PETITIONER:
SUNIL BATRA ETC.

Vs.

RESPONDENT:
DELHI ADMINISTRATION AND ORS. ETC.

DATE OF JUDGMENT30/08/1978

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
CHANDRACHUD, Y.V. ((CJ)
FAZALALI, SYED MURTAZA
SHINGAL, P.N.
DESAI, D.A.

CITATION:
1978 AIR 1675 1979 SCR (1) 392
1978 SCC (4) 494
CITATOR INFO :

RF	1979 SC 916	(82)
E	1980 SC 249	(4)
R	1980 SC 470	(10)
F	1980 SC1535	(2,11,20,21,23,30,38)
REL	1980 SC1579	(3)
RF	1980 SC1789	(112)
RF	1980 SC2147	(51)
R	1981 SC 625	(2,4,7,8,10,11,12,14)
RF	1981 SC 746	(3,4,6)
R	1981 SC 939	(3)
R	1981 SC1767	(11,22)
MV	1982 SC1325	(75)
F	1982 SC1413	(45)
R	1983 SC 361	((2)1,12,14,17)
RF	1983 SC 465	(3,5,12,16,17)
R	1983 SC 473	(6)
RF	1985 SC 231	(2,3)
R	1986 SC 180	(39)
F	1989 SC1375	(20,71)
RF	1991 SC 101	(30,70,115,227,278)
RF	1991 SC 345	(6)
RF	1991 SC2176	(39)

ACT:
Prisons Act 1894-Section 30-Scope of-Solitary confinement-Imposition of bar-fetters under. s. 56 on a prisoner-Whether violates Articles 14, 19, 21 of the Constitution 1950.
Practice and Procedure-Necessity of social welfare organisation to intervene in the litigative process.
Prisons Act 1894 and Punjab Jail Manual-Need for revision to reflect the deeper meaning in the behavioural norms correctional attitudes and luimane orientation for the prison staff and prisoners alike.
Words & Phrases-Under sentence of Death and 'apart from all other prisoner's-Meaning of

HEADNOTE:
Section 30(2) of the Prisons Act provides that every

prisoner under sentence of death 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.

The petitioner in W.P. No. 2202 of 1977 who was a convict under sentence of death challenged his solitary confinement. It was contended on his behalf that s. 30(2) does not authorise placing a prisoner under sentence of death in solitary confinement and that the jail authority could not arrogate to itself the power to impose such punishment under the garb of giving effect to s. 30(2). On the other hand it was contended on behalf of the State that the section merely permits statutory segregation for safety of the prisoner in the prisoner's own interest and that instead of striking down the provision, the Court should adopt a course of so reading down the section as to denude it of its ugly inhuman features.

The petitioner in W.P. 565 of 1977 contended that s. 56 of the Prisons Act which confers unguided, uncanalised, and arbitrary powers on the Superintendent to confine a prisoner in irons is ultra vires Arts. 14 and 21 of the Constitution.

Dismissing the petitions.

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HELD: (per Chandradchud C.J. Fazal Ali, Shinghal and Desai, JJ.).

1. Section 30(2) does not empower the prison authority to impose solitary confinement upon a prisoner under sentence of death. Even jail discipline inhibits solitary confinement as a measure of jail punishment. [499H]

2. It has been well established that convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. For example a man of profession who is convicted would 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

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a convict is entitled to the precious right guaranteed by Art. 21 that he shall not be deprived of his life or personal liberty except according to the procedure established by law. [495G-H]

Procunier v. Martiney 40 L. Ed. 2d. 224 at 248; Wolff v. Mcdonnel 41 L. Ed 409 at 501; D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh & Ors. [1975] 2 SCR 24 referred to.

3. 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 by the Penal Code. [498 B-C]

4. Solitary confinement is so revolting to the modern sociologist and law reformer that the Law Commission 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. [498 F-G]

5. The explanation to s. 44(8) of the Prisons Act makes it clear that a person 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. Para 847 of

the Punjab Jail Manual, if literally enforced would keep a prisoner totally out of bounds, that is, beyond sight and sound. Neither separate confinement nor cellular confinement of a condemned prisoner would be as tortuous or horrendous as solitary confinement of a condemned prisoner. Section 30(2) merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners. Such confinement can neither be cellular confinement nor separate confinement and in any event it cannot be solitary confinement [499E-H]

6. A "prisoner under sentence of death" in the context of s. 30(2) can only mean a prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or avoided by any judicial or constitutional procedure. Till then a person who is awarded capital punishment can be said to be a prisoner under sentence of death. There is an inordinate time lag between the sentence of death passed by the Sessions Judge and the final disposal of appeal by the High Court or Supreme Court depending on the circumstances of each case or the rejection of an application for mercy by the President or the Governor. It cannot be said that under s. 30(2) such prisoner, from the time the death sentence is awarded by the Sessions Judge has to be confined to a call apart from other prisoners. [501F, 502C, 501C, 501E]

7. Jail custody is something different from custody of a convict suffering simple or rigorous imprisonment. The purpose behind enacting s. 366(2) of the Code of Criminal Procedure is to make the prisoner available when the sentence is required to be executed. Unless special circumstances exist, even in cases where a person is kept in a cell apart from other prisoners with day and night watch, he must be within the sight an sound of other prisoners and be able to take food in their company. [502 E-G]

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8. Section 30(2) as interpreted is not violative of Art. 20. When a prisoner is committed under a warrant for jail custody under s. 366(2), Cr. P.C. and if he is detained in solitary confinement which is a punishment prescribed by s. 73, I.P.C. it will amount to imposing punishment for the same offence more than once, which would be violative of Art. 20(2). But as the prisoner is not to be kept in solitary confinement and the custody in which he is kept under s. 30(2) would prelude detention in solitary confinement, there is no chance of imposing a second punishment upon him and, therefore, s. 30(2) is not violative of Art. 20. [502H; 503 A-B]

9. Personal liberty of the person who is incarcerated is to a great extent curtailed by plaintive 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 Art. 21 unless the curtailment has the backing of law. Section 30(2) establishes the procedure by which it can be curtailed but it must be read subject to the interpretation placed in this judgment. Once s. 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. [504E-F] t

10. Classification according to sentence for security purposes is valid and therefore s. 30(2) does not violate Art. 14. The restriction imposed by s. 30(2)
is not unreasonable. It is imposed keeping in view the safety of the prisoner and the prison security and does not violate Art. 19. [505F]

11. There is no warrant for an implicit belief that every prisoner under sentence of death is necessarily violent or dangerous requiring his segregation. The rationale underlying s. 30(2) is that the very nature of the position and predicament of a prisoner under sentence of death leads to a certain situation
and present problems peculiar to such persons and warrant 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. [505 A-C]

12. Section 30(2) as interpreted does not mean that the prisoner is to be completely segregated except in extreme cases of necessity which must be specifically made out and that too after he become a prisoner under sentence of death. [505F]

13. Section 56 is not violative of Arts. 14 and 21. [511C] The power under s. 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 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 or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question. [509A-C]

14. There are sufficient guideiines in s. 56. It contains a number of safe guards against misuse of bar fetters by the Superintendent. Such circumscribed peripheral discretion with duty to give reasons which are revisable by the higher
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authority cannot be described as arbitrary so as to be violative of Art. 14. The A Superintendent can put the prisoner in bar fetters only after taking into consideration the peculiar and special characteristics of each individual prisoner. No ordinary routine reasons can be sufficient. Duty to record reasons in the Superintendent's journal as well as the prisoner's history ticket will narrow the discretionary power conferred on him. The reasons must be recorded in the language intelligible and understandable by the prisoner. A further obligation is that the fetters imposed for the security, shall be removed by the Superintendent as soon as he is of opinion that this can be done with safety. The Superintendent will have to review the case at regular and frequent intervals for ascertaining whether the fetters can be removed. [510-A-B, 509E-H]

15. Moreover the section 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 a secure cell from where escape is somewhat inconceivable. [511B] C
Per Krishna Iyer J. concurring

1. The vires of section 30 and section 56 of the Prisons Act upheld. These and other provisions, being somewhat out of tune with current penelogical values, to be revised by fresh legislation. Prison Manuals are mostly callous colonial compilations and even their copies are mostly beyond the prisoner's ken. Punishments. in civilized societies, must not degrade human dignity or would flesh and

spirit. The cardinal sentencing goal is occupational, changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practises dehumanizing techniques it is wasteful, counter-productive and irrational hovering on the hostile brink of unreasonableness (Article 19). [488B-C]

(2) Solitary confinement, even if mollified an(l modified marginally, is not sanctioned by s. 30 for prisoners 'under sentence of death'. But it is legal under that section to separate such sentences from the rest of the prison community during hours when prisoners are generally locked in. The special watch, day and night. Of such sentences by guards upheld. Infraction of privacy may be inevitable, but guards must concede minimum human privacy in practice. [488E]

(3) 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. Section 30 is no substitute for sentence of imprisonment and merely prescribes the manner of organizing safe jail custody authorised by s. 366, Cr. P. C. [488F]

(4) 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 terrestial farewell his soul may be passing through, the compassion society owes to him whose life it takes. [488H]

(5) The crucial holding under s. 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, s. 30 9-526SCI /78
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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 or 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 s. 30(2). To be 'under sentence of death' means 'to be under a finally executable death sentence'. [48H, 489A-C]

(6) Further restraint on such a condemned prisoner is not ruled out, 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 fair play implied in natural justice. Minimal hearing shall be accorded to the affected prisoner if he is subjected to further severity. [489D]

(7) On the necessity for prison reform and revision of Jail Manuals held:-

(a) Section 56 must be tamed and trimmed by the rule of law and shall not turn dangerous by making prison 'brass' an imperium in imperio. The superintendent's power shall be pruned and his discretion, bridled for the purpose. [489 E]

(b) 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. [489E]

(c) 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. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture. [489F]

(d) Where an under trial 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. [489G]

(e) The 'iron' regimen shall in no case go beyond the intervals, conditions and maxima killed down for punitive 'irons'. They shall be for short spells, light and never applied if sores exist. [489H]

(f) The discretion to impose 'irons' is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security. [490A]

(g) A previous hearing. minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. [490 B]

(h) The gourmands for 'fetters' shall be given to the victim. ,2nd when the decision to fetter is made, the reasons shall be recorded in the n 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. [490 B-C]

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(i) Absent provision for independent review of preventive and punitive A 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 prisoners. 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. [490C-D]

(j) 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 relation or friends to take legal action. Where a remedy is all but dead the right lives only in print. 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. [490E-F]

(k) No 'fetters' shall continue beyond day time as noctural fetters on locked-in detenus are ordinarily uncalled for, viewed from cons derations of safety. [490G]

(I) 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. [490G]

(m) The Inspector-General of Prisons shall, with quick despatch consider revision petitions, by fettered prisoners and direct the continuance or discontinuance of the irons. In the absence of such prompt decision, the fetters shall be deemed to have been negatived and shall be removed. [490H-491A]

(8) The Jurisdictional reach and range of this Court's Writ to held prison caprice and cruelty in constitutional leash is incontestable. Prisoner have enforceable liberals devalued may be but not demonetized, and under on basic scheme, Prison Power must bow before Judge Power is fundamental freedom are in jeopardy. 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 sentinels 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 parmountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons. If judicial realism is not to be jettisoned, judicial activism must censor the argument of unaccountable prison autonomy. [409H, 410A, 412G-413B]

(9) 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

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based concept of locus standi so necessary in a democracy where the masses are in many senses weak. 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 law. [414H, 415B]

(10) Rehabilitation effort as a necessary component of incarceration is part of the Indian criminal justice system as also of the United States. 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. The important proposition is that it is a crime of punishment to further torture a person under going 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. [416H, 416C, 417F]

Mohammed Giasuddin v. State of Andhra Pradesh 1977(3) SCC 287, Shelton v. Tucker 364 US 476 (1950) at p.468 referred to.

