RIGHTS OF THE PRISONER: AN EVOLVING JURISPRUDENCE

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DECLARATION

I declare that the thesis entitled **"Rights of the Prisoner: An Evolving Jurisprudence"** is the record of bona fide research carried out by me under the supervision of **Dr.R.Prasannan**, Member, National Commission for Backward Classes, New Delhi in the Department of Law, Cochin University of Science and Technology. I further declare that this has not previously formed the basis of the award of any degree, diploma, associateship, fellowship or other similar title of recognition.

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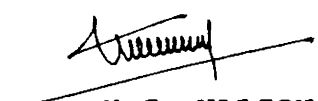

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CERTIFICATE OF THE RESEARCH GUIDE

Certified that to the best of my knowledge the Thesis, "**Rights of the Prisoner : An Evolving Jurisprudence**", is the record of bonafide research work carried out by **Mr.M.C.Valson**, in the Department of Law, Cochin University of Science and Technology under my supervision.

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PREFACE

Prison has become a great concern for all recently. In the eighties the judiciary examined the problems of prison administration in several decisions. The subject has been discussed by jurists too. These developments were the result of the new awakening in the field of human rights in the international community. The atrocities in Bihar jails, especially the blinding cases, persuaded the courts to think seriously about the conditions in jails. Questions came before them in more ways than one. Besides formal writ petitions, simple letters from prisoners or other concerned individuals as well as newspaper articles written by social activists moved the courts to take activist stance. Courts had granted many rights to the prisoners by reading them into Article 21. This thesis makes an attempt to identify these rights and to evaluate the contributions of the courts in evolving the prisoner rights jurisprudence.

The thesis consists of an introduction and eleven chapters. The introduction focuses on the objective of the study. The first chapter gives an historical and

comparative perspective. The subsequent two chapters highlight the constitutional protection of prisoners in India and the growing dimensions of their rights. The classification of prisoners is the topic of chapter four. The class of prisoners sentenced to death is discussed in chapter five. Undertrial prisoners and their rights form chapter six. Prison labour is in chapter seven. How far prison labour can be designed on the basis of individual needs and inclinations are also probed in this chapter. Standards to be maintained for remission, commutation, pardon are the concern of chapter eight. Criteria for parole is examined in chapter nine. An empirical study is made with respect to the open prison in Kerala. This forms part of the tenth chapter. Conclusions and suggestions are in the last chapter.

During my study I got immense help from different persons. Dr.R.Prasannan, Member, National Commission for Backward Communities has guided me in this study. His scholarly guidance and keen interest in the work has encouraged me at every stage of this academic pursuit. I am greatly indebted to him for this. I also express my deep gratitude to Professor P.Leekakrishnan, Dean, Faculty

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CONTENTS

Introduction

INTRODUCTION

Imprisonment is the most common method of punishment resorted to by almost all legal systems. History stands proof to its employment in ancient times.[1] Initially, the purpose of imprisonment was two-fold -- deprivation of the prisoner of social life and his segregation from the society as a security measure. In course of time, however, several purposes such as deterrence, incapacitation and reformation[2] came to be recognised. Even if it does not have any deterrent value, imprisonment atleast compels the prisoner to sit at leisure, repent his past conduct and then probably to change his attitude and behaviour.[3]

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1. Prison system which is a method of handling criminals was the result of historic accidents. It was not a carefully thought out plan. The great prison in Rome was built by Pope Innocent X in 1655. There were generalised institutions for the care of criminals. The Seventeenth and Eighteenth centuries saw the rise of "Prisons", "Jails", "Houses of correction", etc. See John Lewis Gillin, Criminology and Penology (1977), p.372.
2. There is deterrence, but without naked terror, there is prevention, but by methods that are generally regarded as just: there is reform, but by way of expiation rather than by cure; there is education, both in knowledge of the laws themselves and in the need to recognise the rights of others; and there is public denunciation too. H.B.Action (Ed.), The Philosophy of Punishment (1969), p.28; J.D.Mc Clean and J.C.Wood, Criminal Justice and Treatment of Offenders (1969), pp.85-87.
3. V.N.Rajan, Whither Criminal Justice Policy? (1983), p.178.

There have been frequent enquiries into the purposes of punishment by the courts as well as the academics throughout the world. Retribution, deterrence, expiation, reformation or rehabilitation are generally considered to be the purpose of punishment. Since imprisonment is almost the universal form of punishment, the purposes of punishment came to be identified as the purposes of imprisonment as well.[4] This situation made the institution of imprisonment a bad one or better one depending upon the purpose one attributes to it.

Retribution, perhaps the most ancient and foremost purpose of punishment, came to be explained in a very popular but unfortunate statement: 'an eye for an eye and a tooth for a tooth'. For the man in the street it is the crude form of revenge the society which takes upon the offender. When the institution of imprisonment originated the purpose was nothing but retribution. Incarceration was taken as a form of revenge upon the offenders for the sins.

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4. Imprisonment may be analysed according to the subject which it is designed to serve: to hold the prisoner until he can be tried, to punish him after he has been convicted, or to make life unpleasant for him that he yields to his captor's will. In the first case it will be custodial, in the second punitive, and in the third coercive. The three types tend to merge and in the middle ages were never clearly kept apart. See, Ralph P.Pugh, Imprisonment in Medieval England (1968), p.1.

Extraction of pain for the infraction of the society's rules was considered as legitimate, adequate, proper and educative. This led to the strict attitude towards the prisoners. For acts of violation of social interests, the offenders were denied the benefits of community living. In the past, society had hardly any soft corner to the lot of prisoners. Consequently, they were kept away from the social mainstream. This gave an impression that they constituted an inaccommodative minority bent upon the destabilizing societal order.

New theories of crime causation and new approaches to punishment emerged in the earlier part of the nineteenth century. The old free will theory[5] and hedonism[6] were submerged in the flow and the focus was shifted from the individual to the society.[7] The problem

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5. Cesare Beccaria was the exponent of this theory. He deliberately ignored questions regarding the individuals motives and in any event considered them unimportant since he believed that all people have a free will and in this sense are alike. See John F.Galliher and James L.Mc Cartney, Criminology (1977), p.110.
6. It is often referred to as the hedonistic calculus. Jeremy Bentham was the exponent of this theory. He viewed people possessing a free will. According to him the criminal laws should prescribe punishment just severe enough to offset the pleasure people receive from committing a criminal act. See Galliher and Mc Cartney, op.cit., p.110.
7. See Edwin H.Sutherland and Donald R.Cressy, Criminology (1978), pp.77-98.

of crime began to be considered not as individual problem of criminals but as a social problem of eradicating the evils that fell upon society. This change transformed the societal attitude towards the offenders.

It was often argued that the individual offenders were not responsible for becoming criminals and that societal imbalance opens the path of crime. Logical extension of this theory makes the society responsible to look after the criminals. Inevitably it calls for a change of attitude -- a change from oppressing the already depressed lot of criminals to a clearer understanding and liberal accommodation of the deviants into the society. It was a shift from cruelty to kindness, from revenge to benevolence. The international human rights movements added impetus to this development. In what manner does this affect the concept of imprisonment?

While retribution supports harsh methods, rehabilitative techniques call for a kind attitude which conforms with the achievement of the purpose - rehabilitation. Rehabilitation was one of the purposes of punishment in the latter half of the nineteenth century. Consequently the need was felt to change the attitude

towards the prisoners. Old habits die hard. The change did not take place swiftly. The established institutions were reluctant to adopt the new attitudes towards rehabilitation. This confused situation coupled with the difficulty in understanding the real purpose of imprisonment hardly inspired the administration for taking up correctional programmes.

Relevance of the Study

A prison constitutes a walled world of its own. Generally speaking, a prisoner is a person who is confined in prison or kept in custody as the result of legal process by competent authority. In popular parlance, a prisoner is an offender, a threat to societal order and personal security -- a person safest in institutionalised cells isolated from the world outside.[8] He is held in confinement against his will for deviant behaviour or as preventive measure. He is best forgotton once he is locked away. Resounding tales from within prison walls find little sympathy.

A free citizen outside has opportunities to seek relief from wherever he can when he needs it. But a

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8. G.Ramaswamy, "Human Rights in Prison Justice", in E.S.Venkataramiah (Ed.), Human Rights in the Changing World (1988), p.169.

prisoner cannot cross the walls of the prison; life and activity are confined within it. What happens within the prison is not known to the outside world. The prison officials have absolute control over the life and activities of the inmates. The common belief is that the life within the prison is itself a routine and monotonous one, completely devoid of any variety or change or choice. A prison outside have manifold ways open to him to end his miseries and sufferings. A prisoner is denied that liberty. The result is that the life of a prisoner is a life without any hope or prospect of any relief. Under these circumstances, the prisoners should certainly be the object of pity and sympathy to the outside world. Definitely they should be allowed to have some rights.

Prisoner Rights: The Problem

When a person is put 'behind bars' he loses many of his rights. The hypothesis is that a sentence of imprisonment does not automatically extinguish all legal rights of a prisoner. Except the rights deprived to the person by the incarceration, some residuary rights remain. A person's liberty is circumscribed by the very fact of his confinement. The full panoply of fundamental rights cannot be enjoyed by him, but the physical restrictions imposed on

him may not be more than reasonably necessary for security.[9]

Different class of persons inside prisons, undertrials and detainees have various rights. How the scope and content of each type of prisoner rights are determined by courts? What are the standards adopted by the courts in this approach? This study has mainly focussed upon the rights of the convicted prisoners. However, the rights of other classes of prisoners are also probed into. The consequences of conviction and the scope of the rights after conviction are analysed in the light of a comparative perspective of UK and USA. New prisoner rights are to be evolved out of such a comparative study.

Conviction in the form of a sentence of imprisonment undermines the family cohesion and security, destroys the prospects of legal earning for himself and family and results in loss of employment and assets.[10]

A convicted prisoner loses his right to vote. The usual justification for the loss of the right to vote

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9. V.R.Krishna Iyer, A Constitutional Miscellany (1986), p.153.
10. Leon Radzinowiz and Marvin E.Wolfgang, Crime and Justice (1971), p.4.

as a consequence of conviction is that anti-social elements should not take part in the political life of the country. The quantum and nature of such loss differs from country to country. It is true that after conviction what rights the prisoner does retain is a controversial topic.[11] The attitude of the judiciary differs from country to country. But everywhere the rights of prisoners are a recognised fact though the scope varies.

In theory, the most serious impact of imprisonment is the loss of liberty. If the prisoner is equipped with constructive training when he is discharged from prison after punishment he could lead a good and useful life. But the official view stands contrary to this development. It indicates that in practice many a prisoner who at the end of a long sentence is in a state of bewilderment and fear as to what the future will hold for them.[12] The social stigma will continue. The innocent dependents will also be affected by this stigma.

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11. James Inciardi, Criminal Justice (1987), p.592.
12. See Justice M.M.Ismail Commission Report (1977), p.184. It is significant to note the following statement of J.D.Mc Clean and J.C.Wood: "It is difficult to avoid the pessimistic conclusion that all this experimentation with forms of sentence is carried out on the outer fringes of the problems. It is possible that the use and form of imprisonment will one day be radically affected by the results of psychological research. It is becoming clearer that certain types of personality are likely to respond to firm discipline in institutions not unlike present prisons; and that other types of personality require wholly different treatment methods. But work in this field is in its infancy". op.cit., p.139.

A prisoner is deprived of many things than his liberty. Some of them are inevitable results of institutional treatment. How can they be alleviated? What are the practices existing in different systems?[13]

In many countries alternatives to imprisonment are being explored.[14] Instead of sending the prisoners directly to the prison, they are sent to attendance centres and weekend detention or semi-detention centres depending upon the nature of the crime and the character of the offender. Are these innovative techniques feasible in Indian context? Probation has become a very useful means of reforming the first and young offenders and preventing him from being contaminated by the hardened criminals in jail life. The stigma attached to his incarceration prevents him from seeking and getting an employment. He will be a suspect and be subjected to surveillance by the police and wherever he goes, his previous incarceration

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13. At present in England many prisoners serving relatively long terms have one short period of home leave near the end of their sentence. It is intended to be used in seeking employment and making other arrangements for release. In many countries regular home leaves are allowed at intervals throughout the sentence. See J.D.Mc Clean and J.C.Wood, op.cit., p.141.
14. Stanton Wheeler, "Socialization in Correctional Institutions", in Leon Radzinowicz and Marwin E.Wolfgang (Eds.), The Criminal in Confinement (1971), pp.97-116 at p.97.

will be a disqualification for any employment and may even make him a person shunned by the rest of the society. It is in this context, the necessity for effective aftercare is recognised[15] and it is carried out in some countries under official auspices and in certain other countries by voluntary organisations with the assistance of official agencies.[16] Are the present correctional and rehabilitative techniques adequate? In this study the prisoners' rights with regard to the aftercare services are also looked into.

In this context it will be relevant to indicate the broad prevalent thinking on this subject matter. Mahatma Gandhi observed in 1947:[17]

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15. After care is considered to be the released prisoner's convalescence. It is the process which carries him from artificial and restricted prison life to the satisfactory citizenship, resettlement and ultimate rehabilitation in a free society. Hence, the institutional education, training, life, treatment and post-release assistance etc. is a continuous process and it should form an integral part of any correctional work. See James Vadukumcherry, Criminology and Penology (1983), p.244.
16. Some of the voluntary organisations that are active in the State of Kerala are "Snehashramom", Monvila, Trivandrum, "Snehashramom", Vettukadu, Thrissur, and "Jesus Fraternity" at Asir Bhavan, Kacheripady, Ernakulam. See A Convict Prisoner v. State of Kerala, 1993 (1) K.L.J. 902 at p.910.
17. The said thoughts of Mahatma Gandhi was echoed by Justice V.R.Krishna Iyer in his inaugural address at the Sixth Annual Conference of the Indian Society of Criminology at Madras on the 25th March, 1977. He stated: "Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals - mental and moral - is the key to the pathology of delinquency and the therapeutic role of punishment". Ismail Commission Report (1977), p.186.

> "Criminals should be treated as patients in hospitals, and jails should be hospitals admitting such patients for treatment and cure. The outlook of the jail staff should be that of physicians in a hospital. The prisoners should feel that the officials are their friends".

These words reflect the conception of treating the prison as a hospital-cum-educational institution. The aim of imprisonment is to restore the imprisoned man to ordinary standards of citizenship. Unless the period of imprisonment is properly used to change the antisocial outlook of the offender and to bring him into a more healthy frame of mind he will, on leaving the prison gates, again become a danger or a nuisance to the society. Thus the functions of the twentieth century prison have become as of educative and reformative. How far these principles are put into practice in India? This is another focus of the study.

Evolving Prisoner Rights Jurisprudence

It was from the beginning of this century that the prisoners were recognised as societal human beings who should be made useful to the society. The Universal

Declaration of Human Rights recognises that the individual is entitled to certain basic rights. The universal norm is that human rights are sacrosanct regardless of the individual. It is therefore imperative to recognise that prisoners too are human beings, and as human beings they are entitled to certain basic rights even while in incarceration. Deprivation of prisoner's liberty is a serious in-road into the existence and exercise of human rights. In the light of this international developments various rights of prisoners are recognised in USA, UK and other western countries. They are analysed in detail. An enquiry is also made to see how far they are relevant in Indian conditions.

While making an enquiry about the prisoners' rights special attention has been given to the rights such as access to courts and legal services; protection against personal abuse; healthy surroundings; non-discriminatory treatment; rehabilitation; grievance procedures; free expression and association; exercise of religious beliefs and practices; access to the public; and remedies for violation of the offenders' rights. A detailed enquiry is made into these rights in the context of the purpose of imprisonment and specific needs of different classes of

prisoners. Justice Krishna Iyer has aptly indicated the need of a national prisoner rights policy in the new situation. He said:[18]

> "A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through a technology of fostering the fulness of being such a creative art of social defence and correctional process activising fundamental guarantees of prisoner's rights, is the hopeful note of national prison policy struck by the Constitution and the court".

Strictly speaking there are no specific guidelines or policy. The scope and extent of the rights of the prisoners are the matters of judicial interpretation. With judicious caution, the Indian Supreme Court has examined a variety of reliefs that could remedy the wrong done to the individual. The beacon light was Article 21 of the Constitution of India which declares that: "No person shall be deprived of his life or personal

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18. V.R.Krishna Iyer, A National Prison Policy--Constitutional Perspective and Pragmatic Parameters (1981), p.7.

liberty except according to a procedure established by law". What are the judicial approaches in the evolution of the prisoner rights in India? The study focusses its attention on the multifaceted aspects of the evolving rights of prisoners.

CHAPTER 1

Origin and Development of the Concept of Prisoner Rights

Chapter 1

ORIGIN AND DEVELOPMENT OF THE CONCEPT OF PRISONER RIGHTS

Over a period of time there had been new awakening of prisoner's rights throughout the world. More and more rights were recognised as part of the world human rights movement. An examination of the historical evolution of the rights of prisoners will help to get the proper meaning and content of those rights in the present day context.

United States of America (USA)

Till very recently in some states of USA a person convicted of a crime was considered to be legally dead.[1] The conditions of incarceration and every aspect of institutional life were left to the unregulated discretion of the prison administrators.[2] But only a few states invoke such a harsh form of humiliating treatment. Most

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1. James Inciardi, Criminal Justice (1987), p.592.
2. See James Inciardi (1987), op.cit., p.586. The courts maintained a hands off position regarding correctional matters. They unequivocally refused to consider inmate complaints regarding the fitness of prison environments, the abuse of administrative authority, the constitutional deprivations of penitentiary life, and the general conditions of incarceration.

states, however, deprive the convicted men of some civil rights.[3] Depending upon his residence he may find himself deprived of one or more of the rights like the right to vote, the right to testify as a witness or serve as a juror, the right to hold an office, the right to make a contract etc.[4] Prisoners will not be allowed to retain or enjoy unlimited personal possessions while in prison.

American courts were reluctant to recognise the existence of prisoner's rights at earlier times. This reluctance has contributed to the dehumanising conditions which have existed in prisons there.[5] Judicial intervention into the prison conditions provided the impetus for reform. It restricted the abuses of discretionary power, by correctional authorities. Ultimately, it emphasised the ties between the community and the offender. The belief that the inmates have a place in the society was also established.[6] Realisation of these principles would require adherence to a humanistic view, a new perception of the prisoner as a human being and as

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3. Barness and Teeters, New Horizons in Criminology (3rd Ed.), pp.544, 545.
4. Ibid.
5. See James Inciardi (1987), op.cit., p.586.
6. See Gianno F.Vito and Judith Hails Kachi, "Hands on or Hands Off? The use of Judicial Intervention to Establish Prisoner's Rights" in Nicoletti Parisi (Ed.), Coping with Imprisonment (1982), p.78 at p.79.

someone having rights as well as obligations. Despite the proposed benefits of such a conception of prisoner's rights, several factors have coalesced to prevent its growth and expansion. For most of this century in USA, the courts have subscribed to a "hands off" policy regarding the rights of prisoners.[7] In effect, the judiciary abdicated their responsibility as arbiters of the constitution and left the control of all the internal operations of the prison in the hands of correctional authorities.[8] The courts were reluctant to introduce

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7. "Hands off" Policy means the following: The Courts concerned themselves mainly with protecting the rights of persons accused of a crime rather than with defining the rights of those already convicted. The general notion was that the judiciary should not interfere with the executive function of prison administration. The second is the fear that judicial review of administrative decisions will seriously interfere with the ability of prison officials to carry out the objectives of the penal system. Richard P.Vogelman, "Prison Restrictions - Prisoner Rights" in Leon Radzinowicz and Marvin E.Wolfgang (Ed.), The Criminal in Confinement (1971), p.52. The shift from hands-off to hands on was brought about by several factions that had common goals. Increasingly militant and volatile inmates, many of whom saw themselves as political prisoners, stubbornly insisted on having their day in court. See Gerald D.Robin, Introduction to the Criminal Justice System (1980), p.385.
8. There are several reasons for the adoption of this doctrine of judicial non-intervention in correctional affairs. The first is the societal demand for retribution. The common feeling is that incarceration involves the forfeiture of rights. As a consequence of his crime, the prisoner has, not only forfeited his liberty, but all of his personal rights except those which the law in its humanity accords him. He is for the time being the slave of the State. See Gennaro F.Vito and Judith Hails Kachi, "Hands On or Hands Off? The use of Judicial Intervention to Establish Prisoner's Rights" in Nicoletti Parisi (Ed.), Coping with Imprisonment (1982), p.79 at p.80.

impediments to the correctional process, since judges felt that they were lacking the expertise necessary to run a prison. Their greatest fear was that a judicial order will somehow serve to subvert prison discipline and internal security. Apart from that the courts generally cited the separation of powers doctrine which made the operation of the penal system a responsibility of the legislative and executive branches of the government. Adherence to these arguments has allowed the judiciary to bow to the discretionary authority of correctional administrators.

There are some significant judicial pronouncements by the U.S. Supreme Court which clarifies various aspects of prisoner rights there. A U.S. Supreme Court decision in Lanza v. New York[9] indicates that none of the private property rights associated with life in the outside world are likely to have any relevance to prison life. Right of privacy to a certain extent is deprived to the prisoner while he is inside the prison. Mr.Justice Stewart of the U.S. Supreme Court stated that the right of privacy can hardly obtain in prison, for it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.[10] In prison,

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9. 370 U.S. 139 (1962).
10. Id., p.143.

official surveillance has traditionally been the order of the day. The necessity of a thorough search on prisoners has been pointed out in the same case. Prison security necessitates extreme restrictions on access to and possession of personal property.[11]

Although convicted of crimes, and legitimately deprived of their rights, prisoners retain a residue of constitutional rights. It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil righs. Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others.[12] To protect these rights, the Supreme Court has recognised that prisoners have a constitutional right of access to the courts.[13] This right of access includes a right to legal assistance.[14] This has been established beyond reasonable

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11. In the same case the court has observed that a thorough search should be made of all packages to prevent forbidden articles being smuggled into the jail. The number of articles permitted to be taken into the jail should be kept to the minimum. Saws have been secreted in bananas, in the soles of the shoes, under the peaks of caps, and drugs have been secreted in cap visers, under postage stamps on letters, in cigars and various other ways. See ibid.
12. See Houchins v. K.Q.E.D.Inc., 438 U.S.I. (1978).
13. See Bell v. Wolfish, 441 U.S. 520 (1979), at 557.
14. Raymond Y.Lin, "A Prisoner's Constitutional Right to Attorney Assistance", 83,Columbia Law Review (1983), p.1279.

doubt in Bounds v. Smith[15]. Bounds held that prisoners are constitutionally entitled to be provided with either access to law libraries or help from persons trained in the law. This case also recognised that some obstacles to access, whether in the prison regulations or in the rules and laws governing the courts, could be removed by imposing a duty of assistance upon the state. In Bell v. Wolfish[16] the U.S. Supreme Court specifically recognised prisoners privacy rights as fundamental.

Under American law person's rights are supreme and may be taken away only by due process of law.[17] A common truism of correctional philosophy is that the penal law and correctional treatment have two consistent purposes - treatment of the offender and the protection of the public. Another common saying is that the treatment of the offender should be individualised, that is, it should be appropriate for him. Thus it can be seen that beginning in the 1960s and gaining momentum in the 1970s, the U.S. Supreme Court proved receptive to prison suits.[18] At present various rights has been recognised and prisoners

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15. 430 U.S. 817 (1977) at 821.
16. 441 U.S. 520 (1979) at 557.
17. Eighth Amendment of U.S. Constitution.
18. Gennaro F.Vito and Judith Hails Kachi, "Hands On or Hands Off? The use of Judicial Intervention to Establish Prisoner's Rights", in Nicoletti Parisi (Ed.), Coping with Imprisonment (1982), p.79 at 89.

can approach the judiciary for getting these rights enforced. But the prisoners' rights are necessarily tempered both by the fact of their confinement and by the legitimate needs of penal administration.[19]

England

In England also the development of prisoner rights jurisprudence is a gradual process, and it was recognised as a specific right recently. When an offender was convicted, originally the presumption was that he has forfeited all his rights. The common belief was that virtually anything could be done with an offender in the name of correction and punishment.[20] A prisoner was under the mercy of correctional administrators and their staff. Whatever comforts, services or privileges the offender received were a matter of grace of the prison officials. For a long time nobody was bothered about the brutalities going on within the jails. Inhumane conditions and practices were permitted to develop and continue in many systems. A gradual change in this regard was visible from the beginning of this century. A new attitude came up with regard to prisoner's right.

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19. Douglas W.Dunham, "Inmates' Rights and the Privatisation if Prisoners", 86 Columbia Law Review, p.1476 at 1481.
20. Paul F.Cromwell, Jails and Justice (1976), p.267.

In the beginning the rule was that the court has no authority to interfere with regulations of punishment imposed upon a person. Civil rights were lost automatically. Automatic loss of rights can be justified only if it serves some universally useful purpose in rehabilitating the defendant or protecting the public.

At present in England a sentence of imprisonment does not automatically extinguish a prisoner's right.[21] All public and private legal disabilities of convicted prisoners have been abolished, except that they are disenfranchised for the duration of their sentences.[22] A person sentenced to more than a year's imprisonment in the United Kingdom is disqualified for membership of the House of Commons while serving the sentence; and the seat of a member of the House of Commons who becomes disqualified by virtue of such sentence is vacated.[23]

The ordinary civil and criminal law operates in prisons and governs prisoners and prison staff, subject only to the special legislative provisions governing penal establishments and their inmates. Inspite of his

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21. 37 Halsbury's Laws of England (1982), p.746.
22. Criminal Justice Act 1948, S.70.
23. 37 Halsbury's Laws of England (1982), p.747.

imprisonment, a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication.[24] Prisoners are subject to a special regimen and have special status; but they remain invested with residuary rights pertaining to the nature and the conduct of their incarceration.[25]

There may arise situations where injuries may be caused to prisoners as a result of the misdeeds of other prisoners. A prisoner who suffered inconvenience and detriment as a result of breach of prison rules was having no cause of action for damages against prison authorities.[26] A breach of the rules does not in itself created any civil liability. There is no statutory duty which incurs to a prisoner's benefit, so that he can bring an action for infringement, and a breach of the rules cannot be relied on to establish or support a cause of action.[27] Thus it was a settled law in England that a breach of the rules did not entitle a prisoner to sue for damages.

Even this earlier position has now changed. Courts have taken a different view. They have held that

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24. Raymond v. Honey, [1982] 1 All E.R. 756 at 759.
25. R v. Board of Visitors of Hull Prison ex parte Germain, [1979] Q.B. 425 at 454.
26. Arbon v. Anderson, [1943] K.B. 252.
27. Ibid.

they do have jurisdiction to make declarations as to the "true meaning" of the Prison Rules and they have been prepared to analyse the Prison Rules closely in order to determine the legality of the actions of the prison authorities.[28] A particular rule has been even said to confer a right on a prisoner.[29] Prisoners must, by Article 10 of the Civil Rights covenant be treated with humanity and with respect for the inherent dignity of the human person. Except to the extent that their other rights are expressly or by necessary implication limited, prisoners still continue to have such rights.[30]

Thus there is a legal duty upon the government to take reasonable care for the safety of the prisoners. Where a prisoner sustains injury at the hands of another prisoner in consequence of the negligent supervision of prison authorities, the authorities are liable.[31] the prison authorities also owes a duty of care to the members

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28. See Hancock v. Prison Commissioners, [1959] 3 All E.R. 513 at 516; Guilfoyle v. Home Office, [1981] 1 All E.R. 943 at 949; William v. Home Office, [1981] 1 All E.R. 1211 at 1248.
29. Raymond v. Honey, [1982] 1 All E.R. 756 at 759.
30. Id., at 758 per Lord Diplock. But litigation by convicted prisoners asserting their such rights conceived from Lord Denning a consistently chilly reception. See J.L.Jowell and J.P.W.B.Mc Austin (Ed.), Lord Denning: The Judge and the Law (1984), p.304.
31. Ellis v. Home Office, [1953] 2 All E.R. 149 at 153.

of the public, and an action will lie where property is damaged by prisoners which result from negligence on the part of the authorities.[32] While a person is undergoing imprisonment his right to sue for torts committed in relation to his person remain intact. They are as effective as any person outside the bars. He cannot sue for torts to his property since it vests in the crown by statute. This is based on the principle that even a convict remain the Queen's subject, and does not become her enemy merely by breaking the law.[33]

The concept of prisoner's rights in England is comparatively a modern phenomenon.[34] It is the result of the pragmatic approach of judicial officers who have been greately influenced by the American prisoner's right movement and certain human rights conventions in the past decades. As there are no formal declarations of the rights of prisoners, the courts through the process of the

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32. Home Office v. Dorset Yacht Co.Ltd., [1970] 3 All E.R. 294.
33. B.S.Sinha, Law of Torts (1976), pp.115, 116.
34. But the philosophy of prisoner rights is an ancient concept. Julius Stone says: "A first group of reforms in a line descending through Montesquieu and Beccarie to Bentham, was in criminal law and administration resulting in the elimination of many unnecessary cruelties or in Benthanis terms unnecessary pain. They included the beginnings of prison reforms, of reform of lunacy laws, laws for the protection of children and animals and for the emancipation of slaves".

judicial activism have provided certain minimum protection to prisoners there. Apart from that fair treatment will enhance the chances of rehabilitation also. The need for better after care of discharged prisoners was recommended by Gladstone Committee.[35]

Other Countries

Very few countries explicitly provide that conviction of certain offences entails loss of citizenship. But disenfranchisement sometimes attaches to conviction of specific offences, sometimes as mandatory, at other times at the discretion of the judges. Thus for instance, in Norway, the judge may deprive the convict of the right to vote only upon conviction of particular offences and with the further proviso that this disqualification be required in public interest.[36] Similar provisions are found in Ethiopean Penal Code.[37]

In many countries, the disqualification from voting is only temporary. In others, the disqualification

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35. R.M.Jackson, "Prison Administration", 10 Cambridge Law Journal, 32 at 36. One of the remarkable contribution to the reformation of the British Prison System was the report of Gladstone Committee. It is considered as the most important and far reaching document in prison history.
36. Mirjan R.Damaska, "Consequences of Conviction in Various Countries", in Leon Radzinowicz and Marvin Wolfgang (Ed.), The Criminal in Confinement (1971), p.41 at 43.
37. Ibid.

may often be permanent.[38] Some countries provide for loss of the right to vote only while the convict is imprisoned. The disqualification, in other words, does not outlive the execution of the sentence. This limited disqualification is found in Japan, Spain, England and various Canadian jurisdictions.[39]

International Sphere

Way back in Europe, the Assembly of the League of Nations stressed the aspect of readaptation of offenders as a means of reclamation.[40] Then the long night of gas chambers came. Since Hitler's fall the ideology of human rights within the prison bars has risen high. The U.N. Charter has put human rights on a high footing than ever before and has spawned new penological thinking on prisoner's personhood and consequential rights.

Standard Minimum Rules for the treatment of Prisoners were drafted and they were accepted by the United Nations after world war II. This paved ground for discussion on this crucial issue at international level in subsequent years.

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38. For example in France it is a permanent feature. See ibid.
39. Ibid.
40. See V.R.Krishna Iyer, A Constitutional Miscellany (1986), p.153.

In 1948 the General Assembly of United Nations adopted a Universal Declaration of Human Rights. This document is one of the major and basic documents on human rights. Eventhough, it is not generally binding instrument, the articles contained in this document are basic principles of law and represent the elementary considerations of humanity. It provided certain basic principles of law which should be applied by the courts in the process of administration of justice. These principles embodied certain remarkable concepts like equality of treatment, right to life, liberty and security of person and freedom from torture, cruel, inhuman or degrading treatment. By declaring in explicit terms the rights that must be respected in every person, it provides the ambience and the content for a sensitisation on the issue of human rights.[41] Subsequently the U.N. General Assembly by consensus has adopted the Declaration of Protection from

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41. Article 5 of Universal Declaration of Human Rights reads as follows: "No one shall be subjected to torture or cruel, in human or degrading treatment or punishment". It is not and legally binding provision. The articles contained in the Universal Declaration of Human Rights are either basic principles of law or represent the elementary considerations of humanity. This declaration has been regarded as a part of the law of United Nations, by General Assembly. This declaration has been considered as a landmark in the history of human rights and fundamental freedoms. See Naresh Kumar, Constitutional Rights of Prisoners (1986), p.10.

Torture 1975.[42] These declarations are valuable guidelines for the prisoner's rights.

Amnesty International in 1955 adopted certain standard rules for the treatment of prisoners. These rules form certain basic principles of law in most of the democratic countries. It provides for the segregation of prisoners on the basis of age, sex, nature of punishment and the gravity of the offence committed. The rules also condemned the punishments like solitary confinement, reduction in diet and other heavy deprivative measures used by the prison authorities as a punishment for prison offences. The rules also speak of social rehabilitation and aftercare programme of the prisoners. Thus various conventions on Human Rights guarantees to every person freedom from torture.[43] If the courts are receptive to the grievances of prisoners it will resolve individual and collective prison problems.[44]

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42. The Declaration of Protection from Torture was adopted on 9th December 1975. Article 2 of the Declaration reads: "Any act of torture or other cruel, in human or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purpose of the charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights".
43. Commonwealth Secretariat, Judicial Colloquium in Bangalore, 24-26 February 1988, Developing Human Rights Jurisprudence (1988), p.172.
44. Nicoletti Parisi, "The Prisoner's Pressures and Responses" in Nicoletti Parisi (Ed.), Coping with Imprisonment (1982), p.9 at 17.

Prisoners' Rights in India

In India also the status of a prisoner and the rights granted to him are almost the same as that of England and USA. His movements are restricted and some disabilities are imposed upon the prisoner. Various restrictions are imposed upon the exercise of the fundamental rights also. Conviction of certain offences also result in the loss of civil rights.[45] But unlike in England a convict is unable to sue for torts in India.[46] No permanent voting disqualification exists in India. It is only for the period of imprisonment.

History of prisoners and prison administration goes back even prior to the enactment of the Prison Act and Prison Manuals. Concern for the betterment of conditions of prisoners have been attempted in India from earlier times in various legislations. Legislations that deals with the prisoners in India are Prisons Act 1894, Prisoners' Act 1900, Transfer of Prisons Act 1950 and Prisoners (Attendance in Courts) Act 1955. Apart from the specific legislations, Articles 14, 19 and 21 of the

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45. Section 10(d) of the Citizenship Act 1955 prescribes that a citizen by naturalisation or registration loses his citizenship if he has, within five years of its acquisition, been sentenced in any country to imprisonment for a term not less than two years.
46. Sinha, op.cit., p.1116.

Constitution of India are also very much relevant with regard to prisoner's rights. In Kerala, the Travancore-Cochin Prisons Act 1950 extends to the area of the whole of the erstwhile State of Travancore-Cochin. Central Act 9 of 1894 applies to the Malabar District of the erstwhile State of Madras.

Prisons Act 1894 and Prisoners Act 1900 were enacted at a time when prison was intended to be a torture house with a dehumanising environment. Prison reform was not visible on the horizon at that time. More important at that time was discipline and control, not rehabilitation and socialisation. What demanded special attention was the subject of offences inside prisons and their punishment. Correctional treatment, with the new orientation of making offenders non-offenders was irrelevant. Irons on prisoners, security in prisons, award of punishment etc. claimed legislative priority. Naturally, the absence of the Indian Constitution gave the central legislature absolute power of disposal of prisoners. It can be seen that the British government gave scant regard to the human rights principles to prisoners. This was in tune with their philosophy of prison administration as a tool for oppression of their opponents. But when the permanent law,

which created rights came to govern lesser legislations the court, true to its oath to uphold the constitution, had to reinterpret the provisions of the Prisons Act so as to obliterate the absolutism of the British Indian Prison Administration and to broaden the meaning in such a manner that the paramountcy of constitutional provisions was read into the text of the Prisons Act.[47] It was this process which produced revolutionary changes in the area of prisoner rights through various case laws. Women and children in 'protective custody', mentally ill persons unable to find a place in mental hospitals, undertrials who had spent years in prison without trial having commenced against them - these and many more of distinctive qualities have claimed the attention of the Indian Supreme Court.

In the Indian Constitution the human rights principles are given a prominent place. Later developments in prisoners rights truly reflect the constitutional goals and ideals. The Supreme Court has dealt with prisoner rights in an elaborate manner in Sunil Batra (I) v. Delhi

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47. V.R.Krishna Iyer, A National Prison Policy - Constitutional Perspective and Pragmatic Parameters (1981), p.36.

Administration[48] upon a writ petition under Article 32 of the Constitution. Here it was laid down that a court sentence does not deprive the prisoner of his fundamental rights. The Constitution Bench in Sunil Batra cases laid down important principles regarding the status of prisoners. The constitution bench brushed aside the "hands off" prison doctrine, upheld the fundamental rights of prisoners, though circumscribed severally by the reality of lawful custody. The fundamental rights did not forsake prisoners, and that the penological purpose of sentence was reformatory eventhough deterrent too.[49] Further it was explained that the courts has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by the prison administration.[50]

At present the court need not adopt a "hands off" attitude in regard to the problem of prison administration in India.

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48. There are two cases of the same facts. Sunil Batra (I) v. Delhi Administration, A.I.R. 1978 S.C. 1675. Sunil Batra (II) v. Delhi Administration, A.I.R. 1980 S.C. 1579. (1980) 3 S.C.C. 488. The legality of section 56 of the Prisons Act 1894 was challenged on the ground that it violated article 14 and 21 of the Constitution because it empowered the superintendent to confine a prisoner in irons, on the ground that the impugned section conferred unguided and uncanalised power on the superintendent.
49. Sunil Batra (I) v. Delhi Administration, A.I.R. 1978 S.C. 1675.
50. Ibid.

The inadequacy of prison administration and ill-treatment of prisoners has invited criticism not only from academics but from official bodies as well. An overview of the existing studies and reports relating to prisoner rights shows that there is preponderance of publications; but they relate to certain specific aspects like prison administration, prison atrocities etc.

Committee Reports

In India the first committee on the subject of prisons reforms was appointed in 1836 with Lord Macaulay as the member. Though this committee advocated increased rigour of treatment of prisoners and rejected all reforming influences, nevertheless its advocay of proper buildings, health care and intramural employment laid the foundation of future progress.

The next committee to deal with the subject was appointed in 1864. There was a conference of experts in 1877 to enquire into prison administration. In 1888-89 another committee was appointed to examine jail administration and on the basis of its report, the Prisons Act 1894 and the Prisoners Act 1900 and other statutes dealing with prisons were passed.

The most comprehensive study of the prison administration in all its aspects was done by the Indian Jails Committee in 1919-20 which examined the conditions of prisons not only in India but also in England, Scotland, U.S.A., Japan, Philippines and Hong Kong.[51]

In the meantime, the Government of India sought assistance of the United Nations for the deputation of an expert to study the prison administration in India. Accordingly, Dr.W.C.Reckless visited India in 1951 and made several valuable suggestions such as revising boards for the selection of prisoners for premature release and the introduction of legal substitute for short sentences.

In 1956, the Government of India set up the All India Jail Manual Committee which prepared the Model Prison Rules in 1959 mainly for the guidance of the State

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51. The Committee recommended that the reformation and rehabilitation of offenders should be the main objective of prison administration and care of criminals should be entrusted to officers who have received adequate training. They suggested that short term imprisonment should be replaced by probation, fine or warning or other substitutes such as work in lieu of imprisonment.

Governments. But except the state of Maharashtra, no other state has completely revised the jail manuals on the basis of the said Model Rules.[52]

The Ismail Committee in which submitted its report in 1977 mainly dealt with allegations of ill-treatment and beating.[53] Along with that it has made some suggestions for prison reforms, rights of the prisoners and other ancillary matters: The Committee has recommended that scientific classification of prisoners and diversification of institutions are essential for treatment programmes in prisons.[54] Dealing with delay and indifference to prison reforms, Justice Ismail said that so long as prisoners have not been cast out of society and they continue to be members of the society, though segregated temporarily, but are expected to rejoin the mainstream of the society after their release, it is the duty of the State to spend for their rehabilitation,

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52. See Report of the Tamil Nadu Prison Reforms Commission (1979), p.7.
53. On 12th May 1977, the Tamil Nadu Government constituted a Commission of Inquiry consisting of Honourable Justice M.M.Ismail to enquire into and report about the alleged ill-treatment and beating of political prisoners in Madras Central Prison. The learned judge submitted his report in September 1977. See Report of the Commission of Inquiry appointed to Inquire into the incidents of Beating and Ill-treatment alleged to have taken place in the Central Prison, Madras during February 1976 to February 1977.
54. Justice M.M.Ismail Commission Report (1977), p.193.

reformation and re-entry into the mainstream of the society.[55]

The Government of India, concerned at the large number of undertrial prisoners in Indian jails, has brought to the notice of the Law Commission the need for undertaking suitable judicial reforms and changes in the law, in order to deal with the problem posed thereby. The Commission has recommended speedy investigation of the case.[56] It highlighted the need to liberalise provisions for release on bond.[57] It also suggested separate places of detention for undertrial prisoners.[58]

The Tamil Nadu Prison Reforms Commission[59] has suggested that all persons deprived of their liberty shall still be entitled to be treated with humanity and with respect for the inherent dignity and rights of human person.[60] Accused persons shall, save in exceptional

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55. Id., p.194.
56. Law Commission of India, 78th Report (1979), p.16.
57. Id., p.21.
58. Id., p.25.
59. It was constituted by G.O.MS No.397/Home Department dtd.17th February 1978. The Committee consisted of the following persons:
    Chairman - R.L.Narasimhan
    Members - S.M.Diaz and Dr.A.Venkoba Rao.
60. Report of Tamil Nadu Prison Reforms Commission (1979), p.10.

circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.[61] Short term prisoners should also be given useful work, so that they may not remain idle and given wages.[62] The Committee made some progressive suggestions with regard to women prisoners. The co-operation of public spirited, dedicated social workers and voluntary organisations should be enlisted for rehabilitation of female prisoners released from prisons.[63]

Justice A.N.Mulla Committee of Jail Reforms has suggested setting up of National Prison Commission as a continuing body to oversee modernisation of prison in India.[64] It has suggested that the existing diarchy of prison administration at Union and State level should be removed.[65] The Committee specially recommended a total ban on the heinous practice of clubbing together juvenile offenders with the hardened criminals in prisons.[66] According to its suggestion the classification of prisoners

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61. Ibid.
62. Id., p.30.
63. Id., p.47.
64. Justice Mulla Committee was appointed by the Union Ministry and the Committee submitted its Report on Jail Reforms to Home Ministry on 31st March 1983.
65. Justice Mulla Committee Report.
66. Ibid.

central location in the prison.[70] Socio-legal and emotional support to women inmates should be extended through a socio-legal counselling cell and by means of legal aid camps held in prison.[71]

More recently the Estimate Committee of the 9th Kerala Legislature made some valuable suggestions with regard to the rights of prisoners in the State of Kerala.[72] According to the committee taking into consideration the new refommative objective of imprisonment sufficient opportunities must be provided for interview of the prisoners.[73] Prison labour can be made more profitable and useful if provisions are made for distributing work according to the ability and taste of the prisoner.[74] The Committee made an important recommendation to the government suggesting enhancement of punishment for those prisoners who violates conditions of parole.[75]

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70. Ibid.
71. Ibid.
72. P.M.Aboobecker was the Chairman of the Committee. Ishaq Kurikkal, E.E.Ismail, A.Kanaran, K.Krishnankutty, K.Mohammadali, K.K.Ramachandran Master, Therambil Ramakrishnan, T.Sivadasa Menon, V.M.Sudheeran and C.F.Thomas were members of the Committee. The Committee submitted its report on 28th January, 1993. See 9th Kerala Legislature Estimate Committee (1991-93) Report.
73. 9th Kerala Legislature Estimate Committee (1991-93) Report p.5.
74. Id., p.10.
75. Ibid.

The study shows that Judiciary was much cognisant of prisoners rights in all countries. Contribution of legislation was not substantial. It can be seen that the judciary was influenced by the deliberations and recommendations made in the international human rights conventions. Apart from the international conventions the recommendation made by various Prison Reforms Committees in Indiaalso influenced Indian Judiciary especially the apex court. This is clear from the judgement delivered by the Supreme Court in relation to prisons rights.[76] The judiciary made many inroads in to this arena of prisoner rights through a value oriented interpretation of the provisions contained in the Indian Constitution.

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75. Ibid.

CHAPTER 2

Prisoner Rights: Constitutional Perspective

Chapter 2

PRISONER RIGHTS: CONSTITUTIONAL PERSPECTIVE

The fundamental rights guaranteed under the Constitution are not absolute and many restrictions have been imposed on their enjoyment. Right to freedom of person is one of the most important rights among the fundamental rights.[1] When a person is convicted or put in prison his status is different from that of an ordinary person. A prisoner cannot claim all the fundamental rights that are available to an ordinary person. The Supreme Court of India and various High Courts in India have discussed the scope in various decisions. Before discussing these decisions it is necessary to see various constitutional provisions with regard to prisoners rights.

Statutory Provisions

There is no guarantee of prisoner's right as such in the Constitution of India. However, certain rights

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1. The right to freedom of the person comprises the following:-
   Article 20(1) protection against ex-post facto laws;
   Article 20(2) protection against double jeopardy;
   Article 20(3) privilege against self incrimination,
   Article 21 protection of life and personal liberty;
   Article 22(1 to 3) protection in case of arrest,
   Article 22(4 to 7) safeguards in case of preventive detention.
   The fundamental rights under Article 19 are conferred only on citizens, but the discussed above are available to all persons, whether citizens or not.

which have been enumerated in Part III of the Constitution are available to the prisoners also because a prisoner remains a "person" inside the prison.[2] The right to personal liberty has now been given very wide interpretation by the Supreme Court.[3] This right is available not only to free people but even to those behind bars. The right to speedy trial[4], free legal aid[5], right against torture[6], right against in human and degrading treatment accompany a person into the prison also.

One of the important provisions of the Constitution of India which is generally applied by the courts is article 14[7] in which the principle of equality is embodied. The rule that "like should be treated alike" and the concept of reasonable classification as contained in article 14 has been a very useful guide for the courts to determine the category of prisoners and their basis of classification in different categories.

