CHAPTER-VI

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6.1 CONSTITUTIONAL BASIS FOR JUDICIAL REVIEW

Protection and promotion of human rights of an individual form the basis of every organised democratic society. The Constitution is the means adopted by the people to declare, protect and promote those rights. Naturally, the Constitution must be accorded a higher status and be considered as the Supreme Law of the land as it represents the collective will of the people themselves.¹ The Constitution confers only limited powers on legislature and executive.² Any law made by the legislature or any executive action which is repugnant to that Supreme Law must be unconstitutional and invalid.³ In such case, there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and preserve inviolate the will of the people as expressed in the Constitution.⁴

The power to declare a law or an executive action as unconstitutional being repugnant to the Constitution must belong to the courts. The Constitution being a legal instrument, its interpretation must necessarily be vested in the courts.⁵ In U.S.A., the court is considered as the Founders' protective barrier against unconstitutional acts, and security against usurpation. The justices, in this account, stand as "defensories fidei",⁶ as the watchmen in the constitutional edifice. The

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vesting of the reviewing power in the courts, as against other organs of the government, is justified on the ground, "a Select and independent court free from the legislators' necessary attachment to various economic, religious and narrow political interests—has every incentive to be a partisan not only of the constitutional text itself, but especially of the general liberty of the people".7

The judicial review is defended on the ground that it would help the democracy preserve its constitutional heritage intact, its self-evident but difficult aspirations.8 Judicial review of exercise of power has, as its objective, the imposition of restrictions on unchecked or unrestrained power. Thus, it is the accumulation of power into the same hands, whether of one or a few or many, and whether hereditary, self appointed, or elective that could justly be pronounced as the very definition of tyranny.9 This is understood as the negative justification of judicial review. Justice Louis D.Brandies explained the negative justification of judicial review by saying that, it was not to promote efficiency but to preclude the exercise of arbitrary power, purpose was not to avoid friction, but to save the people from autocracy.10

On the other hand, some jurists have emphasized the positive side of the power of judicial review. Thus, "the greater role of the court is not simply that it checks the unconstitutional transgressions of the legislative branch... but that it adds a dimension to public life that might otherwise be absent".11 Justice Cordozo believed that the chief worth of the court was
in making vocal and audible the ideals that might otherwise be silenced, in guiding and directing choice within the limits where choice ranges.\textsuperscript{12} John Agresto emphasized the contribution the judicial review can make to the promotion of values. Thus, he said, "the power of judicial review has a positive aspect that it can be used as a guide to the democracy in its desire to live a principled life, a life in accord with certain formative national ideals. The Supreme role of the court is to be found in the sheltering and nourishing of ideals and principles."\textsuperscript{13}

6.1.1 U.S. CONSTITUTION AND JUDICIAL REVIEW

In the U.S. Constitution, the judicial power of review is a fundamental feature. Though there is no specific provision conferring power of review, it has been inferred by the courts from the existence constitutional restrictions.\textsuperscript{14} In 1803, Marshal J. declared in \textit{Marbury v. Madison}\textsuperscript{15} "the interpretation of the laws is the proper and peculiar province of the court". Further he said that the legislature has no authority to make laws repugnant to the constitution and in the case of constitutional violation, the court has absolute and inherent right to declare the legislative act void. Commenting on this, \textit{Marjouri G Fribourg} said, "this principle has become a binding part of our American legal heritage and an important rampart for the prosecution of our rights and liberties. In proclaiming it Marshall established the power and majesty of the Supreme Court".\textsuperscript{16} Thus the principle of judicial review has become a part of the American Constitution.
6.1.2 Indian Constitution and Judicial Review

In India, the power of the courts to review the validity of laws on the touchstone of the Constitution is specifically granted. The Supremacy of the Constitution to other laws made by the legislature is recognized by Article 13(2).17 The Constitution has several express provisions empowering the courts to declare a law to be void when it offends against the Fundamental Rights,18 or the federal distribution of powers.19 Further, the judicial power of review is strengthened by Article 367 which provides that the Constitution is to be interpreted as a legal instrument.20 The Constitution is drafted in the form of a statute, starting with a preamble, followed by the enacting provisions in the form of Articles and clauses, and ending with schedules - by providing that the General Clauses Act is to be applied for its interpretation, the Constitution makes it amply clear that for the purpose of interpretation, the Constitution is to be treated as if it were "an Act of the legislature of the Dominion of India".21

Questions as to the interpretation of the Constitution will be dealt by the High Courts at the primary level and then by the Supreme Court on appeal.22 If the fundamental rights of a person are violated by state authority, a petition can be directly brought before the Supreme Court under Article 32.23 The interpretation of the constitution by the Supreme Court is given finality and made binding upon all other authorities in India by Article 141 and 144.24
In the exercise of its jurisdiction, the Supreme Court is entitled to pass any decree or make any order necessary for doing complete in any case or matter pending before it. Such decree or order is enforceable throughout India in such manner as may be prescribed by a law of Parliament or pending that by the presidential order. Subject to a law made by parliament in this behalf the Court is empowered to make, as regards the whole of India, any order for the purpose of securing the attendance of any person, the discovery or production of all documents, or the investigation or punishment of any contempt of itself. The powers conferred on the Court by these provisions though broad, cannot, however, be exercised against the Fundamental Rights. All authorities, civil and judicial, in India, are under an obligation to act in aid of the Court.

The constitutional amendment in India is a justiciable issue and it comes under the purview of judicial review. In a number of cases the validity of constitutional amendments was examined by the Supreme Court. In a far reaching decision the Supreme Court has laid down in *Keshavananda Bharati v. state of Kerala* that the parliament cannot so exercise its amending power as to destroy the essential features of the Basic Structure of the Constitution. Further, the judicial independence and judicial review are identified as essential features of the Basic structure of the Constitution.
During the initial years of functioning, unfortunately, the reach of the Court did not extend beyond a few sections of the society and it remained a distant dream, despite Article 32, for the multitude sections of the Indian society. For quite some time, the Supreme Court had become "an arena of legal quibbling for men with long purses". At present, fortunately, the Apex Court has shed this elite attitude and is being identified by justices as well as people as the, "last resort for the oppressed and the bewildered". This change is quite remarkable and significant from the point of constitutional democracy in India. As a jurist put it, "transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary".

The active role-played by the Apex Court in order to rein in rule of law and secure justice to a large number of people cutting across all barriers has earned it a sobriquet of "peoples courts". This transformation in the judicial approach coincided with the liberalization of traditional rule of locus standi. The emergence of 'Public Interest Litigation' has relaxed the traditional rule considerably. Bhagwati J. has explained the liberal rule of standing in S.P.Gupta v. Union of India that, any member of the public having sufficient interest could maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution or the law and seek enforcement of
such public duty and observance of such constitutional or legal provision.36

According to Bhagawati J. such extended approach on the question of *locus standi* was absolutely necessary for maintaining rule of law, furthering justice and accelerating the pace of realisation of the constitutional objective.37 Again in *Bandhua Mukti Morcha v. Union of India*, Bhagwati J. explained how the public Interest Litigation was a boon to espouse the cause of people who are at a disadvantageous position. "[w]here a person or class of persons to whom legal injury caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the Court, for relief under Article 32... so that the Fundamental Rights may become meaningful not only for the rich and the well-to-do, who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress".38 In tune with this liberalized approach to standing the Supreme Court has allowed various public-spirited persons and social organizations to bring petitions before it. Persons like undertrials, as well as convicted prisoners, women in protective custody, bonded labourers, tribal children, hutment and pavement dwellers, migrant labourers, children in juvenile institutions, victims of extra judicial
executions have approached the Court. The Court has also acted on the basis of newspaper reports and letters or post cards or telegrams sent to the Court or individual judges. As a result, the Court has been successful in alleviating the miseries of large number of people.

Scope of judicial review has been widened by the readiness of the Supreme Court to examine the validity of legislative and executive actions on the ground of reasonableness and arbitrariness with reference to article 14. In *E.P. Rayappa v. State of Tamil Nadu* Bhagawati, J., propounded a new approach to article 14:

Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.40

Again in *Maneka Gandhi v. Union of India*, Bhagawati, J. read the principle of reasonableness in Article 14. He said that Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence.42 This opinion of
Bhagwati, J. stamped the new approach with an unanimous opinion of a Constitution Bench of the Court, in *Ajay Hasia v. Khalid Mujib*, wherein he reiterated, "wherever, therefore, there is arbitrariness in state action whether it be of the legislative or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such state action". Thus, he laid down a general principle of reasonableness by widening the scope of Article 14, through a new approach.

Similarly, the scope of Article 21 was widened in *Maneka Gandhi* by Bhagawati, J., who extended the application of Article 14 to the nature and requirement of the procedure under Article 21. It was laid down that the principle of reasonableness, which is an essential element of equality or non-arbitrariness pervading through Article 14, must also apply with equal force to the 'procedure' contemplated by article 21, that is, the procedure must be 'right, and fair', and not 'arbitrary, fanciful or oppressive'. In *Bachan Singh v. State of Punjab*, Bhagawati, J., went beyond Article 14 to establish the requirement of reasonableness and held: "It is plain and indisputable that under our Constitution, law cannot be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14, or Article 19 or Article 21, which ever is applicable". Thus, the requirement of reasonableness has been extended to a law, not just procedural but substantive. By the application of requirement of reasonableness to a variety of cases, it has developed into a general
principle of reasonableness similar to due process of law in the U.S. Constitution, capable of application to any branch of law.\textsuperscript{46} This has widened the scope of judicial review to a great extent.

In a number of cases decided by the Supreme Court, this power has been recognized and exercised by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.\textsuperscript{47} In this connection the observations of J.S.Verma, C.J., made in \textit{Vishaka v. State of Rajastan}\textsuperscript{48} are quite significant. He said:

"It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislative, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field".

Further it was said that the obligation of the Court under Article 32 of the Constitution for the enforcement of these Fundamental Rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in LAWASA region. These principles were accepted by the Chief Justice of Asia and the Pacific at Beijing in 1995 and amended at Manila, 28\textsuperscript{th} August, 1997, as those representing the minimum standards
necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights, and;

(c) to administer the law impartially among persons and between persons, and the state.\(^ \text{49} \)

In *Vineet Narain v. Union of Union of India*,\(^ \text{50} \) the Supreme Court cited the decision of *Vishaka* along with the above principles with approval, and held that "an exercise of this kind of power has taken firm roots in Indian Constitutional jurisprudence". The Court issued a detailed set of directions to uphold probity in public life. These cases have clearly established that when there is vacuum due to inertia on the part of legislature and executive, the judiciary can step in to provide a solution till the legislature enacts a law for the purpose.

6.2 THE COURTS AND PRISON ADMINISTRATION:

Of late, as part of an expanding judicial role in the resolution of important social issues, courts have shown a greater interest in reforming Constitution and statutory defects in the structures and practices of various social institutions, including prisons. The activist judicial attitude became
inevitable to reform the prison system and to protect the prisoners against the evil machinations of wicked prison authorities. The Courts' readiness to review correctional decisions encouraged large number of offenders to seek relief from them. \(^{51}\) One positive fallout of this development was that the prisoners could enjoy their legitimate rights more effectively and administrative arbitrariness was minimized to a large extent.

6.2.1 U.S. Experience

Till very recently the life of prisoners in U.S. prisons was one of deprivations. Even judiciary did not believe that they were entitled to any right of a normal human being. In \textit{Ruffins v. Common Wealth}\(^ {52}\) it was held by a Virginia judge: "prisoner has, as a consequence of his crime, not only forfeited his liberty but all his personal rights except which the law in its humanity accorded to him. He is the \textit{Slave of the State}\(^ {53}\) for the time being".

The Court openly adopted "the hands off"\(^ {54}\) doctrine in \textit{Donald Douglas v. Mauria H. Sigler},\(^ {55}\) and refused to interfere in prison matters. Thus the Court held:

The matter of internal management of prisons or correctional institutions is vested in and rests with the hands of those institutions operating under the statutory authority and their acts, administration of prison discipline and overall operation of the institution are not subject to Court supervision and control.\(^ {56}\)
Thus, the prison conditions and decisions were considered to be beyond judicial scrutiny and the Court's refusal to interfere with the administration of prisons meant that constitutional rights were neither interpreted nor enforced as far as prisoners were concerned. An offender upon conviction was deemed to have forfeited virtually all rights. He retained only such rights as were expressly granted to him by statute or correctional authority.

Fortunately, the Courts in the U.S.A., gradually shed the hands off attitude and policy of non-intervention and recognised that the correctional processes should avoid the infliction of needless suffering and achieve standards of decency and efficiency, of which the community need not be ashamed. In *Coffin v. Richard* it was recognised that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law". Similarly, in *Eve Pell v. R.K. Procmniej* Justice Douglas held: "prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process".

There has been a great controversy in the past about the applicability of 'the due process clause' to the prisoners. But in several cases the correctional administrators were subjected to due process standards, and established more legalistic and just procedures in prison disciplinary proceedings, parole hearings and the transfer of prisoners to harsher conditions. In *Wolf v. Mc.Donnel*, the U.S. Supreme Court held
that although a prisoner's rights were diminished by virtue of incarceration but there was no iron curtain drawn between the Constitution and the prisoners of the country. Thus, prisoners could claim the protections available under the Constitution.

In the U.S.A. the equal protection clauses of Fifth and Fourteenth Amendments have been used to prohibit practices involving direct or indirect racial discrimination. First and Fourteenth Amendments have been invoked to protect the freedom of expression, exemption from censorship of mail, association within the prison, visitation of family and friends, right to religion. Fourth and Fourteenth Amendments have been used to protect the prisoners against unreasonable searches and seizures by prison authorities. Successful use of the Eighth Amendments led to the abolition of corporal punishment, to restrictions on the length and conditions of solitary confinement, to a limited right to privacy and to freedom as regards personal appearance. There have also been judgements to protect prisoners from harm resulting from depredations of other inmates, deliberate indifference to medical needs. Thus a host of rights of prisoners have been enunciated by the Courts.

Some of the decisions of the Courts dealt with the character of the physical environment and prison conditions. Thus, in Holt v. Sarver, a federal Court adopted a new approach to prison conditions and ruled that prison conditions and practices which might not be unconstitutional when
viewed separately could, when viewed as a whole, make confinement 'cruel' and unusual punishment. The court held that imprisonment in the Arkansas State prison system constituted "cruel and unusual punishment" and gave the state two years time to correct the situation or release all prisoners then incarcerated in the state facilities.

In *Pugh v. Locke*, a Federal Court added a new dimension to the scrutiny of prison conditions and practices by examining virtually every aspect of prison life in the entire state prison system. After looking at overcrowding, environmental conditions, idleness, levels of violence, staffing, prisoner classification, medical and mental health care, and restrictions on visits, the Court found that the totality of conditions violates the Eighth Amendment's prohibition against cruel and unusual punishment and that the prison conditions were so debilitating that they necessarily deprived inmates of any opportunity to rehabilitate themselves or even maintain skills already possessed.

The Court laid down various minimum constitutional standards – it required the state to reduce its prison population to the designed capacity of each institution; to provide each prisoner with a minimum of sixty square feet of living space, a meaningful job, the opportunity to participate in recreational, educational, vocational training, and pre-release transition programmes; to provide each prisoner with certain minimum personal articles, such as linens, toilet requisites, reading and writing materials and access to hot and cold water; to provide necessary medical and mental
health care according to certain published standards; to provide minimum staff in various specific locations, at all times, to prevent violence; and to provide certain minimum food, public health, correspondence, visits and other physical standards. The Court also drafted a time table for bringing the state prisons into compliance with the standards, a plan for the hiring of appropriately trained staff, whose racial and cultural background was more similar to those of the prisoners; and a plan for the reclassification of all Alabama prisoners to identify those for whom transfer to community-based facilities would be appropriate, ordering the state to establish those facilities. The Court also ruled that inadequate funding or claimed lack of resources was no answer to the existence of unconstitutional conditions, and warned that failure to comply with the minimum standards would necessitate the closing of those several prison facilities found to be unfit for human confinement.

This decision is a trendsetter as various other courts including the U.S. Supreme Court followed it with similar decisions. These judicial decisions have improved the position of prisoners to a large extent. Thus, from the earlier "hands off" position, the courts have moved to "hands on" position, wherein they have readily tried to restrict the abuses of discretionary power by prison authorities. In exercising their proper function as supervisors of the criminal justice system, the courts have upset practices that have stifled the enjoyment constitutional rights by the
prisoners. Now, due to the judicial intervention in prison administration it is well established that the prisoners retain all the constitutional rights excepting those which are curtailed specifically by the provisions of the Constitution and statutes.

