

## CHAPTER-V

### **JURISPRUDENCE EVOLVED BY THE SUPREME COURT FOR PROTECTION OF CUSTODIAL DIGNITY**

Justice is an absolute component of any legal system yet its content varies from nation to nation and culture to culture. Not with standing such variables, the right to dignity, equality, freedoms and liberty are constant. Thus Justice as a concept is the ideal achieved by law and as a variable component Justice is the goal of law. Law as a concept defies definition but for the purpose of governance. The gap between the two may be described as the field covered by morality. There is no doubt that the development of law is influenced by morals. The infusion of morality for shaping the law is influenced by the principles of equity and natural justice, as effective agencies of growth. The ideal state governs by the rule of law of which justice is an integral part. The purpose of such governance is to bridge the gap between the ideals adopted by the Constitution and the ground reality. The gap between the ideal and the reality can be bridged only by judicial activism, which occasions the development of new Jurisprudence<sup>611</sup>.

The attempt of the courts to bridge the gap between the provisions of existing law and the ground level demands of justice is the occasion for the development of new dimensions of justice by evolving juristic principles within the frame work of the law for doing complete justice according to the current needs of the society<sup>612</sup>.

Judicial Activism is a facet of judicial review. If implementation of rule of law which is the bedrocks of democracy is the basic responsibility of

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611. Dr.Ashutosh, Rights of the Accused, [1<sup>st</sup> Edition, 2009], Universal Law Publication, Delhi. P. 200.

612. Id. P.201.

judiciary then it is the obligation of judiciary to see that every aspect which is essential for proper implementation of rule of law ought to be taken care of. The constitution itself approves it. In this context judicial activism necessarily means, "the active process of implementation of the rule of law, essential for the preservation of a functional democracy. Since the administration of justice is entrusted by the constitution to the Judiciary it is the primary obligation of the judiciary, to ensure that this happens"<sup>613</sup>.

Though the basic legal frame work for human rights within criminal justice administration is provided by a wide range of legislative measures of diverse kinds, in recent times the judiciary particularly at the appellate level, has played a vital role not only vigorously enforcing human rights measures but also for creative interpretations leading to broadening and evolving new concepts of human rights. Such judicial role is a marked feature of the post emergency period judicial process, particularly emanating from the Supreme Court<sup>614</sup>.

India has a strong and independent judiciary which is ordained to be the custodian of the fundamental rights of the people. The development of public interest legislation in the Indian legal system has generated considerable jurisprudence around human rights to the advantaged of the weaker and exploited sections of society. The doors of the apex court and high courts have been thrown open through this device by dispensing with traditional rules of locus-standi. This has definitely taken the cause of human rights further and especially helped those persons who were unable to approach the courts themselves on account of poverty disability and others social or economic impediments<sup>615</sup>

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613. Id. P. 204.

614. K.I.Vibhute; Criminal Justice,[1<sup>st</sup> Edition, 2004], Central Law Publication, Lucknow, P. 212.

615. H.R.Bhardwaj, "Evolving Human Rights Jurisprudence", I.B.R III XX(I) 1993, P. 53

**Concern Regarding Role of the Police:** Policemen stepping out of the legal boundaries are not new, but the frequency and the freedom with which they trample on the right of the citizens are frightening. As the Supreme Court has said<sup>616</sup>, the police has come to treat itself as law unto itself, sometimes even above the law. It is heart rending to note that day in and day out we come across with the news of blood – curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all branches of humanitarian law and universal human rights as well as total negation of the constitutional guarantees and human decency. When the police become an irresponsible lot the plight of the people becomes deplorable. The courts, which are expected to intervene in exceptional cases, have to do so almost a daily basis. Instead of shaming the police into action, this is being construed as judicial activism with all consequences<sup>617</sup>. Our constitutional commitment to the protection and promotion of human rights finds reflection in the preamble and various other provisions relating to Fundamental Rights, Directive Principles of State Policy and Fundamental Duties. The judiciary has shown its wisdom by evolving new human rights oriented interpretation of various provisions of law and thus protected the people from the police atrocities.

“Prisonisation” symbolizes a system of punishment and also a sort of institutional placement of convicts, under trials and suspects during the period of trial. Since there cannot be a society without crime and criminals, the institution of prison is indispensable for every nation. The history of prison in India and elsewhere clearly reflects the changes. In society’s reaction to crime from time to time the system of imprisonment represents

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616. This Principle was laid down in the cases of D.K.Basu v. State of West Bengal, Neelabati Behra v. State of Orissa and State of Madhya Pradesh v. Shyam Sunder Trivedi etc.

617. B.P.Singh Sehgal, Human Rights in India – Problems and Perspective[ Edition, 2004], Deep & Deep Publication, New Delhi, P. 212.

a curious conservation of different objectives of punishment. Thus prison may serve to deter the offender or it may be used as a method of retribution or vengeance by making in life of offender miserable and difficult. The isolated life in prison and incapacity of inmates to repeat crime while in the prison fulfills the preventive purpose of punishment. That apart prison may also serve as an institution for the reformation and rehabilitation of offenders<sup>618</sup>

The constitution of majority of prisons in India is bad even today and many offenders are languishing in jail without trial for several years, further, the non availability of proper health facility for inmates, inhuman torture of prisoners, solitary confinement, handcuffing and fetters on under trials, overcrowding of prisons, criminality in prisons and non availability of adequate separate prisons for women are the common problem of Indian prison system. The past decade has witnessed an increasing consciousness about the desirability of prison reform's it is now been recognized that a reformatory philosophy and a rehabilitative strategy must form a part of prison justice. A significant role of judiciary in bringing prison reforms has been made special emphasis in the criminal justice system<sup>619</sup>.

By playing a vital role in the task of protecting human rights, the Supreme Court has made a positive contribution in sub fertile field. In Pre Maneka era the judiciary assumed rather passive role. The turning point came in 1978 in **Maneka Gandhi's**<sup>620</sup> case, when the Supreme Court held that any state action affecting life and liberty of a person has to be right just, fair and reasonable and not arbitrary, fanciful and oppressive. Thereafter there appeared era of progressive judicial activism for protection of prisoner in the context of human rights jurisprudence. In the post Maneka period

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618. Id.P.40.

619. Dr.Suresh V. Nadagowdar, "Judicial Constitution of Prison Reforms in India an Overview," I.B.R. VOL – XXXIII (2006), P.39.

620. Maneka Gandhi v. Union of India, AIR 1978 SC 597.

court's activism blossomed and flourished a new trend was set in **Maneka Gandhi's**<sup>621</sup> case. The Supreme Court, in its anxiety to protect human rights, has at times under taken the roles of both organs of the government the legislature and executive. The constitution does not confer such omnipotent power on the judiciary<sup>622</sup>.

**Supreme Court on Human Dignity:** The Supreme Court of India under Article 21 has developed a whole character of Human dignity<sup>623</sup> and right Jurisprudence of prisoners. Right to human dignity belongs to all human beings inside and outside the prison. In **Asiad Workers** case, the violation of provisions of contract (Regulation and Prohibition) Act 1970 and the interstate migrant Labour (Regulation and employment and conditions of service) Act 1979 was established. The union of India contended that, unless there was a breach of fundamental rights, Article 32 was not available. J.Bhagawati observed that these statutes in fact, guaranteed the workers human dignity and Article 21's guaranteed of the right of life and personal liberty is not confined to right to physical existence but also includes within its scope and ambit the right to live with basic human dignity, and the state could not deprive any one of this right as no procedure regarded as fair, just and reasonable<sup>624</sup>

There cannot be worst denial of personal liberty than languishing in jail without trial, handcuffing of prisoners in public and interrogating them with third degree methods, and subjecting them to indignities, humiliation, torture, both mental and physical and meting them with in human and humiliating treatment<sup>625</sup>. In the words of Krishna Iyer,

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621. AIR 1978 SC 597.

622. <http://www.su.digitaluniversity.ac>. Visited on 25.3.09.

623. People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.

624. Paras Diwan, Human Rights and the Law [1<sup>st</sup> Edition,2006] Deep & Deep publication, New Delhi, P. 169.

625. Sunil Batra v. Delhi Administration (1) (1978) 4 SCC 494.

"In our world prison are still laboratories of torture warehouses in which human commodities are sadistically kept and where spectrum of inmates range from drift wood juvenile to heroic dissenters"<sup>626</sup>.

Fortunately, in India, the right jurisprudence has reached a stage where one could safely say that the Indian constitution recognized fundamental rights to human dignity which directly flows from Article 21 of the Indian constitution. It is submitted that 'torture' should now be understood to mean, anything done by acts, words or conduct which lower human dignity. In other words in Supreme Court's opinion right life is a life of dignity<sup>627</sup>

In the case of **Kharak Singh v. State of U.P.**<sup>628</sup>, Subba Rao J. approved the following observation of Field, J. in **Munn v. Illinois**<sup>629</sup>

"By the term life as here (Article 21) used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg, or the putting out of an eye or the destruction of any other organ of body through which the soul communicates with the outer world".

This same formulation was accepted in **Sunil Batra(1) v. Delhi Administration**<sup>630</sup>, Bhagawati J. elucidating the aforesaid observation, said that the deprivation which is inhibited by article 21 might be total or partial neither any limb or faculty can be totally destroyed nor can it be partially damaged. Further deprivation is not an act which is complete once and for all, it is a continuing act and as long as it is a continuing act and so

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626. Ibid.

627. Francis Coralie v. Union Territory of Delhi, (1981)1 SCC 608.

628. AIR 1963 SC 1295.

629. (1877) 94 US 113.

630. AIR 1978 SC 1675

long as it lasts, it must be in accordance with the procedure established by law<sup>631</sup>.