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2. See Sunil Batra v. Delhi Administration, A.I.R. 1980 S.C. 1579.
3. Infra n.12.
4. Infra n.53.
5. Infra n.65.
6. Infra n.66
7. Article 14 reads:- "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Article 19 of the Constitution guarantees six freedoms to the citizens of India. Among these certain freedoms like 'freedom of movement', 'freedom to reside and to settle' and freedom of profession, occupation, trade or business" cannot be enjoyed by the prisoners because of the very nature of these freedoms and due to the condition of incarceration.

But other freedoms like "freedom of speech and expression", "freedom to become member of an association" etc. can be enjoyed by the prisoner even behind the bars and his imprisonment or sentence has nothing to do with these freedoms. But these will be subjected to the limitations of prison laws.

Article 21 of the Constitution has been a major centre of litigation so far as the prisoners' rights are concerned.[8] It embodies the principle of liberty. This provision has been used by the Supreme Court of India to protect certain important rights of prisoners. After Maneka Gandhi[9] case, this article has been used against

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8. Article 21 provides:- "No person shall be deprived of his life or personal liberty except according to the procedure established by law".
9. A.I.R. 1978 S.C. 597.

arbitrary actions of the executive especially the prison authorities. After that decision it has been established that there must be fair and reasonable procedure for the deprivation of the life and personal liberty of the individuals. The history of judicial involvement in prison administration shows that whenever the prison officials have subjected the inmates to brutal treatment the courts have intervened to protect their rights. The issue of prison conditions and environment has emerged as one of the predominant themes of correctional philosophy raising questions concerning inmate's rights and fate of prison life.

Originally the treatment of prisoners inside the prisons were cruel and barbarous. When a person was convicted, it was thought that he lost all his rights. The prison community was treated as a closed system and there was no access to outsiders in the affairs of the prisoners. The authorities under the guise of discipline were able to inflict any injury upon the inmates. The scope of judicial review against the acts of prison authorities was very restricted. The courts were reluctant to interfere in the affairs of the prisoners; it was completely left to the discretion of the executive. But gradually a change was visible.

Right to Fair Procedure

When we trace the origin of the prisoner's right in India, the embryo we can find in the celebrated decision of A.K.Gopalan v. State of Madras.[10] One of the main contentions raised by the petitioner was that the phrase "procedure established by law" as contained in article 21 of the Constitution includes a 'fair and reasonable' procedure and not a mere semblance of procedure prescribed by the State for the deprivation of life or personal liberty of individuals.

The majority view in Gopalan was that when a person is totally deprived of his personal liberty under a procedure established by law, the fundamental rights including the right to freedom of movement are not available. It was held:[11]

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder....In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard

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10. A.I.R. 1950 S.C. 27.
11. Id., p.93 per B.K.Mukerjee, J.

> the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties".

Another important decision was State of Maharashtra v. Prabhakar Pandurang.[12] In Pandurang the court held that conditions of detention cannot be extended to deprivation of other fundamental rights consistent with the fact of detention. The respondent was detained by the government in the district prison of Bombay in order to prevent him from acting in a manner prejudicial to the defence of India, public safety and maintenance of public order. While he was inside the jail he wrote with the permission of the government a book in Marathi under the title "Anucha Antarangaat" which means inside the atom. The book was purely of scientific interest and it did not cause any prejudice to the defence of India, public safety or public order. The detenue applied to the government and the Superintendent for the permission to send the manuscript out of the jail for publication; but both were rejected. On approaching the High Court, it held that

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12. A.I.R. 1966 S.C. 424.

there were no rules prohibiting a detenue from sending a book outside the jail with a view to get it published. The High Court held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenue to carry on his activities within the conditions governing his detention.[13] It further held that there were no rules prohibiting a detenue from sending a book outside the jail with a view to get it published.[14] Supreme Court also affirmed the decision of the High Court and held that the said conditions regulating the restrictions on the personal liberty of a detenue are not privileges conferred on him, but are the conditions subject to which his liberty can be restricted.[15]

In D.B.M. Patnaik v. State of Andhra Pradesh[16], the Supreme Court categorically asserted that convicts are not by the mere reason of their detention, denuded of all the fundamental rights they possess. In Patnaik the petitioners were undergoing their sentences in the central jail, Visakapatnam. They were also at the same time

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13. Id., p.425.
14. Ibid.
15. Ibid.
16. A.I.R. 1974 S.C. 2093.

prisoners under trial in what is known as the Parvathipuram Naxelite Conspiracy Case.[17] The petition was filed for the removal of the armed police guards posted around the jail and for dismantling live wires electrical mechanism fixed on the top of the jail-wall.[18] The Supreme Court held that the right of personal liberty and some of other fundamental freedoms are not to be totally denied to a convict during the period of incarceration. Here there was no deprivation of any of their fundamental rights by the posting of the police guards immediately outside the jail. The policemen who live on the vacant jail land are not shown to have any access to the jail which is enclosed by high walls. But the court laid down some important aspects regarding prisoners rights. Chandrachud, J. held:[19]

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17. Ibid.
18. It was contended that even the discipline of the prison must have the authority of law and that there should be a sort of "iron-curtain" between the prisoners and the police so that the convicts and undertrial prisoners may be truly free from the influence and tyranny of the police. Since prison includes lands apurtenent thereto the members and officers of police--who were posted to guard the jail from outside occupied a part of the prison and that must be prevented as it is calculated to clause substantial interference with the exercise by the prisoners of their fundamental rights. Id., at . Section 3(1) of the Prisoners Act 1895 defines prison to mean any jail or place used permanently or temporarily for the detention of prisoners, including all lands and buildings appartment thereto".
19. A.I.R. 1974 S.C. 2092 per Chandrachud, J. at p.2095.

> "The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty".

The petitioners also questioned the installation of high-voltage wires installed on the top of the compound wall. Regarding this the court held that the prisoners cannot complain of the installation of the live-wire mechanism with which they are likely to come into contact only if they attempt to escape from the prison. According to the court, there was no possibility of the petitioners coming into contact with the electrical device in the normal pursuit of their daily chores. Whatever be the nature and extent of the petitioner's fundamental rights to life and personal liberty, they have no fundamental freedom to escape from lawful custody.[20]

Here the court has found that the rights claimed by the petitioners as fundamental may not readily fit in the classical mould of fundamental freedoms.

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20. Id., p.2097.

Thus there was a movement away from Gopalan in 1966 and 1974 concerning the availability of fundamental rights to prisoners. Even though in Gopalan, the courts did not interfere in the matters of detention there was a gradual change visible. But in reality, the courts did not in their actual decisions provide much relief to the prisoners. Even the violation of procedure established by the law in the Prisons Act or Jail Manuals did not entitle prisoners to any relief.

In Patnaik[21] the court was unable to find, from the affidavit and counter affidavits, satisfactory proof that the conditions in Visakhapatnam Jail were such, that would involve violation of right to life and liberty guaranteed by Article 21 of the Constitution. The fact that the "Naxelite" prisoners had resorted to marathon hunger strikes was judicially noticed; the idyllic description of jail conditions by the authorities was not taken at face value.

The court notices that there were subtle forms of punishment to which convicts and undertrial prisoners are

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21. Supra.

sometimes subjected to. These barbarous relices of a bygone era offended the letter and spirit of the Constitution.[22] The matters complained of did not amount to deprivation of the right to life and liberty in Patnaik and the plea of the prisoners were dismissed.

Personal Liberty

The Supreme Court had to consider the relationship of Articles 19 and 21 with the prisoners' rights in Kharak Singh v. State of U.P.[23] The Supreme Court contrasted Article 21 of the Constitution with the Fourth and Fourteenth Amendments to the United States

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22. A.I.R. 1974 S.C. 2092 at p.2096.
23. A.I.R. 1963 S.C. 1295. The petitioner Kharak Singh had been charged in a dacoity case but was released as there was no evidence against him. Under the U.P. Police Regulations the police opened a history sheet for him and he was kept under police surveillance which included secret picketing of his house by the police domiciliary visits at nights and verification of his movements and activities. 'Domiciliary visits' mean visits by the police in the night to the private house for the purpose of making sure that the suspect is staying home or whether he has gone out. The Supreme Court held that the domiciliary visits of the policemen were an invasion on the petitioners personal liberty. By the term 'life' as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and facilities by which life is enjoyed.

Constitution.[24] The word 'liberty' in Article 21 is qualified by the word 'personal'. The word 'personal' liberty in Article 21 is used as a compendious term to include within itself all varieties of right which go to make the personal liberties of men other than those within several classes of Article 19(1).

According to Subba Rao, J. who dissented in Khak Singh, it is not correct to say that the expression 'personal liberty' in Article 21 excludes the attributes of freedom specified in Article 19.[25] He brought out the relationship between Articles 19 and 21 by observing that the fundamental right of life and liberty have many

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24. Fourth Amendment reads as follows:- "The right of the people to be secure in their persons, house papers affects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized".
Fourteenth Amendment reads:- "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of U.S. and of the state where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the U.S. nor shall any state deprive any person of life, or liberty without the due process of law; no delay to any person within its jurisdiction the equal protection of the laws".
25. A.I.R. 1963 S.C. 1295.

attributes and some of them alone are found in Article 19. A person's fundamental rights under Article 21 may be infringed only by law; such that law should satisfy the test laid down in Article 19. It is true that in Article 21 the word 'liberty' is qualified by the word 'personal' but this qualification is employed in order to avoid overlapping between those incidents of liberty which are mentioned in Article 21. An unauthorised intrusion into a person's home and the disturbance caused to him is the violation of the personal liberty of the individual.

Maneka Gandhi v. Union of India[26] was the turning point in the human rights Jurisprudence especially in personal liberty. Maneka Gandhi accepted the dissenting view of Justice Subba Rao in Kharak Singh. The expression 'personal liberty' in Article 21 is of the widest amplitude and covers every one of the rights which constitutes personal liberty of man. The personal liberties have been raised to the status of distinct fundamental right and given additional protection under Article 19.

The Extent of Judicial Interference

There may arise occasions which compel the prisoners to approach the courts for the redressal of their

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26. A.I.R. 1978 S.C. 597.

grievances. Whether a court can interfere with the treatment of prisoners by jail authorities and prescribe fair procedure? What is the remedy available to the convicted persons if their fundamental rights are encroached upon by the acts of prison authorities? The Supreme Court in Charles Sobraj v. Superintendent, Central Jail, Tihar[27] analysed in detail the extent of judicial interference. The Supreme Court not only reiterated the power of courts to issue writs but also highlighted their duty and authority to see that the judicial warrant was not misused.[28] The prisoners should get the protection of the fundamental rights guaranteed to the citizens under the Indian Constitution against any arbitrary and discriminatory treatment by the prison authorities.[29]

In Charles Sobraj the Supreme Court held that the prison authorities are justified in classifying between dangerous prisoners and ordinary prisoners. While dismissing the petition the court held that in the present case the petitioner is not under solitary confinement. A distinction between "undertrial" and convict is reasonable

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27. A.I.R. 1978 S.C. 1594. For a critical comment of this case see G.Sadasivan Nair, "Prison Justice and the Court", [1978] CULR 336.
28. Ibid.
29. Ibid.

and the petitioner is now a convict. A lazy relaxation on security is a professional risk inside a prison.[30]

Though the plea of the petitioner was not allowed the court made some noteworthy observations regarding the role of Articles 19 and 21 in a prison setting. Krishna Iyer, J. of the Supreme Court observed:[31]

> "Confronted with cruel conditions of confinement, the court has an expanded role. True, the right to life is more than mere animal existence, or vegetable subsistence. True, the worth of the human person and dignity and divinity of every individual inform articles 19 and 21 even in a prison setting. True constitutional provisions and municipal laws must be interpreted in the light of the normative laws of nations, wherever possible and a prisoner does not forfeit his part III rights".

Considering the question of the rights available to the prisoners, the Supreme Court has rightly affirmed that imprisonment does not spell farewell to fundamental

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30. Ibid.
31. Id., at 1517.

rights, though the courts may refuse to allow in full the fundamental rights enjoyed by free citizens. The court made it clear that the claims of prisoners against cruel and unusual punishments need not necessarily depend for their soundness upon specific constitutional provisions prohibiting such treatment.[32]

Thus it is evident that Charles Sobraj is a landmark decision in the "prisoner rights jurisprudence". Through this case the court widened the scope of judicial interference in the administration of prisons.

Another opportunity for advancing human rights in the field of criminal jurisprudence came up before the Supreme Court in Francis Coralie Mullin v. The Administrator, Union Territory of Delhi.[33] The right to life protected under Article 21 is not confined merely to the right of physical existence but it also includes within

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32. A.I.R. 1978 S.C. 1594.
33. A.I.R. 1981 S.C. 746. The petitioner, a British national was arrested and detained in the Central Jail, Tihar. She preferred a petition in the Supreme Court for a writ of habeas corpus challenging her detention. Her petition was rejected with the result that she continued to remain under detention in the Tihar Central Jail. Whilst under detention, the petitioner experienced considerable difficulty in having interview with her lawyer and the members of her family. Her daughter aged five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month and she was not allowed to meet her daughter more often, though a child of very tender age.

its broad matrix the right to the use of every faculty or limb through which life is enjoyed as also the right to live with basic human dignity.[34]

The Supreme Court observed that as a necessary component of the right to life, the prisoner or detenue would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 24 and 21, unless it is reasonable, fair and just.[35] Justice Bhagwathi further pointed[36],

> "The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression "personal liberty" occurring in Article 21 is of the widest

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34. Id., at p. 750 per Bhagwathi, J.
35. Id., at 753 per Bhagwathi, J.
36. Id., at 754.

> amplitude and it includes the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, invalid as being violative of articles 14 and 21."

The State cannot, by law or otherwise deprives any person of the right to live with basic human dignity. Torture or cruel, inhuman or degrading treatment or punishment which trenches upon human dignity would be impermissible under the Constitution. Thus the Supreme Court elevated immunity against torture or degrading treatment to the status of a fundamental right under Article 21, though it is not specifically enumerated as a fundamental right in the Constitution.[37]

The Supreme Court was not prejudiced by the fact that the petition was not a citizen of India. Human rights

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37. P.N.Bhagwathi, "Human Rights in the Criminal Justice System", 27 JILI (1985) 1 at p.25.

are universal; and the Supreme Court's endorsement of this proposition is much in evidence in this decision. The extension of the understanding of 'life' to include human dignity is an unmistakable reflection of the court's sensitivity to the pervasive aspect of human rights. The depth of understanding went beyond the words to the substance, and is now an inalienable part of Indian constitutional law.

Sunil Batra Cases

An awareness about prisoners rights was created among the people by the above mentioned decisions. But no substantial reform have been made by the Central Government or the State Governments except the appointment of some Prison Reforms Committees.[38] In spite of this the Supreme Court have taken initiative in order to humanise jail administration to some extent. The two Sunil Batra cases are significant decisions in this direction.[39]

The petition in Sunil Batra (I)[40] was filed by two inmates confined in Tihar Jail challenging the legality

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38. In 1980 the Government of India appointed Mulla Committee on Jail Reforms. Justice A.N.Mulla was the Chairman of the Committee. Ismail Committee was appointed in Tamil Nadu.
39. Sunil Batra (I) v. Delhi Administration, A.I.R. 1978 S.C. 1675; Sunil Batra (II) v. Delhi Administration, A.I.R. 1980, S.C. 1579.
40. A.I.R. 1978 S.C. 1675.

of Sections 30[41] and 56[42] of the Prisons Act. Sunil Batra, a convict under sentence of death challenged his solitary confinement. Charles Sobraj, a French national and then an undertrial prisoner challenged the action of the superintendent of jail putting him in bar felters for an unusually long period commencing from the date of incarceration. Such a gruesome and hair raising picture was pointed out that at some stage of hearing, Chief Justice M.H.Beg, V.R.Krishna Iyer, J. and P.S.Kailasam, J. who were the judges hearing the cases visited the Tihar Central Jail.

The petition was dismissed by the court. But through various interim orders the court have guaranteed a

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41. Prisons Act 1894, Section 30 reads:- "1. Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the jail and all articles shall be taken from him which the jailor deems it dangerous or inexpedient to leave in his possession.
2. Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and night under the charges of guard".
42. Id., section 56 reads:- "Whenever the Superintendent considers it necessary (with reference either to the state of the prison or the character of prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the State Government, so confine him".

fair treatment to the petitioner inside the prison. The **Supreme** Court said:[43]

> "Convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all Constitutional rights unless their liberty has been constitutionally curtailed. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non-person whose rights are subject to the whim of the prison administration, and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards. By the very fact of the incarceration prisoners are not in a position to enjoy the full panoply of fundamental rights because their very rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed".

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43. A.I.R. 1978 S.C. 1675 at p.1727 per Desai, J.

Here the Supreme Court established that convicts are not merely by reason of conviction denuded of all the fundamental rights which they otherwise possess. The conviction deprives the prisoner the fundamental freedoms like the right to move freely throughout the territory of India and the right to practice a profession.

In Sunil Batra (II)[44], arising out of a letter written by Sunil Batra to one of the judges of the Supreme Court alleging that a warden in Tihar Jail had caused bleeding injury to a convict by name Prem Chand by forcing a stick into his anus, the court liberalised the procedural rigidities of the writ of habeas corpus and employed the writ, following the American cases[45] for the oversight of state penal machinery and for the condemnation of the brutalities and tortures inflicted on the prisoners. On the basis of this, the Supreme Court treated Batra's letter as a petition for habeas corpus and issued the writ to the Lieutenant Governor of Delhi and the Superintendent of Central Jail ordering that Prem Chand should not be subjected to torture and the wound on his person should receive proper medical attention.

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44. Sunil Batra (II) v. Delhi Administration, A.I.R. 1980 S.C. 1579.
45. Id., at 1583.

In this case Justice Krishna Iyer openly acknowledged the activist policy-making role of the judicial process, particularly in view of the legislative laxity, in the humanisation of the prison system and observed thus:[46]

> "Of course, new legislation is the best solution, but when law-makers take far too long for social patience to suffer, as in this very case of prison reform, courts have to make-do with interpretation and carve on wood and sculpt on stone ready at hand not wait for far away marble structure".

The judge gave a number of guidelines on the humanist reforms of the penal process and the prison administration.

The Supreme Court has directed that the treatment of prisoners must be commensurate with his sentence and satisfy the tests of Articles 14, 19 and 21 of the Constitution. It expanded the scope of the writ of habeas corpus by recognising the right of a prisoner to invoke the writ against prison excesses inflicted on him or on a co-prisoner. Further, the court gave many directions to improve the prison administration.

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46. Id., at 1594.

Judicial interference into the prison administration is not a prohibited thing at present; on the other hand the interference is necessary and welcome to check arbitrary actions of jail authorities. Habeas corpus powers and administrative measures are the pillars of prisoners rights.[47] The prisoners can invoke the attention of the courts at appropriate times. For instance, where a person sentenced to simple imprisonment with 'B' class treatment is put by the jail authorities under rigorous improvement with 'C' class treatment, or where a prisoner is subjected to brutal treatment, prisoners are able to approach the court for the redressal of their grievance.

The post conviction visits by the judges to the prison will bear many beneficial results.[48] They reduce the possibility of the vindictive attitude of the jail authorities and help the prisoner to get suitable treatment. The visits give an opportunity to the judges to observe the impact of a particular punishment on the criminal, to learn directly whether or not it helps to reform the criminal and to understand how they should act in future to make the penal system functionally effective.

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47. A.I.R. 1980 S.C. 1579 at p.1599.
48. This aspect has been highlighted by Justice Krishna Iyer in Sunil Batra, supra.

Highlighting the responsibility of the sentencing court to visit prisons and to guardian their sentences, Justice Krishna Iyer gave a new dimension to the sentencing power of courts. The popular prejudice that attaches itself to convicts did not deter the court in its attempt to eliminate prison injustice. The court expressly stated that conviction, however heinous an offence, did not make a non-person of a person. While imprisonment would deprive the convict of his personal liberty, his fundamental right did not otherwise stand automatically abrogated.

New Dimensions of Reformative Jurisprudence

The objectives of punishment justify the restrictions imposed upon the prisoner's right to move freely within the jail. But since prisoners are entitled to the fundamental rights, the restrictions should have a rational relationship with the working of the correctional system.

Judiciary can prescribe standards of treatment by jail administration if the convict is likely to become more sociopathic than what he was prior to the sentence. Justice Krishna Iyer, in L.Vijayakumar v. Public Prosecutor[49] stressed the need to keep first offenders who

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49. A.I.R. 1978 S.C. 1485.

were young away from the hardened criminals in jail, so as to provide the former with opportunities of reforming themselves into better citizens.

In Vijayakumar all the accused persons who were around seventeen years were sentenced to 2½ years imprisonment by the sessions court for robbing a bank with non-violent use of crude pistols and country bombs. The High Court enhanced the sentence to seven years rigorous imprisonment. Eventhough the full bench of the Supreme Court did not interfere in the sentence passed, Justice Krishna Iyer gave various guidelines with regard to the treatment of prisoners to reduce their criminal tendencies. Justice Krishna Iyer pointed out that the court has responsibility to see that punishment serves social defence.[50]

> "A hospital setting and a humanitarian ethos must pervade our prisons if the retributive theory, which is but vengeance in disguise, is to disappear and deterrence as a punitive objective gain success not through the hardening practice

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50. Id., p.1847.

> of inhumanity inflicted on a prisoners but by reformation and healing whereby the creative potential of the prisoner is unfolded. These values have their roots in Article 19 of the Constitution which sanctions deprivation of freedoms provided they render a reasonable service to social defence, public order and security of the state".

The purpose of confinement is not to pass a person to the jail authorities to be punished vindictively. Confinement is the punishment and it has to be administered according to law. The responsibility of a judge is not over by rendering a decision on the guilt of the accused and by passing a sentence of punishment.[51] The judge has a greater role to play.

In Sunil Batra (I)[52] Justice Krishna Iyer convassed for positive experiments in rehumanisation including meditation, music, arts of self expression, games, useful work with wages, prison festivals, visits by

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51. Id., p.1488.
52. Supra.

and to families, even participative prison projects and controlled community life. He observed:[53]

> "The roots of our Constitution lie deep in the finer spiritual sources of social justice, beyond the melting pot of bad politicking, feudal cruelties and sublimated sadism, sustaining itself by profound faith in man and his latent divinity and the confidence that "you can accomplish by kindness what you cannot do by force" and so that it is that the Prison Act provisions and the Jail Manual itself must be revised to reflect their deeper meaning in the behavioural norms, correctional attitudes and human orientation for the prison staff and prisoners alike".

In Sunil Batra[54] the judges were unanimous in expressing their opinion in favour of a change in law. It was emphasised that there is a need for making the Jail Manual available to the prisoners. According to the court the decision on the necessity to put a prisoner in bar

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53. Id., p.1725.
54. Supra.

fetters under the power of Section 56[55] of the Prisons Act 1894 has to be made after application of mind of the peculiar and special characteristic of each case. The nature and length of each sentence or the magnitude of the crime committed by the prisoner do not seem to be relevant for the purpose. Putting prisoners in bar fetters continuously for a long period is a cruel and unusual punishment which is anathema to the spirit of the Constitution.

Prison is not only a place of confinement and deterrence but also an abode of rehabilitation and refinement.[56] It is a revolutionary suggestion that the

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55. Section 56 of the Prisons Act 1894 reads:- "Whenever the superintendent considers it necessary (with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the state government so confine him".
56. Although the concept of rehabilitation has profoundly shaped American sentencing and correctional policies, a constitutional right to rehabilitation remains unrecognised by the United States Federal Courts. In sharp contrast, a number of European nations include rehabilitation as a constitutional mandate. Further, customary international law establishes a duty of rehabilitation as expressed, for example, in the 1955 United Nations Minimum Rules for the Treatment of Prisoners and the American Convention of Human Rights". Edgar do Rotman, "Do Criminal Offenders have a Constitutional Right to Rehabilitation?", 77 The Journal of Criminal Law and Criminology, (1986), p.1023.

sentencing court has duty to visit prisons at intervals and to see that the convicts are treated according to law and in conformity with the norms of modern penological and correctional systems. There must be a procedure in the sentencing court itself for receiving complaints from convicted persons if their rights are infringed in jail. The present system of sentencing a person and forgetting him for ever should change. Effective improvement in prison justice administration is possible if the judiciary has a say in the treatment of offenders in jail.

There is a well known saying in law that 'justice delayed is justice denied. It is implicit in the content of Article 21 because no procedure can be reasonable, fair and just which denies speedy trial to the accused. The Supreme Court in Hussainara Khatoon[57] pointed out that speedy trial, though not a specifically enumerated fundamental right, can be claimed by prisoners. The state is under a constitutional obligation to take all steps necessary for ensuring the constitutional right to speedy trial to the accused and the state cannot be permitted to deny this right on the ground that it has no adequate financial resources to incur the necessary expenditure

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57. A.I.R. 1979 S.C. 1360; A.I.R. 1969 S.C. 1369; A.I.R. 1979 S.C. 1377.

needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The court in its anxiety to protect and enforce this right of speedy trial did not remain content with mere formulation and recognition of right but proceeded further to add that the court is entitled to enforce this right by issuing necessary directives to the state which may include taking of positive action calculated to ensure speedy trial. The court thus adopted an activist approach and took positive steps.

The right to approach the judicial forum for the redressal of the grievances is an important right of all persons. If that right is denied it will be a denial of fair procedure envisaged under Article 21 of the Constitution.

The important question in M.H.Hoskot v. State of Maharashtra[58] was whether the right of appeal is an integral part of the fair procedure as envisaged in Article 21 of the Constitution. In Hoskot a Reader in the Saurashtra University was convicted for offences of attempting to issue counterfeit University degrees. The

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58. A.I.R. 1978 S.C. 1548.

sessions court sentenced the person till rising of the court. High Court found the sentence too lenient and awarded 3 years rigorous imprisonment. Against this heavy sentence the accused approached the Supreme Court by special leave. The High Court judgment was pronounced in 1973 and the special leave petition was filed only after four years. The petitioner has undergone his full term of imprisonment during this period. A thorough probe by the Supreme Court has revealed that a free copy of the judgment has been sent promptly by the High Court, meant for the applicant, to the Superintendent, Yervada Central Prison, Pune.[59] The petitioner contented that he did not get the copy. There was noting on record which bears his signature in token of receipt of the High Court's judgment. The Court did not allow the special leave petition. The Supreme Court vehemently criticised the Sessions Court judgment awarding a nominal punishment to the prisoner under the corrective aspect of the punishment. The court observed:[60]

> "Social defence is the criminological foundation of punishment. The trial judge has confused between correctional approach to prison treatment

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59. Criminal Procedure Code 1973, Section 363 provides for furnishing a free copy of the judgment to the accused. See infra n.
60. A.I.R. 1978 S.C. 1548 per Krishna Iyer, J. at p. 1552.

and nominal punishment verging on deciminalisation of serious social offences".

The Supreme Court was critical about the silent deprivation of liberty caused by unreasonableness, arbitrariness and unfair procedures inside the jails. The Supreme Court made it clear that in the light of Article 21 such practices should be stopped. Procedure established by law are words of deep meaning for all lovers of liberty and judicial sentinels. Procedure means 'fair and reasonable procedure which comforts with citilized norms like natural justice rooted firm in community consciousness.[61]

Justice Krishna Iyer has followed this and held that the procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not

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61. In the landmark case Maneka Gandhi v. Union of India, Bhagawathi, J. has explained this. "Does article 21 merely require that there must be some semblence of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that, procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the constitution which confers certain fundamental rights. Is the prescription of some sort of procedure enough or must be procedure comply with any particular requirement? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. A.I.R. 1978 S.C. 597 at p.622.

foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Procedure must be rule out anything arbitrary, freakish or bizzare. Procedural safeguards are the indispensible essence of liberty. The history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human right ring. Procedure in Article 21 means fair, not normal procedure law is reasonable law, not any enacted piece.[62]

Natural justice is an essential part of fair procedure as envisaged in Article 21. So the right of appeal if it is provided by law, becomes an integral part of the fair procedure.

In Hoskot the Supreme Court laid down that the constitutional mandate under Article 21 read with Article 19(1)(d) prescribes certain rights to the prisoners undergoing sentence inside the jail. The rights established in this case can be laid down in the following manner.

The most important duty is upon the court. The court has to furnish a free copy of the judgment when it is

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62. M.H.Hoskot v. State of Maharashtra, A.I.R. 1978 S.C. 1548 at p.1553.

sentencing a person to a prison term. 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 has to see that it is delivered to the sentence and after that must obtain a written acknowledgement thereof from him.

Circumstances are common where the prisoner wants to file appeal from the jail. Where the prisoner seeks to file an appeal or revision every facility for exercise of that right has to be made available by the jail administration.

There are various circumstances where the prisoner is disabled from engaging a lawyer due to various reasons such as indigence or difficulty in communication with outsiders. In such cases the court has to assign competent counsel for the prisoner's defence provided the party does not object to that lawyer.

These guidelines are applicable from the lowest to the highest court where a deprivation of life and personal liberty is in substantial peril.

Of the rights mentioned two have have got special significance in Hoskot. the first requirement is service ~~is~~ of a copy of the judgment to the prisoner in time to file an appeal and the second requirement is the provision of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are state responsibilities if we give a wider interpretation to Article 21.[63]

There is something dubious about the delivery of the copy of the judgment by the Jailor to the prisoner in Hoskot. A simple proof of such delivery is the latter's written acknowledgement. Any jailor who by indifference or vendetta withholds the copy thwarts the court process and violates Article 21. To give effect to the idea contained in Article 21, Section 363 has been incorporated in the

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63. Article 21 says:- "No person shall be deprived of his life and personal liberty except according to the procedure established by law".

Criminal Procedure Code.[64] Jail Manuals will have to be updated to include these principles also.

One of the ingredient of 'fair procedure' to a prisoner, who has to seek his liberation through court process is lawyer's service. Free legal services to the needy is a constitutional mandate under Articles 21, 22 and 39A of the Constitution.[65] Article 39A is an imperative tool to Article 21. Through section 304 of the Criminal Procedure Code[66] the legislature has adopted some of the

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64. Criminal Procedure Code, Section 363 reads:- "(1) When the accused is sentenced to imprisonment, a copy of the judgment shall, immediately after the pronouncement of the judgment, be given to him free of cost.
(2) On the application of the accused, a certified copy of the judgment, or when he desires, a translation in his own language if practicable or in the language of the court, shall be given to him without delay, and such copy shall, in every case where the judgment is applicable by the accused, be given free of cost. Provided that where a sentence of death is passed or confirmed by the High Court, a certified copy of the judgment shall be immediately given to the accused free.
65. Article 39A reads:- "The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".
66. Criminal Procedure Code 1973, section 304 provides for legal aid to the accused at state expense in certain cases.

principles given in Article 39A of the Constitution.

In Maneka Gandhi[67] it has been established that personal liberty cannot be cut out or cut down without fair procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim as part of his protection under Article 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.

In Hoskot, The Supreme Court widened the scope of Article 21 with regard to the rights of prisoners. The court made it a government duty to provide free legal aid to the accused under state expense. The Court held:[68]

> "If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39A of the Constitution, power to assign counsel for such

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67. A.I.R. 1978 S.C. 597, see supra.
68. A.I.R. 1975 S.C. 1548 at p.1556.

imprisoned individual for doing complete justice. This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not Government's charity".

In Khatri v. State of Bihar[69] the Supreme Court laid down that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure a person accused of an offence and it is implicit in the guarantee of Article 21.

In this famous case, popularly known as Bhagalpur Blinding Case large number of persons were put in prison. Neither at the time when the blinded prisoners were produced for the first time before the judicial magistrate nor at the time when the remand orders were passed, no legal representation were available to them. Barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyer. A few of them were released on bail after being in jail for

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69. A.I.R. 1981 S.C. 928.

quite some time. While considering the grievances of prisoners the court held[70]

> "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".

Another question raised in Khatri v. State of Bihar[71] was whether the state was liable to pay compensation to the blinded prisoners for violation of their fundamental rights under Article 21 of the Constitution.

It was contended that the blinded prisoners were deprived of their eyesight by the police officers who were government servants acting on behalf of the state and since this constituted a violation of the Constitutional right under Article 21, the state was liable to pay compensation to the blinded prisoners. The liability to compensate a person deprived of his life or personal liberty otherwise

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70. Id., p. 931.
71. A.I.R. 1981 S.C. 928.

than in accordance with procedure established by law was implicit in Article 21. The court was reluctant to grant relief in the form of compensation. The court held:[72]

> "It is obvious that the petitioners cannot succeed in claiming relief under Article 32 unless they establish that their fundamental right under Article 21 was violated and in order to establish such violation, they must show that they were blinded by the police officials at the time of arrest or whilst in police custody".

Some of the pronouncements by the Indian Supreme Court, which emphasize the rights of convicts and the need for treating them in conformity with those rights, are notable milestones in the path towards finding new penological goals of a correctional and reformative prison justice administration. They do not let the prison gates remain closed for ever against a system of humane treatment of prisoners and against effective judicial supervision of such a system. It was Prabhakar Pandurang which inspired and showed the way-in the spate of cases on condition of detention in the late seventies and early eightees.

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72. Id., p.1074.

Hoskot, the two Sunil Batra cases and the decision in Francis Coralie Mullin were but extensions of the principle first enunciated in Prabhakar Pandurang.

The present trend is that even after conviction, the judiciary has an effective supervising role with regard to the treatment of prisoners inside the jail. When, a person is put in prison he loses some of the fundamental rights like the freedom of movement, freedom to form association etc. The prisoners are entitled to claim the residuary fundamental rights even inside the prisons. The State is under a constitutional obligation to honour and protect their rights including the right to life and human dignity.

CHAPTER 3

Prisoner Rights: Emerging Dimensions

Chapter 3

PRISONER RIGHTS: EMERGING DIMENSIONS

Imprisonment involving denial of liberty of the individual signifies the societal disapproval of the violation of law by him. As such it cannot be denied that it has some punitive content and the system expects the prisoner to suffer some disabilities including his freedom of movement. Therefore one cannot expect the state of life in prison to be the same as in the free world. Restrictions on freedom are inevitable. Despite this position the system cannot ignore the fact that a prisoner is also a human being. Basic necessities of a human being should not be denied to him. Public interest in punishing him must be served. Indeed it is also in public interest that the individual is treated in dignity. So the law should strive to strike a balance between these equally competing interests. The present state of affairs in prisons are not conducive to strike this balance. The pathetic conditions of prisoners are not confined to India alone. This can be seen every where throughout the world.[1] Brutality

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1. V.R.Krishna Iyer, A National Prison Policy - Constitutional Perspective and Pragmatic Parameters, Sir Alladi Krishna Swami Iyer Endowment Lecture (1981), p.26. He says: "I have seen American prisons, where some compuses are still terrible while others are humane. In Europe conditions are better in the matter of amenities but tension hangs in the air and the

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committed on prisoners are rampant everywhere. There is a tendency to degrade and insult prisoners. These people have to live under great disabilities imposed by the society. Under the mantle of discipline there is the senseless infliction of solitary confinement or confiscation of anything that could give semblance of recreation. This make the prisons unpopular. Amidst such a scenario the prisoner rights assume significance. Identification of the essential rights a prisoner can claim during his incarceration is essential at this juncture. Various incidental rights available to prisoners are also to be identified keeping in view the fact that these rights cannot be made available to the prisoners in full as such a situation may defeat the very purpose of imprisonment. The courts have been doing their best to strike a balance between the conflicting interests. It is proposed to examine how much the courts have been successful in identifying and effectuating these rights.

Right to Communication - A Momentous Right

Communication is an essential feature for human being for a reasonable living. The prisoners are also

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(f.n. 1 contd.)

prisoner feel dehumanised. Recently, I was taken to a Japanese prison. The physical comforts of the prisoners were satisfactory although a Dutch prison I saw was the most modern with electronic controls and the like. However, everywhere I found prisoners being treated as if they were non-persons and the rights of prisoners were an allergy to the authorities".

having a right to communicate with the outside world, essentially through the use of mails and conversation with various subject to the matters of discipline.[2] Jawaharlal Nehru has explained the difficulties faced by prisoners for interview in his autobiography.[3] Originally the prison authorities were reluctant to grant this right. Even writing of letters and prison interviews were at the mercy of the prison staff. At times they could avail of these conveniences only after bribing the prison officials.

It was formerly thought that a person who has been convicted of an offence has to suffer not only the loss of freedom of movement but loss of the consequential rights.[4] This impression flows from the decision in Gopalan.[5] But Subba Rao, J. speaking for the constitution

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2. For example the Kerala Prisons Rules 1958, Rule 435 provides:- "Every newly convicted prisoner shall be allowed reasonable facilities for seeing and communicating with his relatives, friends or legal advisers with a view to the preparation of an appeal or to the procuring of bail and shall also be allowed to have interviews or write letters to his relatives, friends or legal advisers, once or twice, or often if the superintendent considers it necessary, to enable him to arrange for the management of his property or other family affairs".
3. Jawaharlal Nehru, An Autobiography (1967), p.221.
4. M.Hidayathulla, Constitutional Law of India, Vol.I (1984), p.502.
5. A.I.R. 1950 S.C. 27.

bench pointed out that the detention of a person in prison cannot mean the end of his other rights.[6] The detenue has the right to write and express himself in exercise of the fundamental rights guaranteed under the constitutional provisions. The personal liberty under Article 21 includes the right of a detenue to send his writings outside the jail. As these are the fundamental rights of prisoners there is no right with the jail authority or the government to prevent him from exercising these rights.[7]

Bhagwathi, J. in Francis Coralie Mullin[8] went further to say that the right to life is not limited only to the protection of limb or faculty, it embraces something more. It includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the

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6. For a detailed discussion of the case see supra, chapter 2. The Supreme Court took the view that since the word 'liberty', is qualified by the word 'personal' which is narrower concept and therefore it does not include all that is implied in the term liberty.
7. See State of Maharashtra v. Prabhakar Pandurang, A.I.R. 1966 S.C. 424. For a detailed discussion of the case see chapter 2.
8. A.I.R. 1981 S.C. 746; see chapter 2 for a detailed discussion.

head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow human beings.[9] The Court said that a detenue as part of his right to live with human dignity would be entitled to interview with the members of his family and friends. Thus Supreme Court has identified the right of communication as an inevitable prisoner right through this decision. But this right is not absolute.

The right of prisoners to communicate with the outside, essentially through the use of mails and conversations with visitors is subject to restrictions once he is inside the prison.[10] Prison regulations usually provide for an approved mailing list consisting of the names of persons with whom a prisoner may correspond. Prison rules also specify who are allowed to visit a prisoner.[11]

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9. Id., p.753.
10. Prisons Act 1894 empowers the State government to make rules for regulating the transmission of appeals and petitions from prisoners and their communication with their friends. Section 59(a) reads:- "The State government may make rules consistent with this Act...(24) for regulating the transmission of appeals and petitions from prisoners and their communication with their friends".
11. In the Kerala Prisons Rules 1958, Chapter XXV is devoted to interviews and communications with prisoners.

State governments have given due recognition to these rights of prisoners. They have formulated rules and regulations in this respect. For example in Kerala every newly convicted prisoner is entitled to reasonable facilities of seeing or communicating with his relatives, friends or legal advisors with a view to preparing an appeal or to the procuring of bail.[12] The same facilities can be claimed by every prisoner committed to prison in default of payment of a fine to enable him to arrange for the payment of the fine or the furnishing of security.

In addition to the above privileges every prisoner has got the right to have an interview with his friends and relatives once in a week and to receive three letters each a month during the term of his imprisonment.[13] This privilege can be withdrawn or postponed by the superintendent for bad conduct. Apart from these the superintendent has got the discretion to grant privileges at shorter intervals. If the superintendent considers that special or urgent grounds such as the prisoner being seriously ill or on the occurrence of the death of a near relative, or if the friends or relatives have come from a distance to see the prisoner, he can at his discretion grant interviews.

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12. The Kerala Prisons Rules 1958, Rule 435.
13. Id., Rule 436.

Wide discretion is given to the superintendent under these rules. For example, the superintendent can refuse to allow any interview to which a prisoner would ordinarily be entitled under these rules if in his opinion it is inexpedient in the public interest to allow any particular person to interview a prisoner or if other sufficient cause exists. But in every such case, he has to record his reasons for such refusal.[14]

Mails and Media Interviews

The only method by which a prisoner is able to maintain contact with outside world is through interviews and correspondence. Generally prisoners can sent and receive letters but with restrictions.[15] The restrictions on the right of delivery of letters to the prisoners are legion. In Kerala no letter will be delivered to a convict prisoner until the superintendent has satisfied himself that its transmission is unobjectionable. If it seems to the superintendent that the letter is in any way improper or objectionable he can refuse it to be sent. Any improper or objectionable passage will be erased.

Without the writing materials the right of correspondence is meaningless. Prisoners are entitled to

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14. Id., Rule 446.
15. Ibid.

get writing materials inside the prison. All letters have to be written at such time and place as the superintendent may appoint. So the superintendent is vested with lot of discretionary power. If a prisoner abuses any privilege relating to the holding of an interview or writing of letters or other communications he is liable to be excluded from such privileges. They are subjected to various restrictions at the discretion of the superintendent.[16] Unconvicted criminal prisoners and civil prisoners are treated separately.[17] Unconvicted prisoners has to be granted all reasonable facilities at proper times and proper restrictions for interview.[18] But every interview between an unconvicted prisoner and his legal advisor has to be taken place within the sight and hearing of a jail official.

In Valambal v. Government of Tamil Nadu[19], the petitioners have challenged the interference of the police in interviews, letters and transfers. The petitioners also questioned the attempt of the authorities for obtaining the list of close relatives and bona fide legal advisors. The

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16. Kerala Prisons Rules 1958, Rule 450.
17. Id., Rule 451.
18. Ibid.
19. 1981 Cr.L.J. 1506 (Mad.).

letters addressed to the prisoners were censored and their interviews were monitored by a special branch of police. The Court pointed out the procedure as illegal; and the court insisted that jail manual should be strictly followed in the matter of communications and interviews with the prisoners.[20] This decision strictly ruled out the unnecessary interference in the matters of prison interviews in the State of Tamil Nadu. They gave various guidelines in this matter which can be followed by prison authorities while granting such rights.

In Madhukar v. State of Maharashtra[21] the validity of certain prison rules which put restrictions on the rights of the prisoners to correspond were challenged.[22] It also provided for censorship. The challenge was on the ground that they violated their rights guaranteed under Articles 14, 19(1)a and 21 of the Constitution.[23] While holding Rule 20 and 17

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20. Id., p.1509.
21. 1985 Cr.L.J. 78.
22. The Validity of Prisons Rules 17 (IX), 20 and 23 of the Maharashtra Prisons (Facilities to Prisoners) Rule 1962 were in dispute.
23. The Maharashtra Prisons Rules 1962 provides:- "A prisoner who is entitled to write a letter and who desires to do so, may correspond on personal and private matters, but he shall not include any matter likely to become the subject of political propaganda or any strictures on other persons confined in the prison who have their own opportunities for communication with their families".
Rule 17 provides:- "Prisoners shall not be allowed to correspond with inmates of other prisons. If, however, a prisoner has got his near relative in another prison, he may be permitted to send welfare letters only".

unconstitutional, the court held:[24]

> "As far as Rule 17(ix) is concerned, it is curious that a prisoner is permitted to send welfare letters to his near relatives in other prisons, but he is not permitted to send welfare letters to prisoners in other prisons, who are not related to him. We fail to see any rational basis for such discrimination between prisoners in the matter of sending welfare letters to prisoners lodged in other prisons depending on whether they are related to the prisoner or not. The Rule is on the face of it discriminatory and violative of Article 14 of the Constitution and must, therefore be struck down".

In Madhukar the courts finding that the prisoners are entitled to send welfare letters to prisoners in the other prisons, whether such prisoners are his relatives or not is very much in consonance with the idea contained in Article 14 of the Constitution. The classification adopted in the Prison Rules was not justified.[25] Here the

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24. 1985 Cr.L.J. 78 at p.83.
25. Similarly Rule 20 was also held discriminatory according to the court. By this rule the prisoner is prohibited from including in his letter any matter which is likely to be the subject of political propaganda. He is also prohibited from including in his letter any reference to other prisoners confined in the prison who have their own opportunity for communication with their families. Ibid.

petitioners contention that the impugned prison rules were against the freedom of speech guaranteed under the constitution was granted by the court. While formulating rules the executive should not be discriminatory unreasonably.

The restrictions imposed on the prisoner will be valid only if there are certain circumstances which necessitates such restrictions. The maintenance of internal order and discipline in the precincts of the jail, prevention of escape of the prisoner, prevention of transmission of coded message or messages which have the potentiality or tendency to give rise to disturbance of public order, inspiring commission of any illegal activity or offence of a like nature are such circumstances.

The importance of such interviews and correspondence from the point of view of the prisoners cannot be over-emphasised. Once it is realised that the object of imprisonment is to treat the offender so as to enable him to come out as a reformed individual to join the mainstream of the society, the old notions about interviews and correspondence must necessarily change. The greater the facilities for interviews and correspondence, the greater is the chance for the offender being reformed.

Freedom of the Press vis-a-vis Prisoner Rights

The general public should always be kept well informed about the working inside the prisons through intensive reporting and arranging frequent visits by pressmen and other social workers in prisons.[26] But in Kerala, the prison superintendent has got unguided discretion to refuse interviews.[27] One safeguard against the arbitrary action of the superintendent is that he should record his reasons when he refuses the interviews. If the safeguards are violated by the authorities it is a clear violation of the fundamental rights of the prisoner. In Binoo K.John v. State of Kerala[28] the petitioner, a correspondent in Kerala for "Sunday", a weekly news magazine, prayed for the issue of a writ of mandamus directing the respondent to allow the petitioner to

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26. With this purpose in view, Sir Lionel Fox, the great prison reformer in England, initiated a Prison Service Journal in 1960. See R.V.Paranjapee, Criminology and Penology (1986), p.202.
27. The Kerala Prisons Rules 1958, Rule 446 reads:- "The superintendent may refuse to allow any interview to which a prisoner would ordinarily be entitled under these rules if in his opinion it is inexpedient in the public interest to allow any particular person to interview a prisoner or if other sufficient cause exists, but in every such case, he shall record his reasons for such refusal in his Journal".
28. 1985 K.L.T. 975.

interview two 'Naxelite' prisoners housed in the Central Prison at Trivandrum. Allowing the petition, the court held that the prisoners are entitled to all the constitutional rights unless it be, such rights have been curtailed by the constitution itself.[29] A journalist is entitled to get permission to interview the prisoners subject, of course, to search, discipline and other security criteria.[30]

The prison superintendent for reasons to be recorded may refuse interview.[31] Reasons recorded must show that it is expedient in the public interest to refuse permission for interview. Only for weighty reasons recorded in writing interview can be refused.