6.2.2 Indian Judiciary and Humanisation of Prisons

The role played by the Indian judiciary in the humanization of prisons through the protection of prisoners' rights has been quite admirable. There are no constitutionally enumerated rights of prisoners in India. However, Superior Courts in India, through their innovative interpretation of various provisions of the Constitution, have recognised many prisoners' rights. The Supreme Court drew heavily on the Preamble which according to the Court, sets the humane tone and temper of the Founding Document and highlights justice, equality and the "dignity of the individual", in addition to the fundamental rights guaranteed by part III of the Constitution. The reforms in jail administration were left to the discretion of the legislature and executive for well over a quarter century, with the judiciary as a mute spectator. But such passivity on the part of the courts would be unacceptable as they have constitutional mandate to uphold constitutional values in India, including, of course, prisons. And it could be rightly said that it is part of their power of administration of criminal justice.

The Supreme Court has emphatically asserted its authority to interfere in prison administration by declaring: "we affirm in unmistakable
terms that the Court has, under Article 32 and so under Article 226, a clear power and, therefore a public duty to give relief to sentences in prison settings”. Further it was stated that the Court had responsibility to intervene and protect the prisoner against mayhem, crude or subtle and might use habeas corpus for enforcing in prison humanism. The Court had a continuing responsibility to ensure that the constitutional purpose of the deprivation was not defeated by the prison administration. So, the sentencing Court could be required to retain jurisdiction to ensure that the prison system responds to the purpose of the sentence. If it did not, the sentencing court could arguably had the authority to demand compliance with the sentence or even order the prisoner released for non-compliance. Such is the constitutional responsibility of courts.

The realisation of this responsibility by the Supreme Court came after much initial hesitation. In the initial stages of its functioning, the judiciary did not show much concern for prisoners rights. Thus in A.K. Gopalan v. State of Madras, it categorically declared that where as a penalty for committing a crime or otherwise the citizen was lawfully deprived of his freedom, "there could no longer be any question of his exercising or enforcing the rights referred to in Article 19 (1)". According to the Court, Article 19 guarantees to the citizens the enjoyment of certain civil liberties "while they are free".

Das, J., in a separate opinion, held that the protection of Article 19 was co-terminus with the legal capacity of a citizen to exercise the rights
protected thereby, for sub clauses (a) to (e) and (g) of Article 19 (1) postulate the freedom of the person, which alone can ensure the capacity to exercise the rights protected by those sub clauses. Further he maintained that a citizen who lost the freedom of his person by being lawfully detained, whether as a result of a conviction for an offence or as a result of preventive detention, loses his capacity to exercise those rights and, therefore, has none of the rights which sub clauses (a) to (e) and (g) might protect. Das, J., clearly denied the benefit of test of reasonableness to a prisoner to test the reasonableness of action of prison authorities by stating, "Article 19 has no bearing on the question of the validity or otherwise of preventive detention and that being so, clause (5) which prescribes a test of reasonableness to be defined and applied by the Court has no application at all". Such categorical denial of the protection of Article 19 virtually robbed the prisoners of their valuable right to question the unreasonableness of the exercise of power by the prison authorities. This was indeed quite ominous from the point of prisoners. The humanisation process in prison suffered a set back at the hands of the Apex Court. The only saving grace of this case was that the Court did not adopt the "hands off" doctrine, the way it was done by U.S. Courts.

However, there came a subsequent change in the judicial attitude after fifteen years, since the decision of Gopalan, in State of Maharashtra v. Prabhakar Pandurang. In this case the respondent wanted to publish a book 'Inside the Atom' written by him while he was in jail. He applied for
permission to send it outside the jail for publication which was refused. The High Court of Bombay had held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenu to carry on his activities within the conditions governing detention. It was further laid down that there were no rules prohibiting a detenu from sending a book outside the jail with a view to get it published. The High Court directed the state to send the manuscript of the book to his wife for publication.\footnote{97}

Instead of accepting the above verdict gracefully, the State Government, dipped in retribution, preferred an appeal against it, before the Apex Court. The Supreme Court upheld the decision of the Bombay High Court with the observation that the conditions of detention could not be extended to deprivation of other Fundamental Rights consistent with the fact of detention.\footnote{98} The Court refused to accept the contention of the State that when a person was detained he lost freedom and was no longer a free man, and therefore he would exercise only such privileges as were conferred on him by the order of detention. The Court held that the State's contention was wrong and if it were accepted, it would mean that the detenue could be starved to death, if there was no condition providing for giving food to the detenue.\footnote{99} The humanistic tone of the Court could be found to be quite obvious and it marked the reversal of Gopalan. The refusal of the State Government to release the manuscript for publication

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was held to constitute an infringement of the personal liberty of the
detenue in derogation of the law, under which he was detained.\textsuperscript{100}

In \textit{D.B.M.Patnaik v. State of Andhra Pradesh},\textsuperscript{101} the naxalite
prisoners who were undergoing a sentence of imprisonment in
Vishakhapatnam had complained that they were living in subhuman
conditions and were treated as inmates of a fascist concentration camp.
The Court emphasized that though the Government possesses the
constitutional right to initiate law, it could not, by taking law into its own
hands, resort to oppressive measures to curb the political beliefs of its
opponents. No person, not even a prisoner, could be deprived of his life
or 'personal liberty' except according to procedure established by law.\textsuperscript{102}

On a perusal of the affidavit of the respondent, in the above noted case
the Court was not satisfied that the allegations made by the petitioners
were not true. Further, for want of satisfactory proof, the Court hesitated
to accept the contention of the petitioners that the treatment meted out to
them was in violation of their right to life and personal liberty. It appears
to be very strange and unfortunate that the Court was ready to believe
what was stated by the respondent in its affidavit, but was hesitant to
adopt some means to ascertain the existence or otherwise of alleged
subhuman conditions prevailing in the jail. This hesitation on the part of
the Court, robbed any credibility that could have been attached to the
opinion of the Court, "convicts are not, by mere reason of the conviction,
denuded of all the fundamental rights which they otherwise possess".\textsuperscript{103}
This statement appears to be hollow. The Court had advocated for the extension of Article 42 to living conditions in jails and opined, "there are subtle forms of punishment to which convicts and undertrial prisoners are sometimes subjected but it must be realised that these barbarous relics of a by gone era offend against the letter and spirit of our Constitution". This opinion only indicates that the Court was ready to enlarge the prisoners' rights to pave way for effective humanisation of prisons.

During the period of National Emergency (1975-1977) the Supreme Court sulked under the pressure of all pervading state machinery and reversed its concern for the protection of prisoners' rights in a number of cases. In A.D.M. Jabalpur v. Shivkant Shukla, the Supreme Court virtually demolished the edifice of prisoners' rights. The petitions were detained during the Emergency and they filed petitions in their respective High Courts challenging the proclamation of Emergency and the legality of their orders of detention. All the High Courts were unanimous in their opinion that notwithstanding the continuance of Emergency and the Presidential Order suspending the enforcement of Fundamental Rights conferred by Article 14, 21 and 22, the High Courts could examine whether an order of detention was in accordance with the provisions of the Maintenance of Internal Security Act, which constituted the condition precedent of the exercise of powers there under, excepting those provisions of the Act which were merely procedural or whether the order was made malafide or was made on the basis of relevant material.
by which the detaining authority could have been satisfied that the order was necessary. The High Courts also held that they could not go into the question whether the Proclamation of Emergency was justified or its continuance malafide.\footnote{108}

In a majority judgment, four justices of the Supreme Court concluded that no person had any \textit{locus standi} to move any petition or to enforce any right to personal liberty as the proclamation of emergency was perfectly valid. They opined that it was not open to the detenue to even ask for the grounds of his detention and further no court could go into the question of malafides.\footnote{109} Thus, the decisions of all the High Courts were reversed. This decision has been termed aptly, as patently wrong and unjust\footnote{110}.

The dissenting opinion of Khanna, J., is worth mentioning at this juncture. According to him Article 21 could not be considered to be the sole repository of the right to life and personal liberty. Even in the absence of Article 21 in the Constitution, the State had got no power to deprive a person of his life or personal liberty without the authority of law. That was the essential postulate and basic assumption of the rule of law in every civilized society. Further, he opined that startling consequences would follow from the acceptance of the contention that consequent upon the issue of the presidential orders in question, no one could seek relief from Courts during the period of Emergency against deprivation of life or personal liberty. If two constructions of the presidential orders were
possible, the Court should lean in favour of a view, which did not result in such consequences.\textsuperscript{111} Khanna J. rejected the opinion of the majority that when Article 21 was suspended the result was that there would be no remedy against deprivation of person's life or liberty even through it was without authority of law, illegal or malafide. Thus, Khanna J. showed his courage of conviction even during those dark days of Indian democracy.

\textit{Union of India v. Bhanudas}\textsuperscript{112} is another case, which belongs to the dark period of Emergency of 1975-1977. In this case, the Supreme Court adopted a retrograde attitude of \textit{Habeas Corpus} case. In this case the detenus under the Preventive Detention Act, had complained of violation by prison authorities of the provisions of the Prisons Act, 1894, jail manuals and of legislations on specific conditions of detention. They had contended that they were entitled to the status of civil prisoners under the Prisons Act; that there was a recognised difference between preventive and punitive detention; that conditions of detention could be judicially examined even after the habeas corpus case; that the principles of legality and ultravires were not abrogated during the times of emergency for detenus and that prisons Act applied to detenus where the conditions of detention prescribe jail as the habitat of a detenue.\textsuperscript{113}

The Supreme Court, reversing the decisions of various High Courts virtually denied all the reliefs claimed by the respondents. The Court conceded that a detenue was confined in jail as a measure of administrative convenience but that fact did not elevate detenue to the
status of civil prisoners. The Court held that, "redressal of complaints against illegality or ultravires or unreasonableness in relation to conditions of detention could not be entertained at all." The Court advised the detenus to approach the competent administrative authorities for special medical attention or for other facilities. And it was open to the administrative authorities to take such action as they might be advised under the relevant provisions of the Act. But if the authorities did not give any relief? The counsel for the detenus argued, "then the detenus could come to the Court". Unfortunately, the Court rejected this contention as "unsound and unacceptable" because that would also be enforcing Fundamental Rights through the aid and process of Court, which was not permissible so long as the Proclamation of Emergency was in force.

According to Beg, J., the nature of claims made was such that they were essentially matters fit to be left to the discretion and good sense of the state authorities and officers. He further held that it was not possible to believe on bare allegations of the kind that the state authorities or officers would be vindictive or malicious or unreasonable in attending to the essential needs of detenus. Thus, the Court virtually embraced the "hands off" doctrine, which had never received judicial recognition in India. As Prof Upendra Baxi averred, during the Emergency courts were just not proper places for detenus to seek any redressal of grievances. The Apex Court would not even look at legality or ultravires of specific
conditions of detention, it would give no relief, it would cancel any relief given by High Courts.117

In the Post-emergency period, one can find a resurgent mood amongst the justices of the Apex Court to resuscitate the humane tone in their sentencing policy. The urge to humanize the prison administration was quite evident in many subsequent decisions. Thus in *Md.Giasuddin v. State of Andhra Pradesh*,118 the petitioner was a young man of 28 years and he was working as a junior Assistant in the Government Secretariat.

The Court stressed the rehabilitation of the criminal by saying that:

Crime is a pathological aberration, that the criminal can ordinarily be redeemed, that the state has to rehabilitate rather than avenge. The subculture that leads to anti-social behaviour has to be countered not by undue cruelty but by reculturisation. Therefore the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishments, thus, a relic of past and regressive times... the modern community has a primary stake in the rehabilitation of the offender as a means of social defence119.

The Court emphasising the need for humanisation of prisons stated:

Indeed, the direction of prison reform is not towards dehumanisation but rehumanisation, not maim and mayhem and vulgar callousness but man making experiments designed to restore the dignity of the individual and the worth of the human person... that there is divinity in every man which has been translated into the
constitutional essence of the dignity and worth of the human persons.\textsuperscript{120}

This opinion of the Court comes, as it does, in the wake of \emph{Habeas Corpus} case and \emph{Bhanudas}, had a profound influence on the penal system in India. As stated by an Eminent Law professor "the decision in \emph{Giasuddin} is conspicuous for various reasons (1) it evolves an Indian approach towards the explanation of crime and purpose of punishment in the light of the western theories; (2) it spells out the framework of a correctional system though couched in persuasive language; (3) it enforces the new punishment- reparation by the offenders; (4) it stresses the need for individualization of punishment;(5) it suggests ways and means for proper prison administration".\textsuperscript{121}

In this case, keeping the young age and his potential and readiness for reform the Court reduced the sentence of the young appellant to eighteen months' imprisonment. This reduced sentence has been rightly regretted as the Court rejected the prayer of the petitioner for probation benefit. Imprisonment, however short its duration may be, it will have many pernicious ill effects on the accused and his family.\textsuperscript{122} Use of probation would have been more appropriate for the reformation and rehabilitation of the accused.

The case is, however, noteworthy because the Court issued several directions to the state that the convict be assigned work not of a monotonous, mechanical, degrading type but of a mental, intellectual or
like type with little manual labour. The Court further directed the State Government to extend the guarded parole release facility every three months for at least a week to the appellant, if jail rules permitting, and the appellant submitting to conditions of discipline and initiation into an uplifting exercise during the parole interval. In order to monitor compliance with its directions and assess the progress made by the appellant, the Court directed the Advisory Board of the prison to make periodical checks and to find out whether the jail authorities were helping in the process and implementing the prescription of the Court. The decision of the Supreme Court in this case, for its innovative tenor, is considered as "the most celebrated decision in the present context for a student of Indian Criminal law in as much as it spells out the framework of a new penal system".

In subsequent years the Supreme Court decided many cases and delivered many judgments, which made a radical break with the existing judicial passivity in respect of rights of prisoners and prison conditions. These cases revealed the pathetic position of prisoners and subhuman conditions in prisons and judicial remedies were prescribed. Through these decisions the Apex Court has recognised and articulated many rights as belonging to the prisoners in a prison. They are:

6.2.2.1 Right to Legal Aid

The Supreme Court has recognised that the prisoners have a right to free legal aid. In M.H. Hoskot v. State of Maharashtra, the Supreme Court...
Court cited with approval a statement of a committee: "prisoners, men and women, regardless of means, are a peculiarly handicapped class. The morbid cell which confines them walls off from the world outside. Legal remedies, civil and criminal, are often beyond their physical and even financial reach, unless legal aid is available within the prison as is provided in some states in India and in other countries. Without legal aid, petitions of appeal, applications for commutation or parole, bail motions and claims for administrative benefits would be well nigh impossible. There is a case for systematized and extensive assistance through legal aid lawyers to our prison population".127

The Court opined that if a prisoner sentenced to imprisonment, was virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there was implicit in the Court under Article 142, read with Article 21 and 39 A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'.128

The Court declared that where the prisoner was disabled from engaging a lawyer, on reasonable grounds such as indigence or in communicable situation the Court should, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party did not object to that lawyer.129 Further, free transcripts of the relevant judgment had to be given to the prisoners and facilities extended to file an appeal.

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In *Superintendent of Legal Affairs W.B. v. Bhowmick* 130 the Supreme Court again discussed the concept of legal aid and fair procedure. The Court laid down that the right to free 'legal service' is an essential ingredient of fair and reasonable procedure as implicit in the right of personal liberty contained in Article 21 of the Indian Constitution. The obligation of the state could not be done away with by saying that it was unable to provide the same due to financial and administrative reasons. It was the duty of the court to see and inform the accused that he has a right to legal service, even if he does not ask for the same.131

In *Ranchod Mathur Waswa v. State of Gujarat*,132 the Supreme Court condemned the fact that sessions judges were not appointing counsel for the poor accused in grave cases. 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 such as the appointment of raw entrants to the bar.133

In *Zarzoliana v. Government of Mizoram*,134 the Gauhati High Court has outlined the broad features of the states responsibility to provide legal aid to dispose of cases expeditiously in Mizoram under the provisions of the Criminal Procedure Code, 1973. Those provisions of the Code are not applicable in Mizoram, because parliament has not extended those provisions to Mizoram, still Lahiri J. held that although the letter of law
was not applicable the spirit was and he directed the state of Mizoram to follow these provisions of the Criminal Procedure Code.\textsuperscript{135}

Thus, the above decisions clearly establish that every prisoner has a fundamental right to free legal aid and even if he does not ask for such an assistance, the presiding judge has an obligation to inform the prisoner about this right and assign a competent advocate if the prisoner desires so.\textsuperscript{136}

6.2.2.2 Right To Speedy Trial

The concept of fair procedure also includes a reasonably speedy trial. In the U.S. Constitution, Sixth Amendment has stipulated the concept of speedy trial: "In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial". In \textit{Hussainara Khatoon v. State of Bihar}\textsuperscript{(1)}\textsuperscript{137} the facts disclosed that large number of men, women and children charged with trivial offences were interminably kept behind bars under abysmal conditions eventually ceasing to be human beings. The Supreme Court noted that one of the infirmities of the legal and judicial system which was responsible for the gross denial of justice to the under trial prisoners, was the notorious delay in disposal of cases. The Court declared that "speedy trial is one of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice".\textsuperscript{138}

The Court further ruled that although Indian Constitution contained no provision corresponding to the Sixth Amendment of the U.S.
Constitution, it was implicit in the broad sweep and content of Article 21 as interpreted in *Maneka Gandhi v. Union of India*, namely, that no person should be deprived of his life or personal liberty except by a procedure which was "reasonable, fair and just". Obviously, no procedure which did not ensure a reasonably quick trial could be regarded as 'reasonable, fair and just" and it would fall foul of Article 21. The Court directed the Bihar Government to supply the list of under trial prisoners including the period of their detention without trial.

