inhuman. It offended a person’s dignity. And right to dignity is one of the most recognized human rights. The significance of human dignity as the foundation of human rights assumes importance because the other rights without a right to live with dignity cannot be made enforceable. Dignity is attached to identify a human being as a person. When human being does not enjoy the right to be a person, dignity does not exist at all. Thus human rights are derived from the dignity and worth inherent in the human person. Whatever adds to the dignified and free existence of human beings are human rights.63

Keeping the above in mind it was held by the Supreme Court in *Prem Shankar Shukla*\(^{64}\) and *Sunil Batra*\(^{65}\) that handcuffing of under trials and convicts and putting them under fetters is, *prima facie* inhuman, unreasonable and arbitrary and as such repugnant to article 21 of the Constitution.

The principles applied in *Prem Shanker Shukla & Sunil Batra* were reiterated in *Sunil Gupta v. State of Madhya Pradesh*.\(^{66}\) It was observed therein that it is most painful to note that the petitioners 1 & 2 who staged a *dharna* for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being handcuffed which act of the escort party is against all norms of decency and which is in utter violation of the principle underlying article 21 of the Constitution of India.\(^{67}\) The Supreme Court strongly condemned this kind of conduct of the escort party arbitrarily and unreasonably humiliating the citizens of the country with obvious motive of pleasing someone.\(^{68}\)

In *Aeltemesh Rein, Advocate, Supreme Court of India v. Union of India*,\(^{69}\) the Supreme Court directed the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment delivered in *Prem Shanker Shukla*. and to circulate them amongst all the State Governments and the Governments of Union Territories.

Basing on the guidelines laid down by the Supreme Court in *Prem Shanker Shukla* the Government of India has issued the following guidelines\(^{70}\) to all the State Governments and Union Territories:

---


\(^{66}\) (1990) 3 SCC 119.

\(^{67}\) *Ibid*

\(^{68}\) *Ibid*

\(^{69}\) AIR 1988 SC 1768.

(i) That no prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort;

(ii) That it is arbitrary and irrational to classify prisoners for purposes of handcuffs, into 'B' Class and ordinary class. No one shall be fettered in any form based on superior class differentia as the law treats them equally;

(iii) Handcuffing of prisoners should be resorted only in exceptional circumstances where there is a clear and present danger of escape or where the concerned accused is so violent that he cannot otherwise be secured. Handcuffing may be avoided by increasing the strength of the armed escort or by taking prisoners in well protected vans.

(iv) It is only in exceptional circumstances where there is no other reasonable way of preventing the escape of the prisoner that recourse to handcuffing him may be taken. Even in such extreme cases where handcuffs have to be put on, escorting authority must record contemporaneously the reasons for doing so. The belief in this behalf must be based on antecedents which must be recorded and proneness to violence must be authentic. Vague surmises or general averments that the undertrial is a crook or desperado, rowdy or maniac cannot suffice. Merely because the offence is serious the inference of escape proneness or desperate character does not follow.

(v) These recorded reasons must be shown to the Presiding Judge and his approval should be taken. Once the Court directs that the handcuffs are not to be used, no escorting authority should over rule this direction.

The Ministry of Law and Justice, Government of India, has also informed all the High Courts that as per the judgment in Prem Shanker Shukla a duty has also been cast on the judiciary as well as for ensuring proper implementation of its directives. It also requested the High Courts to bring these directives of the Supreme Court to the notice of all Subordinate Courts under their jurisdiction for proper compliance.71

But it is a pity that the guidelines laid down and the directions issued by the Supreme Court repeatedly regarding handcuffing of undertrials and convicts are not being followed by the police, jail authorities and even by the subordinate judiciary as is evident from the following cases.

In President, Citizens for Democracy v. State of Assam, Kuldip Nayar, an eminent journalist, brought to the notice of the court through a letter that seven TADA detenus were put in one room of the government hospital of Guwahati and that they were handcuffed to their beds. This was despite the fact that the room in which they were locked had bars and was locked and a posse of policemen stood outside with their guns on their shoulders. Kuldip Singh, J., speaking for the court, held that handcuffing and tying with ropes of patient prisoners in the hospital is inhuman and in utter violation of human rights guaranteed under the international law and the law of the land. The court further directed that the detenus be relieved from the fetters and ropes with immediate effect. The court after laying down the guidelines for handcuffing, directed all ranks of police and the prison authorities to meticulously obey them. The court further held that any violation of any of the directions by any rank of police in the country or member of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under the law. The court held.

We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner – convicted or undertrial – while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to court and back.

72 AIR 1996 SC 2193.
73 Id at 2198.
74 Ibid.
Where the police or jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said magistrate.

_in Re : M.P. Dwivedi,75 the contempt proceedings were initiated in pursuance of the order dated 4-6-1993 passed in writ petition No. 239 of 1993 Khedat Mazdoor Chetna Sangh v. State of M.P. It was a _suo-motu_ contempt petition for disregard or disobedience of the Supreme Court’s order regarding handcuffing of undertrial prisoners by the police personnel. In this case the police personnel had arrested activists of _Khedat Mazdoor Chetna Sangathan_ agitating on behalf of tribals against construction of Sardar Sarovar Dam on River Narmada. They were handcuffed while taking them from jail to court and _vice-versa_ disregarding the law laid down by the Supreme Court in _Prem Shankar Shukla_ and subsequent decisions. The concerned police personnel filed affidavits stating that they were unaware of the law laid down by the Supreme Court. In view of these circumstances the court held that no action need be taken to punish them for contempt. However, it is really astonishing that the police personnel took the plea of ignorance of law laid down by the Apex Court even more than 15 years after the decision of the Supreme Court in _Prem Shankar Shukla_. Contemnor 1 M.P. Dwivedi said that “he was not aware of the decision of this.” So much so that the MP Government had not even amended the MP Police Regulations relating to handcuffing in the light of the Supreme Court decision. The Court held:76

We are also constrained to say that nearly 15 years have elapsed since this Court gave its decision in _Prem Shanker Shukla_ no steps have been taken by the authorities concerned in the State of Madhya Pradesh to amend the

---

75 (1996) 4 SCC 152.
76 Id. at 162.
M.P. Police Regulations so as to bring them in accord with the law laid down by this Court in that case. Nor has any circular been issued laying down the guidelines in the matter of handcuffing of prisoners in the light of the decision of this Court in *Prem Shanker Shukla*.

Accordingly, the Court directed the Chief Secretary of the MP State Government to ensure taking of suitable steps to amend the police regulations in the light of the law laid down in *Prem Shankar Shukla* and issuing of proper guidelines for the guidance of the police personnel in this regard. The Law Department and the Police Department of the State were also directed to take steps to bring the law laid down by the Supreme Court to the notice of all Superintendents of Police in the districts, by issuing circulars and to place the responsibility on the Superintendent of Police to ensure compliance with the circulars by the subordinate police personnel under his charge.

The most astonishing aspect of this case was that when the undertrial prisoners were produced before the judicial magistrate’s court, the magistrate did not take any step for the removal of handcuffs or against the escort party for bringing them to the court in handcuffs and taking them away in handcuffs without his authorization. The court held:

This is a serious lapse on the part of the contemner in discharge of his duties as a judicial officer who is expected to ensure that the basic human rights of the citizens are not violated. Keeping in view that the contemner is a young judicial officer, we refrain from imposing punishment on him. We, however, record our strong disapproval of his conduct and direct that a note of this disapproval by this Court shall be kept in the personal file of the contemner. We also feel that judicial officers should be made aware from time to time of the law laid down by this Court and

---

11 Id. at 164.
The High Court, more especially in connection with the protection of basic human rights of the people and, for that purpose, short refresher courses may be conducted at regular intervals so that the judicial officers are made aware about the developments in the law in the field.

The empirical study conducted by the researcher also revealed that the police officials are reluctant and don’t show due respect to people and protect human dignity and gross violation of this rule is still being followed up to the year 2004.78

The Supreme Court has time and again expounded that “Part III of the Constitution does not part company with the prisoners at the gates, and judicial oversight protects the prisoner’s shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.”79 But the judiciary alone cannot check it; it has to be a joint effort of the law enforcement functionaries that includes the police. It has been rightly remarked that:80

To 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.

D. Right against Solitary Confinement

Dr. Martin Luther King (Jr.) in his letter from Alabama Prison wrote: “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.”81 Hence the prison staff is not to act insolently towards the prisoners. Basic rights do not stop at the prison gates. A man is in prison for his misdemeanors away

78 For details see Chap. VII.
79 Sunil Batra I v. Delhi Administration, AIR 1978 SC 1690.
80 Sunil Batra II v. Delhi Administration, AIR 1980 SC 1596.
from family, friends and the society at large. He need not be given more punishment than this. Convicts are not, by mere reason of the conviction, denuded of the fundamental rights which they otherwise possess.

Hence, in Sunil Batra's case it was held that:

[S]olitary confinement has a degrading and dehumanizing affect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Social isolation represents the most destructive abnormal environment...sub sec. (2) of S. 30(of the Prisons Act) enables the prison authorities to impose solitary confinement on a person under sentence of death not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is a prisoner under sentence of death, the provision contained in sub sec.(2) would offend Article 20 in the first place and also Arts. 14 and 19. If by imposing solitary confinement, there is total deprivation of camaraderie amongst co-prisoners, co-mingling and talking and being talked to, it would offend Art. 21.

With the expanding horizons of article 21 it is no more open to debate that convicts leave alone the accused are not wholly denuded of their fundamental rights. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. However, 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 all the more substantial and his rights are not subjected to the whims of the prison administration.

In *Kishore Singh Ravinder Dev v. State of Rajasthan*83 the petitioners had admittedly been kept in separate solitary rooms for long periods from 8 month to 11 months. It was indeed barbarous even though guidelines had been laid in *Sunil Batra's* case. In this case cross bar fetters were put on Kishore Singh and solitary confinement was given for several days and on Surjeet Singh for 30 days. The reasons for doing this inhuman act were based on flimsy grounds like “loitering in the prison”, behaving insolently and in an “uncivilized” manner tearing off his history ticket.

