CHAPTER 4

JUDICIAL RESPONSE TOWARDS WOMAN PROTECTION WITH REFERENCE TO PRISONERS

Implementation or vindication is very much necessary to give the value a real meaning of every right. Naturally implementation or vindication can only be done access to judicial protection. Lord Denning has said that every law decision on every new situation is a development of law. Law does not stand still. It moves continuously. Once this is recognized, then the task of the judge is put it on higher place. He must consciously seek to mould the law as to serve the needs of times. He must not be more mechinic, mere working machine lying brick and bricks without thought to overall design. He must be an architect thinking of the structure as a whole building for the society a system of law which is strong, durable and just. It is on his work the society depends. Sometime judiciary is called the “third chamber for legislation.”

This shows that the very existence of a right depends upon the remedy for its enforcement. Unless there is remedy there is remedy there is no right, goes a famous maxim \[UBI JUS IBI REMEDIUM] for this purpose every country requires a judicial system with an independent and IMPARTIAL JUDICIARY WITH A POWER OF JUDICIAL REVIEW. In India under Articles 13, 32, 226 and 136 of the Constitution of India, an independent and impartial judiciary with a power of judicial review has been established. Judiciary not only plays the role of custodian of rights of citizen it also determines the limits of power of centre and states. To discharge these obligations judiciary adopts various modes through which justices can be done. The various ways of this power are exhibited in judicial review, judicial activism, PIL & SAL etc.

The power of judicial review of all legislations in India, past as well as future is conferred to the High court [Article 226] and Supreme Court [Art 32] of India by Article 13 of the Constitution. Under this power, Court can declare a law as unconstitutional if it is inconsistent with any of the provision of PART III of the
Constitution. The purpose of this Article was, to provide social, political and economic justice to the people of India. Judicial Review is thus the interposition of judicial restraint on the legislative as well as executive organs of the government. For Article 32, Dr. Ambedkar \(^1\) said in Constituent Assembly's Debate:

"If I was asked to name any particular Article in this constitution as the most important—an Article without which this constitution would be nullity—I could refer to any other Article except this one. It is very soul of constitutions the very heart of it."

Judicial Activism is another concept in judiciary. It means different things to different people. To some it means "dynamism" of judges to some others it implies "judicial creativity" and still to some others it means bringing about a social revolution through the judiciary while some other think that it is a sort of "cultural revolution" being brought about by judiciary and so on and so forth. The term activism some how or the other brings to mind a concept of "revolution" and that is where misconception about "judicial activism" arises but judges never intended to bring revolution. All that they are supposed to be doing is discharges of their duties is to so expand and develop the law as to respond to the hopes and aspiration of the people who are looking to the judiciary to give life and content to the law. The sole purpose of incorporating the methods of judicial review and judicial activism is to provide justice to the people of India. But in such a vast country with a wide economic, social and political disparity among the people of India, it was not possible for the Indian judiciary to provide justice only through judicial activism. As a result, the power of judicial review and judicial activism gave birth to the concept of PIL (Public Interest Litigation).

Public interest litigation (PIL) is a landmark step taken by judiciary in form of judicial activism. To know what is public interest litigation at first one should know why this concept immerged in our country. The constitution of India grantees right to equality to all citizens and this right encompasses all citizens' personality. The concept of the right to equality though universally accepted as back bone of democracy has it genesis in ancient Roman Law, "be however high you and law is about you". The American declaration of independence of 1776, has declared that all men are born equal

\(^1\) C.A.D. VOL VII 953

76
but in practice forgot to give any right to the Negro who had to struggle for centuries before he could share with other the sweetness of equality. In India after half-century of intense education and agitation a person is slowly becoming conscious of his right to equality. It must be admitted that by the slogans, promises and rhetoric especially on the uplifting of the poor and the down trodden, the politicians have created a world of illusion and fantasy. The fallow is so widespread that severity appears to be in capacity of the candidate and corruption in virtue. So in India “the political system become hostage to the racketeers”

In order to safe guard the rule of law and the foundation of which the superstructure of democratic rule rests, judicial intervention becomes the need of the hour. It is to be admitted that the beginning of independence attempts were being made to curb, corruption by ordering judicial enquiries which failed to yield any tangible result.

The High Court and the Supreme Court which are to interpret and enforce the laws made by legislature exercise their jurisdiction. They have restricted themselves within the framework of law. The Supreme Court under Article 142 (1) of the Indian Constitution and the high court by virtue of its inherent power are able to do complete justice in respect of matters pending before them. Even the Supreme Court has the power to send back the cases to High Court for re – decision.

The procedural laws including the concept of locus standi are the main hurdles before the courts when they desire to take up cases which can not be registered under a specific provision of law for want of jurisdiction. Proceeding under Article 32 and Article 226 of the Constitution is an extraordinary proceeding and is the last resort of citizen to whom no other remedy to get his grievances redressed is available under any other law of land. The High Courts and the Apex Court gave shape to a new device and gave it the name of PIL. These courts are duty bound to uphold and protect the basic structure of the constitution of India.

In Black’s Law Dictionary (Sixth Edition), “Public Interest” is defined as something is which the public the community at large has some pecuniary interest or
some interest by which their legal rights and liabilities are affected. It does not mean anything so narrow as mere curiosity or as the Interest of the particular localities which may be affected by matters in question. Interest shared by citizens generally is affairs of local state and national government.

The expression “Litigation on” means a legal action including all proceeding thereinitiated in a court of law with the purpose of enforcing right or seeking a remedy. Therefore locally the expression “PIL” means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a close of the community have pecuniary interest or some interest by which their legal right or liabilities are affected. The concept “Locus Standi” is concerned with whether particular plaintiff is entitled to invoke the jurisdiction of the court. Unlike old concept a new dimension has been given to doctrine of locus standi in the case of Peoples Union for Democratic Right v Union of India\(^2\). In this case the easiest way of getting justice to “lowly and the lost” has been provided and Supreme Court decided that any one can file a suit regarding enforcement of fundamental and legal right of those public who for ignorance of their right for their economic disability or poorness etc are unable to raise voice before the courts.