Thus, right to life includes the right to live with human dignity; inmates of a care homes too have a right to live with human dignity. A home should provide minimum living conditions ensuring human dignity. The home may be for destitute persons<sup>632</sup> or a hospital for mental patients<sup>633</sup>. It is implicit in Article 21 which accords protection against torture, and cruel inhuman or degrading treatment.

However, the Supreme Court has developed rights jurisprudence over the course of last forty years of interpretation of the constitution. Before, **Maneka Gandhi's**<sup>634</sup> case a narrow meaning to the fundamental rights embodied in Article 21, it was laid down that anyone could be deprived of his life or liberty if adherence was made to "the procedure established by law:' But Maneka Gandhi widened the scope of human rights jurisprudence. The courts have voiced concern regarding indiscriminate misuse and abuse of the power of arrest by the law enforcement agencies or occasions. The apex court while commuting or the violations of human rights because of indiscriminate arrest observed that the law of arrest is the balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and most of individuals collectively of simply deciding what is wanted and where to put the weight and the emphasis, of deciding which comes first, the criminal or society, the law violator or abider<sup>635</sup>.

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631. Francis Corali Mullin v Delhi Administration,(1981)SCC 608

632. Vikram v. State of Bihar,AIR 1988 SC1782

633. S.K.Kapur v. U.O.I.,AIR 1990 SC712

634. Maneka Gandhi v. U.O.I AIR 1978 SC

635. Dr. Deepa Singh, Human Rights and Police Predicament,[ 1<sup>st</sup> Edition 2002],R.C.Bangia Publication ,Delhi. P.227.

**Delineating the Boundaries of Dignity in Arrest:** 'Arrest' means to restraint of a man's person, obliging him to be obedient to the law; 'Arrest' is said when one is taken and restrained from the liberty. An 'arrest' of a person, by duly authorized person is accomplished if the officer lawfully touches him; the power of effecting actual capture is not essential. An 'arrest' in civil case is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice<sup>636</sup>.

The expression 'arrest' appeared in Art. 22 of the Constitution of India is a comprehensive term designed to cover all cases in which a person is apprehended by legal authority and is not confined to cases in which a person is apprehended by or under the orders of a civil or criminal court. It covers not only cases of punitive and preventive detention but also cases of what may, for convenience, be called protective detention.

To constitute an arrest it is necessary that the officer should assume custody and control over the party, either by force or with his consent, and it has been held that neither the utterance of words indicating an intention to arrest on the part of the person uttering them, nor the reading of the warrant is of itself sufficient.

In other words the arrest means detention of arrestee, "to take, seize or apprehend a person by virtue of legal process issued for that purpose". "Taking into custody of a person, that he may be held for a public offence, the taking into custody of a person or person and goods, under some lawful command or authority"; "An arrest under civil process is the apprehension of the person, by virtue of lawful authority to answer the demand against him in a civil action", The taking, seizing or detaining the person of

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636. Ibid.

another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest"<sup>637</sup>.

Therefore, the term 'arrest' has a technical meaning applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in or contemplated by, the process.

An arrest may be made in four ways, either by warrant, by an officer without a warrant, by a private person without a warrant, or by hue and cry. In **Joginder Singh**<sup>638</sup> the Supreme Court set four major guidelines that are to be followed by the police in all cases of arrest. They are: -

As arrested person in custody is entitled, if he so requests, to have one friend or relative or other person known to him or likely to take interest in him told as far as is practicable, that he has been arrested and details as to where he is being detained;

The officer shall inform the arrested person of the above rights;

An entry is to be made in the case diary as to who was informed of the arrest (in the concerned case); and Departmental instructions are to be issued that a police officer making arrest should record in the case diary, the reasons for making the arrest.

In order to ensure that the above directions are complied with, the court declared that it shall be the duty of the jurisdictional Magistrate before whom the arrested person is produced to satisfy that these requirements have been made.

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637. Section 41 of Cr.P.C, 1973.

638. *Joginder Singh v. State of Punjab* 1994(3) SCC 423.

The government of India has initiated steps to amend<sup>639</sup> the relevant provisions of the code of criminal procedure, 1973 which in effect covers the directions of the court with regard to the duty of the police to inform the relatives of the arrested about it and also mention the place where he is being detained and other matters incidental thereto. But the proposed amendment is not through yet.

Taking cognizance of the reporting of large number of custodial crimes in India, the Supreme Court delivered a historic judgment in **D.K. Basu v. State of West Bengal**<sup>640</sup> which laid down the rules for custody jurisprudence. The apex court felt the urgency of streamlining the structure and functions of the law enforcement machinery responsible for effecting arrests in the country. The court observed that there should be more transparency and accountability in the system so far as arrests are detentions of the offenders are concerned. In addition to the statutory and constitutional requirements it was made mandatory on part of the law enforcement agencies to follow the following guidelines at the time of effecting arrest of an offender: -

The police personal carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personal who handle interrogation of the arrestee must be recorded in a register.

That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

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639. Bill No.94, Code of Criminal Procedure.

640. AIR1997 SC 610.

A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the arresting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest<sup>641</sup>.

The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

The arrestee should, where he/she so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'inspection Memo' must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by director health services of the

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641. D.K.Basu v. State of West Bengal, AIR 1997, SC 610.

concerned state or union territory. Director health services should prepare such panel for all tehsils and districts as well.

Copies of the entire document including the memo of arrest referred to above, should be sent to the 'Illaqua Magistrate' for his record.

The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

A police control room should be provided at all districts and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and it should be displayed on a conspicuous notice board at the police control room.<sup>642</sup>

Failure to comply with the requirements mentioned above shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and proceedings for contempt of court may be instituted in any high court of the country, having jurisdiction over the matter. The extent of these detailed instructions is itself an indication of judicial concern over illegal detention, torture and custodial death.

**Bail an important Component of Dignity:** Right to bail is an important guarantee concerning the personal liberty of the accused. The late seventies euphoria concerning this right has considerably died down in the eighties and nineties in the wake of terrorism and new forms of criminality like dowry violence, atrocities against SCs and STs and sexual crimes against women, etc. however, there have still been some leading judicial decisions in recent times that aim at balancing the liberty of the accused with the prosecution interest of making the accused available for investigation and trial.<sup>643</sup>

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642. D.K.Basu v. State of West Bengal, AIR 1997,SC 610.

643. K.I.Bibhute , Criminal Justice [1<sup>st</sup> edition,2004],Eastern Book Company, Lucknow P. 144.

In **Hitendra Vishnu Takhur v. State of Maharashtra**<sup>644</sup>, the Supreme Court, while construing Section 20 (4) (bb) of the TADA in the light of section 167 of the Cr. P. C, held that “with the amendment of clause (b) of subsection (4) of section 20 read with the provision to subsection 2 of section 167 of Cr. P.C or indefeasible right to be enlarged a bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under section 173, Cr. P. C.

The court further said that the obligation of court in such cases are : - a) to declare police request for further remand in all cases where the assigned period has expired and no formal extension of period is granted, and b) to inform the accused of his right to bail and also enable him to file an application on that behalf. The liberal bail right has been recognized by Supreme Court in **Sanjay Dutta v. State through C.B.I**<sup>645</sup>.

In **Babu Singh v. State of Uttar Pradesh**<sup>646</sup>, the apex court by justice Krishna Iyer, observed that ‘personal liberty’ is deprived when bail is refused. It is too precious value of our constitutional system recognized under Article 21, because of which the power to negate it must be exercised not casually, but judicially with lively concern for the cost to the individual and community. It was then observed.

“..... to glamorize impressionistic orders as discretionary may on occasions, make a legislative gamble decisive of a fundamental right. After all, personal liberty or an accused or convicts is fundamental suffering lawful eclipse only in terms of procedure established by law”. The last four words of Act. 21 are the life of that Human Right<sup>647</sup>

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644. (1994)4 SCC 602.

645. (1993)5 SCC410.

646. AIR1978 SC 527.

647. Babu Singh v. State of Uttar Pradesh, AIR 1978 SC 527.

The Apex court while dealing with the question whether some conditions should be specified a laid down in exercise of power of granting anticipatory bail under section 438 of Cr. P.C, it was observed by the court in **Gurbaksh Singh Sibbia v.State of Punjab**<sup>648</sup>, that in order to meet the challenge of Article 21, the procedure must be fair, just and reasonable, and so, word may not be read in the section to make it urgent or unfair. On the basis of their judgment, it can be states that if a bail order imposes unjust condition that would be hit by this Article.

Releasing the worst kind of human right violations take place in the course of police remand courts have been unduly sensitive to police request for remand. In **CBI v. Anupam J. Kulkarni**<sup>649</sup> the Supreme Court refused to hand over the accused to the police on remand after his initial custody in judicial remand. The prosecution is also argued in favour of police remand in most of the cases. In this case, J. Ahmedi laid down that:

“There cannot be any detention in police custody after the expiry of first fifteen days even in case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage”<sup>650</sup>

The court further observed: “The proviso to section 167 is explicit on this aspect. The detention in police custody is generally disfavored by Law. The provision of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a magistrate for reasons judicially scrutinized and for such limited purposes as the necessities of the case may require. The scheme of section 167 is obvious and is intended to protect the accused from the methods that may be adopted by some over zealous and unscrupulous police officers”.

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648. AIR1980 SC1632.

649. CBI v. Anupam J. Kulkarni (1992)3 SCC 155.

650. CBI v. Anupam J. Kulkarni (1992)3 SCC 155.

Similarly, the Supreme Court in **Union of India v. Thamisarast**<sup>651</sup> disfavored the continued remand detention beyond the period of 90 days even in a case of arrest under the narcotics Drugs and Psychotropic Substances Act, 1985.