(11) The Court does not 'rush in' to demolish provisions where judicial endeavor, ameliorative interpretational, may achieve both constitutionality and compassionate resurrection. The semantic technique of updating the living sense of a dated legislation is, perfectly legitimate, especially when, in a deve loping country like ours, the corpus juris is in some measure a Raj hang over. 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 Constitution which humanly constitutionalises the statute in question. 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; [419D-E, 420E, 422B]

Weems v. United States 54 L. ed. p. 801, Harvard Law Review Vol. 24 (1970-71) p. 54-55. R. L. Arora v. State of Uttar Pradesh (1964) 6 SCR 784 referred to.

(12) 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 upon or frozen by the prison authority. Is a person under death sentence, or under trial unilaterally dubbed dangerous liable to suffer extra torment too deep for fears ? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Art. 19) become chimerical constitutional clap trap. The operation of Articles 14,19 and 21 may be pared down for a prisoner but not puffed out altogether. The necessary sequitur is that even a prisoner, standing trial has basic liberties which cannot be bartered away. [428H-429B. 429E]

(13) So the law is that for a prisoner all fundamental rights are an enforce able reality though restricted by the fact of imprisonment. When human rights are hashed behind bars, constitutional justice impeaches such law. [430 C-B]

A. K. Gopalan v. State of Madras 1950 SCR 88; R. C. Cooper v. Union of lndia (1971) SCR 512; Kharak Singh v. State of U.P. (1964) SCR 232; Maneka Gandhi v. Union of India (1978) 1 SCR 218, referred to.

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(14) Is solitary confinement or similar stressful alternative, putting the prisoner beyond the zone of sight and speech and society and wrecking his psyche without deceive prophylactic or penological gains, too discriminating to he 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' sentence, 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 the tragic gap between the first judgment and the fall of the pall, under guise of a prison regulation, beyond(l prison power ? [431F-G]

(15) lt 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 allows by frantic forensic proceedings and mercy petitions is not likely to make his hanging certain by committing any murder within the prison. [434B]

(16) A mere administrative officer's deposition about the behavioral may be of men under contingent sentence of death cannot weigh with us when the limited liberties expression and locomotion of prisoners are sought to be unreasonably pared down or virtually wiped out by oppressive cell insulation. Where total deprivation to the truncated liberty of prisoner locomotion is challenged the validatory burden is on the State. [436C-D]

(17) Criminological specialists have 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. Our human order. must reject 'solitary confinement' as horrendous. [444H, 445 A-B]

In re Ramanjulu Naidu AIR 1947 Mad 381 approved.

James C. Colemen-Abnormal Psychology and Modern Life p. 105: Royal Commission on Capital Punishment 1949-1953 Report pp. 216-217.

Law Commission to India-42nd Report. Referred to.

(18) Petitioner is under 'statutory confinement' under the authority of section 30(2) of the Prisons Act read with section 366(2) Cr. P.C. 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. Held Petitioner shall not be solitarily confined. [447B]

(19) 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 IPC, Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, marked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. [447D-E]

(20) Section 30 of the Prisons Act 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. Confinement inside prison does not necessarily impart cellular isolation. Segregation of one person
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all alone in a single cell is solitary confinement. That is a separate punishment which the Court alone can impose. It would be subversion of this statuary provision (Section 73 and 74 IPC) 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. [448B, 448D]

(21) "Apart from all other prisoners" used in Section 30(2) is also a phrase of flexible import, 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 sentence 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 way and by night. [448-F-G]

(22) Prison offences are listed in section 45 and section 46 deals with punishment for such offences. 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. Punitive separate confinement shall not exceed there months and section 47 interdicts the combination of cellular confinement and "separate confinement" "Cellular confinement" is a stricter punishment than separate confinement and it cannot exceed 14 days because of its rigor. 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. An analysis of the provision 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. [449B, 450B-C, 450F, 450H]

(23) The Court awards only a single sentence viz. death. But it cannot be instantly executed because its excitability is possible only on confirmation by the High Court. In the meanwhile, the sentence cannot be let loose for he must be available for decapitation when the judicial processes are exhausted. So it is that section 365(2) takes care of this awesome interregnum by com
missing the convict to jail custody. Form 40 authorities safe keeping. The '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. The inference is inevitable that if the 'condemned' man were harmed by physical or mental torture the law would not tolerate the doing, since injury and safety are obvious enemies. To distort safe-keeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safekeeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe keeping. To preserve his flesh and crush his spirit is not safe keeping. 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. [451 D-H, 452B, D.F]

(24) A convict is under sentence of death when, and only when? the capital penalty inexorably operates by the automatic process of the law.

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Abdul Azeez v. Karnataka [1977] 3 SCR 393: D. K. Sharma v. M. P. State A [1976] 2 SCR 289 referred to. [454G]

(25) 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. Assuming 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 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, until the Supreme Court has pronounced judgment Articles 72 and 161 provide for commutation of death sentence even like sections 433, 434 and 435 Cr. P.C. Rules 547 and 548 made under the Prison Act, provide for a petition for commutation by the prisoner. 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 and he becomes subject to it only when the clemency application by the prisoner stands rejected. [455BD, 456B, H 457A]

(26) The goals of prison keeping, especially if it is mere safe keeping, come be attained without requiring a prisoner to live in the exacerbated conditions 1) of bare-floor solitude. Functionally speaking, the court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system. Sastre v. Rockefeller 312F. Suppl. 863 (1970). Wolfe v. Mc Donnell 41 I. rd. 2d p. 935. [465 B-C]

(27) The great problems of law are the grave crises of life and both can be solved not by the literal instructions of printed enactments but by the interpretative sensitization of the heart-to 'one still, sad music of humanity. [471 G]

(28) . The humane thread of jail jurisprudence that runs right through is that no prison authority enjoys amnesty for unconstitutionality and forced farewell to fundamental right is an institutional outrage in our system where stone walls and iron bars shall bow before- the rule of law. [471H-472A]

(29) Many states like Tamil Nadu, Kerala etc. have abandoned the disciplinary barbarity of bar fetters. 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. Therefore, an outside agency, in the sense of an official. higher than the Superintendent or external to the prison department, must be given the power to review the older of 'irons'. Rule 423 speaks of the Inspector General of Prisons having to be informed of the circumstances necessitating fetters and belchains. Rule 426 has a similar import. 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 v are implicit in the provision. [477D. 477F-478A]

(30) one of the paramount requirements of a valid law is that it must be within the cognizance of the community if a competent search for it were made. Legislative tyranny may be unconstitutional if the State by devious methods like pricing legal publication monopolised by government too high denies the

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equal protection of the laws and imposes unreasonable restrictions on exercise of fundamental rights [485G. 486B]

Bhuvan Mohan Patnaik v. State of A.P. [1975] 3 SCC 185, 189.

(31) 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 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. [492E]

ARGUMENTS

For the Petitioner in Writ petition No. 2202 of 1977.

1. Section 30 by its language docs not enjoin the jail authorities to confine a prisoner under sentence of death to solitary confinement. It provides that a prisoner under sentence of death should be confined in a cell apart from all other prisoners and shall be placed day and night under the charge of a guard. Such a prisoner is entitled to participate in all the recreational and rehabilitation activities of the jail and is also entitled to the company of other prisoners.

2. Section 30 requires that a prisoner "under sentence of death" shall be confined in the manner. prescribed by sub-section (2). The expression 'under sentence of death' also occurs in s. 303 I.P.C.. In [1976] 2 'SCR 289 the Supreme Court held that the expression 'must be restricted to a sentence which is final, conclusive and ultimate so far as judicial remedies are concerned'r As far as death sentence is concerned the trial does not end in the Sessions Court and confirmation proceedings in the High Court are a continuation of the trial, [1975] 3 SCR. 574. In other words until the High Court confirms a sentence of death, there is no operative executable sentence of death. Article 134 of the Constitution also provides for an appeal to the Supreme Court in certain cases where the High Court has awarded death penalty.

3. The conditions of solitary confinement have the tendency of depriving a prisoner of his normal faculties and may have the tendency to destroy a prisoner's mentallity. Justice, Punishment, Treatment by Leonard orland 1973 Edn. 297, 307-308: Havelock Ellis,-The Criminal p. 327; History of solitary confinement and its effects-134 US 160.

4. Solitary confinement is imposed as a punishment under sections 73 and 74 I.P.C. and under the Prisons Manual as a matter of prison discipline. It does not exceed 14 days at a time. In the case of prisoner who is under a sentence of death, as construed by the jail authorities, however, such confinement continues over long periods.

5. The Law Commission of India in its 42nd Reports at p. 78 has recommended the abolition of solitary confinement. Courts have also condemned it. A.l.R. 1947 Mad. 386; 134 US 160, 167. 168.

6. There are compelling reasons that a narrow construction should be put on Sec. 30 which will reduce the extreme rigour and penalty of the law. Only a court has the authority to inflict a punishment. The jail authorities do not have a right to inflict any punishment except as a matter of jail discipline. As

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s. 30 empowers the jail authorities to impose an additional punishment of solitary A confinement, it is submitted that it is violative of Art. 20(l) of the Constitution.

7. The expression under 'sentence of death' should be construed to mean 'under a final executable, operative sentence of death'. There is legislative injunction against the execution of a sentence of death in Ss. 366, 413, 414, 415, 432 and 433 Cr. P. C. A sentence of death cannot be executed till the appeal, if any, has been finally disposed of by the Court. A prisoner has also the right to make mercy petitions to the Governor or the president as the case may

be. Para 548 of the Prison Rules provides that in no case is the sentence of death to be carried out before the Government s reply to the mercy petition is received. Till this time arrives, a prisoner under sentence of death is entitled to be treated as a human being with a hope for the future, entitled to struggle for rehabilitation. Till the final stage has arrived such a prisoner cannot be treated as a lost, condemned human being.