The decision of Binoo shows that the freedom of press is exercisable subject to reasonable restrictions. The conditions regulating the fundamental rights of the prisoner are not privileges conferred on him but are only conditions subject to which alone, he can enjoy his fundamental rights. A prisoner continues to enjoy his fundamental and other rights subject to the restrictions imposed on the exercise of such right by valid laws.

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29. Id., p.980.
30. Ibid.
31. Kerala Prisons Rules 1958, Rule 446.

Journalists and newspaper men can be called as friends of the prisoners. So it can be inferred that every prisoner shall be allowed such interviews and other communications with his relatives, friends and legal advisors as the superintendent thinks reasonable.

Earlier in Prabha Dutt v. Union of India[32] the Supreme Court has held that journalists can be treated as friends of prisoners. In Prabha Dutt the Supreme Court was considering the question with reference to the rule relating to condemned prisoners.[33] Allowing the journalists right to interview the two convicted prisoners, Billa and Ranga, the Supreme Court held that newspaper men can be treated as friends of the society and they should not be denied the right of an interview with prisoners.

The ratio of the decision of the Supreme Court in Sunil Batra[34] also supported this view. In Sunil Batra the Supreme Court's view was that the visits to prisons by family and friends are a solace in isolation and 'only a dehumanised system can derive vicarious delight in

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32. A.I.R. 1982 S.C. 6.
33. Id., p.7.
34. Sunil Batra v. Delhi Administration, A.I.R. 1980 S.C. 1579. For a detailed discussion of the case see chapter 2.

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depriving prison inmates of his humane amenity'.[35] Subject to considerations of security and discipline, liberal visits by family members, close friends and legitimate callers, are part of the prisoner's kit of rights and shall be respected.[36]

The Supreme Court has ruled against the uncontrolled interview of prisoners.[37] A journalist is not entitled 'to uncontrolled interview' of prisoners in jails, though it is necessary to permit citizens access to information as also interviews with persons so that the guarantee of the fundamental right under Article 21 of the constitution may be available to the detenues.

The visitors to the jail are having certain obligations to the prisoner. In Mohammed Giassudin v. State of A.P.[38] the Supreme Court directed the jail visitors to 'instil in him a sense of ethics which would

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35. Ibid.
36. Ibid.
37 Mr.Justice Ranganatha Misra who delivered the judgment of the Bench, rejected the claim of Ms.Sheela Barse, a freelance journalist, that she is entitled to uncontrolled interview of certain prisoners lodged in Bombay Central Jail. She filed a writ petition by means of a letter addressed to the court, following withdrawal of permission to interview prisoners granted to her by the I.G. of Prisons, Bombay. The original permission was withdrawn by the I.G. when she began tape recording her interviews. See The Hindu, Sept.20, 1987, p.4. See also Sheela Barse v. Union of India, A.I.R. 1988 S.C. 2211.
38. (1977) 3 S.C.C. 287.

make him a better man'. With regard to visitors to prisons by family members and friends a liberal attitude may be followed by the authorities. A sullen forlorn prisoner is a dangerous criminal in the making.

Right to Communication in England

Prisoners right to communicate in England is worth studying in this context. There the secretary of the State has got very wide discretionary powers with regard to the communications to be permitted between a prisoner and other persons.[39] Every visit to a prisoner has to take place within the hearing and within the sight of an officer.[40] Every letter or communication to or from a prisoner may be read or examined by the governor or by an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length.

The legal adviser of a prisoner has got the right to get reasonable facilities for interviewing the

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39. The Prison Rules 1964 (England), sections 33 to 37A.
40. Id., Rule 33(5) reads:- "Except as provided by these Rules, every visit to a prisoner shall take place within the hearing of an officer, unless the Secretary of State otherwise directs".

prisoner.[41] The prisoner can correspond with his legal adviser in connection with the proceedings. But this is subjected to the supervision of the Governor. In Guilfoyle v. Home Office[42] the Governor refused to allow the plaintiff to correspond with his solicitor until he identified his complaint. Such restructions are reasonable and it will help to curtail unnecessary and false imputations.

There Secretary of State is the person who is in charge of the affairs like letters and visits.[43] He can with a view to securing discipline and good order or the prevention of crime or in the interests of any person, impose restrictions upon the communications to be permitted between a prisoner and other persons. Any letter or communication can be stopped on the ground that its contents are objectionable or that it is of inordinate length.[44] A visit to a prisoner will be allowed only in the presence of an officer.

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41. Id., Rule 37.
42. [1981] 1 All E.R. 943.
43. The Prisons Rules 1964, Rule 33.
44. Id., Rule 33(3). For a critical commentary see, Patrick Birkinshaw, "The Closed Society - Complaints Mechanisms and Disciplinary Proceedings in Prisons", Ireland Legal Quarterly, p.117 at p.139.

The law is different with regard to convicted and unconvicted prisoners in matters of letters and visits.[45] An unconvicted prisoner can send and receive as many letters and may receive as many visits as he wishes. In the case of a convicted prisoner, he can send and receive a letter on his reception into a prison and thereafter only once in a week.[46] He can receive a visit only once in four weeks. The Governor can allow a prisoner an additional letter or visit where necessary for his welfare or that of his family.[47]

Strict regulations are made with regard to grievance procedures. Every request by a prisoner to see the Governor, a visiting officer of the secretary of state or a member of the board of visitors has to be recorded by the officer to whom it is made and promptly passed to the Governor.[48] The board of visitors and any member have to

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45. Id., Rule 34.
46. Ibid.
47. Ibid.
48. Prisons Rule 1964, Rule 8(1): - "The system of prisoner's complaints in England are the following. There every cell is having a 'cell card' with general information for prisoners, explaining among other things their right to request interviews with the Governor the chaplain, the medical officer, a visiting officer of the Secretary of State. If a prisoner requests an interview through the principal officer of his wing he will be asked what he wants to complain about".

hear any complaint or request which a prisoner wishes to make. Prisoners are also entitled to file petitions before the secretary of state.[49] A prisoner is allowed to write to a member of parliament of his choice, about his treatment in prison.[50] If the M.P.wants to interview a prisoner he can do so, but within the sight and hearing of a prison official. The reply sent to the M.P. from the Home Office must be seen by the Home Office Minister, to the M.P. wrote, so that this procedure ensures a close scrutiny of the department's response to complaint. If the M.P. accepts the reply he writes to the prisoner, either paraphraising or copying it. If he dows not accept it he may try to raise the matter in Parliament, the usual method being a request for an adjournment debate; but the opportunities for this are limited. If he thinks that the prison service may have been guilty of maladiminstration he can write to the Parliamentary Commission for Administration.[51]

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49. Ibid.
50. See Nigel Walker, Sentencing Theory, Law and Practice (1985), p.190 at p.191. If he does not know enough to choose he will be advised to write to the M.P. for his constituency or the M.P. of the constituency in which the prison lies.
51. The duty of the Parliamentary Commissioner is to investigate complaints of "injustice" in consequence of maladministration. He can investigate matters of procedural mistakes, bad decisions and bad rules, as well as administrative aspects of delegated legislation like the Prisons Rules. See Nigel Walker, Sentencing Theory, Law and Practice (1985), p.129.

Freedom of Expression to Prisoners - U.S. Position

Freedom of expression is available to prisoners in United States. The majority of situations involving deprivation of expression which have come before the courts involve the right to communicate freely with the outside world. Generally the inmates are allowed to write and to receive communications only from those persons on his approved mailing list. All communications, both send and received are subject to censorship and confiscation by prison authorities.[52] The reason for these restrictions follow security and budgetary requirements. Contraband must be intercepted, escape plans must be detected, and material that might incite the inmate population in some way must be excluded. Furthermore, correctional budgets do not allow for the unlimited use of the mails. Prisons have also used the goal of rehabilitation to justify certain restrictions on inmates correspondence. The courts have generally accepted these justifications for mail censorship, and limitation, and in years part rarely intervened in prison mail regulations.[53] In Pell v. Procunier[54] the state prison inmates and journalists

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52. "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts", 72 Yale Law Journal (Notes), 506 at p.538.
53. See James A.Inciardi, Criminal Justice (1987), p.596.
54. 417 U.S. 817.

brought actions in the U.S. district court attacking the constitutionality of a state regulation which prohibited face to face interviews between news media representatives and individual inmates whom the representatives specifically named and requested to interview. Eventhough the district court has allowed the plea, the Supreme Court reversed the order of the lower court as to the inmates and affirmed the order as to the journalist. In an opinion by Steward J. it was held that the regulation did not abridge the inmate's freedom of speech and it did not abridge the news media representative's freedom of press since regulation did not deny the media access to sources of information available to members of the general public.[55]

Sex and Family Life in a Prison Setting

Confinement of the prisoner inside the jail deprives to his relations the association of him. If the prisoner is a man his wife will be denied the association of her husband and marital relations without her fault. There are various consequences of this. There is an opinion that prison tensions are primarily motivated by sex deprive.[56] The most practical and economic way to

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55. Id., p.820.
56. Richard D.Knudten, Criminological Controversies (1968), p.335.

alleviate sexual frustrations is to permit conjugal visits by wives while husbands are still imprisoned. Not only such visits would encourage prisoner's self initiative in rehabilitation, but they would also help to create a new prison environment. Most of the prison reforms ignore the fundamental sexual issue. And yet, prison fights, killings, stabbings, riots, revolts, attacks on guards and escape attempts are born of sexual frustration. Accommodating himself to the absence of normal sex is the hardest adjustment any prisoner must make. Quite apart from purely legal considerations, it would be contrary to modern penological standards to restrict unnecessarily the family life of prisoners. If they are to be able to take their place again in society, they should have the greatest contact with the outside world that is consistent with the fact of their detention.[57] In this way a degree of marital life for prisoners may come to be recognised as part of the right to respect for family life. Although American sexual attitude restrict extended private prison visits between husband and wife in the United States, some South American and European prisons allow limited conjugal visiting programme.[58] Some South American countries give bachelors

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57. Francis G.Jacobs, The European Convention on Human Rights (1975), p.137.
58. Id., p.336.

opportunity to visit prostitutes, a practice conflicting with American sexual values and laws.[59] General belief prevalent there is that the most intractable prisoner could be transformed into a cooperative inmate through an occasional private visit with his wife. It is having some psychological impact. Such rewards would discourage escape attempts.

Most attempts to formulate a coherent programme of prison rehabilitation have disregarded the pivotal importance of the prisoner's marital commitment.[60] One opinion is that the length and frequency of private prison visits has to be determined by the prisoner's conduct. Most countries follow practices similar to those found in the United States.[61] Visits which are commonly limited to less than an hour are permitted once or twice a month.

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59. Ibid.
60. Australian law provides that a person who is convicted to a prison sentence of more than one year loses his paternal rights and that a guardian is to be appointed for his children. Francis G.Jacobs, op.cit., p.136.
61. Short home leaves for select classes of prisoners are possible in England, Wales, North Ireland, Scotland, Switzerland, Germany, Greece and Sweden. Several Mexican prisoners allow private conjugal visits in small dormitary cubicles or other private buildings supplied for use by married couples. Other Mexican prisons permit overnight visit by wives. Some countries permit special classes of prisoners to live with their families on the prison grounds, others goes as far as to encourage marriage and family life in an open penal colony. See Richard D.Knudten, op.cit., pp.367, 368.

Quite apart from purely legal considerations, it would be contrary to modern penological standards to restrict unnecessarily the family life of the prisoners.[62] If they are to be able to take their place again in society, they should have the greatest contact with the outside world that is consistent with the fact of their detention. In this way, a degree of marital life for prisoners may come to be recognised as part of the right to respect for family life. The prisoners' adjustment to sexual deprivation often takes the form of homosexual behaviour. Although not so great a problem as in some United States prisons, with their different pattern of supervision, homosexuality is one of the disturbing features of English prison life, adding to the tension.[63]

The Indian prison management does not accept the idea of conjugal visits as the system of furlough and parole serves a more useful purpose so far marital relationship between spouces are concerned. That apart, such conjugal visits cannot be appreciated for the reason of morality and ethical considerations keeping in view the

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62. Francis C.Jacobs, op.cit., p.137.
63. See Ismail Committee Report (1977), p.185.

Indian values and traditions.[64] In India the Prisons Act 1894 provides for release of prisoners on furlough and parole so as to maintain unity of their family life.

If conjugal visits are permitted within the prison it will have some security problems also. It also is in conflict with the very object of punishment itself. A prisoner must have some inconvenience with that of an ordinary person.

Access to Courts and Legal Service

The trial of an issue is settled between the prosecution and the accused with the delivery of the verdict. The consequential effect of the verdict in a criminal trial is that it gives a right of appeal to the aggrieved party.[65] The right of appeal is a substantive right and is provided under criminal procedure. Each

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64. This aspect was considered by Justice Chettur Sankaran Nair in A Convict Prisoner v. State, 1993(1) K.L.J. 902 at p.910. He stated that conjugal visits are permitted in some of the penitentiary in Mississipi, California, North Carolina etc. According to him this is an area falling outside the jurisdiction of the court.
65. A.N.Chaturvedi, Rights of the Accused under Indian Constitution (1984), p.293.

person can exercise this right until the period of limitation is over. But in the case of prisoners the rule is relaxed.[66]

In the Criminal Procedure Code there are provisions for filing appeal if the appellant is in jail.[67] If the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the appellate court. The appeal presented to jail authorities under the above provision is popularly called "jail appeals".

When an appeal is preferred by a prisoner from jail even beyond the period of limitation, the court cannot reject it. The Court cannot act blindly under Section 3 of the Limitation Act,[68] and dismiss the appeal filed out of

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66. The Prisons Act 1894, section 59 empowers the State government to make rules for various purposes including rules for regulating the transmission of appeals and petitions for prisoners.
67. Criminal Procedure Code 1973, Section 383.
68. Section 3 of the Limitation Act reads: "Every suit instituted, appeal preferred, an application made after the period shall be dismissed, although limitation has not been set up as a defence, but this is subject to the provisions contained in Sections 4 to 24".

time, without satisfying itself if there was any cause which prevented the prisoner from preferring the appeal. This was discussed in Phusu Koiri v. State of Assam[69] where a lifer challenged his conviction in the appeal preferred from the jail. There was some delay in filing the appeal. In the High Court, the public prosecutor argued that unless the delay was condoned under Section 5 of the Limitation Act[70] the appeal cannot be heard. Rejecting this argument the court held that where an appeal is preferred from jail it cannot be said that the appellant had the "freedom of decision and action" to exercise not only the statutory right to appeal but also the fundamental right to personal liberty.[71] The Court is required to do so to enforce constitutional mandate. The Court brought to the attention of the mandate of Article 39A of the Constitution also in this case.[72] The Court held:[73]

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69. 1986 Cr.L.J. 1057.
70. Section 5 of the Limitation Act provides that an appeal or application may be admitted after the prescribed period if the appellant or the applicant satisfied the court that he had sufficient cause for not preferring the appeal or making the application within such period".
71. 1986 Cr.L.J. 1057 at p.1060 per Dr.T.N.Singh,J.
72. Article 39A of the Constitution reads:- "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".
73. 1986 Cr.L.J. 1057 at pp.1060, 1061.

"We also bear in mind in this connection the mandate of Article 39A which envisages operation of the legal system to promote justice on a basis of equal opportunity and requires the state to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

According to the court a prisoner is not a free bird. The burden is constitutionally engrafted in such cases on the state.[74] This burden may be discharged by the state by satisfying the court that prison restrictions statutorily provided were not unreasonable as would amount to denial of prison justice. A prisoner is not opposed to lose completely his right to live within the prison a dignified life and enjoy such concomitant rights as are not inconsistent with prison discipline enforced by the enacted law or even his right to secure legally full freedom and live in the free world an unexploited life.

So it has been established beyond reasonable right that the prisoner's right to meet his counsel and the

74. Ibid.

right to appeal cannot be denied in the light of Article 39A of the Constitution. Recently in a judgment the Kerala High Court has directed to make appropriate arrangements for providing a meeting place in the premises of the High Court, where prisoners can meet their counsel and give instructions by prior appointment.[75]

Prisoner Education: A Way to Reform

Education of the prisoner is the heart and soul of the correctional process. It helps the offender in his ultimate resettlement in society. It brings about 'sublimation of the anti-social instinct in a criminal' by slowly moulding his knowledge, character and behaviour.[76]

The term "education" is being used in a very broad sense in contemporary correctional programme. It includes, to quote Sutherland and Cressey, "all intentional efforts to direct inmates away from crime by means of non-academic, as well as academic measures". From this point of view, education of prisoners is almost synonymous with "treatment of prisoners".[77] Prison education can broadly

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75. In Re A Prisoner, 1993 K.L.T. 10 at p.20.
76. Jayatilak Guha Roy, Prisons and Society: A Study of the Indian Jail System (1989), p.112.
77. See Edwin H.Sutherland and Donald R.Cressey, Principles of Criminology (1968), p.529.

be divided into two categories; general and vocational. The important purposes of general education can be said to be removal of illiteracy and creation of a social responsibility.

Emphasizing the importance of literacy to prisoners, Dr.Bhattacharya very poignantly observes: "Literacy, even elementary education, can make a world of difference specially in the lives of long term prisoners. It is difficult for us to know what life would be like if we were illiterate and immuned in prison. Even old prisoners show eagerness to be able to read and write and to get information, though some of them may feel that they are too old to learn and many are too shy to admit their ignorance. Books offer the best 'escape' outlet, and the prison school is a great stabilising factor and its therapeutic value is considerable".[78]

The importance of good libraries for prison inmates to secure their mental revolution has been emphasized both in India and abroad. "A good library", observes Dr.B.K.Bhattacharya, "is an adjunct to a sound educational policy. Even when poorly stocked, a prison

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78. B.K.Bhattacharya, Prisons (1958), p.82.

library can be a blessing. Cellular life and long hours of enforced idleness and solitude intensify the needs of good books".[79] Sutherland and Cressy also project for the need of a good library inside the prison. According to them "in addition to affording recreational reading activities, a well organised prison library can contribute to all phases of the educational programme. It may also serve to connect the inmate with outside, law abiding society, and, if there is a reading room, it provides him with an oasis where, momentarily at least, he can exclude from his life the deleterious influences of the prison environment".[80] The library should provide reading opportunities of a wholesome nature. It should serve as a source of supplementary information. Books, periodicals and newspapers should be carefully selected to meet the needs of the inmates. There should be a close integration between the library and other educational activities of the institution.

Voluntary agencies have a special role to play in educating prisoners. The services of these agencies can be

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79. Id., p.89. In the Viyyur Central Jail, Kerala, a good library is maintained. There are 5832 books there in the library. A convict prisoner who was an school teacher is in charge of the books. He has classified books and have arranged them in order. Prisoners frequently visit and read books.
80. Edwin H.Sutherland and Donald R.Cressey, op.cit., p.540.

utilized in prisons for organising literacy programmes, health camps, programmes for moral and spiritual education, cultural and recreational activities, technical and vocational training etc. Unfortunately, in our country such voluntary services have not been encouraged or utilized. Voluntary women organisations will be particularly helpful and effective in educating female prisoners. The Mulla Committee have suggested that community groups can be organised as 'Friends of Prisoners' to collect books, magazines and journals and distribute them to prison-inmates for their leisure-time reading and to organise lectures and audio-visual demonstrations in prisons on secular moral topics and on social education for the benefit of inmates.[81]

Education has been grossly neglected in prisons inspite of the rare opportunity that this field offers for inculcation of the right attitudes or changing of innocent attitudes among the prisoners. Education can shape the right thinking members among the prison community as messengers of the desirable social values such as improved

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81. Government of India, Ministry of Home Affairs, Report of the All India Committee on Jail Reforms (Chairman: Justice A.N.Mulla), 1980-83, Vol.I, p.260.

farming methods, industrial productivity, environmental cleanliness, sanitation etc.[82] The Narasimhan Committee has recommended that the education department of prisons have to be revamped in structure, content, staff pattern and methodology.[83] The Committee have recommended that every prison should have prison education officers with adequate experience. He will have to be assisted by a band of dedicated teachers. As provided in some statutes, the education programme should consist of physical and health education, academic education, social education, vocational education, moral education and cultural education.[84] Correction and change in the prisoner's mentality can be brought about if certain other facilities are extended to the deserving inmates, such as supply of books, periodicals and newspapers and facilities for continuation of studies during incarceration.[85] The services of voluntary

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82. Government of Tamil Nadu, Ministry of Home Affairs, Report of the Tamil Nadu Prison Reforms Commission (Chairman: R.L.Narasimhan), 1979, Vol.I, p.47.
83. Ibid.
84. See Kerala Prison Manual, Rule 486.
85. The story of one P.M.Sudhakaran is worthy to be noted in this context. P.M.Sudhakaran 33, a prisoner convicted for life sentence and undergoing imprisonment at Central Jail, Cannanore, Kerala found solace in reading when he felt life in jail too terrible and too cruel. Sudhakaran's quest for knowledge was quenched by good friends and well-wishers. Fighting against all the odds, he took his B.A. degree in history and even got registered for LL.B. See K.A.Antony, "Life in Prison Transforms a Murderer into a Writer and Philosopher", Indian Express (Cochin), August 21, 1992, p.3.

organisations may be meaningfully utilized for organising various educational and work programmes in prisons.

Health of Prisoners

A modern welfare state cannot adopt a "hands off" attitude in regard to the requirements of physical and mental well being of its citizens. This is more so in case of prisoners who are in the custody of the State and compelled to live, because of incarceration, under very difficult conditions--'physically crowded and unconfortable, mentally isolated and frustrated'. Adequate care of prisoner's health is needed not merely on humanitarian grounds but for maintaining jail discipline and securing positive response from the inmates to all such measures intended to ensure their moral regeneration and social rehabilitation. Because, if the prisoners feel that the jail administration is absolutely indifferent and callous to their health requirements, they will reciprocally be indifferent to jail discipline and correctional courses. Prisoners are having a right to get reasonably hygiene conditions inside the prisons. Various prison reforms committees have highlighted the necessity of providing healthful surroundings to prisoners. Report of Tamil Nadu Prison Reforms Commission says that every prisoner be guaranteed that he would be kept in custody in

healthful surroundings.[86] For this purpose, the room or cell must be of an adequate sizes, there must be adequate natural and artificial light, adequate facilities for maintaining personal cleanliness and sufficient opportunities for recreation and exercise.[87] The absence of proper toilet facilities especially in cells is a great evil and it must be remedied at once irrespective of the cost.[88] The prison administration is having a responsibility in this respect. The medical officers in prison should realise that they are the health officers of the establishment. In that capacity they should divide between themselves the responsibility by inspecting all buildings and premises, particularly the kitchen, the latrine and the bathing places for a high level of sanitation. They must ensure that water supply and drainage systems are effective and that there are no pools of stagnant water, breeding mosquitoes and discease germs.

In England every prisoner must be provided with toilet articles necessary for his health and cleanliness,

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86. See Report of Tamil Nadu Prison Reforms Commission (Narasimhan Commission Report), 1979, Vol.II, p.74.
87. Ibid.
88. Ibid.

which must be replaced as necessary.[89] Every prisoner is required to wash at proper times, have a hot bath on reception and subsequently at least once a week and unless excused by a Governor or medical officer, to shave or be shaved daily, and to have his hair cut as may be necessary for neatness.[90] However, an unconvicted prisoner or a convicted prisoner who has got yet seen sentenced is not required to have his hair cut or any beared or moustache usually worn by him shaved off exept where the medical officer directs this to be done for the sake of health or cleanliness.[91] The hair of a woman prisoner must not be cut without her consent unless the medical officer certifies in writing that this is necessary for the sake of health or cleanliness.[92] A medical examination on reception is not now obligatory although in practice it invariably takes place.

In India there are provisions in the Prisons Act and Jail Manuels regarding them.[93] The prison area has to

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89. Halsbury's Laws of England, Vol.37 (1982), p.746.
90. Prison Rules 1964, Rule 26(2).
91. Ibid.
92. Id., Rule 26.
93. The jail authorities have got a duty to give medical treatment to the convict. Sufficient rules are incorporated in the Prisons Act, Sections 37, 39 and 40 of the Travancore-Cochin Prisons Act and Section 37 of the Prisons Act 1894 are some of the provisions enacted to ensure medical facilities to the convicts.

be cleaned daily and has to be kept free from all jungle weeds, accumulation of broken bricks, manufacturing bricks etc.[94] No cook room refuse are permitted to be thrown on the ground. No rubbish is permitted to be accumulated in or near the jail. Cesspols and drains for sewage are prohibited in or near the jail.[95] Various guidelines are also given regarding construction and use of latrines,[96] disposal of night soil and urine.[97] The disposal of night soil and urine must always be strictly controlled and should be placed under the supervision of a responsible officer.[98] A recent study by an expert body appointed by the Kerala High Court has revealed that these rules are often not strictly followed.[99] Thus as a part of their

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94. The Kerala Prison Rules 1958, Rule 673.
95. Id., Rule 674.
96. Id., Rule 678.
97. Id., Rule 681.
98. Id., Rule 683.
99. A description of Block No.8 of the Central Prison, Trivandrum is worth to be mentioned. In total 84 prisoners are kept in the block. There are only three common latrines for all of them. During night they are not permitted to go to the latrines, but are forced to defacate in their own cells. The drainage pipe is broken and the sewage comes out and flows along the place where water tap is fixed. See James Vincent, Report, op.cit., pp.5, 6.

human living conditions as prescribed by the "fair and reasonable" law laid down in various statutes the prisoners are entitled to be lodged in physically and hygeneically safe and protected accommodations. The prisoners are having a right to complain and protest against the violation of these requirements. Every prisoner has a right to get due attention of his health during incarceration. He has a right not to be dirty and overcrowded by other prisoners.[100] But a prisoner does not have the right to claim that he should be examined by an expert doctor of his choice and all medicines prescribed by such a doctor be given to him.[101]

Recreational Facilities

Recreation will relieve body as well as the mind of the person. Every prisoner has a right to participate in the sports and other recreational facilities, which are organised in the institution.[102] A prisoner ordinarily

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100. See Hussainara Khatoon v.State of Bihar, A.I.R. 1979 S.C. 1360 at p.
101. Rosamma v. State of Kerala, 1994 (1) K.L.T. 965. Petitioner's husband, a prisoner undergoing imprisonment was having serious kidney problems and required expert medical treatment. The contention of the petitioner is that her husband shall be allowed to have special treatment by the doctor of his own choice and all the medicines prescribed by such doctor is to be given to the patient. But there was no case that her husband was denied medical facilities. So the petition was dismissed.
102. Mir Mehraj-ud-din, Crime and Criminal Justice in India (1984), p.191.

cannot be deprived of such facilities, without the proper procedure established under law. Since under the modern penology, one of the important objectives of the punishment is rehabilitation of the prisoners, a prisoner cannot be deprived of any facility or privilege which will contribute towards his re-socialisation. Recently in a case the Kerala High Court pointed that recreational facilities within reasonable limits has to be provided to prisoners inside the prisons.[103]

Exercise of Religious Beliefs and Practices

Freedom of religion or conscience means the assent of state that each person has the right to observe any particular sect or 'dharma'. A prisoner is privileged to worship God inside the prisons. But it is subject to various limitations imposed by statutes. There has been considerable amount of litigation in all countries in recent years concerning the prisoners right to practice his religion.

U.S. Experience

In USA large number of litigation regarding prisoner's religious rights have resulted from the growth

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103. In re A Prisoner, 1993 (1) K.L.T. 10 at p.20.

of black muslim faith, with its beliefs and practice radically different from Christianity and Judaism.[104] Freedom of religion is subjected to extensive curtailment by the prison authorities. In Cruz v. Beto[105], the plaintiff a Buddhist, was undergoing imprisonment in an American prison. His complaint was that while prisoners who are members of other religious sects were allowed to use prison chapel, he was not. On sharing Buddhist religious material with other prisoners, the plaintiff was put in solitary confinement. He also alleged that he was prohibited from corresponding with his religious advisor. Granting the petition the U.S. Supreme Court held that although it is not necessary that every religious sect or group within a state prison - however few in number - have identical facilities or personnel, or that a special chapel or place of worship be provided for every faith regardless of size, or that a chaplain, priest or minister be provided without regard to the extent of the demand, nevertheless reasonsble opportunities must be afforded to all prisoners to exercise the religious freedom granted by the First and Fourteenth Amendment, without fear of penalty.[106]

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104. Richard P.Vogelman, "Prison Restrictions - Prisoner Rights", The Criminal in Confinement (1971), 52 at p.57.
105. Tred A.Cruz v. George J. Beto, 405 U.S. 319, 31 L.Ed. 2nd 263.
106. Id., p.270.

Total deprivation of freedom of religion is exemplified in the California case of In re Ferguson.[107] There a black muslim prisoner complained of religious discrimination. The court said that it was no abuse of discretionary power for officials to manage the prison system and to base restrictions on the potentially serious dangers to prison security which the black muslim practices involve.[108]

Childs v. Pegelow[109] is another case of partial deprivation of religious rights. Muslim prisoners sought to compel the warden to recognise their special fasting practices during the month of Ramadan. The warden had agreed to comply with their dietary restrictions and to serve their meals before sunrise and after sunset. The prisoners complained, however that in carrying out this

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107. 368 U.S. 864.
108. Id., p. . The petitioner alleged that Muslims were not allowed a place of worship, religious meetings were broken up, purchase and possession of the Muslim holybook and other religious literature were prohibited and religious leaders were not allowed to visit the prisoners. The prison officials admitted the discrimination but argued that prison discipline justified it.
109. 376 U.S. 932.

agreement prison officials did not determine sunset by the traditional Muslim manner.[110] The complaint was dismissed as not presenting a justiciable issue. The court said that the petitioner was merely seeking to enforce an agreement of special privilege, not a constitutionally protected right.[111] The granting of such a privilege was clearly a routine matter of internal prison administration with which the court would not interfere.

Thus in the various cases, the courts had dealt with complaints alleging interference with religious freedom, discriminatory treatment, and punishment inflicted as the result of attempts to prictice their religious faith. Review of denials of religious freedom becomes more complex when the exercise of religious belief involves action. Systematic factors are clearly involved when the prisoner claims the right to hold prayer meetings, to communicate with counsel concerning infringement of religious liberties, to communicate freely with religious leaders and receive publication.[112]

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110. The Black Muslim method of determining day light hours for fasting during the month of Ramsan is by inspection of a black and white thread held in the air. If no difference can be detected the hours of darkness have commenced. The prison officials, instead of using this test, relied upon noval observatory time. Richard P.Vogelman, op.cit., p.67.
111. 376 U.S. 932 at p.
112. Notes, "Beyond the Ken of Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts", 72 Yale Law Journal, 506 at p.542.

English Position

In England, every prison is having a chaplain, and if large, an assistant chaplain also; both of whom may be clergymen of the Church of England.[113] In addition to the chaplain, a Roman Catholic priest is also appointed to every prison.[114] On a prisoner's reception into prison, the Governor must record the religious denomination to which the prisoner declares himself to belong, and the prisoner must be treated as being of that denomination.[115] The prison minister must be provided by the governor with a list of those prisoners declaring themselves to belong to his denomination, and may visit only those prisoners.[116] However, prisoners not belonging to the church of England must be allowed to attend chapel or to be visited by the chaplain. If the prisoner is willing, the chaplain must visit only such prisoner who is sick, under restraint or undergoing cellular confinement and is not regularly visited by a minister of his own denomination.[117] The chaplain must visit daily all prisoners belonging to the church of England who are sick, under restraint or

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113. Prisons Act 1952, Section 7.
114. 37 Halsbury's Laws of England (1982), p.762.
115. Id., p.763.
116. Prisons Act 1958, Section 10.
117. Prison Rules 1964, Rule 11.

undergoing cellular confinement, and a prison minister must do likewise, as far as he reasonably can, for prisoners of his own denomination.[118] Thus it is very evident that prisoners rights to practice religion is a recognised fact.

The Indian Scene

Matters affecting caste and religion inside the prison are significant in the context of prisoner rights. Generally interference with religion or caste prejudices of prisoners are not permitted inside the prisons. Every prisoner is allowed to perform his devotions in a quiet and orderly manner during the hours of rest.[119] No undue interference with the religion or caste prejudices of prisoners are permitted. Every prisoner who expresses a desire to keep a religious fast, and in the opinion of the medical officer is in a fit state of health, has to be permitted to do so. As far as practicable, the convenience of such prisoners has to be met with in regard to the disposal of the food and the hours of its distribution.[120]

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118. Ibid.
119. Eg., Kerala Prison Rules 1958, Rule 274.
120. Ibid. It is also provided that prisoners observing religious fasts provided in each region has to be supplied with pooja and other articles required on the closing day of the pooja at a cost not exceeding the cost of dietary articles not issued to them during the days of fast.

If offered by any religious or charitable body or individual, the superintendent at his discretion has to receive and distribute to well behaved prisoners on festival occasions, small luxuries in the shape of fruits and sweet meats, subject to the approval and strict control of the medical officer.[121] Even religious instructions and moral lecturers can be given to the prisoners.[122] But change of religion inside the prison is not usually allowed.[123] No minister of religion is allowed to have access to any prisoner other than a prisoner sentenced to death who does not belong to his own denomination unless the prisoner voluntarily and spontaneously expresses a wish to see such a minister.[124] In that case the matter has to be submitted to the Inspector General of Prisons for orders.

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121. Ibid.
122. Id., Rule 278. In the Bombay city jails, moral lectures are delivered by ladies and gentlemen. At the Yervada central prison the Chaplains of the Church of England and of the Roman Catholic Church delivers moral and religious lectures. See J.M.J.Sethna, Society and the Criminal (1980), p.283. Justice Krishna Iyer of the Supreme Court urged the jail authorities to consider the desirability of providing instructions in Transcendental Meditation to prisoners. See Mohammed Giassudhin v. State of Andhra Pradesh, (1977) 3 S.C.C. 287 at 295.
123. Id., Rule 279.
124. Ibid.

Due respect is given to religion even at the time of removal of articles from prisoners.[125] In the case of a condemned prisoner, it is provided that the religious teacher of the persuation attached to the prisoner has to visit him daily and if he expresses a desire to see any other approved religious minister the authorities have to comply with his request.[126] There are number of occasions where prisoners religious rights embodied in the statutory provisions are put into practice.[127]

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125. Articles like jewellary, money etc. will be taken away from the prisoner at the time of his admission into the prison; but caste threads of Brahmins or other thread wearing castes and the thali or wedding ring of a woman is not removed from the body of the prisoner. See Id., Rule 230.
126. Id., Rule 792.
127. The convicts in a jail made it a pucca festival by observing all the religious rites in connection with the Sabarimala pilgrimage. The scene was in Viyyur central jail near Trichur on January 11, 1986. There is an Ayyappa temple in the jail itself and the vilakku was celebrated here with all pomp and glory. Four life convicts acted as "Komarams" and performed the ceremonies. The jail authorities had also made available a tantri to help the convicts to conduct the affairs. Bhajans, dancing in the petta thullal style and such other performances connected with the vilakku were there. Some 50 Hindu convicts, some of them sentenced to life, conducted the hours long thullal. See "Petta Thullal in Jail", Indian Express (Cochin), January 13, 1986, p.1.

Thus it can be seen that the role of religion in shaping personal morality and conduct has been accepted from the beginning. Religious perceptors, therefore played important part in prisons. Religion often provides a safe anchor to a drifting man.[128] Many a man facing moral crisis has been saved by the solace provided by salutory doctrines enshrined in religious books.[129] So religious and moral training should form an important part of prison life. Prisoners are 'persons' and neither they lose their citizenship nor other rights which are not covered and prohibited by the prison rules. They can exercise and profess any faith or religion even behind bars. It is the duty of the prison authorities to respect the religious

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128. This is an observation by a jurist in a study in the State of Karnataka, Kerala, Tamil Nadu and West Bengal. After visiting these states and interviewing officers of social welfare departments, prison administration, judiciary and the police such an opinion was formed. Non-officials working in the field of criminology and social defence were also interviewed. R.Deb, "After-care Organisation", 13 JILI (1971), p.517 at p.524.
129. The preachings of Guru Nithyachaitanya Yathi had great influence on P.M.Sudhakaran, a life convict at the Kannur Central Prison. The Guru sent him enough reading materials. He found solace in reading when he felt life in jail too terrible and too cruel. He has read Vedas, Bhagavat Geetha and Upanishad. He is a disciple of Guru Nithyachaitanya Yathi since last seven years. See K.A.Antony, "Life in Prison Transforms a Murderer into a Writer and Philosopher", Indian Express (Cochin), August 21, 1992, p.3. See also "Thadavarayile Criminologist" (Criminologist of Prison), Mathrubhumi (Kozhikode), August 4, 1993, p.6.

beliefs of the prisoner. Ours being a secular state we must focus upon the essence of all religions ie., humanism. As said by Justice Ranganatha Misra in Sanjay Suri v. Delhi Administration[130] 'ours being a secular state there may perhaps be an immediate counter reaction to religion being tolerated anywhere but we never intend to speak of that religion which is enigmatic to the concept of secularism'. So the concept of humanism must be introduced within the prison walls through religious instructions. Prison authorities and administrators can play a positive role in this respect.

If a prisoner voluntarily donate his body organ like eye, kidney etc. whether the prison authorities can impose any restriction on that? The question to be settled is whether it is a right of the prisoner. Such a request by the prisoners was denied by the State Government.[131] In view of the social good, benefit to an individual donations

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130. 1988 Cr.L.J. 705 at p.708.
131. A social organisation doing extensive work in Sabarmathi Jail in Gujarat appealed to convicts to save lives of the sick by donating a kidney each. A convict sentenced to death offered to donate a kidney but the State Government did not permit him on the ground that it might endanger his health. He subsequently also announced that his eyes will be donated for transplant and his body given over for medical research. Several other prisoners also chose that way to atone for their past misdeeds. But they were not allowed. See, "Gujarat: Last Rights", India Today, (New Delhi), November, 1983, p.88.

by prisoners should be allowed. Article 21, which guarantees the right to life and personal liberty should be interpreted to include the right to donate one's body organs also.

Psychiatric Services

The import of psychiatric knowledge into penology especially in the area of correctional and rehabilitative treatment of prisoners is a recent and major trend. The principles of psychiatric information are of relevance not only to those who are in contact with law but to those who come into conflict with it as well. Psychiatric therapies could be meted out for those mentally ill prisoners who are undergoing sentences and also for the psychopathic criminals. Psychiatric and psychological facilities will help refashion the prisoners and enrich the programme content which bring in pronounced effects and change in prisoner's outlook on life and his approach to life.[132] The presence of psychopaths among the prison inmates is deleterious to other non-psychopathic ones since the chances of taking the latter on a career of racidivism are high. The much repeated statement that those discharged from prison commit more crime than before their entry into

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132. See Tamil Nadu Jail Reforms Commission Report, Vol.I (1979), p.64.

prison may find some basis under this situation. Considering these facets to the problems and also taking into account the progressive trends in penology, namely, offering of special facilities for correctional purpose, the proposal for a psychiatric prison appears to be well based.[133]

After-care of Prisoners

The duty of society does not end with the release of the offenders from the prisons and other correctional institutions. The governmental and private agencies must lend the released prisoner efficient after care services. It has to be directed towards the lessoning of prejudices against the prisoner and towards his social and economic rehabilitation.[134] The Report of the Indian Jail Committee

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133. Walter C.Bailey, "An Evaluation of One Hundred Reports", in Radzinowicz and Wofgang (Eds.), The Criminal in Confinement (1971), pp.187-191.
134. S.P.Srivastava, Public Participation in Social Defence (1981), p.73. There is a Kerala After Care Association functioning in Trivandrum with branches in the districts for the after-care service of the prisoners released. This association is mainly non-official in character. Government may render such financial assistance as deemed fit from time to time in furtherance of the rehabilitation of the prisoners released. See, Kerala Prisons Manual, Vol.I, (1981), Rule 721.

1919-20, gave an impetus for starting Discharged Prisoners' Aid Societies in the country.[135] These societies were non-official in character and were aided by the government. The object of such societies was to help the released prisoners in their effective social and economic rehabilitation in society. Besides this, the societies performed reclamation of habitual offenders, prevention of casual and juvenile offenders from becoming habituals, securing employment for discharged prisoners, affording them legal and monetary help and maintaining homes and work houses and so on. Some of these Discharged Prisoners Aid Societies have met their waterloo for want of funds and proper governmental support and recognition.[136] Though public participation has been sought and has been received in several areas of social defence operations, the situation, however, continues to be grossly unsatisfactory. Lukewarm public participation is gradually compelling the social defence workers to rely more and more on governmental support.

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135. The Discharged Prisoner's Aid Societies were formed in Madras in 1921, in C.P. (i.e., Madhya Pradesh) in 1925; in Punjab in 1929; in Bengal in 1928; in Bombay in 1933; in U.P. in 1938; in Andhra in 1951 and in Kerala in 1956. See S.P.Srivastava, op.cit., p.73.
136. Ibid.

The successful functioning of the prison administration will be judged by the efficiency of the after care and rehabilitation services resulting in a substantial reduction in the number of recidivists amongst the prison population. If this result is achieved the expenditure for the government in maintaining prison population will be substantially reduced. Hence, short-sighted arguments such as paucity of funds, or else that the relief of unemployment amongst the general public should get priority over rehabilitation of exconvicts, should not be allowed to prevail. As pointed out by Justice Ismail, 'so long as prisoners have not been cast out of society and they continue to be members of the society, though segregated temporarily, but are expected to rejoin the mainstream of the society after their release, it is the duty of the state to spend for their rehabilitation, reformation and re-entry into the mainstream of the society'[137] The importance of spending money on such measures cannot be any loss than spending money on the health or education of the people. The purpose of training and treatment of convicted prisoners

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137. Report of the Commission of Inquiry (into the incidents of beating and ill-treatment alleged to have taken place in the Central Prison, Madras during February 1976 to February 1977) by Justice M.M.Ismail (1977), p.194.

shall be to establish in them the will to lead a good and useful life on discharge, and to fit them so to do.

Emerging Dimensions

Thus new rights are evolved with regard to the treatment of prisoners everywhere. New dimensions are given to the existing right of prisoners by the innovative and progressive judgments of the courts. When new dimensions are attached to the objectives of punishment, it requires new methods and techniques for the treatment of offenders. During the process new prisoner rights are evolving. Eventhough there are no statutory recognition to many of these, the acceptance by judiciary establish these as the rights of prisoners. To a certain extent such creative judgments are essential for giving actual recognition to the modern objectives of imprisonment. Every prisoner thus has the protection of the court extended to him. The encrusted view of a convict as deserving of punishment apart from the deprivation of his liberty was negated, and new impetus given to a hitherto untended field of criminal jurisprudence.

CHAPTER 4

Classification of Prisoners: Problems and Perspectives

Chapter 4

CLASSIFICATION OF PRISONERS: PROBLEMS AND PERSPECTIVES

One of the objectives of prison administration is to wean the offender away from wrong doing in future and make him return to society safe and useful. To achieve this end the classification of prisoners on scientific lines is of utmost importance.[1] Without such classification, the individualized treatment through which prisons now seek to attain their basic objectives is impossible. Classification will enable the prison administration to provide different types of treatment to different categories of prisoners according to their individual capacities and needs for reform and rehabilitation. Experience of even the early prison reforms reveals that worst psychological troubles are bound to arise if prisoners are huddled together irrespective of their crime peculiarities.[2] Any attempt to eliminate or

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1. Theoretically, classification is a scientific process for determining the background, aptitudes, individual and social needs as well as rehabilitation requirements of those for whom correctional treatment has been ordered by the court and for assigning them therapeutic and work programmes, according to their needs and the society's obligation in the context of the existing resources. See Report of the Tamil Nadu Prison Reforms Commission (1977), Vol.II, p.1.
2. Jayathilak Guha Roy, Prisons and Society: A Study of the Indian Jail System (1989), p.45.

regulate criminal propensities cannot succeed without the requisite knowledge of the history of a crime ie., the family background, mode of living, education, culture and various other aspects of the life of the criminal. These objective aspects serve as the basis for different types of treatment in the matter of food, lodging, work-assignments, recreation, intellectual and reformatory courses etc. for different categories of prisoners.

There are various objectives for the classification of prisoners. It enables the prison authorities to study the offender as an individual and to organise an overall, balanced, integrated and individualized training and treatment programme. It ensures maximum utilization of resources and treatment facilities available in the institution as well as the community. Scientific classification is thus the basis of individualized correctional treatment, which includes proper custody, discipline and work assignment.

The advantages of classification has also to be looked into. It provides more adequate custodial supervision and control. Proper classification provides for better discipline and increased productivity. More

effective organisation of all training and treatment is another advantage.

The classification in prison should be based on certain principles, viz., age, sex, physical and mental condition, educational and vocational training needs and potentialities for reformation and rehabilitation. Besides, factors like nature of crimes, motives, provocations, previous history of the offender, his 'social processing', his 'sophistication in crime' should be taken into account to determine his gradation in custody and appropriate treatment.[3] A broad classification as such was done on the basis of the nature and number of offences by the court itself.[4] In practice the classification has

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3. Eg. The Kerala Prisons Rules 1958, Rule 197-209 deals with classification and separation of prisoners. Rule 200 says:- "All convicted prisoners shall be divided into two main divisions viz., habitual convicts and others. They shall be further divided into four divisions or classes A, B and C and special classes. The definition of prisoners falling within classes A and B and the treatment to be accorded to them are laid down in Chapter XLV of Kerala Prison Rules.
4. For example, Rule 202 of Kerala Prisons Rule says:- "(1) The classification of a convicted person as a habitual criminal should ordinarily be made by the convicting court, but if the convicting court omits to do so, such classification may be made by the Judicial District Magistrate or in the absence of an order by the convicting court or District Magistrate and pending the result of reference to the District Magistrate by the officer in charge of the jail where such convicted person is confined.
Provided that any person classed as a habitual

(contd...)

become a mere routine and a mechanical exercise.[5]

Some modern criminologists are of the opinion that nature of crimes need not be taken into consideration while classifying prisoners on the plea that the nature of a person's offence is not a measure of his potentiality for rehabilitation. As Barnes and Teeters put it:[6]

> "The function of classification is to differentiate the various inmates ... in terms of their potentialities for rehabilitation regardless of the offence on the sentence".

