IV. SELECTED DIMENSIONS OF PERSONAL LIBERTY

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CHAPTER IV

SELECTED DIMENSIONS OF PERSONAL LIBERTY

4.1 Liberty has numerous facets and perspectives. The views on liberty keep on changing but the concept of liberty remains unchanged. These views have attained the status of dimensions of liberty. Not only this, but there are numerous and attributable facets of liberty which are yet to be explored and they can be explored by way of new dimensions by the Courts. In this chapter, an attempt is made to highlight the concept of liberty through dimensions which were laid down by Supreme Court and High Court in different decisions.

RIGHT TO PRIVACY AS A COMPONENT OF PERSONAL LIBERTY

4.2 India's Constitution does not cover right to privacy as one of the fundamental rights. In the Constituent Assembly an amendment on the lines of the Fourth Amendment of the United States Constitution was moved by Kazi Syed Karimuddin and it was also supported by Dr. Ambedkar. However Dr. Ambedkar's support was a little reserved and not forceful enough to secure incorporation of right to privacy in the Constitution. Possibly the Constituent Assembly Members did not visualise the importance of the right of privacy as an aspect of personal liberty.

4.3 Privacy as one of the necessary ingredients of personal liberty suffered heavily on that account. Whereas the Constitution does not mention expressly the right to privacy, the Article 21 miraculously has been playing
a major role in the safeguard of privacy as an essential ingredient of personal liberty.

4.4 It is again important to note that Article 21 by itself has not been potent enough a weapon in defence of privacy until it is not sharpened and made effective by judicial activism.

4.5 It is in this context that we shall examine various aspects of privacy and the right of the individual to have an access to it in the safeguard of personal liberty.

4.6 While dealing with subject of privacy William Cohen and John Kaplan have touched the genesis of the concept of privacy as follows:

"Once a civilization has made a distinction between the 'outer' and the 'inner' man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between Church and State, between rights inherent and inalienable and the rights that are in the power of Government to give and take away between public and private, between society and solitude it becomes impossible to avoid the idea of privacy by whatever name it may be called - the idea of a private space in which man may become and remain himself."

In the above para Cohen and Kaplan has nearly covered all the aspects of privacy but still it is difficult to define the concept of privacy in exact words. It is also observed that privacy is a culturally limited concept and the question what is privacy has therefore remained a problem for those who have made an attempt to define it.
4.7 What is exactly the meaning of the word 'Privacy'? There cannot be straight answers or crystaline definitions. The dictionary meaning is - seclusion; a place of seclusion; retreat; retirement; avoidance of notice or display; secrecy; a private matter.

4.8 The Common Law jurists have described the idea of privacy as an idea of being private or secluded. According to Winfield, the violation of privacy is the unauthorised interference with another's seclusion of himself, his family or his property from the public gaze. Dean Prosser has opined that privacy is not an independent value at all, but a composite interest in reputation, emotional tranquility and intangible property. According to him the law of torts covers cases in which there is an intrusion upon a person's seclusion or solitude or into his private affairs. It includes trespass to the person or property or nuisance or breach of copyright - or infringement of patent or trade marks or the intentional infliction of emotional distress.

4.9 There may be cases where a complaint is made about the public disclosure of embarrassing private facts about an individual or where a person is placed in a false light in the public eye by publishing untrue statements about him. The remedy for such actions would be under the law of defamation or copyright.

4.10 There may be cases in which a person may make use of other person's name or identity. In all the above mentioned cases, a person's right to privacy is affected which is an aspect of liberty and for which remedy is available in the law of torts.

4.11 Whether the word privacy implies positive or negative meaning
depends upon the social cultural background in which the concept of privacy has developed. It could be said that privacy is a dynamic concept and it takes its content from the culture it thrives in. It starts with life and protects human dignity.

4.12 It is akin to the concept of natural justice in accordance with natural human law. Although the concept is not well defined, it can be intellectually perceived with majority consensus. If I say it is wrong to steal, lie, rob others etc. every man in the society would readily agree with me that to lie or to do all these unethical acts is wrong. In a similar manner people will readily agree to certain established human rights. The same is the case with the concept of privacy for which majority consensus would be available when specified. In cases where it is not specified in its generalised aspect it remains still valid. For example, every one will agree to the privacy of a married couple in their conjugation.

4.13 By granting this privacy in our intellectual perception what is in fact we are doing is we are granting the right to privacy to the couple. In other words the society unanimously recognises the right to privacy as inherent in human society.

4.14 Naturally such rights essential to decent and civilised living cannot be defined or incorporated in the form of law or the legal constitutions and in such cases when the questions arise out of abrogation or appropriation of the inherent rights, they are left to the judicial wisdom for appropriate adjudication.

4.15 The concept of privacy can either be interpreted in its absolute
form or many a times when it is not possible to do so, it is to be construed in its relative form. In its absolute form it mainly manifests itself in terms of inherence. In its relative form the concept of privacy becomes opposed to that which is public. Hence, even in its relativity it becomes inherent and in the terms of William Cohen and John Kaplan - "inalienable". These rights to privacy which a Government gives or Government takes away not only lose their element of inherence, but also make the concept of privacy void.

4.16 Therefore in Constitutional law the concept of right to privacy should be developed alongwith the concept of inherent right to privacy. This would be nothing new, because we have already made a beginning quite a long back around the blurred and nebulous concept of human law and its progress namely natural justice.

4.17 Despite being nebulous in the consciousness of the people at large every individual will feel strongly about his right to privacy and therefore it can be generalised and accepted and nobody would object to this right. Thus it becomes a universally accepted concept. It varies in its situational content which takes from the culture in which it grows.

4.18 We should also remember that its demerit of being nebulous or its susceptibility to the impact of the culture influences it to become dynamic in the evolutionary process of civilisation and modernisation. The concept of privacy therefore has a short span of relevance to the age and era in which it exists and the inherence also simultaneously evolves with the changing vistas of human life.
4.19 That is why in the Indian society the women who assiduously practised their privacy through 'pardah' and other systems replaced their right to privacy by abandoning it in favour of their right to intermingle in the society i.e. freedom of association. Whether the women were under the coercion of privacy in the earlier age or they were exercising their right to privacy through disassociation is a matter determinable by cross sectional opinion, which has finally established that women of their own volition preferred privacy and they exercised that right. In this, we recognise the cultural content. (6)

4.20 In many regards culture has no compulsive nature. Every individual has a right to hide his nudity though no where in a written Constitution it is mentioned that every individual will clothe himself/herself such as to hide nudity of certain parts of his/her body. Yet despite this unwritten law by general consensus of decency every one moves about in the society duly clothed. In contrast we have enacted laws on obscenity to be applied in cases where a person indulges in contrary social practice. In Adiwasi areas culturally man and woman may move about nude but if some of them put on garments, it would not be an offence. In their culture in this regard, there is neither decency nor any obscenity. This would naturally make judgements on right to privacy very difficult.

4.21 In Rochester in June 1986 a Court had to decide whether American women had a constitutional right to go topless. Seven women provoked their arrest in a City park by staging a top-less picnic. These women were supported by the Civil Rights group ACLU and they were protesting against the fifty year old law in the State of New York which gives only men the right to show the upper part of their bodies naked in public. According
to ACLU and the demonstrating women who go to the beaches for tanning their skin in the sun or at public swimming pools are fined 250 dollars or 15 days in prison and therefore equality principle in the American Constitution gets violated. The State law also does not prohibit topless barmaids from working in public bars. (7)

4.22 Similarly U.S. Supreme Court despite a sharp division finally upheld a State law that makes sodomy a crime rejecting arguments of the homosexual groups that consenting adults have a constitutional right to private homo-sexual conduct. (8)

4.23 In the case of women by fighting against their discrimination against men for topless movement, we may not say that they are surrendering their privacy, because privacy means what one may want to keep as private. What they are doing can be called exhibitionism which is an offence under criminal law because it is against public order and morality. Two persons cannot perform sex act in public—it is breach of public order and decency and these can be termed as restrictions on personal liberty. (9)

4.24 Hence the question would arise:

(i) How to determine privacy?
(ii) How to determine the right to privacy?
(iii) How to defend privacy?

Again we will have Cohen and Kaplan to guide us to determine privacy.

4.25 First is the test of inherence and their inherence having been established, we have to see whether it is alienable or it is inalienable.

According to Cohen and Kaplan:
"Man likes to think that his desire for privacy is distinctively human, a function of his unique ethical, intellectual, and artistic needs. Yet studies of animal behaviour and social organisation suggest that man's need for privacy may well be rooted in his animal origins, and that men and animals share several basic mechanisms for claiming privacy.

One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small group intimacy. This is usually described as the tendency towards territoriality, in which an organism lays private claim to an area of land, water or air and defends it against intrusion by members of its own species.

A final parallel between animal and human societies is the need for social stimulation, which exists in animals alongside their needs for privacy. What the animal studies demonstrate is that virtually all animals have need for the temporary individual seclusion or small unit intimacy that constitute two of the core aspects of privacy. Animals also need the stimulation of social encounters among their own species. As a result, the animal's struggle to achieve a balance between privacy and participation provides one of the basic processes of animal life. In this sense, quest for privacy is not restricted to man alone, but arises in the biological and social processes of all life."

4.26 In the above para the utmost significance of privacy has been narrated by Cohen and Kaplan. They have also projected privacy as the basic need of all living beings. This basic need prevails uniformly amongst them but human beings as rational animals need more privacy because of their endowment of reason.
Human society being more civilised and evolved in ethical intellectual and aesthetic needs, naturally the value of privacy is more propounded in its quest.

Cohen and Kaplan further observed:

"Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad, there are modulations in the quality of knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded, if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy, if he knew the nature of the illness or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with disease."(10)

In the above para the authors have projected the demerits of privacy in day-to-day life. This aspect of demerit can be described as an abundant caution of the privacy as to its violation. Of course privacy is an agreed relativity concept and this relativity is required to be judged and determined as per the merits of the situation. Cohen and Kaplan have rightly described this in the aforesaid paragraph. All these aspects of privacy will now be discussed in the following pages.

CLASSIFICATION OF PRIVACY:

4.28 The concept of privacy can be classified under following heads:

(1) INTIMATE PRIVACY:

4.29 As per the western view "intimacy is the sharing of information about one's action, beliefs, or emotions, which one does not share with
all, and which one has the right not to share with any one."(11) On account of a different culture, the Indian society in which we live, the concept of intimate privacy differs mostly from the western one. It is observed that most intimate form of privacy exists amongst married couples, but since marriage constitutes a family, the intimate privacy can also be classified under the head family privacy. Hence the intimate privacy relates to the inner and outer mechanisms in the minds of the individuals, their beliefs and actions which they desire to treat as private. It does not however mean that these intimate aspects are never disclosed at all. Many a times the thoughts, emotions, beliefs or action are confined to the trusted ones like intimate discreet friends, parents, spouse etc.

4.30 The individuals sharing this intimate informations, actions, beliefs etc. would not favour any leakage, disclosure or exposure to their privacy. To safeguard this particular type of privacy the help of constitutional provisions is not necessary, nor a situation arises when the safeguard of the law is deemed essential.

4.31 The intimate privacy generally covers the grounds of sexual intimacies personal beliefs, and such other things the society would not approve against the whispers of close friends and relatives.

4.32 Unlike the western society, which strives to defend sodomy as an intimate form of privacy between two individuals or sexual aspects of a man and a woman, not necessarily a married couple no claim on privacy is preferred even if there is a disclosure or exposure.
(2) FAMILY PRIVACY:

4.33 A concept of family privacy can cover a wide area beginning from the privacy between a married couple, extending to joint family living together and ending with all the blood relations of the family though they may not be living together.

4.34 It is often seen that a family secret is assiduously guarded by the members of a family although they might be living in different towns. In India during the olden times people lived in joint families and it was only when our society became progressively urbanised that the institution of a joint family suffered through social institutions but not through the need of privacy. The social customs and the cultural background were such that the families were auto-adjusted to certain kinds of privacy and the individuals never even felt the need of intervention of law or that of any Court. The safeguards were inbuilt in the very customs themselves. There was segregation of males and females and social unwritten rules through which privacy used to be automatically created and granted. A friend or a relative visiting the house would do so without encroaching upon the permissible limits of privacy.

4.35 It was only after the fragmentation of the joint family under the onslaught of urbanisation and its adverse economic impact, that pettiness of mind became abundant, that to share selfishly the privileges of wealth and pleasurable living - not a happy and contended living, that different factions in the family made the need for privacy a dominant tool in their segregation.

4.36 As a result of this, plausibly the need for family privacy has assumed
significance which law would be compelled to bend itself in favour of a clamorous demand and the judicial activism would also be collaborator. What has remained a plausible factor would eventually become the genuine permissible justice.

(3) SOCIAL PRIVACY:

4.37 The third type of privacy is social privacy. This privacy can further be sub-divided into three categories:

(a) Political/Legal Privacy
(b) Professional Privacy
(c) Community Privacy.

By considering the above three kinds of privacy and by composing them together the meaning of social privacy can be understood and, therefore, the above three privacy are discussed separately under three sub-heads.

(a) Political/Legal Privacy:

4.38 Under this privacy certain intimate liberties are protected from the intrusions of the Government. The intrusions by the Government are regulated by means of law and the law in turn either gives or takes away rights to certain liberties which will have considerable bearing on privacy. The examples of regulations are:

- Procedure of search and seizure
- Publication of news
- Eves dropping/wire tapping
- Taking photographs
- Birth control
- National security etc.
- Public nudity (Exposure)
- Sexual relationship beyond marriage
- Privacy of court proceedings (trial in camera)
- Tax recovery and income.

Since a separate thesis can be written on all the above subjects, this Researcher has only mentioned the areas in which human society can lay claim to privacy as can be seen from the American legal literature. So long as and as far as the Indian society is not enveloped and engulfed by the American evaluations as well as devaluations, the Indian society in its self-adjusting and self-limiting pattern is not likely to make any hard demands on the Indian Constitution and the Article 21 will not have to reach its elastic limit to finally break down, while bearing the burden of privacy.

(b) Professional Privacy:

4.39 One of the areas in which privacy of individual can get affected is that of the professionals and through the professions. The knowledge of privacy of individuals gained by a professional cannot be safeguarded unless professional privacy is made possible. A professional may also have his own privacy of vocation to safeguard. Hence in the case of the professionals safeguard to privacy may become essential on two scores -

   Firstly, his own professional privacy, and

   Secondly, the professional privacies of his clients.

4.40 Generally in India lawyers, doctors, chartered accountants, consultants document copiers, magicians, astrologers etc. are the professionals who have the opportunity to possess knowledge about the privacy of their patrons.

4.41 The above class as well as other class of professionals including businessmen may have their trade secrets, inventions, special methods of
operations and so on and so forth. They assiduously strive to guard their secrets and privacy for continual success as well as for avoiding competition.

4.42 The safeguard of professional privacy therefore becomes vitally important to them because based on the protection to their privacy that they can hope for protection to their life and personal liberty.

4.43 A doctor revealing about the disease of his patient to his employer may result in the termination of the service of the patient rendering him without the means of his livelihood or a discreet doctor having carried out an abortion, on a maiden, can come into trouble by one leak in his professional privacy. Similarly a lawyer or a chartered accountant having gained information from their clients can be violated by several means which have emerged from time to time in these pages.  

4.44 In R.M. Malkani's case the Coroner's attempts to extract bribe from Dr. Adatya has been a typical case of an attempt to violate professional privacy.

4.45 Hence professional privacy needs to be safeguarded vehemently not only because it can affect the professional, but because it can also affect the lives of individuals who patronize the professionals.

4.46 In the context of modern living professionalism has come to stay in a long and important way and hence it would adequately need and deserve all legal safeguards. By protecting professional privacy we will be in a position to protect right to life and personal liberty.
(c) Community Privacy:

4.47 Community privacy concept has a very limited field because any society is composed of conglomeration of communities and social laws generally govern major aspects. But there are certain community privacy which may need intervention of law for their safeguard. A Hindu Brahmin community would not approve of a slaughter house for beef in the midst and cluster of their business and residential colony. Nor would Christians and Muslims approve of a ban on cow slaughter. For them beef eating is their privacy of food and dietary habit, and they would not wish to surrender this community privacy. Similarly every community has typical customs and rituals private to their own community, which they would not like to expose to public gaze or interference.

4.48 Many communities hold certain beliefs and religious dogmas from which they adopt their special ways of living. Any interference from outsider to this way of life, they are unwilling to tolerate and, therefore, they would need the right to privacy for their community collectively.

4.49 Especially in Britain in the recent times there are secret organised groups of people involved with supernatural. They are composed of interested believers, worshippers and practitioners, and they are known as Covens of witches or members of black mass cults. There are other such groups constituting membership of Voodoo priests, magicians, cabbalists, etc. they staunchly follow the beliefs, rights and rituals which are generally carried out in secrecy. (13)

4.50 Whether these beliefs are well founded or they are misconceived cannot be the subject matter of any rationalist court but situations may
arise when the courts would be called upon to determine the right of privacy of these secret societies or groups. In India fortified by Articles 25 and 26 coupled with Article 21, these groups can certainly claim access to the privacy of their practices without any blanket bar on superstition.

4.51 For instance in Saifudin Saheb v. State of Bombay (14) our Supreme Court has held that the head of the Dawoodi Bohra Community has the right to excommunicate any member of the community. The power of excommunication is vested in him for the purpose of enforcing discipline and for keeping the denomination as an entity. The Court further held that the Community as a whole has a right through its religious head to manage its own affairs in matters of religion under Article 26 (b) of the Constitution. The person who is excommunicated may be affected but the power of excommunication is mainly for the purpose of ensuring the preservation of the community and it is of prime significance in religious life of every member of the group. This is Community Privacy. But excommunication of a member of a community affects many of his civil rights and to that extent his personal liberty is also affected. An individual cannot be treated as a pariah and he has the right to follow the dictates of his own conscience. Article 21 as it is being interpreted today was not available at the time when this case arose. Otherwise the Court could have granted the right of privacy to an individual in religious matters.

4.52 Even in modern sophisticated society, the members of Masonic Lodge take oath of secrecy and they zealously guard its privacy. To this extent community privacy may also become an important subject for the consideration of our judicial minds.
INDIVIDUAL PRIVACY:

4.53 The most susceptible area is the privacy of individuals. An individual by nature at some time or the other in his daily existence craves for brief periods of privacy for mental peace, quiet, meditation, enjoyment of hobbies, cultivation of personality, both by cosmetical means as well as by rehearsals and practices such as speech modulation, physical exercises, gait improvement etc. Thus quest for privacy is inherent in every human. Man's pursuit of seclusion is in reality his pursuit for privacy and since privacy is an integral part of one's life the right to life cannot be complete with any abnigation of right to privacy.

4.54 In our complex society as per individual idiosyncracy the manifestation of demand for right to privacy may appear even in paradoxical forms. Whereas on the one hand the Hindu women may go for choice of apparels which expose their body to the public gaze to the minimum, in the American society, as we have already seen earlier, the women may want to bare their bodies to the maximum and making it the right to privacy paradoxical. Any attempt on the part of the authority to forbid the exposure of their anatomy on grounds of obscenity may well be construed by these women as an infringement of their right to privacy of their bodies which they wish to exhibit publicly.

4.55 Women when they do not mind exposing their anatomy in public, they are assiduous defenders of their age, which they wish to hide by all means. It would be no wonder if some day, some women, use their right to privacy of their age, not to disclose for educational, employment, census or any other kind of legal record. Even if the law is unable to grant this privacy at least the women can compel the authority under their right to life to keep their dates of birth, furnished for official records as absolute
secrets.

4.56 Any effort on the part of the Government or the society to restrict the right to privacy of an individual who wishes to choose his own way of life, associations, profession, faith, religion and so on and so forth would definitely mean to him that his privacy is at stake and generally governments, journalists, social scientists, employers and relatives constitute a class of main intruders of individual privacy.

INTERNATIONAL LAW AND PRIVACY:

4.57 The importance of the right to privacy as a fundamental human value may be gathered from Article 12 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948 which reads:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Every one has the right to the protection of the law against such interference or attacks."

4.58 The General Assembly of the United Nations could realise the importance of privacy in the day-to-day life of an individual. Privacy is an essential component of human dignity without which life cannot be maintained and enjoyed. This right is not meant for a particular nation but is meant for all the countries in the world and this shows the importance privacy in the international world. This very theme we get in Article 8 of the European Convention on Human Rights which states as under:

"(1) Every one has the right to respect for his private and family life, his home and his correspondence;"
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law (and custom) and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

4.59 Article 8 of the European Convention on Human Rights has projected privacy in a specific manner which includes the scope and object of significance of privacy. Its accent is on giving more protection to individual against encroachment into their privacy by various persons or bodies of persons or by legislation. This theme we further get in Article 17 of the International Convenant on Civil and Political Rights, 1966 which provides as under:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

4.60 All the above Covenant corroborate the significance of privacy as to its existence and applicability of it in the day-to-day life of the people. India as a member of the United Nations and as a signatory to the International Covenant, is under obligation to guarantee this right to her citizens. The State is directed to recognise and enforce International Law as a matter of state policy. The Preamble to the Indian Constitution assures the dignity of the individual. To live a dignified life is protected under Article 21 of the Constitution. In these commands of the Constitution lies the necessary basis for the protection of the right to privacy.
The cultural dimension of the right to privacy with reference to traditional Indian scene is quite different from western world. Traditionally an Indian lives in large joint families. These families are like mini-state. The autonomy of decision making was not availed by an individual minor member. The head of the family decided important matters of the family and members of the family were obedient to the head and they recognised his wisdom. At times family as a whole unit decided issues like marriage, child education and such other things. The Indian homes never in fact even felt the need for privacy due to the life-style and the habit in collective living. The reason for this is that a traditional Indian was never offended by the knock at the door. A person who may be a stranger or an acquaintance is always welcome in an Indian home. Privacy of living either amongst the members of the household or privacy from an outside visitor was not a material consideration. With the growth of urbanisation, the spurt in population and various kinds of shortages caused a contraction in the living as a result of which the old life style of living could not be sustained. The overall impact socially was that broader outlook and considerations were replaced by narrow outlook and compulsive considerations leading to limitation, self interest and comfortable existence in deficient resources.