8. Section 30 is violative of Au t. 14 of the Constitution. It imposes the penalty or solitary confinement on condemned prisoners without any distinction. The Prison Manual does contain provision for dangerous prisoners who may, as a matter of prison discipline, be kept in solitary confinement. Failure to make a distinction between a safe prisoner under sentence of death and a hostile and dangerous prisoner introduces arbitrariness in the treatment accorded to prisoners under sentence of death and thus is violative of Article 14.

9. A prisoner is not deprived of his personal liberties [1975]2 SCR 24. Article 21 is subject to Article 14. [19781 1 S.C.C. 248 The expression 'life' as used in Article 21 means something more than mere animal existence and the inhibition against is deprivation extends to all those limits and faculties by which life is enjoyed.

For the Respondent in W.P. 2202/77

1. Criminal law of India recognises capital punishment. It is awarded in very few cases. It is not the rule but rather the exception, [1974] 3 S.C.R. 340.

2. Death penalty has been upheld as constitutional in [1973] 2 S.C.R. 541. Section 354 (3) Cr. P.C. Of 1973 requires the recording of reasons for infliction of death penalty.

3. there is no provision for substantive due process in the Indian Constitution. 11950] S.C.R. 88, [1973] 2 S.C.R. 541/548.

4.. A prisoner is not a slave of the State and is not denuded of all fundamental rights. Lawful incarceration brings about the necessary withdrawal or limitation of many rights and makes them unavailable to prisoners. Prisoners have less than the full panoply of freedoms which private persons would have in non-prison situation. Prison regulations and prison discipline and considerations underlying our penal system necessitate restrictions being imposed. 92L, ed. 1356. 224 T. ed. 224. 238-24: 411 ed. 935. 950, 954, 957. [1975] 2 S.C.R. 24.

5. Solitary confinement is complete isolation of the prisoner from all human society and confinement in a cell so arranged that he has no direct intercourse or right of any human being or no employment or instruction. Webster's Third New International Dictionary Vol. III p. 2170, 33L ed. 835, 839.

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6. lt is a misnomer to characterise confinement in a cell as provided in Section JO(2) read with Chapter 31 of the Jail Manual as solitary confinement.

7. There is a fundamental distinction between solitary confinement imposed I punishment or an additional punishment and confinement of prisoner under sentence of death in a separate cell, for the purpose of preventing his suicide or escape and for ensuring the presence of the prisoner on the day appointed for execution.

8. The expression "under sentence of death" in section 30(2) means under sentence of death which is executable and which is finally conclusive and ultimate so far as judicial remedies are concerned. [1976] 2 S.C.R 289, [1977] 3 S.C.R.

393. Section 30(2) should be so construed and its implications worked out having regard to Sections 413-415 Cr. P.C'.

9. The rational underlying section 30(2) and Chapter 31 of the Manual is that prisoners under sentence of death, present problems peculiar to such persons which warrants their separate classification and treatment as a measure of jail administration and jail discipline. Prisoners under sentence of death are in a class by themselves and their separate classification has been recognised over the years in India and other civilized countries. Even in countries where solitary confinement as a norm of punishment has been abolished, confinement of prisoners under sentence of death continues. [Halsbury's Laws of England Vol. 30 p. 601. para 1151. U.K. Prison Rules 1964 (r.r. 74-76].

10. The fundamental distinction between imposing solitary confinement as a punishment and as a necessary measure of jail discipline is recognised in the 42nd Report of the law Commission. (para 380).

11. Section 30(2) so construed is not violative of Article 14. The failure to sub-classify does not involve breach of Article 14.

12. In the United States solitary confinement even as a punishment by itself has been consistently held to be not violative of the VIII Amendment. What the Courts have struck down is the particular system of solitary confinement if it is implemented and maintained in an inhuman or barbarous manner. Conditions in jail may not be perfect or ideal but the same cannot be said to be sub-human or violative of human dignity of prisoners. Certain matters may urgently call for reform but that does not brand the Regulations as unconstitutional .

For the Petitioner in Writ Petition No. 565/77

1. (a) The petitioner who is an under-trial prisoner is a French National and not being a citizen of India certain fundamental rights like Article 19 are not available to him. But as a human being he is entitled on the basic rights which are enshrined in Articles 14 20 21 and 22 of the Constitution.

(b) The petitioner who was arrested on 6th July 1976 alongwith four other foreigners has been kept under bar fetters 24 hours a day auld they are welded on him ever since his arurest.

2. The petitioner seeks to challenge Paragraph 399(3) of the Punjab laid Manual and Section 56 of the Prison Act, as violative of the petitioner's fundamental right under Articles 14 and 21 of the Constitution. The following facts indicate the brutality inflicted by the respondents on the Petitioner.

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(a) By continuous wearing of bar fetters? there were wounds on his ankles A and he represented to the jail authority to remove them. As no relier was obtained, the petitioner. filed a writ petition in the Delhi High Court challenging the conditions of his detention but the High Court dismissed the same as not maintainable on February 2, 1977 relying on 1972(2) S.C.R. 719. As such despite his wounds the petitioner had to suffer.

(b) The Jailor ordered removal of bar fetters in February 9, 1977 for 15 days but jail authorities in violation of medical advice put bar fetters after 9 days i.e. 18th February 1977. The respondents thereby violated the mandatory provisions of the Act.

(c) The Punjab Jail Manual is totally an out-dated enactment inasmuch as even after 30 years of Independence,

paragraph 576(d)(1) makes the wearing of Gandhi Cap by prisoners a jail offence an pargraph 63010) permits inhuman punishment like beating, besides putting bar fetters under paragraph 399 read with section 56 of the Prison Act.

LEGAL SUBMISSIONS

1. A person in jail is already subject to enormous curtailment of his liberties. The protection of whatever liberties are left inside the jail demand that they cannot be taken away arbitrarily and without the procedure established by laws. The greater the restriction, stricter should be the security of the Court, so that the prisoner is not subjected to unnecessary and arbitrary loss of his remaining liberties.

2. Paragraphs 399 and 435 of the Punjab Jail Manual are not laws under Article 13(3) of the Constitution of India and are void as they restrict personal liberty without the authority of law under Article 21 of the Constitution. These provisions bar which bar fetters can be put on a prisoner, severely curtailing his liberty of movement of limbs, on the ground that he is dangerous and as long as the jail authorities consider it necessary are void as they do not have authority of law (1964) 1 SCR 332, 338, 339, 345.

3. (a) Section 56 of the Prison Act is arbitrary inasmuch as it allows the jail authorities to choose any type of irons to be put on any prisoner. in paras 425 and 614 of the Punjab Jail Manual, 3 types of irons are mentioned; handcuffs weighing 2 Ibs., link fetters weighing 2 Ibs and bar fetters weighing 5 Ibs. Section 56 does not give any guide-line as to which fetters are to be put on a prisons- who is considered dangerous. Thus similarly situated prisoners can has discriminate under. the section.

(b) Since section 56 which allows the Prison Authority to put irons on prisoner depending upon the state of the prison it is violative of Article 14 as well 15 Article 21. because if the prisoner is fortunate to be imprisoned in a well-guarded modern Jail he would not be put under irons, while a similarly situated prisons who is unfortunate to be put in a dilapidated jail, he would be made to suffer by being put under irons.

(c) Section 56 is ultra vires of Articles 14 and 21 because it allows the Jail authorities to put irons on the personal assessments as "to the character of prisoners" The section thereby gives complete power to pick and choose prisoners for. being confined in irons.

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(d) Section 56 of the Prison Act and paragraph 399 of the Jail Manual, which restrict personal liberty, in so far as they abridge and take away fundamental rights under Article 14, will have to meet the challenge of that Article otherwise it is not a valid law. [1967] 3 S.C.R. 28/46; [19701 3 S.C.R. 530/546 and [1978] I S.C.R. 248/323.

4. Paragraph 399(3) of the Manual and section 56 of the Prison ACT which impose inhuman and cruel restrictions and subjects the petitioner to Torture more than those who are punished for jail offences are not laws when judged from the evolving standards of decency and present concept of civilization. When bar fetters are to be used as punishment they cannot be put continuously for more than 3 months vide paragraphs 616 and 617, while under impugned paragraph 399 and under section 56 of the Prison Act they can be put indefinitely.

5. When a prisons is subject to cruel and inhuman treatment the Court has the power and jurisdiction to interfere because of its sentencing function, since the prisoner is behind bars by the order of the Court. Hence the

condition of his confinement is the continuing, responsibility of the Court

6. In view of the Preamble and Article 51 of the Constitution, which obligate the State to respect human dignity and foster respect for international law and obligations, the Courts have a constitutional duty in interpreting provisions of domestic laws to give due regard to international law and country's inter national obligations.

7. This is also because the judicial process is a part of the State activity vide Article 12 of the Constitution, and the directive principles are addressed as much to the Executive and the Legislature as they are to the judiciary.

8. When domestic law is applied to a foreigner. there is a presumption that the legislature intends to respect rules of international law and country's inter national obligations.

70 ER 712/716; [1960] 3 All. E. R. 814/821; 1891 (1) Q.B.D. 108/112.

9. In interpreting statutes particularly ancient penal statutes, it is the duty of the court to interpret it in a broad and liberal sense in the light of prevailing conditions and prefer a construction which is favorable to the individual.

[1953] S.C.R. 825/847; A.I.R.]961 S.C. 1494, 1968 S.C.R. 62.

For the Respondent in Writ Petition No. 565/77

1. Challenge to Sec. 56 of the Prisons Act 1894 must be judged in the context of the subject matter of the legislation viz. "Prisons".

2. Maintenance of penal institution (Prison) is an essential function of government for preservation of social order through enforcement of criminal law.

3. One of the primary and legitimate goals of any penal institution is the maintenance of institutional security against escape of the prisoner from the care and custody of the penal institution to which he has been lawfully committed 40 I. ed. 2nd 234, 235, 239; 41 L. ed. 2nd 495, 501. 502.

4. There must be mutual accommodation between institutional needs and constitutional provisions. Not unwisdom but unconstitutionality is the touch stone. 41 L. ed. 2d. 935, 951. 954.

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5. Several features of prison administration may be undesirable or ill-advised but that cannot result in condemnation of the statute as unconstitutional, [1975] 2 S.C.R. 24, 28; 40 L. ed. 2d 224, 235. Courts are ill-equipped to deal with the increasingly urgent problem of prison administration and reform.

6. Power under section 56 can be exercised for reasons and considerations which are germane to and carry out the objective of the statute, namely, "safe custody of prisoners The following conditions must be fulfilled before power under section 56 is exercised:-

(a) Existence of necessity, as opposed to mere expediency or convenience, for confining prisoners in irons, 11 Guj. L. R. 403, 413.

