CHAPTER - IV **RIGHTS OF THE PRISONERS AND DUTIES OF PRISON OFFICIALS**

CHAPTER - 4 RIGHTS OF THE PRISONERS AND DUTIES OF PRISON OFFICIALS

It is very unfortunate that a civilised country just like India has not codified rights of the prisoners. However, it cannot be denied that Hon'ble judiciary has not forgotten them and recognised a long list of rights of prisoners and all authorities have to follow these directions in the absence of legislation. But, practically, in absence of legislation these rights find place only on the paper with, hardly any prison's authority following them. There are some important differences between precedent and legislation. Legislative law is clear and available to everyone, but precedent law lies with various publications at different places and there is no clarity and availability of it in one uniform book. The precedent is more powerful law than legislation and binding on all the courts in India. It is felt that, all rights of the prisoners should be codified for the awareness in the State. Moreover, prisoners are not aware of these rights, or not aware of procedure thereof. *V.R. Krishna Iyer* (J) has rightly observed:

"In our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters".

The concept of prison discipline has undergone a drastic change in the modern administration of criminal justice system. The trend shows a shift from the deterrent aspect to reformative and rehabilitative one. The recommendations of the Jails Committee of 1919-20 paved the way for the abolition of inhuman punishments for indiscipline. This resulted in the enforcement of the discipline in a positive manner. All India Jail Reform Committee 1980-83 has also recommended various rights of prisoners and prison discipline. Thus, a gradual trend developed in the form of enforcement of discipline motivated and encouraged by inducements like remission of punishment due to good conduct, payment of wages for labour rendered, creation of facilities like canteen and granting the privilege of writing letters and allowing interviews with friends and relatives. It must be noted that most of these "benefits" are now recognised by judiciary as part of the basic rights of the prisoners.

4.1 Rights of prisoners:

It is established that conviction for a crime does not reduce the person into a non-person, so he is entitled to all the rights, which are generally available to the non-prisoner. On the other hand, it cannot be denied that he is not entitled for any absolute right, which is available to a non-prisoner citizen but subject to some legal restrictions. The Supreme Court of United States as well as the Indian Supreme Court held that prisoner is a human being, a natural person and also a legal person. Being a prisoner he does not cease to be a human being, natural person or legal person. Conviction for a crime does not reduce the person into a non person, whose rights are subject to the whim of the prison administration and therefore, the imposition of any major punishment within the prison system is conditional upon the absence

of procedural safeguards.¹ The courts which send offenders into prison, have an onerous duty to ensure that during detention, *detenues* have freedom from torture and follow the words of *William Black* that "*Prisons are built with stones of Law*". So, when human rights are harassed behind the bars, constitutional justice comes forward to uphold the law.

4.1.1 Right to Fundamental Rights:

The Hon'ble Supreme Court held that imprisonment does not spell farewell to fundamental rights although by a realistic re-appraisal, courts will refuse to recognize the full panoply of Part–III enjoyed by the free citizens. Article 21 read with Article 19 (1) (d) and (5), is capable of wider application than the imperial mischief which gave it birth and must draw its meaning from the evolving standards of decency and dignity that mark the progress of the matured society. Fair procedure is the soul of Article 21. Reasonableness of the restriction is the essence of Article 19 (5) and sweeping discretion degenerating into arbitrary discrimination is anathema for Article 14. Constitutional *karuna* is thus injected into incarceratory strategy to produce prison justice.² Earlier, the Supreme Court held that conditions of detention cannot be extended to deprivation of fundamental rights.³ Prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by

Charles Wolff v. McDonnell, (1974) 41 Law Ed 2nd 935, DBM Patnaik v State of Andhra Pradesh, AIR 1974 SC 2092, Sunil Batra v. Delhi Administration, AIR 1978 SC 1675, and Sunil Batra v. Delhi Administration, AIR 1980 Cr.LJ 1099

² Charles Sobaraj v. Supdt Central Jail Tihar, AIR 1978 SC 1514

State of Maharashtra v Prabhakar Pandurang Sanzgir, AIR 1966 SC 424

prisoners, under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging a situation arises.⁴

Mr. Justice Dougals reiterated his thesis when he asserted: "Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him only the more substantial. Conviction of a crime does not render one a non-person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards." Mr. Justice Marshall also expressed himself clearly and explicitly in the same terms: "I have previously stated my views that a prisoner does not shed his basic constitutional rights at the prison gate and I fully support the court's holding that the interest of inmate."

4.1.2 Right to life and personal liberty:

The Hon'ble Supreme Court has adopted annotation of Article 21 and expanded connotation of "life" given by *Field J*. that "life means more 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 by the amputation of an arm or leg, or the putting out of an eye or the destruction, of any other organ of the body through which the soul communicates with the other world." Right to live is not restricted to mere animal existence. It means something more than just physical survival.

Charles Sobaraj v. Supdt Central Jail Tihar, AIR 1978 SC 1514

The views were observed by Justice Bhagwati in Francis Coralie Mullin v. The Administrator, UT Delhi, AIR 1981 SC 746

⁶ Kharak Singh v. State of UP, AIR 1963 SC 1295

4.1.2.1 Right to live with human dignity:

In new dimension of Article 21, the Hon'ble Supreme Court held that "right to live" does not mean mere confinement to physical existence but it includes within its ambit the right to live with human dignity. While expending this concept, the Hon'ble Supreme Court held that the word 'life' includes that it goes along with; namely the bare necessaries of the life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. After some time, the Supreme Court extended the concept of 'life' and held that 'life' is not limited up to death but, when a person is executed with death penalty and doctor gave death certificate and dead body was not lowered for half an hour after the certificate of death, is violating of right to life under Article 21.9

The Supreme Court held that right to life is one of the basic human rights, guaranteed to every person by Article 21 and not even the State has authority to violate it. A prisoner does not cease to be a human being even when lodged in jail; he continues to enjoy all his fundamental rights including the right to life. ¹⁰ It is no more open to debate that convicts are not wholly denude of their fundamental rights. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his

Maneka Gandhi v. Umon of India, AIR 1978 SC 597, and followed in Francis Coralie v. Delhi Administration, AIR 1981 SC 746

Francis Coralie v Delhi Administration, AIR 1981 SC 746

Pandit Parmanand v Union of India, (1995) 3 SCC 248

¹⁰ State of Andhra Pradesh v. Challa Ramkrishna Reddy, AIR 2000 SC 2083

confinement. His interest in the limited liberty left to him is the more substantial.¹¹

4.1.2.2 Right to health and medical treatment :

The Hon'ble Supreme Court in series of cases held "right to health care" as an essential ingredient under Article 21 of the Constitution. Article 21 casts an obligation on the State to preserve life. A doctor at the Government hospital positioned to meet this state obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protection of life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, law of procedure whether in statutes or otherwise which should interfere therefore with the discharge his obligation cannot be sustained and must therefore give way. 12 Denial of the Government's hospital to an injured person on the grounds of non availability of bed amounts to violation of 'right to life' under Article 21. Article 21 imposes an obligation on the State to provide medical assistance to injured person. Preservation of human life is of paramount importance.¹³

The right to medical treatment is the basic human right. The Gujarat High Court directed the jail authorities to take proper care of ailing convicts.

DBM Patnaik v State of Andhra Pradesh, AIR 1974 SC 2092, and Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

Parmannd Katara v. Union of India, AIR 1989 SC 2039: (1989) 4 SCC 286; also see Consumer Education and Research Center v. Union of India, (1995) 3 SCC 42; Kishore Brothers Ltd v. Employee's State Insurance corporation, (1996) 2 SCC 682

Paschim Bengal Khet Mazdoor Samiti v. State of West Bengal, AIR 1996 SC 2426: (1996) 4 SCC 37

The petitioners convicted in the Central Prison, Vadodara suffering from serious ailments were deprived of proper and immediate medical treatment for want of jail escorts required to carry them to hospital. The Gujarat High Court expressed shock and called I.G. Prison and Addl. Chief Secretary and they both acted with promptness and issued with necessary directions in this regard and held that negligent Officers were to be held personally liable. In 2005, same High Court issued directions to State Government, that all Central and District jails should be equipped with ICCU, pathology lab, expert doctors, sufficient staff including nurses and latest instruments for medical treatment in a *suo moto* writ. Delhi High Court held that where the Unit has obtained an interim order directing the Union of India to continue providing anti-retroviral treatment to the petitioner who was provided the same in Tihar jail and has since been released on bail.

4.1.3 Right to speedy trial:

The Supreme Court held that right to speedy trial is a part of the fundamental right envisaged under Article 21 of the Constitution. Delay in disposal of cases is denial of justice, so the court is expected to adopt necessary steps for expeditious trial and quick disposal of cases.¹⁷ The Hon'ble Supreme Court has laid down detailed guidelines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The court held that the right to speedy trial flowing from Article 21, is available to accused at all the stages, namely, the stage of investigation,

Rasıkbhaı Ramsıng Rana v. State of Gujarat, (DB) 1997 Cr LR (Guj) 442

Gujarat Smachar, Ahmedabad Ed. dated 20th May, 2005

LX v. Union of India, 2004 (Delhi HC)

¹⁷ Kadra Pahadiya v State of Bihar, AIR 1983 SC 1167

inquiry, trial, appeal, revision and re-trial. The court further said that the accused cannot be denied the right of speedy trial merely on the ground that he had failed to demand a speedy trial. The time limit has to be decided by balancing the attendant circumstances and relevant factors, including the nature of offence, number of accused and witness, the workload of the court, etc. The court comes to conclusion in the interest of natural justice that when the right to speedy trial of an accused has been infringed the charges of the conviction shall be quashed.¹⁸

In case of Rajdev Sharma, the accused was not found responsible for the delay in disposal of the criminal case and proceeding having endlessly delayed. After 13 years not a single witness had been examined after framing the charges. In such circumstances attitude of the investigating agency was absolutely callous. The court held that prolonged trial because of the fault of prosecution is a sufficient ground to set aside the trial.¹⁹

Justice *Hasan* through Patna High Court in a minority judgement, expressed the opinion that a day may come sooner or later when the period of less than ten years also will be treated as unjustified delay and it will be brought down to two years and it will be only then that the interest of justice will be served. He also hoped that courts everywhere and at all levels will be conscious of the right of the indicted person to get speedy disposal of his indictment and consequently the hardship that delay beyond the control of the accused causes.²⁰

²⁰ AIR 1986 Patna 38

¹⁸ AR Antulay v. RS Nayak, AIR 1984 SC 1630, again some directions were passed by SC in the case of Common Cause Society v. Union of India, AIR 1996 SC 1619.

¹⁹ Raj Deo Sharma v State of Bihar, AIR 1998 SC 3281

4.1.3.1 Over 21000 undertrial prisoners released from Jails :

It was noticed by Joint Selection Committee that in many cases the accused persons were kept in prisons for a very long period as undertrial prisoners and in some cases the period spent in jail by undertrial prisoners far exceeded the sentence of imprisonment ultimately awarded. So, large numbers of prisoners, in the overcrowded jails of the country, were undertrial prisoners. In the landmark and eye-opener judgement the Hon'ble Supreme Court has held that if the Government fails to conduct a trial within reasonable time, it violates the guarantee of the life and personal liberty enshrined in Article 21. A PIL was filed in the form of habeas corpus writ in the interest of undertrial prisoners, who were languishing in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that "right to speedy trial" is a fundamental right implicit and guarantee of "life and personal liberty" enshrined in Article 21 of the Constitution. Speedy trial is an essence of criminal justice. Justice Bhagwati held that unlike the American Constitution speedy trial is not specially enumerated as a fundamental right, but it is implicit in the broad sweep and content of Article 21 as interpreted in Maneka Gandhi's case. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair and just.²¹ The court ordered to conduct survey, which found that 21,000 undertrial prisoners were languishing in the prisons, who had spent the period of the maximum period of their alleged offence, under which they were accused. For this reason the court ordered the Bihar Government to release undertrial prisoners on their personal bond. By virtue of this order 18,000 undertrial prisoners were released solely from the State of Bihar in 1981.

Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360

4.1.3.2 Over 600 prisoners released from Tihar:

Against strength of at what time 6500 inmates, over 13000 prisoners are languished in Tihar Jail. 623 prisoners were released on bail from Tihar Jail on the direction of Delhi High Court, including four women. They were facing charges of minor offences like breach of peace and many were under preventive arrest. Such direction came from court in a bid to decongest the jail, as it had seen eight deaths, including that of a prison official, within ten days. The court passed such direction after going through the report of a three-member committee appointed by it which pointed out those recent deaths in the jail happened due to overcrowding and lack of proper facilities. The jail authority claimed that all the deaths were natural due to excessive heat conditions.²²

4.1.3.3 Acquitted or discharged of undertrial suffered more term :

The undertrial prisoners, who are accused of multiple offences and who have already been in the jails for the maximum term for which they be sentenced on conviction, even if the sentence awarded to them were consecutive and not non convention, should not be allowed to continue to remain in jail for a momement longer, since such continuance of detention would be clearly violative of not only of human dignity but also of their fundamental rights under Article 21 of the Constitution.²³ The Hon'ble Supreme Court issued the directions while dealing with the problems of undertrial prisoner and said that all the undertrial prisoners, who have been

DD news, 19 June, 2007

²³ AIR 1979 SC 1377; AIR 1979 SC 1819

in remanded for offences other than the offences under any of the Act, including the offence under IPC, shall be released discharged or acquitted forthwith, if they have been in jail for periods longer than the maximum term for which they could have been sentenced if convicted.²⁴

4.1.3.4 Governments are directed to prevent unreasonable delay:

The Supreme Court directed the Centre and all State Governments to prevent unreasonable delay in disposal of criminal cases. In order to make the administration of criminal justice effective, vibrant and meaningful, the Union of India, the State Governments and all authorities must take necessary steps immediately so that the constitutional right of the accused to speedy trial does not remain only on paper. While it is incumbent on the court to see that no guilty person escapes, it is still more its duty to see that justice is not delayed and accused persons are not indefinitely harassed. The constitutional guarantee of speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial; to minimise anxiety and concern accompanying public accusation and to limit the possibilities that long delays will impair the ability of an accused to defend himself. It is the bounden duty of the court and the prosecution to prevent unreasonable delay. The apex court in a number of cases reiterated that speedy trial was one of the facets of the fundamental right to life and liberty enshrined in Article 21 and the law must ensure reasonable, just and fair procedure. "No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21. The right to

Common Causes v. Union of India, (1994) 4 SCC 33, and as modified in (1996) 6 SCC 775; and Raj Deo Sharma v State of Bihar, (1998) 7 SCC 507

speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality can be averted. In the instant case, not a single witness had been examined by the prosecution in the last 26 years without there being any lapse on the part of the appellant officer. Permitting the state to continue with the prosecution and trial any further would be a total abuse of the process of law.²⁵

4.1.4 Right to free legal aid:

A substantial part of the prison population in the country consists of undertrials and those inmates whose trials have yet to commence. Thus, access to court and legal facilities is essential for giving a free and fair trial to these inmates, which is the mandate of Article 21 of the Constitution. The Supreme Court condemns the fact that Session Judges were not appointing counsel for the poor accused in grave cases. The defence should never be refused legal aid of competent counsel. This implies that true and legal papers should be made available to defendant alongwith the service of counsel.²⁶

The Supreme Court held that a free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty.²⁷ In another case it was held that the right to free legal service is clearly an essential ingredient of reasonable, just

Motilal Saraf v. State, 2006 SC; The Hindu, Andhra Pradesh, 3 October, 2006

Rachod Mathur Waswa v. State of Gujarat, AIR 1974 SC 1143

²⁷ Sukdas v. Arunachal Pradesh, AIR 1986 SC 991

and fair procedure for a person accused of an offence and it is implicit in the guarantee of Article 21. The State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State.²⁸ Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when trial commences but also attaches when the accused is for the first time produced before the Magistrate. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be just, fair and reasonable which denies legal advice and representation to him at this stage.²⁹ To fulfil the requirement of the free legal aid, the Supreme Court has extended this right and directed the Government to provide financial aid also to the affiliated law colleges as the Government is providing to the medical and engineering colleges.30

The duty of the Magistrate and Government were pointed out by the Supreme Court, where blind prisoners were not produced before Magistrates subsequent to their first production and they continued to remain in jail without any remand order is plainly contrary to law. The Supreme Court also directed the State of Bihar and required every other State in the country to make provision for grant of free legal services to an accused who is unable

Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369 and followed in the case of Khatri (II) v. State of Bihar, AIR 1981 SC 928

²⁹ Khatri v State of Bihar, AIR 1981 SC 928

³⁰ State of Maharashtra v Manubhai Pragaji Vashi, (1995) 5 SCC 730

to engage a lawyer on account of reasons such as poverty, indigence or incommunicate situation. The only qualification would be that the offence charged against the accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the need of the social justice require that he should be given a free legal representative. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State. The Supreme Court held that the Magistrate or Session Judge, before whom the accused appears, is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Necessary directions and guidelines were issued to Magistrates, Sessions Judges and the State Government in this regard.³¹

The Supreme Court while considering the prisoner's right to have a lawyer and reasonable access to him without undue interference from the prison staff, held that the right of a detenue to consult a legal advisor of his choice for any purpose is not limited to criminal proceeding but also for securing release from preventive detention or for filing a writ petition or for prosecuting any civil or criminal proceeding. A prison regulation cannot prescribe any unreasonable and arbitrary procedure to regulate the interviews between the detenue and the legal advisor.³²

31 Khatrı v. State of Bihar, AIR 1981 SC 928

Francis Coralie v Delhi Administration, AIR 1981 SC 746

4.1.4.1 Free legal aid is the state's duty and not government charity:

Regarding the right of free legal aid, Justice Krishna Iyer declared that "this is the State's duty and not Government's charity". If, a prisoner is unable to exercise his constitutional and statutory right of appeal including Special Leave to Appeal for want of legal assistance, the court will grant such right to him under Article 142, read with Articles 21 and 39A of the Constitution. The power to assign counsel to the prisoner provided that he does not object to the lawyer named by the court. On the other hand, on implication of it he said that the State which sets the law in motion must pay the lawyer an amount fixed by the court.³³

The Hon'ble Supreme Court has taken one more step forward in this regard and held that failure to provide free legal aid to an accused at the State cost, unless refused by the accused, would vitiate the trial. It is not necessary that the accused has to apply for the same. The Magistrate is under an obligation to inform the accused of this right and enquire that he wishes to be represented on the State's cost, unless he refused to take advantage of it.³⁴

4.1.4.2 To receive copy of the judgement at free of cost:

The accused is entitled to be supplied a copy of the judgement of the convicting court. The failure to provide the copy would be violative of Article 21 of the Constitution. In the case of M.H. Haskot³⁵ the petitioner

³³ MH Hoskot v. State of Maharashtra, (1978) 3 SCC 544: AIR 1978 SC 1548

³⁴ Suk Das v Union Territory of Arunachal Pradesh, (1986) 25 SCC 401

³⁵ Haskot v. State of Maharashtra, (1978) 3 SCC 544: AIR 1978 SC 1548

sought to appeal against the order of the High Court but he did not receive a copy of the judgment for about three years from the prison authorities. The court found this to be violative of his rights under Articles 21, 22 read with Articles 39-A and 42 of the Constitution. The court laid down the following principles in this regard:

- "(1) Courts shall forthwith furnish a free transcript of the judgement when sentencing a person to a prison term.
- (2) In the event of any such copy being sent to the jail authorities for delivery to the prisoner by the appellate, revisional or other court, the official concerned shall with quick dispatch get it delivered to the sentenced person and obtained an acknowledgement thereof from him.
- (3) Where the prisoner seeks to file an appeal or revision, every facility for the exercise of that right shall be made available by the jail administration.
- (4) Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign a competent counsel for the prisoner's defence, provided the party does not object to that lawyer.
- (5) The State which prosecuted the person and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix".

4.1.5 Protection against instruments of restraint :

Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

- (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
- (b) On medical grounds by direction of the medical officer;
- (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.³⁶

4.1.5.1 Handcuffing of undertrial prisoner is unconstitutional:

The Hon'ble Justice *Krishna Iyer*, while delivering the majority judgement held that the provisions of Punjab Police Rules, that every undertrial who was accused on non-bailable offence punishable with more than three years jail term would be handcuffed, were violative of Articles 14,

Rules. 33 and 34 of "Standard Minimum Rules for the Treatment of Prisoners"

19 and 21 of the Constitution of India. Hence they were held unconstitutional.³⁷ The Hon'ble Supreme Court again held, where an undertrial prisoner challenged the action of Superintendent of jail putting him into bar fetters and kept him in solitary confinement was an unusual and against the spirit of Constitution and declared it a violation of right of locomotion.³⁸

4.1.5.2 No need of handcuffing, while escorting the voluntary surrendered person :

In case of Sunil Gupta the petitioners were educated social workers. They were handcuffed and taken to the court from the jail and back from court to the prison by escort party. They had voluntarily submitted themselves for arrest from "dharana". They had no tendency to escape from the jail. In fact, they even refused to bail but chose to continue in prison for the public cause. It was held that this act of the escort party was violative of the Article 21 of the Constitution. There was reason recorded by the escort party in writing for this inhuman act. The court directed the Government to take appropriate action against the erring escort party for having unjustly and unreasonably handcuffing the petitioner.³⁹

4.1.5.3 Undertrial prisoner cannot be kept in "leg irons" :

It was held by the Supreme Court in the case of *Kadra Pehadiya*⁴⁰ that, it was difficult to see how the four petitioners who were merely undertrial prisoners awaiting trial could be kept in leg irons contrary to all

³⁷ Prem Shankar v. Delhi Administration, AIR 1980 SC 1535

³⁸ Sunil Batra v. Delhi Administration, AIR 1980 SC 1579

³⁹ Sunil Gupta v. State of MP, (1990) 3 SCC 119

⁴⁰ Kadra Pehadiya v. State of Bihar, AIR 1981 SC 939

prisons regulations and in gross violation of the decision of this court in Sunil Batra's case.⁴¹ The court directed the Superintendent to immediately remove leg irons from the feet of the four petitioners. The court also directed that no convict or undertrial prisoner shall be kept in leg irons except in accordance with the *ratio* of the decision of Sunil Batra's case.

Later on the Supreme Court declared, directed and laid down a rule that handcuffs or other fetters shall not be forced on a prisoner, convict or undertrial, lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back, the police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmates of a jail in the country or while transporting from one jail to another or from jail to court and back. While intending to enforce the order, the court emphasised that if any violation of any of the direction issued by Supreme Court by any rank of the police in the country of member of the jail establishment shall be summarily punished under the Contempt of Court Act apart from other penal consequences under law.⁴²

4.1.6 Protection of custodial torture and mal-treatment in prisons :

The right to life and personal liberty may be curtailed to a certain extent when a person is sent to imprisonment, but it is not absolutely taken away. Thus, the person imprisoned is the possessor of other fundamental rights and the residual part of Article 21 as well. The State does not give a right to take away the life or its important facets to the officers enforcing the

Sunil Batra v Delhi Administration, (1978) 4 SCC 494

⁴² Citizens for Democracy v. State of Assam, (1995) 3 SCC 743 · AIR 1996 SC 2193 : 1996 Cr L.J. 3247

law. If the life of an offender has been taken away, without the procedure established by the law, it would definitely amount to violation of Article 21 of the Constitution. Similarly, the life of an offender cannot be jeopardized by indulging in illegal physical torture by the jail authorities.

The Supreme Court on a complaint of custodial violence to women prisoners in jail directed that those helpless victims of prison injustice should be provided legal assistance at the State's cost and protected against torture and maltreatment. As earlier, the court held that prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crime. The Supreme Court was not happy with the attitude of prison authority and suggested that the prison authorities should change their attitudes towards prisoners and protect their human rights for the sake of humanity.

The Article 5 of the UDHR, states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". There are words that crop up again. They mean severe beatings on the body and the soles of the feet with rubber hoses and truncheons, electronic shocks being run through the genitals and tongue, near-downing, hanging arms and legs, cigarette burns over the body, sleep deprivation or subjection to a high pitched noise and much more. These words repeated all through Amnesty's leaflets and news settlers in the organisations mandate, in urgent action appeals and in letter members write — "cruel inhuman or degrading treatment or punishment". Amnesty knows that two out of three people on earth live in

⁴³ Sheela Basre v. State of Maharashtra, AIR 1983 SC 378

DBM Patnaik v State of Andhra Pradesh, AIR 1974 SC 2092

⁴⁵ Sanjay Suri v Delhi Administration, AIR 1988 SC 414

country where torture occurs. "Torture is fundamental violation of human rights", "... an offence to human dignity and prohibited under national and international law".