The naked violations of human rights take place in the course of investigation, when the police under pressure to secure the most clinching evidence often resort to third degree methods and torture. Recently, the police torture and custodial death are increasing day by day. Courts have not only exposed the seamy side of police investigation process but have in several cases prevented exemplary punishment to ensure human conditions of investigation.

In **Gouri Shankar Sharma v. State**<sup>652</sup>, three members of the police force were charged with custodial death in the course of a dacoity investigation. It was revealed that accused was taken into custody without recording arrest in the general diary and in this way the injuries given in the course of investigation were shown to have been incurred in pre – arrest period. The Apex court passed the order of conviction against alleged police personal under section 304 of I.P.C and following observation was made by Justice Ahmadi:

“The offence is of a serious nature aggravated by the fact that a person who is supposed to protect the citizens and not to misuse his uniform and authority committed it to brutality assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment be such as would deter others from indulging in such behaviour”<sup>653</sup>

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651. (1995) 4 SCC 190.

652. 1991 SCC (Cr.i) 67.

653. Gouri Shankar Sharma v. State 1991SCC(Cri)67

The Apex court recommended a effective strategy to prevent the abuse of power not only by punishing the offending officer but also felt necessary to create the constitutional right of compensation in all such situations where abusing of power violates any of the fundamental rights of the citizen.

**Anathema of Handcuffing:** Handcuffing had been a rule in Indian criminal justice system. In India, it had become a common practice for one police to handcuff under trials and arrestees, irrespective of the nature of the offence committed by them and the possibility of any escape. The practice had become almost indiscriminate, which violated the personal liberty of the concerned persons. The prisoners are quite often handcuffed while being brought them prison to court and vice – versa for the sake of security and discipline<sup>654</sup>. The Supreme Court has made immense contribution by way of its judgments and directions on this issue

In **Prem Shanker Shukla v Delhi Administration**<sup>655</sup>, the Supreme Court added yet another projectile in its armoury to be used against the war for prison reform and prisoners rights. In that case the validity of certain clauses of Punjab police rules were challenged as violation of Art 14, 19 and 21 of the constitution. Krishna Iyer, J, delivering the majority judgment held that provisions in paras 22, 26 that every under trial who was accused of a non-bailable offence punishable with three years jail term would be handcuffed, were violative of articles 14,19 and 21 of the constitution. Handcuffing should be resorted to only when there is clean and present danger of escape' breaking out the police control and for this there must be clean material, not merely an assumption. In special circumstances the application of iron is not ruled out. The court pointed out that where in extreme cases the accused is to be handcuffed; the escorting authority must inform the court and record reasons for doing so. It is only after

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654. Dr Suresh v Nadagouda, "Judicial Contribution to Prison Reforms in India, An Overview," I.B.R. vol .xxxii(1to 4)2006, P. 44.

655. AIR1 980 SC 1535

getting judicial approval that handcuffing should be resorted to. His lordship said.

“Handcuffing is prima-facie inhuman and therefore, unreasonable and harsh and at the first flush arbitrary... to inflict iron’s is to resort to zoological strategies repugnant to Art 21”<sup>656</sup>

The court concluded with the observation: “We clearly declare and it shall be obeyed from the inspection general of police and inspector general of prison to the escort constable and the jail warden – that the rule regarding a prisoners in transit between prison house and court house is freedom from handcuffs and the exception, under conditions of judicial supervision we have indicated earlier, will be restraints with irons. To be justified before or after. We mandate the judicial officer before whom the prisoner is produced to interrogate the prisoner as rule, wheather he has been subjected to handcuffs or other iron’s treatment, and if he has been, the official concerned shall be asked to explain the action forthwith in the light of his judgment<sup>657</sup>.

In **Kishore Singh**<sup>658</sup>, The Supreme court observed, “Human Dignity is dear value of our constitution not to be bartered away from mere apprehensions entertained by jail officials.”

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

“A large number of prisoners – a few hundred at times – minors and under trials too – are shackled day and night for days and months or and by bar

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656. Prem Shanker Shukla v. Delhi Administration, AIR1980 SC 1535.

657. Ibid.

658. Kishore Singh Ravindre Dev v. State of Rajasthan AIR 1981 SC 625.

fetters too shocking to contemplate with cultural equanimity. This, prime-facie, shows the class character of jail injustice for an incisive sociologist.<sup>659</sup> In **Citizen for democracy v. State of Assam**<sup>660</sup>, the Supreme Court expressed serious concern over the violation of law laid down by that court in **Prem Shanker Shukla's**<sup>661</sup> case against Handcuffing of under trial or convicted prisoners by the police authorities. In this case Mr. Kuldeep Nayar an eminent journalist through a letter brought to the notice of the court that sever TADA detainees lodged in the hospital in the state of Assam were handcuffed and tied with a long rope to check their movement. Security guards were also posted outside the hospital. The court treated the letter as a petition under Art 32 of the constitution and held that Handcuffing and in addition tying with ropes of the patient prisoners who are lodged in the hospital is inhuman and in violation of human rights guaranteed to an individual under international law and the law of the land. The Supreme Court again in a separate writ petition filed by **Sunil Batra** and **Charles Shobraj**<sup>662</sup>, two prisoners in Delhi Tihar Jail, made an effort to humanize jail conditions. The question before the court was: "Does a prison setting, ipso facto, outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement? And there is no total eclipse what lucent segment is open for judicial justice? Sunil Sentenced to death had challenged his incarceration in solitary contentment and Charles Sobhraj had challenged his confinement with bar fetters.

The Supreme Court held that there is no total deprivation of a prisoner's right of life and liberty. The "safe keeping in jail custody is the limited

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659. Sunil Batra v. Delhi Administration, AIR1978 SC 1712.

660. (1995)3SCC743.

661. AIR 1980 SC 1535.

662. Charles Sobhraj v. Supdt. Jail, Tihar, AIR1981 SC 1514.

jurisdiction of jailor. To resort safe keeping into a hidden opportunity to score the word and to traumatize them is to betray the custodial of law, safe custody does not mean deprivations, violation, punishment from lantern barguet of prison life and inflection's of travels as if guardianship were best fulfilled by making the ward suffer near insanity<sup>663</sup>

The court held that Sunil Batra's<sup>664</sup> mercy petition had not been disposed of and the expression "prison under sentence of death" could only mean the prisoner whose sentence of death had become final and could not be annulled or violated by any judicial or constitutional procedure. Thus the prisoner was not under sentence of death till he had the right to appeal against this sentence or to appeal for mercy. Hence, his solitary confinement was quashed. In the case of **Charles Shobraj**,<sup>665</sup> it was held that there was no arbitrary power to put an under trial under bar fetters. The desertion to impose, irons is a quasi judicial decision and a precious hearing is essential before putting prisoners in fetters. It was further laid down that no "fetters" shall continue beyond daytime and a prolonged continuance of bar – fetters shall be with the approval of the chief judicial magistrate or a session judge.

Prisoner's rights have been recognized not only to protect them from physical discomfort or torture in the prison but also to save them from mental torture. Therefore the court in **Sunil Batra (II)**<sup>666</sup> recognized the right of prisoners visited by their friends and relatives. The court favoured their visits but subject to search and discipline and over security criteria" it was observed: "Visits to prisoners by family and friends are solace in

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663. Ibid.

664. Sunil Batra v. Delhi Administartion, AIR1978SC1712.

665. Charles Sobhraj v. Supdt.Jail,Tihar, AIR1981 SC 1514.

666. AIR1978SC1575.

insulation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this human amenity"<sup>667</sup>.

In another recent landmark judgment in the case of **Francis Coralie v Union territory of Delhi & others**<sup>668</sup>, the Supreme Court explained the ingredients of personal liberty under article 21. The case arose out of the right of a detainee under COFEPOSA to have an interview with his family members and lawyers. The meeting with family members was restricted to once a month and the lawyer could be met only in the presence of an officer of the customs department. The Supreme Court ruled that the right to life and liberty included his right to live with human dignity and therefore a detainee would be entitled to have interviews with family members, friends and lawyers without these severe restrictions. Further the Supreme Court stated.

"Personal liberty would include the right to socialize with members of the family and friends subject, of course to any valid prison regulations and under Art. 14 and 21 such prison regulations must be reasonable and non – arbitrary"<sup>669</sup>.

In **Prabha Dutta v. Union of India**<sup>670</sup>, a petitioner a newspaper correspondent filed a petition to interview two condemned prisoners Ranga and Billa for which Tihar Jail authorities refused permission to her. The Supreme Court allowed the interviews upholding the right of press to have access to prison inmates.

**Condition of Lockups:** The condition faced by prisoners, and the condition of police lock –ups, raises human rights questions. The lock ups, had no sanitary or proper sleeping facilities, and were dark and dank. The food allowance for prisoners is insufficient to support human life. The conditions

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667. Sunil Batra (II) v. Delhi Administration, AIR1978SC1575.

668. AIR1981 SC 746.

669. Francis Coralie v. Union Territory of Delhi and others AIR1981 SC 746.

670. AIR1982 SC 6.

of prison are de – humanizing. The states of health of prisoners are deteriorating day by day, which needs attention of the prison authorities. Realizing the situation, judiciary felt that steps are to be taken to tackle the problem of prisoners suffering from serious diseases like T.B or AIDS etc. In this context the court pointed out that the grievous failure of local authorities to provide the basic amenity of public convenience drives the miserable slum – dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature’s pressure, bashfulness becomes a luxury and dignity a difficult art. The court observed:

“Decency and dignity are non negotiable facts of human rights and are a first charge on local self governing bodies”.

In **F.K. Hussain v. Union of India**<sup>671</sup>, the Kerala High court pointed out that the right to sweet water and the right to free air are attributes to the right to life, for, those and basic elements which sustain life itself.