Naturally a question would arise when we say on the one hand (under individual privacy) that every individual has an inherent craving for privacy, then how can we reconcile this inference with the view presented above for the life style of the Indian society.

The only possible explanation is that emancipation of women, urbanisation and deficient resources have acted as catalysts to the inherent
craving for privacy to bloat it up in a magnified form that we have witnessed in the recent times. During the modern times, things have changed greatly with the social, political, scientific and industrial advancements and today man is asserting his right of privacy in all its dimensions.

4.64 The right to privacy can also be viewed from the point, of India being economically a poor country. Majority of people live in slums and hutments and they are so near to each other that exercise of right to privacy is rather unthinkable or impracticable. People here are preoccupied with the thought of earning their next meal and major portion of our population lives below the poverty line and is deprived of basic necessities of life such as food, clothing, shelter etc. and they hardly have any time to bother about the right to privacy.

4.65 As far as the middle class people are concerned, they constitute a section of society, who are a well disciplined lot and can take care of privacy rights on their own. The rich and the affluent class are capable of safeguarding their privacy with their wealth.

4.66 Professor Upendra Baxi, has raised a very basic question as to whether 'privacy' is a value of human relations in India. He observed:

"But the question arises at a more general level whether 'privacy' is a value of human relations in India. Every day experience in Indian setting suggests otherwise. Marriage parties and midnight music, wedding processions and morning 'bhajans', unabated curiosity at other people's illness or personal vicissitudes, manifestations of good neighbourliness through constant surveillance by the next door neighbour (large number of Indian
houses do not use curtains) are some of the common experiences. A question may arise whether privacy is not after all a value somewhat alien to Indian culture."(16)

There are many aspects of privacy found in the contemporary Indian Legal system.(17)

4.67 There is ample evidence to show that the right to privacy was broadly recognised in India at least half a century before the United States of America conceived the idea in 1890. There are several cases decided by British-India Courts which recognised the right to privacy in India.

4.68 In the year 1855, a case was decided by the Sadr Diwani Adalat of the North-Western Provinces in which the question of a right of privacy arose. The case was Nuth Mull v. Zuka-oollah Beg in which Begbie, Smith and Jackson JJ held on appeal from the decree of the principal Sadr Amin of Delhi, that the erecting by the defendant of a new house, so that the plaintiff's premises were overlooked from the roof of the new house and their privacy thereby interfered with, gave the plaintiff a cause of action against the defendants.

4.69 Reference to the above case was made by the Chief Justice Edge in Gokal Prasad v. Radho, the Court observed:

"Owing to the destruction of records during Mutiny of 1857 I am unable to ascertain whether the existence of a custom of privacy in this part of India had ever been proved or called in question prior to 1855; and owing to the same cause and to the absence from the report of the case of Nuth Mull v. Zuka-Oollah Beg and Kureem Oollah Beg
of information on the point, I am unable to ascertain whether the Judges of the Sadr Diwani Adalat of the North-Western provinces were in that case following the law as they found it existing, or were deciding the case on facts found."(20)

Justice Edge further observed:

"Having given the best consideration which I can to this question, I am of opinion that such a right of privacy as that to which I have already referred exists and has existed in these provinces, apparently by usage, or to use another word, by custom and that substantial interference with such a right of privacy.....affords a good cause of action."(21)

Justice Mahmood concurred with all the views expressed by C.J. Edge.

4.70 In Gokal Prasad's case C.J. Edge referred to number of cases(22) on privacy. All the above observations in this area go to establish the fact that in the middle of the last century, privacy in India was a public issue and could be enforced through the courts of law with whatever little contents privacy was known in those days. The concept of privacy was not alien to the Indian culture.

4.71 In 1931 Prof. Winfield(23) had to fall back upon the Indian cases to persuade the House of Commons to extend the right of privacy to British nationals.

4.72 Justice Mathew in one of his articles(24) has described the relation of right of privacy and individual dignity as under:

"In democratic societies there is a fundamental belief in the uniqueness of the individual, his basic dignity, his worth as a human being. Psycholo-
tists, sociologists have linked the development and maintenance of the sense of individuality to the human need for autonomy. One of the accepted ways of representing the individual's need for an ultimate core of autonomy has been to describe the individual's relation with others in terms of series of zones or regions of privacy leading to a 'core self'. This core self is pictured as surrounded by a series of layer consecutive circles. The inner circle shelters the individual's ultimate secrets, their hopes, fears and aspirations that are beyond sharing with any one unless the individual comes under such stress that he must pour out these ultimate secrets to secure emotional relief. The most serious threat to individual autonomy is that some one will penetrate this inner zone and learn the ultimate secrets either by physical or other means. This deliberate penetration of an individual's protection shell, his psychological armour will leave him naked to ridicule and will put him under the control of those who know his secrets".

He further observes:

"Privacy seeks to erect an unbreakable wall of dignity and reserve against the entire world. The free man is the private man, who keeps some of his thoughts and judgements entirely to himself, who feels no overriding compulsion to share every thing of value with others, not even with those who he loves and trusts."

He further observes:

"One may desire to live a life of seclusion, another life of publicity. Still another a life of publicity concerning certain matters and privacy as respects other matters of life. Neither an individual, nor the public has a right arbitrarily to take
away from him that liberty. It is difficult to find words adequate to express the material condition resulting from the pain on the violation of the right of privacy. We speak without sufficient discrimination of it as distress, anguish, anxiety, mental illness, indignity, mental suffering."

4.73 In the above para J. Mathew has projected the practical content and applicability of privacy in the day-to-day life of the people. The observations which he has made are beyond dispute for the reason that they are applicable to each and every person in the society. The person who will oppose it would certainly be called a lower animal and not a legal person. His observation also reveal that individual dignity is a social value which every legal system must preserve and protect.

4.74 According to Charles Fried:

"Privacy has become the object of considerable concern. The purely fortuitous intrusions inherent in a compact and inter-related society have multiplied. The more insidious intrusions of increasingly sophisticated scientific devices into previously untouched areas, and the burgeoning claims of public and private agencies to personal information, have created a new sense of urgency in defence of privacy. The intensity of the debates about electronic eavesdropping and the privileges against self-discrimination are but two examples of this urgency."(25)

The above para speaks of the characteristics of privacy, that privacy exists and is recognised even during changing times. The approach towards privacy may vary but the contents remain unchanged. The significance of the right to privacy has increased in the present day society when a rapid development
is made in the field of technology and communication, whereby numerous sophisticated electronic and computer devices have increased the chances of direct and indirect intrusion in the area of an individual's privacy. The mini-cameras, mini-microphones and other devices are used which interfere with the personal liberty of an individual.

CASE LAWS ON PRIVACY (INDIAN):

4.75 The United States of America as a civilised country gave new dimensions to the Bill of Rights and in that process the concept of privacy has emerged out as a fundamental right. In fact there is no explicit guarantee of the right to privacy in American Constitution except that in the Fourth Amendment, the right to privacy is given to the people to be secure in their persons, houses, papers and effects. The U.S. Supreme Court has since then given intimate decisions regarding birth, education, marriage, divorce and death.

4.76 During the recent times, things have changed to a great extent and today man is asserting the right to privacy with all its dimensions in different circumstances. While our Legislatures have not yet recognised the right of privacy, our Judiciary is active and dynamic. In one or two cases efforts have been made by our Supreme Court to recognise that right and they have even tried to read this right in our Constitution in Article 21.

4.77 The basic aim of the Constitution has been to uphold human dignity by granting fundamental rights. Without judicial remedy, the State may tend to degenerate from a welfare State to an authoritarian one. During
the recent times our Supreme Court in Rudul Sah and Bhim Singh's case has given a very wide interpretation to Articles of our Constitution in upholding human dignity and also for upholding the spirit and basic aim of our Constitution. Thus giving of wide interpretation has been aptly described by Justice Jagannadhadas in Sharma's case as "strained construction". Hence the Supreme Court in a number of cases acts wisely, with prudence and forethought in its "strained interpretation of Article 21". The practice of keeping a watch on a suspected or political criminal is prevalent in India. This practice has been questioned on the ground that it violates right of privacy of an individual. This practice of keeping a watch is called surveillance and important point in this respect is whether this surveillance amounts to violation of right of privacy. In this respect two leading decisions of the Supreme Court are discussed below:

i. Kharak Singh v. State of Uttar Pradesh

ii. Govind v. State of Madhya Pradesh

In Kharak Singh's case, the petitioner Kharak Singh was challaned in a case of dacoity in 1941, but was released under section 169, Criminal Procedure Code as there was no evidence against him. On the basis of accusation made against him the police had opened a 'history sheet' which was the personal record of the criminals under surveillance. On many occasions the Chaukidar and police constables entered his house knocked and shouted at his door, woke him up during the night and thereby disturbed his sleep. Petitioner urged that his freedom guaranteed by Article 19 (1) (d) to move freely throughout the territory of India and also personal liberty guaranteed in Article 21 are infringed.

4.78 The sole question for determination before the Court was whether 'surveillance' under Chapter XX of the Uttar Pradesh Police Regulations
constitutes an infringement of any of the citizens' fundamental right guaranteed by Part III of the Constitution.

4.79 The deliberations of the Court mainly rested on the two Articles of the Constitution referred above against which U.P. Police Regulation was examined. The Court held that since Regulation 236 (b) which authorises domiciliary visits was violative of Article 21 and as there was no law on which the same could be justified, it was unconstitutional.

4.80 The opinion in the matter was given by Justice Ayyangar, while the minority judgement given by Justice Subba Rao had a prophetic quality of the things to come.

4.81 Justice Subba Rao (with whom Justice Shah concurred) explicitly held as follows:

".....Further, the right to personal liberty takes in not only a right to be free from restrictions, placed on his movements, but also from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life, it is expected to give him rest, physical happiness, peace of mind and security.....If physical restraints on a person's movement affects his personal liberty, physical encroachment on his private life would affect it in a large degree. Indeed nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy."
4.82 In his dissenting opinion Justice Subba Rao also rejected the test of directness of impact formulated in Gopalan and denied that each fundamental right was a separate island entirely upon itself and held that personal liberty and freedom of movement overlapped each other. It was implication of his thesis that a valid infringement of one right cannot justify invalid encroachments on other rights and that the fundamental rights though intrinsically independent overlapped each other. He asserted that not only physical but also psychological restraint on fundamental rights might be unconstitutional. He held that a person constantly shadowed by a policeman or under surveillance, would be prisoner within the confines of our country. The whole country is his jail.

4.83 According to the majority judgement:

"....that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in several clauses of Article 19 (1). In other words, while Article 19 (1) deals with particular species or attributes of that freedom; personal liberty in Article 21 takes in and comprises the residue."(34)

4.84 It is submitted that while explaining the term 'life' as used in the Fifth and Fourteenth Amendments of the U.S. Constitution and identifying the meaning of the same term used in Article 21 of our Constitution, the Court immediately posed a question as under:

"Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and
his right to sleep which is normal comfort and a dire necessity for human existence even as an animal." (35)

Often the term 'animal' is used in the Supreme Court judgements instead of 'biological existence' while referring to 'life'. The term 'animal' is offensive and derogatory to human dignity.

4.85 Relying upon English Common Law maxim which asserts that "every man's house is his castle" and reading it in personal liberty, the Court struck down clause (b) of Regulation 236 as violative of Article 21 of the Constitution.

4.86 After having reached the conclusion as mentioned above, the court made an unprophetic statement when it observed:

"The right to privacy is not a guaranteed right under our Constitution and, therefore, the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III. " (36)

Either what has been accepted as Common Law right and which has been read into Article 21 of the Constitution does not, in the opinion of the Court, constitute right to privacy or else it was not perceptible to the Court.

4.87 Absence of express mention of the right to privacy ought not to have come in the way of its recognition, for, even the 'right to sleep' does not find any express mention in our Constitution and the Court has read it in the personal liberty so as to assure the dignity of the individual.

4.88 Instead of merely quoting the common law maxim if the court
had tried to analyse the same, it would have appreciated that privacy is an attribute of man. For example, take away the man from his castle and think of the castle, whether privacy has gone with the man or remained with the castle. Castle or home carry no value unless it is manned by the people. It is not a question of right to sleep or intrusion knocking at the door or shouting and acting in high handed manner towards a person whom the Court had not held guilty and who was innocent. Hence the police was -

- inflicting atrocity
- harassing an innocent person
- causing disturbance and nuisance to neighbours, and
- indulging in rowdy behaviour.

The neighbours would have, therefore, instead of blaming the police, placed blame for disturbance on Kharak Singh making his living in the locality difficult and troubled. Thus also his right to life and personal liberty got violated.

The profound vision of Justice Subba Rao in evolving the right to privacy was evident from the Kharak Singh's case. But unfortunately later decisions of our Supreme Court failed in making any serious attempts to build on the visionary insight of Justice Subba Rao.

4.89 Govind v. State of Madhya Pradesh\(^{37}\) is another case which raised the sensitive question, whether our Constitution guaranteed fundamental right to privacy. This case came up before the Supreme Court in almost identical factual situation as Kharak Singh's case for its decision. In Kharak Singh, the U.P. Police Regulation had no support of any law while in Govind's case the impugned regulations 855 and 856 were framed by the Government.
of Madhya Pradesh under section 46 (2) (c) of the Police Act and hence were held to have the force of law.

4.90 The petitioner pointed out that the police were making domiciliary visits by day and by night, picketing his house and the approaches thereto. Keeping a watch on his movements and often calling and harassing him. Regulation 856 authorised all these measures. Regulation 855 restricted surveillance, which included all these measures to dangerous criminals determined to lead a life of crime. The respondent argued that as the petitioner was a dangerous criminal determined to lead a life of crime, he was put under surveillance in order to prevent him from committing offences.

4.91 In this case Justice Mathew gave the opinion of the Court wherein after quoting extensively American judgements observed as under:

"The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute." (38)

He further observed that:

"The right and the freedom of the citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists." (39)

4.92 'Liberty against Government' is a phrase coined by Prof. Corwin
to express this idea forcefully. In this sense many of the fundamental rights of citizens can be described as contributing to the right of privacy. He held that privacy dignity claims 'deserves to be examined with care and to be denied only when an important countervailing interest is shown to be superior'.

4.93 Justice Mathew held that the impugned regulation should be read down to save them from unconstitutionality and that surveillance and domiciliary visits should be resorted to only in clearest cases of danger to community security and not as a routine follow up at the end of a conviction or release of a person from prison at the whim of a police officer. He emphasised that surveillance should not be made unnecessarily irksome or humiliating.

4.94 Justice Mathew like Justice Brandies, has brought into focus the nexus between the right to privacy and human dignity and happiness of the individual, the dangers threatening the privacy of the individual, the allieness of police Raj to our political heritage and the need to have the individual alone so that he may discover himself. But unlike Justice Brandies, he does not hold that there is a right to privacy. He seems hesitant to import into Indian law the theory of penumbras. The theory of penumbras keep specific rights open ended so that new rights that a generation needs may be read into them and fundamental rights can be interpreted in an evolutive sense.

4.95 The observations made by Justice Mathew are bound to create confusion. Having committed himself to the view that individual autonomy is in fact protected by the Constitution, it was not open for him to assert without qualification that judicial reliance on a right that is not explicit in the
Constitution is improper.

4.96 Justice Mathew has admirably written about and described in detail the significance of right to privacy and one would have thought that he would accord this right a constitutional status. However, quite contrary to the expectation, there seems to be confusion assuming that this right emanates from Article 19 or Article 21, it cannot have an absolute character. In fact, there should be no confusion because no right under the Constitution is absolute.

4.97 It is really difficult to say whether his reluctance to hold that there was a right to privacy was due to his unwillingness to adopt the American theory of penumbras or due to petitioner's alleged addiction to a life of crime. He even had readily available Indian alternative to this theory. He could have followed Kharak Singh's case and to treat personal liberty as an open ended concept and to hold that privacy was a part of personal liberty. He could have followed R.C. Cooper's case to hold that personal liberty and freedom of movement overlapped each other. His failure to stretch the concept of liberty was a sort of a setback to the nascent right badly needed in India.

4.98 To what extent may be the citizen's right to be let alone and not to be invaded by the duty of the police to prevent crime is the problem in the following case. In Malak Singh's case the following two important questions were raised for consideration of the Court:

i) whether a person was entitled to be given an opportunity to show cause before his name was included in surveillance register,
ii) whether in the instant case the appellants' name were included in the register without any grounds for reasonably believing them to be habitual offenders or receivers of stolen property, as required by rule 23.4 (3) (b) of the Punjab Police Rules. The vires of the Punjab Police Rules, which provide for the maintenance of surveillance register were, however, not challenged by the appellants.

4.99 To the first question, the court answered that making an entry in the surveillance register is so utterly administrative that the rules of audi-alteram partem cannot be applied. The application of the rule in this case will defeat the very object of the rule providing for surveillance. Answering the second question, the court seems to have taken the view that it may not be necessary to supply the grounds of belief to the person whose names are entered in the surveillance register. It may become necessary in some cases to satisfy the Court, when an entry is challenged on the ground that there are no justification to entertain such belief. The court rejected the appeals making certain observations regarding the mode of surveillance. The Court observed:

"But all this does not mean that the police have a licence to enter the names of whoever they like (dislike) in the surveillance register, nor can surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms, nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in rules 23.4 or for reasons unconnected
with the prevention of crime or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the court's protection which the court will not hesitate to give. The very rules which prescribe the conditions for making entries in the surveillance register and the mode of surveillance appear to recognise the condition and care with which the police officers are required to proceed.... Surveillance, therefore has to be unobstrusive and within bounds..... Organised crime cannot be successfully fought without close watch of suspect. But surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1)(d). Surveillance did not mean licence to the police authorities to interfere with personal liberty. The power of the police officer to enter one's name in surveillance register must be based on reasonable ground with justifications enumerated and recorded and in suitable cases it is subject to judicial scrutiny. Interference with privacy in accordance with law is permissible and the existence of right to privacy, is, therefore, fully recognised.

From the cases discussed above, it becomes necessary for us to conclude by saying that the Court has to review and consider its decisional law to hold that privacy is a part of personal liberty read with freedom of movement and that law trenching on privacy should be reasonable and should lay down a fair procedure. The new constitutionalism that the Court gave in recent years justifies such a course of action. There are scholars
who subscribe to this view and try to read privacy as a fundamental right in our Constitution. (44)

PRIVILEGE AGAINST SELF-INCRIMINATION:

4.102 Now it would be appropriate to consider the scope and ambit of the constitutional guarantee available to an accused person in defence of the well established privilege against self-incrimination. The privilege against self-incrimination enables the maintenance of privacy and observance of civilised standards in the criminal justice system.

4.103 In this topic of self-incrimination there are many perspectives. It is not possible to cover all the perspective otherwise it will become an independent topic of research. Here an attempt is made to project the aspect of personal liberty. When a person is compelled to give evidence against his will it certainly amounts to curtailment of his liberty to that extent. Our Constitution makers were aware of this concept of liberty and hence they rightly provided the significance to it by protecting that liberty under Article 20, clause (3) of our Constitution. (45) The protection of right to privacy of the individual seems to be the very purpose of this privilege. This privilege shows respect for the inviolability of human dignity.

4.104 In American Constitution, the protection against self-incrimination is given by Fifth Amendment which says that 'no person shall be compelled in any criminal case to be a witness against himself'. A person may not be forced to confess, required to testify or otherwise to provide evidence which could convict himself.

4.105 Since the accusatory system of Criminal Justice is rooted firmly
in the idea that the accused is presumed to be innocent, and that the burden is on the prosecution to prove his guilt beyond reasonable doubt, the rationale underlying the institution of presumed innocence is not hard to understand. The law denies the prosecution and the criminal judicial process the scope of every kind of compulsive mechanism, which leads to coerced self-accusation and which can be used to lay an insidious foundation for his conviction. Consistently with the presumption of innocence, the defendant cannot be compelled either to testify to facts affirmatively proving his innocence, or to negate facts, which are inconsistent with his innocence.

4.106 It is not easy to draw a line of demarcation between the accused's right to silence, with respect to disclosure of self-incriminating information, which is within his personal knowledge, but which can also be construed as a hurdle in the course of maintaining an orderly society for those, who are assigned the task of maintaining law and order on the one hand; and the need of the law enforcing agency to invoke all reasonable aids in securing evidence about his guilt on the other. It is easy to polarise the values, which lie at the root of any enlightened effort which aims at suppression of crime, and punishment of offenders between the extreme ends of the spectrum, with the inquisitorial system at the one end, which believes in the theory of fair contest and which would place both the parties in fairly equal position with regard to their duty to establish the truth or otherwise of the accusation; and the accusatory system of criminal justice at the other end which demands that the prosecution must produce the evidence against the accused, through its own lawful and civilised exertions, rather than by the cruel and simple expedient of compelling him to speak under duress and against his will.
4.107 The constitutional values, which lie at the root of the need to exclude compelled testimony of the accused are rightly oriented to secure due respect for the individual's right to personal liberty, but its point of application, as practised by the Supreme Court needs closer examination.