Amnesty described torture as "an epidemic that seemed to spread like a cancer". In the 1970s and in the 1980s torture was reported from more than 90 countries. One point amnesty tries hard to bring home to people is that torture, is not something that only happens in third world countries. Certain regions do have a notorious history of abusing human rights but many countries carry out cruel, inhuman and degrading treatment of their citizen – even in some of the most "enlighted" countries like France, Italy and Britain where Police ill treatment is known to occur.

In October 1983, Amnesty put together a twelve point plan for the prevention of torture. It told Governments, how they could take steps to prevent the torture of prisoners. For example, the highest authorities of a country can make statement telling the law enforcer that torture will not be tolerated. Amnesty called for an end to secret detention and the use of statements extracted under torture. It asked Governments to make torture illegal and to prosecute those found guilty of it. It suggested that places where prisoners are held be visited and examined regularly so that the public knows what goes on.⁴⁶

The Hon'ble Supreme Court has observed that "right to life is one of the basic human rights. Even when lodged in jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the

Marsha Bronson Amnesty International - First Indian Ed. 1996, Orient Longman Ltd, Hyderabad pp 30-32

Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners shall retain the residue of the constitutional rights. This right continues to be available to prisoners and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which have been rejected several times by the Supreme Court". State is liable for the death of undertrial who continues to enjoy all fundamental rights including right to life.⁴⁷

Again, it was observed by the Supreme Court that "custodial violence, torture and abuse of police powers are not peculiar to this country, but it is widespread. It has been the concern of the International Community because the problem is universal and the challenge is almost global. The courts are also required to have a change in their outlook, approach, appreciation, and attitude, particularly in cases involving custodial crimes so that as far as possible within their powers, the truth is found and the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed."

The Hon'ble Supreme Court had passed an order for producing a prisoner before it. It was alleged that while the prisoner was being taken to the court he was manhandled severely by the escort police. After an enquiry, the court expressed the hope the basic pathology which makes police cruelty possible will receive Government's serious attention and the roots of the third degree would be plucked out or otherwise Article 21, with its profound concern for life and limb, will become dysfunctional useless the agencies of

⁴⁷ State of AP v. CR Reddy, AIR 2000 SC 2083

⁴⁸ Shakila v. Vasant, (2003) 7 SCC 749

the law in the police and prison establishments have sympathy for the humanist creed of that Article.⁴⁹ Where the petition under Article 32 was filed by undertrials for enforcement of their fundamental right under Article 21 on the allegation that they were blinded by the police officer either at the time of their arrest or after their arrest, whilst in police custody, production of the report submitted by the police officer to the State Government and correspondence exchanged by police officers or noting on files made by them in enquiry order by the State Government into alleged offence.⁵⁰

4.1.7 Right to bail during the pendency of appeal:

The Hon'ble Supreme Court held that "refusal to grant bail" in a murder case without reasonable ground would amount to deprivation of personal liberty under Article 21. In this case six appellants were convicted by the Session Judge in a murder case and High Court in appeal also convicted the appellants and sentenced them to life imprisonment. The appellants suffered sentence of 20 months. These appellants were male members of their family and all of them were in jail. As such their defence was likely to be jeopardized. In the instance case, any conduct on their part suggestive of disturbing the peace of the locality, threatening anyone in the village or otherwise thwarting the life of the community or the course of justice, had not been shown on the part of these appellants, while they were on bail for a long period of five years during the pendency of appeal before High Court. The appellants applied for bail during pendency of their appeal before the Supreme Court, while granting the bail, the court held that refusal to grant bail amounts to deprivation of personal liberty of the accused

⁴⁹ Francis Coralie v. Delhi Administration, AIR 1981 SC 746

⁵⁰ Khatri v State of Bihar, AIR 1981 SC 1068

persons. Personal liberty of an accused or convict is fundamental right and can be taken away only in accordance with procedure established by law. So, deprivation of personal liberty must be founded on the most serious consideration relevant to the welfare objectives of the society specified in the Constitution. In the circumstances of the case, the court held that subject to certain safeguards, the appellants were entitled to be released on bail.⁵¹

All the undertrial prisoners, who have been in remand for offences other than the specific offences under the various Acts, who have been in jail for period of not less then one half of the maximum period of punishment prescribed for the offence shall be released on bail forthwith in accordance with the direction of the Supreme Court. Andhra Pradesh High Court directed that all the criminal courts including the Sessions Courts, shall try the offences where the undertrial prisoners cannot be released, on the priority basis by following the provisions of section 309 of the Code.

All the undertrial prisoners have been in jails for maximum term of which they could be sentenced on conviction, shall be released on bail on furnishing a personal bond of an appropriate amount. For the purpose of above directions for release on bail, all the criminal courts on the next date fixed for extension of remand or otherwise shall *sou motu* on the authority of this order shall consider the bail cases and grant bail to the undertrial

⁵¹ Babu Singh v. State of UP, AIR 1978 SC 527

Common Causes v. Union of India, (1994) 4 SCC 33, and as modified in (1996) 6 SCC 775; and Raj Deo Sharma v. State of Bihar, (1998) 7 SCC 507

prisoners on furnishing personal bond for appropriate amount and/or the appropriate sureties as necessary.⁵³

All the mentally challenged / mentally retarded undertrial prisoners, who have been under detention for 18 years, 15 years and 6 years, shall be dealt with in accordance with the provisions of Chapter XXV of the Code. If, the Medical Officer of the State Government certifies that the undertrial prisoner is not mentally healthy, all such undertrial prisoners who completed maximum sentence period shall be released forthwith; and all such persons of unsound mind shall forthwith be shifted to any government institute of mental health pending necessary order from the competent criminal court for release of such persons. Further, the court emphasised that the direction issued by the court in the order, shall be complied within a period of two weeks. The court also directed that all the district judges shall regularly visit the Central Jails, District Jails, and sub-jails in their jurisdiction and take appropriate action as per the provisions of the Code. ⁵⁴

4.1.8 Right to be released on due date:

No doubt, it is absolute right; all the prisoners shall be released from prison on the completion of their sentence. It is the duty of the prison staff to notify the releasing date of every prisoner in the register to be maintained by Jailer. If, any formality is needed to be done for releasing purpose, should be completed before the releasing date.

Hussainara Khatoon (iv) v. State of Bihar, AIR 1979 SC 1377; (1980) 1 SCC 108, and Hussainara Khatoon (v) v. State of Bihar, AIR 1979 SC 1819, 1979 Cri LJ 1134, (1980) 1 SCC 115, [1979] 3 SCR 1276

Mir Mohahmad Ali v. State of Andhra Pradesh, 2000

4.1.8.1 Detention undergone to be 'set-off' against final sentence:

Section 428 of the Code, states for set-off of the period of detention of an accused as an undertrial prisoner against the term of imprisonment imposed on him on his conviction. It only provides for a 'set-off', but does not equate an 'undertrial detention or the detention with imprisonment on conviction'. The provision as to set-off expresses a legislative policy; this does not mean that it does away with the difference in the two kinds of detention and puts things on the same footing for all purposes. The two requisites postulated in section 428 are:

- (a) During the stage of investigation, enquiry or trial of a particular case, the prisoner should have been in jail at least for a certain period; and
- (b) He should have been sentenced to a term of imprisonment in that case.

If, the above said two conditions are satisfied, then the operative part of the provision comes into play, i.e., if the awarded sentence of imprisonment is longer than the period of detention undergone by him during the stages of investigation, enquiry, or trial, the convicted person needs to undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded.

The Hon'ble Supreme Court has interpreted the above provisions in a wider sense and held that period of detention undergone is to be set-off against the sentence of imprisonment. Section 428 only provides for set-off

but does not equate an undertrial detention, or detention with imprisonment on conviction. The detention under preventive detention laws is essentially a precautionary measure intended to prevent and intercept a person before he commits an infra active act, which he had done earlier and is not punitive. Therefore, it is impermissible to set-off, period of detention under COFEPOSA against sentence of imprisonment imposed on conviction under Customs Act, in terms of section 428.⁵⁵

It is a settled legal position that detention under the preventive detention laws is not punitive but is essentially a precautionary measure intended to prevent and intercept a person before he commits an infra active act which he had done earlier.

4.1.8.2 Delay in release from jail amounts to 'illegal detention':

The Hon'ble Supreme Court held that a person was acquitted by the court but was not released by the jail authority for 14 years of his precious life. The Supreme Court was first shocked by the sordid and disturbing State of affairs disclosed by the writ petition for habeas corpus filed by the petitioner for the release of a person for the unlawful detention, who was already acquitted by the court more than 14 years ago. Accordingly the petitioner also asked for compensation of illegal incarceration in which the detenue had lost his precious 14 years of life behind the bars even though he was acquitted by court. The Supreme Court held the following principles in its judgement—(1) The monetary compensation for violation of fundamental rights to life and personal liberty can be determined; and (2) If infringements of fundamental rights cannot be corrected by any other methods open to

⁵⁵ Maliyakkal Abdul Azeez v. Assistant Collector, Kerala, (2003) 2 ILD 920 (SC)

judiciary, then right to compensation is opened. The Supreme Court granted interim relief amounting to Rs. 35,000 to petitioner and also right to file regular suit in the ordinary court to recover damages from the State and its erring officials for taking away his precious 14 years of independent life which could never come back. The court has directed the subordinate court to hear the case on merit basis. ⁵⁶ Please remember that this petition was a habeas corpus writ where the remedy is only to release the illegal detenue and not to punish the offender. The Supreme Court has opened the remedy in the monetary form where there is no other way to correct it on the violation of fundamental right. We must not assess that the Supreme Court has given only Rs. 35000 as compensation for the darkest 14 years of the illegal detention but as it was habeas corpus writ and Supreme Court is also bound with the law. Here the Hon'ble Supreme Court has restrained itself from crossing the constitutional provisions.

4.1.8.3 Power of High Court to release prisoners after pardon :

Any High Court may, in any case in which it has recommended to Government the granting of a free pardon to any prisoner, permit him to be at liberty on his own recognizance.⁵⁷

4.1.9 Right to education:

4.1.9.1 Right to higher education:

The Hon'ble Supreme Court directed the State Government to see within the framework of the Jail Rules, that the appellant is assigned work

⁵⁶ Rudul Shah v. State of Bihar, AIR 1983 SC 1086, (1983) 4 SCC 141

Section 33 of Prisoners Act, 1900

not of a monotonous, mechanical, intellectual or like type mixed a title manual labour..." and said that the facilities of liaison through correspondence course should be extended to inmates who are desirous of taking up advanced studies and woman prisoners should be provided training in tailoring, doll-making and embroidery. The prisoners who are well educated should be engaged in some mental-cum-manual productive work.⁵⁸

In an interim order dated 21st February, 2005, the Gujarat High Court allowed an undertrial to appear in the board examination commencing from 14 April, 2005 and passed a mandatory interim order directing the Gujarat Higher Secondary Education Board (GSEB) to accept Gandhi's form, even if it was late by 9 days and issue a provisional seat number. One of the accused Mitesh Gandhi (accused of murder) filed an application before the High Court pleading that he should be allowed to appear in the class XII (Commerce) examination, while he was refused bail. It was submitted in the court that nine days delay on the part of the applicant in filling up of form was because he could not get proper information in the jail about the schedule. Rejection of the form amounted to violation of inmate's fundamental right. Undertrial prisoner Hitesh Gandhi (20 years) was given temporary bail by Hon'ble High Court to appear in HSC Exam begins on 14th March, 2005. Again, in 2006, he was allowed to appear at the Exam.