In **P.A.Jacob v. Supdt.of police Kattayam**<sup>672</sup>, the court took cognizance of noise pollution when it observed:-

“Compulsory exposure of unwilling persons to dangerous and disastrous levels of noise, would amount to a clean infringement of their constitutional guarantee of right to life under article 21. right to life comprehends right to safe environment, including safe air quality, safe from noise”

Another development of the rights jurisprudence relates to under trial prisoner is to provide legal aid to the prisoners. The right to free legal services is as essential ingredient of the reasonable, fair and just procedure, which is instrumental in depriving a person of his life and personal liberty. To secure justice to the poor, free legal aid is essential on the basis of equal opportunity for defends<sup>673</sup>.

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671. AIR1990 Ker.321.

672. AIR1993 Ker.1.

673. P.N.Bhagawati, Justice, “ Human Rights in Criminal Justice System,” I.B.R (1985) P.319.

In Indian scenario, the concept of free legal aid, though not a new phenomenon, but this might have been developed in India rapidly within last 30 years. The very early schemes of legal aid were developed in the hands of Justice P. N. Bhagwati and Justice Trevor Harris. Apart from the initiative taken by the justice, many efforts were made by the different state govt. to formulate the legal aid committee. Justice Bhagwati stated that, free legal aid as a constitutional mandate cannot be disown the responsibility on the ground of financial or Administration constraints.<sup>674</sup>

In Indian constitution, there is no specific right to provide counsel but engage a lawyer of one's choice as contemplated in Art 22(1) of the Indian constitution. Our constitution by the amendment in 1976, added Art 39 – A in the constitution, as a directive principle of state policy. Art 39 – A provides that "the state shall secure the operation of the legal system promotes justice, on the basis of equal opportunity and shall be particular provide free legal aid, by suitable legislation schemes, or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities.

In **Hussainara Khatun v. Home Secretary, State of Bihar**<sup>675</sup>, the Supreme Court observed that a procedure which does not make legal services available to a poor under trial person cannot be regarded as just fair and reasonable and therefore, violates the right to legal aid of the poor accused as contemplated by Art 21 of the constitution. The court in this case ordered release of those under trials that were languishing in jails for an inordinately long period.

The court under Article 142 read with Article 21 and 39 A of the constitution can exercise its implicit power to assign counsel to the accused person provided he does not take objection of a lawyer for his defense. In

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674. B.P.Dwivedi, *The Changing Dimension of Personal Liberty in India*, [1<sup>st</sup> Edition 1998] Wadha Publications, Delhi. P. 51.

675. AIR 1979 SC 1369.

**Suk Das v. Union Territory of Arunachal Pradesh**<sup>676</sup> the apex court held that failure to provide free legal aid to an accused at the state's court would violate the trial. The court had set aside the conviction of an accused on the ground that he was not provided with legal aid at the time of his trial and thus there was violation of Art 21 of the constitution.

In **Khatri v. State of Bihar**<sup>677</sup> popularly known as the Bhagalpur Blinding case also, the Supreme Court held that the right to legal aid under Article 39 A is implicit under Art 21. In **Kadra Pehadiya v. State of Bihar**<sup>678</sup>, the Supreme Court specifically declared that the right to legal assistance of under trial prisoner's in the form of competent lawyer at states expense is part of their fundamental rights under Art – 21.

Moreover, there is no Justification to detail a criminal lunatic though he has becoming perfectly sane and fit for discharge<sup>679</sup>.

The freedom of expression of a detinue is not totally, curtailed and if a prisoner has written a scientific book, he has a right to get it published and the government has no right to refuse permission to do so<sup>680</sup>.

The right of under trial prisoners and accused is very important aspect in regard to the protection of human rights of the accused in criminal justice administration. The right of the accused included the right to speedy trial<sup>681</sup>.

After the independence of India, when the constitution of India is adopted, the people's fundamental rights have been guaranteed and prisoner's rights also began to draw the attention or legislators, Justice and judges. In the early days of post independent era, the Indian court did not adopt the liberal attitudes towards prisoner's claims of various freedom committed to

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676. (1986)2 SCC 401.

677. AIR1981, SC 928.

678. AIR1982, SC 1167.

679. Sant Bir v. State of Bihar, AIR 1982 SC 1470.

680. State of Maharasta v. Provakar AIR 1964 SC 424.

681. Mark Williams, "Prisoners Right," Lawyers Collective, Oct.(1992)13.

the fundamental right. Now, the Indian courts appear to be in a position of implementing the human rights concept in favor of prisoners in better and spirit<sup>682</sup>.

Delay in trial is an inherent defect in the criminal justice system. Generally, due to various reasons: like –Frequent adjournment petition, Lengthy cross examinations without any useful purpose, Lengthy arguments which on many occasions, sound much like an empty vessel without much substance, The inadequacy of staff, The non – cooperation of the police and the absence of judges<sup>683</sup>.

The concept of speedy trial was evolved, as an effective remedy of the above situation. The expeditious trial is the facet of criminal Jurisprudence. The concept of speedy trial helps the prosecution and as well as the accused.

The Hon'ble Supreme Court, in **Kadra Pehadiya v. State of Bihar**<sup>684</sup>, observed quite pertinently. It is a shame upon adjudicatory system which keeps man in jail for years without a trial.

The full bench of Patna High Court, in **Madheswardhari Singh v. State of Bihar**<sup>685</sup>, laid down the following guide lines : -

“That the rights to speedy trial extend to all criminal prosecution for all offences generally. It applies to both trial and investigation as per the code of Cr. P. C 1973 It extends to all criminal proceeding inclusive of the stage of trial and appellate stage. Delay of 7 years or more in trial and investigation other than capital punishment violation Art 21 of the constitution.”

The actual problem to implement this right is the working capacity of administration and judiciary. To overcome this problem the efficient worker

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682. U.N.Dash, “Fundamental freedom of Undertrial Prisoners,”C.I.L.Q(1991)337.

683. Dr. Ashutosh,Rights of accused,[1<sup>st</sup> Edition 2009],Universal law Publishing Co., New Delhi, P. 228.

684. AIR1981, SC 939.

685. AIR1986, Pat .324.

should be increased and to give stress on strength of the prosecution and the court should also be enlarged. Though this exercise may involve huge expenditure but state cannot be permitted to deny this constitutional right on the ground of inadequate financial resources which is already decided in **Hussainara Khatun's case**<sup>686</sup>. Justice Bhagwati aptly remarked that, the state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability.

**Right to Speedy Trial:** An important question came up before the Supreme Court in regards to the speedy disposal of the cases. Can the court direct the state govt. to create additional courts for the quick disposal of pending case. In **Hussainara Khatun's case**<sup>687</sup> the court imposed a constitutional obligation on the Supreme Court for: augmenting and strengthening the investigative machinery, sitting up new courts, building new courts houses providing none staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

The Supreme Court went a step further and gives necessary direction to the state of Bihar and other appropriate authorities, to secure the right to a speedy trial for the accused. Often these directives come in the form of an order to the High Court to try cases within certain periods of time, such as 3 or 4 months. As a result, Supreme Court there has been a significant increase in the number of judges in the state of Bihar, yet this increase was not proportionate to the increase in number of cases in the docket.<sup>688</sup>

The great constitutional importance and a significant question concerning right to speedy trial came up before the Supreme Court in **Advocate on record Association v. Union of India**<sup>689</sup>. whether a direction to asses the

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686. Hussainara Khatun v. State of Bihar, AIR 1979 SC 1369.

687. Ibid.

688. Kadra Pahadiya v. State of Bihar AIR 1982 SC 1167.

689. Advocate on record Association v. Union of India, AIR 1994 SC 268.

judge strength in a High Court to fulfill the state obligation of providing speedy justice could be issued in **Antulay's case**<sup>690</sup> the full bench of Supreme Court has associated a number of rules relating to the right to speedy justice Reddy observed that the provisions of the court of criminal procedure which is the main procedural law in the country are consistent with and indeed illustrated the right to speedy trial. They provides for an early investigation and for a speedy and fair trial. If only the provisions of the court are followed in their letter and spirit there would be little room for any grievance. But unfortunately these provisions are honoured more in breach. It may suffice to note that the constitutional guarantee of speedy trial emanating from Art. 21 are properly reflected in the provisions of the court.

The Supreme Court also observed that it is not possible to lay down the time limit for conclusion of criminal proceedings. The nature of the offence, the number of the accused, the numbers of witness, the work – load in the particular Court, means of communications and several other circumstances have to be kept in mind. Each case must be left to be decided on its own fact having regard to the principles enunciated in this case. However without fixing and outer – limit of time, it has to be ensured that the right does not became illusory<sup>691</sup>.

Moreover the Supreme Court was of the view that, it is wrong to contain the only sequence flowing from the infringement of right to speedy trial each quashing of charges or conviction, as the case may be.

The present case is unique case on the right to speedy trial because in this case the Supreme Court laid down a detailed law relating to fundamental right to the speedy trial. The guidelines laid down by the supreme court included:

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690. A.R.Antulay v. R.S.Naik AIR 1988 SC 1531.

691. Ibid.

"The right to speedy trial is available at all stages, namely the stage of investigation, inquiry, trial, appeal, and re – trial. No criteria can be fixed to determine where there is undue delay. The court by adopting the balancing process determines in each case whether the right to speedy trial has been denied. However, the court definitely ruled that frivolous proceedings or proceedings taken merely for delaying the date of reckoning will attract the right to speedy trial, lastly, the court also laid down the courses open to judiciary while the right to speedy trial was infringed it included quashing the charges or conviction, to conclude the trial within the fixed time where the trial is not concluded or reducing the sentence when the trial has concluded as may be deemed just and equitable in when the trial has concluded as may be deemed just and equitable in the circumstances of the case<sup>692</sup>.

