CHAPTER 2

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

Statutory Provisions

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

¹. The right to freedom of the person comprises the following:-
Article 20(1) protection against ex-post facto laws;
Article 20(2) protection against double jeopardy;
Article 20(3) privilege against self incrimination,
Article 21 protection of life and personal liberty;
Article 22(1 to 3) protection in case of arrest,
Article 22(4 to 7) safeguards in case of preventive detention.
The fundamental rights under Article 19 are conferred only on citizens, but the discussed above are available to all persons, whether citizens or not.
which have been enumerated in Part III of the Constitution are available to the prisoners also because a prisoner remains a "person" inside the prison. The right to personal liberty has now been given very wide interpretation by the Supreme Court. This right is available not only to free people but even to those behind bars. The right to speedy trial, free legal aid, right against torture, right against inhuman and degrading treatment accompany a person into the prison also.

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

3. Infra n.12.
4. Infra n.53.
5. Infra n.65.
6. Infra n.66
7. Article 14 reads: "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".
Article 19 of the Constitution guarantees six freedoms to the citizens of India. Among these certain freedoms like 'freedom of movement', 'freedom to reside and to settle' and freedom of profession, occupation, trade or business" cannot be enjoyed by the prisoners because of the very nature of these freedoms and due to the condition of incarceration.

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

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

8. Article 21 provides:- "No person shall be deprived of his life or personal liberty except according to the procedure established by law".
arbitrary actions of the executive especially the prison authorities. After that decision it has been established that there must be fair and reasonable procedure for the deprivation of the life and personal liberty of the individuals. The history of judicial involvement in prison administration shows that whenever the prison officials have subjected the inmates to brutal treatment the courts have intervened to protect their rights. The issue of prison conditions and environment has emerged as one of the predominant themes of correctional philosophy raising questions concerning inmate's rights and fate of prison life.

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

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

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

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

11. Id., p.93 per B.K. Mukerjee, J.

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

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

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

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

13. Id., p.425.
14. Ibid.
15. Ibid.
prisoners under trial in what is known as the Parvathipuram Naxelite Conspiracy Case. The petition was filed for the removal of the armed police guards posted around the jail and for dismantling live wires electrical mechanism fixed on the top of the jail-wall. The Supreme Court held that the right of personal liberty and some of other fundamental freedoms are not to be totally denied to a convict during the period of incarceration. Here there was no deprivation of any of their fundamental rights by the posting of the police guards immediately outside the jail. The policemen who live on the vacant jail land are not shown to have any access to the jail which is enclosed by high walls. But the court laid down some important aspects regarding prisoners rights. Chandrachud, J. held:

17. Ibid.
18. It was contended that even the discipline of the prison must have the authority of law and that there should be a sort of "iron-curtain" between the prisoners and the police so that the convicts and undertrial prisoners may be truly free from the influence and tyranny of the police. Since prison includes lands apurtenent thereto the members and officers of police—who were posted to guard the jail from outside occupied a part of the prison and that must be prevented as it is calculated to cause substantial interference with the exercise by the prisoners of their fundamental rights. Id., at . Section 3(1) of the Prisoners Act 1895 defines prison to mean any jail or place used permanently or temporarily for the detention of prisoners, including all lands and buildings appurtenant thereto".
"The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty".

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

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

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20. Id., p.2097.
Thus there was a movement away from *Gopalan* in 1966 and 1974 concerning the availability of fundamental rights to prisoners. Even though in *Gopalan*, the courts did not interfere in the matters of detention there was a gradual change visible. But in reality, the courts did not in their actual decisions provide much relief to the prisoners. Even the violation of procedure established by the law in the Prisons Act or Jail Manuals did not entitle prisoners to any relief.

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

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

\(^{21}\) *Supra.*
sometimes subjected to. These barbarous relics of a bygone era offended the letter and spirit of the Constitution.22 The matters complained of did not amount to deprivation of the right to life and liberty in Patnaik and the plea of the prisoners were dismissed.

Personal Liberty

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

23. A.I.R. 1963 S.C. 1295. The petitioner Kharak Singh had been charged in a dacoity case but was released as there was no evidence against him. Under the U.P. Police Regulations the police opened a history sheet for him and he was kept under police surveillance which included secret picketing of his house by the police domiciliary visits at nights and verification of his movements and activities. 'Domiciliary visits' mean visits by the police in the night to the private house for the purpose of making sure that the suspect is staying home or whether he has gone out. The Supreme Court held that the domiciliary visits of the policemen were an invasion on the petitioners personal liberty. By the term 'life' as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and facilities by which life is enjoyed.
Constitution. The word 'liberty' in Article 21 is qualified by the word 'personal'. The word 'personal' liberty in Article 21 is used as a compendious term to include within itself all varieties of right which go to make the personal liberties of men other than those within several classes of Article 19(1).