4.108 Since the time our Constitution came into force a very narrow interpretation was given by our Courts to Article 20 (3) in a number of decisions. It was in the year 1978 in Nandini Satpathy's case that this privilege was resurrected by our Supreme Court. The main issue in this case was whether the appellant, who was a suspect and not yet an accused was entitled to constitutional silence under Article 20 (3) during police interrogation in connection with investigation into the charges of corruption against her. Nandini Satpathy was directed to appear at the police station for being examined in connection with a case registered against her under the Prevention of Corruption Act. On the basis of the first information report, investigations were started against her and she was interrogated by the police with reference to a long string of questions, which she refused to answer claiming protection of Article 20 (3). The Supreme Court held that sec. 160 (1) of Cr. P.C. which bars calling of a woman to a police station was also violated in this case. The court took opportunity to extend the scope of Article 20 (3) in this case.

4.109 The Court speaking through Justice Krishna Iyer laid down few propositions intended to act as concrete guidelines to provide protection to accused persons in police custody. The Court pointed out that the prohibitive sweep of the protection against self-incrimination goes back to the stage of police interrogation and is not confined only to Court proceedings. The Court further pointed out that the ban on self-accusation and the right to
silence, goes beyond the case in question and protects the accused in regard to other offences pending or imminent which may deter him from voluntary disclosure of incriminatory matter. The court held that if there is any kind of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the police in obtaining information from an accused strongly suggestive of guilt, it becomes compelled testimony violative of the privilege against self-incrimination.

4.110 The Court cited with approval the famous American case of Miranda v. Arizona\(^{(48)}\) and observed that the police ought to permit a lawyer to assist the accused, if he can afford one, but the Court was not willing to go with Miranda on the point that State should make a lawyer available to the accused if he is indigent. This view has now undergone a big change and with cases like Hoscot, Hussainara and Sukh Das\(^{(49)}\) right to give legal assistance has been raised to the status of fundamental right under Article 21 of our Constitution.

4.111 The Court in Nandini Satpathy's case adopted the liberal view that police must invariably warn the accused and record the fact about the right to silence against self-incrimination and where the accused is literate to take his written acknowledgement.

4.112 In the United States the accused has a right to complete silence but in this case, Justice Krishna Iyer ruled that an accused has the right to refuse to answer only incriminating questions. The view was taken by the Court that non-incriminating questions can be asked and the accused is bound to answer where there is no clear tendency to incriminate.
4.113 Like an accused even a suspect in a criminal case is exposed to police torture and terror. Sometimes it is the innocent persons who inspite of not having committed any offence make statements to protect themselves from police torture. The aspect of police torture has been discussed in detail in Chapter V of this thesis. The poverty and illiteracy of the people and Governements apathy towards police excesses are the factors which are responsible for dehumanising the criminal process. Under such circumstances, the judgement given by Justice Krishna Iyer came as a ray of hope for protecting the privacy and liberty of the people of India.

SEARCHES AND SEIZURES:

4.114 Another case in which right to privacy was considered was in Sharma's case. Though this case does not refer to Article 21 of the Constitution (right to life and personal liberty), it deals with law relating to searches and seizure. The police on information that Dalmia Group of Companies were engaged in fraudulent practices carried out a search and seized voluminous documents under a validly issued search warrant.

4.115 The petitioner challenged the very search warrant under Article 32 of the Constitution contending that the search warrants were violative of Articles 20 (3) and 19(1) (g) of the Constitution.

4.116 The search warrants were issued under section 96 of the Criminal Procedure Code and the Court upheld the constitutional validity of this section by observing that:

"....the power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law."
Justice Jagannadhadas speaking for the Court observed:

"When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it into a totally different fundamental right by some process of strained construction."

The above observation of Justice Jagannadhadas can be considered valid in so far as different aspects of this particular case were concerned, but since there is an increasing tendency to lift judgements out of their relevant context for citation in other cases having entirely different merits on the part of the litigants, there is a possibility that such generalisation may harm the theme of privacy as a fundamental right.

4.117 In the course of the research work done so far in this thesis to deal with the concept of privacy, the following conclusions can be drawn:

(i) The right to privacy can only be read directly but impliedly in Article 21 of the Constitution, and indirectly in Article 19.

(ii) Whether they be the safeguards under section 96 of the Criminal Procedure Code or under Article 20 (3) of the Constitution, they suffer from inherent defect that they do not only grant privacy in a way as they also remain limited and confined to criminal cases. It does not extend to parties and witnesses in civil proceedings or proceedings other than criminal. They do not have any utility and it is only Article 21 which can ensure right to privacy.

4.118 In the light of what has been observed by the Hon'ble Judge, let us consider hypothetically that if in Sharma's case he had some document
or material of entirely personal and private nature having no relationship with the object of search, yet this document and material would have been exposed to the eyes for which it was meant to be private.

4.119 In a complex society life is often complicated. There may be children who may have been born out of the wedlock and for outward appearances adoption may have been shown or the wife or the husband may have sentimentally secreted love letters or memento of their previous beloveds keeping them beyond the notice of their spouse and yet the search and seizure though validly carried out may adversely affect the privacy of the individuals in the household. Hypothetically if Mrs. Sharma had such a secret of her early life to protect, her right to privacy would have been unnecessarily exposed and fearing this, if she were to ask for her right to privacy opposing such search warrant by a stay in anticipation maintaining that the search be limited only to the extent of the belongings of Mr. Sharma, a piquant situation would have arisen for the Court to decide in the matter. Even the exercise of search warrant would have become meaningless. In the light of this hypothesis the American Fourth Amendment is able to overcome these problems and it is here that we find justification to import it 'into not a totally different Fundamental Right by some process of strained construction' but out of fairness and justice to those like Mrs. Sharma whose right to privacy was vital to her living and it is through the wisdom of our Supreme Court activism that Article 21 comes to rescue notwithstanding the lapses of our Constitution makers.

4.120 Case law shows that a police officer searching a dwelling without a warrant must take precautions. Prior to search, he should record reasons why the search cannot be made after obtaining a warrant and state what
he expects to find as a result of the search. Strict compliance with these procedures is required in law to avoid humiliation and reckless search in disregard of citizens' right. In subjecting the power of the State to the duty to adhere strictly to the law in search and seizure area implies a right of the citizens which should not be violated in ordinary circumstances. What is this right?

4.121 This is nothing but right to privacy. Our Supreme Court in a number of cases have interpreted that certain fundamental rights which are not specifically enumerated in Part III can be read by way of implication. For example Article 19(1)(a) deals with freedom of speech and expression, but by judicial interpretation we can also read the freedom of press in that Article. Therefore, if we apply the same phenomena then in the law relating to searches and seizure we can include the right to privacy. Warrants are usually issued by the Magistrates who generally presume that States have bonafide reasons and since constitutional matters are made prerogatives of the Supreme Court and High Courts and since lower Courts hardly deal with constitutional matters, they mostly remain segregated from the proper awareness of fundamental rights and "privacy". While on the subject of privacy we have also to distinguish between 'privacy' and 'safeguards or protection'. The incorporation of safeguards are aimed at mainly for right to defend, for equity and fairness but on closer reading they do not smell of privacy. The police interrogations, searches, seizures, enquiries in the neighbourhood and society etc. generally destroy the 'privacy' despite the safeguards merely on the suspicion of the police rather than on proven guilt. Hence we have to go a long way to evolve a system of justice and the process of law by which we can uphold the decencies and dignities of human beings.
EXECUTIVE PRIVILEGE:

4.122 There is a perennial demand for greater openness in Government and recognition of the people's "right to know". In the present day society it is the right of every citizen to know what their Government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. The citizens' right to know the facts and the realities about the administration of the country is thus one of the pillars of the democratic state and that is why the demand for openness is increasingly growing.

4.123 Now if secrecy were to be observed in the functioning of Government and the process of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it will be shrouded in secrecy without any public accountability. But if there is an open government with means of information available to the public, there would be greater exposer of the functioning of government and it would help to assure the people a better and more efficient administration. Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.
4.124 It is in the context of this background that section 123 of the Evidence Act should be interpreted. Section 123 reads as under:

"Evidence as to affairs of State. - No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of the State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

4.125 Along with section 123 it would be appropriate to refer to section 162 of the Evidence Act which is as under:

"Production of documents. - A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or its admissibility. The validity of any such objection shall be decided by the Court.

The court if it sees fit, may inspect the document, unless it refers to matters of State or take other evidence to enable it to determine on its admissibility....."

4.126 The claim of immunity can justifiably be made only if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold document may be influenced by the apprehension that such disclosure may adversely affect the head of the Department or the Department itself or the Minister or even the Government or that it may provoke public criticism or censure in the Legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose
the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence - should have no relevance in making a claim for immunity against disclosure. The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court.

4.127 It has therefore been held since long before Conway v. Rimmer case\(^{(52)}\) was decided in England and Sodhi Sukhdev Singh's case\(^{(53)}\) in India that a claim for immunity against disclosure should be made by the minister, who is the political head of the department concerned or failing him by the Secretary of the Department and the claim should always be made in the form of an affidavit. If in a given case no affidavit is filed or the affidavit filed is defective, the Court may give an opportunity to the State to file a proper affidavit. The reason is that the immunity against disclosure claimed under section 123 is not a privilege which can be waived by the State. It is an immunity which is granted to protect public interest. That is the reason why in England this immunity is no longer described as "Crown Privilege" but is called "public interest immunity."

4.128 In India sufficient inroads have been made in the field of Executive privilege regarding non-disclosure of documents in a pending trial in numerous cases and these cases have maintained the supremacy of the judiciary.\(^{(54)}\) The Courts have retained with themselves the residual power to inspect the documents in order to decide whether its disclosure would be injurious to public interest.

4.129 In the landmark case of S.P. Gupta v. Union of India\(^{(55)}\) it was held
by our Supreme Court that there is a heavy burden of proof on any authority which makes the claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of the document in question but upon its membership of a class whatever be its contents and therefore the Court should be very slow in upholding such a broad claim, which is contradictory, if not destructive of the concept of open Government. Secondly, classes of documents to which the immunity may be accorded are not closed and in the life of a fast changing society rapidly growing and developing under the impact of vast scientific and technological advances new class or classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure.

4.130 The court further held that in cases where non appointment of an additional Judge for a further term or transfer of a High court Judge is challenged the disclosure of correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could not be said to be injurious to public interest. Therefore, in a proceeding where the transfer of a High Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence, since on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure.

4.131 In this case Justice D.A. Desai has made the observation that undoubtedly, (section 123), a century old provision enacted to some extent keeping in view the needs of Empire Builders must change in the context of Republican Government and the open society which we have set up.
Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is, however, equally well recognised that fair administration of justice is itself a matter of vital public interest. Therefore, if the two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardised if disclosure is ordered and on the other hand whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration of justice and state affairs at high level in respect of appointment to high constitutional offices and then decide which way the balance tilts.

4.132 Thus from all the above discussion we can conclude that Government's secrecy affects the judicial decisions. If the Government claims privilege and refuses to produce the documents in the Court of law, the other party seeking relief through Court may be defeated in his case as he may find it extremely difficult to prove his case. Therefore the Courts are unable to give relief to the individuals, not because the administration was at fault, but because the administration would make the proof thereof impossible by claiming privilege to produce documents which are in its possession. At times a privilege claimed may be a genuine one whereas some times the documents are denied only to hide bitter truth from being revealed. Under such circumstances, the Government should be prevented from exercising their right to privacy. The State cannot withhold any document or papers, and privacy cannot be claimed by the State. Specially during the time when people look towards the Government with suspicion and distrust, it
is all the more necessary to insist upon maximum exposure of its functioning. It is under such circumstances that the Courts can play a meaningful role in making governmental operations less secretive and more open. The claim of privilege should always be decided by the judiciary rather than by the executive. This would to a considerable extent remove the shadow which has been cast on the rule of law in our country in recent years and contribute towards a further realisation of the ideals set out in the Preamble of our Constitution.

GOVERNMENT - PRIVACY'S ENEMY:

4.133 A problem of encroachment on privacy can arise for the personnel in the Defence Service whose correspondence also is opened out and censored by the authorities even without justifiable reasons in peace times. Though the Defence Department may have valid reasons, the question would still remain whether individual privacy can be encroached. If the judicial thinking of the U.S. Courts is applied, we can safely conjecture that Defence personnel can gain immunity from the censorship.

4.134 In dire disregard of the right to privacy, the Government of India has passed a Bill which is awaiting Presidential assent and which empowers the postal department to break open any sealed letters, parcels, packets etc. with a justification that due to the terrorist activities as well as Espionage problem the Government needs to be armed with proper authority to enable it to tamper with the right of privacy.\textsuperscript{56} Even if the Presidential assent is given to this piece of legislation, it remains to be seen how the right to privacy would be interpreted by our Supreme Court, to render it ultravires.
4.135 In no civilised country who have faced major wars and who are under perennial threat of major war have yet even thought of such a measure as is contemplated by the Government of India. The loud noise made in favour of the legislation puts into relief a conceited thinking as if this new power will permanently end all problems and that the effectiveness of the Government will enhance against tiny political problems of the terrorists. The citizens are shuddering with fear that in a land of no accountability of the public servant, in a land where an innocent complainant gets molested by the police, in a land where through a freak miracle a public grievance gets responded or in a land in the Courts of which a litigant at the time of filing his case plants a small mango sapling and by the time he gets justice, his second generation plucks the mangoes from the tree he has planted in the court, one can imagine why the citizen shudders! The irresponsible and irresponsible postal staff is bound to add blackmail to the existing corruption of pilferage and bribery.

ARTICLE 21 AND CONJUGAL RIGHTS VIS-A-VIS PERSONAL LIBERTY AND PRIVACY OF A WOMAN:

4.136 Article 14 and 21 were applied to the Hindu Marriage Act, 1955 by Justice P.A. Choudhary of the Andhra Pradesh High court in Sareetha v. Venkata Subbaiah (57) in a Civil Revision Application filed by Sareetha, a well known film actress of the South Indian screen against an order passed by a Subordinate Judge of Cuddapah.

4.137 She challenged the validity of section 9 which provided for the remedy of restitution of conjugal rights on the ground that it violated her 'personal liberty' without proper procedure and was thus ultra vires of Article 21.
4.138 Sareetha was given in marriage to Venkata Subbaiah, while she was 16 years of age and immediately thereafter they were separated. Venkata Subbaiah, therefore, filed a case under section 9 of the Hindu Marriage Act for restitution of conjugal rights in Sub-Court of Cuddapah.

4.139 A preliminary objection was taken by Sareetha to the jurisdiction of Cuddapah Sub-Court to the entertaining of that application on the ground of place of residence. But the objection was overruled by Cuddapah Sub-Court, leading Sareetha to the filing of the revision application in the Andhra Pradesh High Court.

4.140 In the same revision petition, Justice Choudhary proceeded rather unusually to examine the constitutionality of section 9 of the Hindu Marriage Act and declared it unconstitutional. (58)

4.141 Here, it is necessary to state that so far as technicality and procedure of established law and its practice are concerned the Hon'ble Judge seemed to have overlooked two aspects:

(1) As no decree for restitution of conjugal rights was passed by the Sub-Court, Sareetha could not have exercised her privilege of challenging the Constitutional validity of Section 9 of the Hindu Marriage Act, 1955.

(2) Here was a revision petition and determining the Constitutionality of a Section under an Act went beyond the scope of a revision petition.

4.142 The Honourable Judge in these circumstances could have remanded the case after judicial determination of issue of jurisdiction which was in this case on the basis of residence. One therefore, carries an impression that the learned Judge exercised judgement on the constitutionality of the
section at a premature stage of the matter.

4.143 But when the same case is considered not in the light of technicality of law and its established practice, but in the light of fundamental rights and personal liberty of an individual, Sareetha had definitely a grievance that by making use of section 9 she was being pestered and harassed at a great inconvenience to herself.

4.144 Here it would be relevant to consider the observation made by Justice Choudhary:

(1) There is a basic distinction between a man and animal. The term 'life' under Article 21 means much more than mere animal existence, it includes a right to live with dignity and freedom from coercion, either mental or physical and unregulated faculty of decision making which shape the very identify which a person wants to project in the world.

(2) The decision should be by a woman as to whether, when and how her body is to become the vehicle for the procreation of another human being.

(3) No law can positively command a woman to have sexual intercourse against her will and this violated her privacy and thereby personal liberty.

(4) Restitution of conjugal rights is an unequivocal attempt to command her to do so, it therefore, violates Article 21 of the Constitution.

4.145 Justice Choudhary has given an expansive interpretation of the right to life and personal liberty in Sareetha's case.

4.146 The instinctive reaction of women to the judgement has to be positive. The Hon'ble Judge is saying what women have been saying now for a long time: Our bodies are our own and nobody else has any right
over them, not even a husband. The judgement goes so far as to support
the view that motherhood must be a women's choice, not a marital or sacred
duty. Women should be able to live in dignity, free to think for themselves
and free to decide. When Hindu Marriage Act came into force in the year
1955, circumstances then prevailing were absolutely different from what
they are today. Male supremacist culture was prevalent in those days.
But now with the advent of modernisation, changes have taken place in
society where women want to assert their rights and they wish to be independent
Even the concept of marriage as an institution has undergone a change.
The whole concept of wife being the property of the husband has now been
buried and wife is looked upon as a woman in her own right in the marital
relationship. She wants to assert the right to privacy against her own husband.

4.147 The judgement given by Justice Choudhary is almost revolutionary
in granting woman the right to control her own body and mind. Even in
marital relationship women want liberty and a right to privacy.

4.148 But Sareetha's case raises some profound problems. Her right
to personal liberty or privacy interpreted under Article 21 cannot be exercised
and enjoyed at the loss of conjugal right of her husband. There seems to
have been a judicial confusion while granting the right of privacy to Sareetha.
The salient problem in the case arises as to what happens simultaneously
to the fundamental right of the husband (This aspect is dealt with a little
later in these pages). This problem can be resolved only if we interpret
marriage as a contract, as an agreement, as an obligation and as an undertaking.

4.149 Let us take illustratively a case of a person choosing his bride.
Whatever the theoretical and social philosophies on marriage, in unexpressed
and implied sense the institution of marriage is for creating orderly society and
to prevent social anarchy by regulating sexualities and therefore sex forms an
important and fundamental implication of a marriage. All other talks on
companionship, setting up of family, settling in life etc., are all in line of
fringe benefits or bonus privileges, but the basic aim is the fulfilment of the
sexual urge. In our hypothetical case when a man in good faith selects his
bride to seek the satisfaction of his sexual and romantic needs and the bride
while consenting for the marriage is presumed to be knowing and understanding
the implied appeasement of mutual sex life by her conduct, she undertakes a
contract, obligation, etc. and if she fails to honour her part of contract, the
husband should definitely have the remedy, which has been provided in a hollow
manner by section 9. Hollow because the restitution of conjugal right, even
when it can provide a decree, it is just not possible that the spouse would
submit herself in a tedious, unwanted mechanical act of sex, lacking wholly and
totally in the romance of it. Further a decree of conjugal right, if not
honoured by the spouse does not serve any purpose beyond the possibility that
such a decree may or may not serve the objects of section 9. Neither contempt
of Court proceedings can be carried out against a defaulting spouse, nor
can any one be compelled in sexual intercourse against one’s will and wish. (59)

4.150 This would also raise questions as to the fundamental rights.
While upholding the fundamental right of the wife, a big question remains
as to what happens to the fundamental right of the husband, who has also
been fortified by the institution of marriage to seek his sexual satisfaction
from the spouse who has willingly and with awareness and consent acceded
to the obligation of a marriage.
4.151 But our judiciary by crushing section 9 of the H.M. Act have deprived the husband of his right to life and liberty. Let us take our illustration further, the husband is deprived of conjugal love and outlet for his sexual needs. If he seeks this outlet from maidens, he is supposed to suffer the charge of incest and if he cohabits with a married woman, he gets prosecuted under the charge of adultery.

4.152 Hence right to personal liberty or privacy of a wife, incest and adultery taken together totally deprive the husband of his right to life and personal liberty and yet we see, recognise and decipher constitutionality in an unconstitutionality of causing triple deprivation to the husband through our process of law.

4.153 It therefore appears that we are too fast as well as too shallow while delivering judgements as not to probe and fathom the intricacies of right to life and personal liberty.

4.154 Despite this, Justice Choudhary has no hesitation in characterising the remedy of restitution of conjugal rights as a savage and barbarous remedy. He also declared section 9 as running foul of Article 14. According to him:

"... this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife or the husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of law." (60)

This is indeed a very poor logic. The law is applicable to all, whether high or low, rich or poor, strong or weak, man or woman though
inherently unequal. Both the husband and wife have equal rights under section 9 and there is no discrimination and, therefore, section 9 should have remained to remedy the conflicts between couples.

4.155 This is the only remedy for women who have been deserted by their husbands and who want a reconciliation. It has always been interpreted legally as a reconciliatory measure and in many cases, the couple have got together during the case. The Courts usually did not grant a petition, if the case involved the husband trying to impose his will on the wife. Striking down section 9 therefore would definitely harm the cause of women who were most in need of it.

4.156 Section 9 of the Hindu Marriage Act is as follows:

"Restitution of conjugal rights - When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the Court, on being satisfied of the truth of the statement made in such petition and that there are no legal grounds why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation - Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society".