Krishna Iyer, J., held that this country has no totalitarian territory even within the walled world we call prison. The justice overruled the extenuary submission that a separate cell is different from solitary confinement and ordered that the petitioners be entitled to move within the confines of the prison like others undergoing rigorous imprisonment. 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 (I) Case.*84

It is very agonising to note that even after clear cut guidelines from the Apex Court the law enforced in many cases continue to flout these guidelines. The convict may be wicked and diabolic. He may not have shown any mercy to the victim. But that does not license the law enforces to act in a barbaric manner. But we may remind them that it is not Shylock’s pound of flesh that they seek, nor a chilling of human spirit. It is justice to the killer too and not justice untempered by mercy that they dispense.85

**E. Right to Speedy Trial**

The mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, resulting in impairing the capability and ability of the accused to defend himself, have persuaded the constitutional courts of the country to hold the right to speedy trial a manifestation of fair, just and reasonable

---

83 (1978) 4 SCC 494.
84 Ibid.
procedure enshrined in article 21 of the Constitution.86 By various decisions of the Supreme Court it is a settled legal position that to have speedy justice is a fundamental right, which flows from article 21 of the Constitution.87

However, the constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far off peak.88 The cases have been dragging for years together. In many cases the under trials have spent more time behind bars than which they would have to, had they been convicted.

The legal position adumbrated by the Supreme Court in Abdul Rehman Antulay89 is that right to speedy trial flows from article 21 and it encompasses the stages right from the date of registration of the FIR and onwards. In Common Cause90 the Supreme Court had issued certain guidelines and directions for the disposal of certain category of cases. These directions have been supplemented by additional directions in Raj Deo Sharma v. State of Bihar91 in which a case regarding an offence under the Prevention of Corruption Act, 1947 was registered against the petitioner on 23 Nov 1982. The CBI submitted the charge sheet on 30 Aug 1985. The special judge, CBI, took cognizance of the offence on 14 Nov 1986 and issued summons. On 24 Apr 1987, the petitioner obtained bail. The charges were framed on 4 Mar 1993 and the prosecution till 1 Jun 1995 examined three out of 40 witnesses. The petitioner, by a writ petition before the Patna High Court sought the quashment of the entire prosecution on the ground of violation of right to speedy trial as there had been long delay since the institution of the FIR. Allowing the appeal, and without passing an order on merits of the case, the Supreme Court laid down the following propositions to ensure speedy trial:92

---

92 Id. at 516-17.
(1) Where the offence is punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close the prosecution evidence on the completion of two years from the date of recording the plea of the accused on the charges framed, whether the prosecution has examined all the witnesses or not, and the court will proceed further to the next step for the trial of the case under the law. (2) In such cases, if the accused has been in jail for a period not less than one-half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail on such conditions as it deems fit. (3) If the offence under trial is punishable with imprisonment for a period exceeding seven years, the court shall close the evidence on the completion of three years, whether the prosecution has examined all the witnesses or not, and the court will proceed further to the next step for the trial of the case under the law. (4) But if the inability for completing the evidence of the prosecution within the above stipulated period is attributed to the conduct of the accused, then the said time-limit for closing the prosecution evidence will not apply. (5) Where the trial has been stayed by orders of the court or by operation of law, the period of such stay shall be excluded from the said period for closing the prosecution evidence.

Another important feature of this case is that the Supreme Court took cognizance of the fact that the delay in trial is also partly on account of the shortage of judges. Accordingly, the Court directed the State of Bihar to constitute, within the period of three
months, at least five special courts to try the cases involving offences under the 
Prevention of Corruption Act with or without other offences allied to them.\footnote{93}

In \textit{P Ramachandra Rao v. State of Karnataka},\footnote{94} a seven judge bench of the Supreme 
Court held that the dictum in \textit{A.R.Antulay} is correct and still holds the field. The time 
limits or bars of limitation prescribed in the several directions in \textit{Common Cause Cases}\footnote{95} 
and \textit{Raj Deo Sharma}\footnote{96} cases could not have been so prescribed or drawn and are not good 
law.\footnote{97} Thus, these decisions to the extent to which they run counter to the dictum of 
constitution bench in \textit{A.R.Antulay}\footnote{98} cannot be said to have laid down a good law as they 
are in breach of the doctrine of precedents. The well-settled principle of precedents 
which has crystallized with a rule of law is that a bench of lesser strength is bound by the 
view expressed by a bench of larger strength and cannot take a view in departure or in 
conflict there from. As regards setting up of the limits for trial is concerned the court held 
in \textit{P. Ramachandra Rao v. State of Karnataka} that:\footnote{99}

\begin{quote}
Though the bar of limitation, judicially engrafted, is meant 
to provide solution, but a solution of this nature gives rise 
to greater problems like scuttling a trial without 
adjudication, stultifying access to justice and giving easy 
extit{e}xit from the portals of justice. Such general remedial 
measures cannot be said to be apt solutions.
\end{quote}

The propositions emerging from Article 21 of the Constitution and expounding the right 
to speedy trial laid down as guidelines in \textit{A.R.Antulay}\footnote{100} adequately takes care of the right 
to speedy trial. However, the guidelines laid down in \textit{A.R.Antulay} are not exhaustive but 
only illustrative. They are not intended to operate as hard and fast rules or to be applied

\footnotesize
\begin{itemize}
  \item \footnote{93} \textit{Id.} at 517.
  \item \footnote{94} \textit{Supra} note 88.
  \item \footnote{95} \textit{Supra} note 90.
  \item \footnote{96} \textit{Supra} note 87
  \item \footnote{97} \textit{Supra} note 88 at 603.
  \item \footnote{98} \textit{Supra} note 87.
  \item \footnote{99} \textit{Supra} note 88 at 580.
  \item \footnote{100} \textit{Supra} note 87
\end{itemize}
like a straitjacket formula. Their applicability would depend on the fact situation of each case. Since it is difficult to foresee all situations, therefore, no generalization can be made.

Raju, J., in his separate but concurring opinion specifically pointed out that the constitution bench in A.R.Antulay refrained from fixing any time limit not because the Court had no power to do so but because that was “neither advisable nor practicable” to do so.101

Therefore, it seems it is to be left to the judicious discretion of the court seized of an individual case to find out from totality of circumstances of a given case if the quantum of time consumed up to a given point of time amounted to violation of article 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceedings or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted. Some of the factors which would be relevant to determine this are (i) length of delay; (ii) the justification for delay; (iii) the accused’s assertion of his right to speedy trial; and (iv) prejudice caused to the accused by such delay.102

P.Ramachandra Rao,103 was relied on by the Supreme Court in State v. Dr. Narayan Waman Nerukar.104 In this case the Supreme Court observed that while considering the question of delay the Court has a duty to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects, which contributed the delay. Number of witnesses examined, nature and complexity of the offence, which is under investigation or adjudication are some of the relevant factors. There can be no empirical formula of universal application in such matters. Each case has to be judged in its own background and special features, if any.105

101 Supra note 88 at 606.
102 Id. at 602.
103 Supra note 88.
105 Id. at 9-10. See also Narinderjit Singh Sahni v. Union of India, (2002) 2 SCC 210.
Ram Ekbak Missir v. Ram Niwash Pandey, demonstrates as to how bars of limitation beyond which the trial shall not proceed can sometimes be misused by playing mischief. In this case the accused was alleged to have committed capital offence. The police filed its report. The complainant filed a protest petition stating that the police have colluded with the accused. The complainant alleged bias in investigation and examining witnesses in support of it. Thereafter, some mischief was played and the proceedings were not placed before the court for over ten years. The Supreme Court held that it is not permissible to drop the proceedings in such a case on the ground of long delay. It is the duty of the courts to see that neither victim nor the accused suffers by mischief of the investigating agency or the staff of the court. It is submitted that the Supreme Court has rightly followed the guidelines laid down in A.R.Antulay.

The Supreme Court in S.C.Legal Aid Committee Representing Undertrial Prisoners v. Union of India had issued various directions for the release of those undertrial prisoners on bail who were charged under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) for offences other than under sections 31 and 31A of the said Act, and who were languishing in jail for a period exceeding half of the punishment provided under the Act. Similar directions were issued again by the Supreme Court to release the undertrials from the State of Maharashtra and notices were issued to ten other states.

Following Abdul Rehman Antulay, the Supreme Court in Durgesh Chandra Saha v. Bimal Chandra Saha, again reiterated that if a criminal case is kept pending for a very long time without any just cause thereby seriously affecting the guarantee under article 21 against deprivation of personal liberty, the law is well-settled that the court, in an appropriate case may quash the criminal proceedings.

106 AIR 2002 SC 3523.
Phoolan Devi v. State of M.P.,\textsuperscript{112} raised an important question of law before the Supreme Court i.e., what is the effect of terms and conditions offered by the Government of Madhya Pradesh (MP) to the petitioner for surrender including the assurance that she would be released from custody after eight years and that she would be tried in the courts in MP only even for the crimes alleged to have been committed in the State of Uttar Pradesh (UP). The petitioner also claimed that the Government of MP had assured her that death penalty would not be imposed on her in any case. On that basis the petitioner claimed that the custody of eleven years already undergone by her was sufficient to satisfy the requirement and all the prosecutions pending against her in the courts in UP should be quashed. The Supreme Court rightly held that the question of the content and effect of the terms and conditions of surrender alleged by the petitioner has to be raised and decided in the criminal cases pending against the petitioner. The same cannot be raised on the basis of an omnibus statement of the petitioner under article 32 of the Constitution. The court also clarified that long continuance of prosecution/trial by itself is not enough to quash the same. It has to be ascertained in each case as a question of fact whether the state alone or the petitioner also was responsible for the delay in completion of trial. However, the court directed that the petitioner was entitled to be released at that time because she had already undergone the sentence awarded in the only case against her in the State of MP unless by order made by any competent court she was required to be taken into custody.