Indian judiciary is the most controversial issue of Indian legal system in spite of different views of a large section of jurists, law professionals, judges and law students. Till now it is not very clear to us that among executives, legislatures and judiciary which one is supreme. So one can only say that judiciary is an important part of the Indian legal system. Though executives and legislatures are working properly in their respective field but even these two organs could not avoid the role of judiciary under check and balance process. In almost all the issues and challenges the role of these three organs are very important. If legislature enacts any law then executive executes that law while judiciary interpreters the meaning of that law.

The judiciary as the ultimate interpreter and the evaluator of the activities of police plays an effective roll in curbing custodial crimes. Judicial activism in the form

---

2. AIR 1982 SC 1473
of institution of public interest litigations have contributed greatly towards restraining the reckless members of the police force. The words ‘police’ and ‘police officer’ need to be explained and understood in no uncertain terms so far as the scope of this study is concerned. The word ‘police’ has been defined in the Police Act to include all persons who shall be enrolled under this Act. Neither the Police Act nor any other statute defined the word ‘Police Officer’. But the term has been explain in different court’s judgment on a number of occasions, mainly in reference of Section 25 and Section 27 of the Indian Evidence Act where the issue of police custody is of prime importance. The judiciary of India on every occasion endorsed the demand of Human rights through judicial verdicts and resolved that the state should expand its welfare polices to benefit of people maximally. The international instruments viz. – the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights came for examination before the courts of India. The Supreme Court of India expanded the meaning of already accepted rights under the constitution covering the recognized rights under the constitution covering the recognized in the covenants like right of person not to be tried without under delay in Hussainara Khatoon v. Home Secretary, State of Bihar. In Keshavananda Bharti v. State of Kerala, Sikri, C.J observed; “I am unable to hold that these provisions show that some rights are not natural or inalienable rights”. As a matter of fact, India was a party to the Universal Declaration of Human Rights and that Declaration describes some fundamental rights as unalienable. The Supreme Court expressed its opinion on enforceability on the Universal Declaration at the municipal level in the ADM Jabalpur v. Shukla. The Court rejected the argument that the Declaration was not a part of the municipal law of India. In legal terms also, it is not being merely a “declaration” and not being legislated by India. Yet, India being a party to the UDHR has to see that the principle laid down is coming into force within its administrative jurisdiction. Similarly in Jolly George Verghese v. Bank of Cochin, the Covenant on Civil and Political Rights was referred by the Court. In this case Justice Krishna Iyer has interpreted Section 51 of the C.P.C in the light of Article 11 of the said

3. Section 1 of the Police Act No. V of 1861
4. AIR 1977 SC 1360
5. AIR 1973 SC 1461
6. AIR 1996 SC 1207
7. AIR 1980 SC 470
Covenant. In Francis Coralie Mullin v. Union Territory of Delhi, the Supreme Court read Article 7 of the International Covenant on Civil and Political Rights and held that the right to live with basic human dignity was implicit in the right to life guaranteed under Article 21 of the Constitution and it include the right not to be subjected to torture or to cruel, inhuman or degrading treatment.

The gender movement in India is comparatively a delayed phenomenon. Of late woman groups have mobilized enormous pressure on the institutional established which, perennially promote patriarchal values. The impact of this collective strength is echoed judicial decisions. Even though given the judgments in Mathura or in Banwari Devi cases, one may not find that male bias underlies such issues as rape, mental discard, harassment; torture proved that it is distaining itself from male bias. The human rights for woman including girl child are therefore inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitant for national development, social and family stability and growth cultural, social and economical, all forms of discrimination on grounds of gender is violative of fundamental freedom and human rights. Prison is the best place where one can easily assess the violations of fundamental freedom and human rights of women prisoners. Some of the decisions handed over by the Supreme Court in recent years have depicted that despite the constitutional mandate and statutory guarantees the legal rights even today, remain non-existent for a large percentage of illiterate, ignorant and poor women prisoners. Administration in different stages viz. person stage, bail stage and other law enforcement level reveals the sad state of affairs prevailing in the society depicting the vast gap existing between law in order and law in action. The cases reveal the enormous power that various organs of the state wield over the life and liberty of persons under the existing criminal justices administration. The courts have developed new techniques for dealing with complaints of the women prisoners, the poor, the weak and their demands for human treatment, legal assistance and justice. Proper functioning of judiciary and of law enforcement services is essential not only for an effective criminal justice policy but

8. AIR 1981 SC 746
also for the protection of the fundamental human rights of individuals, especially the poor.

The role of judiciary can be seen in various landmark judgments of the Supreme Courts and other courts. Judicial responses towards women protection with reference to prisoners are as follows:

The Police Blinding of 33 prisoners in Bhagalpur, Bihar and Maya Tyagi case in Baghpat, Meerut, Uttar Pradesh caused a nationwide outcry. Even as protests over Baghpat were at their height in Parliament and outside, reports of sexual atrocities by the police continued to pour in from several places in Uttar Pradesh, Madhya Pradesh, Karnataka and West Bengal. Baghpat was not the first or the last but it did imprint of the public consciousness, if not conscience. The Baghpat incident in Meerut district in Uttar Pradesh, commonly known as “Maya Tyagi” case which occurred on June 18, 1980 remains a slur on the functioning of the police. More shocking in this case was that attempts were made by the police leadership at every level, to protect the guilty police men. The production of records and documents – key evidence, were suppressed for about four years and had to be extricated. During the trial a deputy superintendent of police and an inspector of police changed their versions in court and declared hostile. Although nothing can atone for the pain and humiliation that Maya Tyagi suffered from the hands of a barbarous group of policemen, the judgment of the sessions judge condemning six of the guilty men to death and sentencing four others to life imprisonment should have, it was hoped, served as a warning to policemen not to indulge in similar misconduct in the future. But it has not; more and more cases of sexual assaults on women by policemen are coming to light.