In the case of **Common cause, a Registered Society v. Union of India**<sup>693</sup>, the Supreme Court supplemented the proposition laid down by the constitution bench in the **Antulay's**<sup>694</sup> case with the following directions:

In cases when the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witness or not, within the said period and the court can proceed to next step provided by law for the trial of the case.

in such cases mentioned above, if the accused has been in jail for period of not less than one half on the maximum period of punishment prescribed for

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692. A.R.Antulay v. R.S.Naik, AIR1992,SC 730.

693. AIR1996 SC 1619.

694. AIR1992,SC730.

the offence, the trial court shall release the accused on bail forthwith on such conditions as it deems fit;

If the offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witness or not within the said period and the court can proceed to the next step provided by law for the trial of the case, unless for very exceptional reasons to be recorded and in the interest of justice the court considers it necessary to grant further time to the prosecution to adduce beyond the aforesaid time limit;

But if the inability for completing the prosecution within the aforesaid period is attributable to the conduct of the accused in protecting the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clause (i) to (iii);

Where the trial has been stayed by orders of the court or by operating of law, such time during which the stay was in force shall be excluded from the aforesaid period for closing prosecution evidence. The above directions will be in addition to and without prejudice to the directions issued by the court in "**Common Cause V. Union of India**"<sup>695</sup> as modified by the same bench through the order reported in common Cause, a registered Society v. Union of India"<sup>696</sup>.

**Custodial Violence:** Custodial violence is considered as a naked violation of human rights and whenever human dignity is wounded, civilization takes a step backward. Custodial violence is treated as the worst crime in a

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695. Common Cause, a Registered Society v. Union of India(1996)4SCC33.

696. Common Cause v. Union of India, AIR 1996 SC 1619.

civilized society governed by the rule of law. Custodial violence flourishes not only in India, but all round the globe<sup>697</sup>.

The record of the police department throughout India has not been such a wonderful one. Cases of death in police custody and death in fake encounters have posed a serious threat to India. It has also been reported that the number of killings by extremists has decreased but the cases of deaths resulting in police custody or torture inflicted on the accused or suspects are increasing. The reason behind this is the unlimited power exercise by the police in our existing administration of justice<sup>698</sup>. The prison administration in India also does not lag behind when it comes to the inhuman treatment meted out to the arrestees, detainees and prisoners, due to the complexities involved in proving the guilt and hailing the erring police and prison officials. The victims have often approached the Supreme Court for providing a commendable judicial activism in the area of human Rights especially those of the arrestees, prisoners and detainees<sup>699</sup>.

In **Kishore Singh Ravinder Dev v State of Rajasthan**<sup>700</sup>, the Supreme court held that use of third degree methods by police or arrested persons, violation their rights under Art. 21.

In **Nelabati Behra v. State of Orissa**<sup>701</sup>, the Supreme Court found that the petitioner's Son was killed in police custody due to torture by the police, when he was arrested on a charge of petty theft. The Supreme Court deprecated the barbaric Act of the police and declared that any person, whose fundamental rights have been violated by state action, can

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697. Gulab Gupta, "Custodial violence and Human Rights Commissions," C.I.L.Q.1999,285.

698. Dr.Ashutosh, Rights of Accused,[1<sup>st</sup> edition2009],Universal Law Publishing Co.Delhi,247.

699. Id .P. 247.

700. AIR1981 SC 65.

701. AIR1993 SC 1960.

move either the High Court under Article 226 or the Supreme Court under Art – 32 for monetary compensation.

The Supreme Court has in **D.K. Basu v. State of West Bengal**<sup>702</sup>, quoted extensively from the report of Royal Commission on Criminal Procedure, 1981 to show how torture was once regarded as a normal practice to get information regarding the crime, but with this development of common law and more radical ideas inhibiting human rights and approach, such inhuman practices were initially discharged and eventually almost done away with. As regards idea, court observed “the increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system.”

Torture is neither defined in the Constitution or in any Penal law in India. In spite of it, it is well understood and treated as violating Constitutional guarantee of life and liberty in Art 21. according to the Supreme Court, “torture of a human being by another human being is essentially an instrument to impose the will of the strong over the weak by suffering, and hence the law courts consider it as their sacred duty, as custodian, and protection of fundamental and basic human rights of the citizen, to deter branches there of.” Torture is therefore understood in a wider sense as meaning as:

1. Custodial rape,
2. Custodial violence not resulting in death.

The custody contemplated may be either by police custody in police lock up or judicial custody in prison<sup>703</sup>. Each and every act of violence is an affront to human dignity and considered violation of Art. 21. More recent

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702. AIR1997 SC 610.

703. Gulab Gupta, “Custodial Violence and Human Rights Commissions,” C.I.L.Q.1999,288.

statesman of the law is given by the Supreme Court in **D.K.Basu's** case<sup>704</sup>, which is as under: -

Fundamental rights occupy a place of pride, in the Indian constitution. Art. 21 provide "no person shall be deprived of his life or personal liberty except according to procedure established by law. Personal liberty thus is a sacred and cherished right under the constitution. The expression: life or personal liberty has been held to include to right to live with human dignity and thus or would also include within itself a guarantee against torture and assaults by the state or its functionaries"<sup>705</sup>.

In 1980 the Supreme Court had to deal with blending of prisoners in Bhagalpur Jail. Justice P.N. Bhagawati and Justice V.K. Krishna Iyer had become active in the Supreme Court and both of them together and in association with other judges of the court developed a new Human rights jurisprudence confecting prison inmates and others similarly disabled<sup>706</sup>.

The Supreme Court while passing the judgment in the case of **Nathu Banjara**<sup>707</sup> made the following observations: -

Torture in custody flouts the basic rights of citizens recognized by the Indian constitution and is affront to human dignity. Police excesses and the maltreatment of detainees under- trial prisoners or suspects furnish the image of any civilized nation and encourages the men in khaki to consider themselves to be above the law and to sometimes become the law unto themselves. Unless stern measures are taken to check the malady, the foundations of criminal justice delivery system would be taken and the civilization would itself risk the consequences of headings towards perishing. The Courts must therefore deal with such cases in a realistic

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704. AIR 1997 SC 610.

705. D.K.Basu v. State of West Bengal, AIR 1997 SC 610.

706. Gulab Gupta, "Custodial Violence and Human Rights Commissions," C.I.L.Q.1999,291

707. (1995) 4 SCC 262.

manner and with sensitivity which they deserve; otherwise the common man may lose faith in the judiciary itself, which will be a sad day<sup>708</sup>

In **Sunil Batra II v Delhi Administration**<sup>709</sup>, it was held that integrity of physical person and his mental personality is an important right of a prisoner, and must be protected from all kinds of atrocities. In this case the petitioner sought protection from inhuman labour treatment inflicted upon him in jail. The court converted the petition of petitioner into a habeas corpus petition and the court gave following directions to the control and state government and the jail authorities:

1. The petitioner's torture was illegal and he shall not be subjected to any such torture until fair procedure is complied with.
2. No corporal punishment or personal violence or the petitioner shall be inflicted.
3. Lawyer nominated by the D.M. Session judge, High Court and the Supreme Court will be given all facilities to interviews, right to confidential communications with prisoners subject to discipline and security considerations.
4. Grievances deposit boxes shall be maintained in jails, which shall be opened by D.M and session judge frequently prisoners shall have access to such boxes.
5. D.M. and Session Judge shall inspect jail once every week, shall make enquiries into grievance remedial and take suitable action.
6. No solitary or punitive cell, no hard labour or dilatory charge, denial of privileges and amenities no transfer to other prison as punishment shall be imposed without judicial approval of the session judge<sup>710</sup>

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708. Ibid.

709. AIR1980 SC 1579.

710. Sunil Batra( II) v. Delhi Administration, AIR 1980 SC 1579.

Judgement in **Joginder Kumar's** case<sup>711</sup> rewrites the law of arrest and detention in police custody in the newly developed human rights perspective and is pride of our system. **D.K.Basu's**<sup>712</sup> case similarly rewrites the law of torture for the benefit of arrestees and provides the Human rights basis to Art 21 and 22 of the Constitution. Extensions of compensatory jurisprudence to cases of misuse of police powers make this law justice oriented and a landmark in our Human Rights Jurisprudence.

In fact, it is a short coming of our criminal jurisprudence that the victims of crime do not attract due attention. Perhaps, the criminal justice system is arbitrary and operates to the disadvantage of the victim. Krishna Iyer, in the case of **Rattan Singh v. State of Punjab**<sup>713</sup>, observed:

"It is a weakness of our jurisprudence that victim of crime and the desire of dependents of the victim do not attract the attention of law. In fact, victim reparation is still the vanishing point of our Criminal law. This is the deficiency in the system, which must be rectified by the legislature"<sup>714</sup>

Among the many reforms canvassed for improving criminal justice is one that advocates a victim orientation to criminal justice administration victim orientation includes greater respect and consideration towards victims and their rights in the investigative and prosecution process, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation compensation particularly for victims of violent crimes<sup>715</sup>.

Justice requires that a person, who suffered loss, must be compensated by the accused. Primarily, the accused is responsible for the reparation of any

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711. AIR 1994 SC 1349.

712. **D.K.Basu v. State of West Bengal**, AIR 1997 SC 610.

713. (1979)4 SCC 719.

714. (1979)4 SCC 719.

715. N.R.Madhav Menon, "Victim Compensation Law and Criminal Justice: A Plea for a Victim Orientation in Criminal Justice", *Criminal Justice*, Edited by K.I. Vibhute, 1st Edition 2004, Eastern Book Company, Lucknow, P.362.

harm caused to the victim. However, if the accused is unable to make any payment or compensate to the victim due to his poverty, the state should compensate the victim for loss and suffering, being the protection of fundamental right.