In Mahinder Lal Dasi v. State of Bihar,\textsuperscript{113} the sanction for prosecution of the appellant in a corruption case was not granted by the government despite the expiry of over 13 years after the registration of the FIR. R.P.Sethi, J., speaking for the court, rightly observed, “the right to speedy trial encompasses all the stages, namely, stage of investigation, enquiry, trial, appeal, revision and retrial.”\textsuperscript{114} The speedy trial was considered also in public interest as it serves the social interest also. The judge rightly pointed out that in cases of corruption the amount involved is not material but speedy justice is the mandate of the Constitution being in the interest of the accused as well as that of the society.

\textsuperscript{112} (1996) 11 SCC 19.
\textsuperscript{113} (2001) 1 SCC 149.
\textsuperscript{114} Id. at 152.
Cases relating to corruption are to be dealt with swiftly, promptly and without delay. Another important aspect of this case is that the judge held that as and when delay is found to have been caused during investigation, inquiry or trial, the appropriate authorities concerned are under an obligation to find out and deal with the persons responsible for such delay.\footnote{Ibid.}

In *Akhtari Bi v. State of M.P.*\footnote{(2001) 4 SCC 355.} the Supreme Court has held that prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. There are two important aspects of this case. First, the Supreme Court has stressed that it is the obligation of the executive to appoint requisite number of judges to cope with the ever-increasing pressure on the existing judicial apparatus. The court has rightly shown its unhappiness by observing that it is unfortunate that even from the existing strength of the high courts huge vacancies are not being filled up with the result that the accused in criminal cases are languishing in jails for no fault of theirs.\footnote{Id. at 357-58.} Secondly, it observed that in the absence of prompt action under the Constitution to fill up the vacancies, it is incumbent upon the high courts to find ways and means by taking steps to ensure the disposal of criminal appeals, particularly such appeals where the accused are in jails, that the matters are disposed of within the specified period not exceeding five years in any case. The court felt that if an appeal is not disposed of within the aforesaid period of five years, for no fault of the convicts, such convicts may be released on bail on such conditions as might be deemed fit and proper by the court. However, in computing the period of five years, the delay for any period, which is requisite in preparation of record and the delay attributable to the convict or his counsel can be deducted. Accordingly, the Chief Justices of the High Courts were requested to take immediate steps for disposal of criminal cases which are pending for more than five years by constituting regular and special benches for that purpose.\footnote{Id. at 358.}
In *Uday Mohan Lal Acharya v. State of Maharashtra*, the majority, consisting of G.B. Pattanaik and U.C. Banerjee, JJ., held that under proviso to sub-section (2) of section 167 of the Criminal Procedure Code, on the expiry of the period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if prepared to and does furnish the bail as directed by the Magistrate. According to the dissenting opinion of B.N. Aggarwal J though accused’s right to be released on bail on default of completing investigation within the stipulated period is a valuable right, but the right is subject to the condition that the accused is not only prepared to but also “does furnish” the bail. If the challan is filed before that, accused’s right would be extinguished.

It has rightly been said that justice should not only be done but should also appear to have been done. Similarly, justice delayed is justice denied, justice withheld is justice withdrawn. Once the entire process of participation in the justice delivery system is over and the only thing to be done is the pronouncement of the judgment, no excuse can be found to further delay for adjudication of the right of the parties, particularly when it affects any of their rights conferred by part-III of the Constitution. In *Anil Rai v. State of Bihar*, the Supreme Court, in order to preserve and strengthen the belief of the people in the institution of judiciary and for the attainment of the rule of law, has laid down following guidelines regarding the pronouncement of judgments after the conclusion of the trial:

(i) Criminal court of original jurisdiction, in view of section 353(1) of the Code of Criminal Procedure, should pronounce the judgment in open court immediately after the conclusion of the trial or on some subsequent time which can at the most be stretched to a period of six weeks and not beyond that in any case.
(ii) The pronouncement of judgment in the civil case should not be permitted to beyond two months.

Regarding the pronouncement of judgments by the high courts, following guidelines were laid down:124

(i) The Chief Justices of the High Courts may issue appropriate directions to the Registry that in a case where the judgment is reserved and is pronounced later, a column be added in the judgment where, on the first page, after the cause title, date of reserving the judgment and date of pronouncing it be separately mentioned by the Court Officer concerned.

(ii) That Chief Justices of the High Courts, on their administrative side, should direct the Court Officers / Readers of various Benches in the High Courts to furnish every month the list of cases in the matters where the judgments reserved are not pronounced within the period of that month.

(iii) On noticing that after the conclusion of the arguments the judgment is not pronounced within a period of two months, the Chief Justice concerned shall draw the attention of the Bench concerned to the pending matter. The Chief Justice may also see the desirability of circulating the statement of such cases in which the judgments have not been pronounced within a period of six weeks from the date of conclusion of the arguments amongst the judges of the High Court for their information. Such communication be conveyed as confidential and in a sealed cover.

(iv) Where a judgment is not pronounced within three months from the date of reserving it, any of the parties in the case is permitted to file an application in the High Court with a prayer for early judgment. Such application, as and when filed shall be listed before the Bench concerned within two days excluding the intervening holidays.

(v) If the judgment, for any reason, is not pronounced within a period of six months, any of the parties of the said list shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other Bench for fresh

124 Id. at 331.
arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit in the circumstances.

Thomas, J., in his separate concurring judgment further supplemented that if the Chief Justice of a High Court thinks that more effective measures for cutting down the delay in delivering of judgment in that court could be evolved, it is open to him to do so as a substitute for the measures suggested hereinbefore. These are interim measures intended to remain only till such time as Parliament would enact measures to deal with this problem.125

It is submitted that the above stated guidelines are timely and will certainly help in avoiding the delay in the pronouncement of the judgments. However, one fails to understand as to why the Supreme Court did not lay down any such guidelines for itself. In fact, the Supreme Court should act as trendsetter for the high courts and other subordinate courts.126

Dealing with the difficulty which arises when an appeal is preferred by a convict and it is not disposed within a reasonable time. The court in *Surinder Singh v. State of Punjab*127 held:

(T)he procedure so prescribed must ensure a speedy trial for determination of the guilt of such person. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt.

In *State of Rajasthan v. Ikbal Hussen*128 the trial court closing the evidence and acquitting the accused respondent in the light of Supreme Court’s decision in *Raj Deo Sharma (I)*129

125 Id. at 345.
129 (2005) 7 SCC 387 at 390.
case. The High Court had also affirmed the acquittal of respondent taking the view that the trial cannot proceed indefinitely.  

It was held that the dictum of the Constitution Bench in *A.R.Antulay case* continues to hold the field and bars of limitation introduced in *Common Cause (I), Common Cause (ii)* and *Raj Deo Sharma (I)* and *Raj Deo Sharma (II)* cannot be sustained as these decisions were rendered by two or three Hon'ble judges and run counter to the view expressed by the Constitution Bench in *A.R.Antulay case*. It was held as follows: (SCC pp. 243-45, para 29):

“29. (1) The Constitution-makers were aware of the Sixth Amendment provisions in the Constitution of the USA providing in express terms the right of an ‘accused’ to be tried speedily. Yet this was not incorporated in the Indian Constitution. So long as *A.K.Gopalan v. State of Madras* 31 held the field in India, only such speedy trial was available as the provisions of the Code of Criminal Procedure made possible. No proceeding could ever be quashed on the ground of delay. On a proper grievance being made, or suo motu, court could always ensure speedy trial by suitable directions to the trial court including orders of transfer to a court where expeditious disposal could be ensured.

(2) With the decision of this Court in *Maneka Gandhi v. Union of India* Article 21 received a new content. Procedure relating to punishment of crime must be fair, just and reasonable. *Hussainara Khatoon (I) v. Home Secy., State of Bihar* and later decisions have spelt out a so-called ‘Right to Speedy Trial’ from Article 21. It is both a convenient and self-explanatory description. But it does not follow that every incident attacking to the Sixth Amendment right *ipso facto* is to be read into Indian Law. In the USA, the right is express and unqualified. In India it is

---

129 (1998) 7 SCC- 507
130 Supra note 128 at 502-504
only a component of justice and fairness. Indian courts have to reconcile justice and fairness to the accused with many other interests which are compelling and paramount.

(3) Article 21 cannot be so construed as to make mockery of directive principles and another even more fundamental right i.e. the right of equality in Article 14. The concept of delay must be totally different depending on the class and character of the accused and the nature of his offence, the difficulties of a private prosecutor and the leanings of the Government.

(4) The court must respect legislative policy unless the policy is unconstitutional. Statutes of limitation, limited though they are on the criminal side, do not apply to:
   
   (a) serious offences punishable with more than 3 years’ imprisonment;
   
   (b) all economic offences.

Corruption by high public servants is not protected for both these reasons.

(5) Right to speedy trial is not a right not to be tried. Secondly, it only creates an obligation on the prosecutor to be ready to proceed to trial within a reasonable time;

That is to say without any delay attributable to his deviousness or culpable negligence.

(6) The actual length of time taken by a trial is wholly irrelevant. In each individual case the court has to perform a balancing act. It has to weigh a variety of factors, some telling in favour of the accused, some in favour of the prosecutor and others wholly neutral. Every decision has to be ad hoc. It is neither permissible nor possible nor desirable to lay down an outer limit of time. The US Supreme Court has refused to do so. Similar view is taken by our court. There is no precedent warranting such judicial legislation.

The following kinds of delay are to be totally ignored in giving effect to the plea of denial of speedy trial:
(a) Delay wholly due to congestion of the court calendar, unavailability of judges, or other circumstances beyond the control of the prosecutor.

(b) Delay caused by the accused himself not merely by seeking adjournments but also by legal devices which the prosecutor has to counter.

(c) Delay caused by orders, whether induced by the accused or not, of the court, necessitating appeals or revisions or other appropriate actions or proceedings.

(d) Delay caused by legitimate actions of the prosecutor e.g. getting a key witness who is kept out of the way or otherwise avoids process or appearance or tracing a key document or securing evidence from abroad.