(b) The determination of necessity to confine prisoners in irons is to be made with reference to definite criteria namely, state of the prison or the character of the prisoners.

(c) The expression "character of the prisoners" in the context and on a true construction is referable to past our present characteristics or attributes of a prisoner which

have a rational and proximate nexus with and are germane to considerations regarding safe custody of prisoners and preventing their escape.

(d) The determination must be made after application of mind to the peculiar and special characteristics of each individual prisoner.

(e) The expressions, "dangerous prisoners" or 'unsafe prisoners" has a definite and well recognised connotation in the context of prison legislation prison literature.

(f) Under para 399 (3)(e), special reasons for having recourse to fetters are required to be fully recorded in the Superintendent's journal and noted in the prisoner s history ticket. Decisions regarding imposition of fetters have to be reviewed from time to time, in order to determine whether their continued imposition is warranted by consideration of security (vide para 435).

(g) Para 69 of the Jail Manual provides for a revision to the Inspector General the order of the Superintendent.

(h) Prisoner can also avail of redress under para 49 read with para 53B of the Manual.

(i) Determination of the Superintendent is open to judicial review on the principles laid down in [1966] Supp. S.C.R. 311 and [1969] 3 S.C.R. 108.

(j) Power under section 56 is not punitive in nature but precautionary in character.

8. If the legislative policy is clear and definite, discretion vested in a body of administrators or officers to make selective application of the law does not infringe Article 14. A guiding principle has been laid down by section 56 which has the effect of limiting the application of the provision to a particular category of persons, [1975] I S.C.R. 1, 21, 22, 23, 48-53.

9. There is a presumption in favour of constitutionality of statutes, [1959] S.C.R. 279, 297. This presumption applies with greater force when the statute under consideration is one dealing with prisons and maintenance of internal security in penal institutions 408

10. It is not open to the petitioner to challenge section 56 on the ground that power can be exercised with reference to "the state of prison", inasmuch as no action based on that part of the provisions is taken against the petitioner [1955] I S.C.R. 1284, 1295.

11. There is no provision in our Constitution corresponding to VIII Amendment of the U.S. Constitution, [1973] 2 S.C.R. 541, 548.

12. There is also no provision for substantive due process in the Indian Constitution.

[1950] S.C.R. 88; [1973] 2 S.C. R. 541. 548.

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition Nos. 2202 and 565 of 1977.

Under Article 32 of the Constitution.

Y. S. Chitale (A.C.), Randhir Jain, M. Mudgal and G. K. B. Chowdhury (A.C.) for the petitioner (in W.P. No. 2202/77).

N. M. Ghatate, S. V. Deshpande, Sumitra Bannerjee & M. K. D. Namboodiry for the petitioner (in W.P. No. 565 of 1977).

Soli J. Sorabjee, Addl. Sol. Genl., K. N. Bhatt, R. N. Sachthey and Girish Chandra for the petitioner (in W.P. No.2202/77)

Soli J. Sorabjee, Addl. Sol. General, E. C. Agarwala and Girish Chandra for the respondents (in W.P. 565/77).

V. M. Tarkunde, P. M. Parekh for the Intervener (in W.P. No. 565/77).

The following Judgments of the Court were delivered:

KRISHNA IYER, J.-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.

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

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change the mataphor) if there is no total eclipse, what luscent segment is open for judicial justice ? Three inter-related problems project themselves: (i) a jurisdictional dilemma between 'hands off prisons' and 'take over jail administration' (ii) a constitutional conflict between detentional security and inmate liberties and (iii) the role 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' human to State torment and the prospect of escape or internal disorder, should be the course for the court to navigate

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

Two petitines-Batra and Sobraj-one Indian and the other French, one under death sentence and the other facing grave charges, share too different shapes, the sailing 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 2 prisoner, ipso facto, forfeits person- hood 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 to facto solitary confinement, pending his appeal, without to 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 sections 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 Constitutional.

The paramount law. Prison discipline and judicial oversight.

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,

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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 cor rectional institutions is vested in and rests with the hands of those institutions operating under statutory authority and their acts and administration of prison discipline and over all operation of the institution are not subject to court super vision or control absent most- unusual circumstances or absent a violation or a constitutional right." 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 non-existent rehabilitative and/or educational programs, deficient recreational opportunities-violate the Eight Amendment ban on ''cruel and unusual punishments."

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

"He has, as a consequence of his crime, not only for feited his liberty, hut all his personal rights except these which the law in its humanity accords to him. He is for the time being, the slave of the State."(8)

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 con-

(1) Federal Reporter 2d. Series, Vol. 386, p. 684; Donnel Douglas v. Maurice H. Sigler.

(2) Supplement to Edward S. Corwin's. The Constitution p. 245.

(3) 62 Vs . (21 Gratt) 790, 796 (1871)

(4) 257 Fed. Suppl. 674 Jordan l.. Fitzharris (N. D. Cal. 1966)

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cepts of decency by permitting conditions to prevail of a shocking and debased nature., the courts must intervene promptly to restore the primal rules of a civilized community ill accord with the mandate of the Constitution of the United States.

In Coffin V. Reichard the court was persuaded to intervene when, while lawfully in custody a prisoner is deprived of some right the B, 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.

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

The harshest blow to the old 'hands-off' doctrines was struck by Manree v. Pepa, 365 US 167, 5 L.Ed. 2d,, 492 (1961).

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

By l 975, 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 Pall(1) opinions and some telling observations from Charles Wolff(2) nail the argument the prisioners the non-persons.

Mr. Justice Steward. 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 corrections officials in their attempt to serve these interests are relevant in gauging the validity of the regulation."

(1) 417 US 817 41 Ed. 2d 495.

(2) 41 L. Ed. 2d. 935.

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

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 retraction in by the considerations underlying our penal system. But though his rights may be diminished by environment, prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no' iron Curtain drawn between the Constitutions 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.

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 is freedom from imposition of serious discipline is a liberty' entitled to due process protection."

Mr. Justice Douglas, again a dissenter, asserted: "Every prisoner's liberty i.e., 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

nonperson whose rights are subject to the within of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards of course, a bearing 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".

I may now crystalise this legal discussion. Disciplinary autonomy, in the hands of mayhem- happy jail staffers, may harry human rights and the walis from behind the high walis will not easily break through the sound-proof, night-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 sentinels on the qui vive, courts will guard Freedom behind bars, tampered, of course, by environmental realism but intolerant of torture by executive echelons. The policy

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Of the law and the paramountcy of the constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons.

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

'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 nineth 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 nineth 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.

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'.

Mr. Justice Douglas stressed this aspect in Wolff v. Mcdonnel: (1)

> .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 official 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,
(1) 41 L. Ed. 2d. 935 at p.976
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unreviewed report of a guard. When the Courts deter 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 persons."

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.

A few special forensic features of the proceedings before us have seminal significance and I adv. rt to them in as helpful factors in the progressive development of the legal process.

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 out. case-by-case correction but transcend into forensic humanisation of a harsh legal legacy which has for long hidden from judicial view lt is the necessitous task of this Court, when invited appropriately, to adventure even into fresh areas of as any 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.

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 beneficient potency beyond the individual litigant, and their consideration on the widely-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 faster people's vicarious involvement in our justice system with a broadbased concept of locus standi so necessary in a democracy where the masses arein many senses weak.
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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 organisation 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 as length the solutions to the issues realised 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.

It in 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 and ignore the mahatma's message. And this, with all the reform bruited about for decades and personal experience of statesman 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

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 numberous part.

This vicarious responsibility has induced the Supreme Court of the United stats to observe.

> "ln a series of decisions this Court held that even though the Governmental purpose be legitimate and subs -tantial, that purpose cannot b,- pursued by means that
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> broadly Stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must he viewed in the light of less drastic means for achieving the same basic purpose." (Shelton v. Tucker, 364 US 476 (1950) at p.468)(1).

Karuna is a component of jail Justice.

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 prisioners, 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.

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 L 1) 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 offences. 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 these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners. '

The benign purpose behind deprivation of freedom of locomotion and expression is habilitation of the criminal into good behavior, 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' (33 L. Ed. 2d. 484).

Rehabilitation effort as a necessary component of incarceration is part of the Indian criminal justice system as also of the United states.

(1) See Substantive Criminal Law by Cherif Bassiouni, p. 115

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For instance? this correctional attitude has been incorporated as a A standard by the National Advisory Commission on Criminal Justice Standards and Goals: (1)

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

In Mohammad Giasuddin v. state of A.P.(1) this Court strongly endorsed the importance of the hospital setting and the therapeutic goal of imprisonment:

> "Progressive criminologists across the world will every that the Ghanaian 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 thera- putic role of 'punishment'. The whole man is a healthy man and very 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 observa tions only to drive home the imperative of freedom-that its deprivation, lay the state, is validated only by a plan to make the sentence more worthy of that birthright. There is a spiritual dimensional 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 cases 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 reversed the process by manufacturing worse animals when they are released into the mainstream of society. Roger G. Lanphear, in a recent study. has quoted a telling letter from a prisoner which makes the poignant point.(3)

Dear Mrs. Stender:

(1) 61, pg. 43: Quoted in Freedom from Crime by Roger Lanphear, J. r). (Nellore Publishing Company).

(2) 1977 (3) S. C. C. 287.

(3) Regers C.. Lamphear Freedom From Crime through TM - Sidhi Progress pp. 46-47.

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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 feeling. And the main reason most inmates in prison today disrespect their keepers is because they themselves (the inmates are disrespected and arr not treated like human being;.. I myself have witnessed brutal attacks upon inmates and have suffered a few myself, uncalled for. I can understand a guard or guards an 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 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 untill 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 human being. And until the big wheels in Sacramento and the personel inside the prisons start practicing rehabilitation, and stop practising zoology, then the can expect continuous chaos and trouble between inmates and officials.

Lewis Moore"

We must heed the wholesome counsel of the British Royal Com mission(l) :

"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 as authorities to add further penalties day by day by punitive conditions of discipline, labour diet and general treatment.

(1) Royal Commission on Capital Punishment.

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The relevance of the though 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 infliction on the touchstone of Art. 19 and the, reasonableness' of the action. In depth 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 invigorators and enforcers of constitutionality and performance auditors or legality, and convicts serve terms in that grim microcosm called prison bu the mandete of the court, a continuing institutional responsibility vests in the system to moniter in the incarceratory process and prevent security 'excesses'. Jailors are bound by the rule of 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 lunreasonable, arbitary and is perilously near unconstitutionality.

Court's interpretative function when faced with invalidatory alternative.