4.157 A petition filed for restoring conjugal rights inevitably inquired into why one partner had withdrawn from the company of the other. It always
meant sharing the conjugal home, and coming together again. If either of the partners refused to cohabit with the other, even after court ordered them to do so, they could file for divorce after one year. If the husband was guilty, he would have to pay the wife maintenance, if the wife was guilty she would have to release the husband and grant him a divorce.

4.158 It appears therefore that it is indeed difficult exercise to reconcile these divergent views. Therefore, a Court judgement should not only become reference case for judicial parameters, but the judgements should serve two purposes, namely:

(i) that of upholding the spirit and objective behind a constitutional provision, and

(ii) that of creating a social impact of channelising and directing the discipline of the society.

4.159 Hence the judgement in Sareetha's case ought not to have acted merely as jubilation for Sareetha and disappointment for her husband. The judgement ought to have gone beyond this to become a parameter of social discipline to enable conflicting couples to derive wise guidelines. Let us now consider another divergent judicial opinion.

4.160 Justice Avadh Behari Rohatgi of Delhi High Court in Harvinder Kaur's case has expressed a contrary view on the similar issue. Section 9 of the Hindu Marriage Act was not violative of Article 14 and Article 21 of the Constitution. The learned Judge noted that the object of restitution decree was to bring about cohabitation between the estranged parties so that they can live together in the matrimonial home in emity. The leading idea of Section 9 was to preserve the marriage. From the definition of
cohabitation and consortium, it appeared to the learned Judge that sexual intercourse was one of the elements that went to make up the marriage, but that was not the summum bonum. The Court does not and cannot enforce sexual intercourse. Sexual relations constitute a most important attribute of conception of marriage. But it was also true that they do not constitute its whole content, nor can the remaining aspects of matrimonial consortium be said to be wholly unsubstantial or of trivial character. The remedy of restitution aimed at cohabitation and consortium and not merely at sexual intercourse.

4.161 Justice Rohatgi further observed that:

"Introduction of 'Constitutional Law' in the home is most inappropriate. It is like introducing a bull in a China shop. It will prove to be ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate & delicate the introduction of cold principle of Constitutional law will have the effect of weakening the marriage bond."

4.162 Section 9 seeks to achieve stability of marriage. It is a fundamental principle in matrimonial law that one spouse is entitled to the society and comfort of the other and when one abandoned the other without just cause, the courts upon the petition of the other would grant a decree for restitution of conjugal rights.

4.163 While in context with section 9 the observations of Justice Rohatgi are quite justified, in a generalised manner the words used in his judgement:
"In the privacy of home and married life neither Article 21, nor Article 14 have any place", are not appropriate. There may arise situations in the privacy of home and married life where these Articles may become important to those aggrieved individuals who may not have any other shelter in the existing enacted legislations to offer remedy for a typical problem. During the recent times numerous cases of dowry deaths, bride burning are taking place in the society, in all such cases the need to invoke Article 21 or Article 14 in the home and married life may become necessary.

4.164 Our Supreme Court too in Saroj Rani's case\(^{(63)}\) noted the character of Section 9. Justice Sabyasachi Mukharjee observed:

"Having considered the views of the learned Single Judge of the Andhra Pradesh High Court and that of the learned Single Judge of the Delhi High Court, we prefer to accept on this aspect namely on the validity of Section 9 of the said Act the view of the learned Single Judge of Delhi High Court. It may be mentioned that conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression 'conjugal' as 'of or pertaining to marriage or to husband wife in their relations to each other'.\(^{(64)}\)

The Court further observed:

"In India, it may be borne in mind that conjugal rights, i.e. the right of the husband or the wife to the society of the other spouse is not merely creature of a statute. Such a right is inherent in the very institution of marriage itself. There are sufficient safeguards in Section 9 to prevent it from being a tyranny".\(^{(65)}\)

4.165 The effect of the Supreme Court's observation is that Sareetha's
case may be taken to be overruled assuming that Sareetha's decision was validly given. It is well known that the sexual gratification is one of the primary biological needs very closely related to the psychological health of a person. A deprived state for sexual gratification causes repressions which in the longer run act upon the physical as well as the mental health of a person. Dr. Sigmond Freud has very ably established this aspect through his researches and writing.

4.166 Very often the Court's judgements appear to be lacking in the sensitivities and perceptions of the intimate problems of the litigants and the cases are treated and judgements delivered as if the matters were related to inanimate things or a callous presumption that the subject can very well wait for his biological needs in a state of celibacy indefinitely or over a long stretch of time in a state of sexual suspension.

4.167 If in our society we have husbands deprived of their biological urge, they would sooner or later try to seek their gratification from other courses because our laws block their legitimate path. In the process our society will degenerate into conjugal relationship, contract marriages, extra marital relationships, etc. creating and causing a very dark future for the sacred institution of marriage and insecurity for families, children and homes. This will be only a part of the scene exhibiting those persons who are bold and irresponsible to desert the institution of marriage.

4.168 There will be, however, another scene showing us those deprived souls who out of their proprieties do not seek alternatives, but keep suffering invariably by practicing repressions and self-gratifications which according to the psychological studies may lead to abnormal state of mind with many
of the sensitive and passionate persons becoming introvert psychotics. While delivering the judgements the judicial wisdom should also encompass these probabilities and prevent multiplication of abnormal class and psychotics in the society.

4.169 Another thrust, inadequate judgements may create, will be by bringing the sexually deprived persons on the threshold of an era which may open up a theatre in which the sexually deprived can be seen raping and kidnapping woman and violating girls and women of any age and all other sequential consequences which generally follow from an initial crime. Hence it is important that cases involving the sensitivities of conjugal relationship and the sentimentalities involving custody of children should be dealt with deep thought, expert consultations with doctors and psychologists, with an eye on possible repercussions on the litigants and the society so that the social order does not degenerate.

4.170 These problems can very well be avoided by an effort to exclude the right to privacy to generate an understanding that such a right cannot be made possible by its non-existence. Man being a social animal in one way or the other, he remains chained and linked with the company of other men and women and if each in the company claims right to privacy, it will be against the social scheme and fundamental human nature and therefore, no anarchical concept of privacy should be permitted in genesis. The matter should not only be viewed from an abstract legal tower but from a reasonable window of moral bondage and the mutuality of obligations arising from human relationship in different forms.
ADULTERY:

4.171 While dealing with the right to privacy of a husband, it is mentioned earlier that if the husband is deprived of his conjugal rights by the wife, he falls within the three corners of the Barmuda Triangle. As a married man he is deprived of his sex life by the wife. If he cohabits with a married woman he faces twin dangers from civil code on Adultery as well as criminal code thereon. If he cohabits with unmarried woman he is supposed to be living in incest with attendant social calumny.

4.172 In Sowmithri Vishnu v. Union of India, Supreme court dealt with the constitutional validity of section 497 of the Indian Penal code, 1860 which punishes adultery. Section 497 of the Indian Penal Code empowers the husband to prosecute the lover of his wife, if he has had sexual intercourse with his wife without his consent or connivance. The wife cannot be punished as abetter and her consent to the sexual relationship is of no importance whilst determining the guilt of the lover.

4.173 This question was raised in a writ petition filed under Article 32 by the petitioner, who was wife of the person, who had prosecuted one Dharma Ebenezer for adultery under the above section. Earlier, the husband had tried to obtain divorce on the ground of adultery, but had succeeded in obtaining divorce on the ground of desertion an alternate ground urged by him. Having failed to obtain a judicial declaration as to the alleged adultery, he made criminal complaint against her alleged paramour for adultery. It was to get this prosecution quashed that the writ petition was filed.

4.174 The main grounds of attack were the following:
(1) Section 497 conferred upon the husband the right to prosecute the adulterer, but it did not confer any right upon the wife to prosecute the woman with whom her husband had committed adultery.

(2) Section 497 did not confer any right on the wife to prosecute the husband who had committed adultery with another woman and,

(3) It did not take in cases where the husband had sexual relations with an unmarried women with the result that husbands had a free licence under the law to have extra-marital relationship with unmarried women. It was, therefore, contended that this section was a flagrant instance of gender discrimination. It treated women as chattel, property of men.

4.175 In this case Supreme Court missed the opportunity of rendering the relevant law on adultery ultravires on the grounds of discrimination between man and woman and the section was also attacked on the basis of Article 21 in so far as the wife is not a necessary party in the prosecution. The petitioner's counsel apprehended that a collusion between the complainant and accused could damage the reputation of the wife without granting her a chance to defend herself. The provision was referred as a "flagrant instance of gender discrimination, legislative despotism and male chauvinism".

4.176 In this case a very peculiar view is held by the Supreme Court even though it professes as under:

"However, the petitioner's counsel had many more arguments to advance and since, more than 30 years have gone by since the decision in Yusuf Abdul Aziz (AIR 1954 S.C. 321) was given, we thought that we might examine the position afresh, particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex." (67)
4.177 After 30 years since the decision in Abdul Aziz was given a more detailed consideration was required to be made in the light of the judicial activism in respect of fundamental right, but instead Chief Justice Chandrachud relied on the above mentioned case and held that no constitutional provision was infringed. In that case constitutionality of section 497 of the Indian Penal Code was upheld by the Supreme Court on the protection of women rationale. The section was attacked by the accused's lover because it did not permit the punishment of the married woman as an abetter. The court rejected the challenge on the strength of Article 15(3) of the Constitution, which permits special provisions for women.

4.178 According to eminent scholars the decision of the Court is not rightly given. Yet another important passage in the judgement reads as under:

"The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under section 392 of the Penal Code, but the offence of adultery should be punishable with a sentence of five years only: 'Breaking a matrimonial home is not less serious a crime than breaking open a house'. Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of
4.179 Avoiding all discussions on the policy of the law and the constitutionality of the law, suffice it would be to say that in cases such as a wife robbing the husband of his rightful claim to conjugal relationship and vice versa, the Constitutional law is unable to render any help.

4.180 This situation provokes a thought in our mind that sometimes the "procedure established by law", viz. the tedious and cumbersome lengthy process to get divorce violates the right to life and personal liberty and those who do not violate the procedure established by law have to surrender personal liberty. The self contradiction in Article 21 arises mainly on account of the procedure established by law. In matrimony when the couples find themselves wrongly paired, they have to make compromise and continue living an anaemic life and both the partners understand very well that only separation can bring cheer and personal liberty back in their lives. But divorce, a procedure established by law is so difficult that they are compelled to make a choice between drudgery and adultery. Thus it is law itself which by its unrealistic nature and failing to comprehend the winds of time promotes adultery. In other words, it promotes unsanctioned personal liberty.

4.181 Today when both men and women are well educated self reliant with opportunities to correct their own or their parents' mistakes of wrong pairing, they should have an easy remedy to dissolve their marriage and live a life of their choice. Except where the law has no political intensions, it assumes a snails speed in amending any obsolete law which may have ceased to have any social relevance. When dead laws live, the living have to lead a life of death and yet Article 21 is made to make such ado about
CONCLUSION:

4.182 While compiling this thesis on various aspects of privacy, it was deeply realised that most of the views and case laws are derived from American sources, while the U.S. views are full of logical justification and assertive in regard to right to privacy they are nevertheless inconsistent with the Indian culture, its history and its semi-civilized pattern of life, pattern of family and the community pattern. While scanning through the literature in search of the material for this thesis it had also become evident that Indian justice system is placing an overincreasing reliance on U.S. case laws, interpretative aspects of the American Constitution and U.S.A. Supreme Court. In other words, the half breed Indian laws adopted from the British are now being germinated by the American system of jurisprudence. If these happenings are not checked and controlled in time, India will be in a mess while searching for the basic Indian element in the so-called Indian laws and systems of jurisprudence. Its impact will be finally on the society which would no longer remain Indian in Indian itself.

4.183 Legal rationalisation apart freedom should not become a licentious one to defeat the sanctity of those individual and social values for which India has gloriously stood through the ravages of time. We have to remain continuously self conscious of our Indianness and confine our reliance on U.S. jurisprudence only as a broad guiding source and also avoid their total imposition for whole acceptance.

PERSONAL LIBERTY & RIGHT TO LIFE

4.184 The word 'life' in Article 21 of the Constitution has also been
given a very wide interpretation along with the words 'personal liberty' by our Supreme Court and different High Courts. The word deprivation of life indicates that Article 21 is intended to guarantee only physical life by procedure established by law. But this meaning of the word 'life' has undergone a change and life has a larger meaning than bodily or physical life. It includes life in all its expressions - physical, intellectual, moral, spiritual and cultural. Life also includes personality and whatever is reasonably required to give reasonable expression to life, its fulfilment and its achievements.

4.185 The recent trend of right to life has been elaborated by the Supreme Court through the perspective of right to livelihood.

4.186 The right to livelihood as a component of right to life is the new dynamics proposed by the Supreme Court under Article 21 of our Constitution. This dynamics of the right to livelihood is discussed in short for the purpose of this thesis.

4.187 Whether right to life should include livelihood or the right to livelihood, has been a complex question vexing our judiciary whenever confronted to adjudicate upon. Primafacie the right to live cannot be enjoyed unless there is right to livelihood. The means of living are as much important as oxygen is to biological life and since in our norms of human dignity we have valued life as much more than mere biological existence, the importance of the means of living and for living cannot be underestimated.

4.188 We have also to pay regard to the modern socio-economic ways and civilized living in which livelihood is earned by different ways and
methods. We have long abandoned picking up our spears and stone knives to rush into a forest whenever we are hungry and attack a deer or trap a rabbit and eat them raw or after roasting. Nor do we climb the trees and bring down the fruits. Hence our primitive means of living is totally banned by a civilised society.

4.189 Under the circumstances we have to earn our livelihood by the means approved by the society and its laws and in doing so if through some force or agency we are denied the right to livelihood, then we are definitely justified in claiming right to livelihood under Article 21.

4.190 However as far as the Judiciary is concerned it has to minutely examine those forces and agencies which deny the right to livelihood. In order to prevent the smuggling of gold, if the gold control order is enforced to regulate the trading in gold in context with the operative socio-economic conditions, it shall not still mean that the right to livelihood is taken away or restricted though the effect of the order may definitely restrict the trading in gold. In such a situation Article 21 cannot be applied.

4.191 But if in case the government totally bans Gold-smithery the gold-smiths are bound to be deprived of their livelihood and Article 21 can come to their rescue. If however, when imposing the ban the Government also provides with an alternative means of livelihood, this very procedure introduced by law will be valid though depriving the goldsmiths of their livelihood from the original trade.

4.192 In Olga Tellis case\(^{(71)}\) for the first time our Supreme Court interpreted the right to livelihood under Article 21.
4.193 Olga Tellis had on behalf of pavement and slum dwellers filed a petition against Bombay Municipal Corporation towards its plan to demolish huts on pavements of Bombay and in some of its slums and to deport back the inhabitants to their original places.

4.194 The petitioner's contention was based on an erroneous plea that the eviction of pavement and slum dwellers will lead to deprivation of their employment and thereby their livelihood and therefore their right to life. In its judgement the Supreme Court observed:

"The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of the effective content and meaning -fullness, but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right of livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived
him of his life." (72)

In logical analysis the plea of the petitioner was too much stressed and irrelevant to the due process of law.

4.195 The roads and pavement in any town or city are the approved legal schemes for definite purposes and they are to be used for locomotion and ambulatory use only. Any person encroaching upon the roads and pavements and putting them to uses not permitted by law cannot claim any immunity for living and Article 21 in all its sound mind and purposes cannot have any such misuse. But the Supreme court displayed an exaggerated though exasperating activism.

4.196 The chief arguments generally used in such cases are:

(i) Any major city holding great potential for trade and employment is bound to attract people and if for living they take law in their hands and create unauthorised shelters or pavement shops, that can be legalised by means of Article 21 through the sanctification of the Supreme Court. The Article 21 can never be true the other way round, whereas it can render ultra vires any procedure which is not fair, reasonable etc. it cannot sanctify any procedure which is unfair, unreasonable and which lacks in the properties of an orderly society.

(ii) Another stretching argument generally put forward is that by shifting the people to remote places from where their locomotion becomes difficult can also have the effect of depriving a person of his livelihood. In earlier times when Country had limited foreign exchange and some of the life saving drugs were not possible to be imported, nobody could have claimed for a patient that the right to life of the patient was affected because of the
import policy of the Government on certain drugs or their manufacture within the country. In a similar manner the means of locomotion could not be the acceptable ground although it may have the effect on one's earning of the livelihood. There are people who serve in Bombay and daily commute from Pune, Gujarat and other adjoining areas.

4.197 There are certain legislations which have sprung not from Article 21, Directive Principles or any other part of the Constitution they have sprung politically and out of greed for votes and therefore they assume the viciousness of a procedure established by law like several other procedures referred elsewhere in this thesis.

4.198 In Re: Sant Ram's case (73) Article 21 was interpreted as not to include the right to livelihood. The Registrar under Rule 24 of the Supreme Court Rules is empowered to publish lists of persons habitually acting as touts. The Registrar issued a notice to the appellant to show cause why his name should not be included in the list of touts. The notice was challenged by the appellant on the ground that inclusion of his name in the list of touts would deprive him of his right to livelihood and thereby the right to life, contravening Article 21. The Supreme Court had held that the language of Article 21 cannot be pressed in aid of the argument that the word 'life' in Article 21 includes 'livelihood' also. The Court said:

"The argument that the word 'life' in Article 21 of the Constitution includes livelihood has only to be stated to be rejected." (74)

Since smuggling, prostitution, toutism, gambling, drug trafficking and other nefarious trades cannot be recognised as acceptable means of living, the
the Supreme court was justified in its interpretation.

4.199 In another case of Begulla Bapi Raju the Supreme Court had again negatived the contention that 'life' in Article 21 does not include the right to livelihood.

4.200 The contention of the petitioner that under the provisions of Andhra Pradesh Land Reforms (Ceiling) Act, they have been deprived of a substantial portion of their holding in the form of surplus land and thereby they have been deprived of their livelihood affecting their right to life, which is violative of Article 21 is not sustainable, because the word 'life' has not been used in this sense in Article 21 as interpreted by the counsel for the petitioner. The Supreme Court in Begula's case negatived the contention on the strength of earlier two decisions of the court that is, in Re : Sant Ram and A.V. Nachane's case.

4.201 The Court took the view that the petitioners had been deprived of their holding in the form of surplus land, but it was only for the purpose of giving relief to the downtrodden and the poor agricultural labourers. The surplus land would vest in the State and the State in its turn would give it to the poor and downtrodden and thus such a deprivation will be protected under Article 39 of the Directive Principles of State Policy. There was thus no question of deprivation of livelihood.

4.202 The same view was also expressed by the Supreme Court in A.V. Nachane's case. In that case the validity of the Life Insurance Corporation (Amendment) Act, 1981 and the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981
were challenged on several grounds including Article 21 of the Constitution and the court dealing with this aspect of the matter quoted with approval the case of Sant Ram in the following words:

"As regards Article 21, the first premise of the argument that the word 'life' in that Article includes livelihood was considered and rejected in Re: Sant Ram."(78)

4.203 The case of Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni (79) dealt with the question of fairness of a departmental inquiry where permission sought by a delinquent to be represented through a lawyer was rejected even though the employer was represented by a legally trained representative. In that context it was held that life in Article 21 includes livelihood. The Court has made the following observations:

"The expression 'life' does not merely connote animal existence or continued drudgery through life. The expression 'life' has a much wider meaning where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person some of the finer graces of human civilisation which make life worth living would be jeopardised and the same cannot be put in jeopardy only by law which inheres fair procedure."(80)

4.204 In State of Maharashtra v. Chandrabhan Tale (81) the constitutionality of the second proviso to Rule 151 (i) (ii) (b) of the Bombay Civil Services Rules, 1959 was questioned interalia on the ground that the provision for payment of only nominal subsistence allowance of Re. 1 per month to a suspended Government servant upon his conviction during pendency of the
appeal and prohibition from engaging himself in any other avocation during the period of suspension contravened Article 21 on the ground that the only logical and possible result would be the death of the civil servant and the members of his family due to starvation. While Justice Chinnappa Reddy clearly held the provision to be violative of Article 14, 16 and 21 and struck down the proviso, Justice Varadarajan also held it to be unfair and unconstitutional.

4.205 In yet another case of State of Himachal Pradesh v. Umed Ram Sharma(82) the Supreme Court has interpreted the right to life as not only the right to livelihood but also as the right to means of livelihood. In this case mostly poor and Harijan residents of the villages of Bhainkhal, Buladi and Bhukho in the Simla District addressed a letter to the Chief Justice of the Himachal Pradesh High Court complaining about the lack of a proper road in their area. This, they said not only affected their livelihood, but also their development. The Court held that the entire State of Himachal Pradesh is in hills and without workable roads, no communication is possible. Every person is entitled to life as enjoined in Article 21 of the Constitution and on the facts of this case read in conjunction with Article 19(1) (d) of the Constitution and in the background of Article 38(2) of the Constitution every person has right under Article 19(1) (d) to move freely through out the territory of India and he has also the right under Article 21 to his life and that right embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself.

4.206 The Court accordingly directed the Superintending Engineer of the Public Works Department to proceed with the construction of the road
and complete the assigned work during the course of the financial year. It also directed the Engineer to make an application to the State Government for an additional sum of Rs. 50,000/- for the purpose and to report the progress in construction with regard to the case.

4.207 The State of Himachal Pradesh filed a special leave petition before the Supreme Court asking whether in view of Article 202 to 207, the High Court had power to issue prerogative writs under Article 226 to regulate financial matters in the State.