Custodial rape is an aggravated form of rape. It is an assault by who are supposed to be the guardians of the women concerned and are specially entrusted with her welfare and safe keeping. In cases of custodial rape the social power that men have over women gets intensified with the legally sanctioned authority and power. Custodial rape is also an instrument of political repression. Even the limited supportive mechanisms that exist for women becomes less effective when the rapist is a custodian. The
intimidating power of such persons enables them to isolate the woman. The more the isolation the lesser the chances of resistance, a fact used as evidence of consent later in the Court.

It was the Supreme Court in *Mathura rape case* that shocked people out of their complacency and brought the crime of custodial rape in the limelight. The crime itself had taken place years before; on March 26, 1972, when a 16 year old tribal girl who worked as a maid servant was brought to the police station on a complaint filed by her own brother and was raped inside the police station while her relatives waited outside. It took seven and a half tortuous years before the highest court in the land finally delivered its judgment. It was with this judgment that the case explored into a cause celebrates Upholding the sessions Court judgment and reversing the High Court one, the Supreme Court acquitted the accused on grounds that were appallingly sexist. Mathura, said the judge was not raped since she had previous sexual relation there were no marks on her body to show that she had not resisted or put up a fight nor did she raise a cry, so it was proved that she consented. Once the judgment was made public there was uproar. A mass movement started across the country demanding a new and more just law on rape. Bowing to public pressure, a bill to amend the law was introduced in parliament. In 1983 an amendment to the rape law was brought into force, which among other things, made the minimum punishment in case of custodial rape ten years and shifted the onus of proof of consent on the rapist. Seven new clauses were added to Section 376(2) IPC which brought policemen, public servants superintendents of jails, managers of remand and rescue homes and doctors within the dragnet of law. It made rape on girls below the age of twelve years, gang rape and rape on pregnant women an aggravated form of rape and stipulated a minimum sentence to ten years for it, but surprisingly this amendment has left out a large number of persons who are also in a custodial position and commit rape on unsuspecting victims. In cases on custodial rape the victim does not resist because she is further overpowered or overawed by the domination position of the rapist and finds herself totally helpless.

The history of Maya Tyagi's case shows that the woman was going to attend a marriage party along with her husband and some close friends when disaster struck them all on a sudden. The car in which they were traveling on their way to Sakalpatti Village where the marriage was taking place developed trouble at Baghpat. They stopped at a small tea stall owned by one Man Singh. The driver of the car went to repair the punctured tyre. Meanwhile, Maya Tyagi's husband Ishvar Tyagi and friends tot out of the car. It was at that point of time a sub-inspector of police with a head constable appeared on the spot in plain clothes. The time was about 12.30 p.m. (midday). Finding Maya alone in the car, the head constable made obscene overtures towards her. When she protested against the policeman's behaviour, her husband and friends came to her rescue. But the policeman would not listen to them to leave them alone. More policemen arrived from the police station to the spot in order to teach a lesson to them. On June 18, 1980 the sub-inspector who held a rifle in his hand shot dead Ishwar and his friend and beat the six months pregnant Maya. But the incident did not end there. Maya was dragged out of the car and attacked obscenely. She was forcibly stripped of her clothes and made to walk nude on the road in order to take her to the police station. In shame she sat down on the road on her toes. But the policemen present there started dragging her forcibly towards the police station. When she refused to move, a bamboo was inserted into her private parts. She was ultimately dragged to the police station and put in the lock up. When the citizens of the locality strongly protested the police made out a story that some dacoits had been killed in an encounter with the police. The erring policeman also circulated another story that Maya was a member of the dacoit gang. Nobody, however, believed the police version. Compelled by the waves of popular protests sponsored by Chowdhury Charan Singh and his wife Gayatri Devi, the Government of Uttar Pradesh appointed P.N. Rai as the one man commission to hold and inquiry. The commission submitted its report in December 1980 holding the policemen guilty. It discarded the encounter story put up by the police as false.

After the report of the judicial commission a case was registered and the investigation delivered to the CID. The CID investigation and the prosecution followed a
difficult course. It was because of various legal wrangles at the trial took eight years to be completed. Delivering the judgment the judge said: It reminds me of the primitive days of ‘police raj’ where the people were at the mercy of the despot. The gruesome killings and the beastly act which followed were the handiwork of hungry wolves in the guise of the senior of the life and property of the people. For the survival of the society it is essential to eliminate such evils. The judgment of this case remains a landmark in judicial history: death penalty for six policemen and life imprisonment for the remaining four. But most shocking was the unrepentant attitude of the policemen sentenced: “we are not guilty. The judgment will not hold good in the High Court,” they said in unison after the verdict, “no crime has been pin-pointed... now which policemen will touch the criminals”. This judgment raised new hopes and cheered the people. It confirmed the observation of Justice A.N. Mulla who had described the policemen as “criminals in uniform.” it was most surprising that instead of taking action against the erring policemen, the Government at that time transferred key men of the C.I.D. who were investigating into the incident. It was unfortunate that the erring policemen continued in their posts because, it was alleged, they had helped Congress (I) Government of return to power in 1980 and had support of Sanjay Gandhi.

The jubilation over the judgment remained short-lived. For, close on the heels of the judgment followed another outrage which threatened to undo everything that had been achieved in the past so many years. It was the verdict of the Supreme Court on rape victim Suman Rani. On March 21, 1984, a young woman, Suman Rani was raped by two policemen in Bhawani Khera police station in Haryana. She filed a complaint and after the trial, the accused were given the mandatory minimum sentence of ten years imprisonment by both the Sessions Court and the High Court. Thereafter the case moved up to the Supreme Court. In January 1989 the Supreme Court gave a judgment that again sent shock waves through the country: it reduced the sentence of the two rapists by half. The 1983 amendment brought after so much struggle, carried a proviso, clearly meant to be applied only to rape cases, that the minimum punishment could be reduced only if there were adequate and special reasons, and it was this proviso that the judges used to
reduce the penalty, citing as reason, 'the peculiar facts and circumstances of the case coupled with the conduct of the victim.