Batra puts in issue the constitutionality of S. 30 (2) of the Prisons Act, 1894 (the Act, for short) while Sobhraj impugns the vires of S.56. But the Court does not 'rush into demolish provisions where judicial endeavour, amelioratively interpretational, may achieved both constitutionality and compassionate resurrection. The salutary strategy of sustaining the validity of the law and softening its application was, with lovely dexterity adopted by Sri Soli Sorabjee appearing for the State. The semantic technique of updating the living sense of dated legislation isk, in our view, perfectly legitimated, especially when, in a developing country like ours, the corpus juirs is, in some measure a raj hand-over.

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.

To meet the needs of India today, the imperatives of Independence desiderate a creatives role for the Court in interpretation and application, especially when enactments from the imperial mint govern. Words grown with the world. that is the dynamics of semantics.

Read Dickerson (1) has suggested :

> "the Courts are at least free from control by original legislatures. Courts, for one, has contended that, consistently with the ascertained meaning of the statute, a court

(1) The Interpretation and Application of Statutes, p. 245.

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> should he able to shake off the dust of the past and plant its feet firmly in the present.
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> 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 future legislature would do after it had read the courts 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."

Constitutional deference to the Legislature and the democratic assumption that people's representative express the wisdom of the community lead courts into interpretation of statutes Which preserves and sustain 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 meaning to adop that construction which humanely constitutionalizes the statute ;11 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 on Weems v. United states sets our sight high :

"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 civil 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 than the mischief which gave it birth. This is peculiary 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 provisions for events of good and bad tendencies of which no prophecy

(1) 54 L. ed. 801 (Weems v. United States)

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can be made. In the application of a constitution, there fore, 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. Under any other rule a constitution would indeed be as easy of applications 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."

A note in Harvard Law Review(1) 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. Tn a recent case concerning such a provision in the Bill of Rights of the Philippine Islands, which has the same meaning was 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 trans script of an old Bill. And excessive punishment may be quite as had as punishment cruel in its very nature. The fear of judicial intermeddling voiced by one of the dissent-

(1) Hervard Law Review, Vol. 24 (1910-II) p. 54-55.

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ing judges seems scarcely warranted, for the power to

prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling. With thin limitation, the progressive construction of this clause laid down by this case seems desirable."

(emphasis added)

The jurisprudence of statutory construction, especially when vigorous break with the past and smooth reconciliation with a radical constitution 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 social tenses. This Court in R. L. Arora v. State of Uttar Pradesh & Ors(1) 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 (Sections 30 and 56) can be vehicle of enlightened value 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."

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-orient approach becomes the philosophy of statutory construction, as we will presently explain by application.

The two problems and our basic approach

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 per son of Sobhraj 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. Three quotes set this tone sharply. In the words of Will Durant(2): 'It is time for all good man 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

(1) [1964] 6 S.C.R. 784.

(2) Will Durant's Article "What Life has taught Me". published in Bhawan' Journal, Vol. XXIV, No. 18, April 9,1978. p. 71 at p. 72.

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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 a 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 beings can have the quality of its belief judged, at least in part, by the quality of its prison and probate services and of the resources made available to them."

Batra facts

I begin with the critical facts in the first writ petition. Sunil Batra, sentenced to death but struggling survive, supplicates pathetically that although his appeal against the death sentence still pends he is being subject to solitary confinement which is contrary to the provision of the Penal Code, the Criminal Procedure Code, the Prison Act an(l Articles 14, 19 and 12 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 class prisoner 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 human, 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 hl 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 unclear sec. 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.

The quasi-solitary confinement was challenged in the High Court, perhaps vaguely (not particularising the constitutional infirmities of Sec. 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

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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 is hereby dismissed". The appeal to a division bench was withdrawn and the present writ petition under Art. 32 was filed, n where the lay prisoner urged his litany of woes and some constitutional generalities, later supplemented by Sri Y. S. Chitale as amicus 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 Whiteman 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 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 seculsion, 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.

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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 inspector notes left by Chief Justice Beg, who visited the 'condemned cell' along its two brothers on the bench:

> "We inspected the cell in which the prisoner was con fined. 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 certain 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.
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> 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

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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 under-trial 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 no 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, ordered). '

The basic facts hearing 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.

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 Art. 136 and, if finally frustrated in this forensic pursuit, to move for the ultimate alchemy of Presidential communication under Art. 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.

Art 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 Sec. 30 of the Prisons Act take in all necessary safeguard for the protection of the prisoners sentenced to death which are abso-

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lutely 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 to' 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 a 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 P cannot be posted to guard the prisoners. The Warder guard has to guard them bare handed. Tn case the prisoners under sentence to 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 t(h 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.

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.... 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."

These factual-legal submission deserve examination. When arguments spread out the learned Additional Solicitors abandoned some of the extreme stances taken in the States affidavit and reduced the rigour of the averments by gentler postures.

Essentiality, we have to decide whether, as a fact, Batra is being subjected to solitary confinement. We have further to explore whether S.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 S. 30(2) is the correct construction, having regard to the conspectus of the relevant provision of the Penal Code and Criminal Procedure Code. Finally, we have to pronounce upon the vires of S. 30(2), if it does condemn the death sentence to dismal solitude.

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 balls 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.

True our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Art. 14 and 19 and if inflicted with procedural unfairness, falls foul of Art. 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 law and the seven
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lamps of freedom (Art. 19) become chimerical constitutional claptrap. A Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to prescribe 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 women 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.

Is it legal or legicidel 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 unfresh. 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.

The ratio in A. K. Gopalan's case 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. Coopers case.(1) In Maneka Gandhi the Court has highlighted this principle in the context of Art. 21 itself.

And what is 'life' in Art. 21? In Kharak Singh s case. Subba Rao, J. quoted Field, J. in Munn v. Illino's (1877)

94, U.S. 113, to emphasise the quality of life covered by Art. 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 H

(1) [1971] 1 SCR 512.

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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."

[1964(1) SCR 232 at 357]., A dynamic meaning must attach to life and liberty.

This court has upheld the right of a prisoner to have his work published if it does not violate prison discipline. (State v. Pandurang)(1). The martydom of Gopalan and resurrection by Cooper paved the way for Maneka(2) where the potent invocation of the rest of Part III, even after one of the rights was validity 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 Arts. 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.

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.

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 or 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

(1) [1966] (i) S.C.R. 702 and see [1975] 3 SCC 185 (Chandrachud, J.)

(2) [1978] 1 S.C.R. 248.

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custody, or is he deemed under s. 30 of the Act to suffer lone A imprisonment until cadaverisation?-a qualitative hiatus in approach and impact.

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 was into that limbo where languish lonely creatures whose personhood is excoriated even if their execution is unexecutable until further

affirmation.

In the next case we have Sobhraj, 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 a 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 . '

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.

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 Art. 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' sentence, 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 then fall of the pall, under guise of a prison regulation, beyond prison power ?

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

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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.

Right now we will examine some of the fallacies in the counter affidavit filed by the State. This will help us judge the reasonableness 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 S. 30(2).

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, some times

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 sentences, often reflective in their terminal chapter and 'sickled over by the pale cast of thought, are homicidal or suicidal beasts and must therefore be kept in solitary confinement. (1)

> "... the evidence given to us in the countries we visited and the information we received from others, were M uniformly to the effect that murderers are no more likely
>
> (1) Royal Commission on Capital Punishment, 1949-1953 Report pp. 216-217.

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> than any other prisoners to commit acts of violence against A 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

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.

Once we set our sights clear, we see a string of non-sequitur in the naked 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 com- passionate measure to protect the prisoner lest he be killed or kill himself or form a mutual aid society with other condemned prisoners for hera kiri Community life for a death sentence, 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 n that sloss 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 men 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 fellow-men 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 sentence, beyond the non-medical jail superintendent's ipse dixit?

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(1) 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.

The instinct of self preservation is so inalienable from biological beings that the easy oath of the Jail Superintendent that condemned

(1) L.M. Hiranandani, The Sentence of Death, The illustrated Weekly of India, Aug. 29. Sept. 4, page 8.

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prisoners are prone to commit suicide if given the facility looks too recondite to commend credibility.

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

Nothing is averred Lo 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 in frequently 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 he good! To find a substantial difference in prison treatment between the two 'lifers' and 'condemned' con victs-is to infer violent conduct or suicidal tendency based on the fluctuating sentence alone for which no expert testimony is forth coming. 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.

A few quotes from a recent American study on prisons, hammer home the negativity of the "solitary".(1) 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.

When I first saw it, I just couldn't believe it. It was a dungeon. Nothing but cement and filth. I could not imagine

(1) Rogers G. Lamphear: Freedom From Crime through the M. Sidhi. Program, pp. 128-129.

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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 bad 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 hand 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 bomb; a crypt. And it was "Home" for twenty four hours a day, every day."(1)

One prisoner wrote:

I swear I want to cry sometimes, when I look at some of the older prisoner 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.

. . . 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 some day 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 T became a nervous and paranoid wreck would be understatement. My mother would end up crying

(1) Ibid pp. 131-132.

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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."

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 all 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 behaviourial may be 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 unreason ably 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

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 behaviourial 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.

Having dealt with some of the untenable positions taken by the affient, 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 ll direction on 5th May, 1978

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

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, experiencially, 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.

American high-security prisons, reportedly with their tours, tantrums and tensions, may not help comparison except minimally. Even so, the Additional Solicitor General draw 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:

> (1) "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 con fined. 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".

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 con duct in segregation has since been entirely satisfactory the G 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."

(1) Kenneth Grahm v. J. T. Willingham Federal Reporter, 2d Series Vol. 384 P. 2d. p. 367.

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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 adds to the sentence of the court an additional and very terrible punishment, so far as adults and even boys accused of 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." (1)

The great Judge Warren, CJ in Trop. v. Dulles(2) 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".

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 tempering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and

(1) B. K. Bhattacharya: Prisons, p. 111.

(2) Leonard Orland, Justice, Punishment, Treatment, p. 297.

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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; thereore, I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitate 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 be neath 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."

Viewing cellular isolation from a human angle, that literary genius, Oscar Wilds, 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 Hows 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 to the inflexible laws of an iron formula: this immobile quality, that makes each dreadful day in the very maniutest detail 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 light 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."

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And Shri Jawaharlal Nehru has recorded in his Autobiography in tho Thirties (1) :

"Some individuals, sentenced for revolutionary activities for life or long term of imprisonment, are often kept in solitary confinement for long period. But in the case of these persons-usually young boys-they are kept along 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."

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 us written, the address is not properly given and the letter does not reach. Interviews are still more difficult. Almost in variably 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."

(1) Jawaharlal Nehru, An Autobiography, p. 222.

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

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 nasality, and deported eventually. She writes:

"By ten o'clock that morning I found myself locked in 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 pallat 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, wear 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 latrine and Kalpana's ran past the two outer walls of my cell, filling the hot nights with a stench that made me wretch he 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 pre- arrangements, 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.