In *Hussainara Khatoon (II) v. State of Bihar* the Supreme Court directed that the under trial prisoners against whom charge sheet had not been filed by the police within the period of limitation provided for in section 468 of the Criminal Procedure Code could be proceeded against at all and they should be released forth with. The reason being that any further detention of such persons would have been unlawful and violative of Fundamental Right enshrined in Article 21.

Similarly in *Hussainara Khatoon* case, Bhagawati, J., observed that the state could not avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. It was also the constitutional obligation of the Court, as the guardian of the Fundamental Rights of the people, as a sentinel on the qui vive, to enforce the Fundamental Right of the accused to speedy trial by issuing necessary directions to the state which may include taking of positive action, such as augmenting and strengthening the investigative
machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.\textsuperscript{145} This opinion clearly demonstrates the seriousness attached by the Court to speedy trial.

State of Maharasra v. Champalal Punjab State\textsuperscript{146} is an important decision of the Supreme Court for the approach it has adopted to the issue of speedy trial. The Court observed that while a speedy trial was an implied ingredient of a fair trial, the converse is not necessarily true. The delayed trial was not necessarily an unfair trial. The delay might be occasioned by the tactic or conduct of the accused himself. The delay might have caused no prejudice whatsoever to the accused. The question whether a conviction should be quashed on the ground of delayed trial depends upon the facts and circumstances of the case. Thus, the Court would not quash proceedings whenever there is delay. If delay is due to the tactics or conduct of the accused and if he has not been prejudiced in any way by the delay, he would not get any relief from the Court.\textsuperscript{147}

In T.V.Vatheeeswaran v. State of Tamil Nadu,\textsuperscript{148} the Supreme Court held that undue delay in carrying out the death sentence entitles the accused to ask for lesser sentence of life imprisonment. This opinion is based upon the immense psychological, emotional and mental torture a man condemned to death suffers. In Sheela Barse v. Union of India,\textsuperscript{149} the Supreme Court spelled out the consequence of violation of the
Fundamental Right to speedy trial that the prosecution itself would be liable to be quashed on the ground that it was a breach of the Fundamental Rights.

Some Courts have set out maximum outer time limits. In *Madheswari Singh v. State of Bihar*, the Patna High Court held that the right to speedy trial applies not only to major crimes but to minor offences as well. Another important principle enunciated in this case related to the question whether a time limit should be prescribed to effectuate the said right. The Court held that seven years was the outer time limit for non-capital cases and after seven years the burden shifts to the state to show that the delay was caused by the accused or by special and exceptional circumstances. Similarly in *State v. Maksudan Singh*, delay of 10 years or more caused entirely by prosecutorial delay considered as perse violations of the right to a speedy trial. But in *A.R. Antulay v. R.S. Nayak*, it was held that it was neither advisable nor practicable to fix any time limit for trial of offences. Any such rule was bound to be qualified one. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. The Court did not think that not fixing any such outer limit in effectuates the guarantee of right to speedy trial.
6.2.2.3 Right To Human Dignity

(i) Protection Against Torture

The Supreme Court has used Article 21 as a tool against torture of prisoner by prison officials. In *Sunil Batra (I) v. Delhi Administration*, Krishna Iyer, J., categorically stated that it was a crime of punishment to further torture a person undergoing imprisonment, as the remedy aggravates the malady and thus ceases to be a reasonable justification for confiscation of personal freedom and is arbitrary because it was blind action not geared to the goal of social defence, which was one of the primary ends of imprisonment. It would reverse the process by manufacturing worse animals when they are released into the mainstream of society. The additional torture was unreasonable, arbitrary and was perilously near unconstitutionality. Thus, torturing a prisoner was considered to be against the philosophy of reformation.

Punishment, though punitive, cannot degrade human dignity. The Court held that the cardinal sentencing goal was correctional, changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practices dehumanizing techniques, it was wasteful, counter productive and irrational, hovering on the hostile brink of unreasonableness.

In *Sunil Batra (II) v. Delhi Administration* the petitioners complained that A. Singh the Head warden of Tihar Jail, had tortured by pushing his baton up the anus of Premchand, a prisoner and ruptured it.
After a perusal of the medical report, which confirmed the atrocity committed on Premchand, Krishna Iyer, J., wondered: "can human nature be such rubber? More than the probity of the investigation and the veracity of the doctor are at stake-hope in human integrity without which human dignity will be the first casualty".159

Reaffirming Court's authority to intervene in such cases, Justice Krishna Iyer observed that the Court had power and responsibility to intervene and protect the prisoner against mayhem, crude or subtle, and he said, it might use habeas corpus for enforcing in prison humanism and forbiddance of harsher restraints and heavier severities than the sentence carries.160 When a prisoner was traumatised, the Constitution, would suffer shock, "and when the Court takes cognizance of such violence and violation, it does, like the hound of heaven ... follow the official offender and frown down the outlaw adventure".161 Thus, the learned justice expressed Court's eagerness to enforce humanisation in prisons.

The Court further felt it necessary to hang large notice boards displaying the rights and responsibilities of prisoners, in prominent places within the prison in the language of the people. This system would facilitate the communication of their rights to the prisoners. In addition to this suggestion the Court gave several directions to make prisoner' rights more effective. They are:

1. Within the next three months Grievances Deposit Boxes shall be maintained by or under the orders of the District magistrate or Sessions
Judge, which will be opened as frequently, as is deemed fit, and suitable action taken on complaints made. Access to such boxes shall be accorded to all prisoners.162

2. District Magistrates and Sessions judges shall, personally or through surrogates, visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances, shall make expeditious enquiries there unto and take suitable remedial actions. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, habeas action.163

3. The state must prepare a prisoner's handbook in Hindi and circulate it among the inmates to raise their legal awareness. Periodical jail bulletins stating how improvements and rehabilitation programmes must be brought into the prison, and a prisoners' wall paper which will freely air their grievances must be put up to help reduce stress and create a fellowship which will ease tensions. All these are meant to implement s.61 of the Prisons Act, 1894.

4. The Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and corrective strategies must be maintained.164

5. The Prisons Act, 1894 and the Prison Manuals, even the Model Prison Manual, must be overhauled as they are out of focus with healing goals. A corrections-cum-orientation course be made compulsory for the
prison staff, which will inculcate therapeutic approaches and tension free management.

6. The right of prisoners must be protected by the Court through its writ jurisdiction: free legal services to the prisoner, programmes be promoted by professional organisations recognised by the Court. The District Bar must also keep a cell for relief of prisoners.\textsuperscript{165}

This decision is significant as for the first time it contains several directions relating to several aspects of prison administration, to bring about substantive changes in the prison system. If implemented faithfully by prison authorities / state, the prisons would undergo a sea change.

\textit{Rakesh Kaushik v. B.L.Vig, superintendent, Central Jail, New Delhi.\textsuperscript{166}} is another case where the Supreme Court received a complaint of torture from the petitioner who was a lifer. He bitterly complained with facts and figures, of the terror and horror physical and psychic, let loose on him and other jail mates by a crypto-criminal combination of senior officials and superior prisoners, thereby making the prison life within the walled world such a trauma and torment the law never meant under the sentence suffered at the hands of the Court.

Krishna Iyer, J., who wrote the judgment expressed his anguish at the fearful circumstances revealed in this case: "Is a prison term in Tihar jail a postgraduate training in tough crime? Is an invisible 'Super' mafia in \textit{de facto} management of the penal institutions? Should every sentencing judge, high and low, hang his helpless head in frustration and humiliation
because institutional aberrations and personnel perversions have sullied and stultified the justice of his sentence?\textsuperscript{167}

The Court referred to the several directions it had issued earlier in *Sunil Batra II*\textsuperscript{168} and wondered "how far have these directives been implemented especially to the extent they affect the present petitioner"?\textsuperscript{169} Shri Markandeya, appointed by Supreme Court as amicus curiae had reported that the injunctions of the Court issued in *Sunil Batra (II)* had not been carried out. Krishna Iyer, J., expressed his consternation at the deterioration of the conditions in Tihar Jail and repented that no major measure of reform had yet taken place in the prison order or in the prison manual. He warned that such indifference could not deter the writ of the Court running into the prison.\textsuperscript{170}

In this case the District and Sessions Judge was directed to conduct an enquiry and file a report. It is not known as to what report was submitted by the concerned judge and what reforms were made in Tihar Jail in response to the report. One weak spot of the decision is that the Court never castigated the prison officials responsible for the deplorable state of affairs. The judge concerned no doubt sensitized the public about the subhuman conditions existing in Tihar Jail, but he never fixed responsibility on the prison officials.\textsuperscript{171} In several cases prison officials have been judged to be worse than the vilest criminals in their custody and yet no strictures were passed against them. As a result, there has been no marked change in the attitude of prison officials.
In Veena Sethi v. State of Bihar the Supreme Court stumbled upon yet another instance of inhumanity in the form of illegal detention of non-criminal lunatics and also some prisoners who were sane, for two to three decades without any justification. This matter was brought to the notice of the Court by a letter written by a member of Hazaribaug Free legal Aid Committee.

Bhagawati, J., lamented that it was unfortunate that most of the prisoners had been in jail for over 25 years and it was a matter of shame for the society that those prisoners had to be detained in jail because there were not adequate institutions for treatment of the mentally sick and the only one institution existing in Bihar for their treatment was full. Referring to the conditions of lunatic asylums in one or two states, Bhagwati, J., stated that the conditions in these lunatic asylums were wholly revolting and one begins to wonder whether they were places for making insane persons sane or sane persons insane and condemned the practice of sending insane persons to jail.173

The case revealed many shocking instances. Particularly shocking was the case of Gohia-Ho who was jailed on 2-5-1945 and was sentenced to undergo rigorous imprisonment for only three years and to pay a fine of Rs.100/. He was kept under observation in Hazanbaug Central Jail since he appeared to be of unsound mind and by an order dated 3rd July 1948, it was directed that he should be kept in safe custody in the Jail and given proper medical treatment until a bed was available in the only mental
hospital at Kanke. In the meanwhile he attempted to commit suicide. As a result an offence under section 309 of the Indian Penal Code was registered against him. Obviously the case could not be proceeded with since Gohia Ho was of unsound mind. Gohia Ho was declared sane after a medical examination on 25th December 1966. But no steps were taken by the Superintendent, Hazaribag Central Jail to Communicate to the Deputy Commissioner Hazaribgaug or to the Judicial Magistrate 1st Class Hazarigaugh, so that the learned judge could proceed with the case. It was only 18th December 1969 the matter was reported to him. Gohia Ho was in illegal detention for 3 years even though he had become sane. After much dilly-dallying Gohia Ho was released from jail in 1982. He was in Jail for 37 years and during that period for 16 years from 1966 he was no longer an insane person. He underwent a mental trauma and torture for such a long period and the Court asked the state to provide him sufficient funds to meet his expenses of his journey to his native place as also maintenance for a period of one week.\footnote{174}

Another similar shocking story was that of Bhondua kurmi who rotted in jail for 9 years in excess of his sentence period, because of controversy between different government departments as to the spelling of his name. Despite such revealing instance of callous attitude of prison authorities verging on the threshold of inhumanity the Court did not fix responsibility on any prison official. The Court "hoped and trusted" that the authorities would reform themselves after reading the judgment of the

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Supreme Court. But this hope and trust of the Court has been recklessly ignored with impunity by prison authorities, as revealed by similar cases reported subsequently.175

(II) Hand Cuffing and Imposition of Fetters

The Supreme Court has considered the legality of the handcuffing and imposing bar fetters, in a number of cases with reference to Article 21 of the Indian Constitution. In *Sunil Batra (I) v. Delhi Administration*176 The Supreme Court considered the allegation of Charles Sobraj in a second petition that ever since he was lodged in Tihar Central Jail he was put in bar fetters and the fetters were retained continuously for 24 hours a day. The Court found the allegation as true.

The petitioner contended that section 56 of the Prisons Act, 1894,177 so far as it confers unguided, uncanalised and arbitrary powers on the Superintendent to confine a prisoner in irons was ultravires Article 14 and 21. The Court considered whether the powers conferred on the Superintendent was unguided and uncanalised. The Court observed that a bare perusal of Section 56 would show that the Superintendent might put a prisoner in bar fetters (i) when he considered it necessary; (ii) with reference either to the state of the prison or character of the prisoner; and (iii) for the safe custody of the prisoner. The determination of the necessity to put a prisoner in bar fetters had to be made after the application of mind to the peculiar and special characteristics of each individual prisoner.178
Krishna Iyer J., upheld the vires of section 56 of the Prison Act as humanistically read but, however, he held the provision as being somewhat out of tune with current penological values and mindless to human rights moorings. Krishna Iyer, J. observed that undertrial shall be deemed to be in custody, but not undergoing punitive imprisonment. Fetters especially bar fetters, shall be shunned as violative of human dignity within and outside prisons. The indiscriminate resort to hand cuffs when accused persons were taken to and from Courts and the expedient for forcing irons on prison inmates were illegal and shall be stopped forth with. Reckless hand cuffing and chaining in public degrades, puts to shame finer sensibilities and was a slur on Indian Culture. However, where an under trial had a credible tendency for violence and escape a humanely graduated degree of 'iron' restraint is permissible if-only-if other disciplinary alternatives were unworkable. The burden of proof of the ground was on the custodian. And if he failed, he would be liable in law.179

Further, Krishna Iyer, J., held that the discretion to impose 'iron' was subject to quasi-judicial oversight, even if purportedly imposed for reasons of security. And when the decision to fetter was made the reason should be recorded. If there was no provision for independent review of preventive and punitive action for discipline or security such action shall be invalid as arbitrary and unfair and unreasonable. No fetters shall continue beyond day time as nocturnal fetters on locked in detenus are
ordinarily not required from considerations of safety. For prolonged continuance of 'irons' previous approval of an external examiner like a Chief Judicial Magistrate or Sessions Judge who should hear the victim and record reasons was necessary. The Inspector General of Prisons shall, with quick dispatch consider revision petitions by fettered prisoners and direct the continuance or discontinuance of the irons. In the absence of such prompt decision the fetters should be deemed to have been negatived and shall be removed.\textsuperscript{180} Thus, the Court tried to mitigate the harshness of bar fetters and to enforce humanization in using them.

Again in \textit{Sunil Batra (II) v. Delhi Administration}\textsuperscript{181} the Supreme Court explained the barbarity of fetters by saying that to fetter prisoners in irons is an inhumanity unjustified save where safe custody was otherwise impossible. The routine resort to handcuffs and irons bespoke a barbarity hostile to Indian goal of human dignity and social justice.\textsuperscript{182}

\textit{Premshankar Shukla v. Delhi Administration}\textsuperscript{183} is another case where Krishna Iyer, J., examined the illegality of handcuffs. The case is a significant one as it clearly reveals the helplessness of the Apex Court in enforcing its directions. This case clearly shows that the judgements of the Supreme Court have absolutely no practical effect on prison administrators and that the directions of the Supreme Court are flouted with impunity.

The petitioner complained that he was routinely hand cuffed when he was taken out to the Court in violation of the directive issued by the
Supreme Court in *Sunil Batra's case (I)*. When he brought this to the notice of Delhi High Court it dismissed the petition in limine which was in clear violation of *Sunil Batra(I)*.

The Court declared that hand cuffing was prima facie inhuman and, therefore, unreasonable, was over-harsh procedure and objective monitoring to inflict 'irons' was to resort to zoological strategies repugnant to Article 21. Insurance against escape does not compulsorily require hand cuffing. The Court laid down as necessarily implicit in Articles 14 and 19 that when there was no compulsive need to fetter a person's limbs, it is a sadistic, capricious, despotic and demoralizing to humble a man by manacling him. The convenience of the guards was not a relevant consideration and the apprehension of escape was not a good enough excuse. If more guards would suffice to prevent escape then no fetters could be imposed. Merely because a person was charged with a grave offence he could not be hand cuffed.

The Court laid down the following rules applicable in extreme cases where hand cuffs have to be put on the prisoner.