Thus the legal position is depressing but there are some stray judgments which keep the hope alive. In *State of Maharashtra v. Chandra Prakash Keval Chand Jain* the Court expressed concern at the deteriorating crime situation and remarked 'decency and morality in public life can be protected and promoted if courts deal strictly with those who violate the societal norms.' When crimes are committed by a person in authority, e.g. a police officer, superintendents of jail or managers of rescue homes or doctors, the courts' approach should not be the same as in the case of private citizen. A person in authority carries with him the awe of his office which is bound to condition the behaviour of the victim. The Court must not be oblivious of the emotional turmoil and the psychological injury which a woman suffers on being molested or raped. She suffers tremendous sense of shame and fear of being shunned.

When a police officer commits rape on a girl there is no room for sympathy or pity. The punishment in such cases should be exemplary. It may be noted for record that the actual punishment awarded and confirmed was only five years imprisonment half of what is prescribed by law as the minimum.

On 18 June 1980, Rukmini (33) a Harijan woman was beaten up in Nandini police station in Madhya Pradesh, stripped in front of her 14-year-old son who was asked to rape her. The Madhya Pradesh chief Minister described the incident as "barbaric". On September 25, 1989 N.L.Patel, Chief judicial magistrate, Nadiad in Gujarat, was handcuffed, beaten up, illegally detained and humiliated by the Nadiad police on "flimsy charges" mainly for teaching him a lesson because he was dubbed as anti-police. The Supreme Court on September 11, 1991 sentenced six police officers for varying terms for their illegalities in arrest, handcuffing and wrongful detention of the chief judicial magistrate. The Court passed strictures on the Director General of Police K.Dada Bhoi saying that "as head of the police of the State, he was expected to intervene in the matter and ensure effective action against erring police officers".

---

10. AIR 1990
A judgment of far reaching significance was delivered by the Guwahati High Court on March 14, 1988 convicting raping of ten Bodo tribal girls by the police. The incident took place in Bhaumka village of Kokrajhar in January 1988. A report had appeared in a newspaper as late as in February but was treated as baseless and motivated by the home minister, Assam. Delivering 22 page judgment on March 14, the Court said that it as the belated response of the State Government to the public demand for a judicial probe which had compelled it to intervene suo moto in the case. The Court directed payment of and ex-gratia grant of rupees twenty five thousand to each of the ten rape victims as interim relief.

Rameeza Bee, a young rustic woman had come to Hyderabad for the first time from Nandikotpur village with her husband Ahmed Husain. In the evening of March 29, 1978, a fortnight after their arrival, the couple want to witness a movie. On the way back home they halted the rickshaw, in which they were traveling, as the husband had to answer a call of nature. Seeing the young woman alone, two police constables questioned her and whisked her away to the Nallakunta police station. Alleging that she was quarrelling with the rickshaw puller in a public place, they charged her under the City Police Act. At the police station she was beaten by sub-inspector and raped by him as well as by two constables. In the morning of March 30 these two constables took her to the house of Imam Saheb, her husband’s uncle, where they were staying. From there they brought her back to the police station along with her husband, Anwar Husain, and his uncle. When the sub-inspector found the three at the police station, he beat Rameeza Bee as well as Anwar Husain. The couple was allowed to leave in the afternoon, after Rs. 400 had been extracted from them. Anwar Husain complained of severe pain in the chest and died when he was taken to hospital. The body was taken to Imam Saheb’s house, where the wailing of women brought the neighbours and local people to the spot. People demonstrated and violence broke out. The Government set up Justice Muktadar Commission. The commission held that the deceased died as a consequence of injury caused by Surinder singh, sub-inspector of Police and Constable Syed Mahmood Ali and recommended their prosecution under section 302 IPC (Murder) read with Section 34 IPC.
The Vijayawada city police in Andhra Pradesh were involved in a controversy, following two incidents reported in February 1986. In the first case, four women were arrested under the suppression of Immoral Traffic Act, taken to the city police station and their heads were shaved in the police lock up in the presence of senior police officials. The additional superintendent of police was suspended and the Chief Minister, N.T.Rama Rao announced an ex gratia payment of Rs.2,000 each of the four women from the Chief Minister's relief fund. A judicial inquiry had been ordered into the lockup death.

The Police in West Bengal had been involved in several rape cases. For example, Kakoli Santra (21) had gone to Singur police station, Hooghly district on June 2, 1990 seeking help. She was detained and was raped. Five policemen including the station house officer were suspended following the incident which had turned to be a political issue in the State. A 20 year old youth was killed and at least 30 others were injured when the police opined fire on a crowd protecting against the rape outside Singur police station on June 7, 1991. A Bandh was called in the area by the Congress (I) and Forward Block. Soon after the Singur incident, a destitute woman (26) stepping on the verandah of a house near Tarakeswar estate police outpost was raped by a drunk constable, Prasanta Gupta on night patrol duty on June 14, 1990. No action could be taken against the constable as the victim disappeared and could not be traced. On August 20, 1991 a teenage girl was raped by five men including a police officer in a hotel in Contai in Midnapore district. There was another case of rape by a sub-inspector of police at Howrah Railway Station in July 1992 at about 10pm when the victim came out of the Ladies toilet on platform No. 1 with her nine-year-old sister-in-law. The sub-inspector accosted them and forcibly took the victim away to the first floor room inside the station and raped her along with two ticket collectors. The sub-inspector and the ticket collectors were suspended but no further action was possible against them as the victim could not be traced.

On a July morning in 1988 Kalpana Samathi (26) a teacher was found half-naked, unconscious and bleeding near Thally police station, Tamil Nadu. She had
been missing for 16 hours. She was taken to hospital where she was found to have 21 injuries, including several deep cuts on the head, a partially severed ear lobe, extensive cuts and abrasions on her back and serious injuries to her hands. Regaining consciousness, Kalpana Samathi said that she had been abducted by a policeman and then gang raped by four policemen, and that most of her injuries were sustained when she tried to resist. She was hospitalized for three weeks. News of her rape provoked widespread public protest. An inquiry was held by a magistrate, who examined 17 witnesses including doctors who had treated her. On the basis of the magistrate’s report the Tamil Nadu Government ordered the prosecution of four police officers accused of rape, and the transfer of a further seven. All the four police officers were granted bail. The Supreme Court awarded Kalpana Samathi Rs. 20,000 (the claim was for Rs. One lakh) as interim compensation, and left her to claim for further compensation once the trial of the policemen was over. But she has not been able to do so because two years later charges against the accused had still to be drawn up and numerous hearing had been repeatedly asked for, by the legal layers for the police, for adjournments. By then the victim had spend Rs. 40,000 on medical treatment alone, twice the sum the Supreme Court had awarded to her. She is still allegedly waiting for the trial to start.