4.208 The Supreme Court upheld the directions given by the High Court and also wide interpretation given to the word 'life'. The Court in its order observed that by the process of judicial review, if the High Court activises or energises executive action it should do so cautiously. Remedial action in public interest must be with caution and within limits.

4.209 In Rashtriya Mill Mazdoor Sangh, Nagpur v. State of Maharashtra the provisions of Central India Spinning, Weaving and Manufacturing Company Ltd., the Empress Mills, Nagpur (Acquisition and Transfer of Undertaking) Act (46 of 1986) were challenged as violative of Articles 14, 19(1)(c) and 21. The impugned Act deals with vital rights of the workers whose livelihood depends upon the service and conditions of service. The Court found the provisions of the Act to be reasonable and the object of the Act was to give effect to the policy of the State towards securing the Directive Principles of the State Policy specified in Article 39(b) of the Constitution which is as under:

".....that the ownership and control of the material resources of the community are so distributed
as best to subserve the common good."

4.210 The Court observed that there is a clear trend in favour of extending the width of Article 21 to human rights including livelihood but on the facts and circumstances of this particular case there is no violation of Article 21 as procedure prescribed by law had been followed. The procedure prescribed by law for deprivation of livelihood is just, fair and reasonable and, therefore, not violative of right to life in Article 21.

4.211 It is, therefore, a certitude that livelihood has to be interpreted under Article 21 as an important right, but the whole nexus will depend on micro-scopic analysis of the merits and demerits of any case and no general thumb rule can be applied such as a categorical view that livelihood is interpreted as one of the fundamental rights under Article 21 in some cases, and therefore it should be granted in other cases too out of an apparent or plausible relationship to livelihood. There cannot be any scope for a farfetched argument which may be establishing in ultimate analysis a remote relationship to livelihood. (85)

4.212 In this connection it will be of interest to note the observation made by our Supreme Court in State of Maharashtra v. Basantibai Mohanlal Khetan (86) in which case the validity of provisions of Maharashtra Housing and Development Act (28 of 1977) were challenged. Justice Venkataramiah observed as under:

".....Article 21 essentially deals with personal liberty. It has little to do with the right to own property as such. Here we are not concerned with a case where the deprivation of property would lead to deprivation of life or liberty or
livelhood. On the other hand land is being acquired
to improve the living conditions of a large number
of people. To rely upon Article 21 of the Constitution
for striking down the provisions of the Act amounts
to a clear misapplication of the great doctrine
enshrined in Article 21. We have no hesitation
in rejecting the argument. Land Ceiling laws,
laws providing for acquisition of land, for providing
housing accommodation, laws imposing ceiling
on urban property etc. cannot be struck down by
invoking Article 21 of the Constitution."

4.213 In the above para Justice Venkataramiah has rightly pointed out the
significance of Article 21 of our Constitution. A wide interpretation can
no doubt be given to the Articles of our Constitution, but it has to be done
in such a manner that its true meaning, its true impact is not lost. If
every law is tested on the touchstone of Article 21 only, its effect would
be that there will hardly be any legislation or executive act, which will
not come within the purview of Article 21. There are other provisions
of the Constitution which may be made use of by the Courts uniformly interpre­
ting laws or for striking down unreasonable laws.

4.214 This proposition has been highlighted by an author in his article in the following words.

".....Is enforcing the wider interpretation of
Article 21, the only legal way to obtain the minimum
need for the deprived people? Moreover is it the
legally most efficacious way to achieve what is
desired? Neither the judgements nor the literature
around the cases have gone into these two basic
questions. They have naively claimed that such
'judicial activism' through new interpretations
of the article has brought about a major change
in our colonial legal heritage. Assertions or vain glorious proclamations are one thing, actual change another. There are two basic reasons why this type of 'judicial activitism' is not as active as it is prima facie made out to be. First, there are problems emerging from the theory of precedent as to what type of judgements can really qualify as precedent in the law making process. Second, there are issues relating to the constitutional aspirations vis-a-vis judicial activitism viz., does the Constitution itself envisage an active role for the judiciary? And if so, it is rightly reflected in what has been achieved through reinterpretation of Article 21?" (89)

4.215 In the above para the author has raised a very pertinent question with regard to the initiative taken by the Supreme Court judges in making our legal system more humane and consistent with the aspirations of the common man. The Court has proved its dynamism by projecting itself as activist institution but has this role of the judiciary really helped in bringing about a major change in our colonial legal heritage?

4.216 The right to life litigations have provided the judges an opportunity to go through different laws, which causes the loss of life and livelihood to the poor people. The recent tendency which is noticed is that the people rush to the Courts as a last resort for getting the necessities of life. In fact the Courts deserve all praise and credit for its role as constitutional interpreter but there are limits as to what the law can achieve and Courts must exercise judicial self-restraint. (90)

4.217 A last note was struck by the Supreme court when it gave a new
dimension to right to life under Article 21 in case of Vincent Panikurlangara v. Union of India. According to the Court, health care, right to maintenance and improvement of public health falls within the purview of Article 21 of our Constitution.

4.218 A lawyer had filed a public interest litigation under Article 32 for withdrawal of 7000 fixed dose combinations and withdrawal of licences of manufacturers engaged in manufacturing of about 30 drugs which were injurious to public health.

4.219 The Court took support of the Directive Principles of State Policy (Article 47) and held that a healthy body is the very foundation for all human activities. In the welfare State, it is obligation of the State to ensure the creation and sustaining of condition congenial to good health.

4.220 Thus right to life would include the right to live a healthy life. The Andhra Pradesh High Court has also given a wide interpretation of word 'life' in T. Damodhar Rao and others v. The Special Officer, Municipal Corporation of Hyderabad. The enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution.

4.221 In L.K. Koolwal v. State of Rajasthan in a public interest
litigation, the Rajasthan High Court has made an observation that maintenance of health, preservation of sanitation and environment falls with the purview of Article 21 of the Constitution as it adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizens because of the hazards created, if not checked.

4.222 In Rural Entitlement Litigation Kendra v. State of U.P.\(^{(94)}\) the Supreme Court has entertained environmental complaints alleging that the operations of limestone quarries in the Himalayan range of Mussoorie resulted in depredation of the environment affecting ecological balance. In this case, the Supreme Court on an application under Article 32 has ordered the closure of some of these quarries on the ground that their operations were upsetting ecological balance. Although Article 21 was not referred to in this judgement of the Supreme Court, those judgements can only be understood on the basis that Supreme Court entertained those environmental complaints under Article 32 of the Constitution as involving violation of Article 21 and specifically right to life.

4.223 In yet another case of Sarkar Banerjee v. Durgapur Projects Limited\(^{(95)}\) Calcutta High Court has observed that the sweep of the right to life conferred by Article 21 of the Constitution is wide and far reaching and should therefore include such minimum living conditions without which a human being ceases to be one of the said species. The Court observed as under:

"To ask a person to live in sub-human conditions by depriving him even of the benefit of two small rooms which is the minimum requirement for a family to live and compelling him to live in one single room with his wife and children and to share the bath, toilet and kitchen with another family,
if it connotes anything, is mere animal existence and nothing more.

....An equally important facet of that right is the right to live like a human being, which conforms to much lesser degree the State's obligation to ensure a decent standard of life and full enjoyment of leisure to all its workmen as provided by Article 43 of the Constitution. Compelling a person to live in sub-human conditions also amounts to taking away of his life, not by execution of a death sentence, but by a slow and gradual process by robbing him of all his human qualities and grace; a process which is much more cruel than sending a man to the gallows. To convert human existence into animal existence no doubt amounts to taking away human life, because a man lives not by his mere physical existence or by bread alone but by his human existence. 

4.224 The Court cited with approval Olga Tellis case(97) and elaborated the right to life further. The court also held that respondent may not be compelled to provide 'a decent standard of life' to the petitioner, but the petitioner having been deprived of his right to a decent living which actually threatens his human existence and which possibly is more valuable than life itself, without any just and fair procedure established by law, he is entitled to challenge the said deprivation as offending the right to life conferred by Article 21.

**SUICIDE - A RIGHT TO DIE**

**AN ASPECT OF PERSONAL LIBERTY**

4.225 Right to suicide has become a burning and debatable issue presently in the country. This needs to be stated for the reason that some who believe
in the liberty of a person think that a person has liberty to die. Others who believe in life and in living life think that to die voluntarily by oneself is contrary to the notions of life and law. This aspect has been analysed and highlighted as a part of liberty as follows:

4.226 The recent judgement by the Bombay High court holding section 309 Indian Penal Code ultra vires of Article 14 and 21 of our Constitution creates considerable misgivings in our minds as to when the recent trends in licentious freedom would stop and strained construction of Article 21 will be halted.

4.227 Some people have described the High Court judgement in Maruti Shripati Dubal v. State of Maharashtra\(^{(98)}\) as historical\(^{(99)}\). Most of the people are in agreement with the judgement because they have thought that right to life is synonymous with the right to die.

4.228 Not many including our Judiciary have remained immune from the perplexity of an apparent synonymity. Besides this synonymity, the overwhelming thinking in the minds of the sympathisers of the suicidal victims, is the predominant consideration that a person fed up of living chooses to end his or her life. If in the case the attempt is successful, then the person has no suffering, no problems and no confrontation with the law. But in the event the attempt is unsuccessful and the person survives, then after physical recovery from the injuries of attempt, the person is forced to continue living without material alteration in the very conditions, which had driven the person to suicide. In addition to his or her continued miseries and sufferings, an additional misery is thrust on the mind of the victim through criminal prosecution by the police, trial in Court and ultimate punishment of extending the miserable existence in the dark and gloomy
confines of a depressive dungeon.

4.229 Naturally the humanistic society would consider section 309 as barbaric, whereas a person feeling frustrated and miserable to the point of terminating his or her life may deserve sympathy, solace, compassion and alleviation, what the person gets is derision and legal prosecution.

4.230 But one wonders, can there be such an easy short-cut such as rendering section 309 ultra vires? In one of the analysis of the genesis of the Indian Penal Code, a view is held that Mr. Thomas Babington Macaulay, the draftsman of the 19th Century was a religious man and the Church did not look kindly to suicidal victims for whom different practices for service and burial were adopted on the assumption that God has given this body to us and we have no right to interfere with the gift of the God. It is being ardently maintained that this religious consideration in the mind of Macaulay was the mother of section 309.

4.231 As lawyers we always look to a section from the angle of legislative intention and surely the legislative intention can not be a mere matter of a religious faith and belief. Since neither the legislators of the yore, nor Mr. Macaulay are available to us for enlightenment, we can, like the scientists trying to understand the mysteries of creation, make a rational contemplative effort to understand the origin of section 309 of the IPC.

4.232 One of the speculation we can make is that battles and wars were quite frequent with considerable prospects of physical disabilities or death, and may be, that some weak minded recruits or soldiers hesitating to face battles would have preferred an easy way out of suicide. It may have been
found expedient in those circumstances to enact a deterrent against the attempt of committing suicide. To a certain extent it may have served a useful purpose.

4.233 Another speculation, consistent with the practices in the Indian society of self-immolation by women after the death of their husbands may have been to curb such a practice by the legislative action. It is also possible with the legislative intent that medical science having hardly advanced in those days, it was only feebly potent, but mostly impotent against epidemics such as plagues, Small pox and varieties of other diseases and the affected may have often chosen to terminate their lives out of despair.

4.234 The Indian society being predominantly a feudalistic society with bonded labour conditions, many subjugated and weak minded subjects from the poor class may have opted for suicide than incurring the merciless wrath of a feudalist. Besides, even in the internal family disputes of a feudalistic society quarrels over division of property may have driven the weaker elements to commission of suicide.

4.235 In this manner, we can make endless guess work but what our experience of the origin of any law tells us is that certain undesirable social happenings, finally become focussed to become legislative intention.

4.236 By rendering section 309 ultra vires of Article 21 of our constitution, the High Court seems to have taken only a single view and that is the right to die. While examining the validity of any law, we have to apply the rudiments of law carefully to determine whether the law is:

i) arbitrary
ii) capricious

iii) unreasonable,

and of course important of all,

iv) Whether it is consistent with the Constitutional provisions of the country.

4.237 Section 309 by itself cannot be said to be arbitrary because it is applied fairly, impartially and equally without any exemptions and exceptions. The judgement holds:

"The want of plausible definition and even of guidelines to distinguish the felonious from the non-felonious act itself therefore makes the provisions of section 309 arbitrary and violative of Article 14".(100)

Only a few lines earlier, the very judgement reads:

"While some suicides are eulogised, others are condemned. That is why perhaps wisely no attempt has been made by the legislature to define either. But the difficulty in providing a plausible definition cannot certainly be pressed in favour of the validity of the provision particularly when it is penal."(101)

4.238 What this means is, there was wisdom on the part of the legislature in not defining suicide and this is being appreciated too. On the other hand the 'want of a plausible definition' is being held attributive to arbitrariness.

4.239 Still further 'the want of guidelines to distinguish the felonious from the non-felonious act itself' is considered contributive to arbitrariness, even after a most informative and learned commentary on the patterns
of suicide! The very commentary itself is indicative of how suicide can be an exception to any established, patent, normal terms and rules of law! And this exception should have weighed in favour of exempting suicide from its plausible arbitrariness.

4.240 Section 309 ought to have been subjected to a deeper consideration because it is not even capricious. There is no inbuilt capriciousness in it. The only deficiency which this section has is confined merely to "attempt" to commit suicide, whereas in order to make it more effective it should be modified to include "intention" to commit suicide, "threat" to commit suicide and "warning" to commit suicide or indulgence in actions which may finally bring an abrupt end to ones existence. The section appears only plausibly unfair, but rendering it ultra vires of the Constitution is not the correct remedy. It is basically its apparent unfairness to a person who has been not only disenchanted and disillutioned but also become miserable that he be required to face further troubles and hardships at the hands of the law and the society. The element of seeming unfairness in the law can be removed by a proper modifying piece of legislation while retaining section 309.

4.241 It is better that we advocate the retention of section 309 with a modification that it should not only include attempt to suicide, but also include the intention, threat, etc as already stated above.

4.242 Our society is domestically composed of households having a distressful and troublesome characters who may often make the family life unbearable through threats and attempts to committing suicide for attaining their selfish whims, wishes and freedom which may be beyond the means of the family.
A wife not wanting to have her in-laws may keep blackmailing the husband by threats and attempts of suicide. The peculiar placement of husband is such that he is helpless to grant the demand of his wife in a divided choice between his own parents, brothers and sisters on one hand with economic distresses and his own children and their need for his wife for their sake. The husband can neither divide the family, nor can he divorce his uncooperative wife for the sake of his children or enlist temporary cooperation and adjustment from hysterical and threatening wife!

4.243 Nor a Managing Director of a Company can sanction an exhorbitant loan for an employee who walks in his chamber with a bottle of cynide and asking him, "you sanction my loan right now or I will gulp this poison, right here and on the spot".

4.244 Similarly a film heroine cannot concede to a sexual relationship if the studio light-boy or a servant goes with a bottle of cynide, asking her to submit herself physically, lest he should consume cynide!

4.245 Instances of this sort can be multiplied. Every society seeks in the legislations of its country a protection. In the illustrations given above, after having been fed up of repetitive threats and attempts of his wife to commit suicide, and when no other form of social intervention is available, the husband cannot call even a friendly policeman to come and instil the fear of law in the mind of his unreasonable wife, nor the Managing Director of the Company can call the police to prevent the employee from committing suicide in his chamber or seeking any other form of relief from the situation. The film actress has either to let the studio servant to have sexual relationship with her or alternatively to let him die for his enamoured foolishness
in depriving his family of a 'life' which was earning bread for the livelihood of the dependents.

4.246 Section 309 having totally vanished, the Indian callous police would still further become callous in responding to the distressed quarters from where the cry for help may emanate! The people, when resourceless and helpless, look upon the machinery of law expectantly to come to their rescue. It is, therefore, not only wise but very much essential that the statute remains present to protect the society from the blackmail of the threats and attempts to commit suicide. Our society needs to be insulated from a few perverts and psychotics with suicidal tendencies.

4.247 The unfairness of the section can be removed by a prosecution with a mild and token punishment or in the form of a parole. A little more stringent punishment can be prescribed for a second repetitive threat or attempt, besides making provisions for mental therapies. These measures can in fact help to extend life. The above considerations apart, it is a matter of opinion and debate whether the right to life can be synonymously taken as right to die.

4.248 Death is a concept, negative to life and therefore both are opposite. Hence, right to life has a special significance and meaning. The right can only imply all those efforts, attempts and measures which help, support and sustain life. The right, because of this implied essence, can do only this much and as much as may help continuance of life. This apart, right to life is created by implied rights of others. As a tax paying citizen of this country, the building of the High Court comes to be created through my contribution with the collective contribution of other fellow citizens.
It creates a common property right. It would be foolish on my part to argue that I have a right to destroy the High Court building because it is my property, or I destroy a portion of it which I presume to have been constructed out of my share of contribution. My life comes from a collective effort of my grand parents who brought about the marriage of my parents and my parents created my life and through a social contribution and a collective effort, my life after creation became sustained and continuous. Hence while considering this kind of issue, we cannot attach any narrow and constricted meaning to life.

4.249 It is not possible to go into all the elaborate and detailed analysis of this abstract matter, but it can be illustrated that right to life cannot be placed in equivalence with the right to die. A mother cannot argue that I have given life to my child and, therefore, I have every right to take the child's life away. In a similar manner, we cannot say that my right to life can also mean and imply my right to death.

4.250 Quite often analogies are used to describe mutuality. Under section 16 of the General Clauses Act the right to appoint a person, deems to include the right to dismiss him. The freedom of association under the Fundamental Rights may imply freedom not to associate. The constitutional matters to be decided by the High Courts and Supreme Court may imply that the lower courts cannot determine constitutional issues. These are all known as common sense interpretations, and if we go by them, then some day, our logic will be "a crow is black and therefore all the blacks are crows!"

4.251 The legislative intentions specify with certain and definite words-things as they ought to be, anything which is contrary to the intention cannot
be valid, even if they be true. The whole contemplative exercise should remain confined to the specified words and legislative intentions.

4.252 The right to life should therefore remain confined to life and continuance of biological existence. The legislative intention while enacting this right could not have centred around "death", hence, there cannot be any concept social or legislative such as the right to die.

4.253 Article 21 deals with the right to 'life' and 'Personal Liberty'. If there is a majority agreement with the views of the writer of this thesis, that only a right to life can be tenable yet the problem will still arise, through 'Personal Liberty'. It would be very easy and convenient to propound a theme that after having granted 'right to life', 'personal liberty' can grant the freedom to end life, i.e. in other words to commit suicide.

4.254 In our study of law we have seen, however outmoded and outdated we may have found the ancient laws, today also, they are mostly valid and true as they were for their times, and this validity used to be derived from social consensus. The consensus behind granting liberty was not arising out of the unfair and capricious liberties of negative form and in this context any reference to 'personal liberty' may not mean a capricious freedom, but its sense becomes restricted to more noble and idealistic and moral personal liberty. Therefore, personal liberty in its restricted meaning and in its virtuous form cannot be exercised for termination of life.

4.255 This philosophical discussion apart, when coming to Article 21 proper which reads as under:

"No person shall be deprived of his life or personal
liberty except according to procedure established by law."

We find that the words "no person" are commencing the construction of the whole Article. What do we mean by no person? In the first place 'no person' will mean any other person i.e. some second party. It can, vice versa, also mean apart from the second party, the person himself, but the words "shall be deprived of his life" clearly lay emphasis on the second party, than the person himself, though by a vague connotation, the person himself can also be included by vice versa interpretation.

4.256 On reading the whole Article, logically, it is much unlikely that a person himself can think of depriving himself intentionally and deliberately of his or her 'personal liberty'. Hence the Article can only mean any other agency than the person himself.

4.257 Basically we know that Article 21 was enacted in context with interference by the State with the life and liberty of the individuals. Once the meaning of 'himself' is taken out of the words 'no person' then the Article 21 will imply that a person himself has no right to life and personal liberty and the person by himself cannot interfere in these matters.

4.258 This type of interpretation would naturally render it totally absurd. Hence, instead of grammatical connotation, we have to read the aims and objects of the Article. The aims and objects are to protect life and personal liberty and therefore right to die or a person interfering with his own life, will totally defeat the aims and objectives of the Article.

4.259 The Article 21 is preserving and protecting life and personal liberty
and therefore no other antithesis can be possible. In other words, right to die, right to take away one's own life, etc. are distortions and antithetic concepts to the Article 21 and therefore they cannot be tenable.

4.260 After examining the absurdity of the meaning, it becomes necessary for us to include the person "himself" in 'no person'. By this inclusion, it would mean that even a person himself cannot deprive his own self of the right to life and personal liberty. But by committing suicide, he does so and becomes guilty of violating Article 21, which cannot be permitted.

4.261 Let us now go a step ahead to consider "except according to the procedure established by law". These words create an exception. The exception created means that if according to the procedure established by law, a person is deprived of his life or personal liberty, such a situation is possible.

4.262 For committing suicide, no procedure has been established by law, because we know that it is utterly absurd to even think of such a provision, if we consider that the law is silent on the aspect of procedure. We have no other option, but to turn to natural law, natural justice and human law. The central theme of human law subscribes to securing and maintaining life.

4.263 Theambits of natural law and natural justice may grant the qualification to persons who may be intending to commit suicide out of duress, which can be of multiple nature, such as illness, starvation, mental agonies through heart breaks, injustices, fears etc.

4.264 In the instant case, failure of the State to provide a means of
livelhood and thereby an access to life may in terms of natural justice create an exemption for a person to end his life, but should we not in our civilised society work and aim for defeating those conditions which defeat life itself? Can rendering a section ultra vires solve the problem and stop the work of the civilised society?

