(1978) 4 Supreme Court Cases 494

(BEFORE Y. V. CHANDRACHUD, C. J. AND V. R. KRISHNA IYER, S. MURTAZA FAZAL ALI, P. N. SHINGHAL AND D. A. DESAI, JJ.)

SUNIL BATRA .. Petitioner;

Versus

DELHI ADMINISTRATION AND OTHERS .. Respondents.

AND

CHARLES GURMUKH SOBRAJ .. Petitioner;

Versus

DELHI ADMINISTRATION AND OTHERS .. Respondents.

Writ Petition Nos. 2202 and 565 of 1977†, decided on August 30, 1978

A. **Prisons Act, 1894 — Section 30(2) — Keeping prisoners sentenced to death in solitary confinement, held, is impermissible being a distinct and separate kind of punishment under Section 73, I. P. C. and not part of the death sentence under Section 53, I. P. C. — To read solitary confinement as permissible under Section 30(2) would render it unconstitutional and violative of prisoner's fundamental rights under Articles 21, 20(2), 19 and 14 — Prisoner in jail still retains his fundamental rights — Nature of non-punitive custodial isolation of such a prisoner awaiting execution permissible under Section 30(2) read with Section 366, Criminal Procedure Code, 1973 laid down — Meaning of "apart from other persons" and "be confined in a cell" in Section 30(2) explained — For applicability of Section 30(2) when is a prisoner "under sentence of death" also explained — "Shall" in Section 30(2) means "shall be liable to" — Criminal Procedure Code, 1973, Sections 366, 415, 433, 434 & 435 — Constitution of India, Articles 72 and 161**

B. **Constitution of India — Article 14, 19 & 21 — Held are as much available to the prisoner in a jail subject however to inherent limitations of his being under imprisonment (Paras 4, 52 and 213)**

C. **Constitution of India — Article 13, 32 & 226 — Court can so interpret the law that it is saved from unconstitutionality — Pre-constitution statutes can be so read as to conform with the Constitution of India — Interpretation of Statutes (Paras 34 to 39 and 228)**

D. **Words & Phrases — "Apart" — Meaning of**

The petitioner, Batra, was found guilty by the Sessions Court of the offence of murder and was awarded the capital sentence in January, 1977. Till then, he was a 'B' class prisoner eligible for certain amenities. After the death penalty was pronounced, the prison superintendent stripped him of the 'B' class facilities and locked him up in a single cell with a small,

†Under Article 32 of the Constitution

walled yard attached but beyond the view of other human beings except the jail guards and formal visitors who visited in discharge of their official duties and a few callers on rare occasions. He filed an appeal against his conviction and sentence to the High Court which dismissed the appeal. He also challenged in the High Court his quasi-solitary confinement but without success. Thereafter, he filed the present petition under Article 32 of the Constitution of India to the Supreme Court. He challenged the solitary confinement under Articles 14, 19 and 21. The respondent State justified the action of the superintendent under Section 30 of the Prisons Act, 1894. That Section provides as follows :

> (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 Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent 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 by night under charge of a guard.

The Supreme Court

Held :

The scope of Section 30(2) is that persons in the position of the petitioner are not to be completely segregated except in extreme cases of necessity which must be specifically made out and that too after he is, in the true sense of the expression, 'a prisoner under sentence of death'. (Para 229)

Per Chandrachud, C. J. and Fazal Ali, Shinghal and Desai, JJ.

(1) It is no more open to debate that convicts are not wholly denuded of their fundamental rights. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is all the more substantial and his rights are not subjected to the whims of the prison administration. Therefore, any imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards. However, they are not in a position to enjoy the full panoply of fundamental rights because these very rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. (Para 213)

D. Bhuvan Mohan Patnaik v. *State of A. P.*, (1975) 3 SCC 185 : (1975) 2 SCR 24, *followed.*

Procunier v. *Martinez* 40 LEd 2d. 224, 228 ; *Wolff* v. *McDonnell* 41 LEd 2d. 935, 973 ; and *Pell* v. *Procunier* 41 LEd 2d. 495, 501 *relied on.*

(2) The Court has to strike a just balance between dehumanising prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional security against escape, and the rehabilitation of prisoners. Solitary confinement has a degrading and dehumanising affect on prisoners. If Section 30(2) of the Prisons Act enables the prison authorities to impose solitary confinement on a prisoner under death sentence, not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is one under sentence of death, the provision would offend Articles 14, 19 and 20. Further, if by imposing solitary

confinement, there is total deprivation of camaraderie amongst co-prisoners, commingling and talking and being talked to, it would offend Article 21. (Paras 213-A to 218)

(3) It is, however, clear that Section 30(2) does not empower the prison authorities to impose solitary confinement in the sense in which that word is understood in paragraph 510 of the Punjab Jail Manual. Sections 73 and 74, I. P. C., show that solitary confinement is by itself a substantive punishment which can be imposed only by a court of law. The limit of solitary confinement that can be imposed under the court order is strictly prescribed and that provides internal evidence of its abnormal effect on the subject. (Para 219)

(4) Section 30(2) merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners and he is to be placed day and night under the charge of a guard. Such confinement can neither be cellular nor separate, and in any event, it cannot be a solitary confinement. (Paras 215 & 220)

(5) The expression "such prisoner shall be confined in a cell apart from all other prisoners" has a restricted meaning. It must be given a rational meaning to effectuate the purpose behind the provision so as not to attract the vice of solitary confinement. Section 366(2), Cr. P. C., 1973 enables the Sessions Court to commit a convicted person, who is awarded capital punishment, to jail custody under a warrant. It is implicit that the prisoner is neither awarded a simple nor rigorous imprisonment. The purpose of the sub-section is to make available the prisoner when a sentence is required to be executed. He is only to be kept in jail custody. After the sentence becomes executable, he may be kept in a cell apart from other prisoners with a day and night watch. But, even here, unless special circumstances exist, he must be within the sight and sound of other prisoners and be able to take food in their company. Hence, the prisoner under sentence of death, who is already in jail custody cannot be subjected to punitive detention except for prison offences. If he is detained in solitary confinement, it will amount to imposing punishment for the same offence more than once and that would be violative of Article 20(2). (Paras 221, 224 & 228)

(6) The expression "prisoner under sentence of death" can only mean a prisoner whose sentence of death has become final and conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. A sentence of death imposed by Sessions Judge cannot be executed unless it is confirmed by the High Court. The High Court may either confirm the sentence or pass any other sentence or even acquit him. If he is convicted he can appeal to the Supreme Court when Section 415, Cr. P. C., provides for postponement of execution of sentence of death. Further, under Articles 72 and 161 of the Constitution of India, the President and the Governor has the power to grant pardon, reprieve, remittance or commutation of sentence of death. 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 or cellular or separate confinement cannot be imposed beyond the prescribed period under Section 73, I. P. C., and 46(8) of the Prisons Act. As the prisoner is not to be kept in solitary confinement and the custody under Section 30(2) would preclude detention in solitary confine-

ment, there is no question of imposing a second punishment and hence the provision is not violative of Article 20. (Paras 222 to 225)

State of Maharashtra v. *Sindhi alias Raman*, (1975) 1 SCC 647 : 1975 SCC (Cri) 283 : (1975) 3 SCR 574 *and Shaik Abdul Azeez* v. *State of Karnataka*, (1977) 2 SCC 485 : 1977 SCC (Cri) 378 : (1977) 3 SCR 393, *followed*.

(7) The challenge under Article 21, must also fail on the interpretation given to Section 30(2). Personal liberty of a person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Section 30(2) of the Prisoners Act establishes the procedure by which it can be curtailed but it must be read as interpreted above. The word 'law'' in the expression 'procedure established by law' in Article 21 means a law which is right, just and fair and not arbitrary, fanciful or oppressive. Once section 30(2) is read down its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law. (Paras 226 to 228)

Kharak Singh v. *State of U. P.*, (1964) 1 SCR 332, 347 : AIR 1963 SC 1295 and *D. B. Patnaik* v. *State of A. P.*, (1975) 3 SCC 185 : (1975) 2 SCR 24, *R. C. Cooper* v. *Union of India*, (1970) 1 SCC 248 : (1971) 1 SCR 512 and *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, *followed*.

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27 and *Munn* v. *Illinois*, 94 U. S. 113, 142 (1877) *referred to*.

(8) Classification, according to the sentence for the security purposes, is vaild, and, therefore, Section 30(2) does not violate Article 14. (Para 229)

Halsbury's Laws of England, 3rd ed. Vol. 30, para 1151, *referred to*

(9) On the interpretation given to Section 30(2) as read down, the restriction is not unreasonable. The restriction is imposed keeping in view the safety of the prisoner and the prison security and it is not violative of Article 19. (Para 229)

Per Krishna Iyer, J.

Condemned prisoners like the petitioner shall bemerely kept in custody and shall not be put to work like those sentenced to rigorour imprisonment. These prisoners shall not be kept apart or segregated except on their own volition since they do not come under Section 30(2) of the Prisons Act. They shall be entitled to the amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic or otherwise, and normal clothing and bed. In a sense, they stand better than ordinary prisoners because they are not serving any term of rigorous imprisonment, as such. However, if their gregarious wishes induce them to live in fellowship and work like other prisoners they should be allowed to do so. To eat together, to sleep together, to work together, to live together, generally speaking, cannot be denied to them except on specific grounds warranting such a course such as homosexual tendencies, diseases, violent proclivities and the like. But if these grounds are to be the basis for revocation of advantages to the

prejudice of the sentencee he should be given a brief hearing in essential compliance with the principles of natural justice. (Para 120)

The jurisdictional reach and range of the Supreme Court's writ to hold prison caprice and cruelty in constitutional leash is uncontestable, but teasing intrusion into administrative discretion is legal anathema, absent breaches of constitutional rights or prescribed procedures. Prisoners have enforceable liberties devalued may be but not demonetized; and under our basic scheme, prison power must bow before judge power if fundamental freedoms are in jeopardy. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's fundamental rights, if flouted, frowned upon or frozen by the prison authority. (Paras 4 & 52)

(1) Section 30 is constitutionally valid read humanistically by interpretation. It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. This provision is out of tune with current penological values and should be revised by fresh legislation. The present prison manuals are mostly callous colonial compilations and their copies are not available to the prisoners. Punishments, in civilized societies must not degrade human dignity or wound flesh and spirit. The cardinal sentencing goal is correctional changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practices de-humanising techniques, it is wasteful, counter-productive and irrational, hovering on the hostile brink of unreasonableness under Article 19, nor can torture tactics jump the constitutional gauntlet by wearing a preventive purpose. (Paras 1 to 33, 39 and 197A)

R. L. Arora v. *State of U. P.*, (1964) 6 SCR 784 : AIR 1964 SC 1230, *followed.*

(2) Solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 for prisoners under sentence of death. The contention that solitary confinement is a compassionate measure to protect the prisoner lest he be killed or kill himself is absurd. Such persons have no motive to commit suicide or further commit murder within the jail. The contention is not based on any relevant statistical study. The contention that the confinement is not 'solitary' but 'statutory' authorised by Section 30(2), Prisons Act, and Section 366(2), Cr. P. C., must also be rejected. It will be a stullification of judicial power, if, under guise of using Section 30(2), the Superintendent inflicts what is substantially solitary confinement which is a species of punishment within the jurisdiction of the criminal Court. The Penal Code and Cr. P. C. regard *punitive* solitude too harsh and the Legislature cannot be intended to permit *preventive* solitary confinement, released even from the restrictions of Sections 73 and 74, IPC and Section 29, Prisons Act and the restrictive Prison Rules. (Paras 66 to 70, 87, 88, 197A)

Under Section 366(2), Cr. P. C., the Court passing the sentence of death shall commit the convicted person to jail custody under a warrant. This 'safe keeping' in jail custody is the limited jurisdiction of the jailor and the convict is *not sentenced to imprisonment.* But it is legal under that section to separate such prisoners from the rest of the prison community during hours when prisoners are generally locked in. A special watch day or night

of such prisoners by guards is also valid. Infraction of privacy may be inevitable but guards must concede minimum privacy in practice.
(Paras 101, 103 & 197A)

The phrase 'to be confined in a cell' does not mean a *solitary* cell, and 'apart from all other prisoners' only connotes that in cell a where there are a plurality of inmates the death sentencee will have to be kept separated from the rest in the same cell but not too close to others, and under a guard. The word 'shall' in this disciplinary context means 'shall be liable to'. The sub-section, understood in the correct setting, plainly excludes any trace of severity and merely provides for a protective distance being maintained between the prisoner under death sentence and other prisoners, although they are accommodated in the same cell and are allowed to communicate with each other, eat together, see each other for all other practical purposes and continue community life. The sub-section relates to separation without isolation, keeping apart without close confinement. (Para 107)

(3) More importantly, if the prisoner desires loneliness for reflection and remorse, for prayers and making peace with his maker, or opportunities for meeting family or friends, such facilities shall be liberally granted. Having regard to the stressfull spell of terrestrial farewell his soul may be passing through the compassion society owes to him whose life it takes.
(Para 197-A)

(4) The crucial holding under Section 30(2) is that a prisoner is *not* 'under sentence of death' even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is *not* 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, *so long as* an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if Supreme Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he *is* 'under sentence of death', even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means "to be under a finally executable death sentence".
(Paras 113 118 & 197-A)

(5) Further restraint, however, on such a condemned prisonet would be valid if clear and present danger of violence or likely violation of custody is, for good reasons, made out with due regard to the rules of fairplay implied in natural justice. (Para 197-A)

E **Prisons Act, 1894 — Section 56 — Imposition of bar fetters arbitrarily and without sufficient and imperative cause will offend Articles 14, 19 and 21 — Discretion must be exercised on an objective assessment of the facts relating to safe custody — Reasons must be recorded for exercise of such power — Review of such orders essential — Further details of mode of exercise of such power under the Section and the Rules laid down so as to keep Section 56 constitutional — Distinction to be maintained between under-trials and**

prisoners after conviction — Constitution of India, Articles 14, 19 & 21 — Punjab Jail Manual, — Not shown to be authorised and therefore not statutory though yet binding (Paras 69, 399 and 435)

F. **Prisons Act, 1894 — Scope of judicial review of prison administration — Day to day prison administration is beyond judicial review except where there is breach of Constitutional or legal rights and when prison practices are not in keeping with human dignity and basic values**

G. **Administrative Law — Subordinate legislation — Failure to prove in Court the necessary sanction or authority behind an existing rule would deprive the rule of its statutory status though yet binding —Ultravires — Punjab Jail Manual, para 399 held without authority of law in such circumstances (Paras 164 and 234 & 238)**

H. **Constitution of India — Articles 19, 21, 32 & 226 — Burden is on the State to show that the provision prima facie unreasonable is reasonable (Para 72 and 226)**

The petitioner, Sobraj, has been in custody since 1976 having been arrested in a hotel along with three foreign criminal companions. His Interpol dossier is stated to be terrible and his exploits include jail break and grave crimes. He was in continuous and indeterminate detention since July, 1976, partly under the Maintenance of Internal Security Act and currently as an under-trial facing serious charges including murder. He had been continuously subjected to torturesome bar fetters for twenty four hours every day of the month, for nearly two years. In a petition under Article 32 he complained against the persistence of bar fetters notwithstanding the the wounds on his heels and medical advice. The respondent-State defended the bar fetters under Section 56 of the Prisons Act, 1894. That section provides "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 local government, so confine them". This court on an earlier occasion had directed a little relaxation in the rigour in the bar fetters, but the petitioner's complaint is that he continues to be fettered by such bar fetters.

The Supreme Court

Held:

Per Chandrachud, C. J. and Fazal Ali, Shinghal and Desai, JJ.

(1) Bar fetters, to a very considerable extent, curtail, if not, wholly, deprive locomotion which is one of the facets of personal liberty. (Para 234)

(2) Paragraph 399(3) of the Punjab Jail Manual provides that special precaution should be taken for the safe custody of dangerous prisoners, which, inter-alia, includes putting them under fetters, if necessary. This paragraph is not a statutory rule referable either to Section 59 or 60 of the

Prisons Act. But the power under Section 56 is not unbridled, because, in the context of Paragraph 399, special precautions have to be taken for the safe custody of dangerous prisoners and that paragraph, though not statutory, is binding on the Superintendent. (Paras 232, 234, 237 & 238)

(3) Section 56 shows that the Superintendent may put a prisoner in bar fetters—(*a*) when he considers it necessary; (*b*) with reference either to the state of the prison or character of a prisoner, and (*c*) for the safe custody of a prisoner. The Superintendent has first to be satisfied about the necessity of putting a prisoner in bar fetters and 'necessity' is certainly opposed to a 'mere expediency'. The power given under Section 56 can be exercised only for reasons and considerations which are germane to the objective of the statute, namely, safe custody of the prisoner which takes in considerations regarding the character and propensities of the prisoner. The determination of the necessity to put a prisoner in bar fetters must be relatable to the character of the prisoner and the safe custody of the prisoner. These and similar considerations bear direct nexus with the safe custody of the prisoners as they are aimed primarily at preventing their escape. The determination of the necessity to put a prisoner in bar fetters has to be made after application of mind to the peculiar and special characteristics of each individual prisoner. The nature and length of sentence of the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question. Ordinary routine reasons cannot be sufficient for putting a prisoner in bar fetters. The reasons have to be fully recorded in the Suprintendent's journal and the prisoner's history ticket, and this will narrow the discretionary powers conferred on the Superintendent. These reasons must be recorded in the language of the prisoner so as to make the next safeguard effective, namely, a revision petition to the Inspector General of Prisons. The Superintendent has to remove the fetters imposed for the security as soon as he is of the opinion that this can be done with safety. For this purpose, the Superintendent will have to review the case of the prisoner at regular and frequent intervals for ascertaining whether the fetters can be removed consistently with the requirements of safety. Thus, the section contains a number of safeguards against the misuse of bar fetters by the Superintendent, and hence, it cannot be described as arbitrary so as to be violative of Article 14. (Paras 236 and 238)

(4) It may be that in view of the provisions in Paragraphs 426 and 427 of the Jail Manual, bar fetters may be put on a prisoner on irrelevant and extraneous considerations such as length of sentence or number of convictions. But since such considerations are irrelevant it would be illegal, the only relevant considerations being the character, antecedents and propensities of the prisoner. The legislative policy behind the section is clear and discernible and the guidelines prescribed by it have the effect of limiting the application of the provisions to a particular category of prisoners.
(Paras 239 and 240)

(5) However, the court cannot be oblivious to the fact that the treatment of the human beings which offends human dignity, imposes avoidable torture and reduces the man to a level of beast would certainly be arbitrary and can be questioned under Article 14. Putting bar fetters for an unusually long period, without due regard of the safety of the prisoner and the security of the prison would certainly be not justified under Section 56.

Particularly, it would be so when the medical opinion is that bar fetters should be removed. (Para 24)

Since the bar fetters of the petitioner have been removed, as a result of an interim order of the Court the question of re-imposing them would not arise until and unless the requirements delineated above and safeguards provided are observed. (Para 241)

Jagmohan Singh v. *State of U. P.*, (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169, *followed*.

Per Krishna Iyer, J.

(1) Section 56 is also valid humanistically read by interpretation. The section must be tamed and trimmed by the rule of law and shall not turn dangerous by making the prison 'brass' an *imperium in imperio*. Instructions in the Jail Manual are not freed to have any legal sanction. The Superintendent's power shall be pruned and his discretion bridled in the manner indicated below. (Paras 153, 162 and 197-B)

American Cases and Indian literature on bar fetters *referred to*.

(2) Under-trials shall be deemed to be in custody, but not undergoing punitive imprisonment. So much so, they shall be accorded more relaxed conditions than convicts. (Para 197-B)

(3) Fetters, especially bar fetters, shall be shunned as violative of human dignity, within and without prisons. The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in a small category of cases dealt with next below. Reckless handcuffiing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture. (Para 197-B)

(4) Where an undertrial has a credible tendency for violence and escape, a humanely graduated degree of 'iron' restraint is permissible if—only if—other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law. (Para 197-B)

(5) The 'iron' regimen shall in no case go beyond the intervals, conditions and maxims laid down for punitive 'irons'. They shall be for short spells, light and never applied if sores exist. (Para 197-B)

(6) The discretion to impose 'irons' is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security. (Para 197-B)

(7) A previous hearing, minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. (Para 197-B)

(8) The grounds for 'fetters' shall be given to the victim. And when the decision to fetters is made, the reasons shall be recorded in the journal and in the history-ticket of the prisoner in the State language. If he is a stranger to that language it shall be communicated to him, as far as possible, in his language. This applies to cases as much of prison punishment as of 'safety' fetters. (Para 197-B)

(9) Absent provision for review of preventive and punitive action, for discipline or security, such action shall be invalid as arbitrary and unfair and unreasonable. The prison officials will then be liable civilly and criminally for hurt to the person of the prisoner. The State will urgently set up or strengthen the necessary infrastructure and process in this behalf—it already exists in embryo in the Act. (Para 197-B)

(10) Legal aid shall be given to prisoners to seek justice from prison authorities, and, if need be, to challenge the decision in court—in cases where they are too poor to secure on their own. If lawyer's services are not given, the decisional process becomes unfair and unreasonable, especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. Article 19 will be violated in such a case as the process will be unreasonable. Article 21 will be infringed since the procedure is unfair and is arbitrary. (Para 197-B)

(11) No 'fetters' shall continue beyond day time as nocturnal fetters on locked-in detenus are ordinarily uncalled for, viewed from considerations of safety. (Para 197-B)

(12) The prolonged continuance of 'irons', as a punitive or preventive steps, shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who shall briefly hear the victim and record reasons. They are ex-officio visitors of most central prisons. (Para 197-B)

(13) The Inspector General of Prisons shall, with quick despatch consider revision petition by fettered prisoners and direct the continuance or discontinuation of the irons. In the absence of such prompt decision, the fetters shall be deemed to have been negativated and shall be removed. (Para 197-B)

VPS/3983/CR

Advocates who appeared in this case :

Y. S. Chitale, Senior Advocate (amicus curiae), *Randhir Jain*, *M. Mudgal* and *G. K. B. Chowdhury*, Advocates, with him), for the Petitioner in W. P. 2202 of 1977;

Dr. N. M. Ghatate, *S. V. Deshpande*, *Sumitra Bannerjee and M. K. D. Namboodiry*, Advocates, for the Petitioner in W. P. 565 of 1977;

Sole J. Sorabjee, Additional Solicitor-General (*K. N. Bhatt*, *R. N. Sachtey* and *Girish Chandra*, Advocates, with him), for the Respondent in W. P. 2202 of 1977;

Soli J. Sorabjee, Additional Solicitor-General (*E. C. Agarwala* and *Girish Chandra*, Advocates, with him), for the Respondent in W. P. 565 of 1977;

V. M. Tarkunde, Senior Advocate (*P. H. Parekh*, Advocate, with him), for the Intervener in W. P. 565 of 1977.

The following Judgments of the Court were delivered by :

KRISHNA IYER, J. (*concurring*).—The province of prison justice, the conceptualization of freedom behind bars and the role of judicial power as constitutional sentinel in a prison setting, are of the gravest moment in a world of escalating torture by the minions of State, and in India, where this virgin area of jurisprudence is becoming painfully relevant. Therefore,

explicative length has been the result; and so it is that, with all my reverence for and concurrence with my learned brethren on the jurisdictional and jurisprudential basics they have indicated, I have preferred to plough a lonely furrow.

The core-questions

2. One important interrogation lies at the root of these twin writ petitions: Does a prison setting, *ipso facto*, out-law the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement, and (to change the metaphor) if there is no total eclipse, what luscent segment is open for judicial justice? Three inter-related problems project themselves: (*i*) a juridictional dilemma between 'hands off prisons' and 'take over jail administration', (*ii*) a constitutional conflict between detentional security and inmate liberties and (*iii*) the rule of processual and substantive reasonableness in stopping brutal jail conditions. In such basic situations, pragmatic sensitivity, belighted by the preamble to the Constitution and balancing the vulnerability of 'caged' humans to state torment and the prospect of escape or internal disorder, should be the course for the court to navigate.

3. I proceed to lay bare the broad facts, critically examine the legal contentions and resolve the vital controversy which has profound impact on our value system Freedom *is* what Freedom *does*—to the lest and the least—*Antyodaya*.

The paramount Law: Prison discipline and judicial oversight

4. Two petitioners—Batra and Sobraj—one Indian and the other French, one under death sentence and the other facing grave charges, share in two different shapes, the slings and arrows of incarceratory fortune, but instead of submitting to what they describe as shocking jail injustice, challenge, by separate writ petitions, such traumatic treatment as illegal. The soul of these twin litigations is the question, in spiritual terms, whether the prison system has a conscience in constitutional terms, whether a prisoner, *ipso facto* forfeits personhood to become a rightless slave of the State and, in cultural terms, whether man-management of prison society can operate its arts by 'zoological strategies'. The grievance of Batra, sentenced to death by the Delhi Sessions Court, is against *de facto* solitary confinement, pending his appeal, without *de jure* sanction. And the complaint of Sobraj is against the distressing disablement, by bar fetters, of men behind bars especially of undertrials, and *that* for unlimited duration, on the *ipse dixit* of the prison 'brass'. The petitioners seek to use the rule of law to force open the iron gates of Tihar Jail where they are now lodged, and the Prison Administration resists judicial action, in intra-mural matters as forbidden ground, relying on Section 30 and 56 of Prisons Act, 1894 (the Act, hereafter). The petitioners invoke Articles 14, 21 (and 19, in the case of Batra) of the Constitution. The jurisdictional reach and range of this Court's writ to hold prison caprice and cruelty in constitutional leash is incontestable, but teasing intrusion into administrative discretion is legal anathema, absent breaches of constitutional rights or prescribed procedures. Prisoners have enforceable liberties devalued may be but not demonetized; and under our basic scheme, Prison Power must bow before Judge Power if fundamental freedoms are in jeopardy. The principle is settled, as some American decisions have neatly put it.