It cannot be denied that the nature of a person's offence is not a measure of his potentiality for rehabilitation. Even so, in order to avoid the evil effects of an over-optimistic assessment of the criminal and also of

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(f.n. 4 contd.)

criminal may apply for a revision of the order.
(2) The convicting court or the District Magistrate may, for reasons to be recorded in writing, direct that any convicted prisoner any person committed to or detained in prison under section 110 read with section 99E or section 99F of the Code of Criminal Procedure shall not be classed as a habitual criminal and may revise such directions".

5. Report of the Tamil Nadu Prison Reforms Commission, Vol.II (1977), p.1.
6. Harry Elmer Barnes and Negle K.Teeters, New Horizons in Criminology (1966), p.467.

uncontrolled mixing and consequent contamination, the nature of crime should reasonably be taken into account for the purpose of classification of offenders in prison.[7] If a prisoner convicted for an organised crime is kept with the first offenders, the possibility of contamination and worsening of community life would remain very great. While classifying prisoners the nature of crimes should, therefore, receive due attention. The observation of an eminent criminologist Austin Mc Cormick is very significant in this context, when he says:[8]

> "Scientific classification and programme planning on the basis of complete case histories, examinations, tests and studies of the individual prisoners will promote a high degree of morale and efficiency. For that psychatry and psychological services can be utilized".

Scientific classification of prisoners has been accepted as an essential element of modern prison system throughout the world. It should be adopted in the

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7. Jayathilak Guha Roy, op. cit., p.47.
8. Austin Mc Cormick, "The Prison's Role in Crime Prevention", 41 Journal of Criminal Law and Criminology, 43 at p.54 (1950-51).

administration of prisons in India.[9] However, it is often argued that scientific classification involves huge expenditure as it requires a large number of professional personnel in prison administration.

The existing Jail Codes of various States and Union Territories provide for segregation of prisoners more or less on the basis of their age, sex, criminal antecedents, nature and terms of imprisonment, physical and mental conditions etc. These minimum statutory requirements, though insufficient for the purpose of scientific classification, are more in breach than in observance. This aspect is lucidly highlighted by the latest All India Committee on Jail Reforms (1980-83) in the following words:

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9. In India classification was practically unknown until the greater part of the last century. Classification of prisoners, atleast in some measure, was attempted to have introduced in Indian prisons when the government orders regarding habitual offenders were issued in 1886. As the concepts of correctional treatment became popular in the early present century, the need for segregation of offenders on the basis of essential principles of scientific classification was emphasised by the Indian Jails Committee of 1919-20 as well as Jails Reforms Committees of several states. See, Report of the Tamil Nadu Prison Reforms Commission, Vol.II, (1977), pp.1-3; Report of the Commission of Inquiry by Justice M.M.Ismail (1977), p.193; Report of National Expert Committee on Women Prisoners, (1986-87), p.128.

> "Undertrial prisoners, prisoners sentenced to short medium and long terms of imprisonment, prisoners sentenced to simple imprisonment, habitual offenders, lifers, hardened and dangerous prisoners, children, young offenders, women offenders, civil prisoners, prisoners sentenced by court martial, criminal and non-criminal lunatics, detenus under the National Security Act, persons detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, smugglers etc. were all kept in the same institutions and the arrangements for their segregation even in different wards were not effective".[10]

The Committee further observed that factors like overcrowding and periodic large turnover of prisoners override all principles and requirements of segregation and that in reality segregation has become a provision only on paper.[11]

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10. Report of All India Committee on Jail Reforms (1980-83), Vol.I, p.108.
11. Ibid.

Classification Adopted in Kerala

Today more and more people are coming to believe that it is the task of the prison to help bring about the reformation of the inmate.[12] If nothing has been done in prison to help them, many of them would become more dangerous to life and property after release than they were before. The treatment inside the prison must help the prisoner to change his ways to thinking and attitudes, and equip him for useful work. Classification of prisoners should facilitate to achieve these objectives.

The purpose of classification programme are the following in Kerala under the Kerala Prisons Manual.[13]

(i) the study of the offender as an individual, to understand the sequence of his criminal behaviour and the problems presented by him;

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12. If real rehabilitation is to take place the inmate must possess intellectual and emotional capacity to change himself provided suitable circumstances are created. The process naturally requires an identification by the subject himself about what has been wrong with him and a conscience desire to change to a more desirable pattern of living. See Report of the Tamil Nadu Prison Reforms Commission (1979), p.2.
13. The Kerala Prisons Manual, 1958, Rule 288.

(ii) to segregate prisoners into homogeneous groups for the purpose of treatment;

(iii) to organise individualized training and treatment programme;

(iv) to co-ordinate and integrate all institutional activities and develop a system of constructive institutional discipline;

(v) to ensure maximum utilization of resources and facilities available in the institution;

(vi) to review inmates response to institutional activities for treatment and to adjust the programme to suit his needs.

In Kerala there is a classification committee[14] and the process of classification and reclassification work

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14. Each Central Prison and District Jail shall have the classification committee consisting the following personnel:
(a) Chairman - Superintendent
(b) Vice-Chairman - Jailor
(c) Members:- (i) Assistant Jailor, (ii) Medical Officer, (iii) Welfare Officer, (iv) Technical Officer in charge of vocational training, (v) Psychologist/Psychiatrist
(d) Member Secretary - Welfare Officer.

should be phased through different stages.[15] Here prisoners should be classified on the basis of age, physical and mental health, length of sentence, degree of criminality and character.[16] Sequence of offender's criminal behaviour, his sophistication of crime and urban-rural backgrounds, requirements of gradations in custody, vocational and educational needs also has to be considered. So first offenders should not be put along with hardened criminals. If they are not separately treated it will spoil the deviants and the prisons will become breeding ground for new criminals.[17] In Kerala the prisoners have

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15. Classification and reclassification work should be phased as given below:-
(i) Admission, (ii) Study of the offender through interview, collection of social information, tests and examination, observation; (iii) Analysis of the collected materials; (iv) Planning of training and treatment; (v) Review of progress and reclassification; (vi) Planning post-release rehabilitation programme in collaboration with the aftercare agencies; (vii) Pre-release preparation; (viii) Release procedure.
16. Kerala Prisons Manual 1958, Rule 292.
17. But in the prisons visited by the researcher there are no facilities for such segregation. In the Central Jail, Viyyur and Central Jail, Trivandrum convicted and undertrial prisoners are put in the same cell.

several complaints against non-categorization under certain heads like bahitual offenders, first offenders etc.[18]

Classification in England

In England prisoners are classified into different groups along the following lines.[19]

(1) Male and female prisoners;

(2) Civil and criminal prisoners;

(3) Remand and sentenced prisoners;

(4) Adult and young prisoners;

(5) Stars[20] and ordinaries.

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18. James Vincent Commission Report, p.3, in Re A Prisoner before the Kerala High Court in Cr.M.C. No.179 of 1989 (Mimeographed).
19. J.E.Hall Williams, The English Penal System in Transition (1970), p.85. This classification is made under Prison Rules 1964, Rule 3.
20. The star class is basically reserved for prisoners with no previous experience. This often includes persons with long experience of crime and of custodial institutions for young offenders, such as approved schools, detention centres and borstal institutions and therefore does not mean prisoners lacking criminal sophistication, though no doubt that was the original idea and is still the basic consideration. Ordinaries are those who have been in prison before. Id., p.87.

But in England also classification procedure is not strictly followed due to various reasons. The fact is that classification of prisoners and the use to which prisoners are put fall victim to the demands of expediency, and pressure on the system, which forces the adoption of solutions which are convenient rather than ideal. Law also provides for treatment of persons while they are detained in prison pursuant to a court order. Unconvicted prisoners are as far as possible kept out of contact with convicted prisoners.[21] Proper classification of offenders for the purpose of treatment is a prerequisite of an ideal penal programme. The introduction of modern classification methods in prisons is essentially directed to meet this end.

Judicial Attitude in India

Different criteria are adopted for the classification of prisoners in India. It is made on the

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21. As a matter of administrative practice, prisoners are classified into following categories such as those whose escape would be highly dangerous to the public, those who cannot be trusted in open conditions, those who can be trusted. See Halsbury's Laws of England, Vol.37 (1982), p.740. The importance of security in classification or allocation decisions is most obvious where selection for open conditions is being considered, but it affects every decision. See J.D.Mc Clean and J.C.Wood, Criminal Justice and Treatment of Offenders (1969), p.100.

basis of sex, age and the nature of the sentence awarded to prisoners.[22] In Kerala prisoners are classified mainly as A class, B class and ordinary prisoners,[23] female prisoners,[24] youthful prisoners,[25] lunatics,[26] civil prisoners,[27] undertrial prisoners[28] and prisoners sentenced to death.[29] If a prisoner is having a contagious disease he should not be put along with other prisoners.[30] The female prisoners are classified and separated, not only the unconvicted from convicted but also adolescent from older prisoners, habituals from non-habituals and prostitutes

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22. Prisoners Act 1900, S.29 reads:- "The requisitions of this Act with respect to the separation of prisoners are as follows:- (1) In a prison containing female as well as male prisoners, the female shall be imprisoned in separate buildings, or separate parts of the same building, in such manner as to prevent their seeing, or conversing or holding any intercourse with the male prisoners; (2) In a prison where male prisoners under the age of twentyone are confined means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not; (3) Unconvicted criminal prisoners shall be kept apart from the convicted criminal prisoners; and (4) Civil prisoners shall be kept from criminal prisoners".
23. Kerala Prisons Rules 1958, Rule 756.
24. Id., Rule 818.
25. Id., Rule 829.
26. Id., Rule 825.
27. Id., Rule 711.
28. Id., Rule 734.
29. Id., Rule 781.
30. Id., Rules 855, 861.

from respectable women.[31] There are various safeguards provided for female prisoners. They are not permitted to leave the enclosure set apart for females, except for release, transfer or attendance at court or under the order of the Superintendent.[32] Prisoners Act 1900 also stipulates such a classification of female prisoners. If a male prisoner is below twenty one years he has to be treated differently from other prisoners. As seen earlier civil and criminal prisoners and convicted and undertrial prisoners are also treated differently. Among the convicted prisoners, if circumstances warrant, further classification can be made, convicted criminal prisoners may be confined either in association or individually in cells or partly in one way and partly in the other.[33] thus Section 28 or the Prisoners Act empower the jail Superintendent to segregate the convicted prisoners keeping them in separate cells and restrict their movements for the purpose of maintaining discipline within the prisons.

The constitutional validity of Section 28 of the Prisoners Act which empower such classification was

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31. Id., Rule 818.
32. Id., Rule 819.
33. The prisoners Act 1900, S.28.

questioned in K.Valambal v. State of Tamil Nadu[34] It is a landmark decision with regard to classification of prisoners. Justice Gokulakrishnan and Justice Venugopal of the Madras High Court found that the classification of prisoners is not against Article 14 of the Constitution.

In Valambal the petitioners were found indulging in activities in jail like indoctrinating the other co-prisoners by preaching the policy of violence and annihilation of moneyed class and planning to escape from the jail. The court held that the petitioners formed a class by themselves.[35] Their separate classification in the matters of security measures was not arbitrary. So the action of the prison authorities did not violate article 14 of the Constitution.[36] Disciplinary segregation taken by the jail superintendent cannot be characterised as solitary confinement as contemplated under Section 73 of the Penal Code, nor can it be characterised as cellular confinement or separate confinement which are intended as punishment for prison offences under Sections 46(8) and 46(10) of the Prisons Act.

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34. 1981 Cr.L.J. 1506.
35. Id., p.1525.
36. Ibid.

In Madhukar Bhagwan Jambale v. State of Maharashtra[37] along with other grounds the prisoner questioned the classification of convicts as class I and class II prisoners on the basis of higher status, better education and higher standard of living in the state of Maharashtra. According to the petitioner it was discriminatory and violative of Article 14 of the Constitution. While rejecting the contention, the court held that the grievance about classification of convicts as class I and class II prisoners do not survive since the classification has been already abolished in that state.[38]

Various reasons can be attributed for the classification of prisoners. The security of the prison and the safety of the prisoners have to be kept in the forefront. But at the same time, the court has a paramount obligation to protect the rights of the convicted prisoners and to ensure that no inhuman or debasing treatment is

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37. 1985 Cr.L.J. 78.
38. The Court held:- "It appears that Rule 3 of Part II of the Maharashtra Prisons (Admission, Classification and Separation of Prisoners) Rules 1966, provided for classification of convicted prisoners to class I and class II. However, this classification has been discontinued by government by resolution dated January 1, 1971. As a result of this abolition of this classification all convicts are entitled to the same facilities. The challenge to the classification of prisoners as class I and class II, therefore does not survive". Id., p.81.

meted out to them under the grab of enforcing internal order and discipline in jail. At the same time, the prison authorities' discretion in segregating the convicted prisoners as a measure of preserving internal order and discipline in jail cannot also be lightly interfered with.

In Naresh Soni v. State of U.P.[39] the accused who were being prosecuted under Section 107 I.P.C. and Section 25 of the Arms Act were made to live in solitary cells with iron-bar betters on their body, day and night ever since they were lodged inside the jail. In justification of the action taken against the accused it was stated by the authorities that the accused belonged to a proclaimed gang which had created havoc in different states. So different types of classification can be followed by authorities for the proper treatment of prisoners inside the prison. But the classification must be reasonable according to the guidelines given in the statutes.

Specific Classes of Prisoners

There are certain classes of prisoners who need special attention inside the prisons. Insane prisoners, women prisoners and young prisoners are such categories.

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39. 1983 Cr.L.J. (Noc) 16.

They cannot be equated with ordinary prisoners. There are various statutory provisions where they are given special treatment.

Mentally Disordered in Prisons

If a prisoner's state of mind is not properly balanced he is not treated as an ordinary prisoner inside the jail. There are various statutory guidelines with regard to the treatment of insane prisoners inside the jail.[40] Section 30 of the Prisoners Act 1900 lays down the procedure for dealing with lunatic prisoners. The section relates to the powers of the state government. It has nothing to do with powers of courts. If a mental imbalance of a prisoner has come to the knowledge of the authorities he has to be removed to a lunatic asylum. 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.[41] If on the expiry of that term it is

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40. Prisoners Act 1900, S.30(1).
41. Ibid.

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 he has to be kept in custody according to law.[42] Subsequently on becoming a normal person he is remanded to the prison from which he was removed. If the prisoner is no longer to be kept in custody then he can be discharged. The Kerala Prisons Rules 1958 classifies lunatics in the jail into five different classes.[43]

The maximum period for which any person alleged to be a lunatic can be detained for observation by order of a magistrate under Section 16 of the Indian Lunacy Act IV of 1912 is 30 days from the date on which he was first brought before the magistrate, but each order given by the magistrate for such detention can only cover ten days and has to be renewed as soon as that period expires. If any

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42. Ibid.
43. The Kerala Prisons Rules 1958, Rule 835 classifies the lunatic prisoners as the following: (1) Persons supposed to be lunatics and detained under observation under the provisions of S.19 of the Indian Lunacy Act IV of 1912; (2) Persons who have become insane after their conviction and admission to jail; (3) Prisoners incapable of making their defence owing to unsoundness of mind; (4) Prisoners who have been trained for a criminal offence and found to have committed the act alleged but who have been acquitted on the ground of having been insane; (5) Recovered criminal lunatics.

convict becomes insane after admission to jail a report of his case has to be immediately be submitted to the Inspector-general with a view to government being moved to order his removal to the mental hospital.[44] Thus there can be seen that there are various safeguards provided for the treatment of lunatic criminals. But the prison authorities usually did not strictly follow these statutory provisions. There are numerous instances where the insane prisoners have approached the courts for the redressal of their grievances.

In Veena Sethi v. State of Bihar[45] the letter of the Free Legal Aid Committee, Hazaribagh brought the plight of 16 prisoners in Hazaribagh Central Jail before the Supreme Court. These prisoners were insane or of unsound mind at the date when they were received in the jail. Some prisoners were detained in prison for the period ranging from 37 years to 19 years. These prisoners were declared insane at the time of their trial and were put in central

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44. For example, Prisoners Act 1900, S.30 and Travancore-Cochin Prisoners Act 1950, S.9. Prisons Act 1894, S.59(23) empower the state government to make rules for the treatment, transfer and disposal of criminal lunatics or recovered criminal lunatics confined in prisons.
45. 1983 Cr.L.J. 675.

jail with directions to submit half yearly medical reports. When the court examined the records relating to six prisoners, it found that they were still to be of unsound mind. The court did not order their release "because having regard to the mental condition of these prisoners, it would not be in the interest of the society as also in their own interest to set them free".[46] The court also pointed out that the practice of sending lunatics or persons of unsound mind to the jail for safe custody is not at all healthy or desirable practice, because jail is hardly a place for treating those who are mentally sick.[47] The Supreme Court ordered at the same time, the release of some other prisoners.[48] The necessity of giving compensation by the State Government for the illegal detention of the prisoners was also pointed out by the court.

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46. Id., p.676.
47. Ibid.
48. One Bhondua Kurmi along with 7 other prisoners were ordered to be released by the Supreme Court. Bhondua Kurmi was charged for an offence under S.302, I.P.C., but on account of his being of unsound mind at the time of commission of the offence he was acquitted and was directed to be kept in safe custody and under a proper treatment in the Hazaribagh Central Jail, admitted to jail in 1956. He became normal in 1960. Though after a long delay the intimation of sanity was given by the Superintendent there was no response from the I.G. of Prisons or from the government. The Supreme Court ordered the release of prisoners with immediate effect. See 1983 Cr.L.J. 675.

In Sant Bir v. State of Bihar[49] a person was kept in jail as a criminal lunatic, for sixteen years even after a medical report that he was fit for discharge. While releasing the person from jail, the Supreme Court asked the State Government to provide the necessary funds for the purpose of meeting the expenses of his journey to his native place. The facts narrated in this case makes very sad and distressing reading. It seems that we have lost all respect for the dignity of the individual and the worth of human person so nobly enshrined in our constitution. It also shows that we are prepared to forget a person once he is sent to jail and we do not care to enquire whether he is continued to be detained in the jail according to law or not. It is a matter of shame for the society as well as the administration to detain a person in jail for over 16 years without authority of law.

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49. A.I.R. 1982 S.C. 1470. The petitioner was sentenced to life imprisonment on 28th February 1949. Since the mental condition of the petitioner was not stable, on 20th November 1961 the petitioner was transferred to another jail for confinement as a criminal lunatic. The medical history sheet and the medical report showed that the petitioner was fully recovered and was free from any symptoms since 23rd December 1966 and was fit for discharge. This medical report was sent by the Jail Superintendent to the State Government and it was stated that the petitioner was fit for discharge "in the care of his guardian or surety" and the necessary orders should be passed in that behalf. The State government instead of directing release of the petitioner directed the Jail Superintendent to keep the petitioner in safe custody as a criminal lunatic for three years.

In Amrit Bhushan Gupta v. Union of India[50] the Supreme Court was reluctant to grant excess rights to the prisoners sentenced to death on the ground of insanity. A petition under Article 226 of the Constitution was filed in the High Court of Delhi, seeking a writ of mandamus to restrain the respondents from carrying out the sentence of death passed against the petitioner, a person condemned to death for having committed culpable homicide amounting to murder. While dismissing the appeal the Supreme Court held that the courts have no power to prohibit the carrying out of a sentence of death legally passed upon an accused person on the ground either that there is some rule in the common law of England against the execution of an insane person sentenced to death or some theological, religious or moral objections to it.[51] In this decision the Supreme Court has not given due regard to the objectives of punishment. One of the purpose of punishment is that the offender should know that because of his sinful act he is

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50. A.I.R. 1977 S.C. 608.
51. Id., p.614. In this context it is relevant to note Rule 801 of the Kerala Prison Rule 1958. This Rule lays down that if a prisoner is found insane the execution has to be stayed. He has to be kept under observation in the condemned cell and the authorities have to submit a report to the government on his mental condition. If after observation the prisoner is found not insane that matter has to be reported to the government for orders. If insanity is confirmed it has to be forwarded to the government for orders.

punished. If a person is insane at the time of executing the sentence he is unable to suffer the feeling. So there is no meaning in awarding punishment to such a person.

The unlawful delay caused in the case of insane persons has been revealed in Cheruman Velan's[52] case. The Kerala High Court ordered the release of the detenue who has been imprisoned in three mental hospitals in Tamil Nadu and Kerala for a long period of forty years. Mr.Justice Krishna Iyer has brought this case to the notice of the Kerala High Court through a letter. The division bench comprising Justice V.S.Malimath and Justice V.Bhaskaran Nambiar, after treating it as a writ petition ordered to release him immediately from the mental hospital and directed the State Government not to prosecute him for the alleged murder.

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52. Velan was arrested by Kollengode police in May 1947 on the charge of murdering his wife and then attempting to kill himself. He was charge-sheeted before the then Sub-Magistrate of Palghat who ordered his detention in the mental jail, Coimbatore since he was found to be of unsound mind. Later, Velan was transferred to Madras mental hospital and finally he was brought to Trivandrum mental hospital on May 16, 1961. For a detailed description of the story see Indian Express (Cochin), February 7, 1987, p.1. Same is the story of Chathu who is undergoing detention as an undertrial in the Cannanore Central Jail for the last 16 years. He was charged for murder in 1977 for killing his nephew. He was acquitted by the Calicut Sessions Court in 1980. As none of his relatives came for his rescue the court ordered his detention in jail. Eventhough he is a normal man for the last 4 years he is still in the jail. See, P.Gopi, "Sikshayillathe Pathinaru Varsham Jayilil" (Sixteen Years in Jail without Conviction), Malayala Manorama (Kozhikode), July 23, 1993, p.1.

Velan's case is a new trend in Kerala where judiciary has looked into the fate of insane prisoners. The role played by the former judge of the Supreme Court Justice Krishna Iyer is also worthy to be noted. Because of him only that the case was brought before the High Court. Some voluntary organisations were also ready to help the victim. It is a welcome trend. Studies reveal that there is a substantial overlap between the populations of prisons and mental asylums and many inmates of jails deserve to be beyond penal premises.[53] They need a separate treatment. Putting them along with other prisoners make the condition worse. That is why Justice Krishna Iyer has said:[54]

> "... the treatment of partially disordered persons in the same cells as others, lugging them together without bothering about their mental handicaps and often handling them more severely confusing between derangement and delinquency, is a practice where the prison system is the criminal".

So the insane persons inside the persons should be treated medically. Putting them along with ordinary

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53. V.R.Krishna Iyer, A Constitutional Miscellany (1986), p.145.
54. Id., p.144.

prisoners will aggravate their problem. They will be a burden to the prison authorities also as the various security measures cannot be strictly enforced on them. Eventhough there are some statutory provisions regarding their treatment, it is not properly implemented.

Youth Inside the Prisons

A child is a national asset if properly brought up. So it is the duty of the state to look after the child with a view to ensuring full development of his personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail.[55] When we analyse the history we can see that before legislations were effective, there were philanthropic bodies and social organisations which had brought into existence special institutions for children, minors, insane persons etc.[56] These institutions proved to be of help to

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55. Some of the decisions of the Supreme Court have highlighted these. See Sheela Barse I v. Union of India, (1986) 3 S.C.C. 596; Sheela Barse II v. Union of India, (1986) 3 S.C.C. 632.
56. J.M.J.Sethna, Society and the Criminal (1980), p.324. The legislation for children on all India level dates back to 1850 when the Apprentices Act 1850 was passed. An important landmark in the progress of separate legislation for children was the recommendation of the Indian Jails Committee (1919-20) for the formulation of a law for children and for separate courts with informal and elastic procedure. Following the recommendation, various Indian states started enacting children Acts to provide for the custody, trial and punishment of juvenile offenders, and for the protection of children and young persons. See Ved Kumari, "Whither Rehabilitation? A Critical Study of Juvenile Correctional Institutions in Delhi", in Law and Poverty: Critical Essays (1988), Upendra Baxi (Ed.), pp.310-321 at p.310.

the state which afterwards resorted to legislation. Prior to such legislation, apart from the help rendered by the philanthropic institutions, the treatment afforded to juvenile delinquents was undesirable. Juveniles were tried by the ordinary courts, and if found guilty sentenced to imprisonment or treated in the same way as adults. They were lodged in prisons with adults who often taught them bad ways.[57] The child offender was often imprisoned even for trivial offences and was given the same treatment as the adult offender.

Later legislations have incorporated various provisions giving special protection to youthful prisoners: Prisons Act 1894 provides that in a prison where male prisoners under the age of twenty one are confined, means has to be provided for separating them altogether from other prisoners and for separating those who have arrived at the age of puberty from those who have not.[58]

In Kerala, the Kerala Prisons Rule 1958 also provides for segregation of youthful prisoners. So long as

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57. See Sethna, op.cit.
58. See Prisons Act 1894, S.27. In Kerala under the Kerala Borstal Act a borstal school was established at Cannanore in 1957. Two to five years are the sentences awarded here. Children between the age group of 18 and 23 are admitted here.

a male prisoner under the age of twenty one is detained in any jail, measures has to be taken to prevent any communication between him and any prisoner of another class.[59] But this provision should not be a disadvantage to the prisoner. That is why it has been provided that if there is only one such prisoner in the jail and it is considered inadvisable to keep him in solitude, the Superintendent has to apply for his transfer to a jail where prisoners of the same class are confined.[60] It is an offence if a youthful prisoner refuses or neglects to learn the lessons assigned to him.[61] But reduction of diet has to be avoided in such cases.[62] Timely notice of the date of release of every youthful prisoner has to be intimated to his parents, relatives or friends, to enable them to attend at the jail to receive him.[63]

In most of the states juvenile offenders sentenced to imprisonment are detained in a reformatory school.[64] Detention in these schools is not considered as

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59. Kerala Prisons Rules 1958, Rule 829.
60. Ibid.
61. Id., Rule 832.
62. Ibid.
63. Id., Rule 834.
64. For example, Madras Borstal Schools Act 1926; The Bombay Borsal Schools Act 1929; The Central Provinces Borstal Schools Act 1929.

or equated in punishment in the sense in which the word is used in Section 53 of I.P.C, though it is punishment in a narrow sense because there is a restraint on personal liberty. The objects of detention is to reclaim erring young persons lost or likely to be lost to society by reason of environment or bad upbringing or companionship and to make good citizens of them.[65] Strictly speaking a borstal school is a correctional institution and not a prison. That object is frustrated if the child or young person is to be sent to prison from the borstal school.[66] It would be anomalous to retransfer the persons into prisons, where they would be allowed to mingle with hardened, incorrigible and habitual offenders thereby nullifying the reformation brought about during borstal detention.

Eventhough there are provisions in the statutes giving special treatment to youthful offenders it is not properly implemented. On a number of occasions the Supreme Court has intervened to protect the interests of children.

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65. Ratanlal and Dhirajlal, Law of Crimes, Vol.I (1988), p.143.
66. Public Prosecutor v. Shaik Valli, 1971 Cr.L.J. 1229 (A.P.).

In Sanjay Suri v. Delhi Administration[67] the Supreme Court even went to the extent of warning home secretaries of some state governments that they will be committing contempt of court if appropriate affidavits regarding the status and number of children in jails are not furnished. The Supreme Court has called upon the authorities in the jails throughout India not to accept any warrant of detention as a valid one unless the age of detenu is shown therein.[68] The Supreme Court issued orders to release and rehabilitate children housed in jails along with common criminals.

Earlier in Hiralal Mallick v. State of Bihar[69] Justice Krishna Iyer with Justice Goswami of the Supreme Court developed the theme of humane jail conditions in the case of a twelve year old boy convicted of homicide. The Court directed that "reformatory type of work should be

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67. 1988 Cr.L.J. 705. Two applications under Article 32 of the Constitution in the nature of public interest litigation were filed before the Supreme Court. A news reporter and a trainee sub-editor moved the Supreme Court for appropriate directions to the Delhi Administration and the authorities of the Central Jail at Tihar, pointing out features of maladministration within the jail relating to juvenile undertrial prisoners. During the pendency of the proceedings, the court made several orders with reference to juvenile prisoners and undertrials.
68. Id., p.708.
69. (1977) 4 S.C.C. 44; A.I.R. 1977 S.C. 2236.

prescribed for the appellant in consultation with the medical officer in the jail.[70] It directed the visiting team of central prison to ensure that this was implemented Periodic parole was also prescribed. The Court was even more elaborate in stressing the regenerative and reformative potential of transcendental meditation and urged the prison authorities to arrange with the consent of the prisoner and under medical supervision, initiation into courses which will refine his behaviour and develop his potential.[71] Kadra Pehadia v. State of Bihar[72] illustrate the fate of four young undertrial prisoners who was inside the prison for eight years without a trial. They were compelled to work outside the jail walls. They were put in leg irons to avoid their escape and even in the lock up leg irons were not taken off. Condemning it as unconstitutional, Bhagawathi. J remarked that it discloses a sense of callousness and disregard of civilized norms.[73] The undertrials should not be kept in leg irons in violation of the decisions of the court nor they could be asked to work outside the jail. It seems that once a person accused of an offence is lodged in the jail everyone

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70. Id., p.52.
71. Id., p.53.
72. A.I.R. 1981 S.C. 939.
73. Id., p.941.

forgets about him and no one bothers tocare what is happening to him. In Sheela Barse series of cases the Supreme Court has tried to give full effect to the constitutional obligations towards children while they are inside the prisons.[74] In this case the Supreme Court has given effect to the directive principles of state policy guaranteed under Article 39(f) according to which the state has to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Here the petitioner has undertaken a real social service in bringing this matter before the courts. She offered to personally visit different parts of the country to gather information and verify correctness of statements of facts. Here the petitioner volunteered to perform the functions which state

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74. Sheela Barse I v. Union of India, (1986) 3 S.C.C. 596. Sheela Barse II v. Union of India, (1986) 3 S.C.C. 632. In Sheela Barse I petitions were filed under Article 32 of the Constitution for the release of children below the age of 18 years detained in jails within different states of the country, production of complete information of children in jails, information as to the existence of juvenile courts, homes and schools and for a direction that district judges should visit jails or sub-jails within their jurisdiction to ensure that children are properly looked after when in custody.

should have done.

Female Prisoners

The most striking fact about female offenders is that there are so few of them in comparison with the number of male offenders. This is a fact which may be observed in all countries, but the proportion of female offenders varies according to the degree of feminine emancipation and the extent of social protection afforded to women in different cultures.[75] So we can see there is some truth in the assertion that males are the delinquent sex.[76] Various accounts of the experiences of women in prison have been written by former prisoners and prison visitors. A full scale academic study was carried out by Ann D.Smith and published in 1962. [77] In India the National Expert Committee on women prisoners headed by Justice V.R.Krishna Iyer have made a detailed study of female offenders in India.

Until the beginning of the nineteenth century, even the most enlightened writers and statesmen seldom

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75. J.E.Hall Williams, The English Penal System in Transition (1970), p.240.
76. Ibid.
77. Ann D.Smith, Women in Prison: A Study in Penal Methods, (1962), p.324. She says:- "Women prisoners are seldom dangerous, unless mentally deranged in which case they should not be in prison at all. Tension, hysteria and clautrophobia in women are all aggravated by the old type of prison buildings. These restrict essential outlets for physical and mental energy, and can give no scope for progressive schemes of training.

considered that the needs of women prisoners might be different from those of men. Generally it was considered that if women were adequately segregated from men in prison they presented no further special problem.[78] Women are seldom mentioned in books on penal reform, and the sufferings of women prisoners--if noted at all--were not pitied by the more fortunate of their sex.

Even with regard to the method of execution of capital punishment discrimination was there among male and female prisoners. In England, burning was the punishment for women convicted of treason during that time. By the middle of the eighteenth century hanging had become the accepted punishment for women convicted of capital crimes. With the abolition of the earlier elaborations to simple hanging--such as mutilation and exposure of the corpse of

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78. History has revealed that during 16th and 17th century in England in a number of prisons there was no separation of the sexes even at night. To suit the convenience of gaolers, certain classes of men prisoners were confined in the women's quarters of many large prisons. Male lunatics and men who had turned Kings evidence and therefore, in danger of their lives from their fellow prisoners were often put in the women's ward. Even when the sexes were separated, there was generally easy access between the men's and women's quarters of the prison. See Ann D.Smith, op.cit., p.81.

the person executed--it was felt that the 'decency due to the sex' would no longer be offended by extending the punishment of hanging to women.[79]

In England Elizebeth Fry had made substantial contribution for the alleviation of the miseries of women prisoners.[80] She prompted women prisoners to act as school mistresses that will be set up inside the prisons. She realised that if care and comfort were to be brought regularly to the prisoners, and employment provided for them, an association must be formed to organise this welfare work. The task of providing work for the women over the years was, however, not easy. Mrs.Fry was sure that it was better for women prisoners to be paid little for their work than not to be paid at all.[81] She was equally sure that it was better to have any form of productives work, rather than to have no occupation at all.[82] She considered that women prisoners should be

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79. Bodies of women who had been executed were never exposed in chains although they were occasionally shown to the public after death. See Ann D.Smith, op.cit., p.81.
80. At first she focussed upon the problems of women prisoners in the famous Newgate Prison. Although warned of the risks she was running, Mrs.Fry went among them and talked to them about their problems. As a result of her conversations, she realised that the women prisoners had two main needs: First, to be treated as human beings, rather than as animals, by being given the chance to make plans, so that they might look to the future with hope, instead of apathy; secondly, that their 'multitudes of children' confined with them in prison, should be occupied and educated. At this stage she had no intention of providing work or education for the prisoners themselves. Ann D.Smith, op.cit., p.102.
81. Id., p.104.
82. Ibid.

classified according to their general character and degree of criminality, rather than according to the nature of the offence they had committed.[83]

There are various difficulties faced by women prisoners on their release from prison. One advantage in providing work for prisoners was so that they might acquire skills and be able to maintain themselves when they are discharged. Those prisoners who had no means of livelihood on release would inevitably return to their former ways of life. Women prisoners without a home to go should be provided with somewhere to stay until they could find employment.

Women's prisons are not materially different from men's prisons in its working everywhere. Compared to men, women offenders are considerably less and therefore no special programmes are drafted for them.[84] In Kerala female prisoners are not permitted to leave from the enclosure set apart for female except for release, transfer or attendance at court or under the orders of the

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83. Id., p.106.
84. For example, in Viyyur Central Jail out of the total 584 only 48 are women prisoners.

Superintendent for any special purpose.[85] Male prisoners are excluded from the female ward. A man is not permitted to enter the female ward of the jail by day unless he has a legitimate duty to attend, and is accompanied by female warder while he remains therein.[86] The objective of all these provisions are to give protective discrimination to the women even though they are inside the prison. Taking into consideration the special care needed for female body various special protections are provided for it. For example, provisions are there for the treatment of hair of female prisoners inside the prisons. The hair of a female prisoner cannot be cut without her consent, except on account of vermin or dirt or when the medical officer dees it requisite on the ground of health and cleanliness.[87] There are provisions for supplying them oil, comb and looking glass.[88] Facilities for pre-natal and post-natal treatment for women are available in all prisons where females are kept. Handcuffs can be used as a means of restraint under the same conditions as male prisoners but using fetters are completly excluded in the case of female

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85. Kerala Prisons Rules 1958, Rule 819.
86. Ibid.
87. Ibid.
88. Ibid.

prisoners.[89] In the state when a female prisoner is released from prison she is given special treatment. Before a female prisoner is released, timely notice has to be sent to her relations or friends to enable them to attend at the jail and receive her.[90] Women prisoners who are released from jails has to be provided with conveyances where the distance to be travelled by them exceeds 1.6 K.M. The child up to five years of age of a female prisoner will be admitted to jail with its mother if it cannot be placed with relations or otherwise properly provided for.[91] Children born in jail will be allowed to remain with their mothers upto five years of age if there is nobody to lookafter it outside.[92] A recent study has revealed that most of the women are anxious about their children.[93] They

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89. Id., Rule 823.
90. Id., Rule 826.
91. Id., Rule 828.
92. The story of Dhanya is to be mentioned in this context. Her mother and father were convicted in a murder case. Along with her mother the child was also staying in the Cannanore Central Jail. But now she has crossed the prescribed age limit, so hereafter she cannot continue her stay in the prison. She filed petitions before the Chief Justice of Kerala High Court and Chief Minister of Kerala to release her mother from jail as she is unduly denied material affection by her detention. The final decision is awaited. See Mathrubhumi (Calicut), July 7, 1993, p.1.
93. James Vincent Commission Report, supra n.18.

also feel that if adequate vocational training is given to them it would help them in the process of rehabilitation and re-socialisation.

Women prisoner's rights are specially protected under the Indian Penal Code against offences like rape, intercourse by Superintendent of jail, remand home etc.[94] A women prisoner under the special circumstances inside the prison may subject herself to have intercourse with the authorities of the prison by the inducement from the authorities. Such intercourse even if it did not amount to the offence of rape, will be punished under Section 376C of the Indian Penal Code. So this section of the Indian Penal Code can be said to be protective shield of the women prisoners in India. But how these offences are brought to the attention of criminal courts. The procedure and

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94. Indian Penal Code, S.376. reads:- "Whoever, being the Superintendent or Manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term hich may extent to five years and shall also be liable to fine". See Ratanlal and Dhirajlal, Law of Crimes (1988), Vol.2, p.1417.

measures suggested at present are not adequate. Therefore most of such offences go un-noticed. The offences will brought to light only after the release of the prisoner.

The National Expert Committee on women prisoners headed by Justice V.R.Krishna Iyer in its report submitted to the government in February 1988 has recommended that beneficial correctional approaches are owed to all prisoners, men and women, irrespective of their number.[95] According to the committee the numerical argument cannot be held to be a limiting factor in creating suitable custodial conditions for women. Moreover, non-custodial institution can allow itself to cause further damage to a prisoner through the risk of contamination. The Committee therefore recommended that custodial facilities should be set up in every state separately for convicted and undertrial women, and adequate mobility must be provided to the prisoner and the law enforcement authorities to facilitate such concentrated intake speedly.[96] Separate prisons for women and completely separated custodial facilities for convicted

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95. Report of National Committee on Women Prisoners (1987), p.129.
96. Ibid.

and undertrial women were suggested by the committee.[97] The same suggestion was made by another committee also and the Kerala government has acted on the basis of that.[98]

There are various guidelines evolved with regard to the treatment of women prisoners especially after the suggestion made by Elizebeth Fry in England. But in India there is no statutory recognition to these innovative social and rehabilitative methods. Steps should be taken for that. Women, insane and young persons inside the prison are classes which requires 'protective

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97. The Report says:- "The prison reform thinking in India is unable to resolve the dilemma of having to cater to small numbers of women in prison with the budgetary and other implications of an elaborate separate institutional infrastructure. An acceptable way out has been to congregate women from various jails and prisons in the state at a single custodial venue designated as 'concentration prison'. In this approach, humanistic considerations have necessarily to be sacrificed in favour of economies of scale. The option of allowing women prisoners to continue in dispersed facilities where no meaningful introduction of correctional measures is possible for the fewer numbers of custodialised women is wore". See p.129.
98. A women's prison was established in 26.3.1990 in Neyyatinkara in Kerala as per the recommendation of the Mulla Commission and other commissions. See Third and Final Report of Estimate Committee (1991-93) of 9th Kerala Legislature.

discrimination' for their rehabilitation. Individualisation of the offender as a method of his or her rehabilitation has now become the cardinal principle of modern penology. It can be seen that the modern penologists have worked out an objective classification of prisoners according to differential treatment. The prisoners should be classified according to the treatment to which they are likely to respond most favourably.

CHAPTER 5

Condemned Prisoners

Chapter 5

CONDEMNED PRISONERS

For centuries death penalty was a universal punishment for many crimes.[1] In the medieval period even for the most trivial breaches of the law death penalty was the common punishment.[2] With the progress of civilization there has been a marked decline of the award of capital punishment. At present in many of the countries it is imposed only in the cases of very serious crimes like treason and murder.[3]

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1. The prevailing notion about death penalty was that it is the quickest and easiest method of punishment having retributives as well as deterrent effect. The common modes of subjecting the offender to capital punishment were boiling or burning him alive, mutilating the body till death, crucification, drowning, throwing before wild beasts, precipitation from heights, stoning starving to death or hanging in public places. See N.V. Paranjapee, Criminology and Administration of Criminal Justice (1970), p.114.
2. "Cruel and Universal Punishment", II Yale Law Journal (1902-03), p.55.
3. There is a steady decline in the award of capital punishment in England. After 1957 law greatly restricted imposition of death penalty and abolished in 1964. Certain other trends in the use of capital punishment suggest that it will continue to decline. Except for cases of treason and some infractions of military discipline, there has been a marked reduction in the number of offences that call for the death penalty. The above trend mean that capital punishment is very rarely used in any modern society as a device for the control of traditional crimes. See 18 Encyclopaedia Britanica (1973), p.557.

In India death penalty has been prescribed as a form of punishment under the Penal Code.[4] Eventhough the constitutional validity of death penalty was questioned at various occasions, still it is a form of punishment in India.[5]

Law Commission of India has considered the capital punishment in its 42nd and 48th Reports. The Commission has expressed a view that retribution involved in capital punishment does not connote the primitive concept of 'eye for an eye' but it is an expression of public indignation at a shocking crime, which can better be described as reprobation.[6] Therefore the Commission did

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4. Indian Penal Code 1860, Section 53. In ancient India there were different ways by which death sentence could be executed. The public execution was conducted when the criminal was hated by the people or was an enemy of state, but secret execution was intended for those whose public execution would arouse discontent and anger of the people. See Sukla Das, Crime and Punishment in Ancient India (1977), p.75.
5. There were strong suggestions for abolition of capital punishment in India. In the Constituent Assembly Shri Rohini Kumar Chaudhuri argued for its abolition. He said: "My bitter complaint is that the constitution is silent about the death sentence. The world is civilised to such an extent now that the continuance of the death sentence is an act of barbarity. The civilised world does not want death sentence. The death sentence has no deterrent effect. I wish we had put in the constitution that there should be no death sentence". Constituent Assembly Debates, Vol.XI, p.793.
6. See, Law Commission of India, 42nd Report.

not recommend any material change in the offences which are not present punishable with death under the Indian Penal Code.

As regards the question of exempting certain categories of persons from death sentence, the Law Commission in its 42nd Report suggested that certain persons like children below 18 years, women etc. may be exempted from capital punishment.[7] But in its concluding remarks the commission has observed that having regard to the peculiar conditions prevalent in India and the paramount need for maintaining law and order in this country, India cannot risk the experiment of abolition. This is perhaps the most appropriate approach to the problem of capital punishment so far Indian conditions are concerned.

In USA capital punishment is inflicted in some states. The American Convention on Human Rights 1969 gives some guidelines with regard to the infliction of capital

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7. 42nd Law Commission Report published in June 1971 suggested that: "(1) The children below 18 years of age (at the time of commission of crime) should not be sentenced to death, (2) It is not unnecessary to exempt women generally from the death penalty".

punishment in USA It says:

> In countries that have not abolished the death penalty, this may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women"[8]

Death Penalty - Constitutional Validity

The Constitutional validity of death penalty was questioned on various occasions in India. Firstly it was in Jagmohan Singh v. State of U.P.[9] The main argument in Jagmohan Singh was that the death sentence puts an end to all fundamental rights in article 19 of the Constitution. The law which prescribes capital punishment is unreasonable and is not in the interest of general public. The

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8. American Convention on Human Rights 1969, Article 4.
9. A.I.R. 1973 S.C. 947.

discretion of judges, as to award and not to award capital punishment is not based on any guidelines or standards; it is unfettered, uncanalised and uncontrolled, hence hit by article 14 of the Constitution.

Section 302 of the Indian Penal Code is vitiated due to the fact that it left wide discretion to judges to choose between two alternative punishments, that is death sentence and life imprisonment, which is an essential legislature function and the judiciary has nothing to do with it.[10] The Supreme Court rejected the contentions of the petitioner and upheld the validity of capital punishment and laid down that it is impossible for the legislature to prescribe law and rules for each and every case.[11] The judges have no uncontrolled or uncanalised discretion, but their discretion is guided by the mitigating factors and circumstances of each case, hence, the discretion to choose between the two alternatives is not merely an arbitrary discretion but is judicial discretion. Moreover, to declare death penalty as being cruel or unusual, is not the business of the courts but of

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10. Id., p.947.
11. Id., p.948.

the legislature. The courts have nothing to do with the prescribed and settled law of a country.[12]

It was again pleaded in Rajendra Prasad v. State of U.P.[13] that capital punishment cannot be justified in each and every case of murder under section 302 of the Indian Penal Code. The intention of the legislature for introducing this punishment was for its restricted application, ie., for only those hard and professional criminals who deliberately kill the human beings.[14]

Justice Sen, however, in his minority judgement laid down that it is not the business of the judicial chambers to decide the question of abolition or retention of the capital punishment. It is an essential, judicially, established norm that they should not reconsider the nature and scopes of the punishment which has been duly recognised by the legislations. He further observed that the courts are not justified, that while hearing a special leave

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12. Ibid.
13. A.I.R. 1979 S.C. 916.
14. Criminal Procedure Code, Section 354(3) reads:- "When the conviction is for an offence punishable with death or in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence".

petition on the issue of sentence to think over the restructuring or abolishing section 302 of the Indian Penal Code.[15]

In Bachan Singh v. State of Punjab,[16] the Supreme Court by a majority of four to one has again reaffirmed its earlier decision and held that the provision of death penalty as an alternative punishment for murder in section 302 of the Indian Penal Code it is not unreasonable and it is in the public interest. The impugned provision in section 302 I.P.C. violates neither the letter nor the ethos of Article 19 of the Constitution. It laid down that the capital punishment was never considered by the legislature as a degrading method used to "defile the dignity of the individual", hence it is not tenable that death penalty for the murder cases under section 302 of the Indian Penal Code is violative of the basic structure of the Constitution.[17]

It is relevant to note that Justice P.N.Bhagvati did not agree with the majority and gave a dissenting

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15. Id., p.957.
16. A.I.R. 1980 S.C. 898. In this case, the judges of the Supreme Court differed in their views. The majority view is that of Chandrachud C.J., R.S.Sarkaria, A.C.Gupta and N.L.Untwalia JJ. and the minority view by P.N.Bhagwathi, J.
17. Id., p.901.

judgement. He said:

> "Section 302 of the Indian Penal Code, in so far as it provides for imposition of the death penalty as an alternative to life imprisonment is ultra vires and void as being violative of article 14 and 21 of the Constitution, since it does not provide any legislative, guidelines as to when life should be permitted to be extinguished by imposition of the death sentence.[18]

The Supreme Court after initial hesitations and confusions, ultimately tried to curtail the scope of capital punishment and ultimately it established that the capital punishment should be inflicted in the "rarest of rare cases".