(7) Delay is usually welcomed by the accused. He postpones the delay of reckoning thereby. It may impair the prosecution’s ability to prove the case against him. In the meantime, he remains free to indulge in crimes. An accused cannot raise this plea if he has never taken steps to demand a speedy trial. A plea that proceedings against him be quashed because delay has taken place is not sustainable if the record shows that he acquiesced in the delay and never asked for an expeditious disposal. In India the demand rule must be rigorously enforced. No one can be permitted to complain that speedy trial was denied when he never demanded it.

(8) The core of ‘Speedy Trial’ is protection against incarceration. An accused who has never been incarcerated can hardly complain. At any rate, he must show some other very strong prejudice. The right does not protect an accused from all prejudicial effects caused by delay. Its core concern is impairment of liberty.

(9) Possibility of prejudice is not enough. Actual prejudice has to be proved.

(10) The plea is inexorably and inextricably mixed up with the merits of the case. No finding of prejudice is possible without full knowledge of facts. The plea must first be evaluated by the trial court.”
5. In the aforesaid background the decision of the High Court affirming the acquittal of the respondent cannot be maintained. We set aside the judgments of the trial court and the High Court. The trial before the trial court shall be revived. Since the trial is pending for a considerable period of time, it would be appropriate for the court concerned to take up the matter on day-to-day basis, keeping in view the mandate of Section 309 of the Code of Criminal Procedure, 1973 (in short “CrPC”).

When sanction for prosecution in corruption case was not granted by the government despite expiry of over 12 years after the registration of FIR the court held:\footnote{132}

It is in the interest of all concerned that guilt or innocence of the accused is determined as quickly as possible in the circumstances. However, every delay may not be taken as causing prejudice to the accused. The alleged delay has to be considered in the totality of the circumstances and the general conspectus of the case. Inordinate long delay can be taken as a presentive proof of prejudice. The prosecution has miserably failed to explain the delay of more than 13 years by now, in granting the sanction for prosecution of the appellant accused. The authorities of the respondent state also appear to be not satisfied about the merits of the case and were convinced that despite granting of sanction the trial would be a mere formality and an exercise in futility.

... Thus in view of the peculiar facts and circumstances of the case, further prosecution of the accused would be a travesty of justice and a mere formality causing unnecessary burden on the courts.

\footnote{Mahendra Lal Dasi v. State of Bihar, supra note 113.}
Therefore, it must be left to the judicious discretion of the court sized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed up to a given point of time amounted to violation of article 21 and if so, then to terminate the particular proceedings and if not, then to proceed ahead.

Though the Supreme Court has tried to devise solutions, as can be gauged by the case law, which go to the extent of almost enacting by judicial verdict bars of limitation beyond which the trial shall not proceed and the aim of law shall lose its hold but the practical reality is still very dismal in the whole area of international law.

G. Right against Inhuman Treatment

The traditional concept was that once a man is taken into custody he loses his liberty and all that is attached to it and is then on the mercy of the captors. But there have been drastic changes in the thinking and as of now the very idea of a human being in custody save for protection and nurturing is an anathema to human existence. The word 'custody' implies guardianship and protective care. Even when applied to indicate arrest or incarceration, it does not carry any sinister symptoms of violence during custody. No civilized law postulates custodial cruelty – an inhuman trait that springs out of a perverse desire to cause suffering when there is no possibility of any retaliation; a senseless exhibition of superiority and physical power over the one who is overpowered or a collective wrath of hypocrite thinking.

The attack on human dignity can assume any form and manifest itself at any level. It is not merely the negative privilege of a crude merciless display of physical power by those who are cast in a role play of police functioning, but also a more mentally lethal abuse of position when springing from high pedestals of power in the form of uncalled for insinuations, unjustified accusations, unjust remarks, menacingly displayed potential harm that can strike terror, humiliation and a sense of helplessness that may last much

longer than a mere physical harm and which brooks no opposition.

The area of human dignity is in one’s sacred self and that field is quite apart and distinct from the field of considerations of rights and duties, power and privileges, liberties and freedoms or rewards and punishments wherein the laws operate. If a person commits any wrong, undoubtedly he should be penalized or punished, but it is never necessary to humiliate him and maul his dignity as a human being.

Now the International Charters have laid an emphasis on the proposition that there is a basic level on which all human beings must be treated by the law as equal, irrespective of other conditions. They maintain that an accused person cannot be deprived of his dignity. Thus:

(1) The Universal Declaration of Human Rights 1948, adopted and proclaimed by the General Assembly Resolution 217A(III) of 10th December, 1948 declared in the preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 1 proclaimed that all human beings are born free and equal, in dignity and rights. In article 3 it proclaimed that everyone has the right to life, liberty and security of person, and in article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The presumption of innocence of a person charged with a penal offence until proved guilty as contained in article 11(a) is meant to insulate him against any high-handed treatment by the authorities dealing with him in the matter.

(2) Article 7 of the International Covenant on Civil and Political Rights, 1966 adopted by the General Assembly Resolution dated 16th December, 1966 covenanted that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Under article 10 of the said Covenant all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and the accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
The minimum guarantees to which everyone charged with a criminal offence is entitled in full equality covenanted in article 14(3), *inter-alia*, provide that no shall be compelled to testify against himself or to confess guilt, which obviously will rule out use of force of any kind on a person accused of any crime. 134

(3) The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, was adopted under the auspices of the Council of Europe[1] in 1950 to protect human rights and fundamental freedoms. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention establishes the European Court of Human Rights. Any person who feels their rights have been violated under the Convention by a state party can take a case to the Court; the decisions of the Court are legally binding, and the Court has the power to award damages. State Parties can also take cases against other State Parties to the Court, although this power is rarely used. The Convention has several protocols. For example, Protocol 6 prohibits the death penalty except in time of war. The protocols accepted varied from State Party to State Party, though it is understood that State Parties should be party to as many protocols as possible.

Prior to the entry into force of Protocol 11, individuals did not have direct access to the Court; they had to apply to the European Commission on Human Rights, which if it found the case to be well-founded would launch a case in the Court on the individual's behalf. Protocol 11 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.135 Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are

---

134 India ratified the ICCPR in 1979 with reservations on some articles including Art. 9 (5), which states that 'Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation. But despite this reservation the court in *Nilabati Behara* while granting compensation held that Art. 9 (5) also indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

**ARTICLE 3**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

**ARTICLE 7**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.
3. The American Convention of Human Rights 1969 which came into force in July, 1978, declares under Article 4(1) that every person has the right to have his life respected and this right shall be protected by law. Under Article 5, the right of every person to have his physical, mental, and moral integrity respected is recognized and it is covenanted between the States who are parties to this Convention that no one shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment and that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Right to human treatment recognized by article 5 cannot be suspended even in time of war,
public danger, or other emergency situation, as declared in article 27 of this Convention

G. Delay in Execution of Death Sentence

Before considering whether delay in execution must entitle the convict for commutation of death sentence, it will not be out of place to discuss whether the State has the right at all to take someone's life in accordance with the procedure prescribed. The debate about capital punishment has been going on for a long time. The arguments on both sides i.e. favouring it and otherwise are equally convincing. The new European philosophy says that justice system should not be seen as a means of private revenge. The issue of sensitivity towards the victims' rights and interests is, of course, a valid one and Europe is confident that this will be taken care of by specially designed assistance agencies and programme. Europe's now free from capital punishment.136

While many consider the 'ultimate punishment as belittling the value of human life, others such as John Sevare Nill, argue that the death sentence actually shows our regard for human life by “the adoption of a rule that he who violate the right in another forfeit it for himself.”137 India has refused to sign the second optional Protocol to the International Covenant on Civil and Political Rights, proclaimed by the UN General Assembly in 1989. The Covenant recommends the abolition of death penalty and the Optional Protocol makes sure: “No one within the jurisdiction of a State Party to the present Protocol shall be executed.” India's official representative keeps on repeating at all relevant international meetings the argument that the imposition of legal penalties is the responsibility of the state and no limitation is acceptable.

Facts and figures compiled by Amnesty International show that till the middle of 2004 80 countries had formally abolished capital punishment for all crimes, 23 others de facto and 15 retained it for only crimes under military law or crimes committed in exceptional circumstances. All these countries together make about three-fifths of the UN’s

membership. On the other side, those who have kept capital punishment still available
for ordinary crimes add up to 78. Of them too, only four countries make frequent use of
death by shooting or hanging or lethal injection or the electric chair. China is the most
prolific judicial killer. In 2003, at least 64 people were executed in Vietnam, 65 in the
US, 108 in Iran and 489 in China. The real figure for China, according to an Amnesty
source, might be even more than tenfold. India and Japan are in the category of countries
which execute people from time to time.

However, the majority in India feels that in the Indian set up capital punishment for
heinous crimes should continue and the test of "rarest of rare cases" employed is a check
on ill misuse. Though it is a general feeling that an inordinate delay in the execution of
death sentence may be regarded as a ground for commuting it elaborating this principle it
was held in *Nawab Singh v. State of U.P.*: 138

> But this is no rule of law and is a matter primarily for the
consideration of the local Government. If the court has to
exercise a discretion in such matter, the other facts of each
case will have to be taken into consideration.

In *T.V. Vatheeswaran v. State of Tamil Nadu* 139 the Supreme Court held that delay in
execution of death sentence exceeding 2 years would be sufficient ground to invoke the
protection of article 21 and the death sentence would be commuted to life imprisonments.
This view was reiterated in *Sher Singh v. State of Punjab* 140 that prolonged delay in
execution of a death sentence was an important consideration for invoking article 21 for
judging whether the sentence should be allowed to be executed or should be converted
into sentence of imprisonment. However, it was held that the Court should consider
whether the delay was due to the conduct of the convict (where he pursues series of legal
remedies), the nature of offence, its impact on the society, its likelihood of repetition,
before deciding to commute the death penalty into a sentence of a life imprisonment. The

138 AIR 1954 SC 278.
139 AIR 1981 SC 643.
140 AIR 1983 SC 465.
delay in the instant case was due to the conduct of the convict and therefore it was held that death sentence was not liable to be quashed.

However, in *Javed Ahmad v. State of Maharashtra*\(^{141}\) it was held that whether there is delay in execution of death sentence of more than two years and the conduct and behaviour of the accused in the jail, evident from the report of the jail authorities show that he was showing genuine repentance it was held that the death sentence would be commuted to life imprisonment.