**Compensation as Remedy:** In India, there are five possible statutes under which compensation may be awarded to victims of crime. They are 1) Fatal Accident Act, 1855, 2) the motor vehicles Act 1988, and 3) the Criminal Procedure Code, 1973, 4) the constitutional necessities for human rights violations, 5) the Probation of Offenders Act 1958.

In pursuance of the recommendations of law commission of India in its forty first Report, 1969, a comprehensive provision for compensation to the victim of crime has been provided in section 357 of the new Cr. P.C. under sub section (3) of section 357 Cr. P.C. the court is expressed to award compensation for loss or injury suffered by a person, even in cases where fine does not form a part of a sentence. Apart from involving section 357 of the Cr. P.C the victim may approach a higher court under section 482 Cr. P.C. to claim compensation which empowers a higher court to exercise its power in the interest of justice.

However, the Supreme Court has not formed involving of such a power in view of existing statutory provision under section 357 Cr. P.C. In **Palaniappa Gouder v. State of Tamil Nadu**<sup>716</sup> the Court said: -

"If there is an express provision in a statute governing a particular subject matter, there is no scope for involving or exercising the inherent powers of the court because the court ought to apply the provisions of the statute. Hence the application made by the heirs of the discussed for compensation could not have been made under section 482 since section 357 expressly

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716. AIR1977 SC 1323.

confers powers on the court to pass an order for payment of compensation"<sup>717</sup>.

The guarantee against unjustified deprivation of life and liberty<sup>718</sup> obligates the state to compensate victims of criminal violence. In fact Supreme Court has in several cases directed compensatory payment for unlawful detention, custodial homicide and custodial torture<sup>719</sup>. In the case of **Delhi Domestic working woman's forum v. Union of India**<sup>720</sup> Supreme Court considering the plight of many rape victims in the country, wasted the national commission for women to drawing a scheme for compensatory payment to victims of sexual violence.

Relying on the judgment of **Delhi Domestic Working Women's Forum** case<sup>721</sup>, the Division Bench of Supreme Court in **Bodhi Sattwa Goutam** case<sup>722</sup>, awarded compensation of Rs. 1000/- every woman to the respondent as interim compensation during the pendency of the criminal case and also directed the petitioner to pay arrears of compensation at the same rate from the date on which the complaint was filed till date.

The Supreme Court further observed: -

"If the court trying an offence of Rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation. The jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the courts trying the offence of rape of which is an offence against the basic human rights and also the fundamental right of personal life and liberty..... unfortunately, a woman in our country, belongs to a class or group of society who are in a disadvantaged position on account of several

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717. Palaniappa Gouder v. State of Tamil Nadu, AIR 1977 SC 1323.

718. Art.21 of The Indian Constitution.

719. Rudal Sah v. State of Bihar(1983)4 SCC 141.

720. Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14.

721. (1995) 1 SCC 14.

722. Bodhi Sattwa Goutam v. Subhra Chakroborty (1996) I SCC 490.

social barriers and impediments and have therefore, been the victim of tyranny at the hands of men with whom they, fortunately under constitution enjoy equal rights<sup>723</sup>

However, with due respect it is submitted that there appears to be inconsistency in the judgment of the Apex Court or similar fact situations in different cases. This is evident from the decision of the Court in the UttaraKhand Jan Morchan and the **Chandrima Das**<sup>724</sup> cases. In former the Court turned down the grant of compensation to the rape victims, where in the latter in both cases women sexually assaulted by the state functionaries. Such diametrically opposite view on secular facts is not only uncalled for but also sends a wrong signal.<sup>725</sup>

In a recent case of **Chairman, Railway Board v. Chandrima Das**<sup>726</sup>, the apex Court observed Rs.10 Lakh compensation from a foreign tourist from Bangladesh who was raped by the railway employee in the Yatri Niwas of Calcutta on Feb 26, 1998, endorsing the Calcutta High Court's view, the Court held that the foreign national is also entitled to the fundamental right to life in India. The Court said: -

"As a national of another country, Smt Hanuffa Khatoon could not be subjected to physical violence at the hands of the govt. employees who outraged her modesty. The right available to her under article 21 was thus violated consequently; the state was under a constitutional liberty to pay compensation to her"<sup>727</sup>.

The Supreme Court has also displayed similar concern to the victims of police atrocities. In **Saheli's case**<sup>728</sup>, the Apex Court held that the Delhi

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723. *Bodhi Sattwa Goutam v. Subhra Chakroborty*, (1996)1 SCC 490.

724. *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465.

725. K.D. Gour, "Justice Victim of Crime:A Human Rights Approach", *Criminal Justice*, Edited by K.I.Vibhute, [1<sup>st</sup> Edition 2004], Eastern Book Company, Lucknow, P. 351.

726. (2000) 2 SCC 465.

727. *Chairman, Railway Board v. Chandrima Das*,(2000)1SCC465.

728. *Saheli, a Woman's Resource Centre v. Commissioner of Police*, (1990) 1 SCC 420.

administration responsible and asked to pay Rs.25000 as compensation to Smt. Hanlesh Kumari for the death of her 9yrs old son, Naresh, which resulted from assault by the police. The state as an employer was held vicariously liable for the wrongful acts of its employees done in the course of employment. The court further held that the Delhi administration might take appropriate steps for recovery of the amount paid as compensation or part thereof from the arising officer. Similarly in **Nilabati Behra v. State of Orissa**<sup>729</sup>, the Supreme Court held that the state is liable to pay compensation to the victim on his heir by way of monetary compensation and redressal for custodial death.

The Literature on prison justice and prison reform shows that there are nine major problems which afflict the system and which need immediate attention. In case of **Rama Murthy v. State of Karnataka**<sup>730</sup> Supreme Court set out these problems such as (1) Overcrowding (2) delay in trial; (3) torture and ill-treatment; (4) neglect of health and hygiene; (5) insubstantial food and inadequate clothing; (6) prison vices; (7) deficiency in communication; (8) streamlining of jail visits and ; (9) management of open air- prisons. The prisoner's rights on prison justice are discussed in various cases commencing from the case of **Charles Sobraj v. Superintendent Central Jail Tihar**<sup>731</sup> and **Sunil Batra v. Delhi Administration**<sup>732</sup>. In these cases Supreme Court has laid down the Constitutional dimension and right available to a person behind stone walls and Iron bars. In **State of Maharashtra v. Prabhkar**<sup>733</sup> for the first time Prisoner's right of reading and writing books in jail is recognized as the right springs from article 21 of the constitution. In **Suresh Chandra v.**

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729. (1993) 2 SCC 746.

730. AIR1997 SC 1739.

731. AIR1978 SC 1514 .

732. AIR1978SC 1675.

733. AIR1966 SC 424.

**State of Gujarat**<sup>734</sup> and **Krishan Lal v. State of Bihar**<sup>735</sup> penological innovation in the shape of parole to check recidivism because of which liberal use of the same was recommended. In **Bhuvan Mohan Patnaik v. State of Andhra Pradesh**<sup>736</sup>, resort to oppressive measures to curb political belief was subjected to inhuman treatment and it was held that, that could not be permitted. However, a prisoner will not complain of installation high-volt live, wire, and mechanism on jail walls to prevent escape from prisons because no prisoner has fundamental right to escape from lawful custody.

In **Veena Shethi**<sup>737</sup>, **Sant Bir**<sup>738</sup> and **Sheela Barse's** cases<sup>739</sup>. It was ruled that jailing of non – criminal, mentally ill persons is unconstitutional and confinement of such person should be stopped. In **Mohamad Glasuddin v. State of Andhra Pradesh**<sup>740</sup>, reformatory aspect was emphasized by stating that the State has to take responsibility to rehabilitate the prisoner. Further more, Krishan Iyer pointed out that "sub-culture that leads to anti social behaviour has to be countered not by undue cruelty but by re-collateralization ". In a series of cases it was held that under trial prisoners have right of speedy trial and Supreme Court directed for release of those under trial prisoners who were languishing in jail for a period exceeding half of the punishment provided in the particular Act. These directions were followed in the case of **SC Legal Aid Committee v. Union of India**<sup>741</sup> and **Common Cause v Union of India**<sup>742</sup>.

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734. AIR1976 SC 2462.

735. AIR1976 SC 1139.

736. AIR1974 SC 2092.

737. *Veena Shethi v. State of Bihar*, (1982) 2 SCC 583.

738. *Sant Bir v. State of Bihar*, AIR1982 SC 1470.

739. AIR1983SC339.

740. AIR1977 SC 1926.

741. (1994) 6 SCC 731.

742. *Common Cause, a Registered Society, v. Union of India*, (1996) 6 SCC 530.

The journey which commenced during the last more than 30 years planted many mile stones. The Supreme Court so far as fundamental rights are concerned has to take note of agony and to lay down what is required to be done to make prisons match the expectation of society.

In **Rama Murthy's**<sup>743</sup> case it was observed that "Constitutional rights of the prisoners shall have to be interpreted in such way that larger public interest does not suffer while trying to be soft and considerate towards the prisoners". For this, "it has to be seen more injury than is necessary is not caused to a prisoner". "At the same time efforts have to be made to reform him so that when he comes out of prison he is a better citizen and not a hardened criminal." The Supreme Court laid down the dos and donts, relying on 1994-95 Annual report of National Human Rights commission. The Commission has disclosed that "the situation in prisons visited was varied and complex ....overcrowded....The diet was inferior, and; the management was denounced by the inmates as brutal and corrupt.....Though care is taken to separate juveniles from others, petty offenders from hardened criminals major efforts required to reform conditions, to generate employment in a worthwhile and remunerative way, to encourage education and restore dignity.....callousness prevailed, prisoner were seen in shackles, mentally disturbed inmates-regardless of whether they were criminal or otherwise were incarcerated with others, with no real effort to rise above the very minimum required for the meanest survival.....Prisoners worked but their remuneration often was pittance, offering scant hope of savings being generated for future rehabilitation in society. By and large, the positive experiences were the exceptions rather than rules, dependant more upon the energy and commitment of individual officials rather than upon the capacity of the system to function appropriately on its own".