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During the daytime, the key to the gate of the female word 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 or 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 Superintend (dent.

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 hi n as much as possible so as not to get caught out if he happened to change his mind."

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 jail. Without empathy, decision-making may be futility.

It is fair to state that Sri Soli Sorabjee, expressed himself for jail reform and his heart was with those whose limited liberty was ham strung, 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.

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 crudition 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.

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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."(1)

"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 that social isolation represents the most destructive abnormal environment. As this isolation progresses from partial to total, the severity of impairment increases, ranging from

schizord-like postures to depressive-type postures."(2) Eloquent testimony to man's need for belonging,, acceptance, and approval is provided by the experience of small groups of scientists, officer, and enlisted personnel who voluntarily subjected themselves to isolated antartic 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 fr 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."(3)

"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

(1) David J. Rotman. Historical perspectives-Justice, Punishment, Treatment by Leonard Oreland, 1973, p. 144.

(2) Psychiatrist and the Urban-setting-Comprehensive Text Book of Psychiatrist-ll, 2nd Ed. Vol. II (1976) by A . M. Freeman, Harlod I. Kaplan, Benjamin J. Sedock, p. 2503.

(3) James C. Coleman-Abnormal Psychology and Modern Life p. 105.

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the history of American penology.(1)

Some prisoners are kept in these gloomy places for month. 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 Klondike is a grim example of what is known to students of corrections as 'deed end' penology. Resorting to it for long periods o time is n 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 his deputy in charge of custody."

A much more recent case which bids well to become a cause clebre is that of Robert Shroud 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 Alska 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 all expert in disease of birds and is alleged to have become a world-wide authority in his field.(2)

"Regarded as a rational method of treatment, cellular confinement is 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 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 wooden substitute for the harmonising influence f honest society.(3)

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

(1) Harry Elmer Barnes and Negley K. Testers-New Horzons in Criminology, 3rd Ed. 2p. 351-352.

(2) Royal Commission on Capital Punishment 1949-1953 Report pp. ;217.

(3) Havelock Ellis, The Criminal, 5th Edn. 1914, r. 327.

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Many penologists in India take exception to the solitary confinement rule. It is hard to differentiate between this as an 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".(1)

Yahya Ali. J., in 1947, loll before our constitutional charter Came into being, had expressed himself strongly against 'solitary confinement' and we feel more strongly about it and against it. Our humane order must reject solitary confinement' as horrendous. The learned Judge observed :

" 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 or 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 S. 379, Penal Code and I do not consider that to be I circumstance 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 No 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 22-9-1893 the provisions in Larceny Act relating to solitary confinement which had become obsolete for several decade 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 all exclusively for the maintenance of prison discipline Although in the medieval times under the influence of the eccesiastics it was considered that cellular confinement as a

(1) B. K. Bhattacharya, Prisons, p. 117,

(2) AIR 1947 Madras 381

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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 is part of the Indian Penal Code, be administered, if ever in the most exceptional cases of unparalleled atrocity or brutality."

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 penelogical horror as long solitary confinement should be allowed to survive after death within the prison. 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.

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'. 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 hangmen's lethal move, and remain to be gone through. is contention is that solitary confinement is a separate substantive punishment of maddening severity prescribed by sections 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 1 860 has interposed, in its cruel tenderness, intervals, maxima and like softening features in both sections 73 and 7. Such being the penal situation, it is argued that the incarcertory 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
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secret clause of solitary confinement. What warrant then exists for A 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. It will be a stultification of judicial power if under guise of using section 30(2) o 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 no be solitarily confined. Can he be segregated from view and Voice and visits and comingling, 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'.

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 section 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, wold be sanctioned. Commonsense quarrels with such nonsense.

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."

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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 3() 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.

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.

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 (section 73 and 74 I.P.C.) to impart a meaning to section (1)(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 o the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone. the power being discretionary and disciplinary.

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.

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 or 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 sentence will have to be kept separated from the rest in the same cell but no 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 meanings preserves the disciplinary purpose and avoids punitive harshness. Viewed function ally, the separation is authorised, not obligated. that is to say, if discipline needs it the authority shall be entitled to and the prisoner

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shall be liable to separate keeping within the same cell as explained A 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.

When we move on to Chapter 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."

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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 separate confinement and it cannot exceed 14 days because of its rigour. It entirely excludes a prisoners from communication with other prisoners but it shall not exclude a prisoner from sight o other prisoners.

Solitary confinement has the severest sting and is awardable only by Court. o 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 sentence, save to the extent indicated.

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 .6(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.

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:
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> "So many convicts went mad or died as a consequence of the solitary regime that by the mid-19th century it was generally abandoned..."(1)

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.

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."

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 365(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 hall receive the further warrant or order of this Court, carrying into effect the order of the said Court".

This 'safe keeping' in jail custody is the limited jurisdiction of the jailor. The convict is not sentenced to imprisonment. He is lo 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 o the Superintendent not imprisonment in the true sense. Section 366(2) Criminal procedure Code (Jail Custody) and Form 4 (safely to keep) underscore this concept, reinforced by the absence of a sentence o 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

(1) Britannica Book of the Year 1975-Events of 1974. p.567.

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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 things of life, so long as lie 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 o 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 misconceives 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.

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 sentence can no more be denuded or life's amenities than a civil debtor, fine defaulter, maintenance defaulter or contemner indeed, a

gross confusion accounts for this terrible maltreatment.

The Prisons Act (Sec. 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 sentences 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.

To exaggerate security unrealistically is morbidity and, if it is a pervasive malady, deserves psychiatry for the prison administration.

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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 penology 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.

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.

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."

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 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. Bad fellows in misery have heartloads to unload and real conversation 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 legomachic 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.

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
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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 or the body of the prisoner on the day appointed for his execution".

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

> "ln 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.

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'. Is he under sentence of death? Not yet.

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".

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 lip and the cup. Rulings of this Court in Abdul Azeez v. Karnataka(1) and D. K. Sharma v. M. P. State(2), though not directly on this point, strongly suggest this reasoning to be sound.

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

> "366. (1) When the Court of Sessions passes a sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it be confirmed by the High Court.

(1) [1977] (3) S.C.R. 393.
(2) [1976] (2) S.C.R. 289
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> (2) The Court passing the sentence shall commit the A convicted person to jail custody under a warrant."

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.

I go further. Let us assume that the High Court has confirmed that death sentence or has de novo imposed death sentence. Even there is quite a likelihood of an appeal to the Supreme Court and the plenary power of the highest court extends to demolition or 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 E 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 tc the High Court for the grant of a certificate under article 132 or under sub-clause (c) of clause (l) of article] 34 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 intends to present a petition to the Supreme

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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

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.- lmmediately 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 convicts submit a petition within the period of seven days prescribed by Rule I it should be addresses 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 an(l shall certify that the execution has been stayed pending receipt of the orders of the Governor in Council and the Governors 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."

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
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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 both prisoner stands rejected. Of course, thereafter section 30(2) is attracted. A second or a third, a fourth or further application for mercy docs not take him out of that category unless there is a specific order by the competent authority staying the execution of the death sentence.

The conclusion inevitably follows that Batra, or, for that matter, others like him, cannot be classed as persons "under sentence of death". Therefore the cannot be confined apart from other prisoner. 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 sentence in custody. The concrete result may be clearly set out.

Condemned prisoner 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 sentence he should be given a hearing in brief in essential compliance with the canons of natural justice.

Deference to the erudite efforts of Counsel persuades me, before l 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.

Punitive segregation is regarded as too harsh that it is limited to no more than 8 days except with special approval of the commissioner
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of corrections in many American states... The average for this type of punitive incarceration is five days. Now note what the U.S District court states:

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

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.

An Afro-American citizen Sostre, brought a Civil Rights action Sostre v. Rockfeller(2) complaining of solitary confinement otherwise called(l 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, dehumanizing 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'.

The decision on punitive segregation confinement in Sostre v. Rockfeller 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 punishment when tested against the evolving standards if decency that mark the progress of maturing society .(Trio v. Dulles, 356 U.S 86 ,101(1958)(Opinion of warren C.J)
>
> 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

(1) Justice Punishment, Treatment by Leonard Orland, The Free Press New York, p. 293.

(2) 312 F. Suppl. 863 (1970).

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> 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.

What is of considerable interest is the observation on procedural due process whish in our country has its counter part in Article 21, as expounded in Maneka Gandhi. The American Judge observed in Sostre's case

> 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 governments case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual also have the right to retain counsel. the decision maker's 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 affect, 'sentenced' to more than a year in punitive

segregation with out the minimal procedural drastic punishment upon a prisoner."

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 mays not uncritically adopt the holdings of decisions that take color from contexts where the shading 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

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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

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

We are not to be understood as disapproving the judgement of many 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 prison, it is wise that such 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 con fronted with the accusation, informed of the evidence against him.'

The Supreme Court of the United states in Wolf v. McDonnell(1) 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 dsciplinary-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 Committee, 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 incor-

(1) 41 L. Ed. 2d p. 935.

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rigible 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. lt 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 defence when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals".

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 if that is forbidden, to have adequate substitutes aid in the form to help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, how ever, 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.

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

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".. 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 require lent 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 effect 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."

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

"Certain principles have remained relatively immutable our jurisprudence. One of these is that where govern mental 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

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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 jealously. 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 of 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...."

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 counter-productive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle (to reintegration) in the concept of a prisoner as a non-person 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...."

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'

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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.(1)

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 rest 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 my 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 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)

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 tile 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.

(1) Sostre V. Rockefeller. 312 F. SUPDI. 863 (1970)

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The facie 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 humane 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.

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 framework for this confrontation."(')
>
> 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 prison cases is that they sensitized both the public and prison officials to the need for prison reform. As a result, progressive prison authorities and humanitarian citizens' groups are able to take advantage of this increased sensitivity to advocate reform."

The Sobraj Case

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 !

The manacled numbers of the Tihar Jail community appear lo be alarmingly large and fluctuating, if we go by the averments in the

(1) Harward Civil Right-Civil Liberties Law Review (Vol.]2)

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affidavit of the petitioner and the counter affidavit by the State. In January, 1978 according to Sobraj, there were 207 under trial 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 remind of what Douglas, J. Observed in Hicks:(1)

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

" Even the intervener, Citizens for Democracy, have, 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 discrepencies 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.

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

(1)383 US 252 (1966)

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murder. The prisoner challenged the legality of arbitrary 'irons' in A 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'....

Discomfited Sobraj has moved this Court.

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 little relaxation in the rigour of the 'iron' prescription, Sobraj (and how many submissive sufferers like Him there are ?) has been continuously 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.

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/- Mr. Mukhreja
Assistant Superintendent of Jails.