Mohammad Giasuddin v State of AP, AIR 1977 SC 1926

Times of India, Ahmedabad Ed. 23rd Feb and 11th March, 2005

4.1.9.2 Right to receive Books and Magazines inside the Jail:

The Superintendent of Nagpur Central Prison had arbitrarily fixed the number of books to be allowed to each prisoner at 12. The court held that under the Bombay Conditions of Detention Order, 1951 there was no restriction on the number of books and the only ground on which a book may be disallowed is that it was, in the opinion of the Superintendent, 'unsuitable'. The Superintendent could not fall back on any implied power to disallow the books. Of all the restraints on liberty, that no knowledge, learning and pursuit of happiness is the most irksome and least justifiable. Improvement of mind cannot be thwarted but for exceptional and just circumstances. It is well known that books of education and universal praise have been written in prison cells. 60

The prison officials had refused to Mr. Khan certain journals and periodicals, even though the prisoner had offered to pay for them. It was refused on the ground that, they were not included in the officials list. The court held that prisoners can be refused reading materials only if the newspapers are found 'unsuitable' by the authorities. In the present case prison authorities had supposedly found the journals 'unsuitable' because they 'preached violence' and criticized policies of the government in respect of Kashmir. Preventing prisoners from reading papers does not in any way relate to maintenance of discipline. Further, the court said that the word 'unsuitable' in clause 16 gave the State arbitrary and unregulated discretion as there were no guidelines for the exercise of power.⁶¹

61 MA Khan v State, AIR 1967 SC 254

George Fernandes v State, (1964) 66 Bom LR 185

Where a prisoner was prevented from receiving "Mao literature" by authorities, he challenged the same through the petition in Kerala High Court. The Kerala High Court held that no passage from these books could be shown, if read, to endanger security of the State or prejudice public order and so the books were allowed. The court held that there was no ground to prevent *Kunnikal* from obtaining these books. Article 19 (i) (a) includes the freedom to acquire knowledge, to pursue books and read any types of literature subject only to certain restrictions for maintaining the security of State and pubic order. ⁶²

4.1.9.3 Right to publication:

Where a scientific book was not allowed to be published by the prison authorities, the Hon'ble Supreme Court held that there was nothing in the Bombay Detention Order, 1951 prohibiting a detenue from writing or publishing a book. The court further observed that the book being a scientific work 'Inside the Atom' could not in any case be detrimental to public interest or safety as envisaged under the Defence of India Rules, 1962. The person detained under Preventive Detention Act was not permitted to hand over his written work to his wife for publication, is violative of Article 21 of Constitution of India. In another case, the Hon'ble Supreme Court held that to deny the permission of publication of autobiography of Auto Shanker under the fear of defamation of IAS, IPS and its officials have no authority in law to impose prior restraint on publication

Kunnikkal Narayanan v. State of Kerala, AIR 1973 Ker 97

⁶³ State of Maharashtra v Prabhakar Pandurang Sanzgir, AIR 1966 SC 424

of defamatory matter. The public official can take action only after the publication of it is found to be false.⁶⁴

4.1.10 Right to reasonable wages for work:

For the first time in 1977, the Hon'ble Supreme Court held that the unpaid work is bonded labour and humiliating. The court expressed its displeasure on this issue. Surprisingly, even after two decades in spite of, all discussions regarding correction and rehabilitation in the country, the A.P Government has yet to frame rules for the payment of wage to the prisoners. It was held that some wages must be paid as remuneration to the prisoner; such rate should be reasonable and not trivial at any cost. The court held that when prisoners are made to work, a small amount by way of wages could be paid and should be paid so that the healing effect on their mind is fully felt. Moreover, proper utilisation of service of prisoners in some meaningful employment, whether a cultivators or as craftsmen or even in creative labour will be good from society's angle, as it would not be the burden on the public exchequer and the tension within.

In fact, the question relating to wages of prisoner was explained by Kerala High Court in 1983, which seems to have taken the lead by the division bench. It was suggested that wages given to the prisoners must be at par with the wages fixed under the Minimum Wages Act and the request to deduct the cost for providing food and clothes to the prisoners from such wages was spurned down. On the notice of court, the Government has fixed the rate of wages as 50 paise and maximum of Rs. 1.26. The court has

⁴ R Rajgopal v. State of Tamil Nadu, AIR 1995 SC 264

⁶⁵ Mohammad Giasuddin v. State of A P, AIR 1977 SC 1926

⁶⁶ Dharambir v. State of UP, AIR 1979 SC 1595

rejected their fixation of wages for prisoner and directed the State Government to design a just and reasonable wage structure for the inmates, who are employed to do labour, and in the meanwhile to pay the prisoners at the rate of Rs.8/- per day until Government is able to decide the appropriate wages to be paid to such prisoners.⁶⁷ In the same year, the Hon'ble Supreme Court has held that labour taken from prisoners without paying proper remuneration was "forced labour" and violative of Article 23 of the Constitution. The prisoners are entitled to payment of reasonable wages for the work taken from them and the court is under duty to enforce their claim. The Court went one step ahead and said that there are three kinds of payment - 'fair wages', 'living wages' and 'reasonable wages'. The prisoners must be paid reasonable wages, which actually exceeded minimum wages.⁶⁸

The Hon'ble Supreme Court held that no prisoner can be asked to do labour without wages. It is not only the legal right of a workman to have wages for the work but it is a social imperative and an ethical compulsion. Extracting somebody's work without giving him anything in return is only reminiscent of the period of slavery and the system of begar. Like any other workman a prisoner is also entitled to wages for his work. It is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners the State concerned shall constitute a wage fixation body for making recommendations. The Court also directed that each State to do so as early as possible. Until the State Government takes any decision on such

Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328

⁶⁷ "In Re Prison Reforms Enhancement of Wages of Prisoners", AIR 1983 Kerala 261

recommendations every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixed in the light of the observations made above. The Court also directed all the State Governments to fix the rate of such interim wages within six weeks from the date of decision and report to this court of compliance of the direction.⁶⁹

In the same case *Thomas J* said that equitable wages payable to the prisoners can be worked out after deducting the expenses incurred by the Government on food, clothing and other amenities provided to the prisoners from the minimum wages fixed under Minimum Wages Act, 1948. *Wadwa J* in the same case, held that the prisoner is not entitled to minimum wages fixed under Minimum Wages Act, 1948, but there has to be some, rational basis on which wages are to be paid to the prisoners.⁷⁰

More recently, MP High Court held that, if the twin objectives of rehabilitation of prisoners and compensation to victims are to be achieved, out of the earnings of the prisoners in the jail, then the income of the prisoner has to be equitable and reasonable and cannot be so meager that it can neither take care of rehabilitation of prisoner nor provide for compensation to the victim.⁷¹

State of Gujarat v Hon'ble High Court of Gujarat, AIR 1998 SC 3164 (Clause (3) of Para 51)

State of Gujarat v Hon'ble High Court of Gujarat, AIR 1998 SC 3164 (Para 45 and Para 77)
 SP Anand v State of MP, AIR 2007 MP 167 (Para 22)

4.1.11 Special rights to women prisoners:

4.1.11.1 Right to female guard for female security:

The Hon'ble Supreme Court has given detailed instructions to the concerned authority for providing security and safety in police lock-up and particularly woman suspects. Female suspects should be kept in a separate lock-up and not in the same in which male accused are detained and should be guarded by female constables. And also directed the IG Prison and State Boards of Legal Aid Advice Committee to provide legal assistance to the poor and indigent accused (male or female) whether they are undertrial or convicted prisoners.⁷²

4.1.11.2 Rights to pregnant prisoners:

The Hon'ble Supreme Court directed that before sending a pregnant woman to a jail, the concern authorities must ensure that jail in question has the basic minimum facilities for delivery of child as well as for providing pre-natal and post natal care for both, the mother and the child. As far as possible and provided the woman prisoner has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases causality constituting high security risk or cases of equivalent grave descriptions can be denied this facility.⁷³

⁷² Sheela Basre v. State of Maharashtra, AIR 1983 SC 378

⁷³ RD Upadhyay v. State of AP, AIR 2006 SC 1946

4.1.11.3 Rights to mother prisoners:

The Hon'ble Supreme Court held that female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to the physical distance. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once in a week.⁷⁴

4.1.11.4 Rights to child of women prisoners:

Although educational programmes are reported to be running for children in some jails, they have not been able to fulfil the requirements of children from different age-groups. By way of recreational facilities, only playgrounds were available in jails. Since the playgrounds can be utilised by only grownup children, there is clearly a need to provide different types of recreational programmes, which can cater to the recreational needs of children of different age-groups.

The mother prisoners have mixed perceptions regarding the health care, educational, recreational and other programmes for their children. While most of them expressed their unhappiness regarding health care, recreational and other facilities (religious) for the children, they were

¹⁴ Ibid

generally satisfied with the educational programmes. Despite their dissatisfaction in certain areas, most mother prisoners are inclined to believe that these programmes are beneficial to their children.⁷⁵

The Hon'ble Supreme Court has issued directions, for the development of the children languishing in jail with their undertrial prisoner or convicted mothers. These children are languishing for none of their fault, but per force, have to stay in jail with their mothers; due to tender age or no one is available at home, in their absence to take care of them.⁷⁶

4.1.12 Right to security of life inside the jail:

It is the duty of the State to provide security to prisoners. If it fails and any incident takes place in jail, then the Government has to pay compensation to the dependents of the deceased person.

4.1.12.1 Prisoner killed by the co-accused, entitled for compensation :

The Supreme Court in the case of *Smt. Kewal Pati*⁷⁷, directed the State of UP to deposit a sum of Rs. 1,00,000 within three months, with the Registrar of this Court. A sum of Rs. 50,000 out of this amount shall be deposited in fixed deposit in any nationalised bank and the interest of it shall be paid to the wife and the children of the deceased. The remaining amount shall be paid to the wife by the Registrar after being satisfied about the identification of the petitioner. The amount in deposit shall be paid to the

Status of Children of Women Prisoners In Indian Jails. A research note, Women's Link, Vol.6, No 2, April-June 2000 and First Periodical Report of India on CRC, 2001, p. 297-298

RD Upadhyay v State of AP, AIR 2006 SC 1946

⁷⁷ Smt. Kewal Patt v. State of UP, 1995 (101) Cr LJ -2920 SC

wife on her option after all the children become major. In case of petitioner's death prior to the children becoming major, the amount shall be divided equally between the surviving children. In this case a petition was filed by the wife and children of Ramjit Upadhaya, who was killed by a co-accused in the Central Jail, Varanasi. The Government claimed that there were no provisions in the UP Jail Manual for grant of compensation to the family of the deceased convict. Even though Ramjit Upadhaya was a convict and was serving his sentence, yet the authorities were not absolved of their responsibility to ensure his life and safety in the jail. A prisoner does not cease to have his constitutional right to life except to the extent he has been deprived of it in accordance with law. Therefore, he was entitled to protection. Since the killing took place when he was in jail, it resulted in deprivation of his life contrary to law. He is survived by his wife and three children. His untimely death has deprived the petitioner and her children of his company and affection. Since it has taken place while he was serving his sentence, due to failure of the authorities to protect him, the court was of the opinion that they are entitled to be compensated.

4.1.12.2 Murder by co-accused in Sabarmati Central Jail, Ahmedabad:

Chetan Patel, alias "Battery" inmate in Ahmedabad Central Jail, was murdered on 7th Aug, 2005, allegedly for refusing to pay "protection money" to strongmen inside the central jail. The State authorities conceded that though the top-security jail had earlier witnessed cases of organised violence between rival groups, the prison officials had failed to take corrective measures in time. Three jailers were suspended, pending an official inquiry into Patel's death. A rival group had attacked Patel with

knives and two people were injured when they rushed to protect him. While Patel succumbed to the injuries, the other two were recuperating. The five accused were identified and investigation is on. The probe would also focus on the smuggling of weapons like knives into jail. The use of mobile phones by some of the inmates, as was found in an official checking earlier, would also be investigated. Another case of murder also was reported from the same jail in 2006. In 2007, it was reported that ten inmates were murdered inside highly secured *Tihar* Jail within a short time, worried the court, and compelled it to release more than 600 undertrial prisoners on bail. In such cases, it is the duty of the State to give reasonable compensation to the kin of deceased irrespective of being him a prisoner, undertrial prisoner or detenue, without interfering of judiciary.

4.1.12.3 Prison staff made prisoners blind :

Everyone is aware about the incident of *Bhagalpur*, where many undertrial prisoners were made blind by putting acid into their eyes and moreover this act was done by the prison staff. This sordid act of prison staff shows how unsecured inmates are from the prison staff in this country.

4.1.12.4 Prison is taken over by prisoners:

In Chhapra (Bihar), the jail was overtaken by the prisoners themselves. This shows not only omission by the prison staff but also indicates involvement in such a sordid act. In another case, *Jahanabad* Jail (Bihar) was attacked by around 1000 persons in the month of November,

⁷⁸ Times of India, Ahmedabad Ed. Aug 6, 2005

2005. In the same year, *Raigiri-Udaigiri* Jail of Orissa also was attacked by Naxalities.

4.1.13 Right to interaction with society:

4.1.13.1 Right to be interview:

The Supreme Court held that lawyers nominated by the District Magistrate, Session Judge, High Court and the Supreme Court will be given all facilities to interview, right to confidential communications with prisoners, subject to discipline and security considerations. Lawyers shall make periodical visits and report to the concerned court, results of their visits. Again, while showing importance of the right to free speech and expression relates to the press, the Hon'ble Supreme Court held that denial of permission to press for an interview of prisoner is a violation of press rights. In the instance case, the petitioner, a newspaper correspondent filed a petition to challenge the permission denied to interview two convicts. The court while granting the permission held that the press is entitled to interview prisoners unless weighty reasons to the contrary exist.