The matter of internal management of prisons or correctional

institutions is vested in and rests with the heads of those institutions operating under statutory authority and their acts and administration of prison discipline and overall operation of the institution are not subject to court supervision or control absent most unusual circumstances or absent a violation of a constitutional right.[1]

But Corwin notes[2]:

> Federal courts have intensified their oversight of State penal facilities, reflecting a heightened concern with the extent to which the ills that plague so-called correctional institution—overcrowding, understaffing, unsanitary facilities, brutality, constant fear of violence, lack of adequate medical and mental health care, poor food service, intrusive correspondence restrictions, inhumane isolation, segregation, inadequate or nonexistent rehabilitative and/or educational programs, deficient recreational opportunities—violate the Eighth Amendment ban on "cruel and unusual punishments.

5. The 'hands-off' doctrine is based on the fallacious foundation stated in 1871 in *Ruffin* v. *Commonwealth*[3]:

> He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being, the slave of the State.

During the century that followed, the American courts have whittled away at the doctrine and firstly declared in *Jordan*[4] that when the responsible prison authorities . . . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene promptly to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.

6. In *Coffin* v. *Reichard*[5], the court was persuaded to intervene when, while lawfully in custody a prisoner is deprived of some right, the loss of which makes his imprisonment more burdensome than the law permits:

> When a man possesses a substantial right, the Courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of *habeas corpus* to protect his other inherent rights.

7. In *John* v. *Dys**, the Court again held it preferable "that a potentially dangerous individual be set free than the least degree of impairment of an individual's basic constitutional rights be permitted". Thus, the constitutionality of imprisonment, its duration, and conditions can be validly tested by means of *habeas corpus*.

8. The harshest blow to the old 'hands-off' doctrine was struck by *Monroe* v. *Pane*[6]:

1. *Donnel Douglas* v. *Maurice H. Sigler*, 386 Fed. Rep. 2d 684.
2. Supplement to Edward S. Corwin's *The Constitution*, p. 245.
3. 62 Va. (21 Gratt) 790, 796 (1871).
4. *Jordan* v. *Fitzharris*, 257 Fed Supp 674.
5. 143 F 2d 443 (CA 6, 1944) Cert denied, 325 US 887 (1945).
* *Ed.* citation missing in certified copy.
6. 365 US 167 : 5 L Ed 2d 492 (1961).

Where the court insisted on "civilized standards of human decency" and interdicted the subhuman condition which could only *serve to destroy completely the spirit and undermine the sanity of the prisoner.*

9. By 1975, the United States Supreme Court sustained the indubitable proposition that constitutional rights did not desert convicts but dwindled in scope. A few sharp passages from *Eve Pell*[7] opinions and some telling observations from *Charles Wolff*[8] nail the argument that prisoners are non-persons.

10. Mr. Justice Stewart, who delivered the opinion of the Court in *Eve Pell* observed :

Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to correction officials in their attempt to serve these interests are relevant in gauging the validity of the regulation.

11. Mr. Justice Douglas, in his dissenting view, stated "prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been *constitutionally curtailed by procedures that satisfy all the requirements of due process*". (emphasis added).

12. In the later case of *Charles Wolff*, the court made emphatic statements driving home the same point. For instance, Mr. Justice White, who spoke for the Court, observed :

Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a retraction justified by the considerations underlying our penal system. But though his rights may be diminished by environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. *There is no iron curtain drawn between the Constitution and the prisons of this country.* ... In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

13. Mr. Justice Marshall expressed himself explicitly :

I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the court's holding that the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection.

14. Mr. Justice Douglas, again a dissenter, asserted :

Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. *Conviction of a crime does not render one a non-person whose rights are subject to the whim of the* prison administration, and therefore, *the imposition of any serious punishment within the prison system*

7. 417 US 817 : 41 L Ed 2d 495 (1974) 8. 41 L Ed 2d 935 (1974)

requires procedural safeguards. Of course, a hearing need not be held before a prisoner is subjected to some minor deprivation, such as an evening's loss of television privileges. ***Placement in solitary confinement, however, is not in that category.***

15. I may now crystallise this legal discussion. Disciplinary autonomy, in the hands of mayhem-happy jail staffers, may harry human rights and the wails from behind the high walls will not easily break through the sound-proof, sight-proof barrier to awaken the judges' writ jurisdiction. So, it follows that activist legal aid as a pipeline to carry to the court the breaches of prisoners' basic rights is a radical humanist concomitant of the rule of prison law. And in our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinals on the *qui-vive*, courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons.

16. If judicial realism is not to be jettisoned, judicial activism must censor the argument of unaccountable prison autonomy.

17. 'Dangerousness' as a cover for police and prison atrocities is not unusual, as a recent judicial enquiry by Mr. Justice Ismail in a Tamil Nadu prison indicates :

> The black hole of Calcutta is not a historical past but a present reality. The Report finds the detenus were *deliberately lodged* in the ninth block which was previously occupied by leprosy prisoners.
>
> On the night of February 2, "there were brutal, merciless and savage beatings of the detenus in the ninth block" ; earlier in the afternoon, the Chief Head Warder went to the block and noted down the names of the detenus and the cells in which they were locked up. The exercise was undertaken. The Judge finds that "the beating of the detenus that took place on the night of February 2, 1976 was a premeditated, pre-planned and deliberate one and not undertaken on the spur of the moment either *because of any provocation offered by the detenus to go into the cells as contended by the jail officials*".

(Other lurid judicial reports from other States also have appeared.)

18. After all, though the power vests in the Superintendent, it is triggered by the guard. We cannot, without check, permit human freedom to be gouged by jail guards under guise of 'encounters' and 'escape attempts'.

19. Mr. Justice Douglas stressed this aspect in *Wolff* v. *Modonnel*[9] :

> We have made progress since then but the old tradition still lingers. Just recently an entire prison system of one State was held as inhumane ....The lesson to be learned *is that courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates.*
>
> Prisoners often have their privilege revoked, are denied the right of access to counsel, sit in solitary or maximum security or less accrued 'good time' on the basis of a single, unreviewed report of a guard.

9. 41 L Ed 2d 935 at 976 (1974).

> When the Courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison.... the unreviewed discretion granted to the poorly trained personnel who deal directly with prisoners.

20. If wars are too important to be left to the generals, surely prisoners' rights are too precious to be left to the jailors. We must add a *caveat*. Where prison torture is the credible charge and human person the potential casualty, the benefit of scepticism justly belongs to the individual's physical-mental immunity, not to the hyper-sensitivity about safe custody.

Some welcome features: *Community based litigation and participative justice, supportive of democratic legality*:

21. A few special forensic features of the proceedings before us have seminal significance I advert to them *in limine* as helpful factors in the progressive development of the legal process.

22. The essence of this class of litigation is not adjudication on particular grievances of individual prisoners but broad delivery of social justice. It goes beyond mere moral weight-lifting or case-by-case correction but transcends into forensic humanisation of a harsh legal legacy which has for long hidden from judicial view. It is the necessitous task of this Court, when invited appropriately, to adventure even into fresh areas of agony and injustice and to inject humane constitutional ethic into imperial statutory survivals, especially when the (prison) Executive, thirty years after Independence, defends the alleged wrong as right and the Legislatures, whose members, over the decades, are not altogether strangers to the hurtful features of jails, are perhaps pre-occupied with more popular business than concern for the detained derelicts who are a scattered, voiceless, noiseless minority.

23. Although neither of these writ petitions is a *class action* in the strict sense, each is representative of many other similar cases. I think these 'martyr' litigations possess a beneficent potency beyond the individual litigant, and their consideration on the wider representative basis strengthens the rule of law. Class actions, community litigations, representative suits, test cases and public interest proceedings are in advance on our traditional court processes and foster people's vicarious involvement in our justice system with a broad-based concept of *locus standi* so necessary in a democracy where the masses are in many senses weak.

24. Another hopeful processual feature falls for notice. Citizens for Democracy, an organisation operating in the field of human rights, has been allowed to intervene in the *Sobraj* case and, on its behalf, Shri Tarkunde has made legal submissions fuelled by passion for jail reforms. The intervention of social welfare organisations in litigative processes pregnant with wider implications is a healthy mediation between the People and the Rule of Law. Wisely permitted, participative justice, promoted through mass-based organizations and public bodies with special concern seeking to intervene, has a democratic potential for the little men and the law. We have essayed at length the solutions to the issues raised and heard parties *ad libitum* because of their gravity and novelty . . . although a capsulated discussion might make-do. A short cut is a wrong cut where people's justice is at stake.

This Court's role as catalyst of prison justice.

25. It is an unhappy reflection, charged with pessimism and realism, that Governments have come and Governments have gone but the jails

largely manage to preserve the macabre heritage aud ignore the *Mahatma's* message. And *this*, with all the reform bruited about for decades and personal experience of statesmen in State power! The learned Attorney General at a very early stage of one of these cases, and the learned Additional Solicitor General as well as Shri Tarkunde in the course of their submissions, did state that this Court's reformist response to the challenges raised here may go a long way in catalysing those humane changes in the prison laws and practices already high on the national agenda of Government. Disturbing Commission Reports and public proceedings put to shame prison justice and shake people's faith in the firm fighting functionalism of the judicial process. So I have stretched the canvas wide and counsel have copiously helped the Court.

Prison decency and judicial responsibility

26. What penitentiary reforms will promote rapport between current prison practices and constitutional norms? Basic prison decency is an aspect of criminal justice. And the judiciary has a constituency of which prisoners, ordered in by court sentence, are a numbrous part.

27. This vicarious responsibility has induced the Supreme Court of the United States to observe:

> In a series of decisions this Court held that, even though the Governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[10]

27a. *Karuna* is a component or Jail Justice.

27b. *Ex post facto* justification of *prison* cruelty as prevention of disorder and escape is often a dubious allegation. Another factor often forgotten, while justifying harsh treatment of prisoners, is the philosophy of rehabilitation. The basis is that the custodial staff can make a significant contribution by enforcing the rule of prison law and preparing convicts for a law-abiding life after their release—mainstreaming, as it is sometimes called.

28. Mr. Justice Stewart in *Pall* adverted to the twin objectives of imprisonment:

> An important function of the correction system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes, of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of

10. *Shelton* v. *Tucker*, 364 US 479 at 488 (1960). *See* Cherif Bassionni: *Substantive Criminal Law*, p. 115.

these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

29. The benign purpose behind deprivation of freedom of locomotion and expression is habilitation of the criminal into good behaviour, ensuring social defence on his release into the community. This rationale is subverted by torture-some treatment, antagonism and bitterness which spoil the correctional process. 'Fair treatment... will enhance the chance of rehabilitation by reactions to arbitrariness'.[11]

30. Rehabilitation effort as a necessary component of incarceration is part of the Indian criminal justice system as also of the United States. For instance, this correctional attitude has been incorporated as a standard by the National Advisory Commission on Criminal Justice Standards and Goals[12]:

> ...A rehabilitation purpose is or ought to be implicit in every sentence of an offender unless ordered otherwise by the sentencing court.

31. In *Mohammad Giasuddin* v. *State of A.P.*[13] this Court strongly endorsed the importance of the hospital setting and the therapeutic goal of imprisonment:

> 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'. The whole man is a healthy man and every man is born good. Criminality is a curable deviance.... Our prisons should be correctional houses, not cruel iron aching the soul.... This nation cannot—and, if it remembers its incarcerated leaders and freedom fighters—will not but revolutionize the conditions inside that grim little world. We make these persistent observations only to drive home the imperative of Freedom—that its deprivation, by the State, is validated only by a plan to make the sentences more worthy of that birthright. There is a spiritual dimension to the first page of our Constitution which projects into penology.

All this adds up to the important proposition that it is a crime of punishment to further torture a person undergoing imprisonment, as the remedy aggravates the malady and thus ceases to be a reasonable justification for confiscation of personal freedom and is arbitrary because it is blind action not geared to the goal of social defence, which is one of the primary ends of imprisonment. It reverses the process by manufacturing worse animals when they are released into the mainstream of society. Roger G. Lamphear, in a recent study, has quoted a telling letter from a prisoner which makes the poignant point:[14]

> Dear Mrs Stender:
>
> You cannot rehabilitate a man through brutality and disrespect. Regardless of the crime a man may commit, he still is a human being and has feelings. And the main reason most inmates in prison today disrespect their keepers is because they themselves (the inmates) are disrespected and are not treated like human beings. I myself have

11. 33 L Ed 2d, 484 (1972).
12. 61, Pg. 43: Quoted in '*Freedom from Crime*' by Roger Lamphear, J. D. (Nellon Publishing Company).
13. (1977) 3 SCC 287: 1977 SCC (Cri) 496.
14. Roger G. Lamphear: *Freedom From Crime Through* I.M. Sidhi—Progress, pp. 46-47.

witnessed brutal attacks upon inmates and have suffered a few myself, uncalled for. I can understand a guard or guards restraining an inmate if he becomes violent. But many a time this restraining has turned into a brutal beating. Does this type of treatment bring about respect and rehabilitation? No. It only instills hostility and causes alienation toward the prison officials from the inmate or inmates involved.

If you treat a man like an animal, then you must expect him to act like one. For every action, there is a reaction. This is only human nature. And in order for an inmate to act like a human being you must trust him as such. Treating him like an animal will only get negative results from him. You can't spit in his face and expect him to smile and say thank you. I have seen this happen also. There is a large gap between the inmate and prison officials. And it will continue to grow until the prison officials learn that an inmate is no different than them, only in the sense that he has broken a law. He still has feelings, and he's still a human being. And until the big wheels in Sacramento and the personnel inside the prisons start practising rehabilitation, and stop practising zoology, then they can expect continuous chaos and trouble between inmates and officials.

Lawis Moore

32. We must heed the wholesome counsel of the British Royal Commission[15]:

> If the suggestion were that, because of enormity of the crime, murderers ought to be subjected to special rigorous treatment, this would run counter to the "*accepted principle of modern prison administration that imprisonment is itself the penalty and that it is not the function of the prison authorities to add further penalties day by day by punitive conditions of discipline, labour, diet and generarl treatment*".

33. The relevance of the thought that accentuation of injury, beyond imprisonment, may be counter-productive of the therapeutic objective of the penal system will be clear when we test such inflictions on the touchstone of Article 19 and the 'reasonableness' of the action. Indepth application of these seminal aspects may be considered after unfolding the fact-situations in the two cases. Suffice it to say that, so long as judges are invigilators and enforcers of constitutionality and performance auditors of legality, and convicts serve terms in that grim microcosm called prison by the mandate of the court, a continuing institutional responsibility vests in the system to monitor the incarceratory process and prevent security 'excesses'. Jailors are bound by the rule or law and cannot inflict supplementary sentences under disguises or defeat the primary purposes of imprisonment. Additional torture by forced cellular solitude or iron immobilisation—that is the complaint here—stands the peril of being shot down as unreasonable, arbitrary and is perilously near unconstitutionality.

Court's interpretative function when faced with invalidatory alternative

34. Batra puts in issue the constitutionality of Section 30(2) of the Prisons Act, 1894 (the Act, for short) while Sobraj impugns the vires of Section 56. But, the Court does not 'rush in' to demolish provisions where judicial endeavour, amelioratively interpretational, may achieve both constitutionality and compassionate resurrection. This salutary strategy of sustaining the validity of the law and softening its application was, with

15. Royal Commission on Capital Punishment 1949—53 Report, pp. 211-217.

lovely dexterity, adopted by Sri Soli Sorabjee appearing for the State. The semantic technique of updating the living sense of a dated legislation is, in our view, perfectly legitimate, especially when, in a developing country like ours, the *corpus juris* is, in some measure a Raj hang-over.

35. Parenthetically, we may express surprise that, going by the Punjab Jail Manual (1975), the politically notorious Regulation III of 1818 and ban on 'Gandhi cap' still survive in Free India's Corpus Juris, what with all the sound and fury against detention without trial and national homage to Gandhiji.

36 To meet the needs of India today, the imperatives of Independence desiderate a creative role for the Courts in interpretation and application, specially when enactments from the imperial mint govern. Words grow with the world. That is the dynamics of semantics.

36A. Read Dickerson has suggested :[16]

> ... the Courts are at least free from control by original legislatures. Curtis, for one, has contended that consistently with the ascertained meaning of the statute, a court should be able to shake off the dust of the past and plant its feet firmly in the present.
>
> ...The Legislature which passed the statute has adjourned and its members gone home to their constituents or to a long rest from all law making. So why bother about what they intended or what they would have done? Better be prophetic than archaeological, better deal with the future than with the past, better pay a decent respect for a future legislature than stand in awe of one that has folded up its papers and joined its friends at the country club or in the cemetery....
>
> ...Let the Courts deliberate on what the present or a future legislature would do after it had read the court's opinion, after the situation has been explained, after the Court has exhibited the whole fabric of the law into which this particular bit of legislation had to be adjusted.

37. Constitutional deference to the Legislature and the democratic assumption that people's representatives express the wisdom of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provision. That is to say, courts must, with intelligent imagination, inform themselves of the values of the Constitution and, with functional flexibility, explore the meaning of meanings to adopt that construction which humanely constitutionalizes the statute in question. Plainly stated, we must endeavour to interpret the words in Sections 30 and 56 of the Prisons Act and the paragraphs of the Prison Manual in such manner that while the words belong to the old order, the sense radiates the new order. The luminous guideline in *Weems* v. *United States* sets our sights high :[17]

> Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but—its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application

16. *The Interpretation and Application of Statutes*, p. 245.
17. 54 L Ed 793, 801 (1909).

than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it". The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

38. A note in Harvard Law Review[18] commenting on *Weems* v. *United States* urges such a progressive construction:

> The inhibition of the infliction of 'cruel and unusual punishment' first appears in the Bill of Rights of 1680, at a time when the humanity of Judge Jeffreys of Bloody Assizes' fame and of his fellows under the Stuarts, loomed large in the popular mind. ... In the eighth Amendment to the Constitution of the United States the same prohibition is found ... (Courts) have held that whatever is now considered cruel and unusual in fact is forbidden by it. Another difference of interpretation intersects these divergent views and separates the Courts which confine the words to the kind or mode of punishment from those who extend their meaning to include as well its degree or severity. In a recent case concerning such a provision in the Bill of Rights of the Philippine Islands, which has the same meaning as the Eighth Amendment, the Supreme Court of United States, committing itself to the most liberal interpretation, not only held that the clause was concerned with the degree of punishment, but *approved of the extension of its scope to keep pace with the increasing enlightenment of public opinion. (Weems* v. *United States, 217 US 349) It is, indeed, difficult to believe that a law passed in the twentieth century is aimed solely at abuses which became almost, unknown two hundred years before, even though it is an exact transcript of an old Bill.* And excessive punishment may be quite as bad as punishment cruel in its very nature. The fear of judicial intermeddling voiced by one of the dissenting judges seems scarcely warranted, for the power to prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling. *With this limitation, the progressive construction of this clause laid down by this case seems desirable.* (emphasis, added)

39. The jurisprudence of statutory construction, especially when a vigorous break with the past and smooth reconciliation with a radical constitutional value-set are the object, uses the art of reading down and reading wide, as part of interpretational engineering. Judges are the mediators between the societal tenses. This Court in *R. L. Arora* v. *State of Uttar Pradesh*[19] and in a host of other cases, has lent precedential support for this proposition where that process renders a statute constitutional. The learned Additional Solicitor General has urged upon us that the Prisons Act (Sec-

18. (1910-11) 24 Harvard Law Review, 54-55.

19. (1964) 6 SCR 784 : AIR 1964 SC 1230

tions 30 and 56) can be a vehicle of enlightened values if we pour into seemingly fossilized words a freshness of sense.

> It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction.

40. To put the rule beyond doubt, interstitial legislation through interpretation is a life-process of the law and judges are party to it. In the present case we are persuaded to adopt this semantic readjustment so as to obviate a legicidal sequel. A validation-oriented approach becomes the philosophy of statutory construction, as we will presently explain by application.

The two problems and our basic approach

41. The specific questions before us are whether the quasi-solitudinous cellular custody of sorts imposed on Batra is implicit in his death sentence and otherwise valid and, the heavy irons forced on the person of Sobraj still standing his trial comport with our constitutional guarantees qualified and curtailed by the prison environs. Necessarily our perspective has to be humanistic-juristic, becoming the *Karuna* of our Constitution and the international consciousness on human rights.

42. Three quotes set this tone sharply. In the words of Will Durant[20]: 'It is time for all good men to come to the aid of their party, whose name is civilization'. And, more particularised is the observation of Chief Justice Warren E. Burger about what is to be done with an offender once he is convicted, that this is 'one of mankind's unsolved and largely neglected problems'. And Winston Churchill's choice thought and chiselled diction bear repetition:

> The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

And a clinching comment concludes this thought. The White Paper entitled "People in Prison" published by the British Government in November, 1969, articulates profound thought in its concluding paragraph, much less true for India as for the United Kingdom:

> A society that believes in the worth of individual human beings can have the quality of its belief judged, at least in part, by the quality of its prison and probation services and of the resources made available to them.

Batra facts

43. I begin with the critical facts in the first writ petition. Sunil Batra, sentenced to death but struggling to survive, supplicates pathetically that although his appeal against the death sentence still pends he is being subjected to solitary confinement which is contrary to the provisions of the Penal Code, the Criminal Procedure Code, the Prisons Act and Articles 14, 19 and 21 of the Constitution. The Sessions Court of Delhi held him guilty of a gruesome murder compounded with robbery and awarded the capital penalty, way back in January, 1977. Until then, Batra was a B class prisoner

20. Will Durant's Article "*What life has taught Me*" published in Bhawan's Journal, Vol. XXIV, No. 18, April 9, 1978, p. 71 at p. 72.

eligible for amenities which made his confinement bearable and companionable. But once the death penalty was pronounced, the prison superintendent promptly tore him away from fellow humans, stripped him of the B Class facilities and locked him up in a single cell with a small, walled yard attached, beyond the view and voice of others save the jail guards and formal visitors in discharge of their official chores and a few callers once in a blue moon. The prisoner filed an appeal against his conviction and sentence to the High Court, which also heard the reference for confirmation of the death sentence under Section 395 of the Criminal Procedure Code (for short, the Code). In the meanwhile—and it proved a terribly long while—he was warehoused, as it were, in a solitary cell and kept substantially incommunicado.

44. The quasi-solitary confinement was challenged in the High Court, perhaps vaguely (not particularising the constitutional infirmities of Section 30 of the Prisons Act and the Punjab Jail Rules) but was given short shrift by the High Court. The learned Single Judge reasoned :

> The only point for consideration is whether the petitioner can have the facility as demanded by him till the sentence of death is confirmed. By going through all these rules I am of the clear view that he cannot be given the facilities as it might lead to disastrous consequences. It also becomes the function of the State to look to the personal safety of such a condemned prisoner. There is no force in the petition which it hereby dismissed.

The appeal to a division bench was withdrawn and the present writ petition under Article 32 was filed, where the lay prisoner urged his litany of woes and some constitutional generalities, later supplemented by Sri Y. S. Chitale as *amicue curiae*. His lurid lot was pathetically painted by counsel. Grim walls glare at him from all sides night and day; his food is inserted into the room and his excretory needs must be fulfilled within the same space. No pillow to rest his restless head, no light inside, save the bulb that burns blindly through the night from outside. No human face or voice or view except the warder's constant compulsory intrusion into the prisoner's privacy and the routine revolutions of officials' visitations, punctuated by a few regulated visits of permitted relatives or friends, with iron bars and peering warder's presence in between. No exercise except a generous half hour, morning and evening, in a small, walled enclosure from where he may do asanas were he yogi, do meditation were he sanyasi and practise communion with Nature were he Wordsworth or Whitman or break down in speechless sorrow were he but common clay. A few books, yes ; newspapers? No. Talk to others? No ; save echoes of one's own soliloquies ; no sight of others except the stone mercy in pathetic fallacy. This segregation, notwithstanding the prescribed category of visitors permitted and censored letters allowed, argues Sri Chitale, is violation of the primordial gregariousness which, from the beginning of the species, has been man's social milieu and so constitutes a psychic trauma, when prolonged beyond years, too torturesome for tears, even in our ancient land of silent mystics and lonely cavemen. For the great few, solitude sometimes is best society but for the commonalty the wages of awesome seclusion, if spread over long spells, is insanity. For the fevered life of the modern man, more so under the stress of sentence, solitude is terror and cellular vacuum horror. Just think, not of the contemplative saint but of the run-of-the mill mortal. Cage his lonely person and monitor his mind and mood with a sensitive understanding. Then you know that moments bear slow malice ; hours hang heavy with ennui ; days drop dead

and lonely weeks wear a vicious stillness ; for sure, weary months or singleness, with monotonous nights, made more hurtful by the swarms of mosquitoes singing and stinging, and in many cells, by the blood-thirsty armies of bugs, invisibly emerging from nocturnal nowhere, to hide and bite, make for lunacy. Time cries halt and the victim wonders, is death a better deal? Such is the torture and tension of the solitary cell, picturised by counsel.