This point was reiterated in *Munawat Hadua Shah v. State of Maharashtara*\(^{142}\) where five years had elapsed since award of death by the trial court. The Apex Court held that for the lapse of about three years subsequent to Supreme Court’s decision affirming death sentence accused persons were themselves partly responsible having pursued further review and writ petitions in Supreme court against the sentence. Any leniency shown in the matter of sentence would not only be misplaced but will certainly give rise to and foster feeling of private revenge among the people leading to destabilization of the society. The court ordered that death sentence be immediately carried out without any further loss of time in accordance with law.

The policy should be that the issue of commutation from sentence of death into one of life imprisonment in case of delay should commence from the day when the judicial process comes to an end. Till the time the convicted person is appealing against a decision a ray of hope continues and does not suffer from that kind of mental torture which a person suffers when he knows that he is to be hanged but waits for the doomsday. Finally in *Triveniben v. State of Gujarat*\(^{143}\) the Apex Court has held that “the only delay which would be material for consideration will be, subsequent to the final decision of the court, the delay in disposal of the mercy petitions under article 72 or 161 are received by the authorities concerned. It is expected that the petitions shall be disposed of expeditiously.”

---

\(^{141}\) AIR 1985 SC 231.
\(^{142}\) (1983) 3 SCC 354.
\(^{143}\) (1989) 1 SCC 680.
Keeping the above guidelines in mind the Apex Court in *Madhu Mehta v. Union of India*\textsuperscript{144} altered the death sentence into life imprisonment where the court found no reason sufficiently commensurate to justify the long delay of over eight years in disposal of the mercy petition in the present case.

However, the court can only examine the nature of delay caused and circumstances which ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death.\textsuperscript{145}

Till date no non-political execution in India has attracted so much media attention or provoked so much comments as *Dhananjoy's*.\textsuperscript{146} Dhananjoy was awarded death sentence for the brutal rape and murder of 14 year old, which was upheld by the Apex Court in January 1994. He could not be executed as he had launched a series of litigations in the High Court and the Apex Court, apart from filing mercy petitions before the President and the Governor. Finally he was executed. But his execution has started a serious debate as to abolish capital punishment or not leave aside the question that delay in execution should commute a death sentence to life imprisonment.

The researcher feels that apart from the inherent arbitrariness of the death penalty, Indian conditions for investigation of crimes and trial court procedures in homicide cases do not inspire confidence. Methods of investigation remain crude, archaic and unscientific. Conviction is largely based on oral evidence of witness. Witnesses are often motivated by caste, communal and factional factors. It is not uncommon for the police to fabricate a case for caste or communal reasons or for the accused's enemies to fabricate a case against him. Prosecutors are not trained to shun irrelevant considerations. Such factors may create an apparent cast-iron prosecution case but the reality may be different – an innocent man may have been victim of a faulty or false prosecution.

\textsuperscript{144} (1989) 4 SCC 62.
The Indian experience is that almost invariably the death sentence is given to the accused from society’s poor and disadvantaged sections. It seems the death sentence is the privilege of the poor. One does not come across any case of the death penalty being inflicted on those who are better off and who can afford to engage skilled lawyers. Often the accused is defended by a novice who holds a legal aid brief. What Justice Douglas said in the US has application with even greater force in India. He said, “It is the poor, the sick, the ignorant, the powerless and hated who are executed.”

All these considerations must weigh against the consolation, which sensitive persons in India have derived from accepting the facile “rarest of rare case” formula. At heart, the problem remains that the award of the death penalty is inherently arbitrary, discriminatory and even freakish and must be done away with and the question regarding delay in execution would not arise.

H. Protection of Human Rights Act, 1993

After ratification of International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), India brought into force the Protection of Human Rights Act, 1993. This Act provides for the establishment of National Human Rights Commission and States Human Rights Commissions for better protection of human rights. Section 2(d) of this Act defines ‘human rights’ as: ‘the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India.’ Thus, the Act provides a mechanism to monitor the implementation of various constitutional provisions and obligations under international covenants on different rights, including economic, social and cultural rights. This also indicates India’s readiness to implement non-justiciable rights.

Respect for human dignity is thus not a matter for any deep study in axiology for an estimate of comparative values in ethical, social or an aesthetic problem but a matter of acknowledging a simple truth already recognized by our national document when its opening chant exudes the cultural nobility of a fraternity that assures the dignity of the
individual. The Constitution recognizes it to be fundamental in the governance of the country that the State shall direct its policy to secure conditions of freedom and dignity and insulates against all forms of tyranny against mind and body and their freedom to grow fearlessly. All custodial safeguards in the constitutional and other laws are meant to protect human dignity and shun barbaric approaches. This is why no person accused of any offence shall be compelled to be a witness against himself.\textsuperscript{147} A person is entitled to know why he is arrested or being detained in custody and to consult a legal practitioner of his choice.\textsuperscript{148} There is prohibition of traffic in human beings and forced labour\textsuperscript{149} and, above all, that mother of all rights, the right to protection of life and personal liberty\textsuperscript{150} The right to live with human dignity enshrined in article 21 derives its life and breath from the Directive Principles of State policy particularly clauses (e) and (f) of article 39 and articles 41 and 42 as held by the Supreme Court in \textit{Bandhua Mukti Morcha case}.\textsuperscript{151}

The arrest of a person suspected of crime does not warrant any physical violence on the person or his torture. But, when the captive exercises his fundamental right to silence against self-incrimination\textsuperscript{152} during his interrogation, the police often abuse their authority by use of criminal force to extort information. The tyrannical way of custodial interrogation that exposes the suspect to the risk of abuse of his person or dignity has prompted the Supreme Court to ordain that interrogation should not be accompanied with torture or use of “third degree” methods.\textsuperscript{153} The Constitution as well as the statutory laws condemns the conduct of any official in extorting a confession or information under compulsion by using any third degree methods. A confession to police officer cannot be proved as against a person accused of any offence\textsuperscript{154} and confession caused by threats from a person in authority in order to avoid any evil of a temporal nature would be irrelevant in criminal proceedings as, \textit{inter-alia}, provided in section 24 of the Evidence Act. Sections 330 and 331 of the Indian Penal Code provide for punishment to one who

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{147} Constitution of India, Art. 20(3).
\item \textsuperscript{148} Id., Art. 22(1).
\item \textsuperscript{149} Id., Art. 23.
\item \textsuperscript{150} Id., Art. 21.
\item \textsuperscript{152} Supra note 136, Art. 20(3).
\item \textsuperscript{153} Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
\item \textsuperscript{154} S. 25 Indian Evidence Act.
\end{itemize}
\end{footnotesize}
voluntarily caused hurt or grievous hurt to extort the confession or any information which may lead to detection of an offence or misconduct. The expression "life or personal liberty" in article 21 includes a guarantee against torture and assault even by the State and its functionaries to a person who is taken in custody and no sovereign immunity can be pleaded against the liability of the State arising due to such criminal use of force over the captive person.155

In India custodial violence is a norm and the incidence of custodial deaths is widespread. It assumed much importance when the Supreme Court of India in *D.K.Basu v. State of W.B.* 156 took cognizance of its existence after a letter was sent to the Chief Justice of India drawing attention to newspaper reports regarding deaths in police lock ups and custody. The court took note of the Third Report of the Indian Police Commission and other data. Delivering the landmark judgment Anand, J., wrote:157

> The expression ‘life or personal liberty in Article 21 includes the right to live with human dignity and thus would include within itself a guarantee against human torture and assault by the State and its functionaries.

This judgment lays down a detailed code to be scrupulously followed by the police personnel prior to and after making the arrest. This was thought to have far reaching consequences in the development of a human jurisprudence. One of the rights recognized is the right of the arrestee to meet his lawyer during interrogation, though not throughout the interrogation. The presence of a lawyer during the investigation process is perhaps the only foolproof method to prevent human rights abuses which has been the bane of Indian investigating system. The Supreme Court’s code governing arrest and detention expressly prohibits third degree methods and torture by the police. This judgment was hailed as a watershed in judicial history in its efforts in ridding the system of human rights violations during custody and investigation. Its importance lay in the recognition of the right to

---

155 Available at http://gujarathighcourt.nic.in/Articles/custodialdignity.htm visited on 29 Sep 2005.
156 (1997) 1 SCC 416.
157 *Id.* at 426 para 17.
counsel at the investigation stage. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of article 21, whether it occurs during investigation, interrogation or otherwise. Using any form of torture for extracting any kind of information would neither be right nor just nor fair and would therefore offend article 21. A crime-suspect can indeed be subjected to a sustained and scientific interrogation in accordance with law but he cannot be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge. The requirements under D.K. Basu guidelines ensured, the record of the police personnel arresting and handling the arrestee, the record of arrest, the record of his whereabouts during detention, giving of information to his relative or acquaintance having interest in his welfare, periodic medical examination of the arrestee to ascertain whether any force is used and the state of his health while in custody, preparation of "Inspection memo" recording injuries if any on the arrestee so that the events of custodial violence can be easily detected and the perpetra tors are duly dealt with. These requirements, which flow from articles 21 and 22(1) of the Constitution are ordered to be strictly followed not only by the police agencies but also by the other governmental agencies like the Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force, Border Security Force, the Central Industrial Security Force, the State Armed Police, Intelligence Bureau, RAW, CBI, CID(traffic) Police, and ITBP etc.

However, inspite of clear cut guidelines the practical reality continues to be grim. In Nilabati Behera v. State of Orissa and Others, the deceased was taken into police custody and was found dead the next day on a railway track. It was held that it was a case of custodial death. The court refused to buy the police's story of suicide. Anand J. held that a custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law. Convicts, prisoners or undertrials are not denuded of their fundamental rights under article 21 and it is only such restrictions, as are permitted by law which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement or the indefeasible right of a citizen to

158 Santosh Paul, "Right to Counsel" (1997) 8 SCC (Jour) 14.
159 Supra note 133.
life, except in accordance with procedure established by law, while the citizen is in custody, whether he be a suspect, undertrial or convict.