The Supreme Court struck down the provisions, which were prohibiting the detenue to have interviews with a legal advisor of his choice and held that it was violating of the Articles 14 and 21 of the Constitution, hence such provisions are unconstitutional and void. It would be quite reasonable if, a detenue has to be entitled to have interviews with his legal advisor at any reasonable hour during the day after taking appointment from the Superintendent of the Jail. Such appointment should be given by the

⁷⁹ Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

Prabha Dutta v. Union of India, AIR 1982 SC 6

Superintendent without avoidable delay. The Supreme Court also added that the interview need not necessarily take place in the presence of the nominated officer of department. If, the presence of such officer can be conveniently secured at the time of interview, without involving any postponement of the interview, such officer, or any other jail official may be present, if thought necessary to watch the interview but not so as to be within hearing distance of the detenue and the legal advisor. ⁸¹

4.1.13.2 Right to socialise:

The Hon'ble Supreme Court held that, the word personal liberty in Article 21 is of the widest amplitude and it includes the "right to socialise" with members of family and friends, subject of course, to any valid Prison Regulations which must be reasonable and non-arbitrary. The person detained or arrested has a right to meet his family members, friends and legal advisers and woman prisoners are allowed to meet their children frequently. This will keep them mentally fit and respond favourably to the treatment method.⁸²

In instance case, the petitioner, a British national was detained in Tihar Jail of Delhi in connection with her alleged involvement in violation of COFEPOSA, 1974. The petitioner also raised the issue about the procedure and frequency of exercise of her right to meet her five years old daughter and her sister who was looking after the girl. The Rules of the Punjab Jail Manual, applicable in Delhi, permitted the detenus to meet friends and relatives only once a month while similar facility was available

Francis Coralie v. Delhi Administration, AIR 1981 SC 746

Francis Coralie v. Delhi Administration, AIR 1981 SC 746

once and twice a week to the convicts and undertrials respectively. The court held the relevant provisions of the condition of the detention order to be violative of Articles 14 and 21 of the Constitution. The court also found the provisions of the order prescribing that detenue can have an interview with a legal advisor only after obtaining permission of the District Magistrate and that the interview had to take place in the presence of certain officials of the Customs and Excise Department, to be invalid. The court also observed that in this regard a distinction has to be made between convicts and detenus under preventive detention, the latter being on higher pedestal compared to the former.

4.1.13.3 Right to confidentiality of letter:

The Court of Appeal of England held that prisoners' letters to and from solicitors in contemplation of legal proceedings could not subjected to scrutiny and stoppage under the Prison Rules. The Prison authorities have limited powers to read the letters only when there are reasonable and probable grounds for believing that the same contains something in breach of security and only to the extent necessary to determine the same. The prison authority doing so is under a duty of law to maintain the confidentiality of the communication.⁸³

4.1.13.4 Right to communication:

The Hon'ble Supreme Court taking the antics of one of RJD MP inside Beur Jail as an eye opener seriously weighed the idea of disabling mobile phone services inside prison across the country to stop its misuse by

⁸³ Regina v Secretary of State for Home Department Ex-parte Leech, 1994 QB 198

criminals and influential inmates. The Supreme Court asked mobile services operators BSNL and Reliance Infocom to inform about the jamming of the mobile inside the jails. The direction comes during the hearing of a petition challenging a Patna High Court order granting bail to accused in the Ajit Sarkar murder case. The apex court had stayed the High Court order sending accused back to jail. Referring to the public meeting held by accused inside the Beur Jail at Patna and the mobile phones seized from him, the bench said — "there are instances when highly influential persons and the powerful personalities have misused the mobile phones while being lodged inside the prison". It has to be stopped across India in all jails and the process could begin by installing the jammers at the Central Jails.⁸⁴

4.1.14 Facilities in prison:

4.1.14.1 Right to food and water:

Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. And drinking water shall be available to every prisoner whenever he needs it.⁸⁵

4.1.14.2 Right to have adequate accommodation:

The Hon'ble Supreme Court has issued direction to the State of UP, that wherever such detentions are stored to the persons detained must be housed in a lock-up which will provide at least 40 sq. ft. per person with minimal facilities of some furniture such as a cot for each of the detained

⁸⁴ Times of India, 05-01-2005

Rule-20 of "Standard Minimum Rules for the Treatment of Prisoners, 1957" adopted by UN and India is a party.

persons and supply of potable water. Having regard to the climate conditions of the place, the lock-up should provide for an electric fan. There must be hygienic arrangements for toilet. The State shall ensure the satisfaction of these conditions wherever such arrests and detentions are resorted to.⁸⁶

A convict lodged in jail must have reasonable accommodation to live a healthy life and enjoy his person liberty to the extent permitted by law. A reading of Rule 22, 29 and 30 of Madhya Pradesh Prison Rules shows that every sleeping ward must have certain amount of superficial area, cubic space and lateral ventilation must be allowed for each prison. If the prisoners cannot be provided with the space of 41.80 Square meters per prisoner as mandated by rules, then State Government will have to continue with the construction and expansion of jails to discharge its obligation under Article 21 of the Constitution and under the Prisons Act and the Rules towards the prisoners lodged in the jails.⁸⁷

4.1.14.3 Other prison facilities:

A letter was written to the court about the prison facilities such as shaving blades, letters, ventilations in the rooms and so on; the most shocking however was the attitude of the High Court in the face of the sustained disobedience of previous order of the court. Despite several judgements, the Prison Manual and Rules were not printed and made available to the prisoners. Despite another series of decisions, prison wages were not enhanced and remained at the pitiably low level. Despite repeated order, the visitor board was not properly constituted and made functioning.

TN Mathur v State of UP, 1993 (Supp) 1 SCC 722

SP Anand v. State of MP, AIR 2007 MP 167; Relied on Sunil Batra v Delhi Administration, AIR 1978 SC 1675

After noting non-compliance with the orders of the court, the Divisional Bench of Bombay High Court was content with merely repeating the same directions all over again. Inspector General compliance was to be reported within six months (from September 1988). This was not done and again the Government was directed to fulfill such requirements.⁸⁸

4.1.15 Right to co-habitation with spouse :

In 2000, New Zealand's Corrections Minister Matt Robson has tried to change prison policy by introducing sex for inmates and raising children in prison. However, idea was rejected by voting to 92:8 and highly criticized by all the law experts and jurimetrics. The critics says that "more seriously, both restorative justice and attempts at rehabilitation will only be supported, and successful, if victims and the community, feel the state is still committed to ensuring that victims do not suffer more than prisoners.⁸⁹

In December 2000, an application was moved by the wife of the prisoner, in which she claimed that, she is having natural right to have child and she cannot avail this natural right till her husband is inside the prison being a Hindu wife (faithful). One of the court from Haryana held that, we are agreed that she is having right to have child and it is not possible without the release of prisoner. According to medical science normally a woman can conceive up to the age of 45 years in India and at the time of application the age of the woman was around 27 years and her husband was to be in imprisonment for seven years more from the date. It means, at the time of

⁸⁸ Incio Manuel Miranda v. The State, 1989 Mah LJ 77

Press Release, New Zealand various Parties, 24 May, 2000

his release, she will be around 34 years old. In such circumstances she can avail the right to have child for 11 years of her life.

Again, the POTA Court, Ahmedabad on 13th Sep, 2004, turned down the plea of bail of a prisoner on the ground of having sex with his wife. The accused had sought 30 days temporary bail on the unique ground that abstention from sex, because of the long period in jail, was causing him and his wife immense mental trauma. The POTA court has directed the jail authorities to extend the meeting time of the accused with his wife as per the Jail Manual once in three months. The court observed, "Apex Court while defining the right to life has not incorporated conjugal right as inevitable and shrinkage of certain rights is also categorically mentioned. Therefore, this court cannot permit temporary bail for the reasons mentioned in the petition". The court has also observed that there is no authoritative pronouncement on the issue. 90

4.1.16 Right to compensation in case of miscarriage of justice :

4.1.16.1 Right to compensation in case of custodial violence :

Considering the importance of the issue raised by DK Basu through a letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock-up, the Supreme Court has treated this letter as a writ petition and a notice was issued on 9th February, 1987 to the State regarding the issue. The Supreme Court held the principles that - (i) Article 21 of the constitution could not be denied to convicts, undertrial, detenues and other prisoners in custody, except according to the procedure

⁹⁰ Times of India, Ahmedabad Ed 14th Sep. 2004

established by law. (ii) Any form of torture or cruel, inhuman or degrading treatment falls within ambit of Article 21, whether it occurs during investigation or otherwise. "Monetary or pecuniary remedy is an appropriate and indeed effective and sometimes the only suitable remedy for redressal for established infringement of the fundamental right to life of citizen by the public servants and the State vicariously liable for their act. The claim of citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall the right to be indemnified by the wrongdoer". 91

4.1.16.2 Right to compensation in case of custodial death:

The Hon'ble Supreme Court has observed that due to the gross negligence on the part of jail authorities, 'R' an undertrial prisoner, was subjected to serious injuries inside the jail which ultimately caused his death. It has been stated by the petitioner 'M', the mother of the said deceased that 'R' was the only bread earner in the family and on that day she had become a helpless widow with three sons to be maintained. The Supreme Court has held that it was the bounded duty of the jail authorities to protect the life of an undertrial prisoner lodged in the jail and as in the instant case such authorities have failed to ensure safety and security to "R". The State is directed to pay a sum of Rs. 2,50,000 to the petitioner within a period of six weeks.⁹²

⁹¹ DK Basu v. State of West Bengal, AIR 1997 SC 610

⁹² Murti Devi v. Delhi Administration, (1998) 9 SCC 604

4.1.16.3 Right to compensation in case of 'illegal detention':

When a person by a final decision has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. ⁹³

The Hon'ble Supreme Court has been very particular in safeguarding the plight of the prisoners. While enhancing the amount of compensation from Rs. 1000, awarded by the High Court to Rs. 30,000 for a delinquent subjected to three months illegal detention, the Supreme Court had held, "the payment of compensation in such cases is to be understood in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protracting the fundamental rights of citizens. The compensation is in the nature of the 'exemplary damages' awarded against the wrong-doer for the breach of its public law duty". No doubt Army Act is designed to achieve a high standard of discipline and therefore, action taken against defaulters should deter others. But humanitarian considerations do not deserve to be lost sight of. The words of TERENCE need to be remembered when he said that "extreme law is often extreme injustice". 94

⁹³ Article 14 (6) of ICCPR, 1966

⁹⁴ Sepoy Bhuwneshwar Singh v. Union of India, 1993 Cri LJ 3454 (SC)

The Supreme Court held that a person cannot be illegally detained in prison without any justification. If any person is detained illegally, he shall be entitled for compensation. The prisoners in India were the castaways of society and the prison authority showed a callous disregarded for human values it their behaviour with them and a total disregarded for their basic human rights. Their attitude and behaviour were an affront to the dignity of human beings. It is shocking that such a situation should prevail in any civilised country.⁹⁵

4.1.16.4 Right to compensation in case of death of prisoner during work :

In 1998, the NHRC, ordered State Government of UP for payment of compensation of Rs. 1,00,000/- where the undertrial prisoner was assigned work and the person died during discharging the work.⁹⁶

4.1.17 Right to apply for mercy and concessional application:

4.1.17.1 Right to mercy appeal (Pardon, suspension, etc.) :

The Constitution of India empowered the President by Article 72 and the Governor of the State by Article 161 to pardon any of the offenders in a mercy appeal to pardon any of the punishment or remit that sentence into other kinds of sentence or suspend the sentence. Even though, the Constitution has not explained any of the grounds on which pardon may be given or not given, it is presumed that this Hon'ble office can used this power discretionarily, but in the interest of justice only.

⁹⁵ Veena Sethi's case, AIR 1983 SC 339

Raval KC an article on "A Human Right approach to the Prisoners" 1999 Cr LJ. 33 (J)

4.1.17.2 Right to remission:

The periods which can be earned by way of remission are different in the different States. But, it is clear that all prisoners are entitled to get remission according to law enforceable in the State. This is the grace and not the right, which depends upon the character of the prisoners and circumstances of the case and seriousness of the grounds applied in the application.