4.265 And finally, we come to the forth thumb rule of law and i.e. consistency of section 309 with Article 21 of the Constitution. The applicability of Article 21 is related to "except according to procedure established by law". Since section 309 is not violating "any procedure established by law", how does it become ultra vires? In essence, right to life and personal liberty by the provision making the procedure established by law as a prerequisite. It is for this reason that a section can become ultra-vires, if it is inconsistent with the procedure substantively. Since suicide is negative and antithetic to life, it also becomes inconsistent with life. In other words, section 309 can neither be rendered ultra vires substantively or procedurally.

4.266 Even from the point of view of the established practice of applying the natural justice norms to cases where no specific conditions are made, section 309 cannot be invalidated by the norms of natural justice which grant right to survival and not the right to extinction.

4.267 It is often seen that many categories of ending life by individuals are generally classified and taken as suicide. This is done because these different categories are not adequately and properly legislated and in the absence of proper legislation they are generally and broadly covered under the heading suicide because of the akinness of the act.
4.268 For example, self immolation has been an ancient Hindu custom staunchly subscribed by the rural community as a religious faith and a social need created out of problems of widowhood, chastity and such other considerations. As we have seen in the report of the Indian Law Commission on the Penal Code, dated 14.10.1837 that:

"For example, a Mohamedan is punishable for adultery, a Christian is at liberty to commit adultery with impunity". (102)

This distinction shows that those subscribing to the Christian faith can indulge in adultery, but those who follow the Muslim faith cannot. This clearly shows that the Code upholds the faith followed by different people. We, therefore, wonder that unemancipated women from the rural areas subscribing to religious faith and practices of Hindu community can be permitted to carry on with the practice of self-immolation. When we try to classify such an effort as an attempt to commit suicide, how far morally, logically and legally, we will be justified in our comparative assessment, is a matter open to trenchant debate. However, conclusions of this researcher are that self-immolation in absence of a suitable Penal Code enacted in this regard, should be straight considered as violative of Article 21 if right to life is substantively recognised and since, there cannot be any procedure of law prescribed that the substantive law should become the overwhelming element.

4.269 The subject of self-immolation came to the fore with the incidence of 'Sati' which took place in Rajasthan. Sati, the most gruesome of all crimes against women was committed by or on 18 year old Roop Kunwar of Deorala village in Sikar District. The practice of the immolation of the widow on the pyre of the dead husband is referred to as Sati. To describe this practice as pyre-immolation will be more appropriate. 'Sati' literally mean a virtuous woman.
4.270 In India, a widow is treated as inauspicious by both her relatives and even society and to escape the miseries of widowhood, she commits suicide. By making widowhood unpleasant and difficult society was tresspassing on the woman's right to complete her role in the cycle of life. The important question is - does a widow's life also ends with the death of her husband? and if so, why not vice - versa?

4.271 In the modern context the importance of the individual has certainly increased. Yet individual liberty is, by and large elusive. One reason for this is that radicalism and scientific objectivism has not really spread. If an immolation of this sort occurs due to force, then it is clearly a case of homicide and it is being extolled as a voluntary act of courage and piety. In case of Roop Kunwar it was said that she decided to commit Sati on her own and that no one forced her to do so. But the point is why no one stopped her from committing the ghastly act. Women have committed suicide by jumping into well or by taking poison on the death of their husbands and it is not unusual. But what is objectionable and outrageous about Sati is this that though the people are living in a modern era, they are unable to create an anti-sati feeling amongst those who are possessed by it under the name of sanction and part of their religion. The Government has now passed the Commission of Sati (Prevention) Bill, 1987, it now remains to be seen how far this Act will check the incidents of Sati. Three petitions, including one on behalf of Jagatguru Shankaracharya of Puri, Niranjan Dev Tirth, challenging the validity of the Commission of Sati (Prohibition) Act, 1987, have now been filed in the Supreme Court(103).

4.272 In India mostly the practice of hunger strike is adopted as a measure of protest mainly politically to a certain extent, and by the sick and the
aged in some instances in private family lives. Most of the hunger strikes have ended well without any casualties and the legislations do not come into existence until the focus and frequencies become intense.

4.273 In the Report of the Indian Law Commission, 1837(104) one of the interesting comments is: "We are perfectly aware that law givers ought not to disregard even the unreasonable prejudices of those for whom they legislate". This lays before us a noble objective for the legislators and they should indeed enact elaborate laws considering the inadequacy of section 309 to deal with cases of this kind.

4.274 An important consideration which is generally made by the Codes is that hunger strike may not constitute an attempt to commit suicide except when the striking person reaches a critical state from which onwards the striking person may be endangering his life. This is indeed a ridiculous situation making it extremely vague and debatable. A person is permitted to continue with his hunger strike and the law awaits an opportunity, if it presents itself for the person to reach the critical point dividing the whole situation in two stages, in the first stage abatement by law, and in the second stage, prosecution by law.

4.275 This is analogous to a situation when the law becomes aware of a plot to rob a bank and yet it keeps silent until the robbery is actually committed. As such legislation on prevention, preparation, attempt and commission to penal actions are necessary. In context with Article 21, the whole issue even when legally tried, would become too cumbersome and lacking in rational appeal.
4.276 On May 11, 1987 our Supreme Court admitted a writ petition by a renowned social activist Shri Nagabhusan Patnaik, challenging section 309 of the Indian Penal Code. Justice Chinnappa Reddy and Justice K.J. Shetty also stayed the prosecution of Shri Patnaik on the charge of attempt to commit suicide, pending in a court of Sub-Judge in Gunupur, Orissa.

4.277 Counsel for the petitioner contended that hunger strike is a form of right to expression and, therefore, a fundamental right protected by the Constitution under Article 19. The petitioner was arrested in 1981 under section 309 as he was on fast in support of five-point memorandum in favour of the tribal peasants in the area. He was later admitted in the hospital, on the false complaint of dehydration so that it would be impossible for him to continue his fast. The criminal prosecution would negate the ideals of self sacrifice for a social cause and noble purpose. The section is also challenged as discriminatory as leaders like Mahatma Gandhi, Nehru, Vinobaji have not been prosecuted for going on hunger strike for noble causes. The section treats all cases of attempt to commit suicide equally and makes them an offence without regard to circumstances.

4.278 Another controversy hotly raging within the society is Euthanasia generally known as mercy killing. The word Euthanasia is derived from the Greek words "eu" meaning "good" and "thanatos" meaning "death" - literally speaking it means "good death". The concept of mercy killing basically revolves around the request of a sufferer made to an outside agency for terminating his life and therefore basically either it can come within the purview of suicide and murder, both combined, or a new purview may have to be evolved. The sufferer requesting for death may be committing suicide and the agency granting death may become an abettor and a murderer. But when
euthanasia gets synonymously confused with suicide, we start indulging in an interminable debate of creating more chaos and confusion instead of clarity and order.

4.279 In the first place, it is essential to stop this confusion and give it a new independent status for segregating it from the concepts of suicide and murder, and to independently legislate in favour or against it in the light of Article 21. It will save us lots of spoken and printed words and all the energies and time lost in them.

4.280 In yet another case decided on 17th April, 1987 a Division Bench of Andhra Pradesh High Court consisting of Mrs. Justice K. Amareshwari and Justice I. Panduranga Rao upheld the constitutional validity of section 309 of the Indian Penal Code. The Bench dismissed a criminal appeal filed by Dr. Jagadeshwar and his wife, residents of Malial, Jagtial Taluq in Karimnagar District. The doctor had killed his four minor children at his residence in August 1984 and later attempted to commit suicide along with his wife.

4.281 The sessions Judge had convicted the doctor for killing his children and sentenced him to life imprisonment. The Judge had also convicted the doctor and wife for attempting to commit suicide. In the appeal filed against their conviction, the doctor contended that the relevant provisions of the Indian Penal Code which punishes the attempt to commit suicide is unconstitutional and violative of fundamental rights guaranteed under the Constitution.

4.282 The judgement of the Court was delivered by Mrs. Justice Amareshwari who disagreed with the judgement of the Bombay High Court in Maruti Shripati
Dubal's case and upheld the constitutional validity of section 309 of the Indian Penal Code and made the following observations:

"Unless a man is assured of physical existence there can be no other fundamental rights. Since the State exists for the common good of the citizens, no Constitution can ignore the rights of the citizens of life though it may not be explicitly explained. In these circumstances, it is rather difficult to hold that the right to life impliedly guaranteed by the Constitution of India includes the right to die."

The Court pointed out that if the attempt to commit suicide is not an offence, people who actively assist and induce persons to commit suicide may go scot free.

The Court further observed:
"It is a paradox that society will neither provide sentence, nor allow the sufferer to die. In this complexity of social maladjustments, the best safeguard is the Court which should exercise and temper its judgement with humanity and compassion."

The Court also observed:
"To confer a right to destroy one-self and to take it away from the purview of the Courts to enquire into the act would be one step down in the scene of human distress and motivation."

The judgement of the Bombay High Court disappointingly lacked in law and logic, whereas here in this case, the Court has taken into account complex sociological factors before arriving at a conclusion. The judgement given by the Andhra Pradesh High Court is correct and it should be followed in subsequent cases also.
The present day conditions in India are such that external pressures on a human being are invidious and tremendous, it may well be worse for the law to err on the side of caution. In all the walks of life there is a cut throat competition as a result of which the individuals either have frustration or depression, and it is this frustration and or depression which drifts an individual towards committing suicide. Unwanted family members ranging from daughters-in-law to elderly invalids could be coerced into suicide. Considering high rate of dowry deaths passed off as suicide, there would be no scope (in the absence of section 309) for intervention of law and inquiry. Even the police will not be able to take action in cases of indefinite hunger-strikes, threatened self-immolations or other such potentially explosive situations.

To confer as a right, the right to take or attempt to take, a human life (even if it is only one's own) and to relinquish the right of the Judiciary to inquire into the act would very likely be the first step down the slippery slope into the grey areas of human distress and motivation. In view of the judgement of the Andhra Pradesh High Court, to commit suicide is an offence, whereas within the jurisdiction of the Bombay High Court it is a right to die. It would be better, considering these implications that before finally nailing in coffin the provision of section 309 our Supreme Court as well as the Government direct itself for a fresh look at the matter for a comprehensive assessment for retention or amendment of section 309 as the case may be. (108)

RIGHT TO HUMAN DIGNITY

Article 21 is a Fundamental Right having its origin in human rights. This aspect of human rights has been brought into picture by Justice Krishna
lyer as a component of liberty. He has further elaborated that human dignity is an important aspect of liberty and hence while considering liberty we have to consider human dignity. This has been highlighted with the help of Jolly George Varghese case (109) as follows:

4.288 Part III of the Indian Constitution embodies the fundamental freedoms which are the very life of the United Nations Charter and the Universal Declaration of Human Rights to both of which India was a signatory prior to the drafting of the Constitution. On 27-3-1979 India has also acceded to the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights subject to certain exceptions.

4.289 The exception shows the gap between the chapter on Fundamental Rights under our Constitution and the International Covenant on Civil and Political Rights which have now been ratified by India.

4.290 Over the last more than thirty eight years our Supreme Court and even High Courts have upheld the human rights without which no freedom can exist and they also fearlessly and impartially enforced the constitutional mandates. The Supreme Court has provided immense help and invaluable cooperation to preserve and maintain the rights of the common man against predatory instincts of the State.

4.291 Here the question will arise as to whether the rights conferred by the International Covenants are enforceable by the proceedings in an Indian Court. This type of situation arose before the Indian Supreme Court in Jolly George Varghese V. Bank of Cochin (110).
4.292 The Supreme Court without proper perspective indulged in excessive judicial activism in Jolly George Varghese. Although the judgement arrived at in setting free Jolly George Varghese was correct it was processed through faulty and irrelevant channels of logic with a needless rhetoric, as if right to life and personal liberty had an obsessive possession on the mind of Justice Krishna Iyer.

4.293 The facts of the case in brief are as under: The appellants were the judgement debtors and two money decrees were passed against them for payment of debt of over Rs.7 lakhs to the respondent bank. In execution of the decree, a warrant for arrest and detention in the civil prison was issued against the appellants under Section 51 and Order 21 Rule 37 of the Civil Procedure Code on 22.6.1979. Besides this process the entire immovable properties of judgement debtors had been attached for the purpose of sale in discharge of the decree debts. Nevertheless the Court issued a warrant for arrest because on an earlier occasion a similar warrant had been already issued. The judgement debtors filed the revision before the High court against the order of arrest which was summarily rejected.

4.294 An interesting thing to be noted here was that no investigation had been made by the executing court regarding the current ability of the judgement debtors to clear off the debts or their malafide refusal, if any to discharge the liability for repayment of debts. The question was whether under such circumstances the personal freedom of the judgement debtor could be held at ransom or personal liberty could be imperilled by the inferior judicial process itself and was such a deprivation of liberty illegal?

4.295 Justice Krishna Iyer in his classic judgement pointed out that Article
II of the International Covenant on Civil and Political Rights bans imprisonment merely for not discharging a decree debt. Article 11 reads:

"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation".

It meant unless there be some vice or mens rea International Law did not permit detention of debtor's person in prison. India is now a signatory of this Covenant and Article 51 (c) of the Constitution obligates the State to "foster respect for International Law and treaty obligations in the dealings of organised peoples with one another".

4.296 Thus the International Covenant on Civil and Political Rights is, though not a part of the law of land, in view of the acceptance by India of dualistic theory of relationship between International Law and Municipal Law, while interpreting the statute, this covenant over-shadows the judgement of the court.

4.297 Article 11 grants immunity from imprisonment to indigent but honest judgement debtors. So the fault lies in the judgement of Justice Krishna Iyer that when the declaration of Human Rights merely sets a common standard or achievement for all people and all nations but cannot create a binding set of rules, how it can act in irrelevance to our legislations?

4.298 Member States may see through appropriate agencies, to initiate action, when these basic rights are violated, but individual citizens so far as India is concerned cannot complain about their breach in the Municipal Courts. The individual cannot come to the Court but may complain to the Human Rights Committee, which in turn, will set in motion other procedures.
4.299 In short, the basic human rights enshrined in the International Covenants may at best inform judicial institutions and inspire legislative action within Member States but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority. Thus Article 11 of the Covenant applied by Justice Krishna Iyer in this case can now become the law of the land under Article 141 in the form of a principle, it is still doubtful if at a later date, some other Bench would uphold it due to its far-fetched irrational logic.

4.300 This view is taken because although our Chapter IV on Directive Principles carry lofty ideals, still the Articles thereof are not made justiceable out of a prudent foresight that a nation having emerged from bonds of slavery and backwardness would not be possessing the economic means and resources to fulfil the obligations outlined in Chapter IV.

4.301 In other words even after 38 years of progress and independence the judiciary shudders due to the words of Article 37: "The provisions contained in this Part shall not be enforceable in any Court...." to be able to touch some of the Articles which no longer depend on the factors which operated 38 years back to preclude the justiceability even from within its own Constitution, but chivalrously adopts something from International Covenants by conjuncting them with Article 21 to be able to set a debtor free.

4.302 It was easy for a Court to see the double punishment of attachment of the property as well as the arrest. After depriving the person of all his belongings even if the debt was not satisfied Jolly Varghese could have been granted an employment at appropriate wages from which he would have partly maintained himself and partly repaid the debt, instead of becoming a burden
on the Government to feed him and to maintain him.

4.303 The Court had also the latitude to render the penal provision of arrest in the case of a debtor ultra vires. Of course by rendering the penal provision ultra vires the effect would have been that of granting exemption even to the deliberate evaders of debt. But the key point is where the very penal provision of imprisonment is obnoxious to human dignity where destitution and personal circumstances prevent satisfaction of debt, a few deliberate defaulters may no doubt try to take advantage, but then alone the Government would come out with a suitable legislation such as "Conscriptive Labour for Repayment of Debt".

4.304 This apart a destitute debtor after becoming the guest of the Government does not only become an economic burden on the public funds, but such a prisoner on completing the sentence becomes pariah in the society losing all respectable chances of earning his livelihood and all these aspects get covered under Article 21.

4.305 Besides this while considering the impact of International Covenants on Municipal Law Justice Krishna Iyer added equal emphasis on Article 21 of the Constitution of India. The high value of human dignity and the worth of the human person enshrined in Article 21 read with Article 14 and 19 prevents the State to deprive a person from enjoyment of his personal liberty, except under law which is fair, just and reasonable in its procedural essence. In Maneka Gandhi's case and in Sunil Batra's case the same proposition was laid down by the Supreme Court.

4.306 Thus to recover debts by the procedure of putting one in prison is
too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay the debts. Hence after a careless diagnosis of the facts of the case the appeal was allowed. What is irksome in Varghese, is the far fetched manner in which Justice Krishna Iyer transplanted Article 11 of the Covenant into the fair procedure in Article 21 of the Constitution.

4.307 The Indian society suffers from poverty and destitution and therefore from economic inequalities. As long as these inequalities remain, there are bound to be debtors and creditors. To become a debtor or to remain a debtor is itself a major human indignity, but unless the inequalities are removed the indignity of a debtor will continue. The International Covenant has rightly recognised that imprisonment for non-fulfilment of a debt cannot be consistent with human dignity.

The Court in this case observed:

"To be poor, in this land of Daridra Narayan (Land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant". (113)

The Court need not have gone all the way to Article 11 of the Covenant to set Varghese free in a disjointed and circuitous manner. Though destination is the same, the path to reach it, is wrong.

4.308 Another very significant feature of Varghese is that the Supreme Court entertained a challenge to the validity of a statutory provision repugnant
4.309 This decision of the Supreme Court has proved that personal liberty and thereby civil liberty is the key-stone of the Constitution. One of the essential purposes of the Constitution is to ensure freedom of and the dignity of the individual, and to keep basic human rights safe. Supreme Court by vindicating the rights of the citizen has really protected the integrity of the Constitution and its opinion regarding the personal liberty and freedom of individual marches with the great design of our fundamental law. (114)

CONCEPT OF LIBERTY VIS-A-VIS PRISONERS AND UNDERTRIALS

4.310 Prisoners and the rights of the prisoners were kept at a distance till the advent of this new dimension that personal liberty covers even the prisoners and their rights under the Indian Constitution. This aspect has been realised very late in our country as compared to other western countries. The credit of discovering this aspect certainly goes to the judiciary which is solely responsible to protect the rights of the prisoners under the concept of personal liberty.

4.311 Before Independence there was British Raj in India and the laws which used to govern the administration of criminal justice then, were adopted by us without any substantial changes or amendments even after the Independence. The British Rule was authoritarian, and Indians were exploited and treated like slaves, and the laws applicable to prisoners, criminals or freedom fighters, did not have humanistic aspect. (115)
4.312 In 1835, Lord Macaulay remarked about Indian Prisoners that:

".....it is of greatest importance to establish such regulations as shall make imprisonment a terror to the wrongdoers." (116)

In 1836 a Prison Discipline Committee, headed by Lord Macaulay, was appointed to enquire into the prison conditions. In its Report submitted in 1838, the Committee jettisoned any ideas about improving the conditions of prisons or reforming prisoners.

4.313 In 1864, a second Committee was appointed to go into the question of high and increasing rates of prison deaths, but this Committee was interested more in management and disciplining of prisons and prisoners rather than improving their conditions. In 1888-89/92 a Jail Committee headed by Lord Dufferin was appointed and as a result of its proposals, the Prison Act, 1894 came to be passed. The purpose of this Act was not the ameliorating of conditions of prisoners but to bring about a uniform system of prison management in India. (117)

4.314 During the National Movement, eminent Leaders like Nehru, Gandhi, Tilak and others had played a great role wherein they wanted to establish democratic and just society for India. But soon these became hollow precepts after independence. No doubt a new Constitution was framed with high ideals and lofty principles, but no attention was given to other pre-independence laws which affected the liberties of the individuals.

4.315 Our Constitution is silent on the plight of prisoners and how they should be treated in free India in keeping with human dignity and the International Charter on Human Rights. Being made a poor country, robbed by Muslim and British regimes with abject illiteracy, superstitions trapped in the
social web of poverty, illiteracy, exploitation and tensions, economic and political, and further aggrieved by the refugee conditions and unsettled homes due to the partition of the country, whatever element of crime was arising needed to be handled more with humanistic, sympathetic approach and least by the Maculanian methods. There is a striking difference between crimes here and abroad. Our people were not committing crime by choice but driven by the conditions to their commission. A country where the religious and social, historic and Gandhian Philosophy taught pardon and forgiveness, panacea and self abnegation, its prisons became suddenly barbaric caves for the prisoners to take away whatever exhilaration of the citizenship of a free country the inmates may have felt. Whatever crime was taking place in the country was understandable as arising out of poverty, superstition, illiteracy and sometimes from rivalries in the heat of the moment. But in the simple and innocent culture of the people, it was visible to call for a more moderate and reformative approach.

4.316 It was, therefore, highly needed to dismantle our prisons and to create in their place dormitories and monasteries to bring about reformation. But this neglect on the part of our leaders finally helped perpetuation of the British Prisons and Maculanian methods. With the passage of time, unfortunately the jails of our country which were supposed to be reformatory centres, have become breeding grounds for corruption, requiring the very jail officials to be jailed. Far from reforming the behaviour of criminals, by mismanagement, bunglings, by maltreatment and torture, our jails have contributed more hardened criminals to our society, whether within the jails or upon their release.