1. The escorting authority must record the reasons when hand cuffs are to be put;
2. The reasons recorded must be shown to the presiding judge and get his approval;
(3) If the Court directs that hand cuffs shall be off, no escorts authority can over rule judicial discretion.

Further the Court declared that it shall be obeyed from the Inspector General of Prisons to the escort constable and the Jail Warder- that the rule regarding a prisoner in transit between prison house and Court house is freedom from handcuffs and the exception, could be under conditions of judicial supervision.¹⁸⁸

However, Aeltemesh Rein v. Union of India¹⁸⁹ reveals the callous indifference of the police authorities regarding the directions issued by apex Court on hand cuffing. In this case an advocate was hand cuffed contrary to law while he was being taken to the Court of the Metropolitan Magistrate at Delhi, after he had been arrested on the charge of a criminal offence. It was urged by the petitioner that the union Government and Delhi Administration had not issued necessary instructions to the police authorities with regard to the circumstances in which an accused, arrested in a criminal case could be hand cuffed or fettered in accordance with the judgment of the Supreme Court in Prem Shankar Shukla's case.

The Court accordingly directed the Union of India to frame rules or guidelines as regards the circumstances in which hand cuffing of the accused should be resorted to in conformity with the judgment of the Court in Prem Shankar Sukla's case and to circulate them amongst all the State Governments and Union Territories. The Court stipulated that the order should be complied within three months.¹⁹⁰
The severe disapproval by the apex Court of the practice of routine hand cuffing of prisoners by the escorting officials has never been taken seriously by the police and the prison authorities. Unfortunately, the Apex Court has to repeat whatever it had earlier laid down, whenever any new case of illegal unwarranted handcuffing is brought to its notice. *Sunil Gupta v. State of Madhya Pradesh* is yet another case involving unjustified handcuffing. The petitioners in this case were social workers and members of Kisan Adivasi Sanghtan, Kerala. The Sanghatan was working against the exploitation of local farmers and tribal people. The petitioner along with a number of children and tribal women staged dharna for the appointment of regular teachers in schools located in the tribal hamlets.

The petitioners alleged that they were arrested, abused, beaten and taken to the Court C.J.M. I class Hoshangabad by hand cuffing them. Sunil Gupta in his additional affidavit stated that he was hand cuffed in the Court itself, and this was not done with the consent of the Magistrate or under his direction. After examining the various facts and affidavits the Court came to the conclusion that the escort party neither got instructions nor obtained any orders in writing from the magistrate. The escort officer did not note any reasons for handcuffing the petitioners.

The Supreme Court observed that it was most painful to note that petitioners who worked for a public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been
subjected to humiliation by being hand cuffed which act of the escort party was against "all norms of decency and which is in utter violation of the principle underlying Article 21 of the Constitution of India".\textsuperscript{194} This observation is a reiteration of what it had laid down earlier in other cases.

The Supreme Court reiterated the principle laid down in \textit{Sunil Batra and Prem Shankar Shukla} again in citizens for \textit{Democracy v. State of Assam},\textsuperscript{196} that hand cuffing was inhuman and in utter violation of human rights guaranteed under the international law and the Constitution of India. Kuldip Singh, J., said that the law declared by the Court in \textit{Shukla's case} and \textit{Batra} case was a mandate under Article 141 and 142 of the Constitution of India and all concerned were bound to obey the same. He was constrained to say that the directions issued \textit{repeatedly} regarding handcuffing of undertrials and convicts were not being followed by the police, jail authorities and even by the subordinate judiciary.\textsuperscript{196} He further warned:

"We make it clear that the law laid down by this Court in the above said two judgments and the directions issued by us are binding on all concerned and any violation or circumvention shall attract the provisions of the Contempt of Courts Act apart from other penal consequences under the law".\textsuperscript{197} The Court issued directions to the police which are similar to those issued in \textit{Shukla case} and directed all ranks of police and the prison authorities to meticulously obey them.
(iii) Solitary Confinement

The Supreme Court discussed the concept of solitary confinement in a number of cases with reference to Article 21, humanistically interpreted. In *Sunil Batra (I) v. Delhi Administration*, the petitioner complained that from the time he was sentenced to death on July 6, 1976 he was kept in solitary confinement. He contended that section 30 (2) of the Prisons Act did not justify keeping a prisoner under sentence of death in solitary confinement on the alleged ground of security and hence it was void as violative of the provisions of Articles 14, 19 and 21 of the Constitution. Batra further contended that he was not under 'sentence of Death' within the scope of S.30 until the Supreme Court had affirmed and Presidential mercy had dried up by a final 'nay'. Batra had been sentenced to death by the Sessions Court.

Batra contended that solitary confinement was a separate substantive punishment of maddening severity prescribed by Section 73 of the Indian Penal Code, which can be imposed only by the Court. Hence it was argued that the incarceratory insulation inflicted by the prison superintendent on the petitioner was virtually solitary confinement unauthorized by the penal code and therefore, illegal.

Krishan Iyer, J., observed that admittedly no solitary confinement had been awarded to Batra. So, if he was de facto so confined it was illegal. A sentence of death under Section 53, Indian Pena Code, did not carry with it a supplementary secret clause of solitary confinement.
The Court interpreted the words in Section 30(2): "under sentence of death" to mean that a prisoner was not under sentence of death till all steps open to the prisoner to appeal against the sentence or to appeal for mercy had been exhausted and an order for his execution was passed. Till that time he was not a person under the sentence of death.  

Section 366(2) Code of Criminal Procedure, 1973, read with form 40 authorizes only "safe keeping" which was the limited jurisdiction of jailor. Section 366 (2), enabled the Court to commit the convicted person who was awarded capital punishment to jail custody under a warrant. It was implicit in the warrant that the prisoner was neither awarded simple nor rigorous imprisonment. According to Iyer, J., the purpose behind enacting subsection (2) of S.366 was to make available the prisoner when the sentence was required to be executed. When a prisoner was committed under a warrant for jail custody under s.366 (2) Criminal Procedure Code and if he was detained in solitary confinement prescribed by s.73, Indian Penal Code it would amount to imposing punishment for the same offence more than once which would be violative of Article 20 (2). However, on the interpretation put on Section 30 (2) by the Court there was no question of the Section being void for violating Article 20(2) or Article 21 of the Constitution.

Further the learned judge held that, 'safe keeping' in jail custody was the limited jurisdiction of the jailor. The convict was not sentenced to imprisonment and solitary confinement. He was a guest in custody, in the
safekeeping of the host jailor until the terminal hour of terrestrial farewell whisked him away to the halter. This was trusteeship in the hands of the Superintendent. To distort safekeeping into hidden opportunity to cage the ward and the traumatize him was to betray the custody of the law, safe custody did not mean deprivation, isolation, banishment from the lanten banquet of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near insanity. Thus, the judge tried to infuse humanity into solitary confinement.

*Kishore Singh v. State of Rajasthan* is another case, which unfolds prisons barbarity causing limitless misery to the hapless prisoners. The case also reveals the scant regard, which the prison authorities have for the Court rulings. A telegram addressed to the justices of the Supreme Court sent by Kishore Singh revealed that he along with two others were confined in cells with fetters, for more than eight months, in Jaipur Central Jail.

The Court directed that the prisoners should be forthwith liberated from solitary confinement and freed from fetters interms of the law laid down by the Court in *Sunil Batra's case (I)*. The Court appointed shri P.H.Parekh as *amicus curiae* and directed the Superintendent of the Jaipur Central Jail to submit a report to the Court. The Court found that the petitioners were kept in separate solitary rooms for long periods from 8 months to 11 months. The counsel for the petitioners had submitted that flimsy grounds like 'loitering in the prison' 'behaving insolently' and in
an 'uncivilised' manner, 'tearing off his history ticket' were the foundation for the torturesome treatment of solitary confinement and crossbar fetters. The Court felt unsatisfied that the mandate of Sunil Batra (I) had not been obeyed. The Court overruled the submission that a separate cell was different from solitary confinement. Further it repeated its ruling in Sunil Batra (I) and said that if special restrictions of a punitive or harsh character have to be imposed for convicting on security reasons, it was necessary to comply with natural justice as indicated in Sunil Batra case. The Court reminded the sessions judges in the state of Rajasthan to remember the rulings of the Court in Sunil Batra I and II and Rakesh Kaushik and act in such a manner that judicial authority over sentences and the conditions of their incarceration are not eroded by judicial inaction.206

Most importantly, the Court found that the old rules and circulars and instructions issued under the Prisons Act, 1894 were read incongruously with the Constitution, especially Article 21 and interpretation put upon it by the Court. Therefore, the Court directed, the State Government of Rajasthan and indeed all the other state Governments in the country to convert the rulings of this Court bearing on prison administration into rules and instructions forth with so that violation of the prisoners' freedom could be avoided and habeas corpus petitions may not proliferate.207 Apart from this, the Court did not find it necessary to punish the erring officials.
Right to compensation for violation of Fundamental Rights is also implicit in Article 21. The Indian Courts were earlier reluctant to award compensation for the violation of Fundamental Rights by the state and its officers on the ground of sovereign immunity. In *Rudul Sah v. State of Bihar*, though the petitioner was acquitted by the Court of sessions, Muzaffarpur, Bihar, on June 3, 1968 he was released from the jail on October 16, 1982, that is, more than 14 years after he was acquitted.

By a *habeas corpus* petition, the petitioner asked for his release on the ground that his detention in the jail was unlawful. He had also asked for certain ancillary relief's like rehabilitation, reimbursement of expenses, which he might incur for medical treatment and compensation for the illegal incarceration. The Court issued a show cause notice to the State of Bihar, but the state offered no explanation for over four months. The Court adjourned the petition twice. At last, as the Court received no explanation from the State to explain the continued detention of the petitioner in jail after his acquittal, it proceeded with the petition.

The jailor’s affidavit stated that the petitioner was not released from the jail upon his acquittal and that he was reported to be insane. But it disclosed no data on the basis of which he was adjudged insane, the specific measures taken to cure him of that affliction. No medical opinion was produced in support of the diagnosis that he was insane. The Court concluded that if at all the petitioner was found insane at any point of
time, the insanity must have supervened as a consequence of his unlawful detention.

The Court considered whether in the exercise of its jurisdiction under Article 32, it could pass an order for the payment of money if such an order was in the nature of compensation consequential upon the deprivation of a Fundamental Right. The Court opined that:

the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his Fundamental Right to life, and liberty be denuded of its significant content if the power of this Court were limited to passing order of release from illegal detention of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant impingements of Fundamental Rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest.\(^{210}\)

Taking into consideration that great harm was done to the petitioner by the Government of Bihar, the Court directed that the State must pay to the petitioner a sum of Rs.30,000/- in addition to the sum of Rs.5,000/- already paid by it. Rudul Shah is the first case where the Court awarded compensation to a prisoner for his unlawful detention violating his Fundamental Right.\(^{211}\)

In *State of Maharastra v. Ravikant S.Patil*,\(^{212}\) the Supreme Court considered a very important question whether the Police Officer who had
hand cuffed the respondent illegally could be made personally liable? In this case one Ganesh Kolekar was murdered and the respondent was arrested on the suspicion that he was a party to the said murder. He was handcuffed and both his arms were tied by a rope and he was taken through the streets.

The respondent filed a writ petition in the High Court of Bombay. The Division Bench held that the 4th respondent Mr. Prakash Chavan, Inspector of police had subjected the undertrial prisoner to an unwarranted humiliation and indignity which could not be done to any citizen of India and accordingly directed him to pay the compensation.213

The Supreme Court agreed with some of the findings of the High Court regarding the handcuffing and directed the State Government to take appropriate action against the erring official for having unjustly and unreasonably hand cuffed the arrested persons. But, the Court opined that the Inspector of police could not be made personally liable. It held, "he has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the under trial prisoner handcuffed, still we do not think that he can be made personally liable".214 This opinion of the Court is unacceptable in the light of the fact that the directions issued by the Court regarding handcuffing in cases like Sunil Batra I, II, Prem Shankar Shukla, Sunil Gupta have been repeatedly ignored and violated with impunity by the prison and Police Officials. The Supreme Court is content with making general statement of law, in case after case, without

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fixing liability on any erring official. As a result the opinion of the Court is never taken seriously by them. One of the means to instill a sense of humanistic responsibility in the officials would be to fix personal liability for the excesses they commit in exercising their powers.

In a number of cases the Supreme Court awarded compensation to the victims of arbitrary exercise of police power. *Smt. Nila Beti Behera v. State of Orissa*\(^{215}\) is a case which deserves special mention. The Supreme Court held in this case that the custodial death is to be compensated by way of damages payable to the family of the victim. J.S. Verma, J., stated that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which was guaranteed in the Constitution, was an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a Fundamental Right was distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the Fundamental Right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of Fundamental Rights, there could be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of Fundamental Rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the
state or its servants in the purported exercise of their powers; and
enforcement of the Fundamental Right was claimed by resorting to the
remedy in public law under the Constitution by recourse to Articles 32 and
226 of the Constitution.216 This opinion formed the basis for award of
compensation in other cases.

The Supreme Court has indicated its readiness to forge new tools to
secure justice. Thus, in Khatri (II) v. State of Bihar217 and Khatri IV v.
State of Bihar,218 the Court said that it was not helpless to grant relief in a
case of violation of right to life and personal liberty, and it should be
prepared to forge new tools and devise new remedies for the purpose of
vindicating fundamental rights. It was also indicated that the procedure
suitable to the facts of the case must be adopted for conducting the
inquiry, needed to ascertain the necessary facts for granting relief, for
enforcement of the guaranteed Fundamental Rights. Similarly it was held
in Union Carbide Corporation v. Union of India219 by Misra, C.J., "we have
to develop our own law and that it is necessary to construct a new
principle of liability to deal with an unusual situation which has arisen and
which is likely to arise in future".

In Nila Beti Behera, the Court concurred with the view that the Court
was not helpless and the wide powers given to the Court by Article 32,
itself is a Fundamental Right. It imposes a constitutional obligation on
the Court to forge new tools which may be necessary for doing complete
justice and enforcing the Fundamental Rights guaranteed in the

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Constitution, which enable the award of monetary compensation. The power available to the Court under Article 142 was also an enabling provision. The Court opined that any contrary view would not merely render the Court powerless and the Constitutional guarantee a mirage, but may in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court was powerless to grant any relief against the state.220

Awarding compensation is one such new judicial tool to curb the lawless behaviour of the prison authorities and fixing personal liability to pay damages, though very severe, is another one. Unless such drastic steps are taken, the Court would have to see helplessly the violation of its own directions and just remain content in repeating and re-repeating its general statements, as is witnessed in a string of such decisions.

6.2.2.5 Right To Family Visits

A most important thing, which a prisoner loses on his incarceration, is the company of his family members and friends. If a prisoner is allowed to meet his dear ones, it will have an effect of soothing his ruffled feelings and lessen the feeling of deprivation. The Supreme Court has considered the importance of family visits in a number of cases. In Sunil Batra (II) the Supreme Court held that visits to prisoners by family and friends "are a solace in insulation"; and only dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. The Court opined that subject, of course, to search and
discipline and other security criteria, the right to society of fellow-men, parents, and other family members could not be denied in the light of Article 19 and its sweep. More over, the whole rehabilitative purpose of sentencing is to soften, not to harden, and this will be promoted by more such meetings. "A sullen, forlorn prisoner is a dangerous criminal in the making and prison is the factory", the Court said, while describing the life in Jail.

The Court referred to the report of the National Advisory Commission that correctional officials should not merely tolerate visiting but should encourage it, particularly families. The Commission proposed that priority be given to making visiting areas pleasant and unobtrusive. It was also urged that correction officials should not eavesdrop on conversations or otherwise interfere with the participant's privacy. The Court held that, subject to considerations of security and discipline, liberal visits by family members, close friends and legitimate callers, are part of the prisoner' kit of rights and should be respected.

In *Hiralal v. State of Bihar*, the Court opined that a prisoner insulated from the world becomes bestial and, if his family ties are snapped for long becomes de-humanized. Therefore the Court regarded it as correctionally desirable that the appellant be granted parole and expected the authorities to give consideration to paroling out periodically prisoners.
In Francis Corallie v. Union Territory of Delhi, the petitioner was a British national who was arrested and detained in the Central Jail. The petitioner alleged that she was allowed to meet her daughter aged five, only once in a month and she was not allowed to meet her often. The restriction on interviews was imposed by the prison authorities by virtue of clause 3 (b) sub-clause (i) and (ii) of the conditions of detention laid down by Delhi Administration under an Order dated 23rd August 1975, issued in exercise of the powers conferred under Section 5 of the COFEPOSA Act.