45. The Tihar Jail is the scene and a glimpse of it is good. Law is not a brooding omnipresence in the sky but a behavioural omnipotence on the earth, a do-don't calculus of principled pragmatism. So, any discussion of prison law problems must be preceded by a feel of the cell and surroundings. For this reason we now set out the inspection notes left by Chief Justice Beg, who visited the 'condemned cell' along with his two brothers on the bench :

> We inspected the cell in which the prisoner was confined. We were relieved to find that conditions there did not correspond to the picture which eloquent arguments of his counsel before us conjured up in our minds. We had been led to believe that the prisoner was kept in some kind of a dungeon with only a small hole through which light could penetrate only when there was enough sunshine.
>
> *It was true that the prisoner was living in a room with a cemented floor and with no bed, furniture, or windows in it. The light came from a ventilator with iron bars on the wall at the back of the room and the wide gate of iron bars in front. The light was, however, enough. It is also true that there was no separate room for the petitioner to take a bath in or to answer calls of nature. But, in this very room, the site of which given on a diagram furnished by the jail authorities, water and sanitary fittings were installed in one corner of the room. In front of the room there was a small verandah with pakka walls and iron gates separating each side of it from a similar verandah in front of an adjoining cell.* The entrance into this verandah was also through a similar iron gate. *The inner room in which the prisoner was confined had also a gate of iron bars.* All gates were with iron bars on frames so that one could see across them through the spaces between the bars. All these gates were locked. *We learnt that the petitioner was able to come into the verandah at cartain times of the day. At that time only he could communicate with other similarly kept prisoners whom he could see and talk to through the iron bars. In other words, for all practical purposes, it was a kind of solitary confinement.*
>
> We did not see a separate guard for each prisoner in the row of cells for prisoners sentenced to death. All these prisoners were certainly segregated and kept apart. But it is difficult to determine, without going into the meaning of 'solitary confinement', as a term of law whether the conditions in which the petitioner was kept amounted to 'solitary confinement'. Probably, *if small windows with iron bars were provided between one cell and another, the prisoners could talk to each other also so that the confinement would no longer be solitary despite the fact that they are kept in separate adjoining cells.*
>
> The petitioner did not complain of any discomfort other than being kept in 'solitary confinement' and being made to sleep on the floor. He asked us to see another part of the prison where undertrials were kept. When we visited that part, we found dormitories provided there for undertrial prisoners who had beds there and their own bedding and clothing. They also had, in that part of the prison, radio sets,

some of which belonged to the prisoners and others to the jail. The under-trials were allowed to mix with each other, play games, or do what they wanted within a compound (emphasis, added).

46. The basic facts bearing upon the condition of the prisoner in his cell are not denied although certain materials have been averred in the counter affidavit to make out that the mental mayhem imputed to the system *vis a vis* the petitioner is wild and invalid.

47. For updating the post-sentence saga of Batra it is necessary to state that the High Court has since upheld the death penalty imposed on him and open to him still is the opportunity to seek leave to appeal under Article 136 and, if finally frustrated in this forensic pursuit, to move for the ultimate alchemy of Presidential commutation under Article 72. The cumulative period from when the Sessions Court sentences to death to when the Supreme Court and the President say 'nay' for his right to life may be considerable as in this very case. From them, if discomfited at all stages and condemned to execution, to when he swings on the rope to reach 'the undiscovered country from whose bourn no traveller returns' is a different, dismal chapter. Keeping these spells of suffering separate, we may approach the poignant issue of quasi-solitary confinement and its legality.

48. Article 21 insists upon procedure established by law before any person can be denuded of his freedom of locomotion. What then is the law relied upon by the State to cut down the liberty of the person to the bare bones of utter isolation? Section 30 of the Prisons Act is pressed into service in answer. The respondent's counter-affidavit alleges, in substantiation of cellular seclusion and deprivation of fellowship, the following facts:

> In fact, I submit that the provisions of Section 30 of the Prisons Act take in all necessary safeguard for the protection of the prisoners sentenced to death which are absolutely necessary in view of the state of mind of such prisoners as well as all the possible circumstances in which these prisoners may indulge in harming themselves or any other criminal activity in their voluntary discretion and in the alternative the possibility of their being harmed by any other prisoner. A prisoner under sentence of death can connive with such prisoners and may thereby succeed in getting some instrument by which he may commit suicide or may be enabled to escape from the jail. Moreover, a prisoner under sentence of death has a very harmful influence on the other prisoners.
>
> In the administration of prisoners in jail, the maximum security measures have to be adopted in respect of the prisoners under sentence of death. As they are highly frustrated lot, they will always be on the look out for an opportunity to over-power the watch and ward guard, and make attempt to escape. It is quite relevant to add that under the existing provisions of Jail Manual, armed guard cannot be posted to guard the prisoners. The Warder guard has to guard them bare-handed. In case the prisoners under sentence of death are allowed to remain outside the cells, then it would be next to impossible for the guard to control them bare handed.
>
> Under the provisions of the new Cr. P. C. the capital punishment is awarded only to the exceptionally few prisoners because now it is the exception rather than rule, and the learned Courts have to record special reasons for awarding the extreme punishment. This implies that the

> prisoners under sentences of death are exceptionally dangerous prisoners, who do require maximum security measures while confined in Jail. Under the existing arrangements in the Jail there can be no substitute to the confinement treatment of such prisoners otherwise than in the cells. After having been awarded the capital punishment the prisoners sentenced to death harbour feelings of hatred against the authorities. If such prisoners are allowed to remain outside the cells, then there is every possibility of incidents of assaults etc. on the fact (*sic*) of such prisoners. . . . If the prisoners sentenced to death are mixed up with other categories of prisoners then the very basic structure of superintendence and management of jails will be greatly jeopardised.
>
> . . . I submit that the provisions of Section 30 of the Prisons Act are absolutely necessary looking to the state of mind of prisoners under sentence of death, the possibility of such prisoners harming themselves or getting harmed by others or escaping in view of the relevant sociological aspects of security relating to the Society in the modern States.

49. These factual-legal submissions deserve examination. When arguments spread out, the learned Additional Solicitor General abandoned some of the extreme stances taken in the State's affidavit and reduced the rigour of the averments by gentler postures.

50. Essentiality, we have to decide whether, as a fact, Batra is being subjected to solitary confinement. We have further to explore whether Section 30 of the Act contemplates some sort of solitary confinement for condemned prisoners and, if it does, that legalizes current prison praxis. We have further to investigate whether such total seclusion, even if covered by Section 30(2) is the correct construction, having regard to the conspectus of the relevant provisions of the Penal Code and Criminal Procedure Code. Finally, we have to pronounce upon the vires of Section 30(2), if it does condemn the death sentences to dismal solitude.

51. The learned Additional Solicitor General made a broad submission that solitary confinement was perfectly constitutional and relied on citations from the American Courts at the lesser levels. Its bearing on the structure of his argument is that if even in a country like the United States where the VIIIth Amendment bans cruel and unusual punishment, the 'solitary' has survived judicial scrutiny, it is *a fortiori* case in India, where there is no constitutional prohibition against cruel and unusual punishment.

52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper*[21] and *Maneka Gandhi*[22], the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. ***Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears***? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by

21. *R. C. Cooper* v. *Union of India*, (1970) 1 SCC 248: (1970) 3 SCR 531.

22. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.

law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life-style within the *carcers*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether. For example, public addresses by prisoners may be put down but talking to fellow prisoners cannot. Vows of silence or taboos on writing poetry or drawing cartoons are violative of Article 19. So also, locomotion may be limited by the needs of imprisonment but binding hand and foot, with hoops of steel, every man or woman sentenced for a term is doing violence to Part III. So Batra pleads that until decapitation he is human and so should not be scotched in mind by draconian cellular insulation nor stripped of the basic fellowship which keeps the spirit flickering before being extinguished by the swinging rope.

53. Is it legal or legicidal to inflict awesome loneliness on a living human? The lesser poser to the prison administration is, what is its authority, beyond bare custody, to wound the condemned men by solitary confinement? Indeed, the Additional Solicitor General, at the threshold, abandoned such an 'extinguishment' stance ambiguously lingering in the State's counter affidavit and argued only for their realistic circumscription, since a prison context affects the colour, content and contour of the freedoms of the legally unfree. The necessary sequitur is that even a person under death sentence has human rights which are non-negotiable and even a dangerous prisoner, standing trial, has basic liberties which cannot be bartered away.

The Cooper effect and the Maneka armour vis-a vis prisons

54. The ratio in *A. K. Gopalan's case*[23], where the Court, by a majority, adopted a restrictive construction and ruled out the play of fundamental rights for anyone under valid detention, was upturned in *R. C. Cooper's case* (supra). In *Maneka Gandhi* (supra), this Court has highlighted this principle in the context of Article 21 itself.

55. And what is 'life' in Article 21? In *Kharak Singh's case* [24], Subba Rao, J. quoted Field, J. in *Munn* v. *Illinois*[25], to emphasise the quality of life covered by Article 21 :

> Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

A dynamic meaning must attach to life and liberty.

56. This court has upheld the right of a prisoner to have his work published if it does not violate prison discipline (*State of Maharashtra* v. *Prabhakar Pandurang*[26]). The martyrdom of *Gopalan* and resurrection by *Cooper* paved the way for *Maneka* where the potent invocation of the rest of

23. 1950 SCR 88 : AIR 1950 SC 27.
24. (1964) 1 SCR 332, 357 : AIR 1963 SC 1295.
25. 94 US 113 (1877).
26. (1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 311 and see *Bhuvan Mohan Patnaik* v. *State of A. P.*, (1975) 3 SCC 185 : (1974) SCC (Cri) 803 (Chandrachud, J.).

Part III, even after one of the rights was validly put out of action, was affirmed in indubitable breadth. So the law is that for a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment. The omens are hopeful for imprisoned humans because they can enchantingly invoke *Maneka* and, in its wake, Articles 14, 19 and even 21, to repel the deadening impact of unconscionable incarceratory inflictions based on some lurid legislative text or untested tradition. As the twin cases unfold the facts, we have to test the contentions of law on this broader basis.

57. 'Prisons are built with stones of law' (sang William Blake) and so, when human rights are hashed behind bars, constitutional justice impeaches such law. In this sense, courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu.

58. I may project, by way of recapitulation, issues in the two cases. Is Batra or any convict condemned to death liable to suffer, by implication, incarceratory sequestration, without specific punishment of solitary confinement, from when the Sessions Judge has pronounced capital sentence until that inordinate yet dreadful interregnum ends when the last court has finally set its seal on his liquidation and the highest executive has signed 'nay' on his plea for clemency? Is prison law, which humiliates the human minima of jail justice, unlaw? Is Batra, strictly speaking, 'under sentence of death' until its executability, and his terrestrial farewell have become irrevocable by the final refusal to commute, by the last court and the highest Executive? Till then, is he entitled to integrity of personalities *viz.* freedom from crippling on body, mind and moral fibre, even while in custody, or is he deemed under Section 30 of the Act to suffer lone imprisonment until cadaverisation?—a qualitative hiatus in approach and impact.

59. I have limned the key questions canvassed on behalf of Batra before us and, if I may forestall my eventual response, Law India stands for life, even the dying man's life and lancets its restorative way into that limbo where languish lonely creatures whose personhood is excoriated even if their execution is unexecutable until further affirmation.

60. In the next case we have Sobraj, an undertrial prisoner kept indefinitely under bar fetters, as a security risk, arguing against the constitutionality of this obvious torture, sought to be justified by the State under the prison law as safety procedure. The two cases have a certain ideological kinship. The jurisprudential watershed between the jail sub-culture under the Raj and criminological consciousness in Free India is marked by the National Charter of January 26, 1950.

61. Bluntly put, are jail-keepers manegerie managers? Are human beings, pulverized into living vegetables, truly deprived of life, the quality of life, or at least of liberty, that limited loop of liberty, the fundamental law, in its basic mercy, offers to the prison community? Are punitive techniques of physio-psychic torture practiced as jail drill, with the trappings of prison rules, constitutional anathema when pressed beyond a point? Every Constitution projects a cultural consciousness and courts must breathe this awareness.

62. A few more variants of these interrogatories may be spelt out. Is solitary confinement or similar stressful alternative, putting the prisoner

beyond the zone of sight and speech and society and wrecking his psyche without decisive prophylactic or penological gains, too discriminatory to be valid under Article 14, too unreasonable to be intra vires Article 19 and too terrible to qualify for being human *law* under Article 21? If the penal law merely permits safe custody of a 'condemned' sentencee, so as to ensure his instant availability for execution with all the legal rituals on the appointed day, is not the hurtful severity of hermetic insulation during that tragic gap between the first judgment and the fall of the pall, under guise of a prison regulation, beyond prison power?

63. This epitome, expressed tartly, lays bare the human heart of the problem debated with elaborate legal erudition and compassion at the Bar.

64. These are critical problems which symbolize the appeal to higher values, and inspired by this lofty spirit, counsel have argued. I must, right at the outset, render our need of appreciation for the industry and illumination brought in by Shri Y. S. Chitale, *amicus curiae*, as he pressed these points of grave portent and legal moment. So am I beholden to Shri Soli Sorabjee, the Additional Solicitor General, who has displayed commendable candour and benign detachment from his brief and shown zealous concern to advance the rights of man, even 'condemned' man, against the primitive drills behind the 'iron curtain' sanctified by literal legality. The Prison Manual is no Bible. This shared radical humanism at the bar has narrowed the area of dispute and reduced the constitutional tension, and this has made my task easy.

65. Right now we will examine some of the fallacies in the counter-affidavit filed by the State. This will help us judge the resonableness or otherwise, the arbitrariness or otherwise, and the processual fairness or otherwise of the prescription of the *de facto* solitary confinement, especially where the Court has not awarded such a sentence and the Jail Superintendent has read it into Section 30(2).

65A. A prefatory clarification will melt the mist of obscurity in the approach of the State. Many a murderer is a good man before and after the crime and commits it for the first and last time under circumstantial crises which rarely repeat. Some murderers are even noble souls, patriotic rebels, or self-less sacrificers for larger, sometimes misguided, causes. Not an unusual phenomenon is the spectacle of persons in the death row being political or social dissenters, sensitive revolutionaries, national heroes, coloured people, socio-economic pariahs or victims of fabricated evidence. Brutus and Bhagat Singh plus some proletarians, blockheads and blackguards! And this powerful realisation has driven many countries to abolish death penalty and our own to narrow the area of this extreme infliction by judicial compassion and executive clemency. Against this contemporary current of penological humanity, it is presumptuous to impose upon this court, without convincing back-up research, the preposterous proposition that death sentencees, often reflective in their terminal chapter and sicklied over by the pale cast of thought, are homicidal or suicidal beasts and must therefore be kept in solitary confinement.

> . . . the evidence given to us in the countries we visited and the information we received from others, were uniformly to the effect that murderers are no more likely than any other prisoners to commit acts of violence against officers or fellow prisoners or to attempt escape; on

> the contrary it would appear that in all countries murderers are, on the whole better behaved than most prisoners....[27]

Political coups, so frequent in our times, put 'murderers' in power who would otherwise have been executed. To universalise is to be unveracious when validation is founded on habituated hunch, not authentic investigation.

66. Once we set our sights clear, we see a string of non-sequiturs in the necked assertions of the State and an encore of the folklore of 'dangerousness' surrounding human sentenced to death! The burden of the song, strangely enough, is that solitary confinement is a compassionate measure to protect the prisoner lest he be killed or kill himself or form a mutual aid society with other condemned prisoners for *hara kiri*! Community life for a death sentencee, the social psychology of the Jail Superintendent has convinced him to swear, is a grave risk to himself. So, solitary segregation! The ingenious plea in the counter-affidavit is like asserting not only that grapes are sour but that sloes are sweet. Not only is group life bad for him because he may murder but 'solitary' is a blessing for him because otherwise he may be murdered! To swear that a solitary cell is the only barricade against the condemned man being killed or his killing others is straining credulity to snapping point. Why should he kill or be killed? Most murderers are first offenders and often are like their fellowmen once the explosive stress and pressure of motivation are released. Are there prison studies of psychic perversions or lethal precedents probabilising the homicidal or suicidal proclivities of death sentences, beyond the non-medical jail superintendent's *ipse dixit*?

67. We are dealing with men under sentence of death whose cases pend in appeal or before the clemency jurisdiction of Governor or President. Such men, unless mad, have no motive to commit suicide or further murder within the jail. If they mean to take their life themselves why plead in appeal or for commutation? The very legal struggle to escape death sentence strongly suggests they want to cling to dear life. Dostoevsky[28] once said that if, in the last moment before being executed, a man, however brave, were given the alternative of spending the rest of his numbered days on the top of a bare rock, with only enough space to sit on it, he would choose it with relief.

68. The instinct of self-preservation is so inalienable from biological beings that the easy oath of the Jail Superintendent that condemned prisoners are prone to commit suicide if given the facility looks too recondite to commend credibility.

69. Likewise, the facile statement that men in the death row are so desperate that they will commit more murders if facility offers itself lacks rational appeal. It is a certainty that a man in the death row who has invited that fate by one murder and is striving to save himself from the gallows by frantic forensic proceedings and mercy petitions is not likely to make his hanging certain by committing any murder within the prison. A franker attitude might well have been for the Superintendent to swear that prison praxis handed down from the British rule has been this and no fresh orientation to the prison staff or re-writing of the Jail manual having

27. *Royal Commission on Capital Punishment*, 1949-1953 Report, pp. 216-217.
28. L. M. Hiranandani, *The Sentence of Death*, The illustrated Weekly of India, Aug. 29, Sept. 4, p. 8.

taken place, the Past has persisted into the Present and he is an innocent agent of this inherited incarceration ethos.

70. Nothing is averred to validate the near-strangulation of the slender liberty of locomotion inside a prison, barring vague generalities. The seat of crime is ordinarily explosive tension, as stressologists have substantiated and the award of death sentence as against life sentence turns on a plurality of imponderables. Indeed, not infrequently on the same or similar facts judges disagree on the award of death sentence. If the trial Court awards death sentence the Jail Superintendent holds him dangerous enough to be cribbed day and night. If the High Court converts it to a life term the convict, according to prison masters, must undergo a change of heart and become sociable, and if the Supreme Court enhances the sentence he reverts to wild life. Too absurd to be good! To find a substantial difference in prison treatment between the two—'lifers' and 'condemned' convicts—is to infer violent conduct or suicidal tendency based on the fluctuating sentence alone, for which no expert testimony is forthcoming. On the other hand, the 'solitary' hardens the criminal, makes him desperate and breaks his spirit or makes him break out of there regardless of risk. In short, it is counter-productive.

71. A few quotes from a recent American study on prisons, hammer home the negativity of the 'solitary'. The "hole", or solitary confinement, is often referred to as an "Adjustment Center" (AC). Here is one man's memory of it from San Quentin prison in California.[29]

> When I first saw it, I just couldn't believe it. It was a dungeon. Nothing but cement and filth. I could not imagine who have lived in there before me. All day I just sat there on my bunk, in a sort of daze, staring at my new abode,.....
>
> ... Instead of bed spring there was a flat steel plate (which is the same throughout the Hole); the window was cemented up, except for the very top section, which was one quarter the standard size, and without any glass panes, thus exposing the occupant to all kinds of weather (the rain would actually come through, into the cell); there was no shelving whatsoever—not so much as a hook to hang a towel or clothes on (and it was against the regulations to fix up a clothes line; so anyone who did so, did it at the risk of being beefed). In short, there was nothing; just four walls, and room enough to take five paces—not strides—from one end of the cell to the other. Nothing to break the monotony of cement except the usual graffiti. The window was too high for a view of anything but the roof of the wing next door. It was truly a dungeon; a tomb; a crypt And it was "Home" for twenty four hours a day, every day.

One prisoner wrote :[30]

> I swear I want to cry sometimes when I look at some of the older prisoners who have been in prison so long that they hold conversations with people who aren't there and blink their sad eyes once every four or five minutes.

29. Roger G. Lamphear: Freedom From Crime through the T. M. Sidhi Program, pp. 128-129.
30. *Ibid.* pp. 131-132.

> ... All I can do at this stage of the game is to look at my older brothers of oppression and wonder if this will be me 15 or 20 years from now. Can I hold on? Will I last? Will I someday hold conversations with ghosts?
>
> ... I have seen cats leave here twice as hostile, twice as confused, twice as anti-social than they were when they entered. Depleted of nearly all of them mental justices, they are "thrown back" into society where they are expected to function like normal human beings. And then society wonders why recidivism is so high in the country; why a man serves five or ten years in prison only to go out and commit the same act again.
>
> They seem to fall apart emotionally and mentally;
>
> To say that I became a nervous and paranoid wreck would be understatement. My mother would end up crying every time she came to see me, because of my nervousness, which caused my hands to shake, and I had developed a sty in my right eye.

72. When handling the inner dynamics of human action, we must be informed of the basic factor of human psychology that "Nature abhors a vacuum; and man is a social animal". (Spinoza). In such an area we must expect Brandies briefs backed by opinions of specialists on prison tensions, of stressologists on the etiology of crime and of psychiatrists who have focussed attention on behaviour when fear of death oppresses their patients. A mere administrative officer's deposition about the behavioral maybe of men under contingent sentence of death cannot weigh with us when the limited liberties of expression and locomotion of prisoners are sought to be unreasonably pared down or virtually wiped out by oppressive cell insulation. No medical or psychiatric opinion or record of jail events as a pointer, is produced to prove, even prima facie, that this substantial negation of gregarious jail life is *reasonable*. Where total deprivation of the truncated liberty of prisoner's locomotion is challenged the validatory burden is on the State.

73. The next fallacy in the counter-affidavit is that if the murder is monstrous deserving death sentence the murderer is a constant monster manifesting continued dangerousness. Does this stand to reason? A woman who coldly poisons all her crying children to death to elope with a paramour may be guilty of maniacal murder and, perhaps, may be awarded death sentence. But is she, for that reason, a dangerously violent animal? Other diabolical killings deserving death penalty but involving no violence, in special social settings, may be visited with life term, though the offender is a ghastly murderer. Imagine how the respondent's test of behavioral violence breaks down where death sentence is demolished by a higher court for the reason it has been on his head for years or he is too young or too old, or commuted by the President for non-legal yet relevant considerations as in the case of patriotic terrorists. The confusion between sentencing criteria and blood-thirsty prison behaviour is possible to understand but not to accept.

74. Having dealt with some of the untenable positions taken by the affiant, I move on to a consideration of the torture content of solitary confinement. The Batra treatment is little short of solitary confinement.

This inclination persuaded the court to make the interim direction on May 5, 1978:

> We direct that until further orders of this Court the petitioner Sunil Batra will not be kept in 'confinement' as contemplated by Section 30(2) of the Prisons Act, 1894. Reasons to follow.

74-A. Even so, from a larger angle, it becomes necessary to explain why a sensitized perspective repels judicial condonation of solitary confinement of sorts. What is solitary confinement, experientially, juristically, and humanistically understood? At the close of this consideration, a legal definition of solitary confinement may be given to the extent necessary in this case.

75. American high-security prisons, reportedly with their toughs, tantrums and tensions, may not help comparison except minimally. Even so, the Additional Solicitor General drew our attention to observations of the U.S. Court of Appeals decisions affirming segregated confinement in maximum security prisons. His point was autonomy for the Jail administration in matters of internal discipline, especially where inmates were apt to be

> threat to themselves, to others, or to the safety and security of the institution. Such a policy is perfectly proper and lawful and its administration requires the highest degree of expertise in the discretionary function of balancing the security of the prison with fairness to the individual confined. In the case at bar the record reveals that appellant's confinement in segregation is the result of the considered judgment of the prison authorities and is not arbitrary.[31]

In the specific cases cited the facts disclose some justification for insulation.

> Appellant has indeed, been in segregation for a protracted period, continuously for more than two years prior to the present hearing. However, his record during these separate periods when he was allowed confinement "within the population" of a prison reflects a history of participation, directly or indirectly, in conduct of extreme violence. Although his conduct in segregation has since been entirely satisfactory the trial Court was manifestly correct in determining that appellant has been denied no constitutional right and that the determination of whether appellant presently should be considered a threat to others or the safety or security of the penitentiary is a matter for administrative decision and not the courts.

76. But, in our cases, no record revealing balancing of considerations or compelling segregation or murderous in-prison violence save that he is potentially 'under death sentence', is shown. To be mindless is to be cruel and that is reflex action of the jail bosses when prisoners are routinely sent to the solitary cell on hunch or less. Alleging chances of killing or being killed as the alibi for awarding 'solitary' is an easy 'security' phobia which shows little appreciation of the suffering so heaped. And abuse is undetected and indiscriminate in that walled world within the world.