Provisions in the Criminal Procedure Code 1973

The statutory provisions with regard to the execution of death sentence is contained in sections 413 to 416 of the Criminal Procedure Code. Eventhough sessions judge is having the power to impose death sentence it

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18. Id., p.935.

always has to be submitted to the High Court for the confirmation of a sentence of death.[19] If the court of session receives the order of confirmation or other order of the High Court, it has to see that such order is carried into effect by issuing a warrant or taking such other steps as may be necessary.

Mandatory Death Sentence

Mandatory sentence of death prescribed in section 303 of the Penal Code with no discretion left to the court to have regard to the facts and circumstances is unconstitutional being violative of the rights guaranteed under Articles 14 and 21.[20] Unlike Section 302, this section gave no option to the court to impose any other sentence but death, no matter what the motivation for the crime was and what the circumstances of the case were. The legislature could not make relevant circumstances irrelevant and deprives the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases.[21]

Treatment of Condemned Prisoners

With regard to the treatment of prisoners

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19. Criminal Procedure Code 1973, Section 413.
20. Mithu v. State, A.I.R. 1983 S.C. 474.
21. Ibid.

sentenced to death, there has been a gradual change in India. A prisoner under the sentence of death has to be confined separately from other prisoners and has to be placed day and night under the charge of a guard.[22]

Section 30 of the Prisons Act 1894 is the main provision dealing with the treatment of prisoners sentenced to death inside the prisons. It says:

> "(1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by or by order of the jailor and all articles shall be taken from him which the jailor deems it dangerous or inexpedient to leave in his possession.
>
> (2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and night under the charge of a guard".

The scope of Section 30(2) of the Prisons Act has been properly interpreted by the Supreme Court in Sunil

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22. Prisons Act 1894, Sec.30.

Batra v. Delhi Administration.[23] In Batra, the Supreme Court held that the provision does not empower the jail authorities in the garb of confining a prisoner under the sentence of death, in a cell apart from all other persons to impose solitary confinement on him.[24]

Under Kerala Prison Rules

There are various safefuards with regard to condemned prisoners in State rules.[25] When a condemned prisoner is brought to the prison after search he is confined in a condemned cell.[26] Special guards are deputed to watch him continuously day and night and various restrictions are imposed on communication with other prisoners.[27]

Along with these strict restrictions he is also conferred with some rights. If the condemned prisoner wants to read books the prison authorities has to provide facilities for that.[28] Subject to the control of the

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23. A.I.R. 1978 S.C. 1675.
24. Id., p.1703.
25. In the State of Kerala, Rules 780-817 of the Kerala Prisons Rules 1958 deals with prisoners sentenced to death.
26. Id., Rule 781.
27. Id., Rule 784.
28. Id., Rule 792.

superintendent they are allowed to purchase or obtain from their relations or friends any book which they wish to read. In deservin cases books are purchased at government expenses.[29] Condemned prisoners on request has to be given tobacco in the form of cigars, cigarettes or beedies for smoking, in the form of leaves for chewing and in the form of snuff for snuffing provided the medical officer of the jail finds no objection to their supply from the point of view of health.[30] It is also the duty of the religious teacher of his persuation attached to the jail to visit the condemned prisoner daily.[31]

Sufficient intimation has to be given to the prisoners with regard to the judgements of the courts affecting them. On receipt of a copy of the High Courts' judgement it has to be communicated to the prisoner without delay.[32] In the case of an order of the High Court confirming or imposing a sentence of death, the warrant for executing that sentence should not be issued by the sessions judge to the superintendent of the jail until

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29. Ibid.
30. Ibid.
31. Ibid.
32. Ibid.

after the dismissal of the appeal by the Supreme Court or of the application for special leave to appeal to the Supreme Court, or in case no appeal has been lodged, until after the expiry of the period allowed an appeal or special leave.[33] If a petition for mercy has been submitted to the governor and the president by or on behalf of the convict, the warrant for execution of the sentence has to be postponed pending the orders of that petition.

Postponement of Execution of Death Sentence

There are three situations envisaged in the criminal procedure code where execution of death sentence is postponed.[34] Where a person is sentenced to death by the High Court and an appeal from its judgement lies to the Supreme Court, the High Court has to order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of. If a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate,[35] the

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33. Ibid.
34. Criminal Procedure Code 1973, Section 415.
35. Application is made under Article 132 or under sub-clause (c) of clause (1) of the Article 134 of the Constitution.

High Court has to order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired. Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition. If a woman sentenced to death is found to be pregnant, the High Court has to order the execution of the sentence to be postponed and if it thinks fit it can commute the sentence to imprisonment for life.

Delay in the Execution of Death Sentence

A sentence of death imposed upon a person usually is not executed immediately. There are various formalities to be observed before it is executed. In certain circumstances due to various technical reasons the execution may be protracted for a longer period. Many convicts sit on death row for years, while appeal after

appeal are dragged on through the courts.[36] Recently some of the decisions of the Supreme Court of India have focussed attention on the question whether inordinate delay in the execution of death sentence can be considered to entitle the convict to claim commutation of the sentence to that of life imprisonment.[37]

In Rodnick v. State of West Bengal[38] the Supreme Court laid down:[39]

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36. Perhaps the most celebrated case in USA was Caryl Chessman of California, sentenced to death on May 21, 1948, executed in May 1960, nearly twelve years later, after endless writs, appeals, reviews and procedural maneuvers. Lawrence F.Friedman, Law and Society: An Introduction (1977), p.122.

37. For a critical analysis see, V.Nageswara Rao, "Inordinate Delay in the Execution of Death Sentence - An Overview", 1990 Cr.L.J. (Journal), p.65. Also See Mool Singh, "Commutation of Sentence of Death Into Life Imprisonment - Consideration of Delay as Mitigating Factor", 1990 Cr.L.J. (Journal), p.42.

38. A.I.R. 1971 S.C. 1584. Virian Rodrick in 1964 was sentenced to death by sessions court under section 302 I.P.C. Against this judgment he filed appeal in the High Court of Calcutta. But in 1967 the High Court confirmed the death sentence. The point raised in the High Court on behalf of the appellant was that the death sentence should be commutted to life imprisonment on account of long delay. But High Court rejected the plea. But on appeal to Supreme Court, the court held that the delay was extremely excessive and sentence of life imprisonment was imposed.

39. Id., p.1586.

> ".... where there has been inordinate delay in the disposal of the appeal by the High Court it seems to us that it is a relevant factor for the High Court to be taken into consideration for imposing lesser sentence".

The Supreme Court had exercised its discretionary power from another point of view in Neeti Sreeramulu v. State of Andhra Pradesh.[40] The Court analysed the history of the case to see as to who was responsible for the delay. the Supreme Court held that delay was caused by the respondent state and the appellant was not responsible for the delay and therefore the death sentence was commuted into life imprisonment.

In Javed Ahmed v. State of Maharashtra[41] death was hanging over the accused for two years and nine months. So much of delay was due to the time consumed for

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40. (1974) 3 S.C.C. 314. The appellant was convicted for murder under section 302 I.P.C.,on October 30, 1971. In July 1972 the special leave petition has been placed before the Supreme Court and notices were sent to the respondent state to show cause why the special leave petition should not be granted. But unfortunately, the matter was not set down for hearing till March 1, 1973.
41. (1985) 1 S.C.C. 275.

confirmation of the sentence by the High Court and appeal and review petition filed before Supreme Court and clemency petition presented before President of India. The petitioner filed the writ petition under Article 32 of the Constitution praying that in view of his tender age, his reformation in jail and the long lapse of time since the passing of the sentence of death on him, the execution of the sentence of death may be stopped and the sentence may be commuted to one of imprisonment for life. Accused sincerely repented and promised to strive to serve humanity if given a chance to survive. Jail authorities did not make any adverse report against him. On the basis of an overall view of all the circumstances including the delay in the execution of the sentence the court held that the petitioner is entitled to the protection of Article 21. So death sentence was commuted to life imprisonment.

In Ediga Anamma v. State of Andhra Pradesh[42] the brutal murder of one lady and her child was committed by the appellant lady and the body of the child was buried. Murder was the result of a reckless passion of a jealous mistress. Krishna Iyer J. of the Supreme Court commuted the death sentence into life imprisonment on the ground

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42. (1974) 4 S.C.C. 443.

that the broading horror of hanging had been haunting the prisoner in her condemned cell for over two years. Here the death penalty was awarded by the sessions judge in December 1971 and the Supreme Court delivered the judgement in February 1974. Krishna Iyer J. observed:[43]

> "Although this consideration is valuable to the criticism made by counsel for the state that as between two capital sentence cases that which is delayed in its ultimate disposal by the courts received the less terrible punishment while the other heard with quick, despatch for that very reason, fails to relieve the victim from condemnation to death. In this unclear situation it is unfortunate that there are no penological guidelines in this statute for preferring the lesser sentence, it being left to forensic impressionism to decide for life or death".

State of Bihar v. Pasupathi Singh[44] is an example of the blind exercise of the discretion. In Pasupathi appellants were tried for murder committed in the year 1965 and death sentence was awarded by the sessions judge. High

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43. Id., p.451.
44. (1974) 3 S.C.C. 376.

Court acquitted them. On appeal, the Supreme Court found them guilty but awarded life imprisonment only on the ground of delay. Here delay was counted from the date of occurrence of the offence, and secondly the death sentence passed by session court was set aside by the High Court and therefore the terror of hanging was not haunting the appellants, despite this the discretion was exercised by the Supreme Court in favour of appellants and the life imprisonment was awarded by Alagiriswamy J. to meet the ends of justice.

In Chawla v. State of Haryana[45] death sentence of the appellant was commuted to life imprisonment due to prolonged mental torture suffered by the appellants on account of their being constantly haunted by the spectre of death for one year and ten months when the death sentence was first imposed by the Sessions Court. It was opined by Sarkaria J. that there had been rethinking about crime and punishment and in every creature born but to die it is blindness to the future, kindly given that keeps life going.[46] But in condemned men, the book of fate opens before him constantly telling of the doom prescribed, the life stream of hopes and aspirations rapidly starts drying

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45. (1974) 4 S.C.C. 579.
46. Ibid.

under the excruciating heat of mental desert. With the passage of time the prisoner painfully awaiting execution becomes no better than a "lifeless" mummy.

Duration of Delay

In case of inordinate delay in execution of death sentence the convict is entitled to approach the Supreme Court under Article 32 of the Constitution. No fixed period of delay can be specified for this purpose. According to Supreme Court considering the facts and circumstances, the court may alter the sentence of death to sentence of life imprisonment.[47] No fixed period of delay could be held to make the sentence of death inexecutable.[48]

In Vatheeswaran v. State of Tamil Nadu[49] according to the court Article 21 of the Constitution enjoins that any procedure, which deprives a person of his life or personal liberty must be just, fair and reasonable.

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47. In view of the conflicting decisions in T.V.Vatheeswaran v. State of Tamil Nadu, (1983) 2 S.C.C. 68; Sher Singh v. State of Punjab, (1983) 2 S.C.C. 344 and Javed Ahmed Pawala v. State of Maharashtra, (1985) 1 S.C.C. 275, the question as to whether prolonged delay in execution of death sentence entitles the accused to the lesser sentence of life imprisonment has come up before the constitutional bench.
48. Triveniben v. State of Gujarat, (1988) 4 S.C.C. 574, per Oza, J. at p.575.
49. Supra.

It implies humane conditions of detention, preventive or punitive. Procedure established by law does not end with the pronouncement of sentence; it includes the carrying out of sentence. Prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence.[50]

The validity of that decision did not last long. In Sher Singh v. State of Punjab[51] a bench of three learned judges of the Supreme Court held that the prolonged delay in the execution of a sentence of death is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and

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50. Justice Chinnappa Reddy was of the view that the sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another. A period of anguish and suffering is an inevitable consequence of sentence of death, but a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it was no answer to say that the man would struggle to stay alive. It was, therefore, found in that case that a delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death. The court substituted the sentence of life imprisonment in that case. See supra.
51. (1983) 2 S.C.C. 344.

fast rule that 'delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death can be laid down as has been done in Vatheeswaran case.[52] While in Vatheeswaran the period had been fixed at two years, it Sher Singh it was held that two years rule cannot be laid down.

In Madhu Mehta v. Union of India[53] the Supreme Court has reiterated the view that inordinate delay in execution of death sentence causing mental agony and torture is violative of Article 21.

In Triveniben v. State of Gujarat[54] the constitution bench of the Supreme Court has held that delay in disposal of mercy petitions by the president or the governor or delay by the executive will entitle a condemned prisoner to approach the apex court for commutation of capital punishment. This is a far reaching judgment on death penalty.

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52. (1983) 2 S.C.C. 68.
53. (1989) 4 S.C.C. 62.
54. (1988) 4 S.C.C. 574.

The issues dealt with by the bench were delay in execution of sentence of death, the starting point for computing the delay, the rights of a condemned prisoner sentenced to death but not executed and the circumstances to be considered along with the time that has been taken before the sentence is executed. The court observed that, "it could not be doubted that so long as the matter is pendin in any court before final adjudication even the person who has been condemned to death has a ray of hope".[55] When delay is caused at the instance of the condemned person himself like repeated moving of mercy petitions, he shall not be entitled to gain any benefit out of such delay.

In Daya Singh v. Union of India[56] the petitioner prayed for a commutation of death sentence to life imprisonment on the ground of delay in execution. Actually there was a delay of two years in answering the reference to the president for which no reasons were put forth. So the death sentence was commuted to life imprisonment. In doing so the court also took into consideration as a circumstance assuming significance the fact that the petitioner was detained in prison for about 18 years although this fact had been considered in his earlier petition that was dismissed.

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55. Id., p.578.
56. 1991 Cr.L.J. 1903.

In Haja Moideen v. Government of India[57] convicts were suffering mental agony of living under shadow of death for long period. Delay was not justified by acceptable reasons, so death sentence was altered into life imprisonment.

Solitary Confinement and Condemned Prisoners

Solitary confinement means the confinement of a prisoner secluding him from the sight of, and communication with other prisoners.[58] Prisons Act 1894 provides that every condemned prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard.[59] Taking advantage of the provision contained in Section 30, the jail administration used to keep the convict sentenced to death by the sessions judge in solitary confinement.[60] Solitary

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57. 1991 Cr.L.J. 1325.
58. This has been accepted as a form of punishment under section 73 of the Indian Penal Code. This section gives the scale according to which solitary confinement may be inflicted.
59. Section 30(2) reads:- "Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard".
60. See Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675.

confinement itself being a specific type of punishment under this section, a question was raised whether in the name of security a prisoner sentenced to death can be kept in solitary confinement even though the punishment is not imposed upon him. It could not have been the intention of the legislature that a prisoner under sentence of death could be kept in a solitary confinement from the time the sessions judge awards the punishment till the sentence is finally executed, especially when solitary confinement cannot be imposed beyond the prescribed period under this section.[61] Prisons Act 1894 merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners and he is to be placed by day and night under the charge of a guard.[62] Such confinement can neither be cellular confinement nor separate confinement and in any event it cannot be solitary confinement. The confinement under Section 30(2) of Prisons Act is only custodial and not punitive. The jail authorities could not convert it into a solitary confinement which is a punishment prescribed under Section 73 of the Indian Penal Code and if they did so, "It will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2).[63]

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61. Ibid.
62. Prisons Act 1894, Section 30(2).
63. See A.I.R. 1978 S.C. 1675 at p.1731.

The scope of Section 30(2) of the Prisons Act 1894 has been properly interpreted by the Supreme Court in Sunil Batra v. Delhi Administration. The Court said,[64]

> "The provision does not empower the jail authorities in the garb of confining a prisoner under sentence of death, in a cell apart from all other prisoners, to impose solitary confinement on him. Even jail discipline inhibits solitary confinement as a measure of jail punishment. It completely negatives any suggestion that because a prisoner is under sentence of death therefore, and by reason of that consideration alone, the jail authorities can impose upon him additional and separate punishment of solitary confinment. They have no power to add to the punishment imposed by the court which additional punishment could have been imposed by the court itself. Upon a true construction, sub-section (2) section 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death".

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64. A.I.R. 1978 S.C. 1675.

When can a person can be considered as "under sentence of death?" The expression 'prisoner under sentence of death' in the context of sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority. Therefore, the prisoner can be said to be under the sentence of death only when the death sentence is beyond judicial scrutiny and would be operative without any intervention from any other authority. Till then the person who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of Section 30 sub-section (2). This interpretative process would to a great extent relieve the torment and torture implicit in sub-section (2) of Section 30 reducing the period of such confinement to a short duration.

Double Jeopardy and Delay in Execution

A prisoner under sentence of death is held in judicial custody while he is inside the jail. So punitive

detention cannot be imposed upon him in jail by jail authorities except for prison offences.

When capital punishment is awarded to a person the sentence awarded is only sentence of death but not sentence of death plus imprisonment. Therefore if a condemned prisoner has to live in jail for long, in substance it amounts to punishment which is sentence of death and imprisonment for sometime.[65]

When a prisoner is committed under a warrant for jail custody under Section 366(2) Cr.P.C.[66] and is a punishment prescribed by Section 73 I.P.C. it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2) of the Constitution.[67]

In Sunil Batra[68] the validity of Section 30(2) of the Prisons Act was questioned in the light of Article 20

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65. This was argued in Triveniben, A.I.R. 1989 S.C. 1335 at 1346. This argument is obviously an echo from what Lords Scarman and Brightman have stated in Noel Rilay v. Attorney General, in which their Lordships observed: "Sentence of death is one thing; sentence of death followed by lengthy imprisonment prior to execution is another. See [1982] 3 All E.R. 469.
66. Section 366 says that sentence of death is to be submitted by court of session for confirmation.
67. Article 20(2) deals with the doctrine of double jeopardy.
68. Supra.

of the Constitution. But the Supreme Court held "as the prisoner is not to be kept in solitary confinement and the custody in which he is to be kept under Section 30(2) would preclude detention in solitary confinement, there is no chance of imposing second punishment upon him and therefore Section 30(2) is not violative of Article 20.[69]

Prisoners under sentence of death form a separate class. Their separate classification has to be recognised. There is no justification for the inference that a prisoner under sentence of death is necessarily of violent propensitie or dangerous to co-prisoners. Approached the matter from that angle sub-section (2) of Section 30 is interpreted to mean that he is not to be completely segregated except in extreme cases of necessity which must be specifically made out and that too after he in the true sense of the expression becomes a prisoner under sentence of death. In Sunil Batra it was held that classification according to sentence for the security pruposes is certainly valid and therefore, Section 30(2) does not violate Article 14.[70] Similarly in the view taken of the requirement of Section 30(2), the restriction does not

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69. A.I.R. 1978 S.C. 1675.
70. Ibid.

appear to be unreasonable. It is imposed keeping in view the safety of the prisoner and the prison security and it is not violative of Article 19 also.

Hanging by Rope

In India death sentence is executed by hanging the prisoner.[71] Hanging by rope has been a very controversial aspect in the present era as it is being considered by the modern reformists as outdated and out modelled technique of executing a criminal.

In Deena v. Union of India[72] the constitutional validity of the method of the execution of the capital punishment as prevalent in India was challenged being cruel and barbarous, hence hit by Article 21. The petitioner pleaded that the method is outdated and is not justified in the human rights era.

The Supreme Court has found that it is a matter of policy that how the death sentence should be executed and therefore it is for the legislature to decide. Moreover, it is the legislature which is responsible for

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71. Criminal Procedure Code 1974, section 354(5) reads:- "When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead".
72. A.I.R. 1983 S.C. 1155.

the dignity of the moral values of its subjects and the courts have nothing to do with the moral aspect of the feelings of the subjects". Once a legislature provided certain method for the execution of death sentence, its function is over and then, it is for the courts to decide whether the method for the execution of the death sentence prescribed by the legislature is in conformity with the constitution or it has failed to comply with the dictates of the Constitution".[73] Ultimately, the court opined that the method prescribed in section 354(5) of the Code of Criminal Procedure for executing death penalty cannot be considered as cruel, unusual or barbarous and hence, section 354(5) does not offend the test of 'fairness' as laid down in Article 21 of the Indian Constitution.[74]

Public Hanging

Ordinarily hanging of the prisoner is made inside the prison.[75] The Prison Rules lays down the procedure for execution.[76] But there are instances where the court has

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73. Id., p.1157.
74. Id., p.1161.
75. For eg., Kerala Prison Rules 1958, Rule 806 says:- "Execution shall take place within the premises of the jail, unless otherwise ordered in the warrant. They shall usually be carried out in a special enclosure attached to the jail".
76. Kerala Prison Rules 1958, Rules 806 to 817 deal with the detailed procedure of execution of a condemned prisoner.

ordered the hanging of the prisoner in public places.

In Attorney General of India v. Lachana Devi[77] the Supreme Court received from the Rajasthan High Court a certified copy of an order passed by the same bench which made an earlier order for execution of death sentence by public hanging at the stadium ground or Ramlila ground of Jaipur after giving widespread publicity through the media of the date, time and place of such execution. The Supreme Court stayed the proceeding. The Court held:[78]

> "The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution".

Thus even after a person is condemned to death, some residuary rights remains with him. Until the sentence is actually executed, the prisoner get ample opportunities to get his rights established through courts. At present the method adopted in India for executing death sentence is

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77. A.I.R. 1986 S.C. 467.
78. Id., p.468.

very savage and brutal. Some changes are necessary. The mental torture on the prisoner should be avoided.

CHAPTER 6

Undertrial Prisoners

Chapter 6

UNDERTRIAL PRISONERS

One of the most neglected aspects of criminal justice system is the delay caused in the disposal of cases and detention of the accused pending trial. These undertrial prisoners are detenus put in prison mainly under non-bailable offences and persons who are unable to produce sufficient sureties in cases of bailable offences. It is the result of an arrest for an alleged offence not followed by grant of bail. Sometimes they are denied justice for long stretch of time.[1] They are separated from their family for the best part of their life eventhough they may be innocent. In different Indian prisons they are found in a sizeable number. In certain cases they have to live in prison for a longer period than the period of imprisonment which would be awarded to them if they were found guilty.[2]

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1. In India, the violation of the basic human rights of the suspect or the accused is most prevalent at the undertrial stage. See Manjula Batra, Protection of Human Rights in Criminal Justice Administration (1989), p.90. The 78th Report of the Law Commission (1979) says that on January 1, 1975 out of 220146 prisoners, 126772 (57.6 percent) were undertrials.
2. S.K.Sharma, "Distributive Justice in Prisons: Human Rights of Prisoners and Undertrials and Their Rights to Bail and Speedy Trial", in K.D.Gaur (Ed.), Criminal Law, Criminology and Criminal Administration (1992), 245 at p.261.

The law enforcement authorities are doing these without any legal authority because prisons are primarily meant for lodging convicts and not for housing persons under trial. The evils of contamination in jail are well-known.

There are various problems for the undertrial detention. The problem is not confined to India alone. It has been reported even from countries like USA and England.[3] In certain countries, the feeling has been growing that the decision of the court on the merits may sometimes itself depend on the detention or release of the accused pending trial. The problem of persons in prison has received attention at length even in United Nations.[4]

Article 21 - The Harbinger of Undertrial Prisoners

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty

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3. See the Law Commission of India, 78th Report on Congestion of Undertrial Prisoners in Jails (1979), p.2. According to the Commission Report the percentage of undertrials in jails have far exceeded those of convicts. See supra n.1.
4. The United Nations held the First United Nations Congress on the Prevention of Crime and Treatment of Offenders at Geneva in 1955, as a follow up of the work of the earlier International Penal and Penetentiary Commission. The Congress approved the standard minimum rules for the treatment of prisoners, offering guidelines on the basis of which member nations could modify their national practices in the treatment of prisoners. Id., p.3.

except according to the procedure established by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair or just such deprivation would be violative of his fundamental right. He can enforce such fundamental right and secure his release. An undertrial prisoner can effectively invoke this article against the authorities who unnecessarily detains him in prison.[5]

Speedy trial is not specifically enumerated as a fundamental right. But the broad interpretation given to Article 21 in Maneka Gandhi v. Union of India[6] include it

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5. The Supreme Court of India in Madhav Hatawaimarao v. State of Maharashtra, A.I.R. 1978 S.C. 1548 had declared that where the prisoner is disabled from engaging a pleader on reasonable grounds the court shall assign the service of a competent counsel for the prisoner's defence and the State shall bear the expenses for the same.
6. (1978) 1 S.C.C. 248; A.I.R. 1978 S.C. 597. Bhagwathi, J. held that Article 21, though couched in negative language, confers the fundamental right to life and liberty. It does not exclude Article 19. Even if there is a law prescribing procedure for depriving a person of personal liberty and there is consequently no infringement of the fundamental right conferred by Article 21, such law in so far as it abridges or takes away any fundamental rights under Article 21 would have to meet the challenge of Article 21. Such law would also be liable to be treated with reference to Article 14. The expression personal liberty in Article 21 is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of men and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19(1). Thus articles 19(1) and 21 are not mutually exclusive. Id., p.

also within the purview of Article 21. So a procedure which does not ensure a reasonably quick trial cannot be regarded as reasonable, fair and just and it falls within the ambit and scope of Article 21.

Reasons for Unlawful Detention

There are large number of persons in the Indian jails undergoing incarceration even before a trial.[7] Various reasons are attributed for this detention. One of the reasons of this long pre-trial detention is our highly unsatisfactory bail system.[8] Persons who are undergoing imprisonment for lack of furnishing proper bail are mostly poor and illiterate. The bail system here is controlled by the financial capacity of the accused. It is based on the

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7. The Government of India concerned at the large number of undertrial prisoners in Indian Jails, has brought to the notice of the Law Commission the need for undertaking suitable judicial reforms and changes in the law, in order to deal with the problem posed thereby. See Law Commission of India, 78th Report on Congestion of Undertrial Prisoners in Jails (1979). In India, one of the major reasons for aggravating the problem of overcrowding of undertrial prisoners in jails is that there are no separate detention centres for accommodating them. As such lunatic, non-lunatic offenders, victims of offences, women and children are all lodged together in jails under the general category of undertrial prisoners. See Manjula Batra, op.cit., p.142.
8. Sections 436-450 of the Criminal Procedure Code deals with the procedure of granting bail. "Most of the research studies undertaken have revealed the fact that these undertrial prisoners have been languishing in jails either because they were denied bail by the court on account of their involvement in grave offences or simply because they were not in a position to furnish bails owing to their poverty or illiteracy". Manjula Batra, op.cit.,

erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. This system of bails operate very harshly against the poor. The rich people are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties. The reason is that the amount of bail fixed by the courts are very excessive. This thrusts a lot of persons behind bars. The Legal Aid Committee appointed by the Government of Gujarat under the Chairmanship of Mr.Justice Bhagwathi has expressed this glaring inequality.[9]

Position in England

When compared to India the plight of undertrial prisoners is highly satisfactory in countries like England and USA. In England unconvicted prisoners are kept out of

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9. The report has been quoted in Hussainara Khatoon v. Delhi Administration, (1980) 1 S.C.C. 80 at pp.85, 86. According to the committee the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty, while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail is fixed by the magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.

contact with convicted prisoners as far as this can be reasonably be done.[10] If this practice is adopted it will prevent the innocent undertrial prisoners coming into contact with hardened criminals. The seeds of criminality will develop easily at this stage in the mind of undertrial prisoners. That may be the reason for adopting such a practice there. The unconvicted prisoner should not be detained in a wrong place, in a manifestly unauthorised manner or in a manner plainly inconsistent with his status as a prisoner awaiting some disposal such as trial or removal from the country.[11] Unconvicted prisoners are entitled to certain special facilities also.[12]

Hussainara Cases - A Milestone in India

The general apathy of the criminal justice administration towards the inhumane conditions of the undertrials lodged in jails was brought to the notice of

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10. Halsbury's Laws of England (1982), Vol.37, p.815.
11. Ibid.
12. At his own or his friend's expense, an unconvicted prisoner may have food sent in from outside the prison. An unconvicted prisoner may be visited and treated by a doctor or dentist at his own expense, in consultation with the prison medical officer. He can use books, newspapers, writing materials and other means of occupation. Id., pp.815, 816.

the Supreme Court for the first time by a public spirited lady lawyer in Hussainara Khatoon Cases.[13] Section 468 of the Code of Criminal Procedure[14] has been used by the courts to release large number of prisoners who had been imprisoned for long periods of time without a trial. These cases are the most significant decisions with regard to the treatment of undertrial prisoners inside the jails in India. There were a series of cases of the same issue. A series of coincidences have brought about these cases before the court.[15]

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13. The cases are: Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360; Hussainara Khatoon v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1369 and Hussainara Khatoon v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1377.
14. Section 468 of the Code of Criminal Procedure 1973 provides that no court can take cognisance of an offence after the following time periods have expired: (1) six months for offences punishable with a fine only, (2) one year for offences punishable with imprisonment of one year or less; (3) three years for offences punishable with imprisonment of three years or less. Section 468 does not apply to offences punishable with imprisonment of more than three years or to certain economic offences. Also, a court may extend the time period if the delay had been properly explained or it is necessary in the interest of justice to do so.
15. Dr.Upendra Baxi has pointed out that a strange combination of circumstances in early 1979 brought unexpected national attention to the plight of prisoners awaiting trial. These four coincidences have brought new and basic changes in criminal justice as well as the constitution. First of these was the distribution of 'tour notes' by R.K.Rustomji, Member of the National Police Commission among a select group of people. A second coincidence was that a major English daily, The Indian Express decided to publish two articles out of these notes. A third coincidence was that a lawyer, Mrs.Kapila Hingorani shocked by the horror of the situation moved the Supreme Court for habeas corpus.

Hussainara I[16] disclosed a shocking state of affairs in regard to administration of justice inside the prison in the State of Bihar. A large number of people including women and children were put behind bars for years for trivial offences. They were put in such condition for periods ranging from three to ten years.

The Supreme Court issued notice to the State of Bihar to furnish details regarding the allegations of illegal detention. No one appeared on behalf of the State. The court then proceeded on the basis of the allegations contained in the issue of the Indian Express which were incorporated in the writ petitions as correct. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as nine years and a few of them, even more than ten years without their trial having begun.

The court made an impassioned plea in exceptionally strong terms for the administration of social justice through a 'revamped and restructured legal and judicial system to remedy the inequality and injustice of indefinite pre-trial incarceration'.[17] The court ordered

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16. A.I.R. 1979 S.C. 1360; also (1980) 1 S.C.C. 81.
17. Id., p.84.

the immediate release of the undertrials on their personal bond, without sureties and without any monetary obligation. While disposing of the petitions Justice Bhagwathi has vehemently criticised the existing system of bail in India, Justice Bhagwathi held:[18]

> "Even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our courts in regard to pre-trial release. If the court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to be absolved it can safely release the accused on his personal bond".

The criteria adopted by Justice Bhagwathi to determine whether an accused has roots in the society are

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18. A.I.R. 1979 S.C. 1360 at p.1362.

factors like length of residence in the community, family ties and relationships, employment status etc. In that case again the poor and illiterate will be at a disadvantageous position. Ordinarily a poor individual will not have any employment status or social status worthy to be noted. So even after the decision in Hussainara such persons will not be materially benefitted. So eventhough some guidelines have been formulated with regard to the release of undertrial prisoners the benefits they get out of this decision are negligible. Only persons of middle class will be benefitted. On the other hand if the Supreme Court has given a directive to the lower judiciary to apply their mind subjectively, the consequence of this case would have been more significant.

The Supreme Court has given a free hand to the lower court to a certain extent within limited area. The Supreme Court held:[19]

> "If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial

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19. A.I.R. 1979 S.C. 1360 at p.1364.

> risk of non-appearance, the accused may, as far as possible, be released on his personal bond....But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it fixed should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding".

Justice Pathak even went to the extent of holding that there is an urgent need for a clear provision enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation.[20]

In Hussainara II[21] the court reviewed and clarified orders passed in Hussainara I. The court also ordered withdrawal of cases against undertrials held for

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20. A.I.R. 1979 S.C. 1360 at p.1366; (1980) 1 S.C.C. 81 at p.91.
21. Hussainara Khaton and Others v. State of Bihar, (1980) 1 S.C.C. 91.

more than two years. Women and children were released on personal bond and the jail authorities were directed to make suitable arrangements for their care.

There were some women prisoners who were in Bihar jail without even being accused of any offence. They were put in jail under protective custody. Some of them were victims of an offence; and some others were required for the purpose of giving evidence in some cases. The Supreme Court in Hussainara III[22] held that this so called 'protective custody' is nothing short of a blatent violation of personal liberty guaranteed under Article 21 of the Constitution, because there is no provision of law under which a women can be kept in jail by way of 'protective custody' or merely because she is required for the purpose of giving evidence.[23] The court also directed the state government to release such persons against whom no charge-sheet has been filed within the period of limitation in Section 468 Criminal Procedure Code.[24]

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22. (1980) 1 S.C.C. 92.
23. Id., p.96.
24. Section 468 reads:- "(1) Except as otherwise provided elsewhere in this Code, no court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
(2) The period of limitation shall be- (a) Six months, if the offence is punishable with fine only; (b) One year, if the offence is punishable with imprisonment for a term not exceeding one year; (c) Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years".

Several undertrials have been kept imprisoned for periods longer than the maximum sentence that can be imposed on them if they were convicted for the charge for which they are being held.[25] The Supreme Court ordered the Bihar Government to provide revised charts showing year-wise break-up of the particulars of the undertrial prisoners in the jails after dividing them broadly into two categories, one of minor offences and the other of major offences.[26]

In Hussainara IV[27] the Supreme Court issued directions for supplying free legal aid service to enable undertrials to secure their release on bail. The Supreme Court said:[28]

> "The right to free legal services to the poor and the needy is an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held

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25. One Lambodar Gorain has been in Ranchi Jail since June 18, 1970 for an offence under Section 25 of the Arms Act for which the maximum punishment is two years, with the result that he has been in jail as an undertrial prisoner for 8½ years for an offence for which even if convicted, he could not have been awarded more than two years imprisonment. (1980) 1 S.C.C. 93 at p.97.
26. Ibid.
27. (1980) 1 S.C.C. 98.
28. Id., p.105.

> implicit in the guarantee of article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the state is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer".

The court said:[29]

> "The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State".

The court also gave directions to the State for augmenting and strengthening the investigative machinery, setting up

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29. Id., p.107 per Bhagwathi, J.

new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

The need for speedy trial was also highlighted by the Supreme Court in this case. Justice Bhagwathi pointed out that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused.[30]

In Hussainara V[31] the court considered the extent to which directions in Hussainara IV had been complied with. The court passed further directions and gave more time where necessary. In Hussainara VI[32] the Supreme Court requested further details from the High Court and also directed the State Government to file affidavit in reply.

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30. Id., p.107.
31. (1980) 1 S.C.C. 108.
32. (1980) 1 S.C.C. 115.

The Impact of Hussainara

Whatever the reason may be the truth is that the cumulative effect of the absence of the right to speedy trial, bail, any legal aid and the virtual non-availability of free legal aid to the suspect or the accused has resulted in the erosion of human rights of the undertrials and thereby caused a major dent in the criminal justice system of the country.[33] The presence of an excessive number of undertrial prisoners in jails has led to an increasing public and professional concern about the non-observance of human rights in these institutions.

The Hussainara cases have made some impact upon the fate of undertrial prisoners in Indian jails. At the time of the decision of these cases Bihar State in its sixtyfive jails, contained twentytwo thousand undertrial prisoners.[34] For the first time the problem of undertrials was subjected to serious judicial scrutiny. The review of undertrial cases in all parts of India featured prominently. The Union Home Ministry convened a meeting of Chief Secretaries of States and Union Territories in April

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33. Govt. of India, Ministry of Home Affairs, Report of the All India Committee on Jail Reforms (Chairman: Justice A.N.Mulla), 1980-83, Vol.I, p.70.
34. Upendra Baxi, The Crisis of the Indian Legal System (1982), p.236.

1979 to consider the problem of jail conditions. There has been some compliance by the executive.

Apart from all these, approximately one lakh undertrial prisoners were languishing in Indian jails at that time.[35] Majority of these undertrials were in the States of Bihar and Uttar Pradesh only.[36] In consequence of the Hussainara Khatoon's Supreme Court judgment, the State of Bihar released many undertrial prisoners but it retained quite a few and added many latter.

Through these cases Justice Bhagwathi has not only brought forth the case of travesty of justice caused by non-availability of bail to the undertrials, but has also given the reason for the sorry state of affairs. The learned judge has said the obvious reason when he observed that the bail procedure is beyond their meagre means. The observation of the judge points out about the need for restructuring the bail law, its procedure and practice. The undertrial prisoners should be released by taking liberal view of the concept of bail, which will be an

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35. Supra, n.2.
36. Supra, n.2; also see Surendra Yadav, "Undertrials Need Bail Reforms", 1982 Cr.L.J. 25.

important solution for solving their problem. By changing the practice and attitude of the courts and by reforming and liberalising the bail provisions under the Criminal Procedure Code, the number of them in our jails can be minimised, thereby improving the situation. Thus Hussainara has given rise to the emergence of the right of speedy trial and bail as integral parts of the fundamental right to personal liberty in Article 21. This judicial enthusiasm against the systemic injustice towards the undertrials has been continued by the court in subsequent cases as well.[37] After the decision of Hussainara Khatoon there was a flood of litigation regarding the undertrial prisoners.

Khatri v. State of Bihar[38] illustrate another point in this context. There were mainly two issues in

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37. For instance, see in Mantoo Majumdar v. State of Bihar, A.I.R. 1980 S.C. 846, Krishna Iyer, J. ordered the release of the two undertrials who spent six years in jail without trial, on their own bond and without sureties. See also, Moti Ram v. State of M.P., A.I.R. 1978 S.C. 1594; and Babu Singh v. State of U.P., A.I.R. 1978 S.C. 527. In Kadra Pehadia v. State of Bihar, A.I.R. 1981 S.C. 939 the court dealt with the case of four young boys languishing in jails as undertrials for over 10 years.
38. A.I.R. 1981 S.C. 928. This case is notorious as Bhagalpur blinded prisoner's case.

this case. The importance of these was whether the right to legal aid is clearly an essential ingredient of reasonable, fair and just procedure guaranteed in Article 21. Following the decision in Hussainara[39] the court held that the State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability.[40] The Court further widened the scope of Hussainara. The court held:[41]

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39. A.I.R. 1979 S.C. 1369.
40. A.I.R. 1981 S.C. 928 at 930 per Bhagwathi, J. The High Court of Kerala followed the above dictum in two decisions, Chandran v. State of Kerala, 1983 K.L.T. 315 and Unnikrishnan v. State of Kerala, 1983 K.L.T. 586. These decisions have brought to light the urgent necessity of framing rules by the High Court under sub-section (2) of Section 304 of the Code of Criminal Procedure. The matter engaged the attention of the Rule Committee. In exercise of the powers conferred the High Court of Kerala with the previous approval of Government of Kerala made a rule in G.O.Ms.76/92/Home dated 8th April, 1992. The Rule provided for giving legal aid in all criminal cases where the accused is disabled from engaging a lawyer on account of indigence or being in judicial custody or other reasonable grounds. See 1993(1) K.L.T. Kerala State I.
41. Id., p.930 per Bhagwathi, J.

> "Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the 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 reasonable, fair and just which denies legal advice and representation to him at this stage".

In another order Justice Bhagwathi in the same case suggested to make efforts to find out institutions where blinded prisoners are rehabilitated. If any such institution can be found, the blinded prisoners should be taken and kept in such institutions at the cost of the State Government. Justice Bhagwathi also directed that if for any reason the blinded prisoners have to go back to the jail, they should be given proper vocational training in the jail, so that even in the jail, they can engage themselves in productive activity and earn money for themselves and the members of their families and on discharge from the jail, become useful members of the society.[42] By this attitude Justice Bhagwathi has given

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42. Id., p.934.

effect to the rehabilitative objective of imprisonment. To a certain extent he has followed the ideas of Justice Krishna Iyer in this respect. Justice Bhagwathi's eagerness to protect the rights of undertrial prisoner is evident in this case.

The Supreme Court assumed the role of the guardian and mentor of wrongs. Lost sight could not be restored, but the victims could be helped to rehabilitate themselves. Through the medium of directions, the court provided treatment, technical training to ensure a living and a sum from the state to aid in establishing in themselves in some vocation, trade or occupation. The content of personal liberty was thus realised.

In Sunil Batra v. Delhi Administration[43] the Supreme Court has held that keeping of undertrial prisoners with the convicts was a violation of human rights. Justice Krishna Iyer held:[44]

> "We have the fact that a substantial number of the prisoners are undertrial who have to face

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43. A.I.R. 1980 S.C. 1579. For a detailed analysis of the case see chapter 2.
44. Id., p.1584.

their cases in court and are presumably innocent until convicted. By being sent to Tihar jail they are by contamination, made criminals - a custodial perversity which violates the test of fairness in Article 21".

Justice Krishna Iyer even went to the extent of comparing prisoners sent to jail as patients going to a hospital for medical treatment. By putting an undertrial prisoner along with hardened convicted prisoners he will be spoiled. "How cruel would it be if one went to a hospital for a check-up and by being kept along with contagious cases came home with a new disease?".[45] Prison reform is now a constitutional compulsion and its neglect may lead to drastic court action. If the judges are dynamic they can give new dimensions to the constitutional protection of individual rights. Legal aid shall be provided to the undertrial prisoners who are poor to defend their cases in courts of laws. If the lawyer's service is not available to them, the decisional process becomes unfair and unreasonable. If the chains of communication between the undertrial prisoners and the courts are not kept

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45. Id., p. 1585.

open, all of their other rights become valueless. Those undertrial prisoners who are indigent and languishing in jail, legal aid shall be extended to them for the protection of equal justice.

The impact of Hussainara was reflected in Kadra Pehadia v. State of Bihar[46]. the Supreme Court expressed anxiety over the pathetic situation of undertrial prisoners even after their direction to improve the situation in Hussainara. This is a highly disturbing state of affairs and it discloses a sense of callousness and disregard of civilized norms. Undertrial prisoners should not be forced to work. If they are forced to work it would be in flagrant violation of prison regulations and contrary to the I.L.O. Conventions against forced labour.

Here the Supreme Court held that, a right to speedy trial is a part of the fundamental right envisaged under Article 21 of the Constitution. The delay in disposal of cases is nothing but denial of justice. So, the court shall adopt necessary steps for speedy disposal

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46. A.I.R. 1986 S.C. 1167 at p.1169. For a detailed discussion of the case see chapter 2.

of cases. The speedy disposal means, the expeditious trial and quick disposal of it. The State has no right to detain the undertrial prisoners in prison for longer period than the term if they would have been convicted. Pre-trial release is also a freedom under the law. Long delay of cases in various courts without limitation of adjudication is the infringement of fundamental rights. In USA speedy trial is one of the constitutionally guaranteed rights.[47]

Pre-trial release in the present setup in criminal administration of justice is a rule rather than exception. The accused shall avail of his right to release on bail before conviction. The undertrial prisoner should get fair and free chance to exercise his right before the court. It is to be economic conditions of their family may be ruined. Detention, even for a shorter period is bound to cause disruption in their private life.

There were instances where innocent women and children are detained as undertrial prisoners though they have not commited any crime. In Kamaladevi Chathopadhya v. State of Punjab[48] several children and women were rounded

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47. The Sixth Amendment declares that, in criminal prosecution, the accused shall enjoy the right to speedy and public trial.
48. (1985) 1 S.C.C. 41.

up in the army action within the precincts of Golden Temple, Amritsar. They were kept in jails along with the convicts. When the matter came before the Supreme Court it directed the District Judges of Ludhiana and Amritsar to personally visit the jails and to verify whether any children were detained in the jails and if so to forthwith take steps for their removal from the jails and further to arrange for their safe custody and wellbeing There was no response to this order from the government. District Judge, Ludhiana reported the sad state of affairs of the court. On the basis of this report all the detenus were directed to be released. The Supreme Court applied Article 21 in this case. According to the court there was not the slightest justification for detaining these innocent persons inside the jail.[49]

In the case of young undertrial prisoners there is a chance of spoiling them if they are put in the prison along with hardened criminals. Supreme Court by a significant decision suggested certain standards to be observed by prison authorities with regard to the detention

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49. Id., p.42.

of juvenile undertrial prisoners.[50]

There are circumstances when warrant sent by the court does not indicate the age of the prisoner authorised to be detained in the jail. This is a very wrong practice. The Supreme Court in Sanjay Suri directed the magistrates that every warrant authorising detention to specify the age of the person to be detained. Judicial mind has to be applied in cases where there is doubt about the age and every warrant must specify the age of the person to be detained.

In Mohammed Salim Khan v. State of U.P.[51] the petitioners were detained for three years without trial.

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50. In Sanjay Suri v. Delhi Administration, 1988 Cr.L.J. 705 also A.I.R. 1988 S.C. 414, a news reporter and a trainee sub-editor moved the Supreme Court for appropriate direction to the Delhi Administration and the authorities of the Central Jail at Tihar, pointing out features of maladministration within jail relating to juvenile undertrial prisoners. The warrant sent by the court did not indicate the age of the prisoner. Allowing the petition court gave specific directions to the prison administrators for the treatment of undertrial prisoners. The Supreme Court called upon the authorities in the jails throughout India not to accept any warrant of detention as a valid one unless the age of detenue is shown therein. It shall be open to the jail authorities to refuse to honour a warrant if the age of the person remanded to jail custody is not indicated. It would be lawful for such officers to refer back the warrant to the issuing court for rectifying the defect before it is honoured.
51. (1982) 2 S.C.C. 347.