4.317 The major factors responsible for deteriorating conditions of prisons
are:

There is no proper classification of prisoners. The war prisoners, criminal prisoners, and political prisoners are all treated alike. The lifers, hardened criminals, R-Class prisoners, women convicts and minor convicts are all housed together in the same vicinity. The murderers, the rapists have an easy access to the female ward. Prostitutes, mentally unsound prisoners, and female political detenues are all kept together.

4.318 For these operative conditions in our prisons the question arises, who is to be held responsible? The scapegoat usually found is either the jail warden or the police department. As far as the prison authorities are concerned, they are helpless as they have no power to legislate. As civil servants they have to follow and obey the rules and regulations already laid down. They are considered as nonentities to interfere with them, but paradoxically, they are the very people who have to bear the brunt of blame whenever anything goes wrong.

4.319 The Jail Manuals and Prisons Act which in the present context have become absolutely outdated cannot be altered or changed by the wardens. We make a lot of farce in briefing the accused of familiarising him with his rights on self-incrimination, but once found guilty and sentenced and made prisoner we do not consider one more farce necessary to brief him of his rights as a prisoner and thus, prisoners are absolutely ignorant of their rights while undergoing imprisonment.

4.320 This is the most complex subject. By the very act of imprisoning, a person's personal liberty gets snatched away by the State although it may be forfeited by the procedure established by law. In this paradox can there
be any right to personal liberty for the prisoner? Can there be any prospect of imparting the concept of personal liberty to the prisoners?

4.321 Personal liberty and the rights of prisoners on the line of concept of personal liberty have been deemed essential in jurisprudence based on human law. Whereas imprisonment may only amount to punitive measure, personal liberty consistent with human dignity is an essence of life. Hence Article 21 in its aim to protect life has to protect personal liberty and in case of prisoners, this can be achieved through due process of law as extended to prisoners by ensuring the following:

(a) No prisoner should be confined below sub-human conditions.
(b) No exploitation of the prisoners should take place through the callous, corrupt, nepotic prison administration.

4.322 The emergency and post-emergency periods have catalysed a great development via American jurisprudence in the law relating to fundamental rights of the prisoners. Shockingly poor and miserable conditions prevailing in jails and the maltreatment meted out to the prisoners have attracted attention in the recent years. Reports of various Commissions including Shah Commission and revolutionary socialistic judgements of the Supreme Court have thrown enough light on the rights of the prisoners.

4.323 In 1980 an All India Committee on Jail Reforms, chaired by Ex-Judge A.N. Mulla was constituted to go into prison conditions and make its recommendations. The members of the Committee visited prisons in most of the States of India and also relied on information from various countries all round the world. It submitted a comprehensive three volume report in 1983. It stressed for prison reforms and better life for prison inmates.
4.324 The Committee came to this conclusion that harshness of punishment does not have such deterrent effect. In fact, in many countries lighter sentences with slightly liberal burden of proof had led to reduction in the crime rate. It called for giving up of brutal approach and strongly recommended reform as the goal.

4.325 In India majority of the crimes take place on the spur of the moment in an unpremeditated manner. It is, therefore, very much necessary to classify crimes of deliberate and premeditative nature and segregate them from the crimes arising out of abject destitution, superstition, misdirection and unintentional ones arising out of force of circumstances. Such crimes if they are borne out of deprivation of fundamental rights such as right to life, personal liberty, equality, right to religion, justice etc. with also an assessment of the decree of remorse and repentance of the recalcitrant should be treated with more humanism than those minority of premeditated crimes. A premeditated crime of black-marketing by a trader against the society at large is more heinous than the crime of murder accidentally taking place and without intention in a petty brawl.

4.326 In Islamic countries inhuman deterrent laws have been introduced such as cutting down wrist for the crime of picking pockets. But in our country right to life cannot permit such a measure. By imprisonment the movements of the prisoners are restricted by partial withdrawal of personal liberty, but by virtue of right to life the limbs of the prisoners are kept beyond the reach of any law. It is indeed a sorry state of affairs that till date, no attempt has been made by the Government to implement these recommendations. But our Supreme Court has taken some initiative to reform prison practices and to inject constitutional consciousness in the system.
In India, right to human dignity has been recognised in our Constitution as a component of fundamental rights. This right directly flows from Article 21 of our Constitution, read with Declaration of Rights in Preamble. The Supreme Court’s interpretation of Articles 14, 19 and 21 has been justified when read with Preamble and Directive Principles of State Policy. The Supreme Court has dealt at length on all aspects of personal liberty which gives reality and meaning to the right to liberty. The most remarkable feature of the development of the right to human dignity is that Supreme Court has upheld the dignity of the person who is behind the bars.

The core principle can be traced from Article 5 of the Universal Declaration of Human Rights, 1948 which is as follows:

"No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment".

and Article 10 of the International Covenant on Civil and Political Rights 1960, gives protection as under:

"All prisoners deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Rights of prisoners have attained some dimensions and perspectives under our Constitution. These dimensions and perspectives are interpreted by our Courts for the purpose of providing liberty to the prisoners. They are discussed under the following heads:

- Exercise of Fundamental Rights in Prison.
- Solitary confinement.
- Torture in Prison.
- Protection to Women Prisoners.
- Protection to Juvenile Delinquents.
4.330 All the persons who are put in prison are not hardened criminals, habitual offenders or the like. But in many cases people are put behind the bars for some reasons or the other which are not connected with the commission of crimes. Some of these prisoners are talented people and even during the period they are in prison they would like to spend their time for some constructive work or for pursuing their hobbies. But by virtue of their being prisoners they are denied the right to do any constructive work. In fact, because, they are prisoners they are denuded of all the fundamental rights which are available to other people. Unfortunately this concept prevailed for a long time in Indian Prisons but it was not correct. Again it was our Supreme Court who recognised the rights of the prisoners to exercise their fundamental rights within four walls of prison subject to reasonable restrictions and this was done by the Court for the first time in case of The State of Maharashtra V. Prabakar Pandurang Sanzgiri. (118)

4.331 One Prabakar Pandurang was detained under the Defence of India Rules, 1962. He had written a book during the period of his enforced idleness in prison. It was a book in Marathi entitled "Inside the Atom". The book was written with the permission of the Government, but his request to send the book for publication was turned down. The High Court found the book to be of a purely scientific interest which could not prejudice the Defence of India, public safety and the maintenance of public order. It directed the Government to allow the detenu to get the book published.

4.332 The Supreme Court also upheld the decision of the High Court that failure to release for publication of the manuscript of a detenu infringed his personal liberty. It was Justice Subba Rao speaking for the Court who brushed aside the objection and held that there are different aspects of personal
liberty. Having fortified his right to move about freely by reason of the detention order, the detenu had not forfeited his other freedoms - the liberty to write and publish a book was one such freedom that had not been taken away under the Defence of India Rules, 1962. Justice Subba Rao observed:

".....If this argument (for the State) were to be accepted it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of liberty of a subject such a construction shall not be given to the said rules and regulations, unless for compelling reasons.....As there is no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenu from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of the first respondent in derogation of the law whereunder he is detained."(119)

In the above case Prabhakar's right to publish a book was affected by the jail authorities. Had the Court not come to his rescue, he would not have exercised his right to publish a scientific book. This instance is sufficient to project an arbitrary rule of jail authorities and deprivation of the right of prisoners to that extent. Infact, there are some dazzling examples wherein prisoners have created unparalleled contributions for the society, for example Jawaharlal Nehru wrote the 'Discovery of India', B.G. Tilak wrote 'Geeta Rahasya' when in jail. The reflection of this theme we get in the protection of the rights of the prisoners.

4.333 A major break through in the rights of prisoners came in 1974 when Supreme Court delivered its judgement in D.B.M. Patnaik V. State of Andhra Pradesh.(120) This case raised interesting issues concerning personal liberty guaranteed in Article 21. The petitioner had been sentenced to imprisonment and was also a Naxalite under-trial prisoner in respect of a Naxalite conspiracy
case. The petitioner alleged that the location of the police force on a part of the vacant jail land and a fixation of live-wire mechanism atop the walls of the jails to prevent the prisoners from escaping from the jail infringed their personal liberty. Justice Chandrachud said that conviction and imprisonment would deprive prisoners of some but not all of their fundamental rights. They might lose freedom of movement throughout the territory of India or freedom to practice any lawful trade or business. But they would retain their right to acquire, hold and dispose of property and the right to life and personal liberty.

Justice Chandrachud found that the jail authorities had undertaken the impugned precautions after one of the petitioners had escaped from the jail. He further found that the police, separated from the prisoners by the high walls of the prison, did not interfere with the personal liberty or the lawful pre-occupations of the petitioners. Similarly the live wire mechanism on the top of the walls of the prison, did not interfere with the personal liberty or the lawful pre-occupations of the petitioners. Similarly the live wire mechanism on the top of the walls of the prison did not endanger the prisoners' lives. This mechanism might prove dangerous only if the prisoners tried to meddle with it to escape from the prison. As they had no fundamental right to escape from prison, they had no right to demand facilities and amenities for safe escape from the prison.

Another opportunity for advancing human rights in the field of criminal jurisprudence came up before the Supreme Court in the case of Francis Coralie Mullin. The Court held in this case which is also a landmark case, that the right to life granted under Article 21 is not confined merely to the right to physical existence but it also includes within its broad matrix
the right to use of every faculty or limb through which life is enjoyed as also the right to live with basic human dignity. The court pointed out that no one can be deprived of his right to live with basic human dignity except by reasonable, fair and just procedure prescribed by law and indeed no procedure which deprives a person of his right to live with basic human dignity can possibly be reasonable, fair and just.

4.336 In this case the petitioner Francis Mullin, a foreigner was detained under COFEPOSA and her young daughter wanted to interview her every week, but this was refused and she was allowed to visit her mother only once a month. The Supreme Court held that it would not only be entitled, but constitutionally bound to intervene to protect the person concerned against such cruel or degrading treatment by requiring the State to take positive remedial action. The Court observed:

"We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing, expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being.... Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights". (122)

4.337 In 1978 the Supreme Court stressed the need for reform within the prison and granted many important rights to the prisoners. In Batra's case (123) the petitioner was sentenced to death on charges of gruesome murder and robbery and
was kept in solitary confinement while his appeal against the Sessions Court verdict was pending before the High Court. He filed a writ petition in the Supreme Court under Article 32 and the Supreme Court admitted the petition and issued orders directing that the petitioner should not be kept in solitary confinement till the final determination of the case.

4.338 The Court pointed out that it would be violative of the fundamental rights to impose solitary confinement on a prisoner under sentence of death, not as a consequence of violation of prison discipline, but on the sole ground that he is prisoner under sentence of death. It is only where the sentence of death becomes finally executable that a prisoner would be liable to be dealt with under Section 30 (2) of the Prison Act, 1900 and then also, he cannot be treated differently from other prisoners except in two respects i.e. during confinement he must be kept in a cell apart from other prisoners but he must be within the sight and sound of other prisoners and be able to take food in their company and he shall be subject to a day and night watch by guards. Except for these two restrictions he is not to be denied any of the amenities like games, newspapers, books and meeting prisoners and visitors subject of course, to reasonable regulations of prison management.

4.339 In this case Court made out a strong case against "hands off" doctrine and gave the following directives:

1. Undertrials will be given more relaxed facilities than convicts.
2. Barfetters and handcuffing shall be shunned as violative of human dignity.
3. Iron restraint is permissible only if the undertrial has a credible tendency of violence and no other alternative is workable.
4. The discretion to impose irons is subject to quasi-judicial review.
5. Previous hearing shall be afforded to the victims before any punishment.
(6) The grounds for fetters must be communicated to the prisoners.

(7) When the prisoners cannot afford it, legal aid shall be provided.

(9) No fetters shall continue beyond daytime.

(9) Prolonged continuation of fetters is subject to previous approval by an examiner like a Chief Judicial Magistrate or a Sessions Judge who shall hear the victim and record reasons.

(10) The Prison Act does not empower the prison administration to put anyone under solitary confinement as it is a substantive punishment under the Indian Penal Code and can be imposed only by the Courts.

In 1980, the Second Sunil Batra case was decided by the Supreme Court. This case arose out of a letter written by Sunil Batra to one of the Judges of the Supreme Court alleging that a Warden in Tihar Jail, New Delhi, had caused bleeding injury to a convict by name Prem Chand by forcing a stick into his anus. The Supreme Court treated the letter as writ petition and observed that "whenever the rights of a prisoner either under the Constitution or under any other law are violated, the writ power of the Court can and should run to his rescue". Justice Krishna Iyer was ready to do what the political process was unwilling to do. He said:

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

The Supreme Court also gave some directions which were as under:

(1) Lawyers nominated by the District Magistrate, Sessions Judge, High Court and Supreme Court will be given all facilities for interviews,
visits and confidential communication with prisoners, subject to discipline and security considerations.

(2) Grievance Deposit Boxes should be maintained under the orders of the District Magistrate and Sessions Judges to be opened as frequently as possible and suitable action taken on complaints made.

(3) District Magistrates and Sessions Judges personally or through surrogates must visit the prisons under their jurisdictions, afford effective opportunities to prisoners to ventilate their grievances, make expeditious enquiries and take suitable actions.

(4) No punishment like solitary confinement or confinement in a punitive cell, hard labour or dietary change and no denial of privileges and amenities, no transfer to other prisons with penal consequences shall be imposed without the sanction of the Sessions Judge.

TORTURE IN PRISON:

4.342 In numerous cases our Courts have dealt with the question of maltreatment of undertrials, convicted prisoners and victims of police torture. All cases of police torture are decided on the touch stone of right to life and liberty though Article 21 as such may not be stressed specifically.

4.343 Torture implies infliction of severe pain upon a person with a view to extracting some information from him or to compel him against his will or to punish him.\(^{(126)}\) It can also be described as the "systematic and deliberate infliction of acute pain in any form by one person on another or on a third person in order to accomplish the purpose of the former against the will of the latter".\(^{(127)}\)

4.344 Different methods are used by the officials for torturing prisoners.
They are third degree methods (physical assault, phalange) and fourth degree methods (psychological disorientation such as sensory deprivation). Other tortures are: discomfort of the prison conditions (cramped quarters, inadequate toilet facilities) brutality (rough handling), assault (beatings, kickings), social deprivation (separation of families, cultural indecencies) injustice (violation of legal rights) and sleep deprivation. Besides the above mentioned, there are other techniques, such as wall standings, hoarding, subject to noise, deprivation of food and drink are also used in order to inflict torture on a victim.

4.345 During the recent times the interest of international organisation in the matter of torture has increased considerably. Our Courts have in a number of cases criticized in particular, the practice of causing physical injury to the prisoners for obtaining information and confessions or in the name of maintaining discipline. Our Supreme Court has laid great stress on the rights of the prisoners to the integrity of their physical person and mental personality. At this juncture it will be appropriate to consider one or two cases which will highlight the role played by our Courts in protecting prisoners against police brutality and torture.

4.346 In Raghubir Singh's case the Supreme Court expressed its distress over the diabolical recurrence of police torture. In this case a suspect was arrested in connection with theft in the house of an officer and he had died of torture in a police lock up. The investigation showed the murderous conduct of the petitioner, one of the injuries which, according to the doctor, made the deceased unconscious, was torture on both the soles of the feet of the victim. The petitioner was convicted under section 302 of Indian Penal Code and was awarded life sentence. Justice Krishna Iyer confirmed the
life sentence while making the following observations:

"We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril, when the guardians of law gore human rights to death." (132)

4.347 In this case the issue of torture touches the question of life and liberty of the suspect involved in a criminal case but the Court has not directly referred to Article 21 as such. In fact every case of this nature would be a fit case which could be decided within the purview of Article 21 of the Constitution. Just for the sake of confessions and for proving the case of prosecution, the police officials should not be allowed to take law into their own hands. Specially the Court after having provided immunity against torture, cruel, inhuman or degrading treatment under Article 21, should have considered that aspect.

4.348 In Ram Sagar Yadav's case, (133) Yadav had made a complaint against a policeman, who had demanded bribe from him, was arrested in order that he might be taught a lesson for his audacity. Two hours after his arrest the Magistrate who remanded him to custody found that the arrested person was badly injured and in a serious condition. The doctor who examined him in prison, found that there were 19 injuries on various parts of his body. He was beaten up by darogah and constables. The Court found that his death had resulted from the injuries and convicted the accused policeman under section 304 of the Indian Penal Code.

4.349 The Supreme Court while restoring the sentence of life imprisonment reversed by the High Court, regretted that the Sessions Judge had been unduly
liberal to the accused by convicting them under section 304 and not under section 302 of the Indian Penal Code. Chief Justice Chandrachud pleaded for amendment of the law relating to burden of proof. He said:

"We would like to impress upon the Government the need to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence, police officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood they often prefer to remain silent in such situations, and when they choose to speak, they put their own gloss upon facts and prevent the truth. The result is that persons on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station are left without evidence to prove who the offenders are." (134)

4.350 In the above para Chief Justice Chandrachud had rightly emphasized that police officials who perpetuate brutality and torture on the prisoners should be punished and only for want of enough proof they should not be allowed to go scot free. According to this researcher, the punishment given to guilty police officials should act as a deterrent. If deterrent punishment is not awarded, then the social structure, democratic set up and backbone of the society would crumble down. Every case of reported crime is symptomatic of several other cases which go unreported. People are loosing hope and if the system is not reorganised, chaos is bound to engulf the country.

PROTECTION TO WOMEN PRISONERS:

4.351 In India the plight of women prisoners is worse. Women do not
commit crimes by choice, they are driven by the conditions of their life.
It is beyond doubt that women condemned to life sentence are generally victims
of circumstances. Unlike criminals guilty of theft, burglary, prostitution, 
kidnapping etc. women usually do not commit offence by premeditation.
Among them are those who wished to commit suicide, because life was intolera­
ble, wives, of husbands who fled after committing crimes, those who in trying
to protect their husband's from assailants turned assailants. Yet under section
302 Indian Penal Code they are condemned to life sentence. These women
are mothers who pine for their children, for their parents. Can they hope
for freedom?

4.352 In developed and developing countries, the feminist movement has
gained momentum. The decade 1975-85 focussed attention on the problems
of women. But for the women, who are behind the bars or condemned to
life term all these seem a far cry. There is no forum for them. They suffer
in silence. Even ordinary compassion is denied to them. They are deprived
of reliefs that even the laws allow to others. The national expert committee
on women prisoners has found custodial fascilities for women most deplorable,
depressing and harsh, with prisons and lockups being nothing short of dungeons
with awful sanitary conditions.

4.353 Quite often, women accused of some offences and brought to the
lock up fall victim to the lust of the cops and such crimes take place within
the premises of the police station. Women arrested on complaints and put
in lock ups overnight, also fall victim to the sexual assault of cops on duty.
The shocking behaviour of Police towards Rameeza Bee, Mathura and Maya
Tyagi are well known.
4.354 In the case of Sheela Barse v. State of Utter Pradesh\(^ {135} \) the women prisoners were assaulted and maltreated by the police in the police lockup. The Supreme Court laid down certain guidelines for ensuring protection against torture and maltreatment of women in police lockup. This was a public interest litigation initiated by a freelance journalist Sheela Barse by addressing a letter to the Court. The Court treated the letter as a writ petition and gave the following guidelines:

1. That 4 or 5 places should be selected in reasonable good locations where female suspects only should be confined by the police and they should be guarded by female constables.

2. That interrogation of females should be carried out only in the presence of female police officers/constables.

3. That a pamphlet, setting out the legal rights of these prisoners in their local language and also in Hindi and English, should be affixed in each cell in every police lock up and should be read out to the arrested persons in any of the languages, which they understand as soon as they are brought to the police station.

4.355 To ameliorate the conditions of women prisoners the Jail Reforms Committee has made a number of recommendations like: whenever women prisoners are in large numbers, a proper classification system must operate which should include medical, criminological and social assessment of the inmates and which can serve as a basis for specialised and segregated care, treatment, employment, training, education and rehabilitation of the inmates. Medical care facilities should be made available to them and by a female doctor.

4.356 The indiscriminate custodialisation of women should be discouraged
through careful sentencing and greater reliance should be on non-custodial options than is currently visible. Work therapy should be encouraged among women inmates. On the need for intensive female literacy and education programmes in prisons, the Committee said recreation, sports, singing, acting, painting and other therapeutic arts can be taught to the women prisoners so that they can return to normalcy and they can also be rehabilitated.

4.357 In addition to separate Women's Courts or family Courts, the Committee has recommended that Nari Bandigriha Adalats (Women Prison Courts) should be formed in the nature of mobile judicial camps as a modality for rendering speedy redress to women in custody.

PROTECTION TO JUVENILE DELINQUENTS:

4.358 The problem of juvenile delinquency is increasing in the wake of industrialisation and urbanisation in our country. The roots of juvenile delinquency lie in the abysmal poverty of the majority of the people. The juvenile offenders are not the criminals. They are only victims and still they are treated by the authorities just like adult criminals.

4.359 The future of a country is dependent on its children and they must be protected against every form of exploitation and must be given requisite means for its full development both material and spiritual so that they might become useful citizens in the years to come.

4.360 A case came before the Supreme Court by way of a letter addressed to one of the Judges and also in pursuance of a report published in Indian Express that exposed the maltreatment which was being meted out to juvenile prisoners in Tihar Jail and Kanpur Central Jail. This has been explained
by Justice Bhagwati in one of the articles (137) as under:

"The complaint in the letter pointed out how juvenile prisoners were being subjected to sexual abuse and were being sodomised by the adult prisoners with the connivance of the jail warden. The letter was treated as a writ petition and the Court appointed District Judge of Delhi as Commissioner to visit the jail and interview the juvenile prisoners who had complained of being sexually abused by the adult prisoners with the connivance of jail warden and this had become almost a regular practice in the jail. The Court gave directions for immediate transfer of the jail warden and ordered that two of the juvenile prisoners who had made damaging statements against the jail administration should be transferred to another jail so that they may not be victimised. Effective steps have since been taken by the jail administration for the purpose of completely segregating the ward of juvenile prisoners from that of the adult prisoners and adult prisoners have no longer any access to the ward of juvenile prisoners and vice-versa."