> Commenting on solitary cellular confinement, Pandit Nehru observes that the gaol department add to the sentence of the court an additional and very terrible punishment, so far as adults and even boys accused of

31. *Kannath Grahm* v. *J. T. Willingham,* 384 F 2d 367.

revolutionary activities are concerned. Over-zealous prison administrators in the past have contributed not a little to the disrepute and unpopularity of the Government by making reckless use of this on political offenders or detenus.[32]

The great Judge Warren, C.J. in *Trop.* v. *Dulles*[33] refers to the condemnation of segregation and observes:

> This condemnation of segregation is the experience years ago of people going stir-crazy, especially in segregation.

77. That compassionate novelist, Charles Dickens, in his '*American Notes and Pictures from Italy*' describes the congealing cruelty of 'solitary confinement' in a Pennsylvania Penitentiary (p. 99):

> I am persuaded that those who devised this system of prison discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creatures. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface and it extorts few cries that human ears can hear; therefore, I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself whether, if I had the power of saying "Yes" or "No", I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day, or lie down upon bed at night, with the consciousness that one human creature, for any length of time, no matter what lay suffering this unknown punishment in his silent cell, and I the cause or I consenting to it in the least degree.

78. Viewing cellular isolation from a human angle, that literary genius, Oscar Wilde, who crossed the path of the criminal law, was thrown into prison and wrote De Profundis, has poetized in prose, with pessimism and realism, the lonely poignancy of the iron infirmary. I quote:

> A great river of life flows between me and a date so distant. Hardly, if at all, can you see across so wide a waste...suffering is one very long moment. We cannot divide it by seasons. We can only record its moods, and chronicle their return. With us time itself does not progress. It revolves. It seems to circle round one centre of pain. The paralysing immobility of a life every circumstance of which is regulated....according to the inflexible laws of an iron formula: this immobile quality, that makes each dreadful day in the very minutest detail

32. B. K. Bhattacharya: *Prisons*, p. 111
33. 356 US 86: 2 L Ed 2d 630 (1958). *See* Leonard Orland; *Justice, Punishment, Treatment*, p. 297.

like its brother, seems to communicate itself to those external forces the very essence of whose existence is ceaseless change.

....For us there is only one season, the season of sorrow. The very sun and moon seem taken from us. Outside, the day may be blue and gold, but the flight that creeps down through the thickly-muffled glass of the small iron-barred window beneath which one sits is grey and niggard. It is always twilight in one's cell, as it is always twilight in one's heart. And in the sphere of thought, no less than in the sphere of time, motion is no more.

And Shri Jawaharlal Nehru has recorded in his Autobiography in the Thirties :[34]

Some individuals, sentenced for revolutionary activities for life or long terms of imprisonment, are often kept in solitary confinement for long period.... But in the case of these persons—usually young boys—they are kept alone although their behaviour in gaol might be exemplary. Thus an additional and very terrible punishment is added by the Gaol Department to the sentence of the Court, without any reason therefor. This seems very extraordinary and hardly in confirmity with any rule of law. Solitary confinement, even for a short period, is a most painful affair, for it to be prolonged for years is a terrible thing. It means the slow and continuous deterioration of the mind, till it begins to border on insanity; and the appearance of a look of vacancy, or a frightened animal type of expression. It is killing of the spirit by degrees, the slow vivisection of the soul. Even if a man survives it, he becomes abnormal and an absolute misfit in the world.

79. Much has been said in the course of the argument about the humanism imparted by interviews and letters. Nehru wrote about the Naini Prison, which retains its relevance for many prisons even today, speaking generally :

Interviews are only permitted once in three months, and so are letters—a monstrously long period. Even so, many prisoners cannot take advantage of them. If they are illiterate, as most are, they have to rely on some gaol official to write on their behalf; and the latter, not being keen on adding to his other work, usually avoids it. Or, if a letter is written, the address is not properly given and the letter does not reach. Interviews are still more difficult. Almost invariably they depend on a gratification for some good official. Often prisoners are transferred to different gaols, and their people cannot trace them. I have met many prisoners who had lost complete touch with their families for years, and did not know what had happened. Interviews, when they do take place after three months or more are most extraordinary. A number of prisoners and their interviewers are placed together on either side of a barrier, and they all try to talk simultaneously. There is a great deal of shouting at each other, and the slight human touch that might have come from the interview is entirely absent.

80. The curse of the system is, in Nehru's words :

Not the least effort is made to consider the prisoner as an individual, a human being, and to improve or look after his mind. The one thing

34. Jawaharlal Nehru, *An Autobiography*, p. 222.

the UP administration excels is in keeping its prisoners. There are remarkably few attempts to escape, and I doubt if one in ten thousand succeeds in escaping.

81. A sad commentary on the die-hard 'solitary' in some Indian Jails is gleaned from a recent book, *"My Years in an Indian Prison—Mary Tyler"* (Victor Gallantz Ltd., London 1977). The author, a young British, Mary Tyler, was in a female ward, kept solitary as a naxalite, and deported eventually. She writes :

> By ten o'clock that morning I found myself locked in a room fifteen feet square and completely bare except for a small earthen pitcher and three tattered, coarse, dark grey blankets stiff with the grease and sweat of several generations of prisoners, which I folded to make a pallet on the stone floor. My cell formed one corner of the dormitory building and looked out on to a yard at the end of the compound farthest from the gate. The two outer walls were open to the elements ; instead of windows, there were three four-foot wide openings barred from the floor to a height of eight feet. The door was fastened with a long iron bolt and heavy padlock ; the walls, covered in patchy whitewash, were pock-marked high and low with holes of long-removed nails. In one corner a rickety waist-high wooden gate concealed a latrine, a niche with raised floor, in the centre of which was an oblong slit directly over a cracked earthen tub. My latrine jutted out adjacent to the one serving the dormitory where the rest of the women prisoners slept. The open drains from both these latrines and Kalpana's ran past the two outer walls of my cell, filling the hot nights with a stench that made me wretch. The crevices between the broken concrete and crumbling brickwork of the drains were the breeding grounds of countless flies and giant mosquitoes that, as if by mutual prearrangements, performed alternate day and night shifts in my cell to disturb my sleep and rest.
>
> My first few days in 'solitary' were spent as in a dream, punctuated only by the Chief Head Warder's morning and evening rounds to check the lock, the bustling appearance of the matine bringing food and water, or the wardress fumbling with her keys to unlock me to clean my teeth and baths.
>
> During the daytime, the key to the gate of the female ward was in the custody of a 'duty-warder', one of the hundred and fifty warders in the jail. He was responsible for opening the gate to admit convicts bringing food, the doctor or other persons on essential business. Administration of the jail was in the hands of a staff of Assistant Jailors and clerks, subordinate to the jailor who had overall responsibility for the day-to-day running of the prison. He was answerable to the most exalted personage in the jail hierarchy, the Superintendent.
>
> His unpredictable temper and behaviour were a source of as much exasperation to his subordinates as to ourselves. He demonstrated his authority by reversing his previous instructions so many times that in the end nobody was really sure what he wanted. The jail staff operated by by-passing him as much as possible so as not to get caught out if he happened to change his mind.

82. Judicial opinion across the Atlantic, has veered to the view that it is near-insanity to inflict prolonged solitary segregation upon prisoners. And

the British System has bid farewell to solitary confinement as a punishment. I refer to these contemporary developments not to hold on their basis but to get a feel of this jail within a jail. Without empathy, decision-making may be futility.

83. It is fair to state that Shri Soli Sorabjee, expressed himself for jail reform and his heart was with those whose limited liberty was hamstrung, although, he pleaded strenuously that the reformist goal could be reached by reading new meaning without voiding the provision. So he tried to tone down the acerbity of the isolation imposed on Batra by calling it statutory segregation, not solitary confinement. But, as will be later revealed, the former hides the harshness verbally but retains the sting virtually. Presbyter is priest writ large.

84. A host of criminological specialists has consistently viewed with consternation the imposition of solitary confinement punitively—and, obviously, preventive segregation stands on a worse footing since it does not have even a disciplinary veneer. I may, with eclectic brevity, quote from the wealth of juristic erudition presented to us by Shri Chitale in support of his thesis that forced human segregation, whatever its label, is a barbaric cruelty which has outlived its utility and the assumption that condemned prisoners or lifers are dangerously violent is a facile fiction.

> One main thrust, however, of the congregate school came on the issue of the effects of constant and unrelieved isolation of prisoners. It was unnatural, the New York camp insisted, to leave man in solitary, day after day, year after year; indeed, it was not unnatural that it bred insanity.[35]
>
> Harlow and Harlow (1962) have conducted experiments with species closely related to human beings. Of special interest are the variables involved in the causation of psycho-pathological syndromes in man. In measuring the relation between social environment and social development, Harlow reports that the most constant and dramatic finding is that social isolation represents the most destructive abnormal environment. As this isolation progresses from partial to total, the severity of impairment increases, ranging from schizoid-like postures to depressive-type postures.[36]
>
> Eloquent testimony to man's need for belonging, acceptance, and approval is provided by the experience of small groups of scientists, officers, and enlisted personnel who voluntarily subjected themselves to isolated antarctic living for the better part of a year (Robrer, 1961). During this period troublesome individuals were occasionally given the "silent treatment" in which a man would be ignored by the group as if he did not exist. This 'isolation' procedure resulted in a syndrome called the 'long eye', characterized by varying combinations of sleeplessness, outbursts of crying, hallucinations, a deterioration in habits of personal hygiene, and tendency for the man to move aimlessly about or to lie in his bunk staring into space. These symptoms cleared up when he was again accepted by and permitted to interact with others in the group.[37]

35. David, J. Rotman: *Historical perspectives; Justice, Punishment Treatment* by Leonard Oraland, 1973, p. 144.
36. *Psychiatry and the Urban Setting—Comprehensive Text Book of Psychiatry*-II 2nd Ed. Vol. II (1976) by A. M. Freedman, Harlod I. Kaplan, Benjamin, J. Sedock, p. 2503.
37. James C. Coleman—*Abnormal Psychology and Modern Life*, p. 105.

> The use of the dark or isolation cell—the hangover of the medieval dungeon—known in prison parlance as 'Klondika', is probably the most universally used prison punishment in the history of American penology....
>
> Some prisoners are kept in these gloomy places for months. What to do with a rebellious prisoner bedevils all wardens, but a sustained sojourn in a punishment cell is not the answer. The excessive use of Klondika is a grim example of what is known to students of corrections as 'dead end' penology. Resorting to it for long periods of time is an illustration of total lack of imagination and outmoded prison administration, all too current in most of our prisons even today.
>
> Not much different from the dark or isolation cell is the 'segregation' block or ward. In this isolated part of the prison an inmate may be placed because he is 'uncooperative', is considered dangerous or a bad influence, or for some other reason arrived at by the warden or his deputy in charge of custody.[38]
>
> A much more recent case which bids well to become a *cause celebre*, is that of Robert Stroud who has spent approximately the same period of time in 'segregation' in the federal prisons of Leavenworth and Alcatraz. Stroud was first sent to prison when he was nineteen for killing a man in Alaska in 1909. While in the Leavenworth prison he killed a guard in the dining room for which he was sentenced to be hanged. This sentence was commuted to life by President Woodrow Wilson. While in prison in 'segregated cell', Stroud became an expert in disease of birds and is alleged to have become a world-wide authority in this field.[39]
>
> Regarded as a rational method of treatment, cellular confinement is a curious monument of human perversity. That it should have been established shows the absolute ignorance of criminal nature which existed at the time; that it should still persist shows the present necessity for a widespread popular knowledge of these matters. It may be possible to learn to ride on a wooden horse, or to swim on a table, but the solitary cell does not provide even wooden substitute for the harmonising influence of honest society.[40]

Criminological jurists like Dr. Bhattacharya, who was also judge of the Calcutta High Court, take the view that cellular or separate confinement deserves to be condemned:

> Many penologists in India take exception to the solitary confinement rule. It is hard to differentiate between this as a mode of judicial punishment and by way of a jail punishment for the results are equally disastrous to the physical and mental health of those subjected to them.[41]

85. Yahya Ali, J., in 1947, long before our constitutional charter came into being, had expressed himself strongly against 'solitary confinement' and

38. Harry Elmer Barnes and Negley K. Testers—*New Horizons in Criminology*, 3rd Ed. pp. 351-352.
39. *Royal Commission on Capital Punishment*, 1949—1953 *Report*, pp. 216-217.
40. Havelock Ellis, *The Criminal*, 5th Edn. 1941, p. 327.
41. B. K. Bhattacharya: *Prisons*, p. 117.

we feel more strongly about it and against it. Our humane order must reject 'solitary confinement' as horrendous. The learned Judge observed[42]:

> Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence. The only reason given by the Magistrate is that the 'sanctity of home life has become to him (the appellant) a mere mockery and the desire to take what he wants regardless of ownership is not in him'. This can be said of every person convicted under Section 379, Penal Code and I do not consider that to be circumstances justifying the passing of an order of solitary confinement. The direction regarding solitary confinement will be deleted.
>
> As regards the sentence relating to solitary confinement the attention of the Magistrate is invited to my judgment in Criminal Appeal 114 of 1947. As pointed out in that judgment although the imposition of the sentence of solitary confinement was legal, under the Larceny Act of 1861 (24 and 25 Vict. Ch. 96) the power was very rarely exercised by a criminal Court. By enacting 56 and 57 Vict. Ch. 54, on September 22, 1893 the provisions in Larceny Act relating to solitary confinement which had become obsolete for several decades by that date were formally repealed. A century of experience has thus led to its abandonment in the United Kingdom and at the present day it stands condemned and has generally given place to work in association during the day and confinement in cell for the night, in cases where isolation at night is considered necessary for a brief time for particular prisoners and exclusively for the maintenance of prison discipline. Although in the medieval times under the influence of the ecclesiastics it was considered that cellular confinement was a means of promoting reflection and penitence, it came since to be realised that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement and as a form of torture it fails in its effect on the public. It must, therefore, so long as it is part of the Indian Penal Code, be administered, if ever in the most exceptional cases of unparallelled atrocity or brutality.

86. The Law Commission of India in its 42nd Report took the view that solitary confinement was "out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court". Some ambivalent observation that such treatment may perhaps be necessary as a measure of jail discipline has been made without any special supportive reasons as to why such a penological horror as long solitary confinement should be allowed to survive after death. (*Sic*) Probably, all that was meant by the Commission was that, for very short spells and under ameliorative conditions, the 'solitary' may be kept alive as a disciplinary step.

87. The propositions of law canvassed in Batra's case turn on what is solitary confinement as a punishment and what is non-punitive custodial isolation of a prisoner awaiting execution. And secondly, if what is inflicted is, in effect, 'solitary', does Section 30(2) of the Act authorise it, and, if it does, is such a rigorous regimen constitutional. In one sense, these questions are pushed to the background, because Batra's submission is that he is not 'under sentence of death' within the scope of Section 30 until the Supreme Court has affirmed and Presidential mercy has dried up by a final 'nay'.

42. AIR 1947 Mad 381(1) and AIR 1947 Mad 386(1).

Batra has been sentenced to death by the Sessions Court The sentence has since been confirmed, but the appeal for Presidential commutation are ordinarily precedent to the hangman's lethal move, and remain to be gone through. His contention is that solitary confinement is a separate substantive punishment of maddening severity prescribed by Section 73 of the Indian Penal Code which can be imposed only by the Court; and so tormenting is this sentence that even the socially less sensitive Penal Code of 1860 has interposed, in its cruel tenderness, intervals, maxima and like softening features in both Sections 73 and 74. Such being the penal situation, it is argued that the incarceratory insulation inflicted by the Prison Superintendent on the petitioner is virtual solitary confinement unauthorised by the Penal Code and, therefore, illegal. Admittedly, no solitary confinement has been awarded to Batra. So, if he is *de facto* so confined it is illegal. Nor does a sentence of death under Section 53, I. P. C. carry with it a supplementary secret clause of solitary confinement. What warrant then exists for solitary confinement on Batra? None. The answer offered is that he is not under solitary confinement. He is under 'statutory confinement' under the authority of Section 30(2) of the Prisons Act read with Section 366 (2) Cr. P. C., 1973. It will be a stultification of judicial power if, under guise of using Section 30(2) of the Prisons Act, the Superintendent inflicts what is substantially solitary confinement which is a species of punishment exclusively within the jurisdiction of the criminal court. We hold, without hesitation, that Sunil Batra shall not be solitarily confined. Can he be segregated from view and voice and visits and commingling, by resort to Section 30(2) of the Prisons Act and reach the same result? To give the answer we must examine the essentials of solitary confinement to distinguish it from being 'confined in a cell apart from all other prisoners'.

88. If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy but a working technique of justice. The Penal Code and the Criminal Procedure Code regard *punitive* solitude too harsh and the Legislature cannot be intended to permit *preventive* solitary confinement, released even from the restrictions of Sections 73 and 74, I. P. C., Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Commonsense quarrels with such nonsense.

89. For a fuller comprehension of the legal provisions and their construction we may have to quote the relevant sections and thereafter make a laboratory dissection thereof to get an understanding of the components which make up the legislative sanction for semi-solitary detention of Shri Batra. Section 30 of the Prisons Act rules:

> 30. (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 Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent 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 by night under charge of a guard.

This falls in Chapter V relating to discipline of prisoners and has to be read in that context. Any separate confinement contemplated in Section 30 (2) has this disciplinary limitation as we will presently see. If we pull to pieces the whole provision it becomes clear that Section 30 can be applied only to a prisoner "under sentence of death". Section 30(2) which speaks of "such" prisoners necessarily relates to prisoners *under sentence of death.* We have to discover when we can designate a prisoner as one *under sentence of death.*

90. The next attempt is to discern the meaning of confinement "in a cell apart from all other prisoners". The purpose is to maintain discipline and discipline is to avoid disorder, fight and other untoward incidents, if apprehended.

91. Confinement inside a prison does not necessarily import cellular isolation. Segregation of one person all alone in a single cell is solitary confinement. That is a separate *punishment* which the Court alone can impose. It would be a subversion of this statutory provision (Sections 73 and 74 I. P. C.) to impart a meaning to Section 30(2) of the Prisons Act whereby a disciplinary variant of solitary confinement can be clamped down on a prisoner, although no court has awarded such a punishment, by a mere construction, which clothes an executive officer, who happens to be the governor of the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone, the power being discretionary and disciplinary.

92. Indeed, in a jail, cells are ordinarily occupied by more than one inmate and community life inside dormitories and cells is common. Therefore, "to be confined in a cell" does not compel us to the conclusion that the confinement should be in a solitary cell.

93. "Apart from all other prisoners" used in Section 30(2) is also a phrase of flexible import. 'Apart' has the sense of 'To one side, aside, ...apart from each other, separately in action of function' (Shorter Oxford English Dictionary). Segregation into an isolated cell is not warranted by the word. All that it connotes is that in a cell where there are a plurality of inmates the death sentencee will have to be kept separated from the rest in the same cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge of a guard by day and by night. The guard will thus stand in between the several inmates and the condemned prisoner. Such a meaning preserves the disciplinary purpose and avoids punitive harshness. Viewed functionally, the separation is authorised, not obligated. That is to say, if discipline needs it the authority shall be entitled to and the prisoner shall be liable to separate keeping within the same cell as explained above. "Shall" means, in this disciplinary context, "shall be liable to". If the condemned prisoner is docile and needs the attention of fellow-prisoners nothing forbids the jailor from giving him that facility.

94. When we move on to Chaptar XI we come across Prison Offences which are listed in Section 45. Section 46 deals with punishment for such offences. We reproduce the relevant portion:

> 46. The Superintendent may examine any person touching any such offence, and determine thereupon and punish such offence by....
> .....

(6) imposition of handcuffs of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the Governor General in Council;

(7) imposition of fetters of such pattern and weight, in such manner and for such period, as may be prescribed by the rules made by Governor General in Council;

(8) separate confinement for any period not exceeding three months:

Explanation.—Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from sight of other prisoners, and allows him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners;

. . . . . .

(10) cellular confinement for any period not exceeding fourteen days:

Provided that, after such period of cellular confinement an interval of not less duration than such period must elapse before the prisoner is again sentenced to cellular or solitary confinement:

Explanation.—Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of other prisoners.

95. Sub-section (6) and (7) relate to "irons" and have relevance to the Sobraj case which we will presently deal with. Sub-section (8) speaks of "separate confinement" for any period *not exceeding three months.* There is a further explanation which to some extent softens the seclusion. It obligates the authority not to keep the prisoner "*from sight of other prisoners*" and allows him not less than one hour's exercise per diem and *to have his meals in association with other prisoners.* Thus it is clear that even if a grave prison offence has been committed, the punishment does not carry segregated cellular existence and permits life in association in mess and exercise, in view and voice but not in communication with other prisoners. Moreover, punitive separate confinement shall not exceed three months and Section 47 interdicts the combination of cellular confinement and "separate confinement" so as not to exceed together the periods specified there. It is useful to mention that "cellular confinement" is a stricter punishment than saparate confinement and it cannot exceed 14 days because of its rigour. It entirely excludes a prisoner from communication with other prisoners but it shall not exclude a prisoner from sight of other prisoners.

96. Solitary confinement has the severest sting and is awardable *only* by Court. To island a human being, to keep him incommunicado from his fellows is the story of the Andamans under the British, of Napoleon in St. Helena! The anguish of aloneness has already been dealt with by me and I hold that Section 30(2) provides no alibi for any form of solitary or separated cellular tenancy for the death sentencee, save to the extent indicated.

97. This study clearly reveals that solitary confinement as a sentence under the Penal Code is the severest. Less severe is cellular confinement under Section 46(10) of the Prisons Act and under Section 46(8). Obviously, disciplinary needs of keeping apart a prisoner do not involve any harsh element of punishment at all. We cannot, therefore, accede to any

argument which will upset the scheme or subvert the scale of severity. Section 30(2), understood in the correct setting, plainly excludes any trace of severity and merely provides for a protective distance being maintained between the prisoner under death sentence and the other prisoners, although they are accommodated in the same cell and are allowed to communicate with each other, eat together, see each other and for all other practical purposes continue community life.

98. An analysis of the provisions of the Penal Code and of the Prisons Act yields the clear inference that Section 30(2) relates to separation without isolation, keeping apart without close confinement. Whatever the name, the consequence of the 'solitary' regime has been maddening :[43]

> So many convicts went mad or died as a consequence of the solitary regime that by the mid-19th century it was generally abandoned...

The 'separate system', the "silent system", the "hole" and other variants possess the same vice. In the present case we are satisfied that what reigns in Tihar for 'condemned' prisoners is sound-proof, sight-proof, society-proof cellular insulation which is a first cousin to solitary confinement.

99. Section 366(2), Cr.P.Code has bearing on this discussion, for it states :

> The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

100. So, the Court awards only a single sentence viz., death. But it cannot be instantly executed because its executability is possible only on confirmation by the High Court. In the meanwhile, he cannot be let loose for he must be available for decapitation when the judicial processes are exhausted. So it is that Section 366(2) takes care of this awesome interregnum by committing the convict to jail custody. Form 40 authorises safe keeping. We may extract the relevant part of the form :

> This is to authorise and require you to receive the said (prisoner's name) into your custody in the said jail, together with this warrant, and him there *safely to keep* until you shall receive the further warrant or order of this Court, carrying into effect the order of the said Court.

101. This 'safe keeping' in jail custody is the limited jurisdiction of the jailor. The convict is *not* sentenced to imprisonment. He is *not* sentenced to solitary confinement. He is a guest in custody, in the safe keeping of the host-jailor until the terminal hour of terrestrial farewell whisks him away to the halter. This is trusteeship in the hands of the Superintendent, not imprisonment in the true sense. Section 366(2) Criminal Procedure Code (Jail Custody) and Form 40 (safely to keep) underscore this concept, reinforced by the absence of a sentence of imprisonment under Section 53, read with Section 73, Indian Penal Code. The inference is inevitable that if the 'condemned' men were harmed by physical or mental torture the law would not tolerate the doing since injury and safety are obvious enemies. And once this qualitative distinction between imprisonment and safe keeping within the prison is grasped, the power of the jailor becomes benign. Batra, and others of his ilk, are entitled to every creature comfort and cultural facility that compassionate safe-keeping implies. Bed and pillow, opportunity to commerce with human kind, worship in shrines, if any, games, books, newspapers, writing material, meeting family members, and all the good

43. Britannica Book of the Year 1975—Events of 1974, p. 567.

things of life, so long as life lasts and prison facilities exist. To distort safe-keeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safe custody does not mean deprivation, isolation, banishment from the Lenten banquet of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near-insanity. May be, the Prison Superintendent has the alibi of prison usage, and may be, he is innocent of the inviolable values of our Constitution. May be, there is something wrong in the professional training and the prison culture. May be, he conceives his mission unwittingly to help God! 'Whom God wishes to destroy, He first makes mad'. For, long segregation lashes the senses until the spirit lapses into the neighbourhood of lunacy. Safe-keeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe keeping. So, Section 366, Cr. P. C. forbids any act which disrupts the man in his body and mind. To preserve his flesh and crush his spirit is not safe keeping, whatever else it be.