In most cases of torture medical evidence and in cases of deaths, post mortem examination reports provide evidence. There are several reported cases in which medical officers are pressurized by the police and furnish reports to shield the offenders; many medical officers, however, have given detailed and honest accounts of injuries nad their causes. Due to the falsification of injury and post mortem reports many accused policemen escape punishment. Much of the manipulation of medical reports can be prevented if in serious cases the victim is examined by more than one medical officer and post mortem examination is held in the presence at least 2 doctors and a relation from the victim’s family.

Not infrequently executive magistrates before whom the arrested persons are to be produced within 24 hours of their arrest are pressurized not to record injuries on the prisoner even though clear marks of injuries are noticed. Most magistrates, have honest enough to record correct inquest report and dying declarations and got the victim
of reexamined (if examined earlier before production in court) by a medical officer in his presence. If he is satisfied that a complaint of torture is true, he orders an inquiry by a magistrate at once. Section 176 of the Code of Criminal Procedure, makes an investigation by a magistrate obligatory in all cases of death in police custody. Yet, Amnesty International reported that out of total of 415 cases magisterial inquiry was held only on 42 cases and judicial inquiry was ordered in 20 cases.

Intimidation of witnesses by the police has often been reported. It is essential that before a magisterial or judicial inquiry or trial the accused policemen are transferred so that witnesses may come forward and depose free from fear. In most cases of torture in police lock up the most important part of an inquiry is identification of suspected policemen by the victim. It has been found that in order to shield the erring policemen they are transferred before an identification parade is held and other policemen are substituted to prevent identification of the real culprits by the victims.

On 22 January 1985 V.V. Chandrachud, Chief Justice of India had asked the Government to amend the law of evidence suitably so that policemen who commit atrocities on people in their custody are not allowed to escape for want of evidence. The burden of proof in such cases is to be reexamined so that the police do not use their authority and opportunity for oppressing innocent citizens who look to them for protection. This was expressed by Justice Chandrachud in a case in which a farmer from Uttar Pradesh was murdered in the Hussainganj police station for refusing to pay a bribe to escape a false charge. The Chief Justice had very pertinently observed: “Police officers alone, and none else, can give evidence regarding the circumstances in which a person in their custody to receive injuries. Bound by the ties of a kind of brotherhood, they often prefer to remain silent to such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth.” It was ironical in this case that a person who complained against a policeman for bribery was done to death by that policeman, his two companions and his superior officer, the station house officer.

In a judgment on June 2, 1992 Justice Dilip Basu of the Calcutta High Court laid down certain guidelines to prevent violence in custody. These included
furnishing a “custody memo” either to the arrested person or to his relatives. A compensation of rupees one lakh was recommended to be paid in case of a lockup death. The amount would be payable, within a period of four weeks since the occurrence of the incident”. Interestingly there were eight lockup deaths after this judgment was delivered.

Speaking about payment of compensation to victims the Amnesty International mentioned in their report on India Torture, Rape and Deaths in Custody (chapter 5, pp. 86-89) published in March 1992, that very few courts granted compensation to the relatives of people tortured to death by the police, and out of 415 cases payment of compensation was ordered only in 12 cases, and in six cases of these payment was known to have been made.

State governments have persistently resisted all attempts to establish the right to monetary compensation for wrongful actions by their officers. They have argued that the State in not liable for the acts of their officers when discharging “sovereign functions”. They have also failed to act on the 1956 Law commission’s recommendation that State liability should be the rule and “sovereign immunity” the exception. Moreover, the government has made an express reservation to Article 9 of the ICCPR by stating that “there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State”. As a result, courts have traditionally been reluctant to award compensation to victims of human right violations.

In the Bhagalpur blinding cases the Supreme Court held the State liable for acted beyond their authority. In 1983 the Supreme Court ruled that a person whose right to life and personal liberty has been violated by the State is entitled to compensation which can be awarded both in a habeas corpus petition and a civil suit for damages.

In 1989 the Supreme Court awarded Rs. 75,000 compensation to Mrs. Kamlesh Kumari whose nine-year-old son was beaten to death by Delhi Police. In this case, the Supreme Court ruled explicitly that the State is liable to pay compensation to the victims of police misconduct.
In another case Archana Guha (35) headmistress of Kolorah Girls Junior High School in Howrah (west Bengal) was arrested on July 18, 1974 by the Calcutta police for interrogation on suspicion that she had Naxalite connections. She was never charged or brought to trial. She remained in the jail for three years. The torture she suffered caused paralysis of her legs and she left the jail in a wheel chair in May 1977. Soon after her release, Archana began court proceedings. Fourteen years later she is yet to get justice. The case was adjourned from time to time. Meanwhile, the guilty police officer was promoted and has reportedly sought to use every legal avenue to keep the case out of the court.

Normally in a case of rape, especially at the stage of investigation the question of bail should not arise. It is more so when the prayer is for anticipatory bail, but this is not a hard and fast rule. Bail depends in the facts and circumstances of a case as well as the discretion of the judge. If the judge feels that the release of the accused will create problems in the investigation of the case, or the accused will use his freedom to blackmail the victim, the bail application should be rejected.

Unless very strong reasons exist bail should normally be refused. It is distressing to note that policeman, superintendents of jails, managers of rescue and remand homes and doctors, accused of custodial rape are often released on bail on technical grounds. There are many cases when judges of High Courts have intervened and asked why bail has been granted by the lower courts to police officers etc. accused of raping girls in their custody. Normally police officers accused of rape are first suspended and then transferred from that place. They are arrested only if newspaper publishes reports of their involvement in the alleged rape or there is a hue and cry from the public. In such cases there are doubts whether bail should be granted to the policemen allegedly involved.