The Apex Court in several other cases also has condemned police brutality and torture on prisoners, accused persons and undertrials. The court in Raghbir Singh v. State of Haryana observed: 160

We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.

The Apex Court reiterated that police torture is “disastrous to our human rights awareness and humanist constitutional order”. The court places the burden on the shoulders of the State: - “ The States, at the highest administrative and political level, we hope, will organize special strategies to prevent and punish brutality by police methodology, otherwise, the credibility of rule of law in our Republic vis a vis the people of the country will deteriorate.” Further, the Apex Court has condemned cruelty or torture as being violative of article 21 in Francis Coralie Mullin v. Union Territory of Delhi: 161

[...]

160 AIR 1980 SC 1087 at1088.
161 Supra note 11 at 753.
Human Rights and guaranteed by Art. 7 of the International Covenant on Civil and Political Rights.

Further, the courts have given an expansive definition of ‘torture’. Accordingly, ‘torture’ is not merely physical but may even consist of mental and psychological torture calculated to create fright to make one submit to the demands of the police.\textsuperscript{162} In \textit{Saheli, A Woman’s Resources Center v. Comm’r of Police},\textsuperscript{163} it was held that an action for damages lies for bodily harm which includes battery, false imprisonment, physical injuries and death.\textsuperscript{164}


THE WORST FIVE IN 2003-2004

<table>
<thead>
<tr>
<th></th>
<th>Police Custody</th>
<th>Judicial Custody</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uttar Pradesh</td>
<td>18</td>
<td>199</td>
<td>217</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>32</td>
<td>148</td>
<td>180</td>
</tr>
<tr>
<td>Bihar</td>
<td>9</td>
<td>139</td>
<td>148</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>10</td>
<td>114</td>
<td>124</td>
</tr>
</tbody>
</table>

\textsuperscript{163} (1990) 1 SCC 422.
There has been an alarming increase in cases of torture, assault and death in police custody. The courts must deal with such cases in a realistic manner and with the sensitivity they deserve so that truth may be found and the guilty may not escape. A serious thought may be given to Law Commission’s 113th Report to amend the Evidence Act to provide that injury received by a person during police custody may be presumed to have been caused by the police officer having the custody of that person during that period. However, it should be carefully examined whether the allegations of custodial violence are genuine or false and not designed to gain undeserved benefit.


| Tamil Nadu | 12 | 106 | 118 |

States With Zero Record: Jammu and Kashmir, Nagaland, Manipur, Tripura and Sikkim
before the court promptly which is mandated both under the Constitution\textsuperscript{4} and the Cr.P.C.\textsuperscript{5} is also not adhered to.

Majority of the complaints pertaining to human rights violations are in the area of abuse of police power. Since they are the ones who are responsible for investigations as well as intercepting the crime and the criminal they live up to the slogan power corrupts and absolute power corrupts absolutely.

It is well settled that no arrest can be made only because it is lawful for a police officer to do so. The existence of the power of arrest is one thing and justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. The most appropriate course for a police officer in the interest of protection of the constitutional rights of a citizen is that no arrest should be made without a reasonable satisfaction reached after investigation as to the genuineness and \textit{bonafides} of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest.\textsuperscript{6} It was held in \textit{Joginder Kumar v. State of U.P. and others}\textsuperscript{7} that:

\begin{quote}
The law of arrest is one of balancing individual rights, liberties, and privileges, on the one hand, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis of deciding which comes first – the criminal or society, the law violator or the law abider.
\end{quote}

But the fact remains that there is a wide gap between theory and practice. Police atrocities and violation of basic human rights have become common features. Though it was said by Krishna Iyer, J., that “personal liberty does not end at prison gates.”

\begin{itemize}
\item \textsuperscript{4} Art. 22(2)
\item \textsuperscript{5} S. 57
\item \textsuperscript{6} Available at 164.100.149.67/cicmanipur/GHC/Judge Order/Cril\%20Revn.5\%20of\%202005.pht. visited on 23 March 2006.
\item \textsuperscript{7} (1994)4 SCC 260.
\end{itemize}
The emphasis is still more on muscle that on the mind. An empirical survey was conducted in the State of Himachal Pradesh since we have been talking of rights of the accused and related judgments of the courts on this regard in the preceding chapters but whether the guidelines are being followed or not, whether the rights which are granted to them, are they in a position to avail the rights needs to be examined. A country may switch over from adversarial to inquisitorial or so on but till the time the law laid down is not followed in letter and spirit no system is going to work out.

Human rights as defined in the Protection of Human Rights Act, 1993 are “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Indian Constitution as embodied in the Fundamental Rights and the International Covenants and enforceable by courts in India.” Protection of human rights is guaranteed by the Central and State Governments and Police officers being Government servants have the onerous responsibility to safeguard the rights of citizens during arrest and detention.\(^8\) But as was stated in the Report of the Third Police Commission in India that the power of arrest is one of the chief sources of corruption in the police and that 60% of all arrest were unjustified and that unnecessary arrests accounted for 43% of the expenditure of jails. The Supreme Court has given detailed instructions to be adhered to strictly. Moreover the time of arrest is quite often wrongly indicated. The police detains a person for a long time before making the formal arrest. Violence is usually resorted to at the time of arrest and even later. Torture is an acceptable practice with the police and hence custodial death is not a rare phenomenon. (The NHRC Table is a testimony to the same)

### STATEMENT SHOWING DETAILS OF CUSTODIAL DEATHS REPORTED BY THE STATE/UT GOVERNMENTS FORM 1.4.2003 TO 31.3.2004

<table>
<thead>
<tr>
<th>S.No.</th>
<th>STATE/UT</th>
<th>PC</th>
<th>JC</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>ANDHRA PRADESH</td>
<td>10</td>
<td>114</td>
<td>124</td>
</tr>
<tr>
<td>2.</td>
<td>ARUNACHAL PRADESH</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>3.</td>
<td>ASSAM</td>
<td>6</td>
<td>18</td>
<td>24</td>
</tr>
<tr>
<td>4.</td>
<td>BIHAR</td>
<td>9</td>
<td>139</td>
<td>148</td>
</tr>
<tr>
<td>5.</td>
<td>GOA</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

During the year 2003-2004, one death took place in the custody of para-military forces, thus total no. of deaths comes to 1463.

Hence a need was felt to have a empirical data to know the ground realities. The present survey was done in four jails of Himachal Pradesh viz. Kaithu jail, Kanda Jail, Nahan Jail and Open Air Jail at Bilaspur. The researcher visited the jails personally and after obtaining permission from the respective Incharge of various jails met the inmates. The questions were read out to elicit their responses. The questions were framed keeping in mind the guidelines laid down in D.K.Basu’s case. (For Questionnaire see Annexure VII) Though the task was difficult but the required information was collected and has been tabulated and analyzed as under: The accuseds’ identities were not disclosed and were numbered 1, 2 and so on.
Their age, sex, nature of crime as to the offence under which they were booked, whether undertrials or serving sentence and the period of detention was noted. In Kaithu jail where undertrials were lodged the researcher interviewed 15 undertrials and 25 convicts in Kanda Model Jail and 20 in Nahan Jail.

According to the guidelines by the Supreme Court there are a few preliminary things which a policeman is required by law to do. The questionnaire put forth queries to the accused/ convicts as to whether these preliminaries were followed. Table 1 which is reproduced below provides information relating to the responses received from the respondents concerning these preliminaries.

**TABLE NO. 1**

<table>
<thead>
<tr>
<th>QUESTIONS</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Did the policeman identify himself at the time of arrest?</td>
<td>22.5%</td>
<td>77.5%</td>
</tr>
<tr>
<td>2. Did the policeman prepare a memo of arrest and get it attested?</td>
<td>17.5%</td>
<td>82.5%</td>
</tr>
<tr>
<td>3. Were your near relatives or friends informed about your arrest and place of detention?</td>
<td>80%</td>
<td>20%</td>
</tr>
</tbody>
</table>

The policeman while arresting a person has to first identity himself. In other words a person who is being arrested or detained needs to know that a lawful authority is arresting or detaining him hence he has a right to information as to who is arresting him. The majority of jail inmates i.e. 77.5% said that the policeman did not identify themselves. Only 22.5% said that the police identified themselves. The second question related to the instructions to the police that they must prepare a memo of arrest and get the same attested. Again in 82.5% cases it was not done and only in 17.5% cases something like memo of arrest was made.

Once a person is arrested, no matter how heinous a crime he has committed, his relatives or friends are to informed about the place of arrest and place of detention.
For brevity sake the term respondent will be hereinafter used for convict/accused. Majority of the respondents i.e. 80% of the respondents said that their relatives were informed and the rest 20% said that this necessity of informing was not complied with. The police is under an obligation to inform the near relatives or friends as soon as possible. The expression “as soon as possible” is to be construed literally. Table No. 2 shows the response as to how long the police took to inform. 46.9% agreed that the near ones were informed the same day. 9.3% said that it was done the next day 34.4% said it was after 2-4 days. 3.1% said it was after 1 week and 6.2% said that it was after 15 or more days.

**TABLE NO. 2**

(Part of Question No. 3)

<table>
<thead>
<tr>
<th>Time period after which relatives were informed</th>
<th>Percentage of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same day</td>
<td>46.9</td>
</tr>
<tr>
<td>Next day</td>
<td>9.3</td>
</tr>
<tr>
<td>After 2-4 days</td>
<td>34.4</td>
</tr>
<tr>
<td>After 1 week</td>
<td>3.1</td>
</tr>
<tr>
<td>15 or more days</td>
<td>6.2</td>
</tr>
</tbody>
</table>

An arrested person is to be subjected to a medical examination within 48 hours. This acts as a safeguard against physical torture for which the police force is notorious. Further, the arrested person has a legal right to be informed about the grounds of arrest so that not only does he come to know why his right to liberty is curtailed but can also prepare for his defense. Unless and until a person is informed about the grounds of arrest it is impossible for him to prepare a ground for defense. In the preceding chapter right to legal aid has been discussed in details and the courts have time and again reiterated that a trial is vitiated if legal aid is not provided to a person who is not capable of engaging a lawyer. This is a basic requirement. Then there is a constitutional safeguard that the accused must be produced before the Magistrate within 24 hours of arrest. The duty of the police is to arrest a person and then
investigate the matter. But for this they cannot use third degree methods or torture. These protections are *ipso facto* to be provided to an accused person. But the real scenario is really different. In 67.5% of the cases medical examination within 48 hours was done and 32.5% it was not done. Only 60% of the respondents were informed about the grounds of arrest. 40% did not. 75% of the respondents denied having been informed of the right to legal aid. The researcher got a feeling that where the accused party is very poor or illiterate the police do not care to fulfil these necessary formalities. They feel they can get away with it. 72.5% respondents said that they were produced before a magistrate within 24 hours of arrest and 27.5% said that it was later than that. 75% of the respondents agreed that they were subjected to torture and 25% of the respondents said that there was no torture. See Table 3.