102. Neither the Penal Code nor the Criminal Procedure Code lends validity to any action beyond the needs of safety and any other deprivation, whatever the reason, has not the authority of law. Any executive action which spells infraction of the life and liberty of a human being kept in prison precincts, purely for safe custody, is a challenge to the basic notion of the rule of law—unreasonable, unequal, arbitrary and unjust. A death sentencee can no more be denuded of life's amenities than a civil debtor, fine defaulter, maintenance defaulter or contemner—indeed, a gross confusion accounts for this terrible maltreatment.

103. The Prisons Act [Section 30(2)] spells out with specificity the point of departure from ordinary jail custody needed in the case of those 'under sentence of death'. That is to say, they get the same conditions of prison life as other general prisoners, except in two particulars. During hours of cellular confinement, condemned prisoners shall be secluded from others. Dusk to dawn keeping aside is one restriction. Such sentencees shall also be subject to twenty-four hour watch by guards. Both these are understandable restraints in the setting of death sentence as reasonable concomitants of safe custody without inflicting cruelty.

104. To exaggerate security unrealistically is morbidity and, if it is a pervasive malady, deserves psychiatry for the prison administration. In every country, this transformation from cruelty to compassion within jails has found resistance from the echelons and the Great Divide between pre-and-post Constitution penolgy has yet to get into the metabolism of the Prison Services. And so, on the national agenda of prison reform is on-going education for prison staff, humanisation of the profession and recognition of the human rights of the human beings in their keep.

105. In my judgment Section 30(2) does not validate the State's treatment of Batra. To argue that it is not solitary confinement since visitors are allowed, doctors and officials come and a guard stands by, is not to take it out of the category.

106. Since arguments have been addressed, let us enquire what are the vital components of solitary confinement? Absent statutory definition, the indication we have is in the Explanation to Paragraph 510 of the Jail Manual:

> Solitary confinement means such confinement with or without

labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

107. The hard core of such confinement is (*a*) seclusion of the prisoner, (*b*) from sight of *other prisoners*, and (*c*) *from* communication with *other prisoners*. To see a fellow being is a solace to the soul. Communication with one's own kind is a balm to the aching spirit. Denial of both, with complete segregation superimposed, is the journey to insanity. To test whether a certain type of segregation is, in Indian terms, solitary confinement, we have merely to verify whether interdict on sight and communication with *other prisoners* is imposed. It is no use providing view of or conversation with jail visitors, jail officers or stray relations. The crux of the matter is communication with *other prisoners* in full view. Bed fellows in misery have heartloads to unload and real coversation between them has a healing effect. Now that we have an Indian conceptualisation of solitary confinement in the Prison Manual itself, lexical exercises, decisional erudition from other countries and lagomachic niceties with reference to law dictionaries are supererogatory. Even the backward psychiatry of the Jail Manual considers continuation of such confinement as "likely to prove injurious to mind or body" or even prone to make the person "permanently unfit to undergo such confinement" [vide paragraph 512(7) and (9) of the Jail Manual].

108. In *Words and Phrases* (Permanent Edn.) solitary confinement as a punishment is regarded as "the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size so arranged that he had no direct intercourse or sight of any human being and no employment or instruction". It is worthwhile comparing the allied but less harsh confinement called "close confinement" which means "such custody, and only such custody as will safely secure the production of the body of the prisoner on the day appointed for his execution".

109. A more practical identification of solitary confinement is what we find in *Black's Law Dictionary*:

> In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailor, in a stricter sense, the complete isolation of a prisoner from all human society and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction.

Complete isolation from all human society is solitary confinement in its stricter sense. The separate confinement of a person with occasional access of other persons is also solitary confinement.

110. The ingenious arguments to keep Batra in solitudinous cell must fail and he shall be given facilities and amenities of common prisoners even before he is *'under sentence of death'*.

111. Is he under sentence of death? *Not yet.*

112. Clearly, there is a sentence of death passed against Batra by the Sessions Court but it is provisional and the question is whether under Section 30(2) the petitioner can be confined in a cell all by himself under a 24-hour guard. The key words which call for humanistic

interpretation are "under sentence of death" and "confined in a cell apart from all other prisoners".

113. A convict is '*under sentence of death*' when, and only when, the capital penalty inexorably operates by the automatic process of the law without any slip between the cup and the lip. Rulings of this Court in *Abdul Azeez* v. *Karnataka*[44] and *D. K. Sharma* v. *M. P. State*[45], though not directly on this point strongly suggest this reasoning to be sound.

114. Section 366 Cr. P. C. has pertinence at this point :

> 366. (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.
>
> (2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

115. So it is clear that the sentence of death is inexecutable until 'confirmed by the High Court'. A self acting sentence of death does not come into existence in view of the impediment contained in Section 366(1) even though the Sessions Court might have pronounced that sentence.

116. I go further. Let us assume that the High Court has confirmed that death sentence or has *de novo* imposed death sentence. Even then, there is quite a likelihood of an appeal to the Supreme Court and the plenary power of the highest court extends to demolition of the death sentence. Naturally, the pendency of the appeal itself inhibits the execution of the sentence. Otherwise, the appellate power will be frustrated, the man executed and the Supreme Court stultified if it upsets the death sentence later. In our view, when an appeal pends against a conviction and sentence in regard to an offence punishable with death sentence, such death sentence even if confirmed by the High Court shall not work itself out until the Supreme Court has pronounced. Section 415 Cr. P. C. produces this result inevitably.

> 415. (1) Where a person is sentenced to death by the High Court and an appeal from the judgment lies to the Supreme Court under sub-clause (*a*) or sub-clause (*b*) of clause (1) of Article 134 of the Constitution, the High Court shall 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.
>
> (2) Where 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 under Article 132 or under sub-clause (*c*) of clause (1) of Article 134 of the Constitution, the High Court shall 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.
>
> (3) Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced

44. (1977) 3 SCR 393: (1977) 2 SCC 485: 1977 SCC (Cri) 378.

45. (1976) 2 SCR 289: (1976) 1 SCC 560: 1976 SCC (Cri) 85.

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.

117. Article 72 and 161 provide for commutation of death sentence even like Sections 433, 434 and 435 Cr. P. C. The rules made under the Prisons Act, taking note of these provisions, provide for a petition for commutation by the prisoner. Rule 547 and Rule 548 framed under the Prisons Act relate to the subject of petitions for mercy:

(*a*) *Rules framed by the Government of India*:

I. Immediately on receipt of a warrant for execution consequent on the confirmation by the High Court of sentence of death, Jail Superintendent shall inform the convict concerned that if he desires to submit a petition for mercy, it should be submitted in writing within seven days of the date of such intimation.

II. If the convict submits a petition within the period of seven days prescribed by Rule I it should be addressed both to the local Government and to the Governor-General in Council, and the Superintendent of Jail shall forthwith despatch it, in duplicate, to the Secretary to the local Government in the Department concerned, together with a covering letter reporting the date fixed for the execution and shall certify that the execution has been stayed pending receipt of the orders of the Governor in Council and the Governor General in Council on the petition if no reply is received within 15 days from the date of the despatch of the petition, the superintendent shall telegraph to the Secretary to the local Government drawing attention to the fact, but he shall in no case carry out the execution before the receipt of the local Government's reply.

118. It follows that during the pendency of a petition for mercy before the State Governor or the President of India the death sentence shall not be executed. Thus, until rejection of the clemency motion by these two high dignitaries it is not possible to predicate that there is a self executory death sentence. Therefore, a prisoner becomes legally subject to a self-working sentence of death only when the clemency application by the prisoner stands rejected. Of course, thereafter Section 30(2) is attracted. A second or a third, a fourth or further application for mercy does not take him out of that category unless there is a specific order by the competent authority staying the execution of the death sentence.

119. The conclusion inevitably follows that Batra, or, for that matter, others like him, cannot be classed as persons "under sentence of death". Therefore, they cannot be confined apart from other prisoners. Nor is he sentenced to rigorous imprisonment and so cannot be forced to do hard labour. He is in custody because the Court has, pending confirmation of the death sentence, commanded the Prison Authority to keep the sentencee in custody. The concrete result may be clearly set out.

120. Condemned prisoners like Batra shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. These prisoners shall not be kept apart or segregated except on their own volition since they do not come under Section 30(2). They shall be entitled

to the amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic or other, and normal clothing and bed. In a sense, they stand better than ordinary prisoners because they are not serving any term of rigorous imprisonment, as such. However, if their gregarious wishes induce them to live in fellowship and work like other prisoners they should be allowed to do so. To eat together, to sleep together, to work together, to live together, generally speaking, cannot be denied to them except on specific grounds warranting such a course, such as homosexual tendencies, diseases, violent proclivities and the like. But if these grounds are to be the basis for revocation of advantages to the prejudice of the sentencee he should be given a hearing in brief in essential compliance with the canons of natural justice.

121. Deference to the erudite efforts of Counsel persuades me, before I part with this topic to refer to an anthology of Anglo-American opinions, judicial and academic, which has been made available to us, to some of which I have made reference. The judges in the United States have had to deal with the issue and before I wind up on the legal implications of solitary confinement I may refer to some of them.

122. Punitive segregation is regarded as too harsh that *it is limited to no more than 8 days except with special approval of the Commissioner of Corrections* in many American States. *The average period for this type of punitive incarceration is five days.* Now note what the U. S. District Court states :[46]

> This punishment is imposed only after a formal written notice, followed by a hearing before the disciplinary committee.

123. The emphasis on limited periods and hearing before punishment have been built into the procedure for punishment of solitary confinement. This is important when we consider whether any form of harsh imprisonment, whether of solitary confinement or of bar fetters, should not comply with natural justice and be severely limited in duration. Preventive solitude and fetters are an *a fortiori* case.

124. An Afro-American citizen Sostre, brought a Civil Rights action in *Sostre* v. *Rockefeller*[47] complaining of solitary confinement otherwise called punitive segregation. The year long stay in that segregation cell was bitter. The sting of the situation was 'human isolation loss of group privileges'. On this Judge held :

> This court finds that punitive segregation under the conditions to which plaintiff was subjected at Green Haven is physically harsh, *destructive of morale, dehumanising in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days.*

125. The decision on punitive segregational confinement in *Sostre* v. *Rockefeller* is of value since the case, as here, is one of indefinite punitive confinement. The Court held that it was so disproportionate that it amounted to cruel and unusual punishment :

> The Court also holds that the totality of the circumstances to which Sostre was subjected for more than a year was cruel and unusual punish-

46. *Justice, Punishment, Treatment* by Leonard Orland, (The Free Press, New York), p. 293.
47. 312 F Suppl 863 (1970).

ment when tested against '*the evolving standards of decency that mark the progress of maturing society*'. (*Trop.* v. *Dulles*).[48]

This condemnation of segregation is the experience years ago of *people going stir crazy*, especially in segregation''. (T. 320) The conditions which undeniably existed in punitive segregation of Green Haven this Court finds, ''*could only serve to destroy completely the spirit and undermine the sanity of the prisoner*'' *Wright* v. *Machmann*, supra, 387 F. 2nd at 526, when imposed for more than fifteen days. *Subjecting a prisoner to the demonstrated risk of the loss of his sanity* as punishment for any offence in prison is plainly cruel and unusual punishment as judged by present standards of decency.

126. What is of considerable interest is the observation on procedural due process which in our country has its counter-part in Article 21, as expounded in *Maneka Gandhi* (supra). The American Judge observed in *Sostre's* case (supra) :

Very recently, the Supreme Court reiterated the firmly established due process principles that where governmental action may seriously injure an individual and the reasonableness of that action depends on fact findings, the *evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. In this connection, *the decision-maker should state the reasons for the determination and indicate the evidence upon which he relied.* Finally, in such cases, the High Court ruled, an *impartial decision-maker is essential*...

The Court holds that *plaintiff was, in effect, 'sentenced' to more than a year in punitive segregation without the minimal procedural drastic punishment upon a prisoner.*

127. There has been considerable emphasis by the Additional Solicitor General on the prison setting in truncating processual justice. The U. S. District Court in *Sostre* had this to say :

The difficult question, as always, is that process was due. In answering that question, we may not uncritically adopt the holdings of decisions that take color from contexts where the shadings are as different from the instant case as the cases we have discussed.

As a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

128. A meaningful passage in the appellate judgment in the same case may be excerpted :

We are not to be understood as disapproving the judgment of n any courts that *our constitutional scheme does not contemplate that society may commit law breakers to the capricious and arbitrary actions of prison officials. If substantial deprivations are to be visited* upon a prisoner, it is wise that *such*

48. 356 US 86, 101 (1958) (Opinion of Warren, C. J.).

action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him.

129. The Supreme Court of the United States in *Wolf* v. *McDonnell*[49] considered the question of due process and prison disciplinary hearing, confrontation and cross-examination and even presence of counsel. Mr. Justice White, speaking for the majority, struck the balance that the due process clause demanded and insisted :

> . . . We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defence. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.
>
> We also hold that there must be a "written statement by the fact-finders as to the evidence relied on and reasons" for the disciplinary action.
>
> Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committees, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline", and are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements. We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in the defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.

130. As to the right to counsel Mr. Justice White felt that then the proceedings may receive an "adversary cast", but proceeded to observe :

> Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or

49. 41 L Ed 2nd 935 (1974).

if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that respondent McDonnell, is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

The learned Judge, however, felt that in situations where Habeas Corpus applications had to be made qualified inmates may be permitted to serve as legal advisers.

131. Mr. Justice Marshall went much farther than the majority and observed :

> . . . by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool.
>
> Time has proved....that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct hearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority.
>
> There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.

As the Chief Justice noted :

> ..fair treatment... will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.
>
> ....We have recognized that an impartial decision-maker is a fundamental requirement of due process in a variety of relevant situations, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board composed of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case.

132. Mr. Justice Douglas, in his dissent, quoted from an earlier case :

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who

> in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination .... This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. The decision as to whether an inmate should be allowed to confront his accusers should not be left to the unchecked and unreviewable discretion of the prison disciplinary board. The argument offered for that result is that the danger of violent response by the inmate against his accusers is great, and that only the prison administrators are in a position to weigh the necessity or secrecy in each case. But it is precisely this unchecked power of prison administration which is the problem that due process safeguards are required to cure. "Not only the principle of judicial review, but the whole scheme of American Government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power....

133. Going the whole length of extending the right to cross-examination, the learned Judge took the view that fair procedure inside prisons is part of a successful rehabilitative programme, and observed :

> The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the Government, not arbitrarily. The opposed procedure will be counterproductive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle (to reintegration) is the concept of a prisoner as a nonperson and the jailor as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules...maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have...

134. The substance of these decisions is that 'a prisoner is not temporarily a slave of the State' and is entitled to the fair process of law before condemnation to solitary confinement. The U. S. Judges generally have refused to accept arbitrary or capricious discipline in jail administration.

> We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the substantial discipline.[50]

135. Another passage from Judge Fainberg in the same case deserves our attention :

> In this Orwellian age, *punishment that endangers sanity no less than physical injury by the strap, is prohibited by the Constitution. Indeed, we have learned to our sorrow in the last few decades that true inhumanity seeks to destroy the psyche rather than merely the body*. The majority opinion emphasizes that after all Sostre could have obtained release from isolation at any time by agreeing to abide by the rules and to cooperate. Perhaps that is so, but that does not change the case.... The possibility of endless solitary

50. *Sostre* v. *Rockefeller*, 312 F Suppl 863 (1970).

confinement is still there, unless the prisoner gives in. The same observation could be made if Sostre were tortured until he so agreed, but no one would argue that torture is therefore permitted. ***The point is that the means used to exact submission must be constitutionally acceptable, and the threat of virtually endless isolation that endangers sanity is not*** (emphasis, added).

136. Quite a few other decisions of this lesser level courts of the United States have been brought to our notice by counsel in an endeavour to validate or invalidate solitary confinement from a constitutional angle. Unless driven to pronounce upon constitutionality we may not go into the question at all. Even so, for a perspicacious understanding of the facets of solitary confinement, its soul or rather its soullessness, I may refer to a few of the cited cases. The Court will stand four square between a prisoner and the methodology of destroying completely the spirit and undermining the sanity of the prisoner in jail. This we do, not because of anything like the Eighth Amendment but because unreasonable restrictions and arbitrary deprivations are abnoxious to Part III, especially Articles 14 and 19, even within the prison setting.

137. The facile submission, 'that the determination as to the methods of dealing with such incorrigible persons is a matter of internal management of State prisons and should be left to the discretion of prison administrators . . . ' is untenable if, within the cell, fundamental concepts of decency do not prevail and barbaric conditions and degrading circumstances do violence to civilised standards of human decency, as the Court pointed out in ***Hancock*** v. ***Avery***. The goals of prison keeping, especially if it is mere safe keeping, can be attained without requiring a prisoner to live in the exacerbated conditions of bare floor solitude.

138. Functionally speaking, the court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system :

> The challenge of prison reform is too compelling for courts to decline to exercise their inherent power to protect the constitutional rights of the incarcerated. Affording such protection demands that courts do more than merely invalidate specific practices; it demands that they confront the institution of prison as a whole. The totality of conditions approach and the purposive model of analysis afford a framework for this confrontation.[51]
>
> Moreover, prison officials may welcome judicial intervention, because it enables them to initiate reforms that are politically and financially costly. Studies have demonstrated that one by-product to totality of conditions in prison cases is that they sensitize both the public and prison officials to the need for prison reform. As a result, progressive and prison authorities and humanitarian citizens' groups are able to take advantage of this increased sensitivity to advocate reform.

The Sobraj case

139. I now switch to the averments in the petition by Sobraj. Chief Justice Beg and his companion Judges including me, it may be right to state here, did incidentally see Sobraj (the other petitioner), standing in chains in the yard, with iron on wrists, iron on ankles, iron on waist and iron to link up, firmly rivetted at appropriate places, all according to rules !

51. *Harvard Civil Rights—Civil Liberties Law Review*, (Vol. 12).

140. The manacled numbers of the Tihar Jail community appear to be alarmingly large and fluctuating, if we go by the averments in the affidavit of the petitioner and the counter-affidavit by the State. In January 1978 according to Sobraj, there were *207 undertrial prisoners* with bar fetters in Tihar Jail and all of them, exception Sobraj, were Indian citizens, all of them belonging to the 'C' Class, which is a poverty sign, and *many of them minors*! We are reminded of what Douglas, J. observed in *Hicks*[52]:

> The wanderer, the pauper, the unemployed—all were deemed to be potential criminals. . . .
>
> I do not see how economic or social status can be made a crime any more than being a drug addict can be.

Even the intervener, Citizens for Democracy, has, with passion but without partisanship, complained that 'over a hundred other prisoners in Tihar Jail are subjected to these inhuman conditions'. The State has controverted the arithmetic but has not refuted the thrust of the submission that a substantial number of undertrial prisoners has suffered aching irons over their anatomy. As against 207 the State admits 'a total of 93 prisoners . . . in bar fetters'. There is no dispute that all but the petitioner were of the 'C' class category, that is, men whose socio-economic lot was weak. The Superintendent of the Central Jail has a case that on January 20, 1978, 'the bar fetters of 41 prisoners were removed'. Likewise, on February 6, 1978, bar fetters of 26 prisoners were removed. The trend of the counter-affidavit is that this Superintendent has taken some ameliorative measures to normalise conditions in the Jail. The discrepancies between the competing statements do not demolish the gravemen of the charge that the 'iron' methodology of keeping discipline has had a somewhat dangerous access into the prison Superintendent's mental kit. If irons must rule the jail community there is jejune justice in our prison campuses. The abolition of irons altogether in some States without calamitous sequel as, e.g. Kerala and Tamil Nadu, is worth mention.

141. Now the Sobraj facts. Sobraj has been in custody since July 6, 1976, having been arrested from Vikram Hotel, along with three criminal companions of British, Australian and French extraction. His interpol dossier is stated to be terrible and his exploits include jail break and grave crime. We merely mention this fact but decline to be deflected by it because it is disputed, although the jail officers cannot be faulted if they are influenced by such information. The Sobraj story, since his arrest in July 1976, is one of continuous and indeterminate detention, partly under the Maintenance of Internal Security Act and currently as an undertrial facing serious charges, including murder. The prisoner challenged the legality of arbitrary 'irons' in the High Court but was greeted with laconic dismissal. The parsimonious words, in which the order was couched, ran:

> This is a petition from jail. In view of the facts the petition is not maintainable. It is dismissed in limine. The petitioner informed of the order.

142. Discomfited Sobraj has moved this Court.

143. The disturbing fact of years of pre-trial imprisonment apart, the agonising aspect, highlighted by Dr. Ghatate for the petitioner and by Shri Tarkunde as intervener, is that until the Court sometime ago directed a

52. 383 US 252 (1966)

little relaxation in the rigour of the 'iron' prescription, Sobraj (and how many submissive sufferers like him there are?) has been continously subjected to the torturesome 'bar fetters', through twenty four hours daily and every day of the month, 'religiously' for nearly two years, what with the kindly presumption of innocence jurisprudentially playing upon him in tragic irony. Sobraj bitterly complains of persistence in bar fetters notwithstanding wounds on heels and medical advice to the contrary. The State defends bar fetters statutorily by Section 56 of the Prisons Act and realistically as preventive medicine for 'dangerousness' pathology, in exercise of the wise discretion of the Jail Superintendent, overseen by the revisory eye of the Inspector General of Prisons and listened to by Jail Visitors. The bar fetter procedure, denounced by counsel as intolerable, is described by the State as inconvenient but not inhumane, evil but inevitable, where the customer is one with dangerous disposition and attainments. It is admitted that Sobraj has been in fetters to inhibit violence and escape.

144. The sorrows of Sobraj cannot be appreciated nor his constitutional claims evaluated without a fuller account of the bar fetter chapter of his jail life. Ever since July 6, 1976, he has been kept in bar fetters, duly welded, all these months without respite through the period of preventive detention and after. We have it on the petitioner's word that no holiday was given to the bar fetter therapy, although the Resident Medical Officer has noted, in the history ticket of the prisoner, entries which are tell-tale ;

> 9-2-1977—multiple infected wounds on right ankles. Bar fetters be removed from right leg for 15 days.
>
> (Sd.) Dr. Mittal, R.M.O.
>
> 9-2-1977—Bar fetters removed from right leg for 15 days on medical advice.
>
> (Sd.) Mukhraja
> Assistant Superintendent of Jails.
>
> (Sd.) Mr. Andhur
> Dy. Superintendent of Jails.
>
> 12-2-1977—Bar fetters also to be removed from left foot.
>
> (Sd.) Dr. Bokra.
>
> 12-2-1977—Fetters be removed from left foot for two weeks, on medical advice.
>
> (Sd.) Mr. Marwa,
> Dy. Superintendent of Jails
> (Respondent 3).
>
> 18-2-1977—He is *desperate and dangerous prisoner, for security reasons it is necessary to keep him in fetters. His wounds may also be dressed* (emphasis added).
>
> (Sd.) Mr. Marwa,
> Dy. Superintendent of Jails
> (Respondent 3).

145. The counter-affidavit of Shri Marwa, the then Superintendent, has taken up an extreme position about which I am sceptical. For instance, he has asserted that the Resident Medical Officer had examined the petitioner

on September 3, 1977, and found no wound on his ankles. Significantly on September 4, 1977, this Superintendent has recorded a note in his journal:

> I was informed by Sri S. S. Lal, A. S., that Charles Sobraj has inflicted injury on his ankles deliberately. I am certain in my mind that he has done so as to be produced before Hon'ble Supreme Court of India on September 6, 1977 in connection with his Writ Petition, wherein he has mentioned that his ankles are injured and thus his bar fetters should be removed.

146. In an endeavour to make out that there was discrimination and recklessness in the imposition of bar fetters, the petitioner has set out two circumstances.

146-A. He has averred:

> It is significant to mention that the undertrial prisoners in the following serious cases who were confined in Tihar Jail were without any fetters:—
>
> (*i*) All undertrial prisoners in Baroda Dynamite case who were also detained under MISA;
>
> (*ii*) All the persons accused in the Hon'ble Chief Justice of India (Shri A. N. Ray's) attempt;
>
> (*iii*) All accused persons in Samastipur Bomb Blast case where the former Railway Minister, Shri L. N. Mishra, was killed;
>
> (*iv*) All accused persons in Vidya Jain murder case; and
>
> (*v*) All accused persons in famous Bank Van Robbery case held at New Delhi.

147. What may have relevance to the criticism of the bar fetters technology running riot in Tihar Jail is another set of circumstances about this high security Jail which was commissioned after Independence (1958).

148. The first is, that a large number of prisoners, a few hundred at times—minors and undertrials too—are shackled day and night for days and months on end by bar fetters—too shocking to contemplate with cultural equanimity. And, this, prima facie, shows up the class character of jail injustice for an incisive sociologist. Practically all these fettered creatures are the poor. Sobraj is the only B class prisoner subjected to fetters, the others being C class people. A cynical but tart observer may comment necessarily violent in Gandhian India but that the better-off are able to buy the class justice current in the 'caste system' behind the bars according to rule, of course. Anyone whose socio-economic level is higher is B class prisoner, undertrial or convict; everyone whose lot is below that line is a C class jailbird who is often deprived of basic amenities and obliged to do hard labour if he is a convict. Poverty cannot be degraded as 'dangerousness' except by subversion of our egalitarian ethos. How come that all the undertrials who are under bar fetters are also from the penurious? This suspiciously, is 'soft' justice syndrome, towards the rich, not social justice response towards the poor.