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section(2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she
states in her evidence before the Court that she did not consent the Court shall presume that she did not consent. *P. Rathinam v. State of Gujarat*¹¹ is a case of brutal rape by a police officer on a tribal woman. In failing to get justice, the gates of the Supreme Court were knocked. The Supreme Court appointed a commission to find out true facts. On the bases of commission’s report, several departmental inquiries were conducted by the Government. This lead to considerable delay in the matter. The Supreme Court directed:

(i) All the enquiries pending as on today shall be concluded within three months subject, of course, to any order of stay granted by a competent court on or before this date. We direct that the said enquiries shall proceed unhindered hereafter and shall not be stayed by any Court or Tribunal hereinafter. Any delay or violation of this order, it is made clear, shall be viewed seriously and the persons responsible therefore shall be answerable.

(ii) A sum of Rs. 50,000/- (Rupees fifty thousand only) shall be paid as interim compensation, by the State of Gujarat, to the victim of rape.

*Nagarajan v. State of Tamil Nadu*¹² relates to the rape and subsequent murder of one Malta, a Malaysian student of 3rd year M.B.B.S., who was staying as a paying guest in a private house. One Nagarajan and his friend Venkatasan, entered the room of victim on the pretext of repairing electrical line. Once inside, they bolted the room and raped Malta one after the other. She resisted and raised a loud cry and in the struggle she died. Her shrieks and cries attracted the attention of a neighbour, who rang up the police and within few minutes the police party reached there. They knocked the door and ultimately with the help of others they broke it open. The body of the raped girl was dragged to the bathroom and the rapists pretended to be innocent. Ultimately one of them confessed and gave details of the act of rape and subsequent events. In this case only evidence available was that of police officers. The trial court acquitted the offenders, but the High Court sentenced them for the offences of rape and murder. The Supreme Court affirmed the judgment of the High Court.

---

¹¹ *Director of Public Prosecution v. Morgan, 175 ALL ER 347*

¹² *AIR 1981 SC 361*
Ram Kumar v. State of Himachal Pradesh,\textsuperscript{13} is a ghastly case of custodial rape. The victim and her husband were residing in Chandigarh. The couple was summoned to Rajgarh in Himachal Pradesh, by one Chuhar Singh, brother of one Khem Singh when the couple was sleeping in the house of Chuhar Singh, around midnight they were awakened by Ram Kumar and Nain Singh. On the pretext that a wireless message was received for them from Chandigarh indicating the Mrs. Khemraj was an abducted girl. Nain Singh was an investigating Head Constable posted as Rajgarh police station and Ram Kumar was a Constable posted at Rajgarh police station. Despite protest, Ram Kumar and Nain Singh brought the couple forcibly to the police station. At the police station, the husband and wife were kept in separate rooms. In the room where Mrs. Khemraj was kept, Nain Singh first brutally hit her, then molested her and finally raped her. Her shrieks were heard in the room where Khemraj was confined. But Ram Kumar Constable, who was guarding him, did not allow him to move out. Ram Kumar's conduct throughout was to help Nain Singh in his misdeed of rape. As to the testimony of the victim, the Supreme Court said: that she was a reliable witness and her words directed against Nain Singh and Ram Kumar bear a ring of truth. Her words are corroborated by the evidence of her husband and brother-in-law, Chuhar Singh.

The flaw in these judgments is that courts still talks of corroboration of rape-victim's testimony. Probably, the courts still have no occasion to take recourse to Section 114A of the Evidence Act. After the coming into force of the Amending Act of 1983, once it is shown that woman had sexual intercourse with the man, it is for the rapist to prove that she was a consenting woman. Some of the cases which have been reviewed merited a sentence of life imprisonment.

In the case of D.K. Basu v. State of West Bengal\textsuperscript{14} the Supreme Court discussed at length the impact of torture on persons and concluded that it involves not only physical sufferings but also mental agony. The court termed torture as naked violation of human dignity which aims at destroying the human personality. The apex

\textsuperscript{13} AIR 1989 SC 1445

\textsuperscript{14} (1997) 1 SCC 416.
court remarked that the third degree methods to get information from the accused in custody are totally impermissible. Then the court proceeded to set out specific directions which are to be persuaded mandatory during the interrogation process in which it has been emphatically argued that every action executed within the walls of the custody has to be recorded with the due transparency and on no account the arrested person should be denied his/her right to medical examination.

In the case of Smt. Geeta and another v. Lt. Governor and others, Delhi High Court observed that a young man of 22 of age who was picked up by the police for no fault to him and was found dead with 51 marks of injury in the body during his stay in the custody cannot be reduced to be an ordinary case of murder. The incident bore the evidence how inhuman in our administrative justice system. With serious reservation the court recalled that in spite of a series of judgments by the Supreme Court and several high courts their does not seem to be any respite to custodial torture. Compensation for custodial death should be sufficient to take care of the deceased’s immediate dependents. In Sheela Barse v. State of Maharashtra the court made legal assistance to prisoners in jails, whether they are under trial or convicted prisoners is an absolutely essential requirement. A detinue must be told of the ground of preventive detention. Ground in clause 5 of article 22 of the constitution of India means not only conclusions of facts but also all the materials on which those fact or conclusions were based. Right of accused in preventive detention to be informed about his right to represent as per law is guaranteed by constitution of India under Article 22(5). A person cannot be allowed to languish in jail unnecessarily and without any substantial progress trial or any hope of the same in near future. The person should be set free. A person is wrongly convicted due to inadequate legal representation and jailed but is ultimately acquitted by the Supreme Court is entitled to compensation as per the proper law. Supreme Court directing the Counsel appearing for Union, state and Union Territories to take effective steps to file challans/reports within six weeks particularly in case involving petty offices.