4.361 In yet another case of Munna v. State of Uttar Pradesh (138), the Supreme Court brought into focus the moral depravity of the prison culture. In pursuance of newspaper reports, it was found that there were 100 juvenile undertrial prisoners in Kanpur Central Jail and that young boys were being supplied to the convicts for their delectation and that Munna, after molestation by the adult convicts, was in agony. Three writ petitions were filed in the Court on the ground that allegations, if true, are violative of Article 21 of the Constitution. Though the allegations were not substantiated yet, it was clear that prison authorities were generally ignorant about the U.P. Childrens Act, 1951 and that Kanpur Central Jail did keep juveniles as prisoners
and that they were released within a few days after publication of the report in the Indian Express and the filing of the writ petitions.

4.362 After expounding the relevant provisions of the aforesaid Act requiring remand of juvenile undertrials to Children's Home, Justice Bhagwati observed:

"A nation which is not concerned with the welfare of its children cannot look forward to a bright future". (139)

4.363 In another case of Sheela Barse-1 (140) a public interest litigation was filed under Article 32 in which an application was made for release of children below the age of 18 years detained in jails within different States of the country, production of complete information of children in jails, information as to the existence of juvenile Court, Homes and Schools and for a direction that the District Judges should visit jails or Sub Jails within their jurisdiction to ensure that children are properly looked after when in custody as also for a direction to the State Legal Aid Boards to appoint duty counsel to ensure availability of legal protection for children as and when they are involved in criminal cases and are proceeded against.

4.364 In this case Union of India and all States and Union Territories have been impleaded as respondents. The Court gave directions to various State Governments and Legal Aid Boards and Court lauded the social service done by the petitioner in bringing this case regarding plight of the children in jails before the Courts and directed the Union Government to pay Rs. 10,000/- to her for the expenses incurred in gathering all the relevant information and also to enable her to visit jails, children's homes, remand homes, observation homes, borstal schools and all institutions connected with housing of delinquent children through-out the country.
The two Sunil Batra cases and Prem Shankar's case have sought to humanise jail administration and to convert jails into correctional institutions. But the problem of dehumanisation of jail administration remains because there are hardly any jails in the country where the directions given by the Supreme Court are being scrupulously observed. The Government should take steps for the purpose of ensuring compliance with the law laid down by our Supreme Court in these cases.

The Supreme Court thus elevated immunity against torture or cruel, inhuman or degrading treatment or punishment to the status of fundamental right under Article 21, though it is not specifically enumerated as a fundamental right in the Constitution. Such an interpretation opens up immense possibilities of the use of Article 21 for making 'life' worth living for neglected, the deprived and the otherwise uncared for people.

CRIMINAL PRISONERS:

So far we have seen the cases of criminal prisoners whose plight has been worst in the Indian Prisons. They also show that it was the humanity and respect for law our Supreme Court envisaged that a samble of improvement in prison conditions were advocated. But it is indeed a sad commentary on our politicians and Parliament that after attaining freedom and enjoying liberty they remained far away from the essence of liberty to be able to think about the plight of prisoners. Once rightly or wrongly in the nefarious and corrupt administration of the police and the lower courts, a sentence is issued against a person, he becomes condemned and disowned even as a human being to remain absolutely untouched by piety compassion and humanism of which a considerable farce goes on in the society just outside the prison walls. It is also a sad reflection on the barbaric and savage culture of the
prison administration. This is an area where our Parliament and our Executive should not remain idle in the cosy reassurance that the job is being done by the Supreme Court and therefore they should remain passive.

POLITICAL PRISONERS:

4.368 In India it was mainly during the emergency that the political prisoners were jailed and occasionally leaders of morchas are taken into prison. Whereas in the case of emergency subtle tortures were inflicted in accordance with the political climate in the country, our jail authorities have somehow an auto adjusting mechanism to be able to distinguish between the resourceful and helpless and accordingly the clocks of their courtesy, amnesty and attitude towards prisoners get adjusted.

4.369 In other words it is the private knowledge of the jail officials and not the JailManuals which govern anybody's plight as a prisoner in the Indian Jails. It is a common public knowledge that Charles Sobraj was not the only exception in getting VIP treatment at the hands of the jail officials. Even without the help of Article 21 many notorious anti-social elements even during emergency of high handedness were receiving their daily quota of chicken and wine within their cells and worse still they were permitted to go out of the jail for womanising and return back under the kind patronage of the prison authorities.

4.370 It is, therefore, an irony that our Supreme Court speaks merely of Article 21 the language of which is totally Greek and Latin to our administration. Even the British were better except for a few exceptions in their humanism towards an alien race than the post-independent prison administration towards their own countrymen.
WAR PRISONERS:

4.371 Article 21 in its spirit should apply to war prisoners also, if and when such situations arise within the country. As a law, Article 21 becomes suspended during emergency in the war conditions and also due to the fact that war prisoners fall within the administration of the Army Rule and Military Prisons. A thought provoking account of torture is reported in the newspaper which is as under:

"Chilling accounts of torture carried out in a secret jail inside the Israeli occupied area of southern Lebanon have been documented by the London Times.

In a despatch from Shakra, southern Lebanon, the paper cited evidence from the Lebanese Muslims of their inhuman ordeal at Al-Khaim Prison.

The atrocities carried out against the men and women in the jail include beatings, threats of rape, whippings and torture with electrodes. Prisoners emerging from the secret jail described how they were tortured with electric wires attached to their genitals, fingers and tongue.

The torture was conducted to "Extract Confessions about their suspected role in the resistance to Israeli occupation for information about two captured Israeli Intelligence agents", the paper said.

None of the prisoners interviewed by the Times wished to have their names published.

They said one of them had been threatened by an Israeli officer that he would be taken back to Al-Khaim jail if he spoke to journalists.

One girl told the paper she was repeatedly threatened with gang rape after being arrested in Shakra in February, 1986 and was whipped with a steel cord when she said she would rather die.

Another prisoner from Shakra was taken on an Israeli
army lorry to Al-Khaim and during interrogation about the whereabouts of two Israeli agents, a wire was put around his finger, tongue and genitals. He said this was done twice for three days.

Another person told the Times reporter that he was put in a cell in which he could only crouch. Another said that water was poured over his hand every time the electricity was cranked until blood poured from his nose.

A senior United Nations Officer is quoted by the Times as saying that "Horrible Things" were being carried out at the secret prison where screams could be heard at night."

The human race with all its value of human dignity would naturally feel scandalised on reading this account, but it will also establish the fact that human race has to go a long way to humanism when even the prisoners of war can be treated with human dignity.

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NOTES. Chapter Four.

1. Constituent Assembly Debates Vol. VII p. 794, 976 - Dr. Ambedkar said: "I am however prepared to accept amendment No. 512 moved by Mr. Karimuddin. I think it is a useful provision and may find place in our Constitution. There is nothing novel in it because whole of the clause as suggested by him is to be found in Criminal Procedure Code so that it might be said in a sense that there is already the law of the land. It is perfectly possible that the Legislatures of the future may abrogate the provisions specified in the amendment, but they are so important so far as personal liberty is concerned that it is very desirable to place these provisions beyond the reach of the Legislatures and I am therefore prepared to accept this amendment.


5. The view of Dean Prosser has been quoted by Prof. Salmond in his Book - The Law of Torts' 15th Edition pp. 44-66.

6. There is another view point. During the ancient times the Kings and Emperors kept their women in Pardah to protect them from the evil eye of their enemies.


9. See Supra Note No. 2 at p. 518-519.

10. Id. at p. 423.

11. Id. at p. 524.


13. Based on "Supernatural" by Douglas Hill and Pat Williams (New American Library).


15. Words in the Bracket mine.


17. 1. Section 509 of the Indian Penal Code, 1860 specifically makes it a crime to intrude upon the privacy of a woman;

2. Section 26, 164(3) and 165 of the Code of Criminal Procedure, 1898;

3. Section 121 to 129, 132 (privileged communications) and section 24 to 29 (confessions) of the Indian Evidence Act. 1872;

4. Section 33 of the Special Marriage Act, 1959 and Section 53 of the Indian Divorce Act, 1869;

5. Section 18 of the Indian Easements Act, 1882.

6. Under the Indian Telegraphs Act, 1833, no disturbance or interference of communication was allowed. However, in 1972, Parliament amended the Act and authorised certain officers to intercept such messages or stop their transmission if it was considered to be in the interest of the country or the public or for maintenance of friendly relations with foreign States etc. (Vide section 2 of the Indian Telegraph (Amendment) Act, 1972). A petition was presented to Lok Sabha by Madhu Dandowote Leader of Janta Party in Parliament on behalf of V.M. Tarkunde, President PUCL sought the repeal of the above provision. The petition revealed how the power of intercepting mail is being misused to virtually end a citizen's privacy (The Hindustan Times, 9th April 1982).


The American Courts accorded full consideration to the views of Warren and Brandies on privacy for the first time in 1902 in the case of Roberson v. Rochester Folding Box Co. (1902, 171 N.Y. 536), wherein the defendants made use of the plaintiff's picture without her consent, in their advertisement. The Court held in a four-to-three decisions that the right to privacy did not exist. Justice Gray, (minority opinion) vigorously argued for the active protection of the right of privacy. In 1905 for the first time the right of privacy was recognised and enforced by the American Courts, in Pavesich v. New England Life Assurance Co. (1905, 122 G.H. 190).


In 1886 Mata Prasad v. Behari Lal, S.A. No. 8 of 1856 (unreported), Straight and Mahmood JJ. evidently considered that the right of privacy could exist in respect of a house in the city of Allahabad.


K.K. Mathew: "The Right to be let alone" (1979) 4 SCC 1 (Journal Section).


In Griswold v. Connecticut 381 U.S. 179 (1965), the Supreme Court observed:
"Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one as we have seen. The Third Amendment in its prohibition against quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment is another. The Fifth Amendment in its self-incrimination clause enables the citizens to create a zone of privacy which government may not force him to surrender to his detriment. The Nineth Amendment provides: The enumeration in the Constitution of certain rights shall be retained by the people."

Please see:
AIR 1963 1295.
AIR 1975 SC 1378.
Ayyangar J. (for self), B.P. Sinha, S.J. Imam & J.R. Mudholkar J.J.
See Supra Note 30 on p. 1306.
Id. at p. 1302.
Ibid.
Id. at p. 1303.
See Supra Note 31.
Id. at p. 1385.
Ibid.
Id. at p. 1384.
See Supra Note 26.
Id. at pp. 763-764.
Anirudh Prasad, New Dimensions of The Right Of Privacy Under The Indian Constitution.

45. Article 20(3) : "No person accused of any offence shall be compelled to be a witness against himself".

46. Please see:
384 US 436 (1966)


50. See Supra Note 29.

51. Id. at pp. 306-307.


54. Ibid. Sudhi Sukhdev Singh.
Amar Chand Butil v. Union of India. AIR 1964 SC 1658.
S.P. Gupta v. Union of India. AIR 1982 SC 149.

56. The Bill to amend the Post Office Act was passed by both the Houses of Parliament sometime back. The bill contains a provision authorising the Central or State Government, or any authorised Officer, if satisfied that it is necessary to do so in the interest of public safety or tranquility, the sovereignty or integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any offence or on the occurrence of any public emergency, to intercept or detain any mail.


58. Please see the views expressed by eminent writers -

59. The mode of execution of such a decree is laid down in the Code of Civil Procedure, 1908, under Rule 32 of Order 21. If a person wilfully disobeys such a decree, after being given an opportunity to do so, the court may in execution of the same, attach the property of the person and if within a year after such attachment the decree remains unconfirmed the attached property may be sold and out of the sale proceeds, the court may award such compensation to the petitioner as it thinks fit.

Rule 33 provides another mode of execution where petitioner is the wife, not the husband. The Court may make an order that if the decree is not obeyed within a specified time, the respondent shall make such periodical payments to the petitioner as the Court thinks reasonable.

60. Supra Note 57 at p. 374.
62. Id. at p. 75.
64. Id. at p. 1567.
65. Id. at p. 1568.
66. AIR 1985 SC 1618.
67. Id. at p. 1622.
68. Dr. S.P. Sathe has expressed the view as under:

"...If 'adultery' is to be punished by law its definition must include both man and woman. The present section clearly discriminates against women and also treats married women differently from other women. The Chief Justice wanted this to be decided by Parliament. It is respectfully submitted that the Court was unduly restrained in not striking down this section which had outlived its purpose. The Chief Justice conceded that such patronising case of married women by law could be reviewed by the legislature, but that obviously was not within the Court's purview. It is submitted that Chief Justice took too restricted a view of the judicial function and such a view was not in consonance with the activist thrust of the Court, which has been inaction during last half a decade" XXI ASIL (1985) on pp. 211-212.

Lotika Sarkar's comments are as under:

"Thirty years ago the same section was challenged and was held to be a special provision for the benefit of the woman, but there was the justification for the paternalistic attitude as women's right or the need for gender justice had not been so clearly articulated. But to opine now that if section 497 were removed from the statute book 'adulterous relations will have a more free play than now' and "it is better from the point of view of the interests of society that at least a limited class of adulterous relationships is punishable..." is an anachronistic". Vol. XXI ASIL (1985) on p. 500.


69. See Supra Note 66 at p. 1620.

70. Please see the comments of Jurist Rajeev Dhawan, under the head 'Traffic of Precedent' in his essay entitled 'Borrowed Ideas: On The Impact of American Scholarship on Indian Law.' The American Journal of Comparative Law Vol. 33 1985 on p. 505.


Also see: K. Chandru v. State of Tamil Nadu. AIR 1986 SC 204.

72. Id. at pp. 571-572 (Olga Tellis Case).

73. AIR 1960 SC 932 (A Bench of five Judges decided the case).

74. Id. at p. 935.


77. Ibid.

78. Id. at p. 1131.


80. Id. at p. 134.


82. AIR 1986 SC 847.

83. 1987 Mh. L.J. 955.

84. The Division Bench consisted of V. A. Mohta and W. M. Sombre, JJ.

85. Please see the following cases:


The Court in this case held that petitioners are not being deprived of their right to liberty and life by the abolition of the posts of part time village officers or by their ceasing to be holders of those posts.


Rent Control and Eviction Laws do not violate Articles 14 and 21.

3. V.P. Shop keepers Association v. The Corporation of the city of Banglore AIR 1987 Kant.159.

The lease of land to petty shop keepers came to an end by efflux of time and the lesser city corporation refusing to renew it evicted the lessees, the same was not open to challenge as being in breach of Article 21 of the Constitution. There
was no deprivation of the Shopkeepers right to livelihood. It was only a case of contractual obligation ceasing to exist.

4. In the matter of No. 57 Block Bastuhara Committee & others - AIR 1987 Col. 122.)

In this case a canal owned and maintained by the municipality, was required to be excavated, to flush out sewerage water and rain water. In order to excavate the canal, the Municipality sought the eviction of the hutment and shanty dwellers, who were living by the sides of the canal and also sought demolition of their hutments and shanties. The said hutment and shanty dwellers had been earning their livelihood through various vocations of life in and around the place of their living. The court held that eviction of hutment and shanty dwellers from the sides of the canal did not tantamount to deprivation of their lives within the meaning of Article 21 of Constitution.

According to Justice D.P. Modan, judicial activism is an essential part of the judicial function and he has described it as under:

".....The protagonists of criticism against judicial activism do not spell out definitively what such restraints should be or in which areas they should operate. Their difficulty in this respect is genuine and one which cannot be overcome. Judicial activism in its totality cannot be banned. It is the core and kernel of judicial process of interpretation of statutes and application of old precedents to new cases before the courts. If truly analysed criticism boils down to this - That the courts should have no power of judicial review over legislative measures, statutory rules and regulations, and administrative actions and executive orders. In none of these fields can judicial activism be excluded or restrained, if the judiciary is to perform its true role and dispense justice."

He further observed:

".....To deny judicial activism to the courts is to nullify the judicial process and to negate justice. In to-day's world, where there is so much emphasis on human rights, the concept is that the legal system should so operate as to secure social justice to all..... The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should at least sleep with a roof over their head, that if the rich can eat both bread and cake, the poor should at least eat bread, that if the rich can live in opulence, the poor should at least be able to afford the basic comforts of life. If the law is to operate today so as to secure social justice to all, who else can do it but judges whose constitutional task is to interpret and apply the law. A Judge who denies to himself judicial activism denies to himself his role of a Judge. Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant space."


97. See Supra Note 71.


99. Please see:
V.S. Deshpande - To Be Or Not To Be (1984) 3 SCC p. 10 Journal section.
G.S. Tewari - Plea for Right Not To Live vis-a-vis The Indian Constitution. AIR 1988 (March) on p. 38 (Journal section).

100. See Supra Note 98 on p. 923.

101. Id. at pp. 922-23.

102. The Indian Penal Code, AIR Commentaries D.V. Chitaley and S. Appu Rao at p. 3940.

103. Reported in Nagpur Times, Dated 26th April, 1987 on page 1.

104. Supra Note 102 on p. 3938.


106. Acharya Vinoba Bhave, the last of the Gandhian, gave up food, medicine and even water after suffering a stroke and passed away peacefully. While dying a 'dignified death', the Acharya reiterated the principle of personal autonomy and self-determination.

107. Reported in Hitavada, Dated 18th April 1987 on 2nd front page.

108. To highlight this aspect further it is to be stated, that the issue of the right to die can also be discussed in the light of organ transplant, amniocentesis, cryogenics, etc. It should be discussed in the context of present day society where people live in utter poverty, where basic need of food, shelter, clothing, medical treatment, education still remain unfulfilled. The illiterate population who live in queer circumstances, selling or pledging their progeny for money or individual selling their blood or transplanting organs for livelihood. The discussion on the right to die will be incomplete if all the above aspects are not taken into account.

(Note: Cryogenic is a body freezing technique for achieving immortality. The technique is known as cryogenic suspension. It allows dead people to be specially treated and maintained at ultra low temperatures. The idea is that at some future date, when medical advances allow ageing process to reverse, clients will be thawed out and their ailments repaired, enabling them to emerge into a brave new world where death no longer haunts humanity).


110. Ibid.


Also see: Sita Ram v. State of Uttar Pradesh (1979) 2 SCR 1085.

113. Supra Note 109 at p. 475.

114. Also see:
N. Vijoyakumar, Legality of Imposition of Sentence of Imprisonment In Default of Payment of Fine 1973 Lawyer (I.L.I.) at p. 76.

115. The said view came to be expressed by 1871 decision in Ruffian v. Commonwealth (1871) 62 vs. (21 Gratt), 790, 796. "He as a consequence of his crime not only forfeited his liberty, but also his personal rights except those which the law in its humanity accords him. He is for the time being the slave of the State."
116. Government of India, National Archives of India, Documents connected with Prisons Act, 1894, Legislative Department Proceedings No. 164 to 271.

117. The management and administration of Prisons in India is governed by the following Acts:
   i. Prisons Act, 1894.
   ii. Prisoners Act, 1900.
   v. Indian Lunacy Act, 1912.
   viii. Civil Jails Act, 1874.

118. AIR 1966 SC 424.

119. Id. at p. 428.


122. Id. at p. 753.


   Also see:


125. Id. at p. 1594.

   Also see: Khotri v. State of Bihar (1981) 1 SCC 623, 627, 635.


128. Id. on pp. 35-36.

129. Id. on p. 36.

130. The declaration on Protection from Torture, 1975 passed by the General Assembly of the United Nations in recognition of the inherent dignity and the inalienable rights of all members of the human family, condemns torture in no uncertain terms. It defines torture in Article 1 as under:

   "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official, or a person, for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he has committed or is suspected of having committed, intimidating him or other person."

The International Covenant on Civil and Political Rights, 1960 says in Article 7:

   "No one shall be subjected to torture or to cruel, inhuman or degrading treatment and punishment."

India as a signatory member, ratified the Covenant on April 27, 1979.

A draft Convention on Torture was prepared by the commission on Human Rights in February, 1980 which provides that signatory States shall take effective legislative, administrative or judicial measures to combat torture and provide guarantees which can be regarded as fundamental. Article 11 says that each State party shall keep under systematic review interrogation rules, instructions, methods of practice, as well as arrangement for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment.

Also see:
Article 5 of The Universal Declaration of Human Rights, 1945.

Please see:


Kum Kum Chadha - The Indian Jails (1983).

132. Id. at p. 1088.
134. Id. at p. 421.
This case was a public interest litigation for enforcing human rights of inmates of protective home who were kept in abject dehumanised living conditions. The Court passed the order to ensure that inmates of Protective Home at Agra do not continue to live in inhuman and degrading conditions and that the right to live with dignity enshrined in Article 21 of the Constitution is made real and meaningful for them.


136. Please see:

139. Id. at p. 551.
140. Sheela Barse and another (I) v. Union of India (1986) 3 SCC 596.
Also see:
Sheela Barse - II v. Union of India (1986) 3 SCC 632.
Sheela Barse v. Union of India (1987) 1 SCC 76.

141. Nagpur Times dated 5th March, 1987 p. 5 "Blood Curdling Tortures In Israeli Jail"