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743. (1997) 2 SCC 642.

The major suggestions made by Supreme Court in **Rama Murthy's** case<sup>744</sup> are these:-

- Jails overcrowded is a known fact. Overcrowding contributes to a greater disease, higher noise levels, difficulties which increase danger level. Life is more difficult for inmates and worth more onerous for staff when prisoners are in over capacity. Even if overcrowding be not constitutionally impermissible there is no doubt that the same does affect the health of prisoners; the same also adversely affects hygienic condition. It is therefore to be taken care of .On the question of torture and attachment the Supreme Court suggested:-

- Liberalization of condition of release on bail;
- Imposing of unjust or harsh condition, while granting bail, is however, violative of article 21;
- Overcrowding may also be taken care of by taking recourse to alternative to incarceration, fine, civil commitment; probation;
- Overcrowding can be reduced by release on parole- liberal use of parole streamline remission, leave and premature release which help in reformation and rehabilitation;
- Avoid Segregation among convicts;
- Delay in trial finds an under trial prisoner in jail for a longer period. Therefore, principle to make the prisoner free on bail is implemented;
- Light and sound programme be organized in Jail;
- Apart from torture, other physical ill-treatment like putting fetters, iron bars are generally taken recourse to. Some of these are under the colour pernicious in Jail Manual. The permissible limits of case methods as has been indicated in earlier decision of the Supreme Court will have to be observed;

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744. Ram Murty v. State of Karnataka, AIR 1997 SC 1739.

- Prison discipline mentioned in various Jail Manuals needs to be incorporated in new all India Jail manual to serve as a model for the Country.
- Use of excessive physical force against a prisoner may constitute cruel and unusual punishment even when the inmate does not suffer serious injury. Of course, if for violative prison discipline some punishment required to be given.
- The Mulla Committee report has dealt with neglect of health and hygiene in chapter 6- 7 of its report;
- The deplorable condition of most of the Jails insofar as hygienic condition is concerned;
- Most of them lack proper facilities for treatment of Prisoners;
- Society has an obligation towards prisoners health because:
- The prisoners do not enjoy the access to medical expertise that free citizens have;
- Their incarceration places limitation on such access; no physician of choice, no second opinions and few of any specialists;
- The conditions of their incarceration, inmates are exposed to more health hazards than free citizens;
- The prisoners therefore suffer from a double handicap.

On complaints about food and clothing etc; from the prisoners, the Supreme

Court suggests:

- The system of complaint box be introduced in Jails;
- The complaint received is fairly inquired & appropriate actions against the delinquents be taken;
- Prisoner must receive full assurance that whoever would lodge a complaint would not suffer any evil consequence for lodging the same;

- Many of the vices are related to sexual urge, which remains unsatisfied because of snapping of marital life;
- Prisoner's denial of conjugal life creates emotional problems.
- If something could be done to keep the thread of family life unbroken some vices may take care of themselves, as sexual frustration may become tolerable.
- Communication with outside world gets snapped with a result that the inmate does not know what is happening even to his near and dear ones. This causes another trauma.
- A liberalized view relating to communication with kith and kin is especially desirable.

In **Kehar Singh v. Union of India**<sup>745</sup> Chief Justice Pathak, speaking for the Constitution Bench of the Supreme Court while dealing with the mercy power of the President under Article 72, of the Constitution of India made the following observations:

"To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order and consequently, the legislature, the executive and the judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilized societies regarded seriously and recourse either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal

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745. *Kehar Singh v. Union of India*, AIR 1989 SC 653.

liberty, the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the threatened denial of life or the threatened or continued denial of personal liberty”

In this regard the court also pointed out in the case of **Anil Kumar v State of M.P.**<sup>746</sup> that the state govt. are to be taken initiative to tackle the problem of prisoners from serious disease like T.B. or AIDS etc. Further, the court observed the adequate steps should be taken by the govt. to prevent the diseases in prison.

It is pertinent to note here that the existing prison Act, 1894 is more than a century old, needs to be thoroughly revised and even restated in view of the changed Socio economic and political conditions of India over the years. Many provisions of this Act have now become obsolete.

**Violence against Women:** Violence against women is the greatest humane scandal of our times. From the birth to death, in times of peace, as well as, war, women face violence at the hands of the state, the community and the family. Female infanticide deprives countless women of life itself<sup>747</sup>. Women the source of love and companion, have always been exploited by a patriarchal Society. Even after more than 50 years of the independence, women of India wear a pathetic look. They face an atmosphere of debilitating violence – rape, sexual molestation, bride – burning and unrelenting physical and psychological battering both within and outside the family<sup>748</sup>.

Women issues have increasingly been brought before the Supreme Court with the growth of Women’s movement and investigative journalism exposing harassment for dowry, rape, sexual harassment and discrimination. It is widely perceived investigation into crimes against

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746. 2000 (1) C.Cr. J 118 (MP)

747. Dr Ratnabharan Golder, Violence against woman as Human Rights violence in the international committee-IBR, Vol.xxxiii, 2006, P. 53

748. Palok Basu, Law Relating to Protection of Human Rights, [1<sup>st</sup> Edition 2002], Modern Law Publications, New Delhi, P.1295.

women have been unsatisfactory and in some cases even judges have shown gender bias. The cruel and inhuman treatment to women prisoners conferred in the police lockups is not a new concept, neither uncommon.

The **Chameli Singh v. State of U.P.**<sup>749</sup> The Apex court held that the right to life<sup>750</sup> has a human being is not ensured by meeting only the animal needs of a man, right to live guaranteed in any civilized society includes the right to food, water, decent environment, education, medical care and shelter. Right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings sufficient life, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily evocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all infrastructure necessary to enable then to live and develop as a human being.

The Supreme Court did not hesitate to assume direct legislative function in the case of **Vishaka v. State of Rajasthan**<sup>751</sup>. In this case the Supreme Court virtually a piece of legislation on the ground there is a vacuum in the legislation field of sexual harassment of working woman. The S.C further laid down some guide lines and norms which are directed to be treated as law. It was also submitted that these guidelines cannot be treated as laying down a precedent under Art 141. But this should be treated as unauthorized ad-hoc legislation by the judiciary. Interpreting certain provision of the existing law and laying down certain principles in the form of the precedent is what is envisaged under art 141 and not ad-hoc legislation by judiciary when there is a vacuum in the field. **Vishaka's** an example of judicial trespass in legislative domain.

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749. AIR1996 SC 1050.

750. Art.21 of the Indian Constitution.

751. (1997)6 SCC 241.

The custodial violence to women prisoners in police lockup was complained of before the court in **Sheela Barse**<sup>752</sup>, where prisoners in police were assaulted in Bombay Central Jail. The court held that it is violated art. 21. The Supreme Court laid down detailed guide lines in this regard which include<sup>753</sup>

'Female suspect should not be kept in police lockup in which male suspects are detained. Female suspects must be kept in separate police lockup guarded by female constables:

Interrogation of female suspects should be carried out only in the presence of female police officer/constables.

When ever a person is arrested and taken to the police lockup, the police will immediately give information of the fact of such arrest to the nearest legal aid committee which will provide legal assistance to the arrested person at the cost of state, provided he is willing to accept such help.

The District and Sessions judge will make surprise visit to police lockups in the city periodically with a view to providing the arrested person give an opportunity to air their grievances and ascertaining what are the conditions in police lock ups and take up the matter with the Commissioner of police or Home department of Chief justice of the High Court.

Whenever a person is arrested the police must obtain from him the name of friend or relatives of the person whom he would like to be informed about the arrest.

The Magistrate before whom arrested person is produced shall enquire from the arrested person whether he has any complained of torture or maltreatment in police custody and inform him of his right to be examined medically under section 54 of criminal procedure code'.

To implement the above directions effective, it is suggested that the draconian prison rules must be replaced by humane condition regulations.

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752. Sheela Barse v. State of Maharashtra, AIR 1983 SC 378.

753. AIR1983 SC 378.

For this purpose the prison and police officials should be trained in this respect.

Moreover, Art. 21 of Indian Constitution prescribed the conditions to ensure dignity to the inmates of 'care homes' and protective homes' for women and childrens<sup>9</sup>. The constitution of India shows a particular regard for women and children and it contemplates special provision being made for them. It can be expected only at the time when an enlightened constitutional system takes charge of the political and socioeconomic governance of a society, which has for centuries witnessed the regulation of women to a place below their due. In the case of **Vikram Deo Singh Tomar**, Pathak, C.J., aptly observed:

"The right to live with human dignity is the fundamental right of every Indian Citizen And so, in the discharge of its responsibilities to the people the state recognizes, both women and children, who are the castaways of an imperfect social order and for whom, therefore of necessity provision must be made for their protection and welfare<sup>754</sup>.

Public interest litigation<sup>755</sup> was filed by the Delhi Domestic Working Women's Forum to espouse plight of our domestic servants who were subjected to indecent sexual assault by seven army personnel. In this case the Supreme Court gave the following directions to the government for assistance to the victims of rape:

1. The complaints of sexual assault cases should be provided legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would be not only to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but also to provide her guidance as to how she might obtain help of a different nature from other agencies, for

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754. *Vikram Deo Singh Tomer v. State of Bihar*, AIR1988 SC 1782.

755. *Delhi Domestic Working Women's Forum v. Union of India*,(1995)1 SCC 14.

example mind counseling for medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complaint's interest in the police station represents her till the end of the case.