16. (1986) 3 SCC 596
17. Mena Jayendra Thakur v. Union of India (1999) 9 SCC 177
There was no radical change in the jail condition and the treatment of prisoners inside the jail. It was never thought that prisoners have come outside and to live in the society from which they were expelled due to their unlawful activities, but some how, the idea of reformatory aspect of punishment was given due consideration. Although in the light of Modern Human Right jurisprudence our court try to recognizing the importance of the reformatory aspect of punishment and considering the prisoners as 'person' who have to come outside the jail boundary and live in the society as a reformed person. Now the courts show a readiness in extending certain minimum facilities in the form of inherent rights of individuals and pleading for the human treatment and social rehabilitation of prisoners through creative justice 19. Not only this but our highest court have taken cognizance of letters 20 and telegrams 21 received by them from the prisoners and have triggered off the judicial machinery irrespective of the formalities and technicalties of procedure necessary for activising the court process. In the light of the constitutional interpretation much of the right regarding prisoners have developed and is still to develop. But the world wide development in human right in general and the judicial activism in particular, the condition of prisoner's and prison in India has not improved much. To quote, justice Krishna lyer:

"Prison is an arena of tension, trauma, tantrums and crime, of violence, vulgarity and corruption. And to cap it all, there occurs the contamination of pre-trial accused with habitual and injurious prisoners of international gang."

The growing piece is that jail official themselves are allegedly in league with the criminals in the cell. That is there is large network of criminals, officials and non officials in the house of corruption, drug racket, alcoholism, smuggling, violence, theft, unconstitutional punishment by way of solitary cellular life and transfer in other jails are not uncommon 22. The jail experiences of an eminent journalist 23 also very well reflected

20. Sunil Batra (II) v. Delhi Administration AIR 1980 SC 1574
22. Sunil Batra (II) v. Delhi Administration AIR 1980 P. 1571
the present condition of Indian jails. "Corruption in jail was so well organized and so systematic that every thing went like a clock work, once price has been paid". What Justice Iyer has observed with respect to a particular jail is probably true to most of the prisons in India, because the general level of administrative efficiency and sincerity to the cause of human rights remains the same.

The Supreme Court has recognized in a number of decisions on prisoner's right that they must be treated like human beings and their treatment must conform the basic standard of humanity and fairness. To achieve fairness in trial and human treatment in prison, the authority concerned may pay due attention on different aspect of prison administration stated as under:-

"The object of prison labour is not only to the pain and suffering. With the world wide human right movement and with the development of public welfare concept of state administration, the object of prison labour is to be desired as to suit the prisoner's health and to help him in his after release prospects. Any labour assigned to the prisoner in contravention of these principles is violative of his human rights, and may be termed as the product of unfair and unreasonable jail practices and hit by Article 21 of India Constitution.

Now-a-days labour does not mean horse labour. The prisoners are to be protected from horse labour as imprisonment itself constitutes a substantive punishment. So care must be taken regarding the nature of work assigned to the prisoners, keeping in mind the condition regarding particular prisoner's age and sex."

The prison law does not provide for the payment of any wage to the prisoner for the work in jail premises with exception to open jail, where the prisoners are employed outside the jail premises, in factories or on road et cetera either in public sector or private sector. The practice which is prevailing regarding payment of wage for prisoners labour is discriminatory to that of ordinary labour employed for the same work. This type of practices is against the sprit of constitution and against the right of individual with the violation of human right of prisoner as exploitation which amounts to slavery. This type of practice will develop inferiority complex in the prisoners and in putting the
labour, there can not be a mental association between the labour putting by the prisoner and production. Labour will not have any reformative impact but only a punitive one. It should get reasonable remuneration for their work keeping in view the standard of payment under the provision of Minimum Wages Act. Even if the labour is a part of punishment, the prisoner's should be entitled for reasonable payment as his labour results in the production and by all canon of justice, he must be entitled for certain share in the production. The workers in factories and other industries get wages for their labour but still they get shares in the profit of the concern, earned on account of the production. On the same principle the prisoner's should be entitled for certain payment even he is putting labour as a part of his sentence. The benefit of remission and supply of food and cloth can not form part of remuneration. Even the slaves were entitled for food and clothes and only the work without remuneration has been condemned as slavery and no one will appreciate it. The payment of wages will serve double purpose, the prisoners will realise the dignity of labour and the remuneration earned by them will help them in rehabilitation after release from the prison.

The Andhra Pradesh High Court 24 has held that prisoners would be entitled under Article 21 of the Constitution, Payment for their labour and the State would be violating their right to life and personal liberty by extracting work from them without payment. Mr. Justice P.A. Choudhary observed allowing a writ petition filed by a Law student after visiting Central Jail in Vishakhapatnam in February, 1985. In this case Mr. Justice Choudhary directed the State Government to constitute a committee of competent persons to fix the scale of wage, "which would be fair and considerate to the prisoners and not to be unfair to the rest of the society". It is, therefore, submitted that there should be a uniform wage scale for prisoners so that prisoners may earn in lieu of, what they have done in jail, and rehabilitate themselves after release from prison. The main drawback of the practice regarding jail visit is that, prisoners are allowed to meet their visitors in the presence of jail officers. Their interview / meeting were not free from hindrance. Even the interviewer felt that while interviewing the inmates of jails the freedom of expression was not left.

The Supreme Court direction in this connection is that the prisoner’s must be allowed to meet their family members and friend if they like in a friendly atmosphere, are followed or not is a matter of examination, but there is very much doubt that these direction are followed as it is shown in the above mentioned empirical data. It is submitted that there must not be an element of fear while prisoner’s meet the visitors. There should be a certain fixed liberal regulation and guidelines to regulate the discretionary power of the jail superintendent.

In Hussainara Khatoon v. State of Bihar case, the Supreme Court noted: “quite a few women prisoners were in jail without ever being accused of any offence merely because they happened to be victims of an offence or were held in protective custody”. This was noted as a blatant violation of women’s personal liberty guaranteed under Article 21. The court subsequently directed all such women to be released and further ruled that “women and children who are victims of offences or whose presence is required for giving evidence should not be kept in jail under so-called protective custody but sent to remand or welfare homes”.