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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 No. 3) r

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, n
Dy. Superintendent of Jails
(Respondent No. 3)

The counter-affidavit of Shri Marwa, the then Superintendent, has taken up an extreme position about which I am special. For instance, he has asserted that the Resident Medical officer had examined the petitioner on 3rd September 1977, and found no wound on his ankles. Significantly on September 4, 1977, this Superintendent has recorded a note in his journal: "1 was informed by Shri 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 6-9-1977 in connection with his Writ Petition, wherein he has mentioned that his ankles are injured and thus his bar fetters should be removed.

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.

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:

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(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;

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).

The first is, that a large number of prisoners, a few hundred at times-minors and undertrials too-are shackled day and night four 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 class prisoner subjects fetters, the others being class people. A cynical but to 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 a class prisoner, undertrial or convict; everyone whose lot is below that line is a 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 undertrial 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.

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, para 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.'

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Some flegellations 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.

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

Right at this stage, 1 may read S. 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 of 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 illustrations as may be laid down by the Inspector General with the sanction of the Local Government, so confine them.'

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 S. 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 show'n to be valid. Sobraj's grievance is shocking shackling with

bar fetters. Iron on wrists, iron on ankles, iron in between, welded strongly that all oppressive 6 Ibs. 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 under-trials, cannot be allowed to bid for escape, and where circumstances justify, any result oriented measure, including fetters, is legally permissible. It is argued that a prison is not play-ground 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.

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Rights and Realities

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 Superitendent'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.

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 warp 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 soul less thing, a machine like routine. Like automations 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 weighted 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 ?"

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.

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
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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.

A valuable footnote to this approach may be furnished by recalling how Mahatma Gandhi regarded jails as social hospitals' and Prime Minister(1) 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: what ever 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 affective 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 withy them ..."(2)

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 and claw' 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-ail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors to stampede courts into vesting unlimited power in risky hands with no convincing mechanism for prompt, impartial check. A sober balance, rights that alone will fill the constitutional bill.

(1) Indian Correctional Journal, Vol. 1, No.2 July 1957 p.6a.

(2) Indian Correctional Journal , Vol. 1, No.2, July 1957 pp.25.

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The grave danger of over-emphasizing order, discipline and security within the prison, while interpreting S. 56, is that it lands itself unawares to a pre-conceived, one sided meaning.

> "The unconscious or half-conscious wresting of fact and word and idea to suit a pre-conceived 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."(1)

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.

The learned Additional' Solicitor General commended for our consideration the judicial strategy of softening draconian disablement implied in S. 56 by a process of interpretation as against invalidation. We agree, and proceed to consider whether the language of S. 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 "

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

(1) Sri Aurobindo-Essays on the Gita, p. 37.

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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.

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 conclusion it is not apt to state that these 'rules and instructions' have no legal force as the source of power, S. 56, desiderates for their validity the sanction of the 'Local Government'. After strenuous efforts to trace such sanction, the Addl. 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 Art. 21. In this sense, S. 56 stands unclad and must be constitutionally tested on its sweeping phraseology of naked brevity.

Even otherwise, the rules come into play only to the extent the Act permits, since the stream cannot rise above the source. Therefore, S. 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 becomes a clear and present danger only where the prisoner has by his precedents shown an imminent attempt

to escape. Mere violence by a prisoner of bad behaviour or other misconduct which has no reference to safe custody has no relevance to S. 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. S. 56 is not attracted so long as the safe custody of that prisoner is not shaky. The focus is on his escape and, maybe, on overt and covert attempts in that behalf. Other disorder or vice may deserve disciplinary attention but S.56 is not a nostrum for all administrative aches within jails.

The second requirement of S. 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
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the man in irons to prevent escape from custody, he may exercise his powers under S. 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.

S.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 S. 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 s. 56 is a pre-Constitution measure its application must be governed by the imperative of Articles 14, 19 and 21. Life and liberty age 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 Art. 14. Likewise, whatever decision is the product of insufficient reflection or inadequate material or unable to lead to the inherence of a clear and present danger, is unreasonable under Art. 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 better 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.

This constitutional perspective receives ideological reinforcement from the observations of Mr. Justice Douglas in Morrissey v. Brewer. (1)

(1) 33 I,. Ed. 484, 505.

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> "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."

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 S. 57). The rules also take a horrifying view of the trauma of fetters.

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 protective web that balances security of the prison and the integrity of the person. It is true that a discretion has been vested by S. 56 in the Superintendent to require a prisoner to wear fetters. It is a narrow power in a situation of necessity. It has no 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 Art. 19 emergencies uncontrollable by alternative 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.

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 extraordinarly), 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, maybe 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 and Maneka Gandhi.

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 aggriev-

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ed, the record must be in the language of the petitioner or of the A region, and not in English as is being done now.

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 S. 56 depends on the formula of reasonableness.

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).

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 S. 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 or possibility of escape. So nocturnal hand-cuffs and chains are obnoxious and vindictive and anathema in law.

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 shoking. 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 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 neces

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sary. 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.

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 themseleves that the provisions of the Prisons Act, rules, regulations, orders and directions are duly observed. Undoubtedly, the proper adherence to S. 56 and the related rules falls within the purview of 'rule'. 49 . 'Rule' S 3 states that all visitors shall have the opportunity of observing the state of jail, its management and every prisoner con fined therein. The visitors, official and non-official, have power to call for and inspect jail records. 'Rule' 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 S. 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.

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

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 S. 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:

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> "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, should acquaint themselves with their appearance."

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

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 ?

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 percent were returned to institutions for

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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.

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.

All institutions that hold people against their wishes need outside supervision, for, by definition, 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 management of the institutions it is to super vise 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 British a 'Board of visitors' deals with violations 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 Itlay a guidice di sorveglienza.

Kent S. Miller writes on the subject of dangerousness(') :

> " ....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 post dict let alone pre dict. violent behaviour. However, our review of the literature suggests that it might be possible to demonstrater that violence could be predicted using psychological tests if

1. Kenu S. Miller: Managing Madness, PP. 58, 66. 67. 68

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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 elating to dangerousness and mental illness...

In balancing the interest of the state, against the loss of liberty and rights of the idividual, a prediction of dangerous behaviour must have a high level of probability, 3 condition which currently does not exist), and the harm to be presented should be considerable.)"

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."

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(l):

(1) Dr. B. K. Bhattacharya.: Prisons p. 116.

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"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 escapes and condemned prisoners. In Delhi jail one gained an impression that bar-fetters were the rule of the day."

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 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.

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

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 bloodshot heritage of fierce torture of flesh and spirit, and liabilitative 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 Art. 14 (anti-arbitrariness), Art. l9 (anti-reasonableness) and Art 21 (sensitized processual humanism).

Prison reform is burgeoning in the administrative thanking 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.

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.

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

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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 histcry-tickets and therefore unknowable and in the Journal to which the prisoner has no access. The revisory power of the Inspector General of Prison, 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 prisoners, when the visitors or dignitaries call for a turn-out, prove a circus in a zoo from a practical standpoint 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, rule and nude, cannot be sustain r) ed 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 guideline 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, give 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

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

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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 as 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 arc withheld from public access; and the freedoms under Article 19(1) cannot be restricted by hidden on 'low visibility' rules beyond discovery by fail- 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 ? 1 Likewise, under Article 21, procedural fairness is the badge of constitutionality it 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 legisation and their intricacies and inaccessibility are too disturbing to participative legality so vital to democracy, to leave us in constitutional quiet. Arcane law is ac had as lawless fiat, a caveat the administration will hopefully heed.

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(T. can nevertheless
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> affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized men. It shocks conscience."(')

Legislative tyranny may be unconstitutional if the State by devious methods like pricing legal publications monopolised 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

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 l 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" (2)

"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 suffocations 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

(l) A.l.R. 1951 SC-467.

(2) Listner, Dec. 1977 issue.

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paralysis of the arms. 'People on the hook' says one Uruguyan 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 B. 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 Place of Laughter. In Iran, Otaq-e-Tamehiyat, 'the room where you make people walk', meant the blood stained chamber where prisoner's 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 inter national political agenda. But, in the end, what matters is the pain and suffering the individual endures in police station or cell."

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

Now that the 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,(1)

amplified by humanity:

"We cannot do better than say that the directive principle contained in Article 42 of the Constitution that 'The State shall G: 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." .

(l)Bhuvan Mohan Patnaik v. Sttae of A.B [1975] (3) SCC185.

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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'. i.

1. I uphold the vires of Section 30 and Section 56 of the Prisons Act, as humanistically read by interpretation. These and other pro visions, 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 dehumanizing techniques it is wasteful, counter-productive and irrational, hovering on the hostile brink of unreasonableness (Art. l9).' 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 Sec. 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 vacy in practice.

3. By necessary implication, prisoners 'under sentence of death' not' 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 Sec. 30 is no substitute for sentence of imprisonment and merely prescribes the manner of organising safe jail custody authorised by Sec. 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 op portunities 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.

5. The crucial holding under Sec. 30(2) is that a person is not 'under sentence of death', even if the sessions court has sentenced him

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to death subject to confirmation by the High Court. He is

not 'under A 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, Sec. 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 Sec. 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.

1. Sec. 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. E

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 ns 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.

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6. The discretion to impose 'irons' is subject to quasi-judicial over sight, 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. Art. 39 A is relevant in the context. Art. 19 will be violated in such a case as the process will be unreasonable. Art. 21 will be infringed since the procedure is unfair and is arbitrary. In Maneka Gandhi the rule has been stated beyond mistake.

ll. 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 continuation or discontinuation of the irons. In the absence of such prompt
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decision, the fetters shall be deemed to have been negatived and shall A be removed.

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(1) 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 pre sent 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."

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 Reform 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(2) with reference to death sentence, by Justices Douglas and Marshall, the more painful prison cruelties are often imposed on the socioeconomic 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

(1) Federal Reporter. 2nd Series, Vol 404, p. 571.

(2) 33 L. Ed. 2d. 346.

1 5- 526 SCI/78

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burying our heads in the sands of incredible credulity. Courts must be astute enough to end these 'crimes' against criminals by correctional interpretation.

'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.

Positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan and service-oriented activities, visits by and to families, even par ticipative 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.

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'(l) and so it is that the Prisons Act provisions and the Jail Manual itself must be revised to reflect this deeper meaning in the behavioural norms, correctional attitudes and humane orientation for the prison staff and prisoners alike. We cannot become misanthropes and abandon values, scared by the offchance of some stray desperate character. Then amputation of limbs of unruly suspects may be surer security measure and corporaI punishment may have a field day atfer 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.

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
(1) Pubillus Syrus
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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.

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

The Final Directions

I hold that even though Sec. 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.

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 creds 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 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.

Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in the Raj past, need reorientation; prison house and practices. a hangover of the die-hard retributive ethos, reconstruction; prisoners, those 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,
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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.

If I may end withy an answer to the question posed at the beginning, so long as constitutional guarantees are non-negotiable, human right, 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 are laboratories of torture or warehouses where human commodities are sadistically kept and the spectrum of inmates range from drift-wood juveniles to heroics dissenters, courts- and other constitutional instrumentalities- should not consent to make jails judgeproof 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.

I am aware that a splendid condensation of the answers to the score 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 heed to-day, the next day comes. And, in an appeal to Human To morrow, 'if none responds to your call, walk alone walk alone!' Judicial power is a humane trust 'to drove 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' that is enough.

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 provision 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

I agree that the petitions be dismissed.

DESAI, J -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 depth challenges his solitary confinement sought.

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to be supported by the provisions of s. 30 of the Prisons Act (for short the Act); Charles Sobhraj a French national and then an under trial 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 6th July 1976 till this Court intervented by an interim order on 24th February 1978. Such a gruesome and hair-raising picture was pointed at some stage of hearing that Chief Justice M. H. Beg, V. R. Krishna Lyer, J and P. S. Kailasam J who were then seized of the petitions visited the Tihar Central Jail on 23rd January 1978. Their notes of inspection form part of the record.

There are certain broad submissions common to both the petitions and they may first be dealt 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. Martinex).(l) However, a prisioner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for crime does not reduce

the person into a nonperson 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. McDonnell).(") 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 & ors. v. State of Andhra Pradesh & ors(3) one of us, Chandrachud J., observed:-

> "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 guaran-

(1) 40 L. Ed. 2d. 224 at 24'.
(2) 41 I,. Ed. 2d. 935 at 973.
(3) [1975] 2 SCR 24.

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> tees 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 Poll v. Procunier) (1)

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 "hands 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. 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".

The gravamen of the argument is that sub-section (2) of s. 30 of the Act does not authorise the prison authorities in the garb of securing a prisioner under sentence of death, to confine him in a cell

1) 41 L. Ed. 2d. 495 ,at 501.

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apart from other prisoners by imposing solitary confinement upon A 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.

Mr. Chitale, who gave us competent assistance as an amicus curiae for Batra, after drawing our attention to the development of psycho- pathological syndrome in prisoners under solitary confinement for an unlimited period, urged that s. 30 of the Act does not empower the prison authorities to place the prisoner in solitary confinement. It was said that if 5. 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, can- not be imposed on the prisoner, more so because it is by itself a punishment that can be awarded under ss, 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-s. (2) of s. 30. In any event it was contended that if sub-s. (2) of s. 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.

It may be conceded that solitary confinement has a degrading and dehumanising effect on prisioners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Social 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. F

If sub-s. (2) of s. 30 enables the prison authority to impose solitary confinement of 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-s. (2) would offend article 20 in the first place as also articles 14 and l9. If by imposing solitary confinement there is total deprivation of comaraderie amongst coprisoners, co-mingling 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 snb-s. (2) empowers the authority to impose solitary confinement, but it merely permits statutory segregation for safety of the prisoner in prisoners' own interest and

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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.

It must atonce be made clear that sub-s. (2) of s. 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 oh the history ticket that the prisoner is fit to undergo it. Every prisoner while undergoing solitary confinement has to be visited daily by the medical officer, and when 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 s. 74, IPC). The Court cannot award more than three months' solitary confinement even if the total term of imprisonment exceeds one year (see s. 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 mat 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-s. (2) of s. 30 does not purport to provide a punishment for a breach of Jail discipline. Prison offences are set out in s. 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-
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>
> (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;
>
> x x x x x
>
> (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 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".

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-s. (2) of s. 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-s. (2) of s. 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
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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-s. (2) of s. 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

If s. 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.

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 s. 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 s. 366(1), Cr. P.C.). However, we are not left in any doubt that the prison authorities treat such a convict as being governed by s. 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 s. 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

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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 publication 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-s. (2) of s. 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 s. 30 so as to reduce and considerably minimise the period during which the prisoner suffers this extreme or additional torture ?

The expression "prisoner under sentence of death" in the context of sub-s (2) of s. 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 @ Raman (I), it was said that the trial of an accused person under sentence of death does not conclude with the termination of the proceedings in the Court of Sessions because of the reason that the sentence of death passed by the Sessions Court is subject to confirma-

(1) [1975] 3 SCR 574.

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tion 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 s. 303 of the Indian Penal Code it was said in Shaik Abdul Azeez v. State of Karnataka,(l) 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 s. 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 be a prisoner under sentence of death in the context of s. 30, sub-s. (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-s. (2) of s. 30, reducing the period of such confinement to a short duration.

What then is the nature of confinement if a prisoner who is awarded capital sentence by the Sessions Judge and no other punishment from the time of sentence till this sentence becomes automatically executable ? Section 366(2) of the Cr. P.C. enable 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-s. (2) of s. 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, her must be within the sight and sound of other prisoners and be able to take food in their company.

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 n warrant for jail custody under s. 366(2) Cr.P.C. and if he is detained in solitary confinement which is a Punishment prescribed by s.

(1) [1977] 3 SCR 393.

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73, IPC, it will amount to imposing punishment for the same offence A 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 s. 30(2) as interpreted by us would preclude detention in solitary confinement, there is no chance of imposing second punishment upon him and therefore, s. 30(2) is not violative of Article 20.

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-s. (2) of s. 30 permits solitary confinement, the limited personal liberty of prisoner under 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 precurser of Article 21, have been vividly explained by Field J. in Munn v. Illinois(1) 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 wed 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.,(2)as also in D. B. Patnaik (supra). Personal liberty as used in Article is 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.

There is no more controversy which ranged over a long period about the view expressed in A. K. Gopalan v. State of Madras,(3 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 infringement of

(1) [1877] 94 US 113 at 142.
(2) [1964] I SCR 332 at 347.
(3) [1950] SCR 88.

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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,(l) and it was overruled by a majority of Judges of this Court Ray, J. dissenting. In fact, in Maneka Gandhi v. Union of India,(2) Bhagwati, J. Observed as under:

> "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 in fringement of the fundamental right conferred by article 21, such law, in sq far as it abridges or takes away any fundamental right under article 19 would have to meet the challenge of that article... if a law depriving a person of personal liberty and prescribing a procedure for that pur- pose 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 hypothesis it must also be liable to be tested with refer -ence to article 14".

The challenge under article 21 must fail on our interpretation of sub s.(2) of s. 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-s.(2) of s..30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the 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, not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of article 21 would not be satisfied. If it is arbitrary it would be violative of article 14. Once s. 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.

Incidentally it was also urged that the classification

envisaged by s. 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

(1) 11971] I SCR 512,

(2) [1978] I SCC 248.

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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-s. (2) of s. 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, s. 30(2) does not violate article 14. Similarly, in the view which we have taken of the requirements of s. 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.

Charles Sobhraj, a foreigner, was arrested on 6th July 1976 and on 15th July 1976 he was served with an order of detention under s. 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

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day and the uncontroverted fact is that since his detention he was put in bar fetters till this Court made an order on 24th February 1978 recording an assurance on behalf of the respondents 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 or an interview but if the interview is in the cell no such bar fetters shall be put. By subsequent orders this order dated 24th February 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 no. 3, the Superintendent of Tihar Central Jail dated 5th September 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 s. 56

l) we have not allowed our vision to be coloured, based or abridged by these averments as in our opinion for the main contention raised by the petitioner they may not be relevant.

The petitioner contends that s. 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 56 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 Gov -ernment so confine them".

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 43S 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

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69 in Chapter VI provides that the Superintendent shall discharge A his duties subject to the control of, and all orders passed by him shall be subject to revision by the Inspector General.

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 arc 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 prisoner have no fundamental freedom to escape from lawful custody and, therefore, they cannot complain against precautionary measures which impede escape from the prison.

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) world provide the sanction of law for the purpose of article 21. Section 56 confers power for issuing instructions by the Inspector General of Prison with the sanction of the State Government and section 59 confers power on the State Government to make rules which would include the rule regulating confinement in fetters. A deeper probe into the sanction 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 s. 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 16-526SCT /78
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sanction of the local Government referred to in s. 56. We must, therefore, conclude that the provision contained in para 399 is not statutory and has not the authority of law.

The question, therefore, is, whether the power conferred on the Superintendent by s. 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.

A bare perusal of s. 56 would show that the Superintendent may put a prisoner in bar fetters (i) when he considers it necessary; (i;) with reference either to the state of the prison or character cf the prisoner; and (iii) for the safe custody of the prisoner. No 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 n the necessity of putting a prisoner in bar fetters and "neccssity" 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 after custody of the prisoner who ii 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 s. 56 is uncanalised and unguided it is to be borne in mind that the challenge has to be examined n 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 Procuniers case (supra). It says . "

> "The case at hand arises in the context of prisons. O,.. 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 state in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorised entry, and the rehabilitation of the prisoners".

I 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 or putting any particular
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prisoner in bar fetters must be relatable to them. We are, therefore, of A the opinion that the power under s. 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 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 or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question.

Again, the power under s. 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. lt 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.

Let us look at the conspectus of safeguards that are adumbrated In s. 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 characteristic of each individual prisoner. No ordinary routine reasons can be sufficient. the reasons have to be fully recorded in the Superintendents Journal and the prisoner's history ticket. Duty to give reasons which have, at last to be plausible, will narrow the discretionary power conferred on the Superintendent. It may be made clear that as far as posrsible 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. 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 rcmoved 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
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are sufficient guidelines in s. 56 which contain a number of safe. guards 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.

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 containing 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 can not enter the determination of the Superintendent except to the extent to which they hear on the question of the safety and safe custody of the prisoner.

The legislative policy behind enacting s. 56 as interpreted by use 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 s. 56 would certainly not infringe article 14.

It was said that continuously keeping a prisoner in fetters day and night reduces the prisoner from a human-being to an animal, and that this treatment is so cruel and unusual that the use of bar fetters is anethema to the spirit of the Constitution. Now, we do not have in our Constitution any provision like the VIIIth 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.(1) 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 s. 56. All these so when it was found in this case that 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

(1) [1973] 2 SCR 541.

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some vigour that escape from jail cannot be prevented except by A putting the prisoner continuously in bar fetters. That will be a sad commentary on the prison administration and the administrators. Therefore, s. 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.

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

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

We share the concern and anxiety of our learned Brother Krishna Iyer, J. for reorientation of the outlook towards prisoners and the need to take early and effective steps for prison reforms. Jail Manuals are largely a hangover of the past, still retailing 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 rehablitation and acceptance and retention in the mainstream of social life, becomes counterproductive in the long run.

Justice Krishna Iyer has delivered an elaborate judgement 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.

N.V.K Petitions dismissed.

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