The petitioner challenged the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the conditions of detention order on the ground that these provisions were violative of Article 14 and 21 of the Constitution in as much as they were arbitrary and unreasonable. Particularly when under trial prisoners were granted the facility of interview with relatives and friends twice in a week under Rule 559 A and convicted prisoners were permitted to have interviews with their relatives and friends once in a week under Rule 550 of the Rules set out in the Manual for the Superintendent and Management of Jail in the Punjab.

Bhagawati, J., speaking for the Court held that when an under trial prisoner was granted the facility of interviews with relatives and friends twice a week under Rule 559 A and a convicted prisoner was permitted to have interviews with his relatives and friends once in a week under Rule 550, it was difficult to understand how sub-clause (ii) of clause 3(b) of the
Condition of Detention Orders, which restrict the interview only to once in a month in case of detenue could possibly be regarded as reasonable and non-arbitrary, particularly when a detenue stands on a higher pedestal than an under trial prisoner or convict.229

Therefore Bhagwati, J., held unhesitatingly, sub-clause (ii) of 3 (b) to be violative of Articles 14 and 21. He was of the opinion that a detenue must be permitted to have at least two interviews in a week with relatives and friends and it should be possible for a relative or friend to be with the detenue at any reasonable hour on obtaining permission from the Superintendent of the Jail and it should not be necessary to seek the permission of the District Magistrate, Delhi, as the latter procedure would be cumbersome and unnecessary.230

6.2.2.6 Right to Correspondence

The prisoners should have a right to correspond with any person they want. Their correspondence should be, as far as possible, be free from censorship. This issue was a subject of judicial scrutiny in several cases. Thus, in Madhukar Bhagwan Jambhale v. State of Maharashtra,231 the Bombay High Court, inter alia, examined the right to correspondence of prisoners. The petitioner challenged the validity of Rules 20 and 17 (ix) of the Maharashtra prisons (Facilities to prison) Rules, 1962, Rule 20 of the said Rules provided:

"A prisoner who is entitled to write a letter and who desires to do so, may correspond on personal and private matters,

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but he shall not include any matter likely to become the subject of political propaganda or any strictures on the administrations of the prison, or any reference to other persons confined in the prison who have their own opportunities for communication with their families”.

Rule 17 (ix) provides as under:

"prisoners shall not be allowed to correspond with inmates of other prisons. If however, a prisoner has got his near relative in another prison, he may be permitted to send welfare letters only".

It was contended on behalf of the petitioner that the restrictions imposed on the prisoners under the said Rules were wholly unwarranted and were violative of the prisoners right to freedom of speech guaranteed under Article 19(1) (a) of the Constitution and also violative of Article 14 of the Constitution as being discriminatory²³².

The Court held that the above Rules must be read in the light of the provision of Rule 23 which provides that the Superintendent of Jail was entitled to withhold, for reasons to be recorded in Form III any incoming or outgoing letter of a prisoner which seems to him to be improper or objectionable or he may erase any improper or objectionable passages in such letters.

The Court held Rule 17 (ix) as discriminatory and violative of Article 14 of the Constitution as a prisoner was permitted to send welfare letters to his near relatives in other prisoners, but he was not permitted to send
welfare letters to prisoners in other prisons who were not related to him. The Court did not find any rational basis for such discrimination.233

The Court dealt in detail with Rule 20 which incorporated three prohibitions: 234

1) Not to include any matter likely to become the subject of political propaganda;

2) Not to include any strictures on the administrations of the prison; or

3) Not to include any reference to other persons confined in the prison who have their own opportunities for communication with their families.

The Court held that it was obvious that Rule 20 contained blanket restrictions on the rights of the prisoner, which he otherwise had. The Court reminded that it was well settled that the prisoner did not lose his rights guaranteed under the Constitution, except to the extent necessitated by reason of his incarceration and the sentence imposed. The Court opined that the restrictions imposed on the prisoner to be valid must have relevance either to the maintenance of internal order and discipline in the precincts of the jail or prevention of escape of the prisoner or prevention of transmission of coded message or messages which had the potentiality or tendency to give rise to disturbance of public order or inspiring commission of any illegal activity or offence or reasons.
of a like nature. Barring such restrictions, the Court did not see any reason why the prisoner should be prevented from writing letters containing matters referred to in Rule 20. The Court held that Rule 20 prevented most even the innocent reference about the co-prisoner lodged in the same jail. Such restrictions obviously had no nexus with the constraints and responsibility of the prison administration. With this opinion, the Court held that the prohibition in relation to the reference to other prisoners confined in the same jail was clearly unjust, arbitrary and unreasonable and held it as violative of Article 14, 19 (1) (a) of the Constitution.

Regarding the prohibition on divulging or commenting on the administration of the prison, the Court opined that it failed to see why the prisoner should not give vent to his grievances against the prison administration to the outside world through his letter. It was to be noted that the prisoner was not prevented from making these grievances in the interviews, which are permitted under the Rules. He was also permitted to make complaints to various authorities and was entitled to approach the Court by way of writ petition. It was quite possible that in a given situation he might not be in a position to complain about the administration directly to the prison authorities or even to the other authorities, such as District Judge who visits the prisons, but he might desire that his near relatives or friends do raise the issue before the appropriate Court in order to get his
grievances redressed. The Court opined that it did not see any rational basis for the blanket prohibition.237

As regards the political propaganda referred to in Rule 20, the Court ruled that it was not always the case that every political propaganda was detrimental to the welfare of the society merely because it finds a place in a letter sent through the Jail. The Rule 20 imposed blanket ban on a prisoner to express any views however innocent and beneficial to the society they might be. The Court opined that by reason of the conviction and being lodged in jail, the prisoner did not lose his political right or right to express views on political matters, so long as such views propagated by the prisoners through letters do not have the potency of inciting violence or was likely to adversely affect maintenance of law and public order. Therefore, the Court held, this prohibition on political propaganda as clearly unwarranted, unjust and unreasonable and must be struck down as violative of Article 14 and 19 (1) (a) of the Constitution. However, Rule 23 was not held to be unconstitutional as the power of Jail Superintendent under it was subject to procedural safeguards.238 Thus, the prisoners' right to correspond was implicit in Article 19 (1) (a), which could not be unreasonably curtailed on flimsy grounds.

6.2.2.7 Prison Labour and Wages

Originally prison labour was intended to inflict punishment on the prisoner, to disgrace and humiliate him and finally to crush him. Gradually labour was accepted as a method of reformation, to keep the men usefully
employed, to make them contribute to some extent to the cost of their maintenance, and, what is more important, prevent mental deterioration and at the same time provide some avocation on release. It contributes to prison discipline and reformation of prisoners.

Payment of wages to prisoners was opposed by prison administration as prisoners were considered a heavy burden to the state and they must be made to pay for their upkeep. This was in tune with the retributive theory. However, gradually as an incentive to motivate good conduct and to be industrious, payment of wages to prisoners was evolved. The law provides only for deprivation of a prisoners liberty. It will be unjust to extract work from a prisoner without paying wages. Payment of wages ensures rehabilitation by increasing self-respect and taking away reasons for nursing vengeance against society. The Courts have examined the kind of work to be assigned and payment of wages to the prisoners. Thus, in *Hiralal v. State of Bihar*, Krishna Iyer, J., explained the bad effect of hard labour which the rigorous imprisonment implied by observing that a young man, subjected to hard labour and exposed to the deleterious company of hardened criminals, will return a worse man, with more vices and vengeful attitude towards society. This was self-defeating from the correctional and deterrent angles.

Further, he observed, that it was established that work designed constructively and curatively, with special reference to the needs of the person involved, might have a healing effect and change the personality of
the quandum criminal. The mechanical chores and the soulless work performed in jail premises under the coercive presence of the prison warders and without reference to relaxation or relish might often be counter productive.\textsuperscript{244} So, Krishna Iyer, J., directed that within the limits of the prison rules obtaining in Bihar, reformatory type of work should be prescribed for the appellant in consultation with the medical officer of the jail. The visitorial team was asked to pay attention to see that its directive was carried out.\textsuperscript{245} Thus it was emphasized that the work should be of reformatory type.

**Wages**

The question of wages payable to prisoners for their labour was thoroughly examined by several High Courts. Thus, *In the matter of Prison Reform Enhancement of Wages of Prisoners, Etc.*,\textsuperscript{246} the Kerala High Court considered several pertinent questions pertaining to prison labour. Is a prisoner who has to undergo his term of sentence in Jail entitled as of right, to claim that he should be paid wages for his out-turn of work? Is he entitled to insist that the wages paid should not be illusory but reasonable? Can he complain to the Court that his personal liberty is infringed and his rights eroded by compulsion to do hard labour practically free? Is a Court called upon to grant relief in such a case? If so, what should be the approach of the Court in the circumstances?\textsuperscript{247} Answers to these questions are not easy as they are intertwined with the philosophy
of punishment. The Court came to the conclusion: "the dominant purpose of the punishment... is reforming the criminal and redirecting him into society as honest citizen". In this regard any measure for payment of reasonable wages to the prisoners was an appropriate socially oriented measure. According to the Court, payment of reasonable wages to a prisoner would enable him to have sufficient funds to meet the minimum personal requirements in jail. It may help the prisoner in providing his dependants with the minimum to keep them out of hunger. When he goes to prison, his wife and children might have no means to answer their primary needs. In these circumstances they would be punished. This would be quite unfair. This unfairness and injustice could be mitigated by passing on a portion of wages earned by prisoner to his dependents.

After referring to the decisions of the Supreme Court in People's Union for Democratic Rights v. Union of India, and Sanjit Ray v. State of Rajasthan, The Court said that it was the exposition of law in regard to the scope of Article 23(1) of the Constitution in these cases, which persuaded it to take the view that the prisoners were entitled to payment of fair or living wages. The Court ruled:

[T]here is no justification for the state to claim that it is free to take prison labour without payment that whatever it pays is ex-gratia and is not as of right and therefore there can be no claim for proper wages. A prisoner who undergoes the sentence in jail must necessarily have his movement restricted. That is involved in the very concept of imprisonment. His communication with the rest of the world
would also be necessarily restricted. His right to practice his profession, however fundamental it maybe, will not be available to him while in jail. But there are other valuable rights, any curtailment of which will have no relevance to the nature of the punishment. The right not to be exploited in contravention of Article 23(1) is a right guaranteed to citizen and there is no reason why a prisoner should lose his right to receive wages for his labour. In other words there is no reason why a prisoner should be compelled to do forced labour, forced in the sense that such labour is unremerative or not paid for... to deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23(1) of the Constitution.

The Court suggested that the wages given to prisoners must be at par with the wages fixed under the minimum wages Act and the request to deduct the cost for providing food and clothes to the prisoner from such wages was spurned down. The Division Bench directed the State Government to design a just and reasonable wage structure for the inmates of the prisons who are employed to do labour, and in the mean while to pay the prisoners at the rate of Rs.8 per day until Government is able to decide the appropriate wages to be paid to such prisoners.

Similarly, in Jail Reforms Committee v. State of Gujarat, the Full Bench of Gujarat High Court held that the prisoner was entitled to reasonable wages for the work done. Such reasonable wages was determined with reference to wages paid in similar industry elsewhere.
Such payment must be made without any deduction for the food and clothing supplied to such prisoner.

In Gurudev Singh v. State of Himachal Pradesh,\textsuperscript{256} the Division Bench of the Himachal Pradesh High Court held that prisoners were entitled to minimum wages as prescribed under the Minimum Wages Act, 1948 and no deduction was permissible from the wages on account of maintenance of the prisoners in jails.\textsuperscript{257}

Andhra Pradesh High Court, however, took a different view in Poola Bhaskara Vijaya Kumar v. State of Andhra Pradesh.\textsuperscript{258} It was submitted before the Court that extraction of work by the state from the prisoners convicted of rigorous imprisonment without paying for such work was contrary to the mandate of Article 23 of the Constitution. High Court did not accept this contention and held that wages could be justified under Article 21 of the Constitution. And in the case of rigorous imprisonment with hard labour attached to it did not amount to extracting forced labour from the prisoners and was not contrary to Article 23.

The Supreme Court received various writ petitions from the states of Kerala, Gujarat, Rajasthan. All these were directed to be heard together. The Court felt that the question involved in these matters was very important substantial question of law. It, therefore, directed notices to be issued to Union of India and to all State Governments and Union Territories.
The States strongly opposed the right of the prisoners to claim minimum wages under the Minimum Wages Act. They argued that the prisoners had no right to claim wages at all except those provided under the provisions of the Prisons Act, 1894 and the Rules made there under and non-payment of wages to prisoners undergoing sentence of imprisonment with hard labour could not be violative of Article 23 of the Constitution. States were, however, agreed that the prisoners were entitled to certain wages as prescribed but only by way of incentive/bonus /honorarium/gratuity /reward/stipend or the like. They expressed their willingness to revise wages to the prisoners to bring them to a reasonable level for the work done by them subject to deductions for food, clothing and other facilities provided to the prisoners.259

The National Human Rights Commission (NHRC) submitted that while fixing fair, adequate and equitable wage rate for the prisoner the minimum wage rate for agriculture, industry, etc, as may be applicable in the state and the Union Territory be taken into account and from this average per capita cost of food and clothing on an inmate should be deducted from the Minimum Wage and remainder should be paid to him. According to NHRC this would be a fair and equitable basis for fixing wage rates for prisoners.260

The Court considered whether the imposition of hard labour on the convicted prisoner amounts to the "forced labour" under Article 23 of the Constitution.261 The learned Justice K.T.Thomas examined elaborately
the scope of Article 23 and opined that in many other Republication Constitutions protection against forced labour was subjected to the exception that hard labour imposed on convicted persons would not be "forced labour". He said that, during the making of the Indian Constitution the same exception was also thought of in the original draft. After a full debate, the Constituent Assembly did not incorporate the exception on the ground that the exception envisaged in Sub-cl(2) regarding "public purposes" was very wide enough to contain all such exceptional conditions.262

Thomas, J., further stated that imposition of forced labour on a prisoner would get protection from the ban under Article 23 of the Constitution only if it can be justified as a necessity to achieve some public purpose. Since reformation of the prisoner was the dominant objective of a punishment, during incarceration every effort should be made to recreate the good man out of a convicted offender. An assurance to him that his hard labour would eventually snowball into a handsome saving for his own rehabilitation, would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigours of hard labour during the period of his jail life. Thus, reformation and rehabilitation of a prisoner are of great matters of public policy. Hence they serve a public purpose.263

But D.P.Wadhwa, J., did not agree with the above opinion of K.T.Thomas, J., and categorically stated that putting a prisoner to hard
labour while he was undergoing sentence of rigorous imprisonment awarded to him by a court of competent jurisdiction cannot be equated with "begar" or "other similar forms of forced labour" and there was no violation of Clause (1) of Article 23 of the Constitution, clause (2) of Article 23 had no application in such a case. Payment of full wages when labour exacted is forced would attract the prohibition contained in Article 23. It was not that where a person provided labour or service to another on remuneration which was less than the minimum wages, the labour or service provided by him fell within the scope and ambit of the words "forced labour" under Article 23. The learned judge did not agree that when a prisoner was forced to do hard labour, being part of his sentence, it was in the nature of compulsory service imposed by the state for public purpose. He opined that Article 23 had no role to play in this regard and a prisoner was forced to do hard labour as part of his punishment for the crime committed by him and this punishment was imposed upon him by a Court of competent jurisdiction in accordance with law.264

However, Wadhwa, J., concurred with the following conclusions of Thomas, J., which constitute the opinion of the Court. Thus, (1) It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not. (2) It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose. (3) It is imperative that the prisoner should be paid equitable wages for the work
done by them. In order to determine the quantum of equitable wages payable to prisoners, the state concerned shall constitute a wage fixation body for making recommendations. The Court directed each state to do so as early as possible. (4) Until the State Government takes any decision on such recommendations every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above. For this purpose the Court directed all the State Governments to fix the rate of such interim wages within six weeks from the date of judgement and report to the Court of compliance of the direction. (5) The Court recommended to the States concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.265

This case is a trendsetter as it set at rest several doubts about the nature of prison labour, and the wages payable for the work and their utilisation. The case has clearly established that the prisoners sentenced to rigorous imprisonment and life imprisonment cannot be compelled to work without paying equitable wages. If they are compelled to work without such wages, it would amount to 'forced labour' under Article 23 of the Constitution.
6.2.2.8 Prisoners and Press Interviews:

Like judiciary, the press can also play a vital role in the improvement of prison conditions. By reporting prison conditions and the status of prisoners the press can create greater awareness, amongst the public, policy makers and administrators, about true actualities of prisons. In *Prabha Dutt v. Union of India*, the petitioner, a journalist, wanted to interview two notorious criminals, Billa and Ranga, who were sentenced to death for an offence under section 302, Indian Penal Code and the President of India had rejected the petition filed by them for commutation of their sentence to imprisonment for life.