Several serious cases were alleged to have been pending against him. No charge sheet was submitted. The court held that the State was not justified in acting in casual manner where liberty of the subject is involved. The petitioners were released on bail furnishing a bond.

The rules applicable to superior and ordinary classes of convicts are attracted to undertrial prisoners as well. This will necessarily bring in the application of all the rules of the transfer of convicts from one prison to another. In Balram Singh Yadav v. State of U.P.[52] the transfer of undertrials from one jail to another for temporary accommodation to avoid overcrowding was held to be legal. Apart from that the detention in an environment natural to him in point of climate, language, food and other incidence of life and living were held to be reasonable.[53] Once it is found that the detention of the petitioners is supported by valid orders of remand and there are valid custody of warrants issued against them, the mere transfer of the petitioners from one jail to another would not per se render the detention illegal.

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52. 1991 Cr.L.J. 903.
53. Id., p.909.

Prison Visitors

While undergoing detention circumstances compel an undertrial prisoner to communicate with outside world. He has to engage a lawyer and make necessary arrangements for getting bail. So he must be given all reasonable facilities for communicating with their legal advisors.[54] Paper and writing materials have to be supplied to all the undertrial prisoners for the purpose of communicating with friends or for preparing a defence. If that right is not granted the constitutional protection guaranteed to an accused will not be satisfied. So it will be a denial of justice.

In Zoii Nath Sarmah v. State of Assam[55] an advocate who was also a minister was refused to interview an undertrial prisoner who was his client. The court held that the refusal of the Superintendent to allow the petitioners to meet the prisoners was invalid.[56] The court to a great extent relied on the decision of Sunil Batra[57] in which the Supreme Court has held:[58]

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54. See Kerala Prison Rules 1958, Rule 750. In England prison authorities have to provide an unconvicted prisoner with facilities for preparing his defence. Halsbury's Laws of England, Vol.37 (1982), p.816.
55. 1992 Cr.L.J. 2072.
56. Id., p.2073.
57. A.I.R. 1980 S.C. 1579.
58. Id., p.

> "We see no reason why the right to be visited under reasonable restrictions should not claim current constitutional status, we hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers are part of prisoner's kit of rights and shall be respected".

In Zoii Nath the instruction given by the Inspector General to the Superintendent of the prison not to allow interview with the "extremist prisoners" by politicians is a clear-cut case of unlawful dictation interfering with the exercise of statutory discretion of the Superintendent. Apart from that the restrictions under the impugned circular is unreasonable and excessive restriction. The circular directs to all the political leaders including a political leader who is a relative, friend or lawyer of an extremist prisoner. Therefore the relative friend or lawyer of such a prisoner who is ordinarily entitled to interview is also restricted as he happens to be a political leader. Such restrictions impose an unreasonable and excessive restriction upon the persons who are ordinarily entitled to interview an undertrial prisoner. Undertrial prisoner should get privilege to

write letters and have visits by relatives to whom interview can freely be allowed. Any interview to outsiders or visitors of jail can freely be made to ascertain the correctional position as well as treatment under present set up of the jails. He should not be discarded from the outer world. So we should encourage and attach high value to cultural education as that is capable of ennobling the traits of human personality.

Thus it is evident that the administrative authorities cannot impose excessive restrictions on the rights of undertrial prisoners. Some objective standards have to be laid down and only on the basis of those only the essential rights can be denied to the undertrial prisoners.

Compensation for Unlawful Detention

Whether an undertrial prisoner can ask for compensation if he has sustained some loss due to his unlawful detention? Originally the courts were reluctant to grant such reliefs. In Rudul Shah v. State of Bihar[59] the accused had been acquitted but had suffered incarceration for 14 years on an unsubstantiated ground of

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59. (1983) 4 S.C.C. 141.

insanity. The Supreme Court ordered the release of the prisoner and directed to pay Rs.35,000 as compensation for the unlawful detention. Rudul Shah has not only enriched the content of the right to personal liberty in Article 21; it has revolutionalised the remedial jurisprudence of Article 32 as well. In normal course the release of the petitioner from detention would render the continuance of the writ proceedings under Article 32 and the issuance of the writ of habeas corpus as infructuous. But in the circumstances of the present case the court, transcending the procedural orthodoxies, awarded compensation in the writ proceedings under Article 32 itself.

In Ramkonda Reddy v. State[60] the Andhra Pradesh High Court also took a positive aspect in this regard. This is a landmark case in which the conflict between the concept of "sovereign power or function" and "Personal liberty" are dealt with. The question for determination before the Hon'ble Court was whether the state was liable to pay compensation when an undertrial prisoner in jail lost his life due to failure or neglect of its officers to perform their duties.

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60. A.I.R. 1989 A.P. 235.

The defence of the State was that the prisoner was put in jail in accordance with the procedure prescribed by law. It was in exercise of sovereign function and therefore the State was under no obligation to pay compensation. It was held that the State could not avail of the defence of immunity of sovereign functions. "The theory of sovereign function does not clothe the State with the right to violate the fundamental right to life and liberty guaranteed by Article 21 and no such exception can be read into it by reference to Article 300(1). An undertrial prisoner though deprived of liberty by virtue of sovereign function is still entitled to the protection of life".[61]

This case has ensured that the State officials do not act with gross negligence and do not abuse their powers

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61. Here the prisoner brought to the notice of the authorities that he apprehended danger to life while in jail and requested to arrange for extra guards but they did not pay heed to it. On the contrary because of the negligence of the guards on duty bomb was hurled at the prisoner and he died. A suit against the State was held to be maintainable for the default of its officers. Compensation of Rs.1,44,000/- was awarded.

to the detriment of life and liberty of citizens. Concept of sovereign power is not an exception to the right to freedom of life.[62]

These decisions are telling testimonies of the Court's readiness to recognise the basic rights that are inherent in every individual.

Rights under the Kerala Prison Rules

Under the Kerala Prison Rules, undertrial prisoners are classified into two classes, viz., special and ordinary.[63] This classification is made by the court subject to the approval of the District Magistrate. The former class are those who by social status, education and habit of life have been accustomed to a superior mode of

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62. In advanced countries like England, United States and Australia the trend and tendency is to whittle down the rigour of sovereign immunity and pave a smooth and sailing way for laying actions against the Government for torts suffered or injuries caused to the citizens at the behest of the governmental machinery by means otherwise than through procedure established by law. Id., p.254.
63. Kerala Prison Rules 1958, Rule 734.

living.[64] All able bodied undertrial prisoners are provided with some items of unskilled labour like gardening, coir making, spinning etc.

If an undertrial prisoner is unduly detained in a jail the procedure to be adopted by the prison authorities are given in the Kerala Prison Rules.[65] In such a situation the Superintendent has to address to the Sessions Judge concerned with a view to the speedy disposal of their cases or the exercise by them of the power of releasing the prisoner on bail. If prolonged detention continue even after the attention of these officers has been drawn to it, the matter should be reported to the Inspector General who shall if necessary bring it to the notice of the government.[66]

The New Trend

The Hussainara cases has revealed that the plight of undertrial prisoners are pathetic in India. Thousands

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64. Ibid.
65. Id., Rule 746.
66. This rule was not applied in the case of Cheruman Velan, an undertrial lunatic in Kerala Jail. There was a neglect of duty on the part of administration. The Kerala High Court ordered the release of the detenue Cheruman Velan on 6.2.1987 who has been imprisoned in three mental hospitals in Tamil Nadu and Kerala for a period of forty years. For a detailed discussion of the case, see.

of them are languishing in jails for years because of the bottleneck of formed procedures choking the system. It delays the processing of their cases. Poverty and illiteracy deprive them from knowing their rights. Many such prisoners have spent more time in jail than their sentences they will get if they were convicted. Thus an absurd situation has been created in which prisoners have a credit balance of jail time, yet continue to remain behind bars.

It is the constitutional obligation of the state to devise a procedure which would ensure a speedy trial for the accused. It is also the obligation of the Supreme Court as the guardian of the fundamental rights of the people to enforce the fundamental right of the accused, by issuing the necessary directions to the state. The powers of the Supreme Court in the protection of the constitutional rights are of the widest amplitude. Some positive steps have been made by the Supreme Court to alleviate the miseries of undertrial prisoners. The court in Hussainara ordered the release of all prisoners who were being held without trial for more than two years unless the prosecution could institute a case within three months. It further initiated procedural reforms to ensure early

hearings and ordered that prisoners who could not afford legal fees be provided with legal aid at the expense of the State.

Active participation of society is essential for the true welfare of the unfortunate undertrials detained inside the prisons. General attitude of the community has to be changed. The stereotype prevalent in the Indian reality consider them as convicts or men with doubtful character, and cast social stigma effecting them personally and their family members. Frequently they are found as the victims of "justice delayed". After acquittal they find themselves as outcasts and in the midst of a broken family life.

It is true that Constitution of India confers rights on individuals, but they would be mere paper rights unless the government departments discharge their duties and secure those rights for individuals. When that duty is not discharged by the government departments or the rights are encroached upon or deprived by them, it becomes the duty of the judges to enforce them without fear or favour.

CHAPTER 7

Prison Labour

Chapter 7

PRISON LABOUR

Work is the best alternative to channalise the energies of prisoners in a rightful way and for useful purpose. Inside the prison, keeping the inmates engaged in productive work would be helpful for their physical and mental fitness.[1] It would also infuse self-confidence among the prisoners which would enable them to think of returning back to society as a normal man. The greatest advantage of putting the inmates to work is that the wages earned by the prisoners can be utilized for supporting their family and dependents. Thus it would save the entire family of the prisoners from being ruined. In this way, the inmates can help to support their family from inside the prison itself. In short, prison labour would be

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1. The purposes of prison labour are (1) to make the prisoners disciplined and to help them to have self discipline; (ii) to make the prisoners self sufficient and to preserve their physical and mental health; (iii) to prepare the prisoners for return to society as individuals having specialised training for livelihood and finally, (iv) to give punitive value for punishment. See James Vadukkumcherry, Criminology and Penology (1983), p.217.

beneficial to inmates and at the same time remunerative to the State.[2] So prisoners sentenced to rigorous imprisonment are assigned work inside the prisons. Prison labour is intended to develop a sense of personal responsibility.

History of Prison Labour

Originally the jails served only for pre-trial detention or as a place in which to impose a specific punishment. The concept of punishment changed radically with the advent of the Industrial Revolution. The revolution created a demand for manpower and convicts became the answer.[4] The government found that it could sentence offenders to prison and simultaneously receive a payment for lending these prisoners to industry. In

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2. It is said that dumping the prisoners in prison cells throughout the term of sentence served no useful purpose. It was wholly an unproductive process. Therefore it is suggested that inmates should be utilised to work on agricultural farms or construction sites and thus engaged as labour during working hours. This is in the best interest of the inmates as well as the state. See N.V.Paranjapee, Criminology and Penology (1988), p.122. See also A.B.Puranik, The Rights of Prisoners in Jail (1992), p.125.
3. J.D.Mc Clean and J.C.Wood, Criminal Justice and the Treatment of Offenders (1969), p.117.
4. George T.Felkenes, The Criminal Justice System: Its Functions and Personnel (1983), p.260.

effect, the government found it economically advantageous to sentence convicted prisoners to jails for a period of time as punishment. Likewise, employers found it much less expensive to hire convict labour than free men.[5] The rise of industry and mercantalism along with its financial feasibility of utilising convict labour spawned a proliferation of criminal laws that provided for serving different periods of time as punishment. In some foreign countries like Sweden, which is possibly the most advanced in its penal system, new institutions are built around factory.[6]

In ancient times prison labour was conceived of as a form of compulsory labour designed to crush the

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5. In the erstwhile State of Travancore, prisoners sentenced to simple imprisonment had no work while those sentenced to regorous imprisonment had work of various kinds. A large number of them were employed in the making and repairing of roads both at the capital and at Quilon and in sweeping them; others were sold off in small parties from day to day for garden work in the palaces, hospitals, sirkar buildings and public gardens, while some were engaged in carting their own daily provisions, drawing water for cooking and cleaning purposes, in making their own felters and while a few were also employed to saw timber and a few in ivory and wood carving. See V.Nagam Aiya, The Travancore State Manual, Vol.III (1989), p.448.
6. J.D.Mc Clean and J.C.Wood, op.cit., p.118.

criminal and in that process to tame him. Various hard measures were used for this. Devices like treadmill[7] and the crank[8] were used in England in the 19th century with this purpose in view. The use of these devices for harassing prisoners were stopped by the turn of the twentieth century.

In India also prison labour was intended in olden days to humiliate, disgrace and finally to crush the prisoners. Gradually, the idea of profitable employment of prison labour and its reformative impact began to gain ground. Still the emphasis continue to be on the punitive

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7. It was a cylindrical device with steps every 7 or 8 inches. The convict had to step from one step to another, keeping his hands on a hand rail, and keep the mill turning. Though such a device could be used for industrial purposes to secure rotary motion, in prisons in England in the early 19th century, they were employed for the purpose of punishment alone. See Mable A.Elliot, Crime in Modern Society (1952), p.685.
8. In 1846, a new device called the crank was invented by a man by the name Gibbs. This was a device consisting of a crank attached to a narrow iron drum placed on legs. In the interior of the drum a series of revolving cups scooped up a thick layer of sand at the bottom, carried it to the top and emptied it, to be again caught up by the revolving cups. On this machine a diel plate was fixed, which registered the number of revolutions made. This instrument was widely used in the period when task work was the method of prison labour. John Lewis Gillin, Criminology and Penology (1977), p.401.

aspect of prison labour. The Indian Penal Code is based on the punitive aspect of labour when it makes a distinction between simple imprisonment and rigorous imprisonment; hard labour being the distinguishing feature of the latter.[9]

Payment of Wages for Prison Labour

Linked with the question of employment for prisoners is the question of prisoner's pay. The approach to the question of payment of wages in the different countries of the world differs widely. From 1877 to 1913, some local English prisons used to pay wages or gratuity, however small, to the inmates. This practice was totally abolished in 1913 but reintroduced later in response to public opinion. At present in England prisoners are paid for their work at rates approved by the Secretary of the State, either generally or in relation to particular cases.[10]

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9. N.S.Chandrasekharan, "Prison Labour - Reformative and Rehabilitative Aspects", [1985] C.U.L.R. 161 at p.162.
10. 37 Halsbury's Laws of England (1982), p.758. The system of earnings was introduced in 1929 at the suggestion of the Howard League. Small weekly sums could be earned either on a flat rate basis or on pieces rates, which enabled the prisoners to purchase from the canteen various items such as cigarettes and tobacco, toilet articles, stationery, certain items of food, and greeting cards. This is still the basis for most prisoner's remuneration though the amounts a prisoner can earn have slightly improved; ... The possibility of introducing a more realistic wage, "the economic rate for the job", is a matter which has received consideration in recent years. See J.E.Hall Williams, The English Penal System in Transition (1970), pp.146, 147.

The wages paid in the United States of America is said to be meagre.[11] Wages are paid in the shape of compensation in Belgium and Japan, premium in Sweden, gratuity in China, bonus in Thailand and reserve in Portugal.[12] All Australian prison systems provide sliding pay scales for prisoners which vary from approximately ten to fifteen cents per day to a maximum of seventyfive cents or one dollar per day.[13] In some places they earn considerably higher rates if they are employed in special workshops.

Much discussion has taken place on the suggestion that prisoners should be paid normal wages for the work that they do in prison and that the costs of their accommodation and food should be deducted.[14] This would allow prisoners to continue to support their families while they serve their sentences. On the surface, this seems to be an attractive and simple proposition, but it would be difficult to implement it in practice and may even be wrong in principle. Before normal wages were paid it would be

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11. Bhattacharya, Prisons.
12. Ibid.
13. David Biles (Ed.), Crime and Justice in Australia (1977), p.89.
14. Ibid.

necessary to ensure that normal hours and standards of work applied, and this is impossible in many maximum security prisons due to the restricted daily routine.

In Sweden a prisoner is paid a more adequate wage in return for work done.[15] In Sweden there are certain prisons where full civilian wages are paid to all prisoners, who pay income tax and a charge for room and board.[16] But the wages supplied in all these countries are meagre or inadequate and is not in recognition of the right of the prisoner to claim such wages.[17]

Wages are paid to prisoners for work done with a view to offering incentive and stimulus for effort, work and industry.[18] It enable prisoners to purchase their sundry daily extra requirements from the prison canteen and

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15. J.E.Hall Williams, The English Penal System in Transitions (1970), p.147.
16. J.D.Mc Clean and J.C.Wood, op.cit., p.118.
17. In the Matter of Prison Reforms Enhancement of Wages of Prisoners, 1983 K.L.T. 512, per Subramonian Potti, J.
18. A.B.Puranik, The Rights of Prisoners in Jail (1992), p.125. Prisoners have no right to wages. Wages are incentives granted to prisoners for the satisfactory performance of prescribed quantum of work in the prescribed manner and time. Prisoners must be paid wages in accordance with the rates fixed by government from time to time. See Kerala Prison Manual, Rule 523.

help inmates to effect saving for their post-release rehabilitation and also for extending economic help to their families. Elizebeth Fry, the famous social worker was sure that it was better for prisoners to be paid little for their work than not to be paid at all.[19] She even suggested that employment of women should be a regular thing undertaken by the Government.[20] She also stressed her view that women prisoners should be given part of their earnings for their own use.[21] At that time it was not allowed. But her suggestions were accepted later and almost all countries now allow the prisoners to utilise part of their earnings to their own use.

Criticism Against Prison Labour

One defect pointed out with regard to the prison labour is that it is defective in so far as it denies opportunities to the prisoner for introspection and repentence.[22] Labour keeps the prisoner occupied in body and mind. Supporting view is that if the criminal is to be corrected, he must be left alone in prison allowing him to focus his mind on him and his past misdeeds.[23] The

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19. Ann D.Smith, Women in Prison: A Study in Penal Methods (1962), p.104.
20. Ibid.
21. Ibid.
22. N.S.Chandrasekharan, op.cit., at p.162.
23. Ibid.

supporters of anti-labour approach suggest that in such a situation the prisoner will evaluate his past actions from an ethical plane and will resolve to correct himself.

The argument that prisoners will be reformed and will remain well disciplined by not giving them any work is not valid. Experience has shown that contrary is the position.[24] The greatest boredom in life is to remain idle; the boredom is aggravated when idleness is compulsorily imposed. We cannot consider work as such as a punishment.[25]

Human Rights Vis-a-Vis Prison Labour

Forced labour has been condemned as violative of human rights by various covenants and conventions. But

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24. Mable A.Elliot, op.cit., p.596.
25. A common man sent to hard labour finds himself in kindred society, perhaps even in more interesting society than he has been accustomed to. He loses his native place and family, but his ordinary surroundings are much the same as before. An educated man condemned by law to the same punishment as the other, suffers incomparably more. He must stifle all his needs, all his habits; he must descend into a lower sphere, must breathe another air. He is like a fish thrown upon the sand. The punishment which he undergoes, equal in the eye of the law for all criminals, is ten times more severe and more painful for him than for the common man. This is an incontestable truth, even if one thinks only of material comforts that must be sacrificed. See Dostoyevsky, The House of the Dead (1983), p.67.

prison labour is an exception to that because we cannot equate a prisoner with an ordinary person. The International Covenant on Civil and Political Rights eventhough condemns compulsory labour excludes prison labour from its coverage.[26] So is the case with the European Convention on Human Rights. The ILO Convention on Forced Labour imposes on the countries ratifying the convention, the obligation to suppress forced labour in all its forms. But the work exacted as a consequence of a conviction in a court of law is outside its coverage. It also places a restriction on hiring out of prison labour to private employers.

Thus it can be seen that forced labour in prison is not prohibited by international conventions. But it does not mean that prison labour can be exploited to the extreme or that it should always be penal in content. The main emphasis has to be on the reformative and

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26. Article 8(3)(a) and (b) of the covenant provides:- "3(a) No one shall be required to perform forced or compulsory labour, (b) paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such imprisonment by a competent court". For the text of the covenant, see H.F.Van Panhuys, L.J.Brinkhart and H.H.Mass (Ed.), International Organisation and Integration (1968), p.258.

rehabilitation aspects of such labour with a view to making the prisoner develop a sense of self-respect and responsibility. There are some very real difficulties in providing suitable work for prisoners.[27] A proportion of prisoners are unfit for heavy or complicated work; the great majority are serving short sentences which preclude their attending training courses for skilled work. The nature of the prison routine, with constant interruptions for baths and interviews, and the transfer to other prisons of men who have held key roles, all make for inefficiency.[28]

Should Women and Girl Prisoners Work?

From the beginning of the history of prisons female inmates have been compelled to work.[29] From the modern point of view the same arguments for prison labour apply to women as to men. Each inmate should be studied

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27. F.A.Nicholson, Acting Resident of the erstwhile Travancore wrote in 12th June 1899 "The females still seem to have no sufficient employment: it would be kinder to give them full work. There must be work which they can do; eg. the rice for the jail is bought as rice, ie., cleaned; if it or a portion were bought as paddy, the women must husk it, and save the cost of their labour". See V.Nagam Aiya, op.cit., p.454.
28. J.D.Mc Clean and J.C.Wood, op.cit., p.115.
29. John Lewis Gillin, op.cit., p.426.

carefully, and the kind of labour assigned for her should be determined by the facts found in her history. Some can be given vocational training in their work, while others would not profit from attempted training. At present the trend is to adapt the kind of work given to the female inmates not only to the capacities of the individual but also to the vocation open to women. Training in the care of children, for secretarial work, for domestic services, for sewing and machine operation of various kinds is being experimented with at the present time.[30]

Statutory Provisions in India

The Penal Code categorises imprisonment as simple and rigorous.[31] Rigorous imprisonment is imprisonment with hard labour. In every case where imprisonment for life is the sentence imposed, the appropriate government can without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years either simple or rigorous imprisonment.[32]

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30. Ibid.
31. Indian Penal Code 1860, S.53, "The punishments to which offenders are liable under the provisions of this code are:-
    First - Death ...
    Secondly - Imprisonment for life ...
    Fourthly - Imprisonment, which is two descriptions, namely, (1) Rigorous, that is, with hard labour; (2) Simple
    Fifthly - Fociture of property
    Sixthly - Fine."
32. Section 55.

In the Constitution, Article 21 is the repository of human values. It prescribes fair procedure and forbids arbitrariness.[33] Article 23 prohibits forced labour, i.e., labour or service which a person is forced to provide.[34] Forced labour may arise in several ways[35] where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour under Article 23".[36] Such a person is entitled to come to the court for enforcement of his fundamental right by asking the court to direct payment

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33. Article 21 reads:- "No person shall be deprived of his life and personal liberty except according to procedure established by law".
34. Article 23 reads:- "(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race caste or any of them".
35. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. See Gurdev Singh v. State of Himachal Pradesh, 1992 Cr.L.J. 2542 at p.2552.
36. Ibid.

of the minimum wage to him so that the labour or service provided by him ceases to be forced labour.

Statutory recognition is given to prison labour in specific provisions.[37] Civil prisoners with the Superintendent's permission can work and follow any trade or profession.[38] The authorities should not insist a criminal prisoner sentenced to labour or employed on labour at his own desire to work for more than nine hours in a day.[39] The medical officer has to make a periodical inspection of the prisoner and if he is of the opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the medical officer may consider suited to him.[40]

State governments are empowered to make rules for classifying and prescribing the forms of labour and

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37. Prisons Act 1894, Ss.34, 35 and 36.
38. Id., S.35.
39. Ibid.
40. Ibid.

regulating the periods of rest from labour.[41] Rules were framed on the basis of this in Kerala.[42] In this State it envisages three main classes of labour as hard, medium and light and the scale of tasks is arranged according to these classes.[43]

Reference may also be made about the utilisation of wages here.[44] It envisages utilisation of one-third of the wages earned by a convict for his personal needs in jail. One third could be sent to the family for its needs and the remaining one third is to be reserved for being paid to the prisoner on his release. The prisoner can even purchase remission from the wages paid to him. The law for prison labour with regard to the civil prisoners is different from criminal prisoners.[45]

Labour by Civil Prisoners

Civil prisoners can work and follow any trade or profession with the permission of the superintendent.[46]

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41. Prisons Act, S.59(14).
42. The Kerala Prison Rules 1958 framed under this extends to the whole of Kerala State. Chapter XXII of this Rule provides for convict labour.
43. Kerala Prison Rules 1958, Rule 377.
44. Id., Rule 384.
45. The convicted prisoners are classed into civil and criminal prisoners. Civil prisoners are those who are undergoing imprisonment on the basis of an order of a civil court. See supra,
46. Prisons Act 1894, S.34.

They can find and use their own implements. The prisoners will be allowed to receive the whole of their earnings. This is a distinction from the working condition of other prisoners. Law did not treat them equally in this respect. There is no justification for such an unequal application of law. But if the implements are provided by the authorities or maintained by them a deduction will be made for the expenses.[47] There is a discretionary power to the superintendent with regard to the amount to be deducted.

Working Conditions of Criminal Prisoners

Eventhough a prisoner is doing work inside the prison under compulsion the law is very keen to provide adequate working conditions to him.[48] Criminal prisoners employed at his own desire or sentenced to labour must not be kept to labour for more than nine hours in one day.[49] The medical officer from time to time has to examine the labouring prisoners while they are employed. 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 should not be employed on that labour

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47. Ibid.
48. Specific provisions are given in the Prisons Act 1894 with regard to the working conditions of criminal prisoners.
49. Id., S.35.

but has to be placed on such other kind or class of labour as the medical officer consider suitable.

In the case of criminal prisoners sentenced to simple imprisonment if they desire, they can also work inside the prisons. The superintendent of prison has to make provision for that. But if they are unwilling to work they should not be compelled to work. There are various instances where prisoners are forced to do hard labour against their will.[50] they are the steady supply of 'bonded labour' in jail. They never get a share of the produce. What these prisoners are made to do is patently illegal.[51]

Simple Imprisonment and Prison Labour

Imprisonment for a specified term may be either

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50. In Delhi's Tihar Central Jail poor and illiterate prisoners, unaware of their rights, are being made to affix their thumb impressions on jail records, making them appear as willing to do hard work. Batches of prisoners, mostly able-bodied men between 20 and 35 years, are taken out every morning from their cells and engaged in domestic work of the jail officials. See Indian Express (Cochin), January 19, 1983, p.9.
51. Section 374 of the Indian Penal Code says, "whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine or both".

rigorous or simple and that the former involves hard labour.[52] Nothing is said about the nature of simple imprisonment. This is left to be regulated by the State government.[53] It makes rules for classifying and prescribing the forms of labour and regulating the period of rest from labour. The voluntary labour to which a prisoner sentenced to simple imprisonment can be submitted is "as long as he so desires". It is regulated in accordance with those rules.

This differentiation of imprisonment as simple and rigorous has been subjected to various criticisms. It has been suggested from time to time that simple imprisonment should be abolished.[54] A life of complete idleness even for a short period would hardly be welcomed by a normal individual. Simple imprisonment leave the prisoner idle, with leisure for idle thoughts.[55] Work will

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52. Section 53, Indian Penal Code.
53. Prisons Act 1894, S.36 reads:- "Provision shall be made by the superintendent for the employment of all criminal prisoners sentenced to simple imprisonment; but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work except by such alteration in the scale of diet as may be established by the rules of the prisoner in the case of neglect of work by such a prisoner". See also S.59.
54. 42nd Report of the Law Commission, p.64.
55. A Convict Prisoner v. State and Others, 1993 (1) K.L.J. 902 at p.908.

provide necessary therapy against this. The prisoner can earn wages, develop work habits, gain experience in trades and acquire skills. This will ease boredom.

The Law Commission in its 42nd Report recommended that section 36 of the Prisoners Act 1894 should be suitably amended so that convicted persons sentenced to simple imprisonment could be compelled to perform light tasks regularly throughout the period of their incarceration. This is a welcome suggestion. If this suggestion is accepted all the prisoners can be compelled to some kind of work while they are undergoing sentence.

Prison Labour: Kerala Picture

The picture of prison labour in Kerala is not entirely different from other Indian States. The Kerala Prison Rules lays down in detail the procedure to be adopted by the prison officials in matters of prison labour. A study regarding the prison labour has shown that the picture of prison labour is not satisfactory here.[56] In the Central Prison, Trivandrum the item of work to which

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56. See N.S.Chandrasekharan, "Prison Labour - Reformative and Rehabilitative Aspects", [1981] C.U.L.R. 161.

prisoners are put are in general weaving, carpentry, printing and book binding, leather works, tailoring, kitchen work, smithy, maintenance work, sweeping, cleaning and other miscellaneous work.

There the entire prison life is work-oriented. Even persons serving simple imprisonment are doing work. Some of them prefer to do work since it keeps them engaged, gives an opportunity to earn something and entitle them to remission of sentence.[57] There are various guidelines in the Kerala Jail Manual regarding the allotment of works to the prisoners.[58] This is not strictly followed. Safety measures should also be introduced while prisoners are put in manufacturing units.[59] These rights guaranteed to

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57. Id., p.165.
58. Rule 496 says:- "The Classification Committee should take into consideration the following factors while alloting work to prisoners:- (a) Physical and mental health, (b) Age, (c) Length of service, (d) Requirements of security and discipline, (e) Vocational attitude, (f) Previous occupation, training and experience, (g) Level of work-skills and abilities, (h) Resettlement after the release and possibilities of employment, (i) Vocational training needs, (j) Rehabilitation needs.
59. See Kerala Jail Manual. Rule 499 says:- "The following protective and safety measures should be adopted at each manufacturing unit: (i) Safety equipment and accident prevention measures, fire preventive and fighting equipment; (ii) Measures for protecting prisoners from industrial hazards, occupational diseases wherever necessary; (iii) Periodical medical examination of prisoners".

prisoners while engaged in work are only in paper. Adequate safety measures should be introduced.

Work inside the prisons are classified as tasked labour and untasked labour.[60] Wages earned by the prisoner cannot be spent according to his desire. In the Kerala Prison Manual it is laid down that one-third of the wages earned by a prisoner has to be used for personal needs in prison, one third for his family and the remaining one third has to be given to him on release.[61] If any prisoner desires to send to his family the savings from one third of the wages which may be paid for his personal needs in prison or any part thereof, he has to be allowed to send such amounts also to his family. In cases of extreme hardship experienced by the family of a prisoner in a central prison or open prison, the superintendent of the prison can grant permission to send money to his family from out of the one-third portion of the earned wages. The amount used by a prisoner for his personal use in prisons is given in the form of coupens. With this he can purchase things from the prison canteen. Prisoners can be usefully employed and their earnings can support not only their families, but the families of the victims of their crimes.

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60. Id., Rule 523, 524.
61. Rule 527.

The Kerala Prison Rules make provision for payment of wages to prisoners, who work.[62] the nominal wages given to the prisoners will not offer any motivation either to work or to feel the dignity of work. Frequent change of work, except on medical grounds, should be avoided. Practices such as employment of convicts on dangerous work etc. should be avoided.[63]

Fundamental Rights and Prison Labour

The Constitution of India prohibits forced labour under Article 23. Article 39 lays down the rules of policy to be followed by the State and clause (a) of this Article refers to the principle that the citizens should have right to adequate means of livelihood. The State has an obligation under Article 41 of the Constitution to make effective provisions for securing the right to work within the limits of State's economic capacity. Just and humane conditions of work must be secured by the State. Article 42 provides for such an obligation. Article 43 envisages the duty of the State to endeavour to secure by suitable legislation or economic organisation or in any other way to all workers a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

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62. The Kerala Prisons Rules, 1958. The payment ranges from Re.1 to 4.
63. Guidelines regarding this are given in Kerala Jail Manual.

Adequate Wage - A Right?

Whether a prisoner who has to undergo his term of sentence in jail entitled as a matter of right, to claim that he should be paid wages for his work? Is he entitled to insist that the wages paid should be reasonable? Can he complain to the court that his personal liberty is infringed and his rights eroded by compulsion to do hard labour without remuneration? Actually in many places prisoners have no right to wages.[64] Wages are incentives granted to prisoners for the satisfactory performance of prescribed quantum of work in the prescribed manner and time. Prisoners may be paid wages in accordance with the rates fixed by government from time to time.[65] The question of quantum of wages is complicated as it involves consideration of inconsistent attitudes of the society and of the prisoners or reformers and includes a number of contrary approaches to the purposes of, and objects to be achieved by punishment. These matters were considered by the Kerala High Court in the Matter of Prison Reforms .[66]

The Kerala High Court received petitions from prisoners in the various jails of the State directly and

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64. See Kerala Prison Manual, Vol.I, Rule 522.
65. See Id., Rule 524 and Appendix VI.
66. 1983 K.L.T. 512.

through the grievance deposit boxes maintained in the jail questioning the propriety of non-payment of adequate wages. Though the morality of inadequate wages paid to a prisoner is a matter essentially for legislature to consider, the court gave various directives. The court directed the government to make arrangements to pay to the inmates of the prisons, who are put to work, wages at Rs.8/- per day, part of which they may utilise for themselves, part of which they could arrange to remit to their dependents and part accumulated to be paid to them at the time of release.[67] The court held that the Indian Penal code only decrees hard labour and not free labour. Article 23 of the Constitution prohibits forced labour.[68] If there is a fundamental right available to a person to get remuneration for the work done by him and non-payment of such remuneration would also amount to 'forced labour' within the meaning of that article. Prisoners are entitled to claim adequate wages for their work. By extracting not only hard labour, but also free labour from them, the authorities will be infringing the fundamental rights of

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67. 1983 K.L.T. 512 at 525. This has not implemented in the State of Kerala. Here the prison wage is between Rs.1 and 2.
68. Article 23, see supra.

prisoners. In the light of Article 23(1) if such free labour is extracted from them, that would amount to forced labour and consequently the court should come to their rescue.

What would be paid to an employee, who is free to negotiate and has the support of the welfare and labour legislations should determine the standard of reasonable wages in the case of prisoners also. There is no justification for the State to claim that it is free to take prison labour without payment, that whatever it pays is ex-gratia and is not as of right and therefore there can be no claim for proper wages.[69]

A prisoner who undergoes the sentence in jail must necessarily have his movements restricted. That is involved in the very concept of imprisonment. His communication with the rest of the world would also be necessarily restricted. His right to practice profession will not be available to him while in the jail. But there are many other valuable rights, the curtailment of which will have no relevance to the nature of the punishment.

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69. Id., p.520.

The right not to be exploited in contravention of Article 23(1) is a right guaranteed to a citizen in India. So there is no reason why a prisoner should lose his right to receive wages for his labour. He cannot be compelled to do forced labour. To deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23(1) of the Constitution. In the Matter of Prison Reforms Enhancement of Wages of Prisoners[70] the State was directed not to deny such reasonable wages to the prisoners from whom the State takes work in its prisons. Later in another decision Kerala High Court has pointed out that reasonable wages need not be the equivalent of minimum wages.[71] Cost of support of prisoners, circumstances that lead to incarceration etc. can be reckoned in fixing such wages. The approach of the Kerala High Court is good as the prevailing social structure will not approve the idea

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70. Ibid.
71. A Convict Prisoner v. State, 1993(1) K.L.J. 902 at 912. Recently the Chief Minister of Kerala told in the Assembly that the Government had accepted in principle the proposal to increase the wages of prisoners by 50 per cent. The Government had accorded sanction for a Central Government aided Rs.265 lakhs project, to improve facilities in jail. This project includes vocational training and medical facilities for prisoners. See Indian Express (Kochi), February 10, 1994, p.4.

of equal wages to the prisoners. The problem requires a careful analysis of the social attitudes and social structure before accepting the suggestion of equal wages. The fact that the institution provides for free shelter, food and clothes to the inmates should not come in the way of payment of higher wages.

Specific rules have to be framed by the State governments with regard to prison labour. Then the abuse of these discretionary jurisdiction by the authorities can be minimised. In Mohammed Giassudin[72] the Supreme Court expressed shock and indignation because rules for payment of wages to prisoners were still being processed by the State of Andhra Pradesh. So it urged the State to finalise the rules, to ensure that the rates are not "trivial" but "reasonable" and that the State gives retrospective effect to the wages.[73]

In this context we have to examine the other side of the coin also. Wages combined with the concept of rigorous imprisonment denotes some kind of assured employment to the prisoners in preference to the law

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72. Infra.
73. Id., p.298.

abiding unemployed citizens outside the prison wall.[74] Apart from that the stipulation of minimum wages for manual work done by the prisoners in the jail will restrict the discretion of the government to introduce different kinds of jail reforms in future, because any such step would bind it to inflexible quantum of wages which the government may not always be able to provide for.[75]

In Gurdev Singh v. State of Himachal Pradesh[76] the petitioners were undergoing imprisonment. They were employed for work but were being paid Rs.1.50 per day for the labour. They also say that no wages were paid to them for the first three months of labour. Allowing the petition the court held that remumeration, which is not less than the minimum wages has to be paid to any one who has been asked to provide labour or service by the State.[77] The payment has to be equivalent to the services rendered, otherwise it would be forced labour within the meaning of Article 23 of the Constitution. There is no difference between a prisoner serving sentence inside the prison walls and a free man in the society. Although on account of incarceration, a prisoner may lose enjoyment of some of the

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74. See Gurdev Singh v. State of Himachal Pradesh, 1992 Cr.L.J. 2542 at p.2546.
75. Ibid.
76. Supra.
77. Id., at 2555.

rights, but there is no total extinction by reason of the jail sentence.

Section 53 of the Indian Penal Code provide for assignment of work in cases of rigorous imprisonment, it does not say that the labour provided by such a prisoner has to be free. It does not envisage subjecting the prisoner to obnoxious, harsh and uncalled for duties which are ex-facie condemnable.

The State cannot put the prisoners sentenced to rigorous imprisonment to hard labour without payment of any wages in view of the nature of the sentence they serve.

There is another view for this. According to this view giving of better facilities and payment of wages to them would mean creating an impression that committing of crime and going to the prison is a better mode of living and earning wages. But no one would like to do crime, suffer indignity and undergo obligatory hard labour by losing all benefits which a freeman can otherwise avail in the society. Recently the Kerala High Court has held that:[78]

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78. A Convict Prisoner v. State, 1993(1) K.L.J. 902 at p.908.

> The prisoners cannot expect the same wages, as those outside. But, reasonable wages after meeting the supporting costs or what is known as the "user fee" must be paid. this will induce prisoners to work, and part of the earnings could be earmarked for the victims, or a Fund for victim compensation that the State may maintain".

Advantages of Fair Wages to Prisoners

There are various advantages of giving fair wages to a prisoner.[79] The punishment would appear to be just and fair if fair wages are given. It will not be seen as an exhibition of vindictiveness. There is a possibility of the prisoner being rehabilitated on release.

The severity of the resultant punishment on the dependents of the prisoner may be softened by payment of a substantial part of the fair wages due to the prisoner is a recognition of his individuality. That may preserve his self-respect. Such a measure will take away from the prisoner the tendency to take vengeance against the society. A humane approach will make it easier for the prison authorities to enforce discipline. The prisoner may

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79. 1978 K.L.T. 512 per Subramonian Potti, Ag.C.J.

be induced to dedicate himself to the work. Apart from all these, the State can absolve itself of the charge that it is exploiting the prisoners by taking free labour. In the case of a civilised society such a charge is not a commendable one.

The question of quantum of wages, whether equal or unequal, is complicated as it involves consideration of inconsistent attitudes of the society and of the prisoners and prison reformers. It includes a number of contrary approaches to the purpose of and objects to be achieved by punishment.

The approach of the Kerala High Court is correct as the prevailing social structure will not approve the idea of equal wages to the prisoners. The problem requires a careful analysis of the social attitudes and social structure before accepting the suggestion of 'equal wages'. But at the same time one cannot overlook the fact that it is low and inadequate wages, which negatives the purpose of payment of wages. Profit from prison labour must be a subsidiary object as the ultimate goal of prison administration is rehabilitation and reformation of prisoners. It is rightly observed by Justice Ismail that,

"so long as prisoners are expected to rejoin the mainstream of the society after their release, it is the duty of the State to spend for their rehabilitation.[80] Current wages in prison are dismally low, more so for women prisoners.[81] These disparities on the basis of gender are unacceptable and must be removed. Existing disparity in wages on the basis of type of work, and in particular between "light" and heavy work in respect of women prisoners is not necessary and should be removed.

Position in England

In England a convicted prisoner has to do useful work for not more than ten hours a day.[82] It is an offence against discipline to refuse to work or to be idle, careless or negligent at work.[83] Arrangements have to be made to allow prisoners to work, where possible, outside their cells in association with one another.[84] No prisoner

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80. Report of Justice M.M.Ismail Commission (1977), p.194.
81. Report of National Expert Committee on Women Prisoners (1986-87), p.154.
82. Prison Rules 1964, Rule 28(1). In 1894, Gladstone Committee recommended the abolition of unproductive labour in prisons and emphasised the need for work in association and improved classification of prisoners. See N.V.Paranjapee, op.cit., p.200.
83. Id., Rule 47.
84. Id., Rule 28.

may be set to do work of a kind not authorised by the Secretary of State.[85] No prisoner is to work in the service of another prisoner or an officer, or for the private benefit of any person, without the authority of the Secretary of State.[86] Prisoners may be paid for their work at rates approved by the Secretary of State, either generally or in relation to particular cases.[87]

A prisoner is deemed to be in legal custody while he is working outside the prison in the custody or under the control of a prison officer.[88] A prisoner may be temporarily released to enable him to engage in employment.[89] A prisoner may be excused from work on medical grounds by the medical officer, and no prisoner is to be set to do work which is not of a class for which the medical officer has passed him fit.[90]

The prison authorities owe a duty of care to prisoners and are liable if a prisoner sustains injury or

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85. Id., Rule 28(3).
86. Id., Rule 28(4).
87. Id., Rule 28(6).
88. See The Prisons Act 1952, S.13(2).
89. Prison Rules 1964, Rule 6(2).
90. Id., Rule 28(2).

damage to health by negligently being made to work in unhealthy conditions or on dangerous machinery with inadequate instruction.[91] There is no impediment to an action by a prisoner against the prison authorities for breach of this statutory duty in respect of personal injury attributable to unsafe or unhealthy premises.

In Pullen v. Prison Commissioners[92] the nature of prison labour and the type of work that is to be alloted to a prisoner were the matters of issue. The plaintiff, a prisoner was medically examined before admission to prison and was found to be fit for normal work. During a considerable part of the period of his imprisonment he was put to work on the manufacture of coirmats in the prison workshop. In that process dust was given off, but a dust extraction was provided.

Four months after his release he was found to be suffering from tuberculosis. In an action brought for

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91. See Halsbury's Laws of England, Vol.37 (1982), p.758. There are some very real difficulties in providing suitable work for prisoners. The overcrowding of local prisons applies not only to cells but to workshops as well. The labour force, although large, is selected on criteria which would not appeal to average employer. See J.D.Mc Clean and J.C.Wood, op.cit., p.114.
92. [1957] 3 All E.R. 470.

breach of statutory duty[93] by failing to take measure to protect him from dust and fumes, Lord Goddard L.J. held that the prison workshop was not a factory within the definition of 'factory' in the Factories Act 1937, there being no relationship of master and servant or employment for wages in the case of a prisoner. The action was therefore dismissed. Here the court held that the Factories Act did not apply to prison workshop. "Lord Goddard would have been prepared to have found in favour of the plaintiff at common law if his tuberculosis could have been shown to have been caused by negligence on the part of the prison authorities in placing him in the workshop where he was sent to work".[94]

Before the prisoners were sent to work the authorities have subjected them to a medical examination. So in this respect they were not negligent. The court was not ready to go further and did not go deep into the causes of the disease caused to the prisoner. Actually it was a consequence of the prison labour.

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93. This was under S.47 of the Factories Act 1937.
94. S.H.Bailey et. al, Civil Liberties : Cases and Materials (1985), p.530.

Corrective Labour

Reformation and rehabilitation of the offender are the two important objectives of punishment at present. This has been evidenced in India by various decisions especially the judgments of Justice Krishna Iyer.[95] This development in penology has led to an increasing use of non-custodial measures of punishment as contrasted with imprisonment of the traditional pattern. One form is known as corrective labour, the main object being to make the convict work at his own place or at a work centre outside the ordinary prison and thereby avoid the necessary evils of a prison life.[96] This mode of punishment has been in force in USSR for a long time.[97] In India also this method of prison labour can be accepted. Many defects of the

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95. In Mohammed Giassuddin v. State of A.P., (1977) 3 S.C.C. 287 the Supreme Court not only reduced the sentence of the appellant but issued several directions to the State to convert the eighteen month sentence into "a spell of healing spent in an intensive care ward of the penetentiary". (p.295). The court directed that the convict be assigned work not of a monotonous, mechanical, degrading type but of a mental, intellectual or like type with a little manual labour.
96. 42nd Report of the Law Commission of India, p.46.
97. "Corrective labour is claimed to be one of the most typical penalties in Soviet law. Its essential feature is that the offender is not deprived of his liberty. A corrective labour sentence is served either at the place of the offender's ordinary work, or in a special corrective labour institution in the locality where the offender is domiciled". Id., p.47.

present day prison labour can be cured if this is attempted here also. Juvenile delinquents should not be assigned work in the same area where regular prisoners are made to work.[98] Care should be taken to ensure that there is no scope for their meeting and having contacts.

Modern Aims of Work

Prison labour fills the greater part of a prisoner's day. It is a means of reducing or preventing tensions, unrest and even rioting. The eminent criminologist Nigel Walker has pointed out the negative as well as positive aspects of prison labour. He says "As every prison officer knows, however, the workshops are places where fights often breaks out. Nevertheless, prisons without work would probably be even more restless and frustrating.[99]

The days are gone when the idea of the prison labour was to punish the criminals. Today, in the light of human rights developments, it is to be designed as to suit

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98. Sanjay Suri v. Delhi Administration, 1988 Cr.L.J. 705.
99. Nigel Walker, Sentencing Theory, Law and Practice (1985), p.151.

the prisoner's health and to help him in his after release prospects. Any labour assigned to the prisoner in contravention of these principles is violative of his human rights and may be termed as the product of unfair and unreasonable laws or rules to be hit by Article 21 of the Constitution of India.