In R.D. Upadhyay v. State of A.P & other, the Supreme Court in the light of Art 21,21A, 23, 39 (e) and 39 (f) widened the scope of children’s right in jail. Supreme court has given the direction or amendment of jail manuals to suit the need of children living in jail with prisoner mother and who are below 6 yrs of age.

In Rajagopal v. State of Tamil Nadu (Auto Shankar Case) – In this case the editor and the associate Editor of the Tamil Magazine” Nakkherran “published from Madras moved the Supreme court and asked for a write restraining government officials from interfering with their right public the autobiography of Auto Shankar who had been convicted from several murders and awarded capital punishment. Auto Shankar had written his autobiography in jail prisoner and several IAS, IPS and other official , some of

27. Supra note 4
28. AIR 2006 , SC 1946
29. (1994) 6 SCC 632
whom were partner in several crimes. The announcement by the magazine that very soon a sensational life history of Auto Shankar would be published, created panic among several police officials that they might be exposed. They forced him by applying third degree method to write letter addressed to the Inspector general of prisons that he had not written any such book and it should not be published. The I.G. wrote the publisher that it was false and should not be published. The questions for consideration for whether a citizen could prevent another for writing infringe the citizen's right to privacy. Does the press have the right to publish an unauthorized account of a citizen's life? Thirdly, whether the government could maintain an action or defamation or put restraint on press not to publish such materials against their officials or whether the officials themselves had right to do so.

The court held that the state or its officials have not authority in law to impose prior restraint on publication of defamatory matter. The public officials can take action only after the publication if it is found to be false supreme court has expressly held the right to privacy "or the right to be let alone is guaranteed by Art 21 of the constitution. A citizen has a right to safeguard the privacy of his own, his family, marriage procreation motherhood , child bearing and education among other matters' None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right of the person concerned and would be liable in an action for damages. However, position may be different if he voluntarily puts into controversy or voluntarily invites or raise a controversy .This rule is subjected to an exception that if any publication of such matters are base on public record, including court record will be unobjectionable. In Surjit Singh Thind v. Kanwaljit Kaur 30, the Punjab & Haryana High Court has held that allowing medical examination for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Art 21 of the constitution.

In a report published by SNS, concerned at the sharp rise in cases of "custodial deaths and rape", Law commission chairman Dr. AR Lakshmanan has said

30. AIR 2003 P & H 353
"the police have to be extra careful in maintaining the fine balance between protecting citizens rights and curbing heinous crimes against humanity". Speaking at the international conference of Jurists on Terrorism, Rule of Law and Human Rights yesterday, Dr Lakshmanan asked the police to adopt a balanced approach while performing the difficult and delicate task of dealing with terrorist activities, underworld armed gangs, drug mafia, communal riots and political turmoil. Referring to the Supreme Court directive to the National Human rights Commission and the state rights panels regarding appointment of various sub-committees to monitor violation of human rights, Dr Lakshmanan hoped these bodies would ensure that the eleven point guidelines, issued by the apex court on registration of cases, investigation and interrogation of the accused, were followed in letter and spirit. He also drew the attention of law enforcing agencies to the abnormal delay in referring cases of under trial prisoners to courts. "Justice requires that the offenders of the law should be brought to book and punished. The under trial prisoners are denied the right to speedy trial which is a human right," he said.31

In another report published by PTI under the head "Male officers cannot frisk women: SC". It read, male officers cannot frisk women for the purpose of confiscating contraband materials like narcotics as it is illegal and would render the prosecution's case invalid, the Supreme Court has held. The apex Court said any personal search of a woman by male officers is violative of sub-section 4 of Section 50 of the Narcotics and Psychotrophic Substances Act. "Personal search of the accused was conducted by DSP Baldev Singh which as indicated herein before was violative of the provision of sub-section 4 of Section 50 of the Act", a three- judge bench of Justices Mr. S.B. Sinha, Mr. Mukundam Sharma and Mr. H.L. Dattu observed. Search of women if any can be conducted only by women personnel, the apex court said. The bench passed the ruling while dismissing an appeal filed by the Punjab and Haryana high court in favour of an old lady Gurnam Kaur and her daughters-in-law, Ms. Ranjit Kaur and Ms. Gurjit Kaur. A Sessions Court had convicted the trio for possessing narcotic substances and sentenced them to 12 years rigorous imprisonment. However, on an appeal the High

31. The Statesman, SNS, Kolkata, Tuesday 16 December 2008
court acquitted the accused on the ground that there were several infirmities in the prosecution's case, besides holding as illegal the search of the women by male officers.32

Through the power of the judicial review under Articles 13, 32, 226 and 136 of the Constitution the judiciary have imposed various duties upon legislatures when they are enacting different legislations and upon executive for implementing these laws. The roll of judiciary for implementing the fundamental right of individual is wide enough to incorporate all the human rights law under the periphery of fundamental rights. "Judicial Review" Said Khanna J, in Kesavanand Bharati v. State of Kerala 33 "has thus become on integral part of our constitutional system and a power has been vested in the High Courts and Supreme Court to decide about the constitutional validity of the provision of statutes. If the provision of the statutes are found to be violative of the Article of the constitution which is the touch stone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions".

The role played by judiciary under "Judicial Review" provision of constitution for the protection of human rights of women prisoners are not doubt excellent. Each and every landmark judgment of the Supreme Court on custodial death or on plight of under trial prisoners is unique in itself. Each judgment has thrown light upon the human right of prisoners. These works of judiciary has compelled the legislatures to think over the laws enacted by them in favour of the human rights. Judiciary shows the path to protect the women prisoner's from their deprivation.

Therefore in the parliamentary democracy the power of judiciary as given under the Indian Constitution, has settled the scores to protect the teeming millions of the country from onslaughts of the governmental inactions and excess in general and women prisoners in particular to achieve the ends of State in India.

32. The Statesman, PTI, Kolkata, Monday, 16 March 2009
33. AIR 1973 SC 1461