**TABLE NO. 3**

<table>
<thead>
<tr>
<th>QUESTIONS</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Were you subjected to a medical examination within 48 hours?</td>
<td>67.5%</td>
<td>32.5%</td>
</tr>
<tr>
<td>5. Were you informed about the grounds of arrest?</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>6. Were you informed of your right to have legal aid?</td>
<td>25%</td>
<td>75%</td>
</tr>
<tr>
<td>7. Were you produced before a magistrate within 24 hours of arrest?</td>
<td>72.5%</td>
<td>27.5%</td>
</tr>
<tr>
<td>8. Were you subjected to torture?</td>
<td>75%</td>
<td>25%</td>
</tr>
</tbody>
</table>
Torture is the worst form of human behaviour. It reduces a human being to a beast. It is to be condemned by one and all in a civilized society. Being inhabitants of the 21st century it should have been non-existent especially within the lawful domain of prisons. But to the utter surprise of the researcher the percentage of respondents which responded in affirmative were 75% but in Kaithu Jail where undertrials are lodged they laughed at the fact that someone was asking them such a question which is a well known fact. They were of the opinion that of course police handles you physically once you are in their custody. “Their hands, legs and lathis itch to beat you. The moment they can lay their hands on somebody they satisfy this urge of theirs.” On being asked as to the form of torture they were subjected to. It was a mixed reaction wherein 55% said it was mental, 67.5% said it was physical and 17.5% said it was psychological. These responses were overlapping. See Table No. 4:

(Part of Question No. 8)

<table>
<thead>
<tr>
<th>What form of torture were you subject to?</th>
<th>Percentage of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental</td>
<td>55%</td>
</tr>
<tr>
<td>Physical</td>
<td>67.5%</td>
</tr>
<tr>
<td>Psychological</td>
<td>17.5%</td>
</tr>
</tbody>
</table>

Model Central Jail, Kanda is quite big and is maintained properly. The toilet facilities etc. are good. Sh. Ashok Sandalya Superintendent of Police informed that barracks have TV facilities. Library and music halls are there. There is provision for remission. They get parole for 2 months in 1 year. The prisoners are engaged in one or the other work. There is a handloom where blankets are made and supplied to all jails. Their earnings are given to them on release. Kerosene heaters were being made with spare parts imported from Japan and the prisoners assembled them. Prison authorities have maintained a herbal garden where basic knowledge of Ayurveda is imparted to volunteers. They organize Art of Living camps and every 2nd Saturday they have Sai Baba Kirtan. The researcher was informed that “Saksharta Abhiyan” was started and a lady serving life imprisonment u/s. 302 could learn to write her
name. A baby was delivered in jail so they started “Aanganwadi” facility. The prison authorities may send them to open jail on recommendation. As a policy NDPS cases are not sent unless the conduct is exemplary.

**TABLE NO 5**

<table>
<thead>
<tr>
<th>Prison conditions (Q. 9)</th>
<th>Good</th>
<th>Satisfactory/Average</th>
<th>Bad</th>
</tr>
</thead>
<tbody>
<tr>
<td>9. How are the living conditions of the prison?</td>
<td>25%</td>
<td>67.5%</td>
<td>7.5%</td>
</tr>
<tr>
<td>10. How is the behavior of the prison authorities towards you?</td>
<td>32.5%</td>
<td>57.5%</td>
<td>10%</td>
</tr>
<tr>
<td>11. How is the food?</td>
<td>35%</td>
<td>57.5%</td>
<td>7.5%</td>
</tr>
</tbody>
</table>

**Pie diagram showing percentage of responses**

- 25% Good
- 67.5% Average
- 7.5% Bad
Himachal Pradesh being a peaceful state does not face a problem of overcrowding in jails. Unlike many other states as shown in the table alongside.

**CUSTODIAL JUSTICE CELL**

**PRISON STATISTICS AS ON 30.6.2002**

<table>
<thead>
<tr>
<th>S.No.</th>
<th>STATES</th>
<th>Jails Capacity</th>
<th>% over crowding (-) means idle capacity</th>
<th>% UTs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>ANDHRA PRADESH</td>
<td>10794</td>
<td>20.51</td>
<td>67.07</td>
</tr>
<tr>
<td>2.</td>
<td>ARUNACHAL (No Jail)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>ASSAM</td>
<td>6193</td>
<td>11.64</td>
<td>64.15</td>
</tr>
<tr>
<td>4.</td>
<td>BIHAR</td>
<td>21759</td>
<td>73.78</td>
<td>86.27</td>
</tr>
<tr>
<td>5.</td>
<td>CHHATTISGARH</td>
<td>4438</td>
<td>110.16</td>
<td>52.42</td>
</tr>
<tr>
<td>6.</td>
<td>GOA</td>
<td>294</td>
<td>39.46</td>
<td>60.49</td>
</tr>
<tr>
<td>7.</td>
<td>GUjarat</td>
<td>5418</td>
<td>100.22</td>
<td>73.70</td>
</tr>
<tr>
<td>8.</td>
<td>HARYANA</td>
<td>5567</td>
<td>99.95</td>
<td>68.60</td>
</tr>
<tr>
<td>9.</td>
<td>HIMACHAL PRADESH</td>
<td>868</td>
<td>0.92</td>
<td>54.45</td>
</tr>
<tr>
<td>10.</td>
<td>JAMMU &amp; KASHMIR</td>
<td>3100</td>
<td>58.56</td>
<td>91.67</td>
</tr>
<tr>
<td>11.</td>
<td>JHARKHAND</td>
<td>5788</td>
<td>164.86</td>
<td>83.26</td>
</tr>
<tr>
<td>12.</td>
<td>KARNATAKA</td>
<td>9191</td>
<td>11.37</td>
<td>79.34</td>
</tr>
<tr>
<td>13.</td>
<td>KERALA</td>
<td>5904</td>
<td>-9.40</td>
<td>68.52</td>
</tr>
<tr>
<td>14.</td>
<td>MADHYA PRADESH</td>
<td>16239</td>
<td>65.87</td>
<td>56.34</td>
</tr>
<tr>
<td>15.</td>
<td>MAHARASHTRA</td>
<td>19004</td>
<td>16.62</td>
<td>69.65</td>
</tr>
<tr>
<td>16.</td>
<td>MANIPUR</td>
<td>1170</td>
<td>-66.07</td>
<td>92.19</td>
</tr>
<tr>
<td>17.</td>
<td>MEGHALAYA</td>
<td>500</td>
<td>-2.60</td>
<td>94.66</td>
</tr>
<tr>
<td>18.</td>
<td>MIZORAM</td>
<td>1012</td>
<td>0.89</td>
<td>79.14</td>
</tr>
<tr>
<td>19.</td>
<td>NAGALAND</td>
<td>1160</td>
<td>-47.24</td>
<td>89.87</td>
</tr>
<tr>
<td>20.</td>
<td>ORISSA</td>
<td>7542</td>
<td>53.78</td>
<td>75.03</td>
</tr>
<tr>
<td>21.</td>
<td>PUNJAB</td>
<td>10854</td>
<td>16.97</td>
<td>68.24</td>
</tr>
<tr>
<td>22.</td>
<td>RAJASTHAN</td>
<td>15707</td>
<td>-22.67</td>
<td>63.84</td>
</tr>
<tr>
<td>23.</td>
<td>SIKKIM</td>
<td>100</td>
<td>72.00</td>
<td>51.16</td>
</tr>
<tr>
<td>24.</td>
<td>TAMIL NADU</td>
<td>19240</td>
<td>-55.62</td>
<td>36.16</td>
</tr>
<tr>
<td>25.</td>
<td>TRIPURA</td>
<td>744</td>
<td>34.81</td>
<td>57.93</td>
</tr>
<tr>
<td>26.</td>
<td>UTTAR PRADESH</td>
<td>32380</td>
<td>69.84</td>
<td>87.37</td>
</tr>
<tr>
<td>27.</td>
<td>UTTARANCHAL</td>
<td>2433</td>
<td>0.82</td>
<td>79.13</td>
</tr>
<tr>
<td>28.</td>
<td>WEST BENGAL</td>
<td>19666</td>
<td>-25.88</td>
<td>79.42</td>
</tr>
<tr>
<td>29.</td>
<td>TOTAL STATES</td>
<td>227065</td>
<td>28.74</td>
<td>73.94</td>
</tr>
<tr>
<td>30.</td>
<td>UNION TERRITORIES</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>29.</td>
<td>ANDAMAN &amp; NICOBAR</td>
<td>229</td>
<td>3.49</td>
<td>24.05</td>
</tr>
<tr>
<td>30.</td>
<td>CHANDIGARH</td>
<td>1000</td>
<td>57.30</td>
<td>74.24</td>
</tr>
<tr>
<td>30.</td>
<td>DADAR &amp; NAGAR HAVELI</td>
<td>40</td>
<td>-22.50</td>
<td>100.00</td>
</tr>
</tbody>
</table>
Hence the prisons provide decent living under the circumstances. The inmates of the prison on being questioned as to the living conditions of the prison, 25% felt they were good; 67.5% found them average and 7.5% felt that they were bad. It moreover depends on jail to jail. Kaithu jail, Nahan jail and open jail needs renovations. Kanda Model Jail is done up nicely and it could be used as a model by other jails. 57.5% of the respondents were satisfied with the behaviour of the prison authorities towards them. Whereas 32.5% rated it to be good and 10% found it bad. The response for food was equally encouraging. 57.5% rated it satisfactory; 35% rated it to be good and 7.5% found it bad. It could be called from the data as shown in Table No. 5 that the prison authorities are living up to the expectations and providing good living conditions. The subjail where undertrials are kept there a lifer was engaged for cooking food for everybody. The atmosphere was pleasant and the researcher was even served tea since the researcher, they said, was their guest. 92.5% of the respondents were happy with the maintenance of basic hygiene and 7.5% felt otherwise. Undertrials do not have to work but as far as the convicts are concerned they can work and earn for themselves in prison. When the researcher visited Kanda jail whitewash was going on in the jail premises and the prisoners were engaged in it. Since the prisoners under rigorous imprisonment have to work so on a query as to if the working conditions were difficult. 55% of the respondents answered in negative; 17% felt it was difficult and 27.5% did not respond to the query. Question No. 14 dealt with the kind of work they are required to do. The answers were not specific and they said whatever we are asked to do we do it, but it is not harsh. On being asked if they were given minimum wages. 65% said they were given, nobody denied being given minimum wages but 35% the respondents did not answer as tabulated in Table no. 6. The inmates were not aware of the system of open jail and had no knowledge of the same whatsoever.