149. The petitioner has alleged additional facts to paint a para-violent picture of the prison atmosphere and frightening profile of the jail hierarchy. For instance, if I may excerpt the portions of his affidavit:

> In para 630 of the Punjab Jail Manual, which is of 1898, still the punishment of Whipping, paras 628 and 629, is valid and the Jail

Authorities used the said Whipping Rule at their own discretion, that is to say almost daily beating the prisoners and some time beating them up to death as a case which happened in 1971 and went unpunished but for some Jail Officials suspended for an year.

150. Some flagellations and killings are referred to by him which may be skipped. The lurid lines so drawn are blistering commentary on the barbarity of prison regimen even if a fraction of the imputations possesses veracity. A fraction of the facts alleged, if true may warrant the fear that a little Hitler lingers around Tihar precincts.

151. The counter-version on the factual and legal aspects of the Sobraj charges against the Prison Authorities has already been indicated.

152. Right at this stage, I may read Section 56, which is the law relied on to shackle the limited freedom of movement of Sobraj :

> 56. 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 Local Government, so confine them.

153. Before formulating the heads of argument in the Sobraj case it is necessary to state that the respondent, after a vain effort to secure certain pre-Independence government proceedings of the Punjab, now in Pakistani archives, admitted that it could not make good the validating existence of the local government's sanction for the instructions of the Inspector-General of Prisons, as required by Section 56 of the Act, although such an instruction is found in the Jail Manual. Nothing else, which compels judicial notice is available, and so the rule is not shown to be valid. Sobraj's grievance is shocking shackling with bar fetters. Iron on wrists, iron on ankles, iron in between, welded strongly that an oppressive 6 lbs. weight hampers movement, hinders sleep and hurts all the time so much that life is poor purchase. And yet he is in a stage of presumptive innocence and under judicial custody! The basic fact that Sobraj is fettered during the Jail Superintendent's sole discretion is not denied; and he has been enduring this distress for a chronic couple of years with no hope of relief except the unlikely change of heart of the head of the prison. The defence of the State is that high-risk prisoners, even the undertrials, cannot be allowed to bid for escape, and where circumstances justify, any result, oriented measure, including fetters, is legally permissible. It is arguedthat a prison is not a playground and hyper-sensitive reaction to irons may be functional folly, if we realise that custodial security has high prison priority. Dangerous persons, if they are to be produced to answer justice, must suffer indefinite immobilisation, even if painfully inconvenient,—not punitively imposed but preventively clamped down—until the danger lasts.

Rights and Realities

154. Sobraj, in chains, demands constitutional rights for man. For there are several men like him in the same prison, undertrials, indigents, even minors! The official journal allegedly registers the laconic reason for the Jail Superintendent's fiat to impose bar fetters and these 'dangerous' reasons are recorded in ***English*** in the history tickets of the (mostly) 'C' class 'un-English' victims. This voodoo is in compliance with the

formula of the rule and jail visitors' march past. The Inspector-General of Prisons revises, if moved, and the spirit-crushing artifice survives as a technique of jail discipline. Ordinarily, the curtain falls, the groan or moan is hardly heard, the world falls to sleep, the Constitution and the Court sublimely uphold human rights but the cells weep for justice unheard.

155. There is a sad fascination to read Nehru on the Naini Prison which is but a portrait of any Indian prison of those times:

> 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 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. Like automatons they pass their days each exactly like the other, and have few sensations; except one — fear! From time to time the prisoner's body is weighed and measured. But how is one to weigh the mind and the spirit which wilt and stunt themselves and wither away in this terrible atmosphere of oppression? People argue against the death penalty, and their arguments appeal to me greatly. But when I see the long drawn out agony, of a life spent in prison, I feel that it is perhaps better to have that penalty rather than to kill a person slowly and by degrees. One of the 'lifers' came up to me once and asked me, "What of us lifers? Will Swaraj take us out of this hell?."

156. The great problems of law are the grave crises of life and both can be solved not by the literal instruction of printed enactments, but by the interpretative sensitization of the heart to 'the still, sad music of humanity'.

157. The humane thread of jail jurisprudence that runs right through is that no prison authority enjoys amnesty for unconstitutionality, and forced farewell to fundamental rights is an institutional outrage in our system where stone walls and iron bars shall bow before the rule of law. Since life and liberty are at stake the gerontocracy of the Jail Manual shall have to come to working terms with the paramountcy of fundamental rights.

158. A valuable footnote to this approach may be furnished by recalling how Mahatma Gandhi regarded jails as 'social hospitals' and Prime Minister[53] Shri Morarji Desai, while he was Home Minister of Bombay, way back in 1952, told the conference of Inspectors-General of Prisons:

> It is not enough to consider a prisoner merely as a prisoner.... To my mind a prisoner is not a matter of contempt. Even the worst criminal, as you call him, is after all a human being as good or bad as any other outsider; whatever remedies you can find out to treat prisoners, unless your attitude changes, and you consider that the prisoners inside the jails are really human beings equal in self-respect to your self-respect, you will never be effective in whatever you do, because you will affect them only in so far as you extract from them the same respect for you and also good feeling for you and that cannot come unless you behave on equal terms with them....[54]

53. *Indian Correctional Journal*, Vol. 1, No. 2, July 1957, p. 6.

54. *Indian Correctional Journal*, Vol. 1, No. 2, July 1957, pp. 2-5.

159. A synthetic grasp of the claims of custodial security and prison humanity is essential to solve the dilemma posed by the Additional Solicitor General. If we are soft on security, escapes will escalate : so be stern, 'red in tooth andclaw' is the submission. Security first and security last, is an argument with a familiar and fearful ring with Dwyerlist memories and recent happenings. To cry 'wolf' as a cover for official violence upon helpless prisoners is a cowardly act. Chaining all prisoners, amputating many, caging some, can all be fobbed off, if every undertrial or convict were painted as a potentially dangerous maniac. Assuming a few are likely to escape, would you shoot a hundred prisoners or whip everyone every day or fetter all suspects to prevent one jumping bail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the constitutional play. We just cannot accede to arguments intended to stampede courts into vesting unlimited power in risky hands with no convincing mechanism for prompt, impartial check. A sober balance, a realistic system, with monitoring of abuses and reverence for human rights—that alone will fill the constitutional bill.

160. The grave danger of overemphasizing order, discipline and security within the prison, while interpreting Section 56, is that it lends itself unawares to a pre-conceived, one sided meaning.

> The unconscious or half-conscious wresting of fact and word and idea to suit a preconceived notion or the doctrine or principle of one's preference is recognised by Indian logicians as one of the most fruitful sources of fallacy ; and it is perhaps the one which it is most difficult for even the most conscientious thinker to avoid. For the human reason is incapable of always playing the detective upon itself in this respect ; it is its very nature to seize upon some partial conclusion, idea, principle, become its partisan and make it the key to all truth, and it has an infinite faculty of doubting upon itself so as to avoid detecting in its operations this necessary and cherished weakness.[55]

161. Judges must warn themselves against this possibility because the nation's confidence in the exercise of discretionary power affecting life and liberty has been rudely shaken especially when the Court trustingly left it to the Executive. A prison is a sound-proof planet, walled from view and visits regulated, and so, rights of prisoners are hardly visible, checking is more difficult and the official position of the repository of power inspires little credibility where the victims can be political protesters, unpopular figures, minority champions or artless folk who might fail to propitiate arrogant power of minor minions.

162. The learned Additional Solicitor General commended for our consideration the judicial strategy of softening draconian disablement implied in Section 56 by a process of interpretation as against invalidation. We agree, and proceed to consider whether the language of Section 56 lends itself to such leniency. The impugned provision runs thus :

> 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 Local Government, so confine them.

55. Sri Aurobindo—*Essays on the Gita*, p. 37

163. The relevant 'rules' may also be referred to. A whole fasciculus of rules under the heading 'confinement in irons' deals with this subject. The more relevant ones are Rules 423, 428, 432, 433 and 435. These 'rules' merely provide for stacking irons, describe their details, specify the category and conditions of prisoners who may be required to wear irons, direct their medical examination, the removal of fetters and the like.

164. Besides, there are provisions which specify situations where ordinarily prisoners are exempt from fetters, and fetters shall not, ordinarily and without special reasons to be recorded by the Superintendent in his Journal, be imposed on any *'unconvicted criminal prisoner'* (see R. 430). Sobraj is yet unconvicted. The other categories so exempted need not detain us. To avoid confusion it is apt to state that these 'rules and instructions' have no legal force as the source of power, Section 56, desiderates for their validity the sanction of the 'Local Government'. After strenuous efforts to trace such sanction, the Additional Solicitor General failed to make good this condition precedent. The sanction being absent, the instructions are no more than self-presented procedure and cannot qualify for recognition under Article 21. In this sense, Section 56 stands unclad and must be constitutionally tested on its sweeping phraseology of naked brevity.

165. Even otherwise, the rules come into play only to the extent the Act permits, since the stream cannot rise above the source. Therefore, Section 56 demands close scrutiny. Confinement in irons is permitted for the safe custody of prisoners. Therefore, the *sine qua non* is the presence of safety to the point of necessity compelling fetters. Safe custody is imperilled only where escape probability exists. Such escape becomse a clear and present danger only where the prisoner has by his precedents shown an imminent attempt to escape. Mere violence by a prisoner or bad behaviour or other misconduct which has no reference to safe custody has no relevance to Section 56. Supposing a prisoner were short-tempered, vulgar or even homosexual, his safe custody within the prison is not in jeopardy. His misbehaviour unrelated to security is the only issue then involved and correctional therapy is the prescription. Section 56 is not attracted so long as the safe custody of that prisoner is not shaky. The focus is on his escape and, may be, on overt and covert attempts in that behalf. Other disorder or vice may deserve disciplinary attention but Section 56 is no nostrum for all administrative aches within jails.

166. The second requirement of Section 56 is that the Superintendent must *consider* it *necessary* to keep the prisoner in irons for the sake of safe custody. The character of the prisoner, not generally, but with specific reference to safe custody, must be studied by the Superintendent and if he reaches the conclusion responsibly that there is necessity to confine the man in irons to prevent escape from custody, he may exercise his powers under Section 56. To consider a step as necessary the authority must exercise intelligent care, bestow serious consideration and conclude that the action is not only desirable or advisable but necessary and unavoidable. A lesser standard shows scant regard for the statutory imperative.

167. Section 56 empowers the Deputy Superintendent to put a prisoner in irons only in situations of *urgent necessity* followed by an immediate report to the Superintendent. The point that emerges is that only a finding of *absolute necessity* can justify the exercise of the 'iron' power by the Deputy Superintendent and the Superintendent must respect the spirit of Section 58 when he uses the power. This must be an objective finding, and must,

therefore, be based on tangible matters which will be sufficient to satisfy a man acting with a sense of humane justice, properly instructed in the law and assessing the prognosis carefully. Random decisions, freak impressions, mounting suspicions, subjective satisfaction and well-grounded allergy to a particular prisoner may be insufficient. We must remember that even though Section 56 is a pre-Constitution measure its application must be governed by the imperatives of Articles 14, 19 and 21. Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14 or 19 or even by way of abundant caution. Whatever is arbitrary in executive action is pregnant with discrimination and violates Article 14. Likewise, whatever decision is the product of insufficient reflection or inadequate material or unable to lead to the inference of a clear and present danger, is unreasonable under Article 19, especially when human freedom of helpless inmates behind prison walls is the crucial issue. Article 21, as we have explained while dealing with Batra case, must obey the prescriptions of natural justice (see *Maneka Gandhi* as to the quantum and quality of natural justice even in an emergency). Reasonableness in this area also involves some review of the action of an executive officer so that the prisoner who suffers may be satisfied that a higher official has with detachment, satisfied himself about the necessity to fetter him. Such administrative fairness is far more productive of order in prison than the counter productive alternative of requiring every security suspect to wear iron. Prison disorder is the dividend from such reckless 'discipline' and violent administrative culture, which myopic superintendents miss.

168. This constitutional perspective receives ideological reinforcement from the observations of Mr. Justice Douglas in *Morrissey* v. *Brewer*[56]:

> The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitative aspects of modern penology. "Notice and opportunity for hearing appropriate to the nature of the case", are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.

169. To judge whether Sobraj's fetters were legal, we must go further into the period for which this cruel process was to persist. Even prisoners who are 'lifers' shall not be retained in iron for more than three months except with the special sanction of the Inspector General (see Section 57). The rules also take a horrifying view of the trauma of fetters.

170. The power to confine in iron can be constitutionalised only if it is hemmed in with severe restrictions. Woven around the discretionary power there must be a protective web that balances security of the prison and the integrity of the person. It is true that a discretion has been vested by Section 56 in the Superintendent to require a prisoner to wear fetters. It is a narrow power in a situation of necessity. It has to be exercised with extreme restraint. The discretion has to be based on an objective assessment of facts and the facts themselves must have close relevance to safe custody. It is good to highlight the total assault on the human flesh, free movement and sense of dignity this, 'iron' command involves. To sustain its validity in the face of Article 19 emergencies uncontrollable by alternative

56. 33 L. Ed 484, 505.

procedures are the only situations in which this drastic disablement can be prescribed. Secondly processual reasonableness cannot be burked by invoking panic-laden pleas, rejected in *Charles Wolff* by the U. S. Supreme Court.

171. Such a power, except in cases of extreme urgency difficult to imagine in a grim prison setting where armed guards are obviously available at instant notice and watch towers vigilantly observe (save in case of sudden riot or mutiny extraordinary), can be exercised only after giving notice and hearing and in an unbiased manner. May be that the hearing is summary, may be that the communication of the grounds is brief, may be that oral examination does not always take place; even so natural justice, in its essentials, must be adhered to for reasons we have explained in *Gill*[57] and *Maneka Gandhi*.

172. I regard as essential that reasons must be assigned for such harsh action as is contemplated and such reasons must be recorded in the history ticket of the prisoner as well as in the journal. Since the reasons are intended to enable the petitioner to challenge, if aggrieved, the record must be in the language of the petitioner or of the region, and not in English as is being done now.

173. There must be special reasons of an extraordinary or urgent character when fetters are fastened on an unconvicted prisoner. Those substantial reasons must be recorded and its copy furnished to the prisoner. Rule 430 commands that this be done. Even otherwise, the procedural panacea of giving specific reasons (not routine chants) has a wholesome restraining effect. And the constitutional survival of Section 56 depends on the formula of reasonableness.

174. The spirit and substance of Rule 432 make it clear that the record of the reasons is imperative and has a function. Rule 433, whatever the Superintendent's affidavit may say, clearly shows that the wearing of fetters must be for the briefest periods and deserves frequent scrutiny. Indeed, in our view, except in remotely extraordinary situations, rational justification for bar fetters of an unconvicted prisoner cannot be found except on the confession that the Prison Superintendent and his staff are incompetent to manage and indifferent to reasonableness. We cannot be swept off our constitutional feet by scary arguments of deadly prisoners and rioting gangs, especially when we find States in India which have abandoned the disciplinary barbarity of bar fetters (Tamil Nadu, Kerala et al).

175. The import of Rule 435 is that even in cases where security compels imposition of fetters this should be only for the shortest possible time. The fact that, even as a punishment, irons must be restricted in its use [see Section 46 (7)] argues for prophylactic irons being for the shortest spell. At night, when the prisoner is in a cell there is no particular reason to apprehend a possibility of escape. So nocturnal hand-cuffs and chains are obnoxious and vindictive and anathema in law.

176. The infraction of the prisoner's freedom by bar fetters is too serious to be viewed lightly and the basic features of 'reasonableness' must be built into the administrative process for constitutional survival. Objectivity is essential when the shackling is *prima facie* shocking. Therefore, an outside agency, in the sense of an officer higher than the Superintendent or external to the prison department, must be given the power to review the order for 'irons'. Rule 423 speaks of the Inspector General of Prisons having

57. *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405.

to be informed of the circumstances necessitating fetters and belchains. Rule 426 has a similar import. It is right to generalise that the substance of the 'rules' and the insistence of the section contain the command that the Inspector General of Prisons shall post haste, say within 48 hours at least, receive a report of such an infliction and consider whether it is just and necessary. He should also be ready to receive complaints by way of appeals about 'irons' from prisoner concerned. A right of appeal or revision from the action of the Superintendent to the Inspector General of Prisons and quick action by way of review are implicit in the provision. If there is delay, the negation of good faith, in the sense of absence of due care, is inevitable and the validity of the order is in peril.

177. Another remedy also may be visualised as feasible. The visitors of jails include senior executive officers of the Division, Sessions Judges and District Magistrates (see Rule 47). This is ordinarily an All-India pattern. The duties of official visitors include satisfying themselves that the provisions of the Prisons Act, rules, regulations, orders and directions are duly observed. Undoubtedly, the proper adherence to Section 56 and the related rules falls within the purview of 'Rule' 49. 'Rule' 53 states that all visitors shall have the opportunity of observing the state of jail, its management and every prisoner confined therein. The visitors, official and non-official, have power to call for and inspect jail records. 'Rules' 53 and 53B are pregnant provisions. We read humane amplitude into this group of 'rules' so as to constitutionalise the statutory prescriptions. They spell out a duty on the part of the visitors and the Inspector General of Prisons to hear appeals or complaints from the prisoners regarding irons forced on them. The reasonableness of the restriction being the constitutional badge, the only way we can sustain Section 56 of the Act is to imply in the broad group of provisions external examinership, immediate review and cutting short of the iron regime to the briefest spell.

178. A few submissions linking up 'dangerousness' with bar fetters urged by the Additional Solicitor General may now be considered.

179. The learned Additional Solicitor General urged that there was a built-in guideline for the superintendent's discretion. Considerations of safety, expressed in paragraph 435 and Section 56, remove the vice of arbitrariness and unreasonableness. Reference to paragraph 433 was made to make out that only dangerous prisoners were to be chained in this manner. We cannot lose sight of the fact that a non-convict prisoner is to be regarded differently and it may even be a misnomer to treat such a remandee as a prisoner. We see a distinction between unconvicted prisoners and convicted prisoners being dealt with differently. (See paragraph 392 of the Manual). Assuming the indiscriminate provision in para 399 embracing dangerous prisoners 'whether they are awaiting trial or have been convicted' to be applicable, we should deal with the two categories differently. Para 399(3) reads :

> "Special precautions should be taken for the safe custody of dangerous prisoners whether they are awaiting trial or have been convicted. On being admitted to jail they should be (*a*) placed in charge of trustworthy warders, (*b*) confined in the most secure building available, (*c*) as far as practicable confined in different barracks or cells each night, (*d*) thoroughly searched at least twice daily and occasionally at uncertain hours (the Deputy Superintendent must search them at least once daily and he must satisfy himself that they are properly searched by a

trustworthy subordinate at other time), (*e*) fettered if necessary (the special reasons for having recourse to fetters should be fully recorded in the Superintendent's journal and noted in the prisoner's history ticket). They should not be employed on any industry affording facilities for escape and should not be entrusted with implements that can be used as weapons. Warders on taking over charge of such prisoners must satisfy themselves that their fetters are intact and the iron bars or the gratings of the barracks in which they are confined are secure and all locks, bolts, etc. are in proper order. They should during their turns of duty frequently satisfy themselves that all such prisoners are in their places, and should acquaint themselves with their appearance.

180. All these factors focus our attention on the concept of 'dangerousness' as controlling discretionary power and validate the section.

181. The learned Additional Solicitor General argued that the expression 'dangerous' was neither vague nor irrational but vivid and precise, and regulated the discretion of the officer sufficiently to eliminate the vice of arbitrariness. He cited authorities to which we will presently come but before examining them as validation of incapacitation of risky prisoners we may as well refer to some aspects of the problem presented by (1) what kind of danger should lead to incapacitation? (2) What authority is to make the decision on whether or not that danger is present? (3) On what basis is that authority to decide who among offenders is dangerous and for how long?

182. Predictions of dangerousness are hazardous. In 1966 the Supreme Court released 967 offenders held in New York psychiatric institutions beyond the term of their sentences because they were considered dangerous. (They had been confined without proper procedures). Researchers who followed the subsequent careers of these persons for four years found that only 2 per cent were returned to institutions for the criminally insane; more than half were not readmitted to any institution. However, the criteria by which these persons had been declared dangerous in the first place are questionable, and they had been held an average of thirteen years beyond their sentences.

183. The prognosis depends on the peculiarities of the individual and on interpretation by the individuals who study his case—i.e. on the idiosyncrasies of their (intuitive?) judgment criteria.

184. All institutions that hold people against their wishes need outside supervision, for, by definiton, they lack the internal checks and balances that make such supervision unnecessary elsewhere. One can check out of a hotel if abused, but not out of a prison. Prison staffs, which, unlike hotel staffs, can also totally circumscribe the activities of inmates—have extensive coercive power that must be checked by an outside authority if it is not to be abused. While sharing the purposes of the penal system, the outside authority should be altogether independent of the mangement of the institutions it is to supervise and of its personnel. (The general supervisory power of the judiciary is too cumbersome and has not proven sufficient anywhere). Such outside authorities exist abroad: In Great Britain a 'Board of Visitors' deals with violation of prison rules and deals with complaints by prisoners. In France a Judge de l' application des peines is presumed to do so, and in Italy a guidice di orveglienza.

185. Kent S. Miller writes on the subject of dangerousness :[58]

> ....a definitional problem needs to be dealt with. State statutes have been notoriously vague in their references to dangerousness, in large parts leaving the determination of dangerousness to the whims of the Court and of others involved in applying the concept.

Professionals concerned with prediction of violent behaviour had differed in their judgments. Writes Miller :

> Considerable attention has been given to the role of psychological tests in predicting dangerous behaviour, and there is a wide range of opinion as to their value.
>
> Thus far no structured or projective test scale has been derived which, when used alone, will predict violence in the individual case in a satisfactory manner. Indeed, none has been developed which will adequately *postdict* let alone ***predict***, violent behaviour. However, our review of the literature suggests that it might be possible to demonstrate that violence could be predicted using psychological tests if programs of research were undertaken that were more sophisticated than the studies done to date.
>
> Courts and community agencies must muddle through these difficulties and deal with such problems in the best way they can. The fact that we have difficulty defining the predicting dangerous behaviour does not mean that members of the community can disregard such patterns of behaviour. And the fact that psychiatrists do not agree on the nature and scope of mental illness does not imply that the law can be oblivious to such matters.
>
> .... But we are on dangerous ground *when deprivation of liberty occurs under such conditions*.
>
> ....The practice has been to markedly overpredict. In addition, the courts and mental health professionals involved have systematically ignored statutory requirements relating to dangerousness and mental illness....
>
> .... In balancing the interests of the state against the loss of liberty and rights of the individual, a prediction of dangerous behaviour must have a high level of probability, (a condition which currently does not exist), and the harm to be prevented should be considerable.

186. If our law were to reflect a higher respect for life, restraint of the person is justified only if the potential harm is considerable. Miller's conclusions are meaningful and relevant :

> If confinement takes place, there should be a short-term mandatory review.
>
> .... the basis for police power commitment should be physical violence or potential physical violence which is imminent, constituting a 'clear and present' danger, and based on testimony related to actual conduct. Any such commitment should be subject to mandatory review within two weeks.
>
> .... *Restraint should be time-limited, with a maximum of five to seven days*.

38. Kant S. Miller : *Managing Madness*, pp. 58, 66, 67, 68.

187. The inference is inevitable that management of dangerousness in the prison setting is often overkill and underscientific. The irrationality of bar fetters based on subjective judgment by men without psychiatric training and humane feeling makes every prisoner 'dangerous'. Dr. Bhattacharya writes[59]:

> In the Delhi jail particularly in 1949 one came across an astonishing sight of numerous under-trial prisoners in fetters, merely on the ground that they had more than one case pending against them. This was noticed, though in a far less degree, in Patiala and in Jaipur. Numerous transportation prisoners were secured behind bars in cells, yet they were put in bar-fetters, not to mention the escapees and condemned prisoners. In Delhi jail one gained an impression that bar-fetters were the rule of the day.

187A. The key jurisdictional preconditions are—

(*i*) absolute necessity for fetters;

(*ii*) special reasons why no other alternative but fetters will alone secure custodial assurance;

(*iii*) record of those reasons contemporaneously in extenso;

(*iv*) such record should not merely be full but be documented *both* in the journal of the Superintendent *and* the history ticket of the prisoner. This latter should be in the language of the prisoner so that he may have communication and recourse to redress.

(*v*) the basic condition of dangerousness must be well-grounded and recorded;

(*vi*) all these are conditions precedent to 'irons' save in a great emergency;

(*vii*) before preventive or punitive irons (both are inflictions of bodily pain) natural justice in its minimal form shall be complied with (both audi alteram and the nemo judex rules).