The Supreme Court held that Rule 549 (4) of the Prison Manual which provided that every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisers as the Superintendent thinks fit. Journalists or newspaper men were not expressly referred to in clause (4) but that did not mean that they could always be dud without no good reasons be denied the opportunity to interview a condemned prisoner. If in any given case, there were weighty reasons for doing so, the interview might appropriately be refused. As the Court did not see any reason as to why newspaper men who could broadly be termed as friends of the society be denied the right of an interview under clause (4) of Rule 549. Subject to the rules and regulations contained in Jail manual, the Court allowed
several press persons along with the petitioner to interview the condemned prisoners.\textsuperscript{267}

A similar question arose in \textit{Sheela Barse v. State of Maharashtra},\textsuperscript{268} wherein the petitioner, a journalist, sought permission to interview women prisoners in the Maharashtra jails. The Inspector General of Prisons of the State permitted her to do so. But an objection was raised against the tape recording of interviews with female prisoners by the petitioner. She was advised to keep notes of interviews. When the petitioner did not agree for this, the permission granted to her was withdrawn.

The petitioner challenged this action of withdrawal on the ground that it was the citizens right to know if Government was administering the jails in accordance with law. Articles 19 (1) (a) and 21 of the Constitution Guarantee to every citizen reasonable access to information about the institutions that formulate, enact, implement and enforce the laws of the land. Every citizen had a right to receive such information through public institutions including the media, as it is physically impossible for every citizen to be informed about all issues of public importance, individually and personally. The press had a special responsibility in educating citizens at large on every public issue. The conditions prevailing in the Indian prisons where both under trial prisoners and convicted prisoners were housed was directly connected with Article 21 of the Constitution. In a participatory democracy, unless access was provided to the citizens and
the media in particular, it would not be feasible to improve the conditions of the jails.

The State contended that the idea of segregating the prisoners from the community was to keep the prisoner under strict control and cut off from the community. If unguided and uncontrolled right of visit was provided to citizens it would be difficult to maintain discipline and the very purpose of keeping the delinquents in prison would be frustrated.269

Against this contention the Court held that:

(1) Indisputably intervention of the Courts has been possible on account of petitions and protests lodged from jails and news items published in the press.

(2) Public gaze should be directed to the matter and the press men as friends of the society and public spirited citizens should have access not only to information but also interviews.

(3) The citizen does not have any right either under Article 19 (1) (a) or Article 21 to enter into the jails for collection of information but in order that the guarantee of the Fundamental Rights under Article 21 may be available to the citizens detained in the jails, it becomes necessary to permit citizens access to information as also interviews of prisoners. Interviews become necessary as otherwise the correct information may not be collected.
(4) The petitioner was not entitled to uncontrolled interviews. She was subject to reasonable restrictions contained in prison manual.\textsuperscript{270}

The Court directed the prison authorities to deal with any request for interview keeping the above guidelines in view. Thus, the prison authorities cannot reject press interview arbitrarily.

In India, most of the prisons are over crowded. Majority of the prisoners are under trials awaiting trial. In Bihar, under trial prisoners are 84.04\% of the total inmates of the jails, in U.P. it is 85.17\% in Madhya Pradesh it is 64.22\% and in other states also the picture is almost the same.\textsuperscript{271} As a result, no meaningful and correctional programme can be executed in prisons. There is a long felt need to decongest the prisons by speedy trial of cases. \textit{In common cause, a Registered Society v. Union of India},\textsuperscript{272} the petitioner urged for the unconditional release of certain categories of under trial prisoners. B.P. Jeevan Reddy, J., opined that the suggestions made by the petitioner are well-meaning and consistent with the spirit underlying part-III of the Constitution and the criminal justice system. The learned judge observed that in many cases where the persons who are accused of minor offence languish in jail for long periods because of their poverty, as there is no one to bail them out or nobody to think of them. The very pendency of criminal proceedings for long periods by itself operated as an engine of oppression.\textsuperscript{273}

The learned judge found it essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens
guaranteed by Article 21 of the Constitution. And also to ensure that the
criminal prosecutions do not operate as engines of oppression.
Accordingly, the following directions were given:

(1) The Court ordered the release of the following undertrials languishing
in jails, on bail or personal bond to be executed by the accused subject to
such conditions, if any, as may be found necessary in the light of sec.437
of the Criminal Procedure Code.

Where the accused are charged before any criminal Court are
punishable with:

a) imprisonment not exceeding three years with or without fine and if
trials are pending for one year or more and the accused are in jail
without bail for a period of six months or more;

b) imprisonment not exceeding five years, with or without fine, and if
trials are pending for two years or more; and the accused are in jail
for a period of six months or more;

c) imprisonment not exceeding seven years, with or without fine, and
if the trials for such offences are pending for two years or more
and the accused are in jail for a period of one year or more.

(2) The Court ordered the discharge or acquittal of the following accused
languishing in jail without bail and if in such cases trial has still not
commenced.
a) where criminal proceedings are pending regarding traffic offences in any criminal Court for more than two years on account of non-service of summons to the accused;

b) Where the cases are pending in criminal courts- (i) for more than two years and are compoundable with the permission of the Court and if in such cases trials have not commenced (ii) pertain to offences which are non-cognizable and bailable, and if such pendency is for more than two years;

c) offences which are punishable with fine only and if such pendency is for more than one year;

d) offences which are punishable with imprisonment up to one year, with or without fine, and if such pendency is for more than one year.274

However, the Court held that the above directions shall not apply to cases of offences involving corruption, misappropriation of funds, cheating; Smuggling, foreign exchange violation and offences Narcotic Drugs and Psychotropic Substances Act, Essential Commodities Act, Food Adulteration Act; Act dealing with Environment; offences under Arms Act; Explosive substances Act; Terrorist and Disruptive Activities Act, Offences relating to Army, Navy and Air Force; Offences relating to public servants; Offences relating to election; Offences relating to giving false evidence and Offences against public justice; any other type of offences against the state; offences under the taxing enactments and; offence of
defamation as defined in section 499 Indian Penal Code. The court directed that the criminal courts shall try these Offences on a priority basis and the High Courts were requested to issue necessary directions in this behalf to all the criminal courts under their control and supervision.275

It is submitted that, if the directions given in the case are properly carried out, it will help in the disposal of long pending cases involving mostly the poor. However, the essence of the Court verdict is lost due to a long list offences to which the directions are not applicable. As a result, the decision may not help to a substantive extent in reducing the number of pending cases and congestion of prisons. There is a need to reduce the list of excepted offences to the minimum.

6.3 JUDICIAL ENFORCEMENT OF PRISON REFORMS

It is judicially established beyond all doubts that a person confined to a penal institution under a valid judgment of conviction does not lose all his Constitutional rights. Imprisonment brings about the necessary withdrawal or limitation of some privileges and rights, but other rights which are not inconsistent with confinement, belong to him in the prison. Claims by inmates of alleged violation of their Constitutional rights by prison administrators are entertained by the courts. Although the courts have attempted, both in U.S.A. and India, to protect the constitutional rights of inmates and to compel improvements in prison conditions, there is an obvious limit as to how much they can do it alone. The reasons inter alia, are that the judicial remedies are woefully inadequate and the Courts
lack ability to enforce compliance with their orders, particularly in cases requiring affirmative action.276

The courts, since they lack physical power of their own, depend on the other branches of the government for the enforcement of their mandates. If the courts fail to obtain that cooperation, in cases where it is necessary for compliance, "it necessarily stands helplessly on the sidelines".277 A court's effectiveness in the absence of the 'executive sword' is as limited as its operations in general would be with the necessary appropriations from the legislative purse, and the legislative assent to its jurisdictional and procedural needs.278

A study of impact of the decisions of the Court on the prison system would alone reveal the exact effectiveness of the Court in ensuring the human rights standards in a prison. As George D.Braden remarks "we do not know how effective a Supreme Court decision is, or in what manner its effectiveness is transmitted".279 A study of practical consequences of judicial verdict is very essential for understanding the actual role played by Courts.280

Once a court determines that an institutional pattern or practice violates the law it faces the challenge of structuring a process that will lead to the elimination of the illegal condition of practices. For this purpose it has devised what is known as "complex enforcement". In complex enforcement, a court declares an ongoing practice as offensive to legal norms and seeks to reform it through a detailed affirmative
The complex enforcement takes legal criticism into the very structure of the prisons, progressively pursuing back the boundary separating background from violation. It searches causes for ongoing violations and seeks to eliminate them. As the causes identified reveal deeper systemic deficiencies, they too must be addressed through increasingly expansive remedies. The tendency of complex enforcement, in U.S.A., is to expand the judicial inquiry producing wide-ranging remedial plans that seem necessary to prevent future deprivations. The advantages of the complex enforcement are that it does not merely remedy unconstitutional conditions, it also develops a substantive law of systemic wrongfulness. By generating specific criteria to assess the legality of prisons, the complex enforcement makes more concrete the abstract constitutional prohibition of cruel and unusual punishment of Eighth Amendment to the U.S. Constitution.

Despite many advantages of complex enforcement, Court involved in such institutional reforms faces a serious "remedial dilemma". They are Constitutionally compelled to develop a remedy for conditions and practices that violate a plaintiff's rights. At the same time courts must depend on those with group responsibility for the institution to achieve compliance with the law. The controversy over institutional reform litigation swirls around this remedial dilemma and makes the task for the courts quite formidable.
According to Susan Sturm, the courts would have to devise a remedial process that allows, indeed, requires necessary changes within the institution to be developed and implemented at the level where the actual power to do so effectively exists. The success of the judicial intervention depends upon the extent to which it can influence factors that lock in unconstitutional conditions and prevent institutional self-correction. These factors are called as "dynamics of organisational stasis".287

Those in a position to define the normative agenda—the guards, traditionalist administrators and political bosses setting correctional policy—embrace order and autonomy to the exclusion of other values. They are opposed to any interference by external agencies in prison matters. Those within the prison community who embrace the norms of providing humane treatment and maintaining public accountability—inmates, treatment staff, and reform-minded administrators, frequently lack the status and power necessary to institutionalize those norms within the prison system.288 Thus, those who pursue change lack the power to influence those whose cooperation and support are necessary to transform prison conditions and practices. Opponents of change are well situated to thwart the efforts of internal advocates for reforms. Against this backdrop, the intervention by the courts takes place. Courts are not equipped to unlock the factors underlying organisational stasis and institute meaningful reform; Susan feels that the approach adopted to manage the compliance process directly affects a court's capacity to alter
the underlying dynamics of organisation stasis. Each judge responsible for developing a remedy for unconstitutional prison conditions and practices necessarily chooses how to formulate relief, who will participate in this process, what incentives should be used to induce the cooperation of necessary parties, how to monitor compliance and how to deal with the non compliance of prison officials. These choices must be made from among a variety options and techniques.\textsuperscript{289}

In this type of institutional reforms litigation the Court has to evolve a remedy that restructure the defendant institution by altering its policies and practices to meet systemwide violations. The conjunction of the courts broad remedial powers and the defendant's systemwide institutional violations engenders the need for a distinctive judicial role in these institutions. The Court responds to the default of the governmental bodies primarily responsible for the deficient institutions, and although sitting to adjudicate the rights of individual litigants, it must also fill the broader political role of policy maker for the defendant institution.\textsuperscript{290}

In order to discharge the onerous task of complex enforcement, to redress the institutional wrongs, the Court need to collect information. Here, the Courts face two significant problems- their inability to develop and use social information properly, and the common unwillingness of defendants to provide adequate assistance. A prison is a total institution, which is closed to the outside world. What transpires behind high walls of the prison cannot be known outside. Collection of information about
prison happenings is well nigh impossible. In India, the members of the Board of visitors and National Human Rights Commission who are under a statutory duty to visit jails may gather first hand information about prison condition. But how far they can unearth the truth about the quality of prison life is a moot point. It is the parties to a litigation who remain the primary sources for social information. They submit this information as expert evidence, including both testimony and documents and other written material. But the parties being adversaries, do not provide the balanced presentation necessary to give the Court, which is supervising social reform, an adequate understanding of the remedial problems.  

The court can seek the defendant's assistance in remedy formulation as it has superior knowledge of its own operations. But, as the lawsuit itself results from the defendant institution's earlier failure to reform itself, it may not be surprising, if it is unwilling to provide any cooperation in this task.

When a defendant does not cooperate, the Court will be left with no option but to seek a substitute for its participation. There are several ways a court can choose to formulate a remedy. They are remedial abstention, judicially selected remedies, Master-supervised formulation, and negotiated remedies.

The end product of remedy formulation is the issuance of a comprehensive remedial decree. The main objective of this decree or injunction is the elimination of the wrongful conduct or condition that led to
the lawsuit. Because prohibitory orders are generally inadequate to provide this relief, the remedial decree issued, typically, seeks to realise affirmative goals by requiring a comprehensive pattern of reform by the defendant.297

The implementation of the remedial decree requires continued involvement of the judiciary. Implementation of the decree becomes a major judicial concern. Involvement of the judiciary is very essential and without such an involvement, "the decree may prove to be merely a paper victory for the plaintiff".298 The post-decretal judicial involvement takes many forms depending upon the nature of the relief ordered, the attitude of the defendant, the extent to which compliance requires co-operation by organisations or persons not originally subject to the court orders. The amount of resistance by the public or employees of the institution and the skillfulness with which the original decree was drafted.299 The court can employ several means to oversee implementation of its order. Firstly, the court can retain its jurisdiction. Retention of jurisdiction facilitates enforcement of the order by establishing the courts readiness to use more drastic methods to achieve its ends. More importantly the court may anticipate non-compliance and reduce its likelihood by threatening a response to it.300 Secondly the court may enhance compliance with its order by the prison authorities by revising substantive aspects of the remedy. Whenever any conflict arises in interpreting the court order, the court must revise to clarify the issue involved. An order may also be
revised by the court in the light of new evolving legal standards. Thus any impediments to the effective implementation of its order can be removed by the court.

6.3.1 Administrative Techniques

Implementation of the decree involves the problem of resolving disputes, monitoring compliance and supervising the defendant's actions. For this purpose, courts in the U.S.A., have, adopted several administrative techniques. The court may delegate administrative functions to an individual or group whose duties are primarily to the court, rather than to the parties. In the U.S.A. several such agents appointed by the court are known as Masters, Monitors, Mediators, Administrative Receivers and ombudsmen.

6.3.1.1 Ombudsman

Ombudsman is grievance man. In the U.S.A., ombudsmen are appointed in prisons. The appointment by each jail of a jail ombudsman to act on behalf of jail inmates to redress grievances would serve to minimise the need for court intervention, to reduce tension among inmates by providing them with a grievance mechanism, and to create an atmosphere of fairness and humanity in the local correctional facilities. The ombudsman is not an adversary, rather an intermediary and mediator between inmate and jail staff. Ombudsman upon receiving a complaint from a prisoner or upon his own motion investigates and intervenes on
behalf of the prisoner with the prison authorities concerned. He attempts to bring a satisfactory resolution of prisoner' complaints.

6.3.1.2 Masters

The master as the agent of the Court can play a very important role. His duty is to gather information and make recommendations. In the remedial phase of litigation, the master's principal role is to assist the court in formulating the substantive remedy, rather than in implementing it. However, masters sometimes assume implementation functions also.\textsuperscript{303}

6.3.1.3 Monitors

Monitor is an agent of the Court, who can report defendant institution's compliance with the decree and on the achievement of decrees goals. If the remedy is complex, if compliance is difficult to measure or if observation of the defendants conduct, when it is a closed institution, is restricted, having monitor will be more appropriate. He can provide to the Court unbiased and reliable compliance information.\textsuperscript{304} However he must be given sufficient authority and facilities to gather needed information. And, of course, his reports must carry due weightage. The Court can respond appropriately to the situation - compliance or noncompliance and issue necessary orders to ensure compliance with its decree.

6.3.1.4 Mediators

A Mediator is an agent of the Court whose primary duty is handling dispute over the decrees' meaning, compliance standards and the pace of
compliance. Further, he may be authorised to resolve individual grievances that arise during the remedial regime. Thus, he can reduce the need to invoke the jurisdiction of the Courts, which is time consuming, expensive and increases burden on the Courts. The mediator develops into an arbitrator when given the power to render final decisions in disputes.\textsuperscript{305}

6.3.1.5 Administrators

The administrator is the most innovative and unusual of the device utilized by the Courts, in the U.S.A. for remedy implementation. The role assigned to an administrator extends beyond that of the master, monitor, or mediator. He supplements and does not replace the normal management of the institutional defendant. The administrator acts at his own instance to implement the remedy and has an executive role.\textsuperscript{306}

In the U.S.A. The authority to appoint an administrator is best grounded in the inherent power of courts to provide themselves with appropriate instruments required for the performance of their duties, and the Supreme Court's directive that the courts make full use of their equitable powers in civil rights cases.