<table>
<thead>
<tr>
<th>UTs</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>DAMAN &amp; DIU</td>
<td>120</td>
<td>-57.50</td>
<td>68.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DELHI</td>
<td>3637</td>
<td>217.40</td>
<td>78.52</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAKSHADWEEP</td>
<td>16</td>
<td>-100.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PONDICHERRY</td>
<td>305</td>
<td>-7.21</td>
<td>55.48</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL UTs</td>
<td>5347</td>
<td>135.14</td>
<td>76.84</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALL INDIA</td>
<td>232412</td>
<td>31.19</td>
<td>74.06</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TABLE NO. 6

<table>
<thead>
<tr>
<th>QUESTIONS</th>
<th>YES</th>
<th>NO</th>
<th>NO RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>12. Is basic hygiene maintained in prison?</td>
<td>92.5%</td>
<td>7.5%</td>
<td>-</td>
</tr>
<tr>
<td>13. Are the working conditions difficult?</td>
<td>17.5%</td>
<td>55%</td>
<td>27.5%</td>
</tr>
<tr>
<td>15. Do you get minimum wages for the work</td>
<td>65%</td>
<td>0%</td>
<td>35%</td>
</tr>
</tbody>
</table>

Histograms showing percentage of responses
(Prison conditions)
Question No. 17 of the questionnaire dealt with basic facilities which all the prisons are required to provide for. The prison authorities allow the inmates to read and write, only 5% denied the same. The researcher saw no reason why they were denied. The respondents were allowed to meditate as well as practice their religion. Entertainment facilities like TV, Carrom Board etc. are provided by the jail authorities. Doctors visit the jails and medical aid is given in case of sickness. The doctors do prescribe special diet in needful cases and the prison authorities have to provide the same. Visit of relatives is allowed and is regulated by the jail manual. Their transit to court is made comfortable whenever they have to appear before the Court. See Table 7:

TABLE NO.7

<table>
<thead>
<tr>
<th>QUESTIONS</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>17.1 Are you allowed to read and write?</td>
<td>95%</td>
<td>5%</td>
</tr>
<tr>
<td>17.2 Are you allowed to meditate and practice your religion?</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>17.3 Is there any source of entertainment?</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>17.4 Are you entitled to medical aid in case of sickness?</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>17.5 Are you allowed to meet your relatives?</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>17.6 Is your transit to court comfortable?</td>
<td>95%</td>
<td>5%</td>
</tr>
<tr>
<td>17.7 Were you ever handcuffed?</td>
<td>37.5%</td>
<td>62.5%</td>
</tr>
<tr>
<td>17.8 Were you ever confined to solitary imprisonment?</td>
<td>2.5%</td>
<td>97.5%</td>
</tr>
</tbody>
</table>
Do you think open jail is better than regular jails?

Not aware 75%
Yes 25%
No 0%

Inspite of the Apex Court coming down heavily on the police on issue of handcuffing it is still being practiced. 37.5% respondents agreed that at one time or the other they were handcuffed. The under trials were unanimous in their response. It is beyond comprehension as to how can the functionary of the state blatantly violate clear cut strictures of Supreme Court. It was reported from Amritsar that “in clear violation of the law, sick undertrials being admitted to government hospitals in the city are often chained to their beds in the hospital ward test they run away.”

It is shocking since way back in 1980 the Supreme Court in Prem Shanker Shukla’s case through Krishna Iyer and Chinnappa Reddy, JJ., expressed in no uncertain terms that to handcuff is to hoop harshly and to punish humiliatingly and that it is necessarily implicit in articles 14 and 19 that when there is no compulsive need to fetter a person’s limbs it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. The minimal freedom of movement, which even a detainee is entitled to under article 19, cannot be cut down by application of handcuffs.

By the same reasoning solitary confinement is not to be given save under exceptional circumstances. But the jail officials feel that the courts are not being realistic and in cases where jail inmates indulge in ‘hooliganism’ or ‘dadagiri’ and try to vitiate the atmosphere of jail, it becomes imperative to detain them in solitary confinement so that others may not get influenced and the jail discipline is not spoiled. But this is no way to discipline.

The Supreme Court has categorically laid that breach of the guidelines laid down by the Court would warrant departmental action on failure of the official concerned to comply with any of the eleven requirements to be followed in all cases of arrest and detention till legal provisions are made in that behalf and also render such officer liable to be punished for contempt of court.

---

9 “Undertrials chained to hospital beds”. The Tribune April 12, 2002.
Everyone wants to be a free bird. A person may be thrown in jail for some wrong. And so if he can have some freedom within the parameters of this detention it would be bliss. Hence, the system of open jail is a better idea. Though 75% of the respondents were not aware of the open jail. The others felt that it was a good idea. The open jail in Bilaspur started in October 1960. The system of open jail was the brain child of Dr. Sampurnanand, Chief Minister of U.P. The basic idea was taken from a movie “Do Ankhen Bara Hath”. It is the only of its kind in Himachal Pradesh. The concept is that no one is born a criminal; circumstances and other factors turn normal being into criminals. Hence they are kept in open jails since there is complete freedom within the day and you only have to get back in the evening. Bilaspur jail has 45 inmates against the capacity of 80 as eligible candidates are not available. Only those prisoners are sent to open jail whose conduct is exemplary and concerned Superintendent of Police reports to the Inspector General Prisons. As a general rule convicts convicted for rape, dacoity and escape from jail are not considered. Most of the inmates in Bilaspur jail are ones serving life imprisonment. (For details see Annexure VIII)

The researcher had first hand information from the Superintendent of Police, Bilaspur jail as to the working of the jail. Attendance is taken twice a day – 8 a.m. and 5.30 p.m. Frisking is done when the inmates come back. Till date in the past 45 years only once or twice has it happened that the inmate has not come back. This only shows the fool proof method of how the prisoner on the basis of their good conduct are remitted to open jail. There are no instances of hooliganism in jail, there is complete freedom of movement, no locks and no cells. The inmates live in barracks. There is provision for games, ‘natak’ and library facilities. Relative can meet for half an hour twice weekly.

The general public is aware of their background but they get employment as labour in P.W.D. and other Boards. They also sell vegetable and other rehri items. The earnings they get is not kept in the jail but are deposited in their individual accounts. But the S.P. was of the opinion that like the general populace they face a problem of unemployment. So should a factory or industry come up in the town it would ensure employment to this inmates. The jail within itself does not have any scope of employment.
An inmate needs to have served eight years in other jail with exemplary conduct for him to earn a place in the open jail. But a situation may arise wherein the open jail after receiving him may not find him up to the mark. In such cases the inmate can be reverted back to his parent jail. Unfortunately, the researcher could not meet the inmates since during office hours they are not available and it was not possible to get permission otherwise. But a visit to the jail and a talk with the prison incharge was very enlightening.

**Appraisal**

The present criminal justice system is in a bad shape. The courts showing judicial activism have from case to case laid down various guidelines in order to ensure integrity and fairness in police system, accountability of police system and others to ensure fairness of the criminal justice system. A letter was sent to the Chief Justice of India to draw attention to newspaper reports regarding deaths in police lockups and custody in *D.K.Basu v. State of West Bengal*.

The judgment laid down a detailed code to be scrupulously followed by the police personnel prior to and after making arrest. But the guidelines are being flouted with impunity by the police personnel. The accused are being handcuffed and beaten. The inmates of the prison as a matter of fact were narrating their initial brush with the law enforcers i.e. the police force. They blatantly use third degree methods in utter disregard of human rights of the accused. Custodial violence is a calculated assault on human dignity. “Whenever human dignity is wounded”, to quote the Supreme Court in its judgment of 18th Dec., 1996 in the case of *D.K.Basu v. The State of West Bengal,* civilization takes a step backward. The flag of humanity on each occasion must fly half mast”.

Custodial violence causes a chasm between police and public. There are administrative, social, professional and psychological factors contributing to this lack of probity in public life. Lack of specialized investigating skills, misplaced incentives and rewards, sheer callousness are other reasons. Transparency in arrest, medical examination at given intervals, honest record keeping, increasing awareness about

---

human rights, improved interrogation skills are some of the means of reducing incidences of custodial violence.\textsuperscript{13}

Laying down a code has not helped ameliorate the situation as is clear from the survey. Something more needs to be done. Public awareness has to be generated as regards their rights. The ground realities are harsh. If the rules and procedure are being flouted in a peaceful state like Himachal Pradesh, one shudders to think about the situation in other states where crime rate is much higher and the police force is stressed out. One may go on discussing the constitutional provisions and the roll of activist judges in interpreting the same but unless and until practical situation does not improve, everything else is futile.