4.1.17.3 Right to leave and special leave (Furlough and Parole):

All the prisoners have right to apply for the temporary release from the prison on the specified grounds mentioned in the local Act or Jail Manual, as the case may be. Jail administration is the State subject so there is not any Central Act or Guidelines prescribing the number of days for which a prisoner is eligible for a furlough or parole. Furlough and Parole are State subjects and Jail Manuals of different States are so old and confusing that their meanings are not at all clear. The Punjab and Haryana High Court held that, person convicted by the Court Martial is also entitled to seek parole for specific purposes, such as death or serious illness of a close relation and for treatment of serious disease. ⁹⁷

The Bombay High Court held that release of furlough is a legal and substantial right of the prisoner and denial of the same must be based on

⁹⁷ Sharad Keshav Mehta v State of Maharashtra, 1989 Cri LJ 681

material facts indicating that the same would disturb public peace and tranquillity. The court held that rejection of application is misconceived. 98

4.1.18 Rights of the children of mother inmates :

In the jails, some children are housed with their mothers, without any fault for which a prisoner is eligible for a furlough. So they deserve extra advantages than other inmates. Keeping in the mind, the Hon'ble Supreme Court held that "children of women inmates, who are in jail, require additional protection". In many respect they suffer the consequences of neglect. The Court has issued directions to ensure that the minimum standards are met by all States and Union Territories vis-à-vis the children of women prisoners living in prison. A child shall not be treated as an undertrial or convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right. 99 Births in prison, when they occur, shall be registered in the local birth registration office. But, the fact that child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

4.1.19 Prisoners' right to smoke:

Smoking is dangerous to health. This slogan is written on every packet of cigarettes then also we so-called literate people generally smoke, while understanding its bad effects. How can we expect from the accused person not to smoke? In Tihar Prison any articles like Tobacco, *Beedi*, Cigarette or any other drug or narcotics are strictly prohibited. But on the

99 RD Upadhyay v State of AP, AIR 2006 SC 1946

Ex-Sepoy Manjit Singh v Union of India, Cri Misc Petition No. 17437 of 1994

other hand, it is also correct that this prohibition increases the corruption among the prison staff.

The inmates in Gujarat jails are allowed to smoke in special smoking zones at special timings. According to jail officers, this was done to curb irregularities and corruption among the lower-rank officials, who have been alleged time and again of providing such articles to inmates at higher price than fixed by producers. The smoking was banned in Gujarat jails 10 years ago, to maintain prisoners' health standard. However, some officials and prisoners managed to bend the rules. They used various means to smuggle in cigarettes, bidees and tobacco products. In fact, report states that lower officials sold these products at almost ten times more than normal price". In Vadodara Central Jail cigarettes and beedis are supplied through the canteen and it has set-up a special zone for smoking. 100

4.2 Prison Staff and their duties:

The prison staff is doing a challenging task and always accompanied with the person of criminal nature, which is not bed of roses, but they always have to use their skill and commonsense with hard labour. It is not possible to sketch a line regarding the duties of prison staff and tie their hands by the laws. It is necessary that the prison staff should have some discretionary power to use common sense in the interest of justice or to fulfill their duties.

The jail administration in India is generally divided into categories, namely Central Jails, District Jails, Special Jails, Sub Jails and Open prisons. Central jails are housing all the prisoners convicted with death sentence or

¹⁰⁰ Times of India, Ahmedabad Ed., Nov 2004

imprisonment for life or long term imprisonment, which is generally five years, and all local convicts, undertrials and detainees. District Jails are generally in the headquarters of district and housing local convicted for medium imprisonment along with undertrials and detainees. Whereas, in Special Jail, some special kinds of prisoners are lodged i.e. hardened criminals, sick prisoners, etc. Sub-Jails are situated at *Taluka* level and housing the local prisoners convicted for very short period of imprisonment and along with undertrials and detainees. Open prisons are few with less capacity. In such kind of prison, prisoners are allowed to work with the society and left free with less control and less scrutiny. It is one kind of half way home. To maintain law and orders in these prisons, we have the following officers with their staff and law has given them special duties and responsibilities, which may be described as under.

4.2.1 Inspector General of Prison:

An Inspector General shall be appointed for the territories subject to State Government, and shall exercise, subject to the orders of such State Government, the general control and superintendence of all prisons situated in the territories under such Government. "Inspector General" means the Inspector General of Prisons. "Inspector General" is the principal authority of the Department of Prisons and Correctional Services as appointed and designated by the Government and vested with the powers and functions of Inspector General of Prisons, otherwise the Inspector General of Prisons of State. Every State has to appoint an Inspector General of Prisons in the State. Such an officer will exercise all the powers and be

¹⁰¹ Section 5 of the Prisons Act, 1894

Section 3 (7) of the Prisons Act, 1894

responsible for all the duties, imposed on him subject to the order of State Government, provided by the Prison Act enforceable in the State, expressly or impliedly.

For every prison there shall be a superintendent, a medical officer (who may also be superintendent), a medical subordinate, a jailer and such other officers as the State Government thinks necessary. Provided that the State Government of Bombay may declare by order in writing that in any prison specified in the order of office or jailer shall be held by person appointed to the superintendent. ¹⁰³

4.2.2 Superintendent:

The State Government is empowered to appoint superintendents of Presidency Prisons and such officers shall have authority to receive and detain prisoners committed to their custody. Any officer so appointed, by whatever designation he may be styled, is hereinafter referred to "as the Superintendent". ¹⁰⁴ He is in-charge of the Jail for the supervision and control and responsible to Inspector General of Prison.

Subject to the orders of the Inspector General, the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control. Subject to such general or special directions as may be given by the State Government, the Superintendent of a prison other than a central prison or a prison situated in Presidency-town shall obey all orders not inconsistent with this Act or any rule thereunder

Section 6 of the Prisons Act, 1894

Section 6 of the Prisoners Act, 1900

Section 11 of Prisons Act, 1894

which may be given respecting the prison by the District Magistrate, and shall report to the Inspector General all such orders and the action taken thereon. The Superintendent shall keep, or cause to be kept, the following records: -

- (i) a register of prisoners admitted;
- (ii) a book showing when each prisoner to be released;
- (iii) a punishment-book for the entry of the punishments inflicted on prisoners for prison offences;
- (iv) a visitor's book for the entry of any observations made by the visitors touching any matters connected with the administration of the prisons;
- (v) a record of the money and other articles taken from prisoners;
- (vi) all such other records as may be prescribed by rules under section 59.

All or any of the powers and duties conferred and imposed on a Superintendent may be in his absence be exercised and performed by such other officer as the State Government may appoint in this behalf either by name or by his official designation.¹⁰⁶

The Bombay High Court held that the principle of justice must be adhered to by the Superintendent himself and no other person. He must

Section 62 of Prisons Act. 1894

'examine" the prisoners himself. He cannot simply rely on a readymade statement that would not be an 'examination'. The enquiry is of a quasijudicial nature and includes the right of the prisoner to be heard, to be fully informed and to cross examine. Finally, the Superintendent must pass the reasoned order. In the instance case petitioner was punished by the prison authorities on account of an offence he had committed while serving a prison term.¹⁰⁷

4.2.3 Medical Officer and his duties:

"Medical Officer" means a qualified Civil Assistant Surgeon as appointed by the Government; and "Medical Subordinate" means an Assistant Surgeon, Apothecary or qualified Hospital Assistant. In other words, "medical subordinate" means a qualified hospital assistant as appointed by the Government.¹⁰⁸ Subject to the control of Superintendent, the Medical Officer shall have charge of the sanitary administration of the prison, and shall perform such duties as may be prescribed by rules made by the State Government under section 59.¹⁰⁹

Whenever the medical officer has reason to believe that the mind of the prisoner is, likely to be, injuriously affected by the discipline or treatment to which he is subjected; the Medical Officer shall report the case in writing to the Superintendent, together with such observations as he may

Danial H Walcott v. Superintendent, Nagpur Central Prison, 1971 Bom LR 436

¹⁰⁸ Section 3 (8) of Prisons Act, 1894

think proper. This report, with the orders of the Superintendent thereon, shall forthwith be sent to the Inspector General for information.¹¹⁰

The reading of section 15 of Prisons Act, 1894, states that on the death of the any prisoner, the Medical Officer shall forthwith record in a register, the following particulars so far as they can be ascertained, namely: -

- (i) the day on which the deceased first complained of illness or was observed to be ill,
- (ii) the labour, if any, on which he was engaged on that day,
- (iii) the scale of his diet on that day,
- (iv) the day on which he was admitted to hospital,
- (v) the day on which Medical Officer was first informed of the illness,
- (vi) the nature of disease,
- (vii) when the deceased was last seen before his death by the Medical Officer or Medical Subordinate,
- (viii) when the prisoner died, and
- (ix) (in cases where a post-mortem examination is made) an account of the appearances after death,

Section 14 of Prisons Act, 1894

together with any special remarks that appear to the Medical Officer to be required.

4.2.4 Jailer and his duties:

Where a Deputy or Assistant Jailer is appointed to a prison, he shall, subject to the orders of the Superintendent, be competent to perform any of the duties, and be subject to all the responsibilities, of a jailer under this Act or any rule thereunder.¹¹¹

The jailer shall reside in the prison, unless the superintendent permits him in writing to elsewhere. The Jailer shall not, without the Inspector General's sanction in writing, be concerned in any other employment¹¹² The jailer shall not be absent from the prison for a night without permission in writing from the Superintendent; but, if absent without leave for a night from unavoidable necessity, he shall immediately report the fact and the cause of it to the Superintendent.¹¹³

The jailer shall be responsible for the safe custody of the records to be kept by Superintendent, for the commitment warrants and all other documents confined to his care, and for the money and other articles taken from prisoners. Upon the death of a prisoner, the jailer shall give immediate notice thereof to the Superintendent and the medical subordinate.¹¹⁴

Section 20 of Prisons Act, 1894

Section 16 of Prisons Act, 1894

Section 19 of Prisons Act, 1894

¹¹⁴ Sections 17 & 18 of Prisons Act, 1894

4.2.5 Subordinate Officers:

The officer acting as the gate-keeper, or any other officer of the prison, may examine anything carried in or out of the prison, and may stop and search or cause to be searched any person suspected of bringing any prohibited article into or out of prison, or of carrying out of any property belonging to the prison, and, if any such article or property be found, shall give immediate notice thereof to the jailer. Officers subordinate to the jailer shall not be absent from the prison without leave from the Superintendent or from the jailer. Prisoners who have been appointed as officers of prisons shall be deemed to be public servants within the meaning of Indian Penal Code. 115

The officer in-charge of a prison shall receive and detain all persons duly committed to his custody, under this Act or otherwise, by any Court, according to the exigency of any writ, warrant or order by which such person has been committed, or until such person is discharged or removed in due course of law. The officer in-charge of a prison shall forthwith, after the execution of every such writ, order or warrant as aforesaid other than a warrant of commitment for trial, or after the discharge of the person committed thereby, return such writ, order or warrant to the court by which the same was issued or made, together with a certificate, endorsed thereon and signed by him, showing how the same has been executed, or why the person committed thereby has been discharged from custody before the execution thereof.¹¹⁶

¹¹⁵ Sections 21, 22 and 23 of Prisons Act, 1894

Sections 3 & 4 of Prisoners Act, 1900

Where any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to imprisonment or to death, the Court shall cause him to be delivered to the Superintendent together with its warrant, and such warrant shall be executed by the Superintendent and returned by him to the High Court when executed. All officers of a prison shall obey the directions of the Superintendent; all officers subordinate to the jailer shall perform such duties as may be imposed on them by the jailer with the sanction of the Superintendent or be prescribed by rules made under section 59. 117

No officer of a prison shall sell or let, nor shall any person in trust for or employed by him sell or let, or derive any benefit from selling or letting, any article to any prisoner or have any money or other business dealings, directly or indirectly, with any prisoner. No officer of a prison shall, nor shall any person in trust for or employed by him, have any interest, direct or indirect, in any contract for the supply of the prison; nor shall he derive any benefit, directly or indirectly, from the sale or purchase of any article on behalf of the prison or belonging to prisoners.¹¹⁸

4.3 Prison administration and their privileges:

The Hon'ble Supreme Court held that the court is reluctant to intervene in the day-to-day operation of the State penal system but undue harshness and avoidable tantrums, under the guise of discipline and security, again no immunity from court writs. The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of

Sections 7 & 8 of Prisons Act, 1894

Section 10 of Prisons Act, 1894

confinement. Moreover, the rights enjoyed by prisoners, under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situation arises.¹¹⁹

4.3.1 Shifting of prisoners from one State to another:

According to section 3 of the Transfer of Prisoners Act, 1950, where any prisoner is confined in a prison in a State (a) under sentence of death, or (b) under, or in lieu of, a sentence of imprisonment, or (c) in default of payment of a fine, or (d) in default of giving security for keeping the peace or for maintaining good behaviour, - the State Government of the State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State.