An administrator's power normally include monitoring and mediation; power to supervise co-ordinate, approve, or even command actions of the defendant to implement the remedy.\textsuperscript{307}
Position in India

In India, there is no effective machinery to monitor the implementation of directions of Apex Court issued to improve the quality of prison life and to protect the rights of prisoners. Even when the prison authorities act in clear violation of judicial verdict, the hapless prisoner would have to suffer in silence the administrative lawlessness with out any adequate administrative grievance procedure. The aggrieved prisoners or any public-spirited individuals may file a writ petition in a High Court or the Supreme Court to bring the illegality of administrative action to their notice. Though, they may be successful in getting a decision of the Court vindicating their claims, real problem arises at the stage of implementation of that decision. It would not be practicable as Krishna Iyer, J., said, to drive a prisoner to file a writ petition in each and every case of violation of his rights. For the first time in Sunil Batra (II), Krishna Iyer, J., dealt in detail with the prison grievance procedure. He emphasized the need for an administrative machinery to protect the prisoner's rights and safeguards, as internal invigilation and independent oversight were essential. The learned judge, cited the following passage from Krantz with approval: "To respond to the need for effective grievance procedures will probably require both the creation of internal programs (formal complaint procedures) and programmes involving "ombudsman, citizens investigative committee, mediators, etc." The learned judge opined, "

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we have to fabricate instant administrative grievance procedures" for the purpose.310

During the course of his submission, the learned solicitor-General, opined that within the existing statutory framework the requirements of constitutionalism might be read. He suggested for a judicial agency within the prison walls that deal with grievance. For this purpose he relied on the Board of Visitors, their powers and duties, as a functional substitute for a prison ombudsman.311 Krishna Iyer, J., readily accepted this suggestion, and in particular he emphasized the responsibility of the judicial member in this task of monitoring prison administration. Thus, he said that the judicial members had special responsibilities and they must act as wholly independent overseers and not as "ceremonial panelists".312 According to the learned judge, the judges were guardians of prisoners' rights because they had a duty to secure the execution of the sentences without excesses and to sustain the personal liberties of prisoners.313

Referring to the provisions of the Punjab prison Manual, which lay down the duties of the district magistrates with reference to Central Jails, Krishna Iyer, J., held that those provisions covered the ground of reception of grievance from prisoners and issuance of orders thereon after prompt enquiry. He emphatically asserted:

the District magistrate must remember, that in this capacity he is a judicial officer and not an executive head and must function as such independently of the prison executive. To make prisoners rights in correctional
institution viable, we direct the District magistrate concerned to inspect the jails in his district once in every week, receive complaints from individual prisoners and enquire into them immediately... what is important is that he should meet the prisoners separately, if they have grievances. The presence of warders or officials will be inhibitive and must be avoided. He must ensure that his enquiry is confidential although subject to natural injustice and does not lead to reprisals by jail officials. He must pass orders after enquiry. If his orders are not complied he should immediately inform Government about such disobedience and advise the prisoners to forward their complaints to the High Court under Article 226 with a copy of his own report to help the High Court exercise its habeas Corpus power.\(^{314}\)

Justice Krishna Iyer also directed that the sessions and District Magistrate should keep a grievance box in each ward to which free access must be afforded to every inmate. It should be kept locked and sealed by him and on his periodical visit, he alone or his surrogate should open the box, find out the grievances, investigate their merits and take remedial action if justified.\(^{315}\)

Further, referring to the powers and duties of the visitors the learned judge said that, all visitors shall be afforded every facility for observing the state of the jail, and the management thereof, and shall be allowed access under proper regulations, to all parts of the jail and to every prisoner confined therein.\(^{316}\) Every visitor should have the power to call for and inspect any book or other record in the jail, unless the
Superintendent, for reasons to be recorded in writing, declines on the ground that its production was undesirable. Similarly, every visitor should have the right to see any prisoner and to put any questions to him out of the hearing of any jail office. There should be one visitors book for both classes of visitors, their remarks should in both cases be forwarded to the Inspector General who should pass such orders as he thinks necessary, and a copy of the Inspector-Generals order should be sent to the visitor concerned. Thus, the court heavily depended on the Board of Visitors to act as a body to hear grievances of prisoners and secure justice. However, this institution has totally failed in its task as was mandated by the Court. Even the judicial members have-not cared to discharge their visiting duty sincerely. As a result, the prisoners in India do not have any effective means within their reach to get a speedy redressal of their grievances. Their tales of woe hardly reach the outside world.

Justice Krishna Iyer had observed in Sunil Batra (II) that the long journey through jail law territory proves that a big void exists in legal remedies for prisoner injustices and so constitutional mandate could become living companions of banished humane only if non-traditional procedures, duly oriented personnel and realistic relief’s meet the functional challenge. Further the learned judge held that broadly speaking habeas corpus powers and administrative measures were the pillars of prisoner’s rights. The former was inviolable but for an illiterate timorous, indigent inmate community judicial remedies remain frozen. So
the he laid the stress on the need of the Court to be dynamic and diversified in meeting out remedies to prisoner. Not merely the contempt power but also the power to create adhoc, and use the services of, officers of justice must be brought into play. The learned judge referred to the use by American courts of special officers like Masters, Monitors, Receivers, special masters and ombudsman, and held that the use of special judicial officers, like the use of contempt power, held considerable promise for assisting Court in enforcing judicial orders. The Court hoped that their use would be expanded and refined over time. Unfortunately, this hope of the Court has remained just on paper. There is no reported case wherein the services of such special officers have been used. As a result, in India virtually there is no administrative means for the prisoners to air their grievances and get remedies for them.

There is a suggestion for the appointment of a prison ombudsman. But according to one jurist the best course would be to bring the convicted or undertrial prisoners under the surveillance, if not the control, of the High Courts. Officers appointed by the courts have wound up large companies and looked after vast estates. There is no reason why jail superintendents cannot function as court officials responsible to High Courts for the performance of their duties. In principle, a person consigned to prison remains a charge of the court till his release under the order. There is lot of force in this suggestion. If the jail superintendents function as court officials accountable to High Courts it
will help in the retention of court jurisdiction, even in post-sentence phase of adjudication over the prisoners. But as the High Courts are already burdened by burgeoning workload, it is doubtful that they would be able to undertake supervisions of prisons.

In this regard the suggestions of Macklin Fleming holds lot of promise and deserves special consideration. Primarily he suggests for a close judicial supervision of post-sentence phase. He states that the traditional pattern of criminal law presents a startling antithesis between the close judicial supervision of every phase of process up to judgment and the almost total absence of judicial supervision over the judgment’s subsequent execution, the "judicial hyperactivity contrasts sharply with absence of judicial supervision over events that follow imposition of criminal judgment of confinement". According to him, duration of confinement, manner of its execution, reduction in sentence, and commutation of sentence are aspects of the criminal process which, historically, have been left to administrators, who exercise all authority over subsequent confinement of convict and execution of judgment.

However, the judiciary is not totally dissociated from prison administration. It is intervening in the prison administration whenever there is complaint from the prisoners themselves or some public-spirited individuals about the prison conditions. But this judicial intervention has been "sporadic, intermittent in to the penal institution". According to Macklin this sporadic judicial intervention in post sentence phases of
criminal judgment has affected the operation of penal institution, as "judicial intervention of this type is random, spasmodic, and unstructured". Since courts are unfamiliar with problems of prison administration and convict management and have neither time nor facilities to become accurately informed, the consequence is sporadic exercise of judicial authority over prison administration without correlative judicial responsibility for penal effectiveness. Different Courts make conflicting demands as prison administration.

It is suggested by Macklin Fleming that "instead of questioning the validity of criminal judgment long since final, judges should directly oversee execution of their own judgment and directly supervise the sanctions they have imposed with ultimate responsibility for execution of all principal phases of criminal judgment passing from penal administrators to courts, criminal process would come to resemble civil process, in which execution of judgment remains a court responsibility throughout the life of the judgment... In civil judgment, courts possess both full authority and full responsibility to maintain an effective and workable system of execution".

To secure similar judicial supervision over execution of criminal judgment the courts should be vested with authority and responsibility to determine length of sentence, closeness of confinement, conditions of confinement, release from confinement convict reassignment and revocation of conditional release. Penal administrators would limit
themselves to ministerial acts and managerial function. The court supervision over execution of criminal judgment may appear at odds with the traditional separation of executive, legislative, and judicial power. Yet the basic function involved here is execution of criminal judgment, not operation of custodial facility.\textsuperscript{330}

Macklin Fleming suggests that the court should adjudicate the following causes ancillary to execution of criminal judgment: serious breaches for prison discipline and convict crimes in prison; challenges to rules and regulations of prisons administration; claims of illegality of conditions of confinement; civil suits by convicts in confinements related causes. With court assumption of these responsibilities all principal phases in execution of criminal judgment will come under systematic judicial supervision and control.\textsuperscript{331} This suggestion has a lot of force as in all matters relating to prison administration, administrative arbitrariness can be effectively minimised. Instead of administrative solutions accompanied by extraordinary judicial intervention, there would be judicial solutions tendered in the normal course of business by courts acting under established rules and subject to judicial review.\textsuperscript{332}

6.3.1.6 Courts of Sanction

Further, Macklin suggests for the establishment of permanent courts of sanction and full time judges sitting in the principal prisons to make decisions involved in prison administration. These judges will be members of the local court of general jurisdiction assigned to sit in Court
of sanction for periods of a year or more. In performing his duties, a judge will necessarily draw on records, files testimony and recommendations of prison administrators to acquire information relevant to informed decision.\textsuperscript{333} The greatest advantage of full-time courts and judges sitting in prisons to oversee execution of criminal judgment will be the supervision of prison administration by judges familiar with local conditions and local problems of the prisons in which they sit.\textsuperscript{334} To sum up, this direct supervision of prison administration by a court of sanction holds hope for the prisoners and for humanization of prisons. It makes the judicial supervision of prison conditions and prison administration quite effective.

6.4 CONCLUSION

Under the Indian Constitution the Supreme Court is vested with the power to declare a law or an executive action as unconstitutional when they are repugnant to the Constitution. The Court is empowered to declare a law to be void when it offends against fundamental rights or the federal distribution of legislative powers. During the initial years of its functioning the Court adopted an elitist attitude helping only the rich. But eventually the Court transformed into a last resort for the oppressed and the bewildered by widening its reach. This transformation coincided with the liberalisation of the traditional rule of Locus Standi and the emergence of public interest litigation.
In its expansionist and activist role the judiciary in India and U.S.A has shown a greater interest in reforming the various social institutions including prisons. Initially, the Supreme Court refused to interfere in the prison administration by adopting “hands off” doctrine on the ground that the imprisonment deprived prisoners of all their rights except those that are specifically enumerated. But, later, in its newly assumed activist role especially after the Emergency of 1975-77, the Court expressed its readiness to entertain complaints of prison grievances. The Court in Sunil Batra (I) declared that where the rights of a prisoner either under the Constitution or under law were violated, the writ power of the Court should run to his rescue. The Court had a continuing responsibility to ensure that the constitutional purpose of deprivation of liberty was not defeated by the prison administration. The Court has ruled in a number of cases that the prisoners retain all the rights of a human being except those, which are inconsistent with their incarceration. Further, the Court has specifically articulated certain rights of prisoners, the enjoyment of which is very essential to live with basic human dignity.

The analysis of the role played by the judiciary in the humanization of prisons has revealed its helplessness in ensuring compliance with its verdicts by the prison authorities. Several directions issued by the Court have been ignored by the prison authorities with impunity. The Court is dependent on the Board of Visitors of prisons to oversee the implementation of its directions. But the result has been negative. To
ensure the implementation of Court's directions certain innovative administrative techniques employed in U.S. prisons like the appointment of prison ombudsman, masters, monitors, mediators etc., may be considered. In addition, in order to deal with day-to-day prison grievances courts of sanction, which operate within the prison, may be established. Such a Court can also monitor the implementation of court's verdict, can hear grievances of prisoners, and act as a check on the arbitrary exercise of powers by prison authorities. Thus the judicial overseeing of prison administration could be effective.
NOTES AND REFERENCES


5. "The interpretation of the laws is the proper and peculiar province of the Court" Alexander Hamilton. Similarly, John Marshal, J. declared: "It is emphatically the province and duty of the Judicial Department to say what the Law is" see *Marbury v. Madison* (1803) 1 cr. 137.


9. *Id.* at 141.

10. *Id.* at 142.

11. *Id.* at 143.


13. Agresto *supra* note 6, at 143.


15. (1803) 1 cr 137.

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16. *Id.*

17. Article 13 (2) Constitution of India.

18. *Id.*

19. *Id.* Article 254.

20. *Id.* Article 367.

21. *Id.*

22. *Id.* Article 226.

23. *Id.* Article 32.

24. *Id.* Articles 141 and 144.

25. *Id.* Article 142 (1); Also see the Supreme Court (Decrees and Orders) Enforcement Order, 1954.

26. *Id.* Article 144.


29. Seven of the Judges (Sikri, C.J., Shelat, Hegde, Grover, Jaganmohan Reddy, Khanna and Mukherjea, J.J.), held that the power of amendment under Article 368, is subject to certain implied and inherent limitations, and that in the exercise of amending power, Parliament cannot amend the basic structure of the Constitution.


32. State of Rajasthan v. Union of India (1979) 3 SCC 634 at 670 (per Goswami, J.). Liberation of the poor and oppressed through judicial initiatives figures prominently in the contemporary Indian discourse.
on Law and Social change... The Courts have emerged as a highly visible part of Indian life... Judicial activism and public Law litigation have remained the focus of sanguine optimism and admiration, see Paramand Singh, *Judicial Socialism and Promises of Liberation: Myth and Truth*, 28 J IIL (1986) at 337.


34. The traditional rule was that a petition could be made to a court by a petitioner who has himself suffered infraction of his rights and is a person aggrieved. See *Bokaro & Rampour Ltd v. State of Bihar*, AIR 1963 SC 516, at 618. The emergence of Public Interest Litigation wherein the litigation is instituted at the instance of a public spirited citizen espousing cause of others has relaxed the traditional rule considerably.

35. AIR 1982 SC 2 149.

36. *Id.* at 216.

37. *Id.*

38. AIR 1984 SC 802 at 813.


40. *Id.*


42. *Id* at 284.


44. *Maneka Gandhi supra* note 43, at

45. AIR 1980 SC 898.

46. For instance, the requirement of reasonableness was applied to a government order issued under a University Act prohibiting election


49. Id at 916.

50. AIR 1998 SC 889 per J.S. Verma C.J.1 at 916. The Judiciary has been accused of usurping the functions of the administrative agencies and it is advised that the judiciary should resist involving itself in any ongoing supervision of the matter. See Jamie cassels, Judicial Activism and Public Interest Litigation in India: Attempting the impossible? 37 AM.J.COM.L. 495 (1989) at 505. It is also criticized that the courts have usurped the functions of resource allocation that should be best left to the expertise of other officials. See S.K.Agawala, Public Interest Litigation in India, Bombay. N.M.Tripathi Pvt Ltd, 1985 at29. But, these criticisms cannot be accepted as the courts have a constitutional obligation to protect and uphold rule of law and to foster human dignity even in such total institutions like prisons.


53. Emphasis supplied.
54. "The hands-off doctrine represents a denial of jurisdiction over the subject matter of petitions from prisoners alleging some form for mistreatment or contesting some deprivation undergone during imprisonment". See note; Beyond the Ken of the courts: A critique of Judicial Refusal to Review the complaints, 72 Yale L.J. 506 (1963).


56. Id at 684-685.

57. Mike Maguire, Jon Vagg, and Road Morgan, Accountability and prisons, opening up a closed world. London: Tavistock publication, 1985, at 266.

58. "It was commonly believed that, short of extreme physical abuse, virtually anything could be done with an offender in the name of "correction", or, in some instances "Punishment" see Alan E. Bent, Ralph A. Rossum, Police Criminal Justice and the Community, New York, Harpes and Row, Publishers, 1976 at 57.

59. Felkenes supra note 53 at 392.

60. 143 F. 2d. 443 (6th cir 1944).

61. Id.


63. Id. at 827.

64. The U.S. Supreme Court held in Morrissey v. Brewer (408 U.S. 471) (1972) that formal procedures are required in order to revoke a prisoners parole; Jackson v. Indiana (406 U.S. 715 (1972) which held that indefinite Commitment of person who is not mentally competent to stand trial for a criminal offence violates due process of Law; and Procunier v. Martine (15 crime. Law Reporter, 3009 (1974) which held invalid California’s prison mail censorship regulations as burdening the First and Fourteenth Amendment rights of prisoners to send and outsiders to recover correspondence to an extent greater than necessary to protect the substantial and legitimate state interests of prison security, orders, and rehabilitation.
65. 41.Led. 2d. 935 (1974)

66. Id. at 950.

67. "Thus, it was held: "This Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama Penal facilities" see Washington v. Lee, 263 F supp. 327. (M.D. Ala. 1966).