The prisoners are to be protected from harsh labour as imprisonment itself constitute a substantial punishment. Labour does not mean harsh labour or labour in the unhealthy conditions. Care must be taken regarding the nature of work to be carried on by a prisoner.[100] The sick, undertrials and civil prisoners should not be forced to labour as they have their protection under various statutes.

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100. The National Advisory Commission on Criminal Justice Standards and Goals in USA has recommended that all work should form part of a designed training programme with provisions for involving the offender in the decision concerning his assignment, giving him the opportunity to achieve on a productive job to further his confidence in his ability to work, assisting him to learn and develop his skills in a number of job areas and instilling good working habits by providing incentives. See Alwin W.Cohn, Crime and Justice Administration (1976), p.399.

A number of jail reforms committees have rightly recommended that prison labour and employment should not be inhuman, hard and punitive with no remuneration but should be of greatest benefit to the inmates of the penal institutions and be helpful to secure inmates employment on release.[101] The working conditions of prisoners should be at par with free workers so that the value of human dignity are respected[102] and they should be adequately compensated for the injuries sustained or professional sickness suffered by them during work.

Abuse of discretion by prison officials is very rampant in the area of prison labour. Under the guise of labour, prisoners are subjected to brutal treatment inside the prisons. Punishment of rigorous imprisonment oblige

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101. See Narasimham Committee Report (1979); Ismail Committee Report (1978); Mulla Committee Report (1980) and Report of the Estimate Committee of 9th Kerala Legislation (1993). A novel suggestion was given by Narasimham Committee. They said, "if wages are credited to the prisoners for the work done, a portion may be deducted towards the cost of their maintenance in the prison, a portion may be sent for the maintenance of their families and dependents, one portion may be utilised towards payment of compensation for victim of the crime if so ordered by the trying court and the remaining portion funded for his benefit to be given to him on discharge. See Narasimham Committee Report, p.21.
102. Barness and Teeters, New Horizons in Criminology (3rd Ed.), p.541.

the inmates to do hard labour; but it does not envisage harsh labour. The Supreme Court of India has observed that "a vindictive officer victimising a prisoner by forcing on him particularly harsh and degrading jobs violates laws mandate".[103] According to the court "hard labour" in section 53 of the Indian Penal Code has to receive a humane meaning. A girl student or male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day.[104] The prisoner cannot demand soft jobs but may reasonably be assigned congenial jobs. Sense and sympathy are not enemies of penal asylums.

Prison labour should be of the right individualised type. Sometimes prisoners are given work which they do not like and which may be to them a mechanical punishment. Such a thing should be prevented.[105] Labour must be of an interesting type or

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103. A.I.R. 1980 S.C. 1579 at p.1594 per Krishna Iyer, J.
104. Ibid.
105. In Ujjain, a novel method of prison labour has been introduced. In the Bhairogarh jail the new scheme striving towards reformation of the inmates seeks to give them financial assistance by the State Bank of India for engaging, so to say, in small scale industries of their own, in jail, as also after release, so that they are made able to earn while in prison and support their families even during imprisonment and so that after release they are able to make an honest living by self-employment and become useful citizens. See J.M.J.Sethna, Society and the Criminal (1980), p.293.

such as allows self expression of the worker. Existing disparity in wages on the basis of type of work and in particular between light and heavy work in respect of women prisoners is not necessary and should be removed. Profit from prison labour must be a subsidiary object as the ultimate goal of prison administration is rehabilitation and reformation of the prisoners.

CHAPTER 8

Remission and Commutation

Chapter 8

REMISSION AND COMMUTATION

The executive's act of grace in showing mercy to an accused or a convicted person takes several forms such as reprieve, pardon, respite, commutation, remission etc.[1] Pardon and remission stand on different footings and give rise to different consequences.[2] Remission and suspension are also not the same.[3] The effect of an order of remission is to entitle the prisoner to his freedom on a certain date. Therefore, once that day arrives, he is

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1. The term 'reprieve' means a temporary suspension of the punishment awarded by a court of law. The term 'respite' means postponement of the sentence of punishment. The term commutation means changing the punishment from one category to another, such as changing of death sentence to life imprisonment. See Paras Diwan, Indian Constitution (1981), p.418. Remission is reduction of the amount of a sentence without changing its character. See Nelson's Indian Penal Code, Vol.2 (1970), p.1161.
2. The vital difference between a pardon and a remission of sentence lies in the fact that in the former case, it affects both the punishment prescribed for the offence and guilt of the offender. A full pardon may blot out the guilt itself. In the case of remission the guilt of the offender is not affected nor is the sentence of the court affected, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence but is relied from serving out a part of it. Khagendranath v. Umesh Chandra Nath, A.I.R. 1958 Assam 183 at 187.
3. Jagdish Prasad v. R, A.I.R. 1949 All. 626 at 627.

entitled to be released, and in the eye of law he is a free man from that moment. As soon as there is a breach of the conditions of the remission, the remission can be cancelled and the prisoner committed to custody to undergo the unexpired portion of the sentence.[4] As the sentencing is a judicial function whatever may be done in the matter of executing that sentence like remission, pardon etc., the executive cannot alter the sentence itself. Prisoners in Australia are generally eligible to earn remissions for good behaviour with the effect that the sentences imposed by the courts may be shortened.[5] The details of remission systems vary widely between the different jurisdictions, with short sentence prisoners being ineligible for remission in some cases.[6] Prison administrators frequently argue that remission systems are a necessary aid to control, as they encourage good behaviour, but it is common practice for maximum remission to be granted in all cases except where prisoners have been charged with offences while in prison.

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4. Sohan Singh v. State, A.I.R. 1965 Punj. 156.
5. David Biles (Ed.), Crime and Justice in Australia (1977), p.89.
6. Ibid.

Statutory Provisions of Remission

By virtue of Article 72 of the Constitution of India the President is having the power to grant pardon and to suspend, remit or commute sentences passed by courts. Similarly the Governor of a State is vested with the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.[7]

Apart from the powers conferred on the President of India and the Governors, Section 432 of the Criminal Procedure Code empowers the government to suspend or remit sentence. When a person has been sentenced to punishment for an offence, the government may at any time and with or without conditions, suspend the execution of a sentence or remit the whole or part of the punishment under this section.

The procedure to be followed by the government is also enumerated in this section. On receiving any application for the suspension or remission of a sentence,

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7. See Constitution of India, Article 72.

the government has to require the concerned court to state its opinion with reasons as to whether the application should be granted or refused. A certified copy of the records has to be sent along with such opinion. The government may cancel the suspension or remission of a sentence, if in its opinion the condition for granting such suspension or remission is not fulfilled; the offender may thereupon, if at large, be arrested by any police officer without a warrant and remanded to undergo the unexpired portion of the sentence.

The condition on which the sentence is suspended or remitted may be one to be fulfilled by the offender or one independent of his will. It may be noted that on breach of any condition of suspension or remission, the sentence is not automatically revived. It is only when the government chooses to pass an order of cancellation of the suspension or remission that the convict is arrested and is required to serve the unexpired portion of the sentence.

The power under Article 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provisions such as Sections 432, 433 and 433A of the Criminal Procedure Code. This power cannot be altered,

modified or interfered within any manner whatsoever by any statutory provisions or Prison Rules.[8]

There are certain norms to be adopted while exercising these powers. The order of remission must be unconditional. A pardon may be absolute or conditional.

Consequences of Remission

The effect of sentence was a matter of confusion for a certain period. It has been set at rest by the Supreme Court in Sarathchandra Rabha v. Khagendranath[9]. The appellant Sarathchandra was convicted for three years rigorous imprisonment. The sentence was later remitted to a period lesser than two years: He filed a nomination paper to an election to legislative council. It was rejected on the ground that he was disqualified under Section 7(b)[10] of

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8. State of Punjab v. Joginder Singh, A.I.R. 1990 S.C. 139.
9. (1961) 2 S.C.R. 133.
10. 7(b) "disqualified" means disqualified for being chosen as, and for being a member of either House of Parliament or of the legislative Assembly or Legislative Council of a State.

the Representation of People Act 1951. The period of remission granted to him was not considered by the returning officer to take such a decision. The appellant contended that in view of the remission his sentence in effect was reduced to a period of less than two years and therefore he could not be said to have incurred disqualification contemplated in the Act. Dismissing the appeal Justice Wanchoo held:[11]

> "... the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not undergo, leaving the order of conviction by the court and the sentence passed by it untouched".

Eventhough the appellant was released from jail before he had served the full sentence of three years imprisonment he had actually served only about sixteen month's imprisonment, it did not in any way affect the

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11. (1961) 2 S.C.R. 133 at 138.

order of conviction and sentence passed by the court; the sentence remained as it was. The decision in Rabha's case is a clear deviation from Venkatesh Yaswant Despande v. Emperor[12]. In this case Bose, J. has observed:[13]

> "The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for. In fact, in the case of a pardon in England statutory and other disqualification following upon conviction are removed and the pardoned man is enabled to maintain an action against any person who afterwards defames him in respect of the offence for which he was convicted. That may not apply in full here but the effect of an order of remission is certainly to entitle the prisoner to his freedom on a certain date".

Remission - A Sample Study

In a significant decision the Kerala High Court has projected the ignorance of the prison authorities regarding the procedure that are to be followed in case of remission of sentences.

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12. A.I.R. 1938 Nag. 513.
13. Id., p.530.

Under the provisions of Kerala Prisons Rules 1958 a prisoner can earn remission. Detailed procedure is laid down under the Rules for awarding remission.[14] There are two types of remission that can be earned by a convict prisoner while in prison. They are ordinary remission and special remission. Ordinary remission at the scale of two days per month can be earned by a prisoner if his conduct inside the prison is good. For special service rendered by the prisoner special remission is allowed.[15] This is intended to maintain prison discipline by the prisoners and for their co-operation in prison administration.

The following are the important services that can be rendered.

(1) Assisting in detecting or preventing breaches of prison discipline or regulations, (2) Success in teaching handicrafts, (3) Special excellence in or greatly increased outturn of work of good quality, (4) Protecting an officer of the prison from attack, (5) Assisting an officer of the prison in the case of outbreak of fire or similar emergency, (6) Economy in wearing clothes. Apart from that special remission for 15 days is to be granted to a prisoner donating blood on every such occasion.[16]

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14. See Kerala Prisons Rules 1958, Chapter XVIII.
15. Id., Rule 312.
16. Id., Rule 312-A.

Special remission not exceeding sixty days per year can be awarded by the Inspector General or Government and not exceeding thirty days per year can be awarded by the Superintendent for special services rendered by the prisoners.[17] The total remission awarded to a prisoner cannot exceed one third of his sentence.[18] But for special remission earned by donating blood this limitation is not applicable.[19] This remission is allowed on every such occasion. In Robert Sebastian v. State of Kerala[20] the substantive question involved was whether the Inspector General of Prisons had the power to cancel the general remissions earned by a convict like the one earned by donating blood as disciplinary measure under the Kerala Prison Rules and thereby make the government order for

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17. Id., Rule 313. Remission in lieu of wages is an example for this. Kerala Jail Manual, Rule 528 says, If a prisoner wishes to have remission of sentence in lieu of wages, he may purchase the remission at the rate of 25 ps. per day subject to the condition that not more than 30 days special remission by the Superintendent of the Prison and 60 days by the Inspector General of Prisons shall be so granted to any one convict in a year.
18. Id., Rule 315.
19. This was effected by an amendment to rule 315. Amended as per G.O.M.S.27/74/Home dated 15.2.1974.
20. 1981 K.L.T. 582.

remission not applicable to him.[21] Holding that the Inspector General of Prisons did not have the power to cancel the remission earned outside the prison rules, the division bench of the court, consisting of Acting Chief Justice P.Subramonian Potti and Mr.George Vadakkel also directed the State government to examine other similar cases and release the convicts.

Sebastian, who was undergoing a seven year term of imprisonment had earned remissions totalling four years, five months and twentyfour days and this was cancelled by the Inspector General of Prisons for his involvement in an outbreak of violence in the Trivandrum Central Jail. His case, filed from the Cannanore Central Jail was that special remissions earned by him by donating blood could not be forfeited as he had purchased it by parting with his

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21. Rule 301 deals with forfeiture of remission. It reads:- "If a prisoner is convicted of an offence committed after admission to jail under Sections 147, 148, 152, 224, 225B, 302, 303, 304, 304A, 306, 307, 308, 323, 324, 325, 326, 332, 333, 352, 353 or 377 of the Indian Penal Code or of an assault committed after admission to Jail on a warder or other officer or having been released under rule 542 breaks his bond given in Form No.61-B the remission of whatever kind earned by him under these rules upto the date of the said conviction or his temporary release may, with the permission of the Inspector-General of Prisons be cancelled. A prisoner temporarily released under rule 542 who breaks his bond and is again admitted to jail after re-capture shall earn no remission under these rules for such period as the Inspector General of Prisons may order."

blood. The division bench said that the more important question was whether the order of forfeiture of all remissions upto July 7, 1978 would operate to forfeit remissions outside the scope of the Kerala Prison Rules.[22] Pointing out that prison rules could not override the provisions of the Constitution, the bench said that in fact rule 301 of the Kerala Prison Rules did not purport to infringe upon the remission power of the State Government or the Central Government.[23] It dealt only with forfeiture and remissions earned under these rules. That did not in any way operate upon the general remissions made by the Governor or the President. Remission made under Section 432 of the Criminal Procedure Code would be outside the purview of the forfeiture made by the Inspector General of Prisons in regard to remissions earned under the Kerala Prison Rules. By applying the rule of remissions and the scope of Rule 301 of the Kerala Prison Rules in the manner it had been done in this case, others who were entitled to release might still be in the prisons of the State.

The decision of Kerala High Court in Krishnan Nair v. State of Kerala[24] highlights the inadequacies of

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22. 1981 K.L.T. 582.
23. Ibid.
24. 1983 K.L.T. 945.

our prison administration. It is important for two reasons. Firstly the case highlights the ignorance of the prison authorities regarding the procedure to be followed in case of remission of sentences. It also signifies the enthusiasm shown by the judiciary to protect the rights of prisoners by pointing out the areas of injustice in the present remission system.

Krishnan Nair was granted special remission by the Governor under Article 161 of the Constitution on recommendation of the Council of Ministers. No condition was specified in the order. But the prison authorities released him only after getting from him a bond which obligated him to follow the conditions under Rule 547 and 548 of Kerala Prisons Rules.[25] After a few days of his release, on a report of the welfare officer that Krishnan Nair was not observing the conditions of the bond, the

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25. Rules 547 and 548: Rule 547 provides that the Superintendent of the Jail from which a prisoner is released conditionally shall see that a bond indicating the conditions of release and the unexpired portion of sentence on the date of such release is executed by the prisoner. Rule 548 provides that in the event of the failure of the prisoner to observe any of the conditions under which he was released, the Government can issue appropriate orders revoking their earlier orders of conditional remittance of the unexpired portion of sentence which enabled his premature release under Section 432 of the Criminal Procedure Code so that the said prisoner can be arrested.

Inspector General of Prisons reported the matter to the Government to take action. The Government in turn ordered the cancellation of his remission which resulted in his arrest and remand to the jail. After one year's stay in prison Krishnan Nair sent a letter to the Chief Justice of the High Court alleging that he was illegally detained. That letter was taken up as a writ petition and notice was issued to the Government.

Answering the question whether Rules 547 and 548 of the Kerala Prisons Rules could be imposed by the prison authorities to a prisoner released under Article 161 of the Constitution as has been done in Krishnan Nair case, the court observed:[26]

> "This we are told is a ritualistic recital normally incorporated in all cases of release, perhaps on the assumption that such a release can only be subject to such condition. In fact it is inappropriate in a case of remission under Article 161 for Rules 547 and 548 will operate only in relation to a release persuant to the Advisory Board's deliberation and premature release thereupon".

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26. 1983 K.L.T. 945 at p.948.

According to the court the condition imposed was inoperative. Remission of his sentence is not conditional upon compliance with the terms of any bond. Assuming that some bond has been taken from him nevertheless that bond will be inoperative and will not justify cancellation of the remission, rearrest and remand to jail once again.[27]

Krishnan Nair's case is important because of the enthusiasm shown by the judiciary to go into the operation of remission system which violates the fundamental rights of the prisoners who are released on conditional remission. The court is sceptic about the fairness of the procedure followed in the case of release under Rules 547 and 548 of the Kerala Prisons Rules and Section 432(3) of Criminal Procedure Code. According to the court there is no provision for deliberation of the Government to consider the aspects involved in his re-arrest. It does not also give opportunity to the prisoner to show cause against his re-arrest. Similarly the language used in the form of bond, absence of giving a copy of it to the prisoner, the lack of provision to make him understand the conditions to

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27. Ibid.

be followed and the unnecessary conditions that are vaguely imposed in all cases also seem to be unfair which violate Articles 14 and 21 of the Constitution. The procedure followed to grant conditional remission under the Prison Rules and Criminal Procedure Code are entirely different eventhough it is the Government who is the ultimate authority to grant remission in both cases.

Under the Prisons Rules the Advisory Board has the power to recommend the premature release of certain types of prisoners: But it is the government to decide whether release is to be granted or not.

In another significant decision in Soman v. State of Kerala,[28] the Kerala High Court has pointed out that remission earned by a prisoner cannot be carried forward to the succeeding year. A prisoner who wishes to have remission of sentence in lieu of wages should purchase

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28. 1989 (2) K.L.T. 315. Petitioner is convict detained in Open Prison, Nettukaltheri, Trivandrum. He is undergoing imprisonment for life. He went on parole in 1988. At that time he took with him all the money earned by him by way of wages. Therefore he could not purchase remission during 1988. After return he wanted to purchase remission of the eligible days of 1988 with the earnings of 1989. This prayer of the petitioner was not conceded by the jail authorities. Against this he approached the High Court. Dismissing the plea court held that remission cannot be carried forward to the succeeding year.

remission for the days mentioned therein in the year to which that remission relates. In a particular year prisoner can purchase remission for 30 days from the Superintendent of the jail and for 60 days from the Inspector General of Prisons.[29] In case the prisoner fails to purchase the remission which he is legally entitled to, during the year that right will be lost once for all.

Violation of Condition of Remission - As a Specific Offence

Violation of condition of remission is a specific offence. Section 227 of the Indian Penal Code deals with violation of the conditions of remission of a punishment.[30] In order to make out an offence under this section it must be proved not only that the accused was granted a conditional remission of punishment, that he accepted the conditions of the remission, and that he violated any of

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29. Kerala Prison Rules 1958, Rule 384-A.
30. IPC Section 227 reads:- "Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, then with so much of that punishment as he has not already suffered".

those conditions which he accepted, but also that he did so "knowingly". If the conditions are clear and unambiguous and if he violates any of them, he may be considered to have done so knowingly. But if the conditions are vague or ambiguous, the question whether the accused violated them "knowingly" would be a matter of inference from the nature of the conditions, the status of the accused and the circumstances of the violation.[31]

The offence under this section is not cognizable and a summons shall ordinarily issue in the first instance. It is neither bailable nor compoundable, and is triable by the court by which the original offence was triable. It is for the court to decide whether a conditionally released prisoner has violated the conditions on which remission was granted to him. Until he has been found guilty under this section, it is not for the jail authorities to say that he has committed an offence. This was reiterated in an earlier decision Emperor v. Naga Po Min[32] in British India. A conditionally released prisoner was arrested and re-admitted into the jail in Burma. He was subsequently convicted and sentenced again. This sentence was ordered

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31. Nelson's Indian Penal Code, Vol.2, (1970), p.1161.
32. A.I.R. 1933 Rang. 28 at p.29.

to run from the date he was re-admitted into the jail in pursuance of the letter of Rangoon High Court. The letter was issued at the instance of the jail authorities. When a conditionally released prisoner was returned to the jail, the authorities treated him as a convict from date of his re-admission into the jail. While altering the sentence, the court held that under section 227 of the Penal Code, it is for the court to decide whether a conditionally released prisoner had violated the conditions on which remission was granted to him and until he has been found guilty under Section 227 Indian Penal Code, it is not for the jail authorities to say that he had committed an offence.

Life Sentence Vis-a-Vis Power of Remission

The plight of prisoners sentenced to life imprisonment during the British period has been depicted by Jawaharlal Nehru in his Autobiography. He says:[33]

> "For years and years many of these 'lifers' do not see a child or woman, or even animals. They lose touch with the outside world completely, and

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33. Jawaharlal Nehru, An Autobiography (1967), p.219.

> have no human contacts left. They brood and wrap themselves in angry thoughts of fear and revenge and hatred; forget the good of the world, the kindness and joy, and live only wrapped up in the evil, till gradually even hatred loses its edge and life becomes a soulless thing, a machine like routine".

The condition of life convicts is not the same as Nehru has seen. It has changed a lot. Still there are various drawbacks in their treatment.

Life imprisonment as a punishment has been accepted in the Indian Penal Code by Section 53.[34]

If upon a convict, imprisonment for life is passed, the concerned government can commute the punishment for imprisonment for a term not exceeding a term of

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34. Section 53 I.P.C. reads:- "The punishments to which offenders are liable under the provisions of this Code are:
First - Death,
Second - Imprisonment for life,
.....
Fourthly - Imprisonment, which is of two descriptions, namely (1) rigorous, that is, with hard labour; (2) simple,
Fifthly - Forfeiture or property
Sixthly - Fine".

fourteen years.[35] Whether a person sentenced to life imprisonment should undergo the whole of his remaining life inside the prison walls if not commuted? There are various judicial opinions in this respect.

In G.V.Godse v. State of Maharashtra[36] the Supreme Court has explained the legal position thus:[37]

> "A prisoner sentenced to life imprisonment is bound in law to serve the life term in prison, unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of Indian Penal Code or the Code of Criminal Procedure. For the purpose of working out remission which a prisoner is enabled to earn

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35. I.P.C. Section 55, see Criminal Procedure Code 1973, S.433.
36. A.I.R. 1960 S.C. 600; Godse, the accused was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment under S.57, I.P.C. On the basis of a rule which make that equation, Godse, sought his release through a writ petition. The Supreme Court dismissed the petition.
37. Ibid.

under the rules framed under the Prisons Act, the sentence of imprisonment of life is ordinarily equated with a definite period; but it is only for that particular purpose and not for any other purpose".

Godse is an authority for the proposition that a sentence of imprisonment for life is one of imprisonment for the whole of the remaining period of the convicted persons natural life. It is well settled as a result of the Privy Council decision in Kishori Lal case[38] and the Supreme Court's decision in Godse[39], Maru Ram[40] and Karthar Singh[41] that a sentence of imprisonment for life is a sentence for the remainder of the natural life of the convict. Such convicts are not released earlier in the absence of a formal order of commutation passed by the State Government either under Section 55 of the Indian Penal Code or Section 433(b) of the Criminal Procedure Code 1973. In other words, unlike the cases of prisoners

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38. Kishori Lal v. Emperor, A.I.R. 1945 P.C. 64.
39. A.I.R. 1961 S.C. 600.
40. 1980 Cr.L.J. 1440. For a detailed discussion of the case see infra.
41. 1982 Cr.L.J. 1772.

sentenced to terms of imprisonment, in the case of lifers even the remission rules though statutory are of no avail in the absence of a formal order of commutation.

Classification Among the Lifers

Persons sentenced to imprisonment for life are classified again among themselves. One classification is between persons who have been sentenced to death but whose sentence on mercy petitions had been commuted to life imprisonment and persons who are ordinary lifers. Such a classification was subjected to lot of controversy. This was discussed in Sadhu Singh v. State of Punjab.[42] The Punjab State Government took a policy decision in 1971 and issued instructions providing that a period of actual sentence of eight and half years in the case of adult prisoners undergoing life imprisonment and six years in the case of female prisoners. The government also decided that those below twenty years of age at the time of the commission of the offence should be regarded as the qualifying period for consideration of their case for premature release. In 1976 another policy decision was taken by the same government and by that decision the life

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42. (1984) 2 S.C.C. 310.

convicts whose death sentence had been commuted should be considered for premature release only after completion of fourteen years of actual imprisonment. In the petitions the life convicts contended that the State of Punjab had been erroneously making a distinction between cases of prisoners who had been sentenced to death but whose sentences, on mercy petitions, had been commuted to life imprisonment and prisoners who had been straightaway sentenced to life imprisonment in the matter of consideration of their cases for premature release. Rejecting the contention, the Supreme Court held:[43]

> "A sentence of imprisonment for life is a sentence for the remainder of the natural life of the convict and there is no question of releasing such a convict earlier in the absence of a formal order of commutation passed by the State Government".

Persons sentenced to life imprisonment was treated as a separate class under Section 303 of the Indian Penal Code for awarding capital punishment if they commit a

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43. Id., p.311.

murder.[44] In Mithu v. State of Punjab[45], the constitutional validity of Section 303 was questioned. The Supreme Court held that Section 303 is void and unconstitutional as it violates both Articles 14 and 21 of the Constitution.

According to the Supreme Court, Section 303 regarded life-convicts as a dangerous class without any scientific basis. The section has completely cut out judicial discretion. The judge has to give death sentence if a life convict commits murder, whatever may be circumstances under which he has commited it. By completely cutting out judicial discretion it became a law which is not just, fair and reasonable within the meaning of Article 21. At present all murders are punishable under Section 302 I.P.C. only.

Maru Ram and the Post Conviction Orders

Originally the government was having the power to

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44. I.P.C. Section 303 reads:- "Whoever, being, under sentence of imprisonment for life, commits murder, shall be punished with death".
45. 1983 Cr.L.J. 811 (S.C.), see also Bhagwan Base Singh, 1984 Cr.L.J. 928 (S.C.).

commute a sentence of imprisonment for life to imprisonment for a term not exceeding fourteen years or for fine.[46] In 1978 a new Section 433A was added by the Criminal Law Amendment Act 1978.[47] This section prescribed a minimum imprisonment for fourteen years for those who are convicted of an offence for which death is one of the punishments provided by law or where a sentence of death is imposed on a person has been commuted under section 433 into one of imprisonment for life. The new section made it clear that such minimum imprisonment is notwithstanding anything contained in Section 432 which means that the power to suspend or remit sentence under that section cannot be exercised so as to reduce the imprisonment of a person convicted of such an offence or whose death sentence has been commuted to life imprisonment for less than fourteen

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46. Criminal Procedure Code 1973, S.433.
47. Inserted new Section 433A by Act No.45 of 1978. It reads:- "Notwithstanding anything contained in Section 432, where a sentence of imprisonment for an offence for which death is one of the punishments provided by law, or where a sentence of death is imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served atleast fourteen years of imprisonment".

years. The constitutional validity of the new section was questioned in Maru Ram v. Union of India.[48] The Supreme Court held that the section constitutionally valid. According to the court the provision was within the legislative competence of the Parliament by virtue of Entry 2 of List III of the Seventh Schedule[49] read with Article 246 of the Constitution, it was not violative of Article 20(1) of the Constitution, it was not violative of Article 14 of the Constitution as it was based on reasonable classification.

In Maru Ram the Supreme Court repelled the challenge to Section 433A both on the question of competence of Parliament to enact the provision and its constitutional validity. While interpreting sections 432, 433 and 433A of the Criminal Procedure Code, the Supreme Court pointed out that wide powers of remission and commutation of sentence were conferred on the appropriate government but an exception was carved out for the extreme category of convicts who were sentenced to death but whose sentence had been commuted under section 433 into one of imprisonment for life. Such a prisoner is not to be

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48. 1980 Cr.L.J. 1440; A.I.R. 1980 S.C. 2147.
49. Seventh Schedule, List III, Entry (2) reads:- "Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution".

released unless he has served atleast fourteen years of imprisonment. The court refused to read down section 433A to give overriding effect to the remission Rules of the State. It categorically ruled that Remission Rules and like provisions stand excluded so far as 'lifers' punished for capital offences are concerned.

In State of Maharashtra v. Manohar Ghodake[50] the trial court had convicted the accused persons under Section 307 and 34 of the Indian Penal Code and sentenced them to imprisonment for life. They were also convicted and sentenced to death under sections 302 and 34 of the Penal Code. On appeal, the convictions were confirmed but the sentence of death was altered to one of life imprisonment. The High Court considering the serious nature of the case, however, felt that the mere life imprisonment which does not last for more than fourteen years in normal cases, would not meet the ends of justice in the present case as the case was in its opinion in the murky area between the sentence of death and of the usual life imprisonment. The court therefore, while altering the sentence of death to one of imprisonment for life, directed that the convicted

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50. 1982 Cr.L.J. 600 (Bom.).

accused persons shall not be released from jail unless and until each of them serves a minimum period of twentyfive years imprisonment notwithstanding the remissions and concessions, if any granted to him under the relevant rules.

After the decision in this case, a similar question came before another division bench of the Bombay High Court in Madhav Shankar Sonawane v. State of Maharashtra[51].

In Sonawane the accused was convicted for murder and sentenced to imprisonment for life. On appeal before the division bench a direction similar to the one given in Ghodake's case was sought on behalf of the State, requiring the life convict to remain in jail during the mandatory minimum period as would be prescribed by the court. The division bench felt that such a direction would encroach upon the field reserved for the executive and would be contrary to the provisions of Section 433A of the Criminal Procedure Code and hence, it doubted the correctness of the direction given by the High Court in Ghodake's case.[52]

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51. 1982 Cr.L.J. 1762 (Bom.).
52. Ibid.

According to the court the only power which a court can exercise while making order of sentence is to make an order awarding such punishment as is prescribed for the offence for which the accused has been convicted. So far as section 302 is concerned, the power of the court is to award a sentence of death or to award the punishment of imprisonment for life. There is no further power to regulate the duration of the imprisonment which the accused must undergo when he is sentenced to life imprisonment.[53] Any direction which will require an accused sentenced to imprisonment for life to undergo such imprisonment as would be specified by court is bound to trench upon the powers of the executive specially given to it under sections 432 and 433. These sections do not provide that the exercise of the executive powers is subject to the control of the court. Any such direction might interfere with the exercise of the constitutional powers given to the President and the government under Articles 72 and 161 of the Constitution.[54]

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53. 1982 Cr.L.J. 1762 at p.1766.
54. For a detailed discussion regarding these articles, see supra, chapter 2. Thirtynineth Report of the Law Commission of India submitted in 1968 deals with the nature of the punishment called imprisonment for life in the Indian Penal Code, and in particular, with the question whether, when such sentence is passed on an offender the imprisonment he undergoes has to be rigorous or may be simple. The Commission recommended that the imprisonment for life shall be rigorous. See 39th Report of the Law Commission of India (1968), p.13.

By this decision it has been established that in a situation like the one in Ghodake's where the sentencing court strongly feels that the usual sentence of life imprisonment is not adequate, the court cannot have any effective say in this matter. It can only hope that probably the executive authority shall not release such a convict before he has undergone a sufficiently long period of imprisonment, longer than the usual period of life imprisonment, ie., fourteen years imprisonment. The sentencing court can recommend, though not direct, the government to do so.

Life Imprisonment and Set Off

Section 428 of the Criminal Procedure Code provides that the period of detention undergone by an accused can be set off against the sentence of imprisonment.[55] Whether a person sentenced to imprisonment

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55. Section 428 reads as follows:- "Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him".

for life can claim the benefit of this provision? The word used in section 428 is that this benefit is available only to persons who are sentenced to a term of imprisonment. In Bhagirath v. Delhi Administration[56] the question for decision was whether imprisonment for life is imprisonment "for a term". Allowing the appeal the Supreme Court held:[57]

> "The expression 'imprisonment for life' and imprisonment for a term are not used either in Penal Code or in the Criminal Procedure Code in contradistinction with each other. Two or more expressions are often used in the same section in order to exhaust the alternatives which are available to the legislature".

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56. (1985) 2 S.C.C. 580. The appellant, Bhagirath, filed a petition in Delhi High Court asking that his case be referred for order of Delhi Administration under paragraph 516B of Punjab Jail Manual since, though sentenced to life imprisonment, he had undergone a period of detention in jail amounting to 14 years together with the remissions earned by him. A learned single judge of the High Court rejected that petition on the ground that, in computing the period of 14 years, the period spent by the convict in the jail as an undertrial prisoner cannot be taken into account because, section 428 of the Code which allows such a set off applies only when an accused has been sentenced to "imprisonment for a term", and the sentence of life imprisonment is not an imprisonment for a term. Against this order appeal was filed before the Supreme Court. The Supreme Court allowed the petition.
57. Id., p.584 per Chandrachud, C.J.

The Supreme Court directed that the period of detention undergone by the two accused as undertrial prisoners has to be set off against the sentence of life imprisonment imposed upon them.

Earlier in Kartar Singh v. State of Haryana[58] persons who were sentenced to life imprisonment challenged an order passed by the Government of Haryana, denying to them the benefit of the period of undertrial detention under Section 428 of the Criminal Procedure Code. It was held by the Supreme Court that the Penal Code and the Criminal Procedure Code make a clear distinction between 'imprisonment for life' and 'imprisonment for a term' and in fact, the two expressions are used in contradistinction with each other in one and the same section, the former meaning imprisonment for the remainder of the natural life of the convict and the latter meaning imprisonment for a definite or fixed period. The court proceeded to hold that an order of remission passed by the appropriate authority merely affects the execution of the sentence passed by the court, without interfering with the sentence passed or recorded by the court. Therefore, Section 428 which opens

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58. (1982) 3 S.C.C. 1.

with the words "where an accused person has, on conviction, been sentenced to imprisonment for a term", would come into play only in cases where 'imprisonment for a term' is awarded on conviction by a court and not where the sentence imposed upon an accused becomes a sentence for a term by reason of the remission granted by the appropriate authority.

According to the court, the question is not whether the beneficient provision should be extended to life convicts on a priori reasoning or equitable consideration but whether on true construction, the section comprises life convicts within its purview.[59]

Subsequently a conflicting view on the same point was taken by a full bench of the Supreme Court in Sukhlal Hansda v. State of West Bengal[60]. It related to the cases of twentyfour prisoners who were sentenced to life imprisonment. Most of those prisoners had undergone imprisonment for a period which, after taking into account

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59. Ibid.
60. Writ Petitions (Criminal) 1128-1129 of 1982, decided on March 3, 1983 quoted in the judgment of Bhagirathi v. Delhi Administration (1985) 2 S.C.C. 580 at 588.

the remissions earned by them, exceed fourteen years. It was held by the Supreme Court that, for the purpose of considering whether the cases of those prisoners should be examined for premature release under the relevant provisions of the Bengal Jail Manual, there was no reason why the period of imprisonment undergone by them as undertrial prisoners should not be taken into account. The court directed that the cases of the prisoners should be considered by the State Government, both for the purpose of setting off the period of detention undergone by them as undertrial prisoners and for taking into account the remissions earned by them.

In Charanjit Lal v. Delhi Administration[61] Delhi High Court examined the legality of Delhi Administration's not releasing life convicts on parole or furlough as envisaged in a letter issued by it. In terms of the letter the period spent on parole was not to be counted as part of the sentence whereas the period spent on furlough was to be treated as part of the sentence. The Delhi Administration stopped releasing lifers on parole or furlough. The petitioner lifers challenged this sentence. After examining

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61. 1985 Cr.L.J. 1541 (Delhi).

the case law, the court concluded that the Delhi Administration could and should release lifers on parole or furlough. The court added that in the case of prisoners mentioned in Section 433A Criminal Procedure Code, the benefit of period of furlough being counted as part of sentence would not be given in as much as in terms of this section they should undergo fourteen years substantive imprisonment.

Classification for Premature Release

In Amrithlal v. State of Madhya Pradesh[62], the State's notification treating younger prisoners and prisoners who attained the age of 65 years as distinct categories for the purpose of releasing from the prison was challenged as violative of Article 14 of the Constitution. Rejecting this, the Madhya Pradesh High Court observed that the classification is valid mainly on the following

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62. 1985 Cr.L.J. 1096 (M.P.). A notification was issued that all those prisoners who were convicted to life imprisonment prior to 18.12.1978 would be entitled to be released on completing 17 years of jail sentence, including remissions and those persons who had attained the age of 65 years would be released on completing 14 years of jail sentence including remissions. This was challenged on the ground that it violated Article 14.

ground:[63] The principal object of punishment is the prevention of offences. Remissions are granted under special circumstances by the State and also with the object of reforming the prisoners after ensuring that there is no possibility of repeating offences. Average life span in India can be taken to be 65 years. So normally a person attaining the age of 65 years may not commit further offence. So life convicts attaining 65 years are given remissions after completing 14 years of jail sentence, but younger people are given remissions after completing a longer period of jail sentence ie., 17 years including remissions. So there is justification for treating all life convicts who have attained 65 years of age, differently as a class from other life convicts. It may be mentioned that special consideration is given on account of old age while granting bail in non-liable offence under the Code of Criminal Procedure. So the classification is reasonable and does not violate Article 14.

There is the difference of only three years imprisonment between the mandatory requirements for the two categories. It is not known what difference would be additional three years imprisonment make for the offenders

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63. Id., p.1097.

who have not attained the age of 65. Actually rehabilitation would have been better served had the comparatively younger offenders are released early.

In Bir Singh v. State of Himachal Pradesh[64] the petitioner was a murder convict who had undergone 21 years and one month imprisonment including remissions. The review committee which usually made recommendations for premature release of prisoners did not recommend it for the petitioner on the reason that it was on a slight provocation that he committed murder; that there was no study on his conduct outside the prison; and that the district magistrate of his locality apprehended breach of peace if he were to be released. According to the rule, prisoners were prematurely released if they had not committed any offence in the jail, their conduct was good and they had returned from parole promptly.

In this case the prisoner could not be brought within the framework of these rules. He was never released from jail to watch his conduct outside the prison. Nor was he released on parole to show that he returned from parole promptly. In fact there was no record to show that his

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64. 1985 Cr.L.J. 1458 (H.P.).

conduct in the jail was bad. In these circumstances the court ordered his release and advised the authorities to watch his conduct. Since he was old and of weak health, no breach of peace could be apprehended.

With reference to the exercise of its powers the State was advised. The court observed:[65]

> "The Review Committee as well as the state government must bear in mind that the policy regarding premature release of convicts is evolved in the exercise of executive powers and that it is within the realm of discretionary jurisdiction such discretionary power is coupled with the legal duty to exercise the same once the conditions for its exercise are shown to exist. It is settled law that where a power is deposited with a public officer for the purpose of being used for the benefit of the persons who are specially pointed out, and with regard to whom a definition is supplied of the conditions upon which they are entitled to call for the exercise, that power ought to be exercised and the court will require it to be exercised".

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65. Id., p.1459.

The power or pardoning and remission are the noblest prerogative of sovereignty. If the laws are too severe, the power of pardoning is a necessary corrective; but that corrective is itself an evil. Make good laws, and there will be no need of a power to annul them. If the punishment is necessary, it ought not to be remitted; if it is not necessary, the convict should not be sentenced to undergo it.

Eventhough there are statutory rules for remission, the authorities are not implementing these guidelines properly. Various cases that came before the various High Courts and Supreme Court have revealed this fact. Frequently the equality clause of the Indian Constitution is violated by the prison authorities. So strict rules have to be framed for granting remission.

CHAPTER 9

Parole

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PAROLE

There are many devices adopted by the prison administration to ease tension in the prison. One of the most important devices for reducing pressure on prison is the selective release of prisoners on parole. It is a treatment programme.[1] It seeks to protect society and assist the prisoner in readjusting himself to a normal free life in the community. The offender after serving part of a term in a correctional institution is conditionally released under supervision and treatment. It does not waste the sentence imposed, but merely suspends the execution of the penalty and temporarily release the convict from prison.

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1. A parole in criminal law is the release of a convict from imprisonment upon certain conditions to be observed by him. 59 Am. Jur. 2nd p.53. It is a release from prison after part of the sentence has been served, the prisoner still remaining in custody and under stated conditions until discharged and liable to return to the institution for violation of any of these conditions. Taft and England, Criminology (4th Edn.), p.485. Parole may be described as a method of selectively and conditionally releasing offenders from goal before the expiration of their sentences for the purpose of assisting and controlling them during the period of transition from the prison environment to the community. David Biles (Ed.), Crime and Justice in Australia (1977), p.126. See also J.E.Hall Williams, The English Penal System in Transition (1970), pp.184-200.

Professor Gillin has defined parole as the release from a penal or reformatory institution of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision.[2] The layman and most courts look upon parole as a gift to the convict, an act of leniency on the part of the executive, frequently given as a reward for good behaviour in prison.[3] Strictly speaking parole is a privilege and no prisoner is entitled to it as a matter of right. The significance of parole lies in the fact that it enables the prisoner a free social life, yet retaining some effective control over him.[4] Every prisoner is kept under careful examination and one who reacts favourably to the disciplined life of the institution and shows potentiality for correction in his attitudes is allowed considerable latitude and finally

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2. John Gillin, Criminology and Penology (3rd Edn.), p.339.
3. Charles L.Newman, Source Book on Probation, Parole and Pardons (1970), p.73.
4. N.V.Paranjape, Criminology and Administration of Criminal Justice (1970), p.177.

released to join free society conditionally at specified periods. Thus parole is essentially an individualised method of treatment and envisages a final stage of adjustment of the incarcerated prisoner to the community.[5]

It is difficult to define parole in terms of a single precise concept. It is an integral part of the total correctional process. In a sense parole is a method of selectively releasing offenders from institutions, under supervision in the community, whereby the community is afforded continuing protection while the offender is making his adjustment and beginning his contribution to society.[6]

Practice and Procedure of Granting Parole

Parole is granted to a prisoner under certain special circumstances.[7] It is subjected to certain

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5. The eminent criminologist Sutherland considers parole as the liberation of an inmate from prison or a correctional institution on conditions, with restoration of the original penalty if those conditions of liberation are violated. Sutherland and Cressy, Principles of Criminology (6th Edn.), p.575.
6. Charles L.Newman, op.cit., p.17.
7. For eg., See Kerala Prison Rules 1958, Rule 454.

limitations and conditions imposed by the releasing authority. The underlying idea behind the concept of parole is the realisation by the society that the man behind the bars is still the member of his family and society, that he has the same human wants, urges, duties and obligations. The rehabilitative purpose of sentencing would be promoted by permitting him to fulfil those basic human needs and social duties by occasionally permitting him to live for short periods in his home as well as in the community where he has his roots.

There are certain recognised circumstances under which parole is usually granted. If a member of the prisoner's family dies or become seriously ill, or the marriage of his son or daughter is to be celebrated, the authority used to release the prisoner.[8] In certain cases

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8. For eg., Kerala Prisons Rules 1958, Rule 445. It reads:- Grounds for the grant of leave:- "(i) Death or serious illness of a near relative such as father, mother, son, daughter, wife, husband and brother and sister and uncle in the case of Marumakkathayam families shall be reasons for emergency leave. (ii) Marriage of sons and daughters and any extraordinary reasons recommended by the Probation Officer as necessitating the grant of leave, shall be the grounds for granting ordinary leave".
In Hiralal Mallick v. State, A.I.R. 1977 S.C. 2236, the court was of view that periodic parole was a desirable measure.

the prisoners are temporarily released on parole to enable them to carry on agricultural operations. The release on parole for whatever reason shall, however, be subject to the discretion of authorities.

These various grounds indicate that the law on the subject of parole recognises that incarceration should not lead to the prisoner's total alienation from the family or community and ensures his continuing participation.

The procedure adopted for releasing a person under parole consists of two steps, selection and supervision.[9] A properly constituted parole committee has to select carefully those inmates who are to be set free on parole. They assess both the eligibility and the suitability of the inmates to be released on parole. The eligibility is decided by the statutes dealing with the parole of inmates. They become eligible for parole after serving a specified minimum period of confinement.[10] The

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9. See, James Vadackumchery, Criminology and Penology (1983), p.240.
10. Ibid.

suitability to parole is determined by the committee from a variety of data that are available with them.[11] They weigh the positive and negative factors in each case and on the basis of that parole is granted. It involves a balancing of the interests of the prisoner and those of the public. Factors considered relevant in deciding whether the offender should be released may include such matters as the likelihood of the offender committing further offences while on parole; the offenders response to prison treatment; the offenders needs; and especially the nature and gravity of the offence for which he was imprisoned.[12]

Generally before granting parole, the authorities take into consideration the reports from social agencies, pre-parole investigation reports, comments by the judge or prosecuting counsel, the studies and observations made by the trained prison staff during the inmate's stay in the prison. These studies may include psychiatric and psychological reports, extensive social history, intensive pre-parole investigation reports prepared by the field

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11. Ibid.
12. See David Biles (Ed.), op.cit., (1977), p.126.

officers, education in prison, his conduct, attitude and many other things relevant for the purpose.[13] In India there exists no system to prepare all these elaborate reports as done in some Western countries. Here the authorities depend upon only those factors and reports which the penal system is able to provide. This situation calls for change. Better and sophisticated methods should be introduced for evaluating the inmates' eligibility before parole is granted.

The treatment meted out to the prisoners since their entry into the prison should be tailored to suit their rehabilitative needs. They should be mentally prepared to get into the mainstream after a period of detention. Parole should be decided in such a manner that the parolee may do the ground work for his rehabilitation after this during this period so as to cushion the impact of the society on his injuried personality on his final release from prison.

Executive Discretion in Granting Parole

In India statutory provisions relating to release

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13. James Vadackumchery, op.cit., p.241.
14. Kesar Singh v. State of H.P., 1985 Cr.L.J. 1202 at p.1205.

on furlough permit any prisoner who has been sentenced to a term of imprisonment of not less than five years and who has a record of good conduct in jail to be temporarily released for a period of three weeks after he has undergone imprisonment for a period of three years excluding remission, and for two weeks during each successive year of imprisonment thereafter, subject to certain conditions, limitations and just exceptions. Release on furlough is not dependent upon the existence of any specific grounds, unlike temporary release on parole. The furlough power recognizes that a sullen and forlorn prisoner cut off from the family and society for a long period is prone to make a more dangerous criminal and that such intermittant bouts of temporary release from incarceration may soften his criminal proclivity.[14]

Judicial Attitude

The Courts in India have generally favoured the view that the prisoners who have been incarcerated or kept in prison without trial for a long time, should be released

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14. Kesar Singh v. State of H.P., 1985 Cr.L.J. 1202 at p.1205.

on parole to maintain unity of family.[15] In Babulal Das[16] Hon'ble Mr.Justice Krishna Iyer of the Supreme Court though in the context of the preventive detention observed about the need for parole thus:[17]

> "It is fair that persons kept incarcerated and embittened without trial should be given some chance to reform themselves by reasonable recourse to parole power under Section 15 of the Maintenance of Internal Security Act 1971".