The officer in charge of the prison to which any person is removed, shall exercise and detain him, so far as may be, according to the exigency of any writ, warrant or order of the court by which such person has been committed or until such person is discharged or removed in due course of law.

The Supreme Court held that if the factual situation requires a prisoner or undertrial prisoner must be transferred from one prison to another, though the Jail Manual does not permit. The Supreme Court by using the power of Article 142 of the Constitution directed that, "the senior most officer-in-charge of jail outside State to make such arrangements as he thinks necessary to prevent the reoccurrence of the activities of the respondent and shall allow no special privileges to him unless the same is

¹¹⁹ Charles Sobaraj v Supdt Central Jail Tihar, AIR 1978 SC 1514

entitled in law. His conduct during his custody in such jail outside State will specially be monitored and if necessary be reported to Supreme Court. However, the respondent shall be entitled to the benefit of the visit of his family as provided for under the Jail Manual of such jail outside State. He shall also be entitled to such categorization and such facilities available to him in law. It is also that the trial of the case in transfer State shall continue without the presence of the appellant by the court dispensing such presence and to the extent possible shall be conducted with the aid of video-conferencing." ¹²⁰

4.3.2 Jail authorities are not free to impose solitary confinement:

The five judges bench of Hon'ble Supreme Court held by majority of 4-1, that sections 73 and 74 of the Indian Penal Code, don't leave any room for doubt that solitary confinement is by itself a substantive punishment, which can be imposed only by a court of law. It cannot be left to the whim and caprice of prison authorities. The limits of solitary confinement that can be imposed under court's order is strictly prescribed and that provides internal evidence of its abnormal effect on the subject. Human dignity is not to be ignored even in prison, solitary confinement and putting fetters, to be resorted to only in rarest of the rare cases for security reasons.

The Supreme Court also observed that bar fetters to a very considerable extent curtail, if not wholly deprive, locomotion which is one of the facets of personal liberty. Putting bar fetters for an unusually long period without due regard to the safety of the prisoner and security of the

¹²⁰ Kalyan Chandra Sarkar v Rajesh Rajan alias Pappu Yadav, AIR 2005 SC 972: (2005) 3
SCC 284

¹²¹ Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 · (1978) 4 SCC 494

prison would certainly not be justified under section 56. Particularly, it would be so when the medical opinion is that the bar fetters should be removed. The grounds for fetters should be given to the prisoner and the reason shall be recorded in the Superintendent's Journal and in the history ticket of the prisoner. The prolonged continuance of irons as a punitive or preventive step shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who shall briefly hear the victim and record findings. 122

Further, having regard to the scope of section 30 (2) of the Prisons Act, 1894, the Supreme Court held that persons in position of the petitioner are not to be completely segregated except in extreme case of necessity which must be specifically made out and that too after he is, in the true sense of the expression, a prisoner under the sentence of the death. The court laid down the following guidelines in this regard:

"(1) Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. If section 30 (2) of the Prisons Act enables the prison authorities to impose solitary confinement on a prisoner under death sentence, not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is one under sentence of death, the provision would offend Articles 14, 19 and 20. Further, if by imposing solitary confinement there is total deprivation of camaraderie among co-prisoners, it would offend Article 21.

¹²² Sunıl Batra v. Delhi Admınistration, AIR 1978 SC 1675 : (1978) 4 SCC 494

- (2) Section 30 (2) does not purport to provide a punishment for a breach of jail discipline. Prison offences are set out in section 45 and the power to deal with them has been vested in the superintendent under section 46 of the Act, which authorises him to put a prisoner in separate or cellular confinement.
- (3) Solitary confinement is by itself a substantive punishment, which can be imposed only by a court of law as provided in section 73 and section 74 of IPC.
- (4) Section 30 (2) merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners and he is to be placed day and night under the charge of a guard. Such confinement can neither be cellular nor separate and in any event it cannot be a solitary confinement.
- (5) The expression "prisoner under sentence of death" can only mean a prisoner whose sentence of death has been final and conclusive and indefensible, which cannot be annulled or voided by any judicial or constitutional procedure. To be "under sentence of death" means to be under a finally executable death sentence.
- (6) If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently; law is not a formal label, but a technique of justice. The IPC and the Code of Criminal Procedure regard punitive solitude as too

harsh and the legislature cannot be intended to permit preventive solitary confinement, released even from the restriction of sections 73 and 74 of IPC, section 29 of the Prison Act and the restrictive confinement, masked as safe custody, sans maximum limit, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Common sense quarrels with such non sense".

Again, the Hon'ble Supreme Court observed that flimsy ground like "loitering in the prison", "behaving insolently and in an uncivilized manner", and "tearing off history ticket" cannot be foundation for the torturesome treatment of solitary confinement and cross bar fetters. Keeping prisoners in separate solitary rooms for long periods from 8 to 11 months spells is long enough to be regarded as barbarous and would amount to breach of fundamental law laid down by the Supreme Court in Sunil Batra's case¹²³. Solitary confinement disguised as "keeping in separate cell" and imposition of fetters are not to be resorted to save in the rarest of the rare cases and with strict adherence to the procedural safeguards contained in the decision of the Supreme Court relating to the punishment of the prisoners.¹²⁴

The provisions of section 46 of Prisoners Act and Rule 79 (1) (f) and 46 of Rajasthan Prisons Rule, cannot be read in the absolutist expansionism. That would virtually mean that prisoners are not persons, to be dealt with at the mercy of the prison echelons. This country has not totalitarian territory even within the walled world, we can prison. The provisions of Articles 14, 19 and 21 operate within the prisons in the manner explained in the Sunil

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

¹²⁴ Kishor Singh v State of Rajasthan, AIR 1981 SC 625

Batra case.¹²⁵ If special restrictions of a punitive or harsh character like solitary confinement or putting fetters have to be imposed for convincing security reasons, it is necessary to comply with natural justice. Moreover, there must be an appeal from prison authority to a judicial organ when such treatment is meted out. Human dignity is a dear value of our constitution not to be bartered away for mere apprehensions entertained by jail officials.¹²⁶

4.3.3 Employment of prisoners:

4.3.3.1 Employment of civil prisoners:

According to section 34 of Prisons Act, 1894, civil prisoner may, with the Superintendent's permission, work and follow any trade or profession. Civil prisoners finding their own implements, and maintained at the expense of the prison, shall be allowed to receive the whole of their earnings, but the earning of such as are furnished with implements or are maintained at the expense of the prison shall be subject to deduction, to be determined by the superintendent, for the use of implements and the cost of maintenance.

4.3.3.2 Employment of criminal prisoners:

According to section 35 of Prisons Act, 1894, no criminal prisoner sentenced to labour or employed on labour at his own desire, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours on any one day.

The Medical Officer shall from time to time examine the labouring prisoners while they are employed, and shall at least once in every fortnight

¹²⁵ Sunil Batra v Delhi Administration, (1978) 4 SCC 494

¹²⁶ Kishor Singh v. State of Rajasthan, AIR 1981 SC 625

cause to be recorded upon the history ticket of each prisoner employed on labour the weight of such prisoner at the time. When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on the labour but shall be placed on such other kind or class of labour as the medical officer may consider suited for him.

In the case of rigorous imprisonment, the offender was put to hard labour such as grinding corn, digging earth, drawing water, cutting fire wood, bowing wool, etc. Now the day has gone when rigorous imprisoned doing hard labour such as grinding corn, digging earth, drawing water, cutting fire wood, bowing wool are not there as they are asked to perform comparatively less rigorous work, usually reformative and rehabilitative.

Imprisonment is given as a punishment, not for the punishment. Brutal punishment hardly corrects; rather, it brutalises both the criminal and the community and hardens the attitude of the former towards the conventional society.

4.3.3.3 To extract labour without wages is unconstitutional:

The Hon'ble Supreme Court held that labour taken from prisoners without paying proper remuneration was "forced labour" and violative of Article 23 of the Constitution. The prisoners are entitled to payment of reasonable wages for the work taken from them and the court is under duty to enforce their claim. ¹²⁷ In another case, the Hon'ble Supreme Court held that no prisoner can be asked to do labour without wages. It is not only the

¹²⁷ Surjit Roy v. State of Rajasthan, AIR 1983 SC 328

legal right of a workman to have wages for the work, but it is a social imperative and an ethical compulsion. Extracting somebody's work without giving him anything in return is only reminiscent of the period of slavery and the system of *begar*. Like any other workman a prisoner is also entitled to wages for his work.¹²⁸

In the same case the court held that, it is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners the State concerned shall constitute a wage fixation body recommendations. We direct each State to do so as early as possible. Until the State Government takes any decision on such recommendations every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixed in the light of the observations made above. For this purpose Supreme Court directed all the State Governments to fix the rate of such interim wages within six weeks from today and report to this court of compliance of this direction.

4.3.3.4 Employment of prisoner sentence to rigorous imprisonment :

The Hon'ble Supreme Court held that it is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do or not. Jail authorities are enjoined by law to impose hard labour on a particular section of the convicted prisoners who were sentenced to rigorous imprisonment. The jail authority, who was compelling the prisoners sentenced to rigorous imprisonment to do hard labour, cannot be

¹²⁸ State of Gujarat v. Hon'ble High Court of Gujarat, AIR 1998 SC 3164

said to have committed the offence under section 374 of the IPC. So, the task to do labour can be imposed on a prisoner only if he has been sentenced to rigorous imprisonment.¹²⁹

The Hon'ble Supreme Court observed that "hard labour in section 53 of the IPC has to receive a humane meaning. A girl student or a male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day. The prisoners cannot demand soft jobs but may be obliged with congenial jobs. Sense and sympathy are not enemies of penal asylums.¹³⁰

4.3.3.5 Employment of prisoner sentenced to simple imprisonment, detenues or undertrial :

According to section 36 of Prisons Act, 1894, provision shall be made by the Superintendent for the reemployment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment; but no prisoner other than sentenced to rigorous imprisonment shall be punished for neglect of work excepting such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner.

It means all the prisoners sentenced to simple imprisonment or civil imprisonment or detenue, cannot be forced to do the labour, but free to do, if they desires for it. However, jail authority is not empowered to punish them for neglect of work. Similarly, it was held by Hon'ble Supreme Court that a person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. It is open to the jail officials to permit

¹²⁹ State of Gujarat v. Hon'ble High Court of Gujarat, AIR 1998 SC 3164

other prisoners also to do any work which they choose to do, provided such prisoners make a request for such purpose. Neither the undertrial internees nor the detainees with simple imprisonment nor even detenues, who are kept in jails as preventive measures cannot be asked to do manual work during their prison term. It is a different matter that he is allowed to do it at his request. Along with that the Supreme Court recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoners, either directly or through a common fund to be created for this purpose or in any other feasible mode.¹³¹

4.3.3.6 Undertrial prisoner cannot be asked to work outside the jail :

The Supreme Court observed that it is surprising how the four petitioners could be asked to work outside the jail walls when they are not convicted but merely undertrial prisoners. This would be in flagrant violation of Prison Regulations and contrary to the ILO Conventions against forced labour. We direct the Superintendent to immediately remove leg irons from the feet of the four petitioners. We also direct that no convict or undertrial prisoner shall be kept in leg irons except in accordance with the *ratio* of the decision of Sunil Batra's case (1978).¹³²

132 Kadra Pehadiya v. State of Bihar, AIR 1981 SC 939

¹³¹ State of Gujarat v Hon'ble High Court of Gujarat, AIR 1998 SC 3164

4.3.4 Validity of 'bar fetter' by Superintendent:

The Hon'ble Supreme Court held that, Article 21 of the Constitution forbids deprivation of personal liberty except in accordance with the procedure established by law and curtailment of personal liberty to such an extent as to be negation of it would constitute deprivation. Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and therefore, before such erosion can be justified, it must have the authority of law. Here the Superintendent is having authority under section 56 of Prisoners Act, 1894. Therefore, to confine a prisoner in iron by superintendent is not violative of Articles 14 and 21 of the constitution. 133

Further, the Hon'ble Supreme Court held that the treatment of a human being which offends human dignity, imposes avoidable torture, and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14. Now putting bar fetters for an unusually long period without due regard for the safety of prisoner and the security of the prison would certainly be not justified under section 56. It was found in this case that the medical opinion suggested removal of bar fetters and yet it was alleged that they were retained thereafter. Therefore, section 56 does not permit the use of bar fetters for an unusually long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable. Now that bar fetters of the petitioner have been removed and question of re-imposing them would not arise until and unless the requirement therein delineated and the safeguards herein provided are observed.

Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

4.3.5 To keep the police guards and electric live-wire around the jail :

The petitioners, who were naxalite undertrial prisoners, were undergoing the sentence in the central jail Vishakhapatnam. They contended that the armed police guards posted around the jail and the live-wire electrical mechanism fixed on the top of the jail was an infringement of their right to life and personal liberty guaranteed by Article 21 of the Constitution. The court, however, held that the convicts were not deprived of their fundamental rights by the posting of the police guards outside the jail. 146 Naxalite prisoners were lodged in jail as a result of which usual watch and ward arrangement provided was inadequate. Some prisoners had escaped from the prison. It was decided thereafter to take adequate measures preventing the escape of the prisoners from jail. The court said "a convict has no right, more than anyone else to dictate, where guards are to be posted to prevent the escape of prisoners. The installation of live-wire mechanism does not offend their rights. It is a preventive measure intended to act as a deterrent and cause death only if a prisoner causes death by scaling the wall while attempting to escape from lawful custody. The installation of live-wire does not by itself cause the death of the prisoner. 134

4.3.6 Court should not sponge into internal affairs of the jail administration :

The Supreme Court has observed that the penological goals which may be regarded as reasonable justification for restricting the rights to move freely within the confines of penitentiary are now well settled. If, the

¹³⁴ DBM Patnaik v State of Andhra Pradesh, AIR 1974 SC 2092

prisoners have been entitled to rights guaranteed by Articles 19, 21 and 14, subject to certain limitations, there must be correlation between deprivation of freedom and legitimate functions of a correctional system. It is now well settled, that deterrence, both specific and general, rehabilitation and institutional security are vital considerations. Compassion whether possible and cruelty only where inevitable is the art of correction confinement. When prison policy advances such a valid goal, the court will not intervene officiously.¹³⁵

The Hon'ble Gujarat High Court held that the High Court cannot sponge into internal affairs of the jail administration under Article 226 of the Constitution. How to manage and regulate the jail administration is essentially and entirely a concern and look-out of the jail authorities and as long as the orders passed by them are just, fair and proper, this Court has no right or business to meddle with the same and thereby in the internal affairs of the Prison Administration. We are conscious of our widely extraordinary powers under Article 226 of the Constitution of India and more than that we are further conscious of our restraints and bounds of unwarranted trespasses into the realm of administrative affairs, where the impugned order is found to be just, fair and proper. 136

4.3.7 Adopt and follow the release of convicts on temporary bail:

The Hon'ble Gujarat High Court directed jail authorities to adopt and follow the release of convicts on temporary bail to perform sacred ceremonies, etc. The court said that – "we are quite sorry being unable to

¹³⁵ Charles Sobaray v. Supdt Central Jail Tihar, AIR 1978 SC 1514

¹³⁶ Motisinh Kesrisinh v State of Gujarat, (DB) 1994 Cr. LR (Guj) 396

help the convict prisoner", may be his cause is genuine, but we have refused to take any risk with the overall social security in our mind. With a view to see that in future in some genuine deserving cases a father who is undergoing imprisonment shall not denied temporary bail, the Jail Authorities are hereby directed: (i) to notify on the *notice board* that any person intending to move the Court for temporary bail on the ground of marriage of his/her daughter or any other indispensable grounds shall move the concerned court at least before 15 days, (ii) to furnish along with bail application (for temporary bail) - the remark sheet of the convict prisoner, (iii) immediately call for police opinion if necessary, (iv) to state on which background the alleged offence took place for which he came to be convicted and sentenced. Accordingly if application for temporary bail is not moved on or before 15 days, the same may not be entertained and for that the petitioner shall have to think himself. These directions shall be carried out immediately in each and every jail of the State without any exception. ¹³⁷

4.3.8 Creation of Victim Welfare Fund and Prisoner Welfare Fund:

The Supreme Court recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoners, either directly or through a common fund to be created for this purpose or in any other feasible mode. The Hon'ble Gujarat High Court also has suggested that, it is high time to create a consolidating the Victim Welfare Fund on a statutory

¹³⁷ Bhurabhai G B D Vadher v State of Gujarat, (DB) 1997 Cr LR (Guj) 385

State of Gujarat v Hon'ble High Court of Gujarat, AIR 1998 SC 3164

basis, such funds can well be administered by a council or a board named "Victim Welfare Board or Crime Victim Service Council". The payment of compensation may be left to the discretion of such statutory authority. There is high time for an Indian legislation for providing victim assistance and compensation and guidelines for a scheme and as restitution for working in an effective statutory framework for victimological, rehabilitative project in our country. 139

State of Gujarat has created a fund in all the jails called "Prisoner Welfare Fund" with effect from 1st October, 2003. This fund is used for welfare activities conducted in prison.¹⁴⁰

4.3.9 Constitution of Visitor's Board:

The Supreme Court attracted the attention of the Government and observed that the visitor board should consist of cross-sections of society people with good background, social activists, people connected with the news media, lady social workers, jurists, retired public officers from the judiciary as also the executive. The Session judge should be given an acknowledged position as visitor and his visits should not be routine ones. Full care should be taken by him to have a real picture of the defects in the administration qua the resident prisoners and undertrials.¹⁴¹

4.3.10 Care of lunatic prisoners:

According to section 30 of Prisoners Act, 1900, following are the provisions relating to lunatic prisoners –

¹³⁹ State of Gujarat v. Raghu, 2003 Cr LR (Guj) 393 · 2003 (1) GLR 205

official website of Gujarat prison

Sanjay Suri v. Delhi Administration, 1998 (Suppl.) SCC 160

- (a) Where it appears to the State Government that any person detained or imprisoned under any order or sentence of any Court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State, there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned, or, if on the expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.
- (b) Where it appears to the State Government that the prisoner has become of sound mind, the State Government shall by a warrant direct to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison, from which he was removed, or to another prison within the State, or, if the prisoner is no longer liable to be kept in custody, order him to be discharged.
- (c) The provisions of section 9 of the Lunatic Asylums Act, 1959, shall apply to every person confined in a lunatic asylum after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned; and the time during which a prisoner is confined in a lunatic asylum under that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been ordered or sentenced by the Court to undergo.

(d) In any case in which the State Government is competent to order the removal of a prisoner to a lunatic asylum or other place of safe custody within the State, the State Government may order his removal to any such asylum or place within any other State or within any part of India to which this Act does not extend by agreement with the State Government of such other State; and the provisions of this section respecting the custody, detention, remand the discharge of a prisoner removed shall, so far as they can be made applicable, apply to a prisoner removed.

4.3.11 Jail authority to take proper care of ailing convicts:

The Gujarat High Court directed the jail authorities to take proper care of ailing convicts, where petitioners convicted in the Central Prison, Vadodra were suffering from serious ailments but were deprived of proper and immediate medical treatment for want of jail escorts required to carry them to Hospital. The Gujarat High Court expressed shock and called I.G. Prison and Additional Chief Secretary, both of whom acted with promptness and issued necessary directions in this regard and held that negligent Officers were personally liable. 142

4.3.12 Mischief in entry of visitors allowed in jail, held conspiracy:

Detenue held 'darbar' inside the jail throwing lavish parties. Meeting of jail inmates was allowed without following norms relating to entry of visitors to jail. Records of such entries were not maintained by jail authorities. Conspiracies were hatched inside the jail with the help of

Rasıkbhaı Ramsing Rana v. State of Gujarat, 1997 Cr LR (Guj) 442

unauthorised visitors. Jail authorities showed total casualness towards the illegal activities inside the jail. The Bombay High Court held that said activities were not possible without the active cooperation of officials. The court imposed exemplary costs on Additional Chief Secretary, Commissioner of Police, Inspector General of Prisons, and superintendent of jail. In addition, an order was passed to launch criminal prosecution against jail Superintendent and other jail officials. 143

The Supreme Court in appeal case went into the seriousness of the case and directed the State Government to conduct in-depth enquiry within six months, and appropriate remedial measures and actions to be taken on the basis of reports of periodical inspection of the jail, submitted by judicial officer. The Supreme Court disposed off the appeal with the following directions –

- (i) Judicial Officers shall go for inspection of jails periodically. The disturbing features noticed in the case at hand shall be kept in view by them while they make the inspection and appropriate remedial measures and actions shall be taken on the basis of reports, if any submitted by the concerned officers.
- (ii) The Government may consider the appointment of the Commission headed by former judge of Supreme Court to be assisted by a former Inspector General of Prisons and DG Police to probe into the nature of such lapses and explore the possibilities of effectively curbing their recurrence and devising methods and means to prevent them by appropriate statutory

State of Maharashtra v. Asha Arun Gawalui, AIR 2004 SC 2223

provisions of rules, to sufficiently meet the exigencies of the situation.

4.3.13 Court is guardian of their sentences:

The Hon'ble Supreme Court held that it would intervene with prison administration when constitutional rights or statutory prescriptions are transgressed to the enquiry of the prisoner but it declines to intervene where lesser matters alone are involved. Of course, where a prison practice or internal instruction places harsh restriction on jail life, breaching guaranteed rights the court directly comes in every prison sentence is a conditioned deprivation of life and liberty, with civilized norms built in and unlimited trauma interdicted. In this sense, judicial policing of prison practices is implied in the sentencing power. This criminal court has thus a duty to guard their sentences and visit prisons when necessary.¹⁴⁴

The Hon'ble Supreme Court in Sunil Barta¹⁴⁵ case issued some specific guidelines as follows -

- (1) That the petitioner's torture is illegal and he shall not be subjected to any such torture until fair procedure is complied with.
- (2) No corporeal punishment or personal violence on the petitioner shall be inflicted.

¹⁴⁴ Charles Sobaraj v. Supdt. Central Jail Tihar, AIR 1978 SC 1514

Guidelines were issued in Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 and reiterated in Sunil Batra v. Delhi Administration, AIR 1980 SC 1579

- (3) Lawyers nominated by the District Magistrate, Session Judge, High Court and the Supreme Court will be given all facilities to interview, right to confidential communications with prisoners, subject to discipline and security considerations. Lawyers shall make periodical visits and report to the concerned court the result of their visit.
- (4) Grievance boxes shall be maintained in jails which shall be opened by DM and the Sessions Judges frequently. Prisoners shall have access to such boxes.
- (5) District Magistrate and Session Judges shall inspect jails once every week, and shall make enquiries into grievances and take suitable remedial 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 Sessions Judge.

4.3.14 Permission to allow press to interview with undertrial inside the jail :

The Hon'ble Supreme Court held that where the trial of the accused was pending before the Additional Sessions Judge, it cannot be said that he had no authority to issue permission to the press to interview the undertrial inside the jail. However, there cannot be any dispute with the proposition that the order granting permission to the press to interview and undertrial cannot be passed mechanically without application of mind. Inasmuch as the

court granting permission will have to weigh the competing interest between the right of press and the right of the authorities prohibiting such interview in the interest of the administration of the justice. The court, therefore, before disposing of an application seeking permission to the interview as undertrial in jail must notice the jail authorities and find out whether there can be any justifiable and weighty reasons denying such interviews. The court should also try to find out whether any restrictions or prohibitions are contained in the Jail Manual. The so-called permission granted by the court would be subject to the irrelevant Rules and Regulations contained in the Jail Manual dealing with the rights and liabilities of the undertrial prisoners. No court would pass such a blanket order mechanically without applying its mind to the relevant factors, as the press does not have an unfettered right to interview an undertrial prisoner in jail. 146

4.3.15 Difference between preventive and punitive detention:

The Supreme Court held that there is vital distinction between "preventive detention" and "punitive detention". "Punitive detention" is intended to inflict punishment on person, who is found by the judicial process to have committed an offence. While "preventive detention" is not by way of punishment at all, but it is intended to prevent a person from indulging in such behaviour which is injurious to the society. Having regard to this distinctive character of a preventive detention, the restrictions placed on a person preventively detained must consistently with the effectiveness of distinction, be minimal. 147

¹⁴⁶ State through Supdt Jail, Delhi v Charulata Joshi, 1999 C. L.J 2273

¹⁴⁷ Francis Coralie Mullin v Delhi Administration, AIR 1981 SC 746

Again, the Supreme Court held that a preventive detention is not punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated; and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society.¹⁴⁸

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Maliyakkal Abdul Azeez v Assistant Collector, Kerala, (2003) 2 ILD 920 (SC)