2. Legal assistance will have to provide at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station. The guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

3. The police should be under a duty to inform the victim of her right to get free legal assistance before any question were asked of her and the police report should state that the victim was so informed.

4. A list of Advocates willing to act in these cases should be kept at the police station for the victims, who didn't have a particular lawyer in mind or whose own lawyer was unavailable.

5. The advocate should be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the court was sought or obtained.

The above scheme also requires immediate implementation by the government.

### **Death penalty**

Death penalty is the infliction of highest and extreme penalty. Death penalty is supreme punishment because it affects the very existence of human life. Death and exile were two principal devices to eliminate dangerous elements from the society. Death was the quickest mode of retribution as well as deterrence. In the form of legalized and justifiable homicide, the capital punishment seems to have originated with the

concept of an orderly society only to deal with such extreme cases of disorderly deprivation of antisocial element as may be prescribed by it from time to time in accordance with social needs and exigencies.<sup>756</sup> But in 19<sup>th</sup> century, the debate over the death penalty has acquired new dimension. The government has been insisting on the increased used of death penalty for particularly rape crimes instead of murder crimes. The judiciary too has been awarding the death penalty for violent crimes with increased regularity.<sup>757</sup>

Even in 21<sup>st</sup> century, many countries in the world award death penalty to the convicts and execute it in various forms according to their law of the land. Indian government is contemplating to legislate and a few others crimes as capital crimes. The capital punishment is as affront to human dignity and human rights, yet others regard as marching forward to an orderly society. The discussion for and against the death penalty continues to the polemical, and so its solution runs up against a thousand obstacles.<sup>758</sup>

In India, criminal Procedure Code required a court sentencing a person convicted of an offence punishable other than death to state the reason why it was not awarding death sentence. In 1955, the amendment either in Criminal Procedure Code, or in the Indian Penal Code, 1860 as to which cases called for life imprisonment and which the alternative death penalty<sup>759</sup>.

The unsatisfactory state of the criminal law, the use of torture, the wide spread use of capital punishment, and other brutal and degrading penalties received the critical attention of writers of the Enlightenment. The movement to restrict or abolish the death penalty, launched in eighteenth

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756. Anup Kr. Varshney, "Death Penalty,Its Emergence and Practice", June, L N V (1998)25.

757. S.Murlidhar, "Hang them now, Hang them not", 40 J I L I (1998)143.

758. Fr. Jeyaseelan S, "Hang the Death Penalty",Jan, L N V (2000) 18.

759. Section 367 (5) of Cr. P.C.1898.

century enlightenment, exerted important influence throughout the civilized world, and that influence persist to the present day. This century has given birth to numerous documents extolling human rights, including the rights of prisoners and convicts. Particularly in 1931, the question of abolition of death sentence was raised, but this motion was rejected.

After 1931, on several times the issue was raised, but due to various reasons such as political, social, these attempts were rejected. In 1962, a resolution was made in the parliament to abolish capital punishment in India. The government of India referred the question to the law commission of India, which submitted the report the law commission did not approved of capital punishment. It however, recommended certain changes in penal provision<sup>760</sup>

In **Jag Mohan Singh v. State of U.P.**<sup>761</sup>, the Supreme Court held that the sentencing discretion is to be exercised judicially on "well recognized principles" after balancing all the aggravating and mitigating circumstances of the crime. By well recognized principles, the court meant the principles crystallized by judicial decisions, illustrating as to what were regarded as aggravating and mitigating circumstances in those cases. The application of these well recognized principles are now guided by the legislative policy embodied in sections 235(2) and 354(3) of the code of Criminal Procedure, 1973. Section 235(2)<sup>762</sup> speaks for the right of sentences hearing to be given to the offender and section 354(3)<sup>763</sup> speaks for the special reasons

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760. Fr.Jeyaseelan S.J. "Hang the Death Penalty",Jan, L N V (2000)18.

761. Jag Mohan Singh v. State of U.P., AIR 1973 SC 547.

762. "If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

763. "When the conviction is for an offence punishable with death or in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and in the case of sentence of death, the special reasons for such sentence."

to the stated for awarding death penalty and lays down life imprisonment as a rule and death sentence as an exception in murder cases.

Today, non deprivation of life is the core of the rights of person, recognized by almost every nation of the world in their respective Constitution. The universal Declaration of Human Rights 1948, guaranteed that everyone has right to life and liberty and security of person<sup>764</sup>. And also guaranteed that all men are equal before the law and are entitled without any discrimination to equal protection of the law.<sup>765</sup> India, despite being party to the international Covenant on Civil and political rights that requires a progressive abolition of death penalty, continues to have the punishment of death penalty. The U.N. Declaration 1977 has given a call to declare death penalty illegal. The Amnesty International regards death penalty to be cruel, inhuman and degrading punishment.

The constitution ensures that "no person shall be deprived of his life or personal liberty, except according to procedure established by law."<sup>766</sup> The Supreme Court of India has ruled that the capital punishment is not forbidden by law, and therefore it is permissible in arrest of rare cases and death penalty per se is not constitutionally violative. The Supreme Court also suggested that to impose death penalty, the procedure of law has to be followed.

The principles of law enunciated by the Supreme Court for awarding death sentence in the case of **Bachan Singh v. State of Punjab**<sup>767</sup> are reiterated by the Supreme Court as follows:

The extreme penalty of death need not be inflicted in gravest case of extreme capability.

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764. "Everyone has the right to life, liberty, security or person."

765. "All are equal before the law and are entitled without any discrimination to equal protection of the Law. All are entitled to equal protection against any such discrimination."

766. Art 21 of the Constitution of India.

767. AIR 1980 SC 898.

Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime.

Life imprisonment is the rule and the death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, the option to impose sentence of imprisonment for life can not be considerably increased having regard to the nature and circumstances of the crime and all relevant circumstances..

A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be maintained between the aggravating and mitigating circumstances before the option is exercised.

The majority of the four judges in **Bachan Singh**<sup>768</sup> negated the challenge to the constitutionality of the death penalty, affirmed the decision in **Jagmohan**<sup>769</sup> and overruled the case of **Rajendra Prasad**<sup>770</sup> in so far as it sought to restrict the imposition of death penalty only to cases where the security of the state and society, public order and the interest of the general public were threatened. The perceived majority view supporting retention meant that death penalty as an alternative punishment was neither unreasonable nor lacking in public interest.

The court rejected the second limb of the challenge of the validity of section 354 (3) of Criminal Procedure Code, 1973, on the ground that it permitted imposition of death penalty in an arbitrary and whimsical manner. It explained that the requirements under section 235 (2) for a pre sentence hearing of the accused coupled with the requirement that the

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768. "Bachan Singh v. State of Punjab, AIR 1980 SC 898.

769. Jag Mohan Singh v. State of U.P., AIR 1973 SC 547.

770. Rajendra Prasad v. State of U.P, AIR 1979 SC 916.

sentence of death had to be confirmed by High Court under section 366 (2) of Criminal Procedure code meant that errors in the exercise of judicial discretion could be corrected by the superior courts. Although the court was not inclined to lay down standards or norms for guiding the exercise of judicial discretion, it accepted the suggestions of the amicus curiae.

Once the death penalty was challenged in **Mithu v. State of Punjab**<sup>771</sup>, this time section 303 of Indian Penal Code was the subject of challenge. This Section prescribes that if a person under sentence of life imprisonment commits murder, he must be punished with death. This section was declared unconstitutional under Article 21 because the procedure by which section 303 of Indian Penal Code authorized the deprivation of life was fair and unjust. This was an instance where judiciary unanimously supported justice Krishna Iyer in **Maneka Gandhi**<sup>772</sup> case observed that law could be tested under Article 21 also. In this case, Chandrachud C.J. emphasized that the last word on the question of justness and fairness did not rest with legislature. It was for the court to decide that the deprivation was fair, just and reasonable.

In **Machhi Singh v. State of Punjab**<sup>773</sup>, the court emanating from **Bachan Singh's** case and spelt out the task for the sentencing judge. It said:

"A balance sheet of aggravating and mitigating circumstances has to be drawn up and doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."<sup>774</sup> The court then explained how the guidelines would apply. The questions that the sentencing court had to ask were:

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771. AIR 1973 SC 473.

772. *Maneka Gandhi v. Union of India*, AIR1978 SC 597.

773. (1983) 3 SCC 470.

774. *Machhi Singh v. State of Punjab*, (1983)3 SCC 470.

Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence?

Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weight age to the mitigating circumstances, which speaks in favour of the offender?

Thus, both in **Jagmohan**<sup>775</sup> and in **Bachan Singh**<sup>776</sup>, the court bowed to legislative wisdom and shrank away from striking down the death penalty. But the similarity in the two decisions ended there. The change brought about by **Bachan Singh**<sup>777</sup>, as explained by **Machhi Singh**<sup>778</sup>, was significant. There was an affirmation that death penalty was exception and not the rule. The formulation of the rarest of rare test, credited craftily by the court, still shy of being accused of legislating, to the amicus curiae who assisted it, has actually crystallized into applicable law. **Bachan Singh**<sup>779</sup> also witnesses the judicial acknowledgement of reformation and rehabilitation of the delinquent as one goal of punishment.<sup>780</sup>

The role of judiciary in the protection of Human Rights is certainly commendable. However in the quest for socio-economic the judiciary seems to overlap the limits of its judicial function and trespass into the assigned to the executive and the legislature. The need of the hour is to properly balance the judicial activism with judicial restraint.

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775. Jagmohan Singh v. State of U.P. AIR 1973 SC 947.

776. Bachan Singh v. State of Punjab AIR 1980 SC 898.

777. Bachan Singh v. State of Punjab AIR 1980 SC 898.

778. Machhi Singh v. State of Punjab, (1983)3 SCC 470.

779. AIR 1980 SC 898.

780. Ibid.