70. Davis v. Lindsay, 321 supp. 1134 (S.D.N.Y. 1970).


74. "Corporal : Punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals" -see Jackson v. Bishop, 404 F.2d. 571 (8th cir. 1968) ; Also see comment, The Role of the Eight Amendment in Prison Reform, 38 U. Chi. L. Rev. 647, 658-664 (1971); Talley v Stephens, 247 F. supp. 683 (E.D. Ark. 19765). See also: Jeffery D. Bukwski, The Eight Amendment and Original Intent, 99 Dick. L.REV 1995.

75. Stroud v. Johnston, 139 f ed. 171 (9th cir. 1943); unless the state demonstrates a compelling reason for maintaining solitary confinement, or that less severe methods of punishment are less effective, solitary confinement should be held unconstitutional as unnecessary cruel". See Krist v. Smith 309 F. supp. 497 (S.D.G.A 1970).
76. "The debasing Conditions... would, if established constitute cruel and unusual punishment in violation of the Right Amendment" see Wright v. McMann, 307 F.2d. 519 (2d cir. 1967).


78. Kish v. County of Milwaukee, 441 F.2d 901 (7th cir. 1971).

79. "[T]he intentional refusal by correctional officers to allow inmates access to medical personnel and to provide prescribed medicines and other treatment is cruel and unusual punishment in violation of the Constitution" see Mayfield v. Craven, 299 F.Supp 111 (Ed. Cal. 1969).


82. Id.

83. Maguire supra note 59 at 271.


85. See Premshankar shukla v. Delhi Administration, AIR 1980 SC 1535 at 1541. "should the court continue to be a passive agency playing the politics of accommodation with the executive, thus, making trade-off with continuing misery for thousands of people, or should it assert in power to redeem or, at any rate amchorate their plight? .... The Court could have done so within its powers of administration of criminal justice". Pp.238-239.

86. See Upendra Baxi, Crisis of the Indian Legal System, New Delhi Vikas Publishing House Pvt. Ltd. 1982 at 216. "prison houses are
part of Indian earth and the Indian Constitution cannot be held at bay by jail officials" see Sunil Batra v. Delhi Administration (II) AIR 1980 SC 1579 at 1583.

87. *Id.* at 1590.
88. *Id.* at 1591.
89. *Id.* at 1590.
90. *Id.*
91. AIR 1950 SC 27.
92. *Id.* at 69-70.
93. Per Das J. at 113.
94. *Id.* at 113.
95. *Supra* note 55.
96. AIR 1966 SC 424.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
102. *Id.* at 2095.
103. *Id.* at 2094.
104. *Id.* at 2096.
105. Under Article 352 of the Indian Constitution, if the President is satisfied that a grave emergency exists whereby the security of India is threatened whether by war or external rebellion he may by proclamation make a declaration to that effect.
107. See Appendix.

108. Id at 521.

109. The Apex Court, with the dissent of Khanna J., legitimized the suspension of the writ of habeas corpus during the period of emergency on the basis of higher claims of national security.


112. AIR 1977 SC 1027.

113. Id

114. Id at 1044.

115. Id.

116. Id at 1050.


118. AIR 1977 SC 1926.

119. Id at 1929.

120. Id at 1934.


122. "After expressing sympathy for the pitiable condition of the family and the accused, one would not have expected the Court to reject his prayer for probation benefits in the same breath... whether he is treated properly, paid adequate wages in the jail, whether he is allowed to visit his family on parole, the stigma that he has been incarcerated and that he is a criminal cannot be wiped out under the present Indian conditions. Moreover, the accused should have already lost his employment under the government and he cannot normally hope to be employed either by the government or by any public authority in India when he comes out of the jail In these
circumstances his imprisonment would virtually result in the 
ruination of the entire family". Id.P.13.

2236.
124. Id.
125. Chandrasekharan Pillai supra note 121 at 14.; Also see for 
commenton judicial activism, R.L.Agnihotri, Judicial Activism And 
126. AIR 1978 SC 1548.
127. Id.
128. Id.
129. Id at para 12.
130. AIR 1981 SC 917
131. Id.
133. Id.
135. Id.
136. AIR 1986 SC 991.
138. "It is a sad reflection on the legal and judicial system that the trial of 
an accused should not even commence for a long number of year". 
per Bhagawati J. Id. at para 6.
139. AIR 1978 SC 597.
140. See Hussainara Khatoon v. State of Bihar (I) supra note 137 at 
1361.
141. Id at 1369.

143. Id.


145. Id. at 107-108; Again Kadra Pahadiya v. State of Bihar (1983) 2 SCC 2104, the Supreme Court reaffirmed the principle of Hussainara Khatoon (IV) and declared: "[t]his Court in discharge of its Constitutional obligation has the power to give necessary direction to the state governments and other appropriate authorities for securing this right to the accused" at 107.


147. Id at 613.


149. (1986) 3 SCC 632.

150. AIR 1986 Pat 324.

151. AIR 1986 Pat 38.

152. (1992) 1 SCC 225.

153. See B.R.Sharma, Constitutional rights of Prisoners and Judicial Activism, CIVIL AND MILITARY LAW JOURNAL AT 59.

154. AIR 1978 SC 1675.

155. Id at 1684.

156. Id at 1685.

157. Id at 1723.

158. Sunil Batra II supra note 88.

159. Id. at 15 84.

160. Id at 1591 "A significant feature of this judgement, largely unnoticed is that it has advanced the scope of the writ of habeas corpus.... The writ is also available to regulate the conditions of detention of a convict who is law fully incarcerated" see Mukul Mudgal, Do Prisoners have rights? Seminar 437-March 1996 at 28
161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. One of the results of the directions issued by the Supreme Court was that the antiquated Punjab Jail Manual was replaced in 1988 by several rules applicable to the prisoners in Tihar Jail, Delhi. See Mukul Mudgal *supra* note 163 at 28.

166. AIR 1981 SC 1767.

167. *Id.* at 1768.

168. See *supra* notes 162-165.

169. *Id* at 1770.

170. *Id* at 1773.

171. About Krishna Iyer J., Style of dispensation of justice it is commented: "He is satisfied with making general statements about the gross illegalities committed by the prison officials, but he does not order any action to be taken against them" See Colin Golves *supra* note 110 at 209.


173. *Id* at 340.

174. *Id* at 342-342.

175. *Id* at 342, similar fate was suffered by other victims like Mr. Hiralal Gope, Rahgunandam Gope, Francis Purti, Ghulam Jilens and Kamla Singh.

176. Sunil Batra (I) AIR 1978 SC 1675.

177. Section 56 see for Full Text for the provision in Annexure B.
178. *Sunil Batra (I)* supra note 179 at 1734.
179. *Id* at 1723.
180. *Id*.
182. *Id* at 1595.
184. *Id* at 1541.
185. *Id* at 1542.
186. *Id* at 1543.
187. *Id*.
188. *Id*.
190. *Id* at 901-902.
191. (1990) 3 SCC 119
192. *Id* at 126.
193. *Id* at 127.
194. *Id* at 129.
196. *Id* at 745.
197. *Id*.
199. *Id* at 1700.
200. *Id*.
201. *Id*. 

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202. The High Court had upheld the death penalty imposed on him and he had the opportunity to seek leave to leave to appeal under Article 136 and then to move the President of India for clemency under Article 72 of the Constitution of India.

203. *Id* at 1730.

204. *Id* at 1731.

205. *AIR 1981 SC 625*.

206. *Id.* at 630.

207. *Id.*

208. *AIR 1983 SC 1086*.

209. *Id.*

210. *Id.* at 1089.

211. See for instance, *Sebastian M.Hongray v. Union of India*(I) (1984) 1 *SCC* 339; *Sebastian M.Hongray v. Union of India* (11) (Exemplary Costs were awarded on failure of the detaining authority to produce the missing persons, on the conclusion that they were not alive and had met an unnatural death); in *Bhim Singh v. state of J & K*, (1985) U. *SCC* 677 (For Illegal detention in Police custody of the petitioner the State was directed to pay monetary compensation for violation of this constitutional rights); *Saheli: A Women’s Resource Center v. Commissioner of Police, Delhi Police Head Quarters* (1990) 1 *SCC* 422 (The State was held liable to pay compensation to the mother of the deceased who died as a result of beating and assault by the police.


213. *Id.*

214. *Id.* at 374 The Court held that the Compensation of Rs.10,000/- as awarded by the High Court shall be paid by the state of Maharastra (per Jalyachandra Redyy,J.).

216. *Id at* 762-763.

217. *(1981)* 1 SCC 627.


220. *Id at* 764 the Court awarded a compensation of Rs.1,50,000/- to the petitioner to be paid by the State of Orissa.


222. *Id.*

223. *Id.*

224. AIR 1977 SC 2236.

225. *Id at* 2244.


227. *Id.*

228. *Id at* 749.

229. *Id at* 754.

230. *Id at* 755.

231. 1987 Mah. L.J. 68.

232. *Id.*

233. *Id at* para 8

234. *Id at* para.9

235. *Id.*

236. *Id at* Para 10.

237. *Id at* para 11.

238. *Id at* para 12-13 Also see Regina v. secretary of State for Home Department, Exparte Leech, *(1994)* QB 198.

240. *Id* at 73.

241. *Id* at 74.


243. *Id* at 2242.

244. *Id* at 2243.

245. *Id*.

246. AIR 1983 Ker 261.

247. *Id* at 264-65.

248. *Id* at 266.

249. *Id* at 267.


251. AIR 1983 SC 328.

252. *Id* at 272.


254. *Id*.

255. *Id*.

256. AIR 1992 Him Pra 76.

257. State of Rajastan felt aggrieved from the judgement of the Division Bench of Rajasthan High Court dated April 27, 1994. By the impugned judgment High Court upheld the decision of the learned single judge directing the State Government to pay wages to the prisoners as under—"Rs.14/- per day to skilled convict labour Rs.12/- per day to non skilled labour from the date of order. This amount will be subject to modification, of course, on higher side, after the aforesaid exercise is done by the state Government.
aforesaid exercise is done by the State Government and Rules are suitably amended".


260. Id at 3180.

261. Article 23, Constitution of India, see Annexure-A.

262. Per Dr. Ambedkar cited in supra note 251 at 3171.

263. Id at 3171-71.

264. Id at 3186.

265. Id at 3176.

266. AIR 1982 SC 6.

267. Id.


269. Id.

270. Id.

271. Id.

272. AIR 1996 SC 1619.

273. Id at 1620.

274. Id at 1621.

275. Id

276. Sheldon Krantz, *Cases and Materials on the law of Corrections and Prisoners Rights* St. Paul Minn: West Publishing C. 1973 at 860. As a result, "The decisions of Krishna Iyer and others are largely, therefore, of academic interest" and judges in India are Universally unwilling to punish prison officials and policemen even in the face of cast iron evidence of major offences committed by them". See Colin


278. "[T]he Court can perform but one function that of deciding litigations and can proceed in no manner except by the judicial process”-per Justice Jackson in Henry J. Ahabrhan, *Id.* at 330. Similarly, Justice Samuel Miller Said: "[I]n the division of the powers of government between the three great departments, executive legislative and judicial, the judicial is the weakest for purpose of self-protection and for the enforcement of the power which it exercises" *Id.* See also Comment, confronting the conditions of confinement: An Expanded Role for Courts in Prison Reform 12 HARV. C.R. C.L.L. REV 367-369 (1977). The burden of prison reform should fall on the other branches of government because the piecemeal approach of the judiciary has proved inadequate to solve the more basic problem. Limits of what can be achieved by judicial review were reached in *Hague v. Deputy Governor of Park Hurst Prison*, July 28, 1981 see A.W. Bradley, *Judicial Review, the Prison Rules and the Segregation of prisoners*, Pub.


280. "Is the impact of the Supreme Court necessary and desirable? I think it is desirable. It is desirable that the Court should have some feedback on the overall..." Upendra Baxi, *who Bothers About the Supreme Court? The Problem of Impact of Judicial Decisions*. *Id.* at 684.

281. Here 'Complex' refers to the systemic nature of both the target of the lawsuit and the remedy imposed. The central feature of the compels lawsuit is its systemic focus, reflected in both the target selected for legal criticism, a system thought to be wrongful, and the nature of the remedy imposed, a remedial plan wide ranging in scope and


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279. "I feel strongly that the Court does not play the role that lawyers ascribe to it". see George D. Braden, *Legal Research; A Variation on an old lament* in Dhavan, Rajeev, *Legal Resource Methodology* Bombay : N.M. Tripathi Pvt. Ltd., 1971 at 17.

280. "Is the impact of the Supreme Court necessary and desirable? I think it is desirable. It is desirable that the Court should have some feedback on the overall..." Upendra Baxi, *who Boothers About the Supreme Court? The Problem of Impact of Judicial Decisions.* *Id.* at 684.

281. Here ‘Complex’ refers to the systemic nature of both the target of the lawsuit and the remedy imposed. The central feature of the compels law suit is its systemic focus, reflected in both the target selected for legal criticism, a system thought to be wrongful, and the nature of the remedy imposed, a remedial plan wide ranging in scope and
detail. This systemic orientation contrasts sharply with discrete adjudication the application of legal norms to particular instances of wrongdoing See, comment; complex Enforcement: Unconstitutional Prison Conditions, HARV L.REV. 626, 627 (1981) 94. at 626. This kind of a more active and systemic role in the administration of penal facilities is also called as ‘the totality of conditions approach’ see Deborah A. Montick. Challenging Cruel and unusual conditions of prison confinement. Refining the totality of conditions approach 26 HOW. L.J. 227 (1983()).

282. Id. at 630.

283. For instance, in Palmigiano v. Carrady, the Court identified a cause of prison violence in the intermingling of incompatible.

284. Id. at 635.

285. Id. at 646.


287. Id at 810.

288. Id at 816.

289. Id at 847.

290. "A review of the choices actually made by trial judges in a wide range of prison cases reveals four basic strategic approaches to the remedial process: (1) the deferrer, (2) The directors, (3) the broker, (4) the catalysts" Susan Sturm, Id. at 848.; Thus, chayes opines that the decree in a public Law Litigation seeks to adjust future behaviour, not to compensate for past wrong. It provides for a complex, on-going regime of performance and it prolongs the court's involvement with the dispute. See chayes, The Role of the Judge in Public Law Litigation 89 HARV. L. REV 1281 (1976) at 1298. Eisenberg and Yeazell opine that the procedures and remedies employed in institutional litigation are not unprecedented but have analogous in older judicial traditions. See, Eisenberg, Theodore and Yeazell, Stephen C, The Ordinary and the Extraordinary in Institutional Litigation 93 HARV. L.R. 465 (1980) at 467.

292. Id. at 793.

293. In remedial abstention court generally prefer remedies formulated by defendant institutions and, therefore, often limit the judicial role in remedial formulation to the evaluation of the defendant’s proposal- see Brown v. Board of Education 349 U.S. 294 (1955) Id. at 797.

294. A court may select a systematic remedy, after receiving suggestions from all the parties. In this method, the participation of the plaintiff in addition to the defendant increases the likelihood of obtaining a viable remedial plan. Id. at 801. This remedy appears to be more effective than the court imposed remedy in which the defendant may not cooperate in the implementation the courts plan. Id at 801.

295. In Master-supervised formulation, the courts may seek the assistance of an expert special master in resolving remedy formulation problems. In U.S. special masters assist in devising the remedy, and are frequently responsible for creating the plan eventually decreed by the court. The courts in U.S. have broad general powers to seek outside expert aid and have appointed informed consultants or experts to assist in remedy development, see Id at 805-809.

296. In negotiated remedies the court chooses between conflicting remedial alternatives through multi-party participation. Id.

297. Id.

298. Id. According to chayes the compliance problems may be brought to the court for resolution and further remediation, see, supra note 290 at 1301.

299. Id.

300. Id. at 816.

301. Id. at 820.

302. Id at 826.

303. Id. at 827-28.
304. *Id* at 830.
305. *Id.* at 831.
306. *Id* at 834.
307. *Id.*
308. *Sunil Batra (II) supra* at 1595.
309. *Id.* at 1595-96.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 1597.
314. *Id.*
315. *Id.* at 1598.
316. *Id.* at 1597.
317. *Id.* at 1598.
318. *Id.*
320. *Sunil Batra (II) supra* at 1599.
321. *Id.*
322. *Id.*
325. *Id.*
326. *Id.* at 214.
327.  *Id.*
328.  *Id.* at 216.
329.  *Id.*
330.  *Id.* at 217.
331.  *Id.* at 218.
332.  *Id.*
333.  *Id.* at 219.
334.  *Id.* at 220.