(*viii*) the fetters shall be removed at the earliest opportunity. That is to say, even if some risk has to be taken it shall be removed unless compulsive considerations continue it for necessities of safety;

(*ix*) there shall be a daily review of the absolute need for the fetters, none being easily conceivable for nocturnal manacles;

(*x*) if it is found that the fetters must continue beyond a day, it shall be held illegal unless an outside agency like the District Magistrate or Sessions Judge, on materials placed, directs its continuance.

188. Although numerically large, these requirements are reasonably practical and reconcile security with humanity. Arguments to the contrary are based on alarmist *a priori* and may render Section 56 *ultra vires*. Having regard to the penumbral zone, fraught with potential for tension, tantrums and illicit violence and malpractice, it is healthy to organize a prison ombudsman for each State. Sex is an irrepressible urge which is forced down by long prison terms and homosexuality is of hidden prevalence in these dark campuses. Liberal paroles, open jails, frequency of familial

59. Dr. B. K. Bhattacharya: *Prisons*, p. 116.

meetings, location of convicts in jails nearest their homes tend to release stress, relieve distress and insure security better than flagellation and fetters.

189. The upshot of the discussion is that the shackles on Sobraj shall be shaken off right away and shall not be re-worn without strict adherence to the injunctions spelt out. Active prison justice bids farewell to the blood-shot heritage of fierce torture of flesh and spirit; and habilitative processes reincarnate as a healing hope for the tense, warped and morbid minds behind bars. This correctional orientation is a constitutional implication of social justice whose index finger points to Article 14 (anti-arbitrariness), Article 19 (anti-reasonableness) and Article 21 (sensitized processual humanism).

190. Prison reform is burgeoning in the administrative thinking and, hopefully one may leave it to legislative and executive effort to concretise, with feeling for 'insiders' and concern for societal protection, with accent on perimeter security and correctional strategy, the project of prison reform.

191. Presumptive innocence blushes when *ad libitum* discretion is vested in the jailor to put preventive fetters unfettered by the annoying rules of natural justice. The prisons become houses of horror if hundreds of undertrials and even minors have to suffer, on grounds of dangerousness, this disciplinary distress in one jail. That Prison Superintendent surely needs his discretion to be disciplined, being otherwise dangerous. Since constitutionality focusses on rationality and realistic reasonableness these forensic dissections go to the heart of the issue.

192. I hold that bar fetters are a barbarity generally and, like whipping, must vanish. Civilised consciousness is hostile to torture within the walled campus. We hold that solitary confinement, cellular segregation and marginally modified editions of the same process are inhuman and irrational. More dangerous are these expedients when imposed by the untuned and untrained power of a jail superior who has, as part of his professional equipment, no course in human psychology, stressology or physiology, who has to depend on no medical or psychiatric examination prior to infliction of irons or solitary, who has no obligation to hear the victim before harming him, whose 'reasons' are in English on the history-tickets and therefore unknowable and in the Journal to which the prisoner has no access. The revisory power of the Inspector General of Prisons is illusory when the prisoner does not know of his right to seek revision and the Inspector General has no duty to visit the solitary or 'fettered' creatures or to examine every case of such infliction. Jail visitors have no powers to cancel the superintendent's orders nor obligation to hold enquiry save to pity and to make remarks. Periodical parades of prisoners, when the visitors or dignitaries call for a turn-out, prove a circus in a zoo from a practical strandpoint or/and journal entries and history-tickets a voodoo according to rule, the key point to be noted being that after this public exhibition within the prison, the complaining prisoners are marked men at the iron mercy of the hierarchy, there being no active legal aid project busy within the prison. This ferocious rule of law, rude and nude, cannot be sustained as anything but arbitrary, unreasonable and procedurally heartless. The peril to its life from the lethal stroke of Articles 14, 19 and 21 read with 13 needs no far-fetched argument. The abstruse search for curative guidelines in such words as 'dangerous' and 'necessary', forgetting the totalitarian backdrop of stone walls and iron bars, is bidding farewell to raw reality and embracing verbal *marga*. The law is not abracadabra but at once pragmatic and astute and does not

surrender its power before scary exaggerations of security by prison bosses. Alternatives to 'solitary' and 'irons' are available to prison technology, given the will, except where indifference, incompetence and unimaginativeness hold prison authorities prisoner. Social justice cannot sleep if the Constitution hangs limp where its consumers most need its humanism.

Access and the law

193. An allegedly unconscionable action of Government which disables men in detention from seeking judicial remedies against State torture was brought to our notice. I would have left the matter as an unhappy aberration of governmental functioning but the fundamental character of the imputation leaves us no option but to drive home a basic underpinning of our government of laws. Democratic legality stands stultified if the Corpus Juris is not within the actual ken or reasonable reach of the citizen; for it is a travesty of the rule of law if legislation, primary or subordinate, is not available in published form or is beyond the purchase of the average affected Indian. To come to the point, we were told that the Punjab Jail Manual was not made available to the prisoners and, indeed, was priced so high that few could buy. The copy of the Manual handed over to us is seen to be officially published in 1975 and priced at Rs. 260·30, although it contains merely a collection of the bare text of certain statutes, rules and instructions running into 469 printed pages. If what was mentioned at the Bar were true that the Manual as sold before at around Rs. 20 but was suddenly marked up more than ten times the former price solely to deter people from coming to know the prison laws, then the rule of law were surely scandalized. It was suggested that by this means the indigent prisoner could be priced out of his precious liberties because he could not challenge incarceratory injury without precise awareness of the relevant provisions of law beyond his means. Were this motivation true the seriousness of the impropriety deepens. But we have not been taken into these vicious coils and keep out of that probe. However, let us be clear. Access to law is fundamental to freedom in a government of laws. If the rule of law is basic to our constitutional order, there is a double imperative implied by it—on the citizen to know and on the State to make known. Fundamental rights cease to be viable if laws calculated to canalise or constrict their sweep are withheld from public access; and the freedoms under Article 19(1) cannot be restricted by hidden on 'low visibilty' rules beyond discovery by fair search. The restriction must be *reasonable* under Article 19(2) to (6) and how can any normative prescription be reasonable if access to it is not available at a fair price or by rational search? Likewise, under Article 21, procedural fairness is the badge of constitutionality if life and liberty are to be leashed or extinguished; and how can it be fair to bind a man by normative processes collected in books too expensive to buy? The baffling proliferation and frequent modification of subordinate legislation and their intricacies and inaccessibility are too disturbing to participative legality so vital to democracy, to leave us in constitutional quiet. Arcane law is as bad as lawless fiat, a caveat the administration will hopefully heed.

194. One of the paramount requirements of valid law is that it must be within the cognizance of the community if a competent search for it were made. It is worthwhile recalling the observations of Bose, J. made in a different context but has a philosophic import:—

> Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some

> recognizable way so that all men know what it is;....The thought that a decision reached in the secret recess of a chamber to which the public have no access and of which they can normally know nothing, can nevertheless affect their lives, their liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized men. It shocks conscience.[60]

Legislative tyranny may be unconstitutional if the State by devious methods like pricing legal publication monoplied by government too high denies the equal protection of the laws and imposes unreasonable restrictions on exercise of fundamental rights. The cult of the occult is not the rule of law even as access to law is integral to our system. The pregnant import of what I have said will, I hope, be not lost on the executive instrumentality of the State.

Contemporary danger

195. We must have a sense of the prevalence of primitive cruelty haunting our prison cells and what is more alarming, of the increasing versatility of prison torture in countries civilised and other. Our country is no island and courts must be aware and beware. While I am far from inclined to exaggerate possibilities of torture in the silent zone called prison, we are not disposed to dismiss international trends collected in a recent article entitled "Minds behind bars":[61]

> The technology of torture all over the world is growing ever more sophisticated—new devices can destroy a prisoner's will in a matter of hours—but leave no visible marks or signs of brutality. And government-inflicted terror has evolved its own dark sub-culture. All over the world, torturers seem to feel a desire to appear respectable to their victims....There is an endlessly inventive list of new methods of inflicting pain and suffering on fellow human beings that quickly cross continents and ideological barriers through some kind of international secret-police network. The 'wet submarine' means near-suffocation of a prisoner by immersing him in water, or , frequently, in urine; the 'dry submarine' is the same thing, except that a plastic bag is tied over the victim's head to deprive him of oxygen. Another common technique, 'the telephone', consists of delivering sharp blows in both ears simultaneously, which often causes excruciatingly painful rupture of the ear drums. 'The helmet' is put over the head of a torture victim to magnify his own screams. In 'the hook', the victim is hoisted off the ground by his hands, which are tied behind his back in such a way that the stretching of the nerves often causes paralysis of the arms. 'People on the hook', says one Uruguayan torture victim, 'cannot take a deep breath or hardly any breath. They just moan; it's a dreadful, almost inhuman noise'.
>
> And torturers all over the world use the language of grisly disinformation to describe their work. In Uganda, Amin's secret police are known as the 'State Research Bureau', and the main torture houses are called 'Public Safety Units'. In Brazil, torturers call their sessions, 'spiritual sessions' and in Chile, torturers refer to the Villa Grimaldi, their place of work, as the Palacio de la Risa—the Palace of Laughter. In Iran, Otaq-e-Tamahiyat, 'the room where you make people walk', meant the blood-stained chamber where

60. *Harla* v. *State of Rajasthan*, AIR 1951 SC 467.

61. *Listener*, December 1977 issue.

prisoners were forced to walk after torture to help their blood to circulate.

....What is encouraging in all this dark picture is that we feel that public opinion in several countries is much more aware of our general line than before. And that is positive. I think, in the long run, governments can't ignore that. We are also encouraged by the fact that, today, human rights are discussed between governments—they are now on the international political agenda. But, in the end, what matters is the pain and suffering the individual endures in police station or cell.

196. I imply nothing from the quote but it deepens our awareness in approaching our task.

The Counclusion

197. Now that dilatory discussion overlapping at times, has come to an end, I may concretise the conclusions in both the cases, lest diffusion should leave the decision vague or with ragged edges. They flow from the elevating observations of Chandrachud, J. (as he then was) in *Bhuvan Mohan*[62], amplified by humanity: (SCC p. 189)

> We cannot do better than say that the directive principle contained in Article 42 of the Constitution that 'The State shall make provision for securing just and humane conditions of work' may benevolently be extended to living conditions in jails. There are subtle forms of punishment to which convicts and undertrial prisoners are sometimes subjected but it must be realised that these barbarous relics of a bygone era offend against the letter and spirit of our Constitution.

The correction and direction indicated by the Constitution have been broadly spelt out by me so that progressive prison reforms may move towards 'fresh woods and pastures new'.

197A. (1) I uphold the vires of Section 30 and Section 56 of the Prisons Act, as humanistically read by interpretation. These and other provisions, being somewhat out of tune with current penological values and mindless to human-rights moorings, will, I hope, be revised by fresh legislation. It is a pity that Prison Manuals are mostly callous colonial compilations and even their copies are beyond prisoners' ken. Punishments, in civilised societies, must not degrade human dignity or wound flesh and spirit. The cardinal sentencing goal is correctional changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practises dehumanising techniques it is wasteful, counter-productive and irrational, hovering on the hostile brink of unreasonableness (Article 19). Nor can torture tactics jump the constitutional gauntlet by wearing a 'preventive' purpose. Naturally, inhumanity, masked as security, is outlawed beyond backdoor entry, because what is banned is brutality, be its necessity punitive or prophylactic.

(2) I hold that solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 for prisoners 'under sentence of death'. But it is legal under that Section to separate such sentencees from the rest of the prison community during hours when prisoners are generally locked in. I also uphold the special watch, day and night, of such sentencees by guards. Infraction of privacy may be inevitable. But guards must concede minimum human privacy in practice.

62. *Bhuvan Mohan Patnaik* v. *State of A. P.*, (1975) 3 SCC 185, 189.

(3) By necessary implication, prisoners 'under sentence of death' shall not be denied any of the community amenities, including games, newspapers, books, moving around and meeting prisoners and visitors, subject to reasonable regulation of prison management. Be it noted that Section 30 is no substitute for sentence of imprisonment and merely prescribes the manner of organising safe jail custody authorised by Section 366 of the Cr.P.C.

(4) More importantly, if the prisoner desires loneliness for reflection and remorse, for prayers and making peace with his maker, or opportunities for meeting family or friends, such facilities shall be liberally granted, having regard to the stressful spell of terrestrial farewell his soul may be passing through—the compassion society owes to him whose life it takes.

(5) The crucial holding under Section 30(2) is that a person is *not* 'under sentence of death', even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is *not* 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, *so long as* an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he *is* 'under sentence of death', even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence'.

(6) I do not rule out further restraint on such a condemned prisoner if clear and present danger of violence or likely violation of custody is, for good reasons, made out, with due regard to the rules of fairplay implied in natural justice. Minimal hearing shall be accorded to the affected if he is subjected to further severity.

197B. (1) Section 56 must be tamed and trimmed by the rule of law and shall not turn dangerous by making the Prison 'brass' an *imperium in imperio*. The Superintendent's power shall be pruned and his discretion bridled in the manner indicated.

(2) Under-trials shall be deemed to be in custody, but not undergoing *punitive* imprisonment. So much so, they shall be accorded more relaxed conditions than convicts.

(3) Fetters, especially bar fetters, shall be shunned as violative of human dignity, within and without prisons. The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in a small category of cases dealt with next below. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture.

(4) Where an undertrial has a credible tendency for violence and escape a humanely graduated degree of 'iron' restraint is permissible if—

only if—other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law.

(5) The 'iron' regimen shall in no case go beyond the intervals, conditions and maxima laid down for punitive 'irons'. They shall be for short spells, light and never applied if sores exist.

(6) The discretion to impose 'irons' is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security.

(7) A previous hearing, minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. The rule in *Gill's* case and *Maneka Gandhi's* case gives the guidelines.

(8) The grounds for 'fetters' shall be given to the victim. And when the decision to fetter is made, the reasons shall be recorded in the journal and in the history ticket of the prisoner in the State language. If he is a stranger to that language it shall be communicated to him, as far as possible, in his language. This applies to cases as much of prison punishment as of 'safety' fetters.

(9) Absent provision for independent review of preventive and punitive action, for discipline or security, such action shall be invalid as arbitrary and unfair and unreasonable. The prison officials will then be liable civilly and criminally for hurt to the person of the prisoner. The State will urgently set up or strengthen the necessary infra-structure and process in this behalf—it already exists in embryo in the Act.

(10) Legal aid shall be given to prisoners to seek justice from prison authorities, and, if need be, to challenge the decision in court—in cases where they are too poor to secure on their own. If lawyer's services are not given, the decisional process becomes unfair and unreasonable, especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. By and large, prisoners are poor, lacking legal literacy, under the trembling control of the jailor, at his mercy as it were, and unable to meet relations or friends to take legal action. Where a remedy is all but dead the right lives only in print. Article 39A is relevant in the context. Article 19 will be violated in such a case as the process will be unreasonable. Article 21 will be infringed since the procedure is unfair and is arbitrary. In *Maneka Gandhi* the rule has been stated beyond mistake.

(11) No 'fetters' shall continue beyond day time as nocturnal fetters on locked-in detenus are ordinarily uncalled for, viewed from considerations of safety.

(12) The prolonged continuance of 'irons', as a punitive or preventive step, shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who shall briefly hear the victim and record reasons. They are ex-officio visitors of most central prisons.

(13) The Inspector General of Prisons shall, with quick despatch consider revision petitions by fettered prisoners and direct the continuance or discontinuation of the irons. In the absence of such prompt decision, the fetters shall be deemed to have been negatived and shall be removed.

198. Such meticulous clarification has become necessary only because the prison practices have hardly inspired confidence and the subject is human rights. Because prison officials must be responsible for the security of the prison and the safety of its population, they must have a wide discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation. But any humanist-jurist will be sceptic like the American Judges who in *William King Jackson* v. *D. E. Bishop*[63] observed :

> (1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. The present record discloses misinterpretation even of the newly adopted....
>
> (2) Rules in this area are seen often to go unobserved.
>
> (3) Regulations are easily circumvented.
>
> (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.
>
> (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power.

199. We find many objectionable survivals in the Prison Manual like whipping and allergy to 'Gandhi Cap'. Better classification for 'Europeans' is still in the book! I hope that Prison Reforms will receive prompt attention as the higher political echelons in the country know the need and we may not be called upon to pronounce on the inalienable minima of human rights that our constitutional order holds dear. It is noteworthy that, as pointed out in *Furman* v. *Georgia*[64] with reference to death sentence, by Justices Douglas and Marshall, the more painful prison cruelties are often imposed on the socio-economic weak and the militant minorities. Our prisons, both in the matter of classification for treatment and in the matter of preventive or punitive imposts, face the same criticism. To thoughtful sociologists it seems evident that prison severities are visited mostly on agitators, dissenters, protesters, proletarians and weaker sections. Moreover, punitive 'vested interest' sometimes wears 'preventive' veils, when challenged and we cannot wish away discretionary injustice by burying our heads in the sands of incredible credulity. Courts must be astute enough to end these 'crimes' against criminals by correctional interpretation.

200. 'Freedom behind bars' is part of our constitutional tryst and the index of our collective consciousness. That the flower of human divinity never fades, is part of our cultural heritage. Bonded labour, cellular solitary confinement, corporal punishments, status-based elitist classification and the like deserve to be sentenced to transportation from prisons and humanising principles granted visa into prison campuses. In short, transformation of consciousness is the surest 'security' measure to antidote social entropy. That is the key to human development — rights and responsibilities — within and without prisons.

201. Positive experiments in re-humanization — meditation, music, arts of self-expression, games, useful work with wages, prison festivals,

63. Federal Reporter, 2nd Series, Vol. 404, p. 571.
64. 33 L Ed 2d. 346.

sramdan, and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored.

202. The roots of our Constitution lie deep in the finer spiritual sources of social justice, beyond the melting pot of bad politicking, feudal crudities 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'[65] and so it is that the Prisons Act provisions and the Jail Manual itself must be revised to reflect this deeper meaning in the behavioral norms, correctional attitudes and humane orientation for the prison staff and prisoners alike. We cannot become misanthropes and abandon values, scared by the off chance or some stray desperate character. Then amputation of limbs of unruly suspects may be surer security measure and corporal punishment may have a field day after a long holiday. *The essence of my opinion* in both these cases is the infusion of the higher consciousness of the Constitution into the stones of law which make the prison houses.

203. The winds of change must blow into our *carcers* and self-expression and self-respect and self-realization creatively substituted for the dehumanising remedies and 'wild life' techniques still current in the jail armoury. A few prison villains — they exist — shall not make martyrs of the humane many; and even from these few, trust slowly begets trust. *Sarvodaya* and *antyodaya* have criminological dimensions which our social justice *awareness* must apprehend and actualize. I justify this observation by reference to the noble but inchoate experiment (or unnoticed epic) whereby Shri Jai Prakash Narain redemptively brought murderously dangerous dacoits of Chambal Valley into prison to turn a responsible page in their life in and out of jail. The rehabilitative follow-up was, perhaps, a flop.

204. In short, the technology of raising the level of awareness, not generating hatred by repression, show the way to making prison atmosphere safe and social defence secure. Criminology and consciousness are partners in community protection.

The Final Directions

205. I hold that even though Section 30 is *intra vires*, Batra shall not be kept under constant guard in a cell, all by himself, unless he seeks such an exclusive and 'lonely life. If he loses all along the way right to the summit court and the top executive, then and only then, shall he be kept *apart from the other prisoners* under the constant vigil of an armed guard. Of course, if proven grounds warrant disciplinary segregation, it is permissible, given fair hearing and review.

206. The petitioner, Sobhraj, cannot be granted the relief of striking down Section 56 or related prison rules but he succeeds, in substance, with regard to his grievance of bar fetters. Such fetters shall forthwith be removed and he will be allowed the freedom of undertrials inside the jail, including locomotion — not if he has already been convicted. In the eventuality of display of violence or escape attempts or credible evidence bringing home such a potential adventure by him, he may be kept under restraint. Irons shall not be forced on him unless the situation is one of

65. *Pubilius Syrus.*

emergency leaving no other option and in any case that torture shall not be applied without compliance with natural justice and other limitations indicated in the judgment.

207. Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in the Raj past, need reorientation; prison houses and practices, a hangover of the die-hard retributive ethos, need reconstruction; prisoners, these noiseless, voiceless human heaps cry for therapeutic technology; and prison justice, after long jurisprudential gestation, must now be re-born through judicial midwifery, if need be. No longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity. I, hopefully alert the nation and, for the nonce, leave follow-up action to the Administration with the note that stone walls and iron bars do not ensure a people's progress and revolutionary history teaches that tense Bastilles are brittle before human upsurges and many tenants of iron cells are sensitive harbingers of Tomorrow — many a Socrates, Shri Aurobindo, Tilak, Thoreau, Bhagat Singh, Gandhi. So it is that there is urgency for bridging the human gap between prison praxis and prison justice; in one sense, it is a battle of the tenses and in an another, an imperative of social justice.

208. If I may end with an answer to the question posed at the beginning, so long as constitutional guarantees are non-negotiable, human rights, entrenched in the National Charter, shall not be held hostages by Authority. Emergency, exigency, dangerousness, discipline, security and autonomy are theoretically palatable expressions; but, in a world where prison houses are laboratories of torture or warehouses where human commodities are sadistically kept and the spectrum of inmates range from drift-wood juveniles to heroic dissenters, courts — and other constitutional instrumentalities — should not consent to make jails judge-proof to tearful injustice. Until current prison pathology is cured and prison justice restored, stone walls and iron bars will not solve the crime crisis confronting society today.

209. I am aware that a splendid condensation of the answers to the core questions has been presented by my learned brother Desai, J and I endorse the conclusion. But when the issue is grave and the nation, now and again, groans because prisons breed horror and bruited reforms remain a teasing illusion and promise of unreality, brevity loses its lure for me; and 'going it alone' to tell the country plain truths becomes unobviable. If Parliament and Government do not need to-day, the next day comes. And, in an appeal to human tomorrow, if none responds to your call, walk alone, walk alone! Judicial power is a humane trust—'to drive the blade a little forward in your time, and to feel that somewhere among these millions you have left a little justice or happiness or prosperity, a sense of manliness or moral dignity, a spring of patriotism, a dawn of intellectual enlightenment or a stirring of duty where it did not exist before' — is enough.

210. The petitions succeed in principle but in view of the *ad interim* orders which have been carried out and the new meaning read into the relevant provisions of the Act the prayer to strike down becomes otiose. Batra and Sobraj have lost the battle in part but won the war in full.

211. I agree that the petitions be dismissed.

DESAI, J. (on behalf of himself, Chandrachud, C. J. and Fazal Ali and Shinghal, JJ.)

212. These two petitions under Article 32 of the Constitution by two internees confined in Tihar Central Jail challenge the vires of Sections 30 and 56 of the Prisons Act. Sunil Batra, a convict under sentence of death challenges his solitary confinement sought to be supported by the provisions of Section 30 of the Prisons Act (for short 'the Act'); Charles Sobraj, a French national and then an undertrial prisoner challenges the action of the Superintendent of Jail putting him into bar fetters for an unusually long period commencing from the date of incarceration on July 6, 1976 till this Court intervened by an interim order on February 24, 1978. Such a gruesome and hair-raising picture was pointed at some stage of hearing that Chief Justice M. H. Beg, V. R. Krishna Iyer, J. and P. S. Kailasam, J., who were then seized of the petitions visited the Tihar Central Jail on January 23, 1978. Their notes of inspection form part of the record.

213. There are certain broad submissions common to both the petitions and they may first be dealt with before turning to specific contentions in each petition. It is no more open to debate that 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 (see *Procunier* v. *Martinez*[66]). However, a prisoner's liberty is in the very nature or 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 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 (see *Wolff* v. *McDonell*[67]). By the very fact of the incarceration prisoners are not in a position to enjoy the full panoply of fundamental rights because these very rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. In *D. Bhuvan Mohan Patnaik* v. *Sate of A. P.*[68] one of us, Chandrachud, J., observed: (SCC pp. 186-87,para 6)

> Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practice" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law.

Undoubtedly, lawful incarceration brings about necessary withdrawal or limitation of some of these fundamental rights, the retraction being justified by the considerations underlying the penal system (see *Pell* v. *Procunier*[69]).

66. 40 L Ed 2d 224 at 248 (1974).
67. 41 L Ed 2d 935 at 973 (1974).
68. (1975) 2 SCR 24: (1975) 3 SCC 185.
69. 4 L Ed. 2d. 495 at 501 (1974).

213-A. Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution. But the necessary concomitants of the fact of incarceration, the security of the prison and safety of the prisoner, are to be kept in the forefront. Not that the Court would ever abdicate its constitutional responsibility to delineate and protect the fundamental rights but it must simultaneously put in balance the twin objects underlying punitive or preventive incarceration. The Court need not adopt a "hand off" attitude as has been occasionally done by Federal Courts in the United States in regard to the problem of prison administration. It is all the more so because a convict is in prison under the order and direction of the Court. The Court has, therefore, to strike a just balance between the dehumanising prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional security against escape, and the rehabilitation of the prisoners.

214. Section 30 of the Prisons Act reads as under:

> 30. (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 Jailer and all articles shall be taken from him which the Jailer 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 by night under the charge of a guard.