In Samir Chatterjee v. State of West Bengal[18] the Supreme Court, however, set aside the order of the Calcutta High Court releasing on parole a person detained under Section 3(1) of Maintenance of Internal Security Order and disfavoured the observation that long term preventive detention can be self defeating and criminally counter productive. In Gurdeep Bagga v. Delhi Administration[19] a

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15. See Babulal v. State of West Bengal, A.I.R. 1975 S.C. 606; Samir Chatterjee v. State of West Bengal, A.I.R. 1975 S.C. 1165; Poonam Lata v. Wadhawan and Others, A.I.R. 1987 S.C. 1383; Gurdeep Bagga v. Delhi Administration, 1987 Cr.L.J. 1419.
16. A.I.R. 1975 S.C. 606.
17. Id., p.608.
18. A.I.R. 1975 S.C. 1165.
19. 1987 Cr.L.J. 1419.

petition by life convict for parole on ground of illness of mother was rejected by the High Court on the ground that the petitioner was earlier continuously on parole for more than two years and that he had two elder sisters to look-after his ailing mother. However, the Supreme Court taking a lenient view recommended annual leave for him to maintain unity of family. In Veeram Chaneni Raghvendra v. State of Andhra Pradesh[20] the Supreme Court ruled that release on parole and suspension of sentence during pendency of appeal in Supreme Court is liable to be struck down being ultra vires the statutory powers of the State Government.[21] In Kesar Singh v. State of H.P.[22] the Himachal Pradesh High Court laid down that the exercise of power of releasing a prisoner on parole or furlough must not be looked upon as an act of charity, compassion or clemency but as an act in the discharge of a legal duty required to be performed upon

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20. 1985 Cr.L.J. 1009.
21. The Andhra Pradesh Parole Rules 1981, Rule 23 and Andhra Pradesh Prison Rules 1979, Rule 974(2) were held void in this case being inconsistent with S.432(5) read with S.389 of the Code of Criminal Procedure.
22. 1985 Cr.L.J. 1202.

the fulfilment of the prescribed conditions to effectuate a salutory purpose. In another decision[23] it was pointed out that an apprehended breach of peace or the possibility of the prisoner committing a heinous crime during the parole period, without anything more, would constitute a law and order problem. These factors cannot be taken into account as factors subverting public order and would not be grounds to reject temporary release of prisoners.

In Charanjit Lal v. State[24] the Delhi High Court pointed out that remission by way of reward or otherwise cannot cutdown the sentence to leass than a minimum period of fourteen years. However, that does not mean that even a life convict falling within the ambit of Section 433A cannot be set free on parole or furlough during his sentence of imprisonment. There is no reason when even the life convicts who are hit by the mischief of Section 433A, be not released off and either on parole or on furlough subject, of course, to their undergoing atlease 14 years of actual imprisonment. The concept of constructive imprisonment while they are on parole on furlough does not enter into Section 433A even remotely.[25]

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23. Lal Chand v. State of H.P., 1985 Cr.L.J. (Noc) 46.
24. 1985 Cr.L.J. 1541. The petitioners were undergoing imprisonment for life.
25. Id., p.1545.

Nature of the Period of Parole

When a convicted person on parole is arrested for another offence and put in jail, whether he is entitled for set off of his period of detention under Section 428 Cr.P.C. In Onkar Singh v. Police Officers[26] the High Court held that he was entitled to count this period in jail against the sentence he has already undergone. In Faquir Singh v. State of Punjab[27] the vital point for consideration was whether the time spent by a prisoner on parole is or is not to be included towards total period of sentence of imprisonment. The petitioner in this case was sentenced to imprisonment for life. He sought his release on the ground that he has actually undergone 8½ years imprisonment inside the jail including the period in which

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26. 1979 Cr.L.J. 1098. Here the petitioner was undergoing imprisonment for a term of four years. His contention in the writ petition was that the period of four years has expired, but he was not released from jail. According to the petitioner he was put into hospital for sometime while he was in custody because of his illness and that he was entitled to the benefit of this period for the purpose of serving out the sentence. Allowing the petition the court held that once a person has been convicted and sentenced to jail then all the period which he spends in jail will be deemed to be the period spent in serving out the sentence. Id., p.1099 per Hari Swarup, J.
27. 1988 Cr.L.J. 474.

he was on parole. But the authorities did not consider this on the ground that the period on parole by the prisoner cannot be counted as the period of actual imprisonment. But the Punjab and Haryana High Court following the decision of Maru Ram[28] held that the time spent on parole by a prisoner can legitimately be included in the period of imprisonment undergone by him and as such it has to be so considered while deciding his premature release case. Thus, the view taken by the Supreme Court is that the time spent on parole is part of imprisonment because it is a licensed release and the prisoner released on parole is not a free agent.

In Veramchaneni Raghavendra Rao v. Govt. of Andhra Pradesh[29] the government released persons who are sentenced to life imprisonment on parole on flimsy grounds such as financial problems, illness of relatives etc. The allegation in the writ petition was that these convicted persons belonged to some political parties and it was as a result of political pressure that these persons were

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28. Maru Ram v. Union of India, A.I.R. 1980 S.C. 2147.
29. 1985 Cr.L.J. 1009 (A.P.).

released on parole when their appeal was pending in the appellate court. After surveying the case law and rules framed by the State prison authorities, the court said that the power to release a person on bail during pendency of appeal was with the court under Section 389 and the State Government could not circumvent it by devising any parole rules.[30] A similar act of the Chief Minister came to be criticised in Smt.Kawmri Sudesthamma v. State of Andhra Pradesh[31] wherein a life convict whose appeal was pending was granted parole on some flimsy ground in violation of Section 432(2) which required prior permission of the court under parole rules made under Section 432(5). The court held that the release was without jurisdiction. However, it refused to grant any relief to the petitioner on the ground that the court could not interfere with this order in as much as it was an administrative order. The court failed to take note of its earlier decision in Veeramchaneni Raghavendra Rao.[32] The Court ought to have interfered in this case. The act of the Chief Minister was apparently an abuse of power and the court would have been

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30. Id., p.1016.
31. 1985 Cr.L.J. 1890 (A.P.).
32. Supra, n.20.

justified had it interfered with the decision under Section 482 of the Code.[33]

Unguided Discretion: Need for a Check

It is true that the power of granting parole is a matter of executive discretion. But the discretion given to the executive should not be unguided. In Jayakumar v. State of Kerala[34] the petitioner sought a declaration that rule 452(BB) of the Kerala Prison Rules 1958 is unconstitutional, arbitrary and violative of Article 14 of

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33. Criminal Procedure Code 1973, S.482 reads:- "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".
34. 1993(1) K.L.J. 676. In this case petitioners complained of grant of parole to convict prisoners, guided solely by whims and humour of government. They say that the authorities turn the Nelson's eye to genuine cases and grant parole to others on the basis of letters issued by personal staff of ministers, members of legislature and party-men. Those paroled, often do not come back to serve the remaining sentences, according to the petitioners. It is alleged that one Devassykutty convicted of the offence of cheating has been overstaying and enjoying parole, engaging himself in contract work in the meanwhile.

the Constitution of India. The High Court responded:[35]

> "The legislature cannot visualise every situation that may arise, and indicate how to deal with it. It can only declare legislative policy and objective, leaving it to subordinate legislation to carry out purposes of the Act. Delegated legislation is a well-known device. But, basic legislative functions cannot be surrendered to the delegate. Delegated power is not plenary in character. If it transgresses the parameters of delegation, the exercise will be ultravires. Unlike statute law, rule making power is bounded by the terms of delegation".

According to the petitioner, the impugned rule[36] confers arbitrary, unguided and uncanalised power on the

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35. Id., p.679.
36. The Kerala Prison Rules 1958, Rule 452 BB reads:- "Notwithstanding anything contained in Chapter XXVI of these Rules, Government may, in deserving cases grant leave to any prisoner, exempting him from all or any of the provisions relating to the granting of leave".

government to act on whims and in a manner abhorrent to rule of law.[37] The Court accepted that and held that the statute in question does not indicate legislative policy, nor lay down guidelines for grant of parole.[38] For that matter, even the rule does not indicate cases in which parole is to be granted, or considerations upon which parole is to be granted.[39] Neither the Prisons Act, nor the Rules prescribe any condition or guideline for grant of parole. While chapter XXVI of the Rules makes provision for ordinary leave and emergency leave (parole), a third category outside the chapter is envisaged by Rule 452BB. All that is needed is to invoke this rule. Striking down the rule unconstitutional the court held:[40]

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37. It is one of the fundamental principle of administrative law that the legislature cannot part with its essential legislative function of declaring policy, leaving the delegate free to act according to its will. See State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75; Hamdard Dewkhana v. Union of India, A.I.R. 1960 S.C. 554; State of M.P. v. Baldeo Prasad, A.I.R. 1961 S.C. 293; Shama Rao v. Union Territory of Pondicherry, A.I.R. 1967 S.C. 1480; A.N.Parasuraman v. State of Tamil Nadu, A.I.R. 1990 S.C. 40.

38. 1993 (1) K.L.J. 676 at p.679.

39. Ibid.

40. 1993 (1) K.L.J. 676 at p.681.

"Uncanalised and unguided discretion without emunication of legislative policy, or principles upon which discretion is to be exercised, taints the rule with the vice of arbitrariness. Government can pick and choose with an evil eye and an unequal end".

This is a landmark decision in the State of Kerala as far as the law of parole is concerned. After this decision, the State Government made self-imposed restrictions in granting parole. After this decision Rule 452BB of the Kerala Prison Rules relating to grant of emergency leave to prisoners by government has been modified.[41] Rule 452 BB of the Kerala Prisons Rules as substituted required that the petitions for leave by prisoners shall be submitted through the superintendents of the jails where the prisoner is confined. It further states that every petition for leave shall be accompanied with a report from the sub-inspector of police concerned on the repercussions on the law and order situation if the prisoner is released on leave, particularly his own safety

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41. This was effected by G.O.(Ms) No.121/93/Home dated, Trivandrum, 7.9.1993.

as well as that of others, the possibility, if any, of the prisoner absconding, instances of previous misconduct on his part when on leave earlier and on such other relevant points. To a certain extent this provision effectively checks the misuse of these facilities by prisoners.

Position in England

In England there is a body known as the Parole Board for the purpose of supervising the functions of releasing the prisoners on licence.[42] The Boards duties include advising the Secretary of State as to the release on licence of persons serving determinate or life sentences and the recall of persons released on licence; the

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42. The Board which is at present composed of fortyfour members ordinarily sits in panels of five members. See 37 Halsbury's Laws of England (1982), p.783. The Members are appointed by the Home Secretary, and are paid for sessions which they attend. The Chairman is also appointed by the Home Secretary, and receives a part-time salary. By statute the Board must include (1) a person who holds or has held judicial office, (2) a registered medical practitioner who is also a psychiatrist, (3) a person with knowledge and experience of the supervision or after care of discharged prisoners, (4) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders. See Nigel Walker, Sentencing Theory, Law and Practice (1985), p.203.

conditions of such licences and the variation or cancellation of such conditions and any other matter referred to it by the Secretary of State which are connected with the release on licence or recall of such persons. For the purpose of the review and reporting by local review committee on a prisoner's suitability for parole, the prisoner is expressly given certain right.[43] He has to be informed of his right to make written representations, and any such representation has to be considered by the committee when reviewing the prisoner's case. The prisoner has to be interviewed by a member of local review committee, other than the governor of the prison, but he can decline to be interviewed. When the prisoner is interviewed he must be given a reasonable opportunity for making any representations which he wishes to be considered by the committee. The interviewing member of the committee must make a report, a copy of which must be sent to the Secretary of State with the committee's report on the prisoner's suitability for release on licences and the report of the interviewing member must be considered by the committee.

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43. 37 Halsbury's Laws of England (1982), p.788.

The Parole Board must deal with the case on consideration of any documents given to it by the Secretary of State and of any report it has called for and any information, whether oral or in writing, that it has obtained.[44] Where the Parole Board recommends the recall of any person who is subject to a licence, the Secretary of State may revoke that person's licence and recall him to prison.[45] Where it appears to the Secretary of State that it is expedient in the public interest to recall any such person before consultation with the Board, is practicable, he may revoke that person's licence and recall him without first consulting the Board. A person recalled to prison in either way may make written representations with respect to his recall and on his return to prison, must be informed of the reasons for his recall and his right to make such representations. When refusing the parole the Board should give reasons for the refusal. The balancing of interests involved in giving the information to the detainee have

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44. Id., p.788.

45. Id., p.789.

been succintly discussed in Payne v. Lord Harris.[46] Wherein Lord Denning M.R. observed:[47]

> In the interest of the man himself as a human being facing indefinite detention--it would be better for him to be told the reasons. But in the interest of society at large--including the due administration of the parole system--it would be best not to give them. Except in the rare case when the board itself think it desirable, as a matter of fairness, to ask one of the members to interview him. That member may then think it appropriate to tell him".

Parole--US Position

In USA parole is a privilege and no prisoner is entitled to it as a matter or right.[48] It is not a

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46. [1981] 1 W.L.R. 754. The plaintiff was convicted of murder and sentenced to life imprisonment. He was behaved in prison, being described as a "model prisoner", and was in the lowest security category. He sought release on licence, which, after periodic reviews in accordance with the Criminal Justice Act 1967 and the Local Review Committee Rules 1967, had been refused. With the object of being better able to prepare representation for the next review he sought declarations against the defendants, representatives of the Parole Board and the local review committee of the prison where he was detained and the Home Secretary that, in effect, he was entitled to know the reasons for refusing the release on licence.
47. Id., p.759 per Denning, M.R.
48. 370 U.S. 927.

constitutional right; it is a right bestowed by legislative grace, and the subject of parole is within the legislative authority given by a state constitution to the legislature.[49]

The constitutionality of statutes establishing systems of parole has been attacked in some cases on the ground that they infringe on the power of granting pardons vested by the constitution in the governor or in some person or persons other than those in whom the statute purports to vest the power to parole prisoners.[50] But a statute that merely provides for paroling prisoners does not in any way affect the pardoning power of the governor.

Different conditions can be prescribed by the parole granting authority for awarding it. The legislature may constitutionally provide that certain classes of prisoners shall serve longer minimum terms, before being eligible to parole, than other classes. Thus, a provision of a Parole Act that one convicted of murder who is sentenced to life is eligible to parole at the end of 20

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49. 59 Am. Jur. (2nd) 79.
50. Ibid.

years, and that one so convicted who is sentenced for a number of years is eligible when he was served one-third of his term, is not unconstitutional denial of the equal protection of the laws as applied to one sentenced to a term of 100 years, since the granting of a parole is a matter of grance to which the state may attach such conditions as it seems fit.[51] Similarly a statute which provides that a person who receives his final discharge from parole shall be restored to all the rights and privileges of citizenship is not unconstitutional, or an invalid encroachment upon the consitutional powers of the governor to pardon convicts.[52] Furthermore, a statute giving an administrative body the power to parole prisoners and to recommend to the Governor that the parolee be discharged from further imprisonment is not an unconstitutional infringement on the pardoning power of the governor.[53]

Parole does not wipe out the judgment of conviction, but merely suspends its operation by remitting,

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51. Ughbanks v. Amstrong, 208 U.S. 481.
52. 59 Am. Jur. 2nd. 79.
53. Ibid.

for the time being, the confinement and hard labour until the end of the term, or until an unconditional pardon is granted. The power to grant parole is usually vested by statute in an administrative body. The scope and extent of th powers of this body is designated by the statute.

A parole board cannot by rule change the statutory provisions of eligibility for parole. When a prisoner becomes eligible for parole, the parole board is under a mandatory duty to hear his application for parole. The board cannot delegate any of the functions committed to it.

Generally parole will be granted upon such terms and conditions as the granting power may see fit. In USA in some jurisdictions terms and conditions of parole are a matter of express statutory enactments.[54]

The US Supreme Court has analysed the scope of the restrictions that can be imposed in Arciniega v. Edward R.Freeman.[55] In Arciniega a prisoner who was sentenced to

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54. People v. Nowak, 323 U.S. 745.

55. 404 U.S. 4, 30J Ed. 126.

10 years imprisonment was released on parole on condition that he should not associate with persons having criminal records. Later it was found that he was working in association with two other ex-convicts. The Federal Parole Board revoked his parole on the ground of his association with the other ex-convicts. The US Supreme Court reversed this order. It held that the former prisoner's occupational association with the other ex-convicts was not a violation of the parole restriction. The court pointed out that the Board has wide authority to set the conditions of parole. Incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer do not violate a parole restriction forbidding association with other ex-convicts, and, do not, standing alone, constitute satisfactory evidence of a non-business association violative of the parole restriction.

In Morrissey v. Brewer[56] the two prisoner's paroles were revoked by the Iowa Board of Parole. The prisoners alleged that they were denied the due process because their paroles were revoked without a hearing.

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56. 408 U.S. 471.

On certiorari, the US Supreme Court reversed and remanded the case to the Court of Appeals for return to the District Court with directions to make findings on the procedures actually followed by the Parole Board in the two parole revocations.

In a opinion by Burger C.J. representing the views of six members of the court, it was held that the minimum requirements of due process in revoking paroles include: (1) written notice to the claimed parole violations; (2) disclosure to the parole of evidence against him; (3) opportunity to be heard in person and to present witness and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body such as a traditional parole board; (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

In Hunter v. Martin,[57] a person was sentenced for 10 years imprisonment by the Federal Court and for 3 years imprisonment by the State court. The Federal Court's judgment held that he need to undergo the Federal sentence only after undergoing the state sentence.

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57. 334 U.S. 302.

Before expiration of the period, he was paroled by the State and delivered to the State authorities. The petitioner contended that the Federal sentence does not begin until the full term of the State sentence has expired and that for the period of parole, he is entitled to freedom. The Court held that a sentence of imprisonment in a state penitentiary is deemed to have expired upon the prisoner's release on parole, for the purpose of a Federal sentence which provides that the term of imprisonment thereunder shall begin to run at the expiration of the state sentence.

In USA researches have established that parole release decisions are based both on evaluations of past behaviour and predictions of future behaviour.[58] To assess

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58. As an example, the system followed in one U.S. state is taken here. The parole review process in Pennesylvania consists of four formal stages with different personnel involved at each stage. First, the correctional staff associated with the inmate at the institution make a collective recommendation about release. Second, a parole case analyst who works at the institution but is employed by the Parole Board reviews and summarises case and makes a recommendation. Third, a Parole interviewer who is either a Board member or a specialised hearing examiner conducts an interview with the parole applicant at the institution and makes a recommendation. Finally, quorum of Board members must officially decide the case unanimously. See John S.Carroll et.al., "Evaluation, Diagnosis, and Prediction in Parole Decision-Making", 17 (1982) Law and Society Review, p.199 at p.200.

the behaviour of prisoners there is a separate machinery in each State. Although only the Parole Board has the legal authority to grant or deny parole release, the system is established to make the parole interviewer central to the decision process. It is the interviewer who visits each institution to examine the parole applicants. In majority of the cases, the interviewer is a Board member.[59] Parole interviewers are clearly concerned with predicting parolee's future criminal behaviour and responsiveness to rehabilitation.

Need for a Policy

Rehabilitation requires a guided return to the responsibilities of living in the free community. It is in this content that a parole system appears logical and necessary. A parole system cannot operate by itself but presupposes a prison or reformatory. Parole is not a mere method of reliving pressure of the prison population. It is the final step in the adjustment of the incarcerated offender to free society. It is part and parcel of a method of treatment which begins with incarceration in an institution. It is preceded in the institution by successful steps in education for a trade and free social

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59. Id., p.201.

life, with discipline gradually released as the prisoner shows correction of his behaviour.

Thus it can be seen that parole cannot be ignored. It is as half way house between prison and outside world. It facilitates the prisoner to adjust. It serves as an effective measure of safety and treatment reaction to crime by affording a series of opportunities to the parolee to prepare himself for an upright life in society. It is generally accepted that the efficiency of parole administration is greatly hampered due to undue political and executive pressure. In the result many undesirable prisoners procure their release on parole and the object of system is completely defeated. A definite judicial policy is, therefore, much needed in matters of parole and the executive functions performed should be subject to judicial review. Advanced countries like USA and UK have established machinery where judiciary has an effective role. In India the position is not like that. It is high time that legislature should think regarding a legislation where judiciary has a say in this regard.

CHAPTER 10

A Study in an Open Prison

Chapter 10

A STUDY IN AN OPEN PRISON

An open prison is essentially one in which there are no locks, and no surrounding security.[1] The prisoner is trusted to remain inside the prison or in its immediate neighbourhood, for in many open prisons much time is spent working outside the area in which there are prison buildings. The absence of locks and buildings changes the whole atmosphere of the prison. The prisoner is less conscious of being detained, the staff are less preoccupied with security in these institutions. So it develops individual responsibility on prisoners.

Every prisoner is not suitable for the treatment in the open prisons. Any one who is regarded as an escape risk is unsuited to open prisons. Another category of prisoners not eligible to open prisons are those who through inherent inadequacy or institutionalisation would find open conditions intolerable.[2] Violent and sexual

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1. J.D.Mc Clean and J.C.Wood, Criminal Justice and the Treatment of Offenders (1969), p.100.
2. Id., p.122.

offenders are also treated as persons not suitable for open prisons.[3] The population of an open prison must be carefully selected one.[4]

In an open prison anxieties about violence and security are few. Here prisoners stay for lengthy terms so that they can be known as individuals producing a wholly different relationship from that of a busy closed prison where there is an unselected and constantly changing population. In practice, most open prisons are in rural settings; often they are isolated places. This means that they are pleasant and healthier than the prisoners in closed prisons.

General Conditions in the Open Prison

A study in the open prison and interview with prisoners and officials have revealed many valuable information regarding the treatment of prisoners in open

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3. Ibid.
4. Many of the prisoners in open prisons can even be trusted to work as guards. A dozen prisoners from the Nabha jail set out daily after dusk to various bore wells where they work as guards. See Ramesh Menon, "Fettered But Free", India Today, November 15, 1991, p.78.

prisons.[5] In Kerala, the first open institution was established in Nettukalttheri in 1962 as an experiment to treat the prisoners in open air. Later an annex to this prison was started in 1992 in Thevancode.[6]

The prison which is situated 35 kms away from Trivandrum city and very near to the Neyyar Dam is like a small village comprising seven barracks, a small hospital, store room, canteen, laundry, guest room, agricultural farm and a smoke house. Most of the buildings of the prison, we are told, are constructed by the prisoners themselves. There is neither a wall nor a fencing around these buildings. At present there are 411 prisoners in this open institution. They lead a fruitful and productive life. There are no walls, no bars, no sentries in those open jails spread over vast fields and plantations, with sharp knife-like instruments which they use as rubber tappers, they are better armed than the warders watching over them. Yet they never take advantage of it. It is this freedom

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5. Twenty prisoners were interviewed. The officials interviewed are the Superintendent, Deputy Superintendent and five warders.
6. The open prison at Nettukattheri was established on 20th August 1982 and at Thevancode on 15th October 1992 as an annex to the other prison. This is a 486 acre rubber plantations.

that is helping many prisoners turn over a new life. There are very few unpleasant situations in this open jail. The experience is particularly exhilarating. The move to a jail without a wall is almost like a burst of freedom. The condition and treatment in this open prison is far better when compared to the closed prisons in the State.[7] There are very few complaints from the prisoners. One complaint was about the barracks in which they sleep during night. Though the barracks are well-ventilated, the structures are temporary and not very secure. Prisoners complained that the roofs leak and during rainy season the prisoners are not able to sleep. A visual examination from a distance corroborated the complaint. The most serious complaint is about water shortage during summer season. During that season water is taken from a pond near the barracks. The prisoners also have a complaint that they do not get adequate quantity of food. They have to work and trek long distances in the mountainous region, which call for greater application of physique. So the quantity of food has to be increased.[8]

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7. The following other prisons were visited for the study: Central Prison, Trivandrum; Central Prison, Viyyur; District Jail, Kozhikode and Special Sub-Jail, Viyyur.
8. At present they are eligible for the same diet as provided in closed prisons as per the Diet Scale given in chapter XXVII of the Kerala Prisons Manual.

The mats and sheets supplied to the prisoners are short compared to their requirement. During autumn, they are put to heavy manual work under severe cold and most of them suffer from arthritis. As they lie on cement floor it is only natural that part of their legs and feet would be on naked floor, because the mats and sheets are short. The geographical and climatic conditions also showed that the area is prone to acute cold weather during autumn and rainy seasons. Therefore it is necessary that they should be supplied with long mats and sheets.

There is a general complaint of misappropriation of sale proceeds of rubber. It is said that 40% of the rubber sheets are written off as scrap, whereas really, not even 10% is of poor quality. The prisoners feel gravely that their sweat and labour is being misappropriated by the officials.

They also complained that there is delay in the disbursement of wages, with the result that it is impossible for them to send money to their families.

The prisoners have a further complaint that the open prison, being a special community, should not be open

for admission to unreliable prisoners and persons convicted for theft, rape and other anti-social offences.[9] Earlier, they had a good deal of freedom. Now they feel construed and there is tension because of the problems created by such prisoners. This is a factor which has to be taken into consideration by the authorities while selecting prisoners to open prisons.

In the matter of religious services, the prisoners are fully happy.

Selection of the Inmates

Prisoners are selected from other 'closed prisons' in the State by a selection committee. Only such prisoners who are sentenced to life imprisonment who can adequately respond to a programme based on trust and

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9. A few months ago, some prisoners convicted of theft were admitted, and two of them escaped about two months ago, after which the authorities have imposed a lot of restrictions, resulting in loss of freedom to the prisoners. See James Vincent Commission Report in Re a Prisoner before the Kerala High Court in Cr.M.C. No.179 of 1989 (25th March 1993), (Mimeo), p.12.

responsibility are usually selected for confinement in the open prison.[10] No prisoner can claim a transfer to an open prison as a matter of right. The selection committee, at the time of selection, has to give due regard to mental and physical health of the prisoners; behaviour and conduct in prison and sense of responsibility desplayed, progress in work, vocational training, education in closed prison, group adjustability, character and self-discipline, extent of institutional impact and his fitness for being trusted for confinement in an open prison.[11]

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10. The Committee consists of Inspector General of Prisons, Deputy Inspector General of Prisons, Superintendent of the Prison from which the prisoners are to be selected and the Superintendent of the open prison. Persons sentenced to the following offences are not eligible for the sentence in open prison in Kerala. Offences against the State, offences against public tranquility, offences relating to kidnapping, abduction, slavery and forced labour, sexual offences, offences relating to robbery, dacoity, cheating and house-breakings. See Rule 7 of Kerala Prison Manual.
11. J.D.Mc Clean & J.C. Wood observed: "Any one who is regarded as an escape risk is clearly unsuited for open conditions. So are those prisoners who through inherent inadequacy or institutionalisation would find open conditions intolerable, as forcing on them too much responsibility". J.D.Mc Clean and J.D.Wood, op.cit., p.100.

The factors such as 'behaviour and conduct' sense of responsibility displayed, adjustability, institutional impact are guidelines which enable the authority to select a person. Judgments based on these factors are actually subjective.

If reformation of more inmates is to be achieved, it is necessary to relax the rules governing selection of the inmates and to reduce the list of excluded categories of crime and sentence to accommodate more prisoners in the open institution. The criteria for a sentence in open prison should neither be based on pre-confinement in a particular penal or correctional institution nor on the length of his sentence, but it should be based on his adaptibility and tendency to rehabilitation. There should be some scientific and logical criteria for selection of prisoners for being confined in open institution.

Incentives in the Open Prison

There are various incentives provided to prisoners in open prisons. Besides allowing maximum freedom of movement within the campus and providing facilities for leading community life, applicability of a higher scale of remission and parole is an effective

incentive.[12]

The open prison, mainly provide agricultural work to the prisoners. The prison authorities give much stress on agricultural and farming activities in as much as majority of the prisoners come from rural agricultural community. It is in this context that they believe that agricultural activities may have more rehabilitative value. They also justify such prison labour on the ground that the institution is not merely self-supporting but is also helping other sister prisons.[13] The crucial question which

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12. Other labour provided to prisoners are brick making, rubber tapping, masonry etc. For a prisoner in a closed prison maximum 30 days home leave is permitted. But a prisoner in open prison gets 15 days more home leave.
13. The following statement of the Estimates Committee Report of the 9th Kerala Legislature (1991-93) reveals the profit the State government got from the open prison in the State.

Appendix - 7

Statement showing details of receipt and profit of open prison, Nettukaltheri

Sl. No.	Year	Total receipts (including other crops)	Total Expenditure for the maintenance of plantations	Profit
1.	1988-89	15,22,874	1,82,607	13,40,270
2.	1989-90	12,32,366	74,318	11,58,048
3.	1990-91	15,77,428	1,36,904	14,40,524
4.	1991-92	18,70,027	1,43,917	17,26,110

Dy. I.G. of Prisons.

need due consideration and re-examination by the concerned authorities is, does the present prison labour help in reformation, rehabilitation of the inmates as majority of them were engaged in agricultural farming prior to confinement in the open institution. It is further felt that, the present prison labour does not even increase the prisoner's ability to earn an honest living after release as they were habituated with such hard work even before conviction and in the closed prison. If the objective of rehabilitation is to be achieved meaningfully in the present circumstances the institution should make efforts to train the inmates of the modern methods of agricultural farming. In prison labour programmes, special attention should also be paid to vocational training for the inmates along with agricultural activities.

Prison education and recreational programmes also have been launched as effective rehabilitation measures. Education, unlike in the closed prisons, is not imparted in the open institution. However, the prison is having a small library which is managed by one of the prisoners. Some inmates utilize this facility. Newspaper is allowed to prisoners. A Television set has been provided to the inmates. On certain occasions they enjoy the T.V. with the

prior permission of the Superintendent. They are allowed to visit religious places. This gesture allows them to practise their religious rites and ceremonies.

The functioning of open prison in Neyyar Dam which maximises the possibility of prisoner's contact and interaction with free community shows that the inmates, eventhough they constantly have the chances for easy escape, do not escape from the prison. They seem to have adopted the way of being law-abiding rather than being anti-social elements. The general health of the prisoners are found to be far better in these institutions, when compared to the inmate prisoners in closed prisons. Their behaviour with the members of the free community including women, is very good and have acquired the quality of adjustments in life. 'Trust' and 'self discipline', which are supposed to be the foundations of open institutions are effectively put into practice in this open prison. More open prisons have to be established in our country. We have seen that reformative theory propounds that if prisoners are given proper treatment they could be brought back to the society. Open prison is an effective penal instrumentality to achieve this goal meaningfully by

eliminating the tensions and barriers created by the restrictions and physical restraints placed on the inmates of a closed jail and by providing an opportunity for interaction with community.

CHAPTER 11

Conclusions and Suggestions

Chapter 11

CONCLUSIONS AND SUGGESTIONS

The new theories of crime causation propounded in the latter half of the nineteenth century gave rise to the feeling that the prisons could be used as appropriate institutions for reforming the offenders. It called for individualisation of punishment.

It has been established that prisons are no more institutions designed to achieve only the retributive and deterrent aspects of punishment. They are now treated as places where the inmates are lodged not as forgotten members of the society but as human beings having some rights.

Since it was the concern of the executive to look after maintenance of peace and tranquillity in the society, it was thought appropriate to entrust the work of prison administration with the executive. The courts in almost all common law countries followed the 'hands off' doctrine so far as prison administration was concerned. They believed that it was their concern to impose punishments alone. They are not to be worried about the treatment that was meted out

to the prisoners in the jails. This view emanated from the feeling that the prisoners constituted a lot who did not deserve any right.

As a result of international movements for humanisation of prisons the judiciary in the common law countries started taking active interest in prisoner's treatment.

Various studies reveal that much has been done in America to improve the lot of prisoners and to treat them as human beings.[1] The courts there have gone to the extent of saying that there is no iron curtain between a prisoner and the constitution. Most of the rights available to citizens except those which they cannot enjoy due to the conditions of incarceration have also been granted to prisoners. A number of rights like right to counsel, right to speedy trial, right to communication, freedom of religion and right against cruel and unusual punishments are now recognised rights of prisoners there.

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1. American Convention on Human Rights, Article 5 says that no one shall be subjected to torture or to cruel inhumane or degrading punishment or treatment. See Commonwealth Secretariat, Judicial Colloquium 1988, Developing Human Rights Jurisprudence (1988), p.172.

In England due to the "hands off" policy of the courts, the inmates felt great difficulties in challenging the various oppressive measures used by the authorities. But due to various judicial interventions later, the government has recognised and extended various facilities to the prisoners which go in accordance with the concept of human rights and dignity.

In India also the judiciary has come forward to protect the rights of the prisoners. It can be seen that initially here also the courts were reluctant to adopt the liberal attitude towards prisoner's claims of various demands concomitant to the fundamental rights concepts. But later the attitude changed and the courts started recognising the human rights concepts in favour of prisoners in letter and spirit. Through various decisions the judiciary have recognised the right to counsel, right to speedy trial, right to physical protection, right to expression, right to meet family members, and right against cruel and unusual or oppressive jail practices.

Maneka Gandhi is a turning point in prisoner's rights. In that case the Supreme Court gave a wide

interpretation to the word 'law' in Article 21 where it has established that law means fair and reasonable law. In the light of this interpretation much of the law regarding prisoner's rights have developed. Read with the doctrine of fair procedure expounded in Maneka Gandhi, the pronouncements in Sunil Batra and Charles Sobraj, evolved a new prison jurisprudence striking a balance between the dignity of the human beings ruled within the walls and the powers of the jail authorities that rule them.

A prisoner is also entitled to get reasonable wages for the work done while undergoing the imprisonment. They are entitled to the enjoyment of their fundamental rights and the guarantee of such fundamental right is available to them except in so far as such rights may have to be curtailed or restricted by reason of imprisonment. Non-payment of remuneration after compelling the prisoner to do a work is 'forced labour' within the meaning of Article 23(1) of the Constitution. Holding so the court ordered adequate wages for the prisoners. So the prisoners have a fundamental right to get adequate remuneration for the work done by them.

A person who undergoes the sentence in prison must necessarily have his movement restricted. That is involved in the very concept of imprisonment. His communication with the rest of the world would also be necessarily restricted. His right to practice profession will not be available to him while in the prison. But there are other valuable rights, any curtailment of which will have no revelance to the nature of the punishment. The right not to be exploited in contravention of Article 23(1) is a right guaranteed to a citizen and there is no reason why a prisoner should lose his right to receive wages for his labour. In Sunil Batra judges were unanimous in expressing their opinion in favour of a change in law. It was emphasised that there is a need for making the jail manuel available to the prisoners. The decision on the necessity to put a prisoner in bar-fetters has to be made after application of the mind to the peculiar and special characteristics of each case. The nature and length of the sentence or the magnitude of the crime committed by the prisoner do not seem to be relevant for the purpose. It is against the accepted principles of the constitution to put a prisoner in bar fetters continuously for a long period. Similarly one has to doubt whether solitary confinement is necessary for a person sentenced to death under the guise of a guarded confinement.

The repeated intervention of courts in prison administration project the view that prisoners have been denied the basic human rights. It is a fact that prison administrators have been making decisions which place a greater value on coercive methods of maintaining security and order than on the quality of the lives of prisoners. It is interesting to examine whether the rights now evolved by the judiciary are enforceable in our prisons.

Prison is not only a place of confinement and deterrence but also an abode of rahebilitation and refinement. As already pointed out modern trend is to eradicate the causes of crime rather than the criminals by educative, corrective and reformative methods. There must be a procedure in the sentencing court itself for receiving complaints from convicted persons if their rights are infringed in jail. The present system of sentencing a person and forgetting him for ever should change. Effective improvements in prison justice administration is possible if the judiciary has a say in the treatment of offenders in jail. Courts must be clothed with the power to go beyond individual cases and issue affirmative directions of a wider

nature. The High Courts and the Supreme Court of India have been gradually exercising jurisdiction in assuming prison justice, including improving the quality of food and amenities, payment of wages and appropriate standards of medical care. Access to courts must be made easier to the aggrieved prisoners.

Eventhough courts with compassionate outlook may defend prisoner's rights, there are obvious limitations to their actions. The judicial process is too cumbersome and slow, too ill-equipped to handle the numerous complaints of prisoners effectively. It is also inadequate to compel the executive where affirmative administrative steps are needed. The dynamics of judicial power involves extraordinary sensitivity and activism if access to courts is not be to a mere myth or ineffectual ritual. To make the judicial system more meaningful reasonable access to lawyers is essential. A free atmosphere for communication and interaction, including freedom of legal correspondence and freedom from harassment in pursuing judicial avenues must be created. It is also high time to think about organisation ready to champion the causes of deprived prisoners and to launch public interest petitions and other proceedings.

The government should come forward along with some public spirited citizens and voluntary organisations to form a "discharged prisoner" aid society. The society should exploit opportunities for rehabilitation of prisoners after their release. New improvements in rehabilitative programmes initiated by the government should be brought to the notice of the prisoners which may help in easing out prison tension. The discussion has revealed that apart from the judiciary there had been little attempts made by Central and State governments to rejuvenate and modernise the prison administration. The century old statutes and rules made by British Governments to cater to their imperialistic motives are still followed in free India committed to the goal of humanism. Inspite of the specific recommendations made by the judiciary as well as the Law Commission attempts are yet to be taken in this direction.

The Indian prison administration is generally in a depressive stage. Most of the prisons are heavily overcrowded.[2] Convicts and undertrials are lodged in the

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2. For a statistical study of this, see Shaw Commission of Inquiry, Third and Final Report (1978), pp.135-152. The researcher has made some empirical studies. It has been revealed that prisons in Kerala are overcrowded. The present capacity of prisons in Kerala is 5473; but the statement filed by the D.I.G. of Prison on behalf of the Government dated 2.2.1993 shows that in 1991 the strength of the prisons in Kerala Jails was 14313. See In Re A Prisoner, 1993 (2) K.L.T. 10 at p.14.

same institution throughout the country. Adults, adolescents, jeveniles, women and lunatics are also generally confined in the common institution. There is a serious lack of separate institutions for these various categories of prisoners. There is little co-ordination between the prisons and correctional services and many more prisons are sent to prisons. It is obvious that the entire system calls for a thorough overhaul and many reforms are needed.

Most of the prison buildings in the State of Kerala are ill-equipped, ill furnished and without proper ventilation or sanitation and with insufficient water supply arrangements.

Apart from these prisons must be safe places. For that purpose some restrictions must be imposed on prisoners. To keep the prison a safe place constant vigilance is necessary. Prison cells should be systematically searched for materials which would serve as a weapon or medium of self-destruction or escape. Visitors should be carefully supervised to prevent passing in or weapons, tools, drugs, liquor and other contraband articles. Experience has shown

that laxity in supervising visitors and searching packages has resulted in escapes, assaults on officers and serious breaches of discipline.

A radical change is to be effected in the outlook of prison administration - in policy as well as in its functioning. The principle of reform and rehabilitation should get acceptance both in letter and practice.

Once we accept the need to respect the dignity, decency and justice belonging to prisoners, all else follows from these fundamentals. The picture is different with regard to open prisons in Kerala. Here several programmes are initiated for the rehabilitation of the inmates, with a view to their social rehabilitation. The inmates are employed in works which will duly prepare them for useful and remunerative employment after their release. The works are organised in a rational way keeping with the local and regional socio-economic conditions. It has been found that it is the endeavour of the state to evolve proper mechanism to ensure that no undertrial prisoner is unnecessarily detained. This can be achieved by speeding up trials, simplification of bail procedures and periodic review of

cases of undertrial prisoners. Undertrial prisoners should be confined in separate institutions.

The new experiment of open prison may be implemented. Experiences have shown that hundreds of criminals live in the relative freedom of open jail, outside the confines of a closed prison.[3] Spread over sprawling fields and plantation, there are no walls or sentries in these jails, allowing the prisoners to live near normal and reformed lives.

Every person has the right to have his physical, mental and moral integrity respected. No one shall be subjected to torture or cruel, inhuman or degrading punishment or treatment. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners. The study has revealed that the efficiency of parole administration is greatly hampered due to undue political and executive pressure. In the result many undesirable prisoners procure

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3. A visit by the researcher into the open prisons Nettukalthery and Thevancode in Kerala has revealed this. 411 Life convicts lead a fruitful and productive life in the 486 acres of rubber plantations here. When compared to the prisoners in closed prisoners, here they seemed as reformed persons.

their release on parole and the object of the system is completely defeated. A definite judicial policy is therefore much needed in matters of parole.

Prisoners are asked to work in the prison. They are being remunerated also. Prison wages has to be enhanced. Prison labour should be of the right individualised type. The aim of such training and work programme shall be to equip inmates with better skills and work habits for their rehabilitation. Payment of fair wages and other incentives shall be associated with work programmes to encourage inmates participation in such programmes. Existing disparity in wages on the basis of type of work, and in particular between light and heavy work in respect of women prisoners is not necessary and should be removed. No work should be done without pay, and prison staff utilising prisoners for personal work should be discouraged from that.

In India prisoners and prisons today are governed by the old central legislations like Prisons Act 1894, Prisoners Act 1900 and the Transfer of Prisoners Act 1950. Each State has in time enacted separate Prison Rules and Jail Manuals on the lines of the central legislation. The

new awareness brought about my progressive thinking in the field of prison administration do not find a place in these statutes. Hence the statutes should be amended by incorporating all new developments. Fortunately, the case law fills the lacunae in many of the areas where the jail manuals are deficient. The Supreme Court of India has on several occasions, ordered the states to reform the Prisons Act 1894, to completely overhaul the various State Prison Manuals and to incorporate the recent case law regarding prisoner's rights. However, few have completed this task.

Article 21 has projected a dynamic perspective so far as prison justice is concerned. To give effect to the ideals contained in this article there should be in each state an independent agency to safeguard the rights of prison inmates and check prison vices. The recently constituted Human Rights Commission[4] to a certain extent

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4. The Commission was constituted under an ordinance promulgated by the government on September 28, 1993. Former Chief Justice of India Mr.Ranganatha Misra is the Chairman. The other members of the Commission are Ms.Justice Fatima Beevi and Justice Sukhdev Singh Kang, former Chief Justice of Jammu & Kashmir High Court and Mr.Dayal, former U.N. Official. In addition to these members, Chairperson of the National Commission for Minorities, Scheduled Castes, Scheduled Tribes shall be deemed to be members of the Commission.

will achieve the objectives. But as it is a Central Commission it cannot get opportunity and time to look into the affairs of prisoners in details. So in the line of National Commission, State Cmmmissions also should be established. Perhaps the Women Commission and Human Rights Commission could look after this function.

Because of the fact that the statutory laws relating to prisoner's rights are so antiquated[5], the constitutional and judge made law have been much more important in securing and protecting the rights of prisoners. It is a fact that judicial determination of prison complaints places heavy burden upon the courts. But it does not justify leaving prisoners to the mercy of prison officials to fashion rules and regulations as they please. An alternative suggestion is to establish by statute some form of quasi-judicial or administrative review procedures where a complaining inmate could take his claim in the first instance. The courts would then merely serve in an appellate capacity in reviewing such agency's decisions when one party is unsatisfied with the resolution. To assure fair and impartial treatment of prisoners such an agency would preferably be an arm of the court and under its

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5. Prisons Act 1900 and Prisons Act 1894.

direction rather than under the auspices of the prison system. Hearing could be held in the various prisons at designated times. State agencies under the court supervision would travel to State penal institutions.

Although the exact procedure put into effect cannot be suggested, the point remains that some form of judicial or prison administered review system would be desirable. It will be helpful for the fair adjudication of prison complaints without overburdening the courts. It is a true fact that any completely adequate means for the protection of prisoner's right will be expensive, but a truly civilized society must bear the additional cost in order to protect the fundamental rights of all its members.

A new jurisprudence of correctional reform based on reformative and rehabilitative aspects has now set in. Prisoners should not go out to society with a feeling that the rule of law is a casualty within prison walls. It has now been accepted that the purpose of prison life is to train the inmates for a proper social living where the rule of law is respected. It will remain illusory and impaired if the scheme of prison regulation is afflicted by arbitrariness and injustice. The ultimate object of prison

institution should be to reform the offender rather than to torture him. As pointed out by Dr.Sethna the prisons should be places for re-education, but they should not be so comfortable as to be attractive.[6] Inmates should be put to hard manual labour which must be productive for the State and useful to the prisoner after his release. An ideal prison must provide for adequate work, vocational training, basic educational, medical and recreational facilities for inmates. The prison management should be made functional and effective. There is no meaning in maintaining these incarcerated persons at the State expenses if it did not achieve any objective which is beneficial to the society. So we should think of changing the present practice of definite sentence imposing on prisoners. Instead it is better if an indeterminate sentence with a reformative objective is practised in the case of imprisonment.

Those who are in charge of the prison administration from top to bottom must develop the proper approach to deal with the prisoners and undertrials. It is true that a considerable number of hardened prisoners live in the jail and those who have a longer term of sentence to suffer stay on for quite a part of their life behind the

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6. J.M.J.Sethna, Society and the Criminal (1980), p.297.

prison bars. Longer stay at one place brings in familiarity and familiarity generates a number of human reactions. The long term prisoners should keep on shifting from jail to jail. At present in Kerala only life convicts are considered for the sentence in open prisons. Instead all suitable prisoners have to be considered for open prisons.

The parole rule for the open prisons and the closed prisons are the same at present in Kerala and other States. Instead separate rules should be framed for parole for open prisons.

The prison personnel should be given regular training on the subject of basic human right of the prisoners. They should be made aware that a prisoner is not denuded of his basic human rights merely because of incarceration. The widespread prevalence of legal illiteracy among the prison administrators about the rights of the prisoners is the main cause of prison injustice. The prison administrators should be made to understand that certain human rights are sacrosanct and inherent in the personality of the detenue and are not to be violated at any cost. Majority of the jail staff believe in the traditional

theory of deterrence rule. They have no training in modern methods of prison administration and prison management. The position has to undergo a change paving way for overhauling the system. Then only the rights evolved by the judiciary could be of some meaning to the prisoners in India.

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