215. The gravamen of the argument is that sub-section (2) of Section 30 of the Act does not authorise the prison authorities in the garb of securing a prisoner under sentence of death, to confine him in a cell apart from other prisoners by imposing solitary confinement upon him. It is alleged that since the date of his conviction by the Sessions Judge awarding him capital punishment, Batra is kept in solitary confinement.

216. Mr. Chitale, who gave us competent assistance as an *amicus curiae* for Batra, after drawing our attention to the development of psychopathological syndrome in prisoners under solitary confinement for an unlimited period, urged that Section 30 of the Act does not empower the prison authorities to place the prisoner in solitary confinement. It was said that if Section 46(8) and (10) empower prison authorities to impose separate or cellular confinement as a punishment for jail offences, solitary confinement being more tormenting in effect, cannot be imposed on the prisoner, more so because it is by itself a punishment that can be awarded under Sections 73 and 74 of the Indian Penal Code and that too by a Court. The jail authority cannot arrogate to itself the power to impose such a punishment under the garb of giving effect to sub-section(2) of Section 30. In any event it was contended that if sub-section (2) of Section 30 of the Act is to be construed to mean that it authorises prison authorities to impose solitary confinement it is violative of Articles 14, 19, 20 and 21 of the Constitution.

217. It may be conceded that solitary confinement has a degrading and dehumanising effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Special isolation represents the most destructive abnormal environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it. It is abolished in U. K. but it is still retained in U. S. A.

218. If sub-section (2) of Section 30 enables the prison authority to impose solitary confinement on a prisoner under sentence of death not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is a prisoner under sentence of death, the provision contained in sub-section (2) would offend Article 30 in the first place as also Articles 14 and 19. If by imposing solitary confinement there is total deprivation of camaraderie amongst co-prisoners, commingling and talking and being talked to, it would offend Article 21. The learned Additional Solicitor General while not adopting any dogmatic position, urged that it is not the contention of the respondents that sub-section (2) empowers the authority to impose solitary confinement, but it merely permits statutory segregation for safety of the prisoner in prisoners' own interest and instead of striking down the provision we should adopt the course of so reading down the section as to denude it of its ugly inhuman features.

219. It must at once be made clear that sub-section (2) of Section 30 does not empower the prison authority to impose solitary confinement, in the sense in which that word is understood in para 510 of Jail Manual, upon a prisoner under sentence of death. Sections 73 and 74 of the Indian Penal Code leave no room for doubt that solitary confinement is by itself a substantive punishment which can be imposed by a Court of law. It cannot be left to the whim and caprice of prison authorities. The limit of solitary confinement that can be imposed under Court's order is strictly prescribed and that provides internal evidence of its abnormal effect on the subject. Solitary confinement as substantive punishment cannot in any case exceed 14 days at a time with intervals of not less duration than such periods and further, it cannot be imposed until the medical officer certifies on the history ticket that the prisoner is fit to undergo it. Every prisoner while under goingolitary confinement has to be visited daily by the medical officer, andwhen such confinement is for a period of three months it cannot exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods (*see* Section 74, IPC). The Court cannot award more than three months' solitary confinement even if the total term of imprisonment exceeds one year (*see* Section 73, IPC). This is internal evidence, if any is necessary, showing the gruesome character of solitary confinement. It is so revolting to the modern sociologist and law reformist that the Law Commission in its 42nd Report, page 78, recommended that the punishment of solitary confinement is out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court, even though it may be necessary as a measure of jail discipline. Sub-section (2) of Section 30 does not purport to provide a punishment for a breach of Jail discipline. Prison offences are set out in Section 45. Section 46 confers power on the Superintendent to question any person alleged to have committed a jail offence and punish him for such offence. The relevant sub-clauses for the present purpose are sub-clauses (8) and (10) which read as under:

> 46. The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by—
>
> * * * *
>
> (8) Separate confinement for any period not exceeding three months;

Explanation.—Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from sight of, other prisoners, and allows him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners;

* * * *

(10) cellular confinement for any period not exceeding fourteen days:

Provided that such restriction of diet shall in no case be applied interval of not less duration than such period must elapse before the prisoner is again sentenced to cellular of solitary confinement:

Explanation.—Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of, other prisoners.

220. The explanation to sub-clause (8) makes it clear that he is not wholly segregated from other prisoners in that he is not removed from the sight of other prisoners and he is entitled to have his meals in association with one or more other prisoners. Even such separate confinement cannot exceed three months. Cellular confinement secludes a prisoner from communication with other prisoners but not from the sight of other prisoners. However, para 847 of the Punjab Jail Manual and the provisions which follow, which prescribe detailed instructions as to how a condemned prisoner is to be kept, if literally enforced, would keep such prisoner totally out of bounds, i.e. beyond sight and sound. Neither separate confinement nor cellular confinement would be as tortuous or horrendus as confinement of a condemned prisoner. Sub-section (2) of Section 30 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. Such confinement can neither be cellular confinement nor separate confinement and in any event it cannot be solitary confinement. In our opinion, sub-section (2) of Section 30 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 confinement. They have no power to add to the punishment imposed by the Court which additional punishment could have been imposed by the Court itself but has in fact been not so imposed. Upon a true construction, sub-section (2) of Section 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

221. If Section 30(2) does not empower the jail authority to keep a condemned prisoner in solitary confinement, the expression "such prisoner shall be confined in a cell apart from all other prisoners" will have to be given some rational meaning to effectuate the purpose behind the provision so as not to attract the vice of solitary confinement. We will presently point out the nature of detention in prison since the time capital sentence is awarded to an accused and until it is executed, simultaneously delineating the steps while enforcing the impugned provision.

222. The next question is: who is a prisoner under sentence of death and how is he to be dealt with when confined in prison before execution

of sentence? If solitary confinement or cellular or separate confinement cannot be imposed for a period beyond three months in any case, would it be fair to impose confinement in terms of Section 30(2) on a prisoner under sentence of death right from the time the Sessions Judge awards capital punishment till the sentence is finally executed? The sentence of death imposed by a Sessions Judge cannot be executed unless it is confirmed by the High Court [*see* Section 38o(1), Cr. P. C.]. However, we are not left in any doubt that the prison authorities treat such a convict as being governed by Section 30(2) despite the mandate of the warrant under which he is detained that the sentence shall not be executed till further orders are received from the Court. It is undoubtedly obligatory upon the Sessions Judge while imposing the sentence of death on a person to commit him to jail custody under a warrant. Now, after the convicted person is so committed to jail custody the Sessions Judge submits the case to the High Court as required by Section 366, Cr. P. C. The High Court may either confirm the sentence or pass any other sentence warranted by law or may even acquit such a person. Thereafter, upon a certificate granted by the High Court under Article 134(*c*) of the Constitution or by special leave under Article 136, an appeal can be preferred to the Supreme Court. Section 415, Cr.P.C. provides for postponement of execution of sentence of death in case of appeal to Supreme Court either upon a certificate by the High Court or as a matter of right under Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1971, or by special leave under Article 136. Further, under Articles 72 and 161 of the Constitution, the President and the Governor in the case of sentence of death has power to grant pardon, reprieve or remittance or commutation of the sentence. No one is unaware of the long time lag in protracted litigation in our system between the sentence of death as imposed by the Sessions Court and the final rejection of an application for mercy. Cases are not unknown where merely on account of a long lapse of time the Courts have commuted the sentence of death to one of life imprisonment on the sole ground that the prisoner was for a long time hovering under the tormenting effect of the shadow of death. Could it then be said that under sub-section (2) of Section 30 such prisoner from the time the death sentence is awarded by the Sessions Judge has to be confined in a cell apart from other prisoners? The prisoner in such separate confinement would be under a trauma for unusually long time, and that could never be the intention of the legislature while enacting the provision. Such special precautionary measures heaping untold misery on a condemned prisoner cannot spread over a long period giving him no respite to escape from the boredom by physical and mental contact with other prisoners. What then must be the underlying meaning of the expression "a prisoner under sentence of death" in Section 30 so as to reduce and considerably minimise the period during which the prisoner suffers this extreme or additional torture?

223. 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. In a slightly different context in *State of Maharashtra* v. *Sindhi alias Raman*[70], it was said that the trial of an accused person under

70. (1975) 3 SCR 574: (1975) 1 SCC 647: 1975 SCC (Cri) 283.

sentence of death does not conclude with the termination of the proceedings in the Court of Session because of the reason that the sentence of death passed by the Sessions Court is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by a competent court. In the context of of Section 303 of the Indian Penal Code it was said in *Shaik Abdul Azeez* v. *State of Karnataka*[71], that an accused cannot be under sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant a judicially final sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under Section 401, Cr.P.C. 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, we hope, 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.

224. What then is the nature of confinement of a prisoner who is awarded capital sentence by the Sessions Judge and no other punishment from the time of sentence till the sentence becomes automatically executable? Section 366(2) of the Cr. P. C. enables the Court to commit the convicted person who is awarded capital punishment to jail custody under a warrant. It is implicit in the warrant that the prisoner is neither awarded simple nor rigorous imprisonment. The purpose behind enacting sub-section (2) Section 366 is to make available the prisoner when the sentence is required to be executed. He is to be kept in jail custody. But this custody is something different from custody of a convict suffering simple or rigorous imprisonment. He is being kept in jail custody for making him available for execution of the sentence as and when that situation arises. After the sentence becomes executable he may be kept in a cell apart from other prisoners with a day and night watch. But even here, unless special circumstances exist, he must be within the sight and sound of other prisoners and be able to take food in their company.

225. If the prisoner under sentence of death is held in jail custody, punitive detention cannot be imposed upon him by jail authorities except for prison offences. When a prisoner is committed under a warrant for jail custody under Section 366(2), Cr. P. C. and if he is detained in solitary confinement which 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). But 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) as interpreted by us 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.

226. Article 21 guarantees protection of life and personal liberty. Though couched in negative language it confers the fundamental right to life and personal liberty. To the extent, assuming sub-section (2) of Section 30 permits solitary confinement, the limited personal liberty of prisoner under

71. (1977) 3 SCR 393 : (1977) 2 SCC 485 : 1977 SCC (Cri) 378.

sentence of death is rudely curtailed and the life in solitary confinement is even worse than in imprisonment for life. The scope of the words "life and liberty" both of which occur in Vth and XIVth Amendments of the U. S. Constitution, which to some extent are the precursor of Article 21, have been vividly explained by Field, J. in *Munn* v. *Illinois*[72]. To quote:

> By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.... By the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bonds of a prison.

This statement of law was approved by a Constitution Bench of this Court in *Kharak Singh* v. *State of U. P.*[73], as also in *D. B. Patnaik* (supra). Personal liberty as used in Article 21 has been held to be a compendious term to include within itself all the varieties of rights which go to make personal liberties of the man other than those dealt with in clause (*d*) of Article 19 (1). The burden to justify the curtailment thereof must squarely rest on the State.

227. There is no more controversy which ranged over a long period about the view expressed in *A. K. Gopalan* v. *State of Madras*[74], that certain articles of the Constitution exclusively deal with specific matters and where the requirements of an article dealing with a particular matter in question are satisfied and there is no infringment of the fundamental right guaranteed by the article, no recourse can be had to fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in *R. C. Cooper* v. *Union of India*[75], and it was overruled by a majority of Judges of this Court, Ray, J. dissenting. In fact, in *Maneka Gandhi* v. *Union of India*[76], Bhagwati, J. observed as under: (SCC pp. 282-83)

> The law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a 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 right under Article 19 would have to meet the challenge of that article ... [I]f a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, *ex hypothesi* it must also be liable to be tested with reference to Article 14.

228. The challenge under Article 21 must fail on our interpretation of sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the

72. 94 US 113 at 142 (1877).
73. (1964) 1 SCR 332 at 347: AIR 1963 SC 1295: 1963 (2) Cri LJ 329.
74. 1950 SCR 88: AIR 1950 SC 27: 51 Cri LJ 1387.
75. (1971) 1 SCR 512: (1970) 1 SCC 248.
76. (1978) 1 SCC 248.

expression "procedure established by law" in Article 21 has been interpreted to mean in *Maneka Gandhi's case* (supra) that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would no be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law.

229. Incidentally it was also urged that the classification envisaged by Section 30 of prisoner under sentence of death is irrational and it is not based upon any intelligible differentia which would distinguish persons of one class from others left out and the basis of differentiation has no nexus with the avowed policy and object of the Act. There is no warrant for an implicit belief that every prisoner under sentence of death is necessarily violent or dangerous which requires his segregation. Experience shows that they become morose and docile and are inclined to spend their last few days on earth in communion with their Creator. It was, therefore, said that to proceed on the assumption that every prisoner under sentence of death is necessarily of violent propensities and dangerous to the community of co-prisoners is unwarranted and the classification on the basis of sentence does not provide any intelligible differentia. The rationale underlying the provision is that the very nature of the position and predicament of prisoner under sentence of death as construed by us, lead to a certain situation and present problems peculiar to such persons and warrants their separate classification and treatment as a measure of jail administration and prison discipline. It can hardly be questioned that prisoners under sentence of death form a separate class and their separate classification has to be recognised. In England a prisoner under sentence of death is separately classified as would appear from para 1151, Vol. 30, *Halsbury's Laws of England*, 3rd Edition. He is searched on reception and every article removed which the governor thinks it dangerous or inexpedient to leave with him. He is confined in a separate cell, kept apart from all other prisoners and is not required to work. Visits are allowed by relatives, friends and legal advisers whom the prisoner wishes to see *etc.* It is true that there is no warrant for the inference that a prisoner under sentence of death is necessarily of violent propensities or dangerous to co-prisoners. Approaching the matter from that angle we interpreted sub-section (2) of Section 30 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'. Classification according to sentence for the security purposes is certainly valid and, therefore, Section 30(2) does not violate Article 14. Similarly, in the view which we have taken of the requirements of Section 30(2), the restriction does not 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. The challenge in either case must fail.

230. Charles Sobraj, a foreigner, was arrested on July 6, 1976 and on July 15, 1976 he was served with an order of detention under Section 3 of the Maintenance of Security Act, 1971. His allegation is that ever since he was lodged in Tihar Central Jail he was put in bar fetters and the fetters were retained continuously for 24 hours a day and the uncontroverted fact is that since his detention he was put in bar fetters till this Court made an order on February 24, 1978 recording an assurance on behalf of the respon-

dents given by the learned Additional Solicitor General that the bar fetters shall be removed forthwith for a period of 14 days except when the prisoner was taken from the prison to the Court and back and also when the petitioner was taken for the purpose of an interview but if the interview is in the cell no such bar fetters shall be put. By subsequent orders this order dated February 24, 1978 was continued. Thus, from July 1976 to February 1978 the petitioner was kept in bar fetters. In the affidavit in reply on behalf of respondent 3, the Superintendent of Tihar Central Jail dated September 5, 1977, gory details of the criminal activities of the petitioner are set out simultaneously saying that the petitioner is of extremely desperate and dangerous nature whose presence is needed by Interpol and, therefore, it has been considered necessary to keep him under fetters while in Jail. While examining the constitutional validity of Section 56 we have not allowed our vision to be coloured, biased or abridged by these averments as in our opinion for the main contention raised by the petitioner they may not be relevant.

231. The petitioner contends that Section 56 of the Prisons Act so far as it confers unguided, uncanalised and arbitrary powers on the Superintendent to confine a prisoner in irons is *ultra vires* Articles 14 and 21, the challenge under Article 19 being not open to him. Section 46 reads as under:

> 56. 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 them.

232. Sub-para (3) of para 399 of the Punjab Jail Manual provides that special precautions should be taken for the safe custody of dangerous prisoners which *inter alia* includes putting him under fetters, if necessary. The safeguard that it provides is that if the Superintendent decides to put him in fetters he must record special reasons for putting fetters in the Journal and it must also be noted in the history ticket of the prisoner. Warders are under a duty to satisfy themselves that the fetters are intact. Para 435 provides that fetters imposed for security shall be removed by the Superintendent as soon as he is of opinion that this can be done with safety. Para 69 in Chapter VI provides that the Superintendent shall discharge his duties subject to the control of, and all orders passed by him shall be subject to revision by the Inspector General.

233. Undoubtedly, the limited locomotion that a prisoner may enjoy while being incarcerated is seriously curtailed by being put in bar fetters. In order to enable us to know what a bar fetter is and how, when a prisoner is subjected thereto, his locomotion is severely curtailed, a bar fetter was shown to us and its use was demonstrated in the Court. It may be mentioned that the iron rings which are put on the ankles are welded. Therefore, when the fetter is to be removed, the rings have to be broken open. Then there is a horizontal bar which keeps the two legs apart and there are two verticle bars which are hooked to the waist-belt which makes even a slow motion walking highly inconvenient. If along with this, handcuffs are put on the prisoner, his life to put it mildly, would be intolerable. The bar fetters are kept day and night even when the prisoner is kept in cellular confinement. It needs not much of an elaboration to come to the conclusion that bar fetters to a very considerable extent curtail, if not wholly deprive locomotion which is one of the facets of personal liberty. And this is being done

as a safety measure with a view to preventing the prisoner from walking as freely as others or from running away. It was tartly said that the prisoners have no fundamental freedom to escape from lawful custody and, therefore, they cannot complain against precautionary measures which impede escape from the prison.

234. Article 21 forbids deprivation of personal liberty except in accordance with the procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute deprivation. Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and, therefore, before such erosion can be justified it must have the authority of law. At one stage it was felt that the provision contained in para 399(3) would provide the sanction of law for the purpose of Article 21. Section 56 confers power for issuing instructions by the Inspector General of Prisons with the sanction of the State Government and Section 59 confers on the State Government to make rules which would include the rule regulating confinement in fetters. A deeper probe into the section behind enactment of para 399 ultimately led the learned Additional Solicitor General to make the statement on behalf of the respondents that para 399 of the Punjab Jail Manual is not a statutory rule referable either to Sections 59 or 60 of the Prisons Act, 1894. Learned counsel stated that despite all efforts, respondents were unable to obtain the original or even a copy of the sanction of the local Government referred to in Section 56. We must, therefore, conclude that the provision contained in para 399 is not statutory and has not the authority of law.

235. The question, therefore, is, whether the power conferred on the Superintendent by Section 56 is unguided and uncanalised in the sense that the Superintendent can pick and choose a prisoner arbitrarily for being subjected to bar fetters for such length of time as he thinks fit, and for any purpose he considers desirable, punitive or otherwise.

236. A bare perusal of Section 56 would show that the Superintendent may put a prisoner in bar fetters (*i*) when he considers it necessary; (*ii*) with reference either to the state of the prison or character of the prisoner; and (*iii*) for the safe custody of the prisoner. Now, we would exclude from consideration the state of prison requirement because there is no material placed on record to show that the petitioner was put in bar fetters in view of the physical state of the Tihar Central Jail. But the Superintendent has first to be satisfied about the necessity of putting a prisoner in bar fetters and "necessity" is certainly opposed to mere expediency. The necessity for putting the prisoner in bar fetters would have to be examined in the context of the character of the prisoner and the safe custody of the prisoner. The safe custody of the prisoner may comprehend both the safe custody of the prisoner who is being put in bar fetters and of his companions in the prison. We must here bear in mind that the Superintendent is required to fully record in his Journal and in the prisoner's history ticket the reasons for putting the prisoner in bar fetters. When it is said that the power conferred by Section 56 is uncanalised it is to be borne in mind that the challenge has to be examined in the context of the subject-matter of the legislation, viz., prisons, and the subject-matter itself in some cases provides the guidelines. In this context we may profitably refer to *Procunier's* case (supra). It says:

> The case at hand arises in the context of prisons. One of the primary functions of Government is the preservation of societal order through

> enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and indiscipline, t e maintenance of institutional security against escape or unauthorised entry, and the rehabilitation of the prisoners.

Two basic considerations in the context of prison discipline are the security of the prison and safety of the prisoner. These being the relevant considerations, the necessity of putting any particular prisoner in bar fetters must be relatable to them. We are, therefore, of the opinion that the power under Section 56 can be exercised only for reasons and considerations which are germane to the objective of the statute, viz., safe custody of the prisoner, which takes in considerations regarding the character and propensities of the prisoner. These and similar considerations bear direct nexus with the safe custody of prisoners as they are aimed primarily at preventing their escape. The determination of the necesssity to put a prisoner in bar fetters has to be made after application of mind to the peculiar and special characteristics of each individual prisoner. The nature and length of sentence or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question.

237. Again, the power under Section 56 is not unbridled because in the context of para 399 special precautions as required by sub-para (3) have to be taken for the safe custody of dangerous prisoners, irrespective of the fact whether they are awaiting trial or have been convicted. It is difficult to define with precision what attributes of a prisoner can justify his classification as 'dangerous'. But, these are practical problems which have to be sorted out on practical and pragmatic considerations by those charged with the duty of administering jails.

238. Let us look at the conspectus of safeguards that are adumbrated in Section 56 itself and in para 399 which though not statutory are binding on the Superintendent. Determination of necessity to put a prisoner in bar fetters must be relatable to the character of the prisoner, and the safe custody of the prisoner. That can only be done after taking into consideration the peculiar and special characteristics of each individual prisoner. No ordinary routine reasons can be sufficient. The reasons have to be fully recorded in the Superintendent's Journal and the prisoner's history ticket. Duty to give reasons which have, at least to be plausible, will narrow the discretionary power conferred on the Superintendent. It may be made clear that as far as possible, these reasons must be recorded in the prisoner's history ticket in the language intelligible and understandable by the prisoner so as to make the next safeguard effective, viz., a revision petition under para 69 to the Inspector General of prisons. A further obligation on the Superintendent is that the fetters imposed for the security shall be removed by the Superintendent as soon as he is of the opinion that this can be done with safety as required by para 435. In order to give full effect to the requirement of para 435, the Superintendent will have himself to review the case of the prisoner at regular and frequent intervals for ascertaining whether the fetters can be removed, consistently with the requirement of safety. It thus becomes clear that there are sufficient guidelines in Section 56 which contain a number of safegards against misuse of bar fetters by the Superintendent. Such circumscribed peripheral discretion with duty to give reasons which are revisable by the higher authority cannot be described as arbitrary so as to be violative of Article 14.

239. It was submitted that in view of the provision contained in paras 426 and 427 a prisoner may be put in bar fetters, irrespective of the requirement of prison safety and uninfluenced by the prisoner's character, on irrelevant and extraneous considerations such as length of sentence or the number of convictions. The only relevant considerations for putting a prisoner in bar fetters or for confining him in irons are the character, antecedents and propensities of the prisoner. The nature or length of sentence or the number of convictions or the gruesome character of the crime the prisoner is alleged to have committed are not by themselves relevant and cannot enter the determination of the Superintendent except to the extent to which they bear on the question of the safety and safe custody of the prisoner.

240. The legislative policy behind enacting Section 56 as interpreted by us is clear and discernible and the guidelines prescribed by the section have the effect of limiting the application of the provision to a particular category of persons. In such a situation the discretion circumscribed by the requirement vested in the prison authority charged with the duty to manage the internal affairs of the prison for the selective application of Section 56 would certainly not infringe Article 14.

241. It was said that continuously keeping a prisoner in fetters day and night reduces the prisoner from a human being to an animal, and thatthis treatment is so cruel and unusual that the use of bar fetters is an anathema to the spirit of the Constitution. Now, we do not have in our Constitution any provision like the VIII Amendment of the U. S. Constitution forbidding the State from imposing cruel and unusual punishment as was pointed out by a Constitution Bench of this Court in *Jagmohan Singh* v. *State of U. P.*[77] But we cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14. Now, putting bar fetters for an unusually long period without due regard for the safety of the prisoner and the security of the prison would certainly be not justified under Section 56. All the more so when it was found in this case that the medical opinion suggested removal of bar fetters and yet it is alleged that they were retained thereafter. One cannot subscribe to the view canvassed with some vigour that escape from jail cannot be prevented except by putting the prisoner continuously in bar fetters. That will be a sad commentary on the prison administration and the administrators. Therefore, Section 56 does not permit the use of bar fetters for an unusually long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable. Now that bar fetters of the petitioner have been removed in February 1978, the question of re-imposing them would not arise until and unless the requirement herein delineated and the safeguards herein provided are observed.

242. In the result, on the interpretation put by us, Section 56 is not violative of Article 14 or 21. The challenge must, therefore, fail.

243. Both the petitions are accordingly disposed of in the light of the observations made in the judgment.

244. We share the concern and anxiety of our learned Brother Krishna Iyer, J. for reorientation of the outlook towards prisoners and the need

77. (1973)2 SCR 541 : (1973) 1 SCC 20 1973 SCC (Cri) 169.

to take early and effective steps for prison reforms. Jail Manuals are largely a hangover of the past, still retaining anachronistic provisions like whipping and the ban on the use of the Gandhi cap. Barbaric treatment of a prisoner from the point of view of his rehabilitation and acceptance and retention in the mainstream of social life, becomes counterproductive in the long run.

245. Justice Krishna Iyer has delivered an elaborate judgment which deals with the important issues raised before us at great length and with great care and concern. We have given a separate opinion, not because we differ with him on fundamentals, but because we thought it necessary to express our views on certain aspects of the questions canvassed before us.