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

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

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

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

The Extent of Judicial Interference

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

\textsuperscript{26} A.I.R. 1978 S.C. 597.
grievances. Whether a court can interfere with the treatment of prisoners by jail authorities and prescribe fair procedure? What is the remedy available to the convicted persons if their fundamental rights are encroached upon by the acts of prison authorities? The Supreme Court in *Charles Sobraj v. Superintendent, Central Jail, Tihar* 27 analysed in detail the extent of judicial interference. The Supreme Court not only reiterated the power of courts to issue writs but also highlighted their duty and authority to see that the judicial warrant was not misused. 28 The prisoners should get the protection of the fundamental rights guaranteed to the citizens under the Indian Constitution against any arbitrary and discriminatory treatment by the prison authorities. 29

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

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28. Ibid.
29. Ibid.
and the petitioner is now a convict. A lazy relaxation on security is a professional risk inside a prison.\textsuperscript{30}

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

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

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

\textsuperscript{30} Ibid.  
\textsuperscript{31} Id., at 1517.
rights, though the courts may refuse to allow in full the fundamental rights enjoyed by free citizens. The court made it clear that the claims of prisoners against cruel and unusual punishments need not necessarily depend for their soundness upon specific constitutional provisions prohibiting such treatment.32

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

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

33. A.I.R. 1981 S.C. 746. The petitioner, a British national was arrested and detained in the Central Jail, Tihar. She preferred a petition in the Supreme Court for a writ of habeas corpus challenging her detention. Her petition was rejected with the result that she continued to remain under detention in the Tihar Central Jail. Whilst under detention, the petitioner experienced considerable difficulty in having interview with her lawyer and the members of her family. Her daughter aged five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month and she was not allowed to meet her daughter more often, though a child of very tender age.
its broad matrix the right to the use of every faculty or limb through which life is enjoyed as also the right to live with basic human dignity.\textsuperscript{34}

The Supreme Court observed that as a necessary component of the right to life, the prisoner or detenue would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 24\textsuperscript{14} and 21, unless it is reasonable, fair and just.\textsuperscript{35} Justice Bhagwathi further pointed\textsuperscript{36},

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

\textsuperscript{34} Id., at p. 750 \textit{per} Bhagwathi, J.
\textsuperscript{35} Id., at 753 \textit{per} Bhagwathi, J.
\textsuperscript{36} Id., at 754.
amplitude and it includes the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, invalid as being violative of articles 14 and 21."

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

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

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

Sunil Batra Cases

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

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

38. In 1980 the Government of India appointed Mulla Committee on Jail Reforms. Justice A.N.Mulla was the Chairman of the Committee. Ismail Committee was appointed in Tamil Nadu.


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

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

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41. Prisons Act 1894, Section 30 reads:- "1. Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the jailor and all articles shall be taken from him which the jailor deems it dangerous or inexpedient to leave in his possession.
2. Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and night under the charges of guard".

42. Id., section 56 reads:- "Whenever the Superintendent considers it necessary (with reference either to the state of the prison or the character of prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the State Government, so confine him".
fair treatment to the petitioner inside the prison. The Supreme Court said:43

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

43. A.I.R. 1978 S.C. 1675 at p.1727 per Desai, J.
Here the Supreme Court established that convicts are not merely by reason of conviction denuded of all the fundamental rights which they otherwise possess. The conviction deprives the prisoner the fundamental freedoms like the right to move freely throughout the territory of India and the right to practice a profession.

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

\textsuperscript{44} Sunil Batra (II) v. Delhi Administration, A.I.R. 1980 S.C. 1579.
\textsuperscript{45} Id., at 1583.
In this case Justice Krishna Iyer openly acknowledged the activist policy-making role of the judicial process, particularly in view of the legislative laxity, in the humanisation of the prison system and observed thus:46

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

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

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

46. Id., at 1594.
Judicial interference into the prison administration is not a prohibited thing at present; on the other hand the interference is necessary and welcome to check arbitrary actions of jail authorities. Habeas corpus powers and administrative measures are the pillars of prisoners rights. The prisoners can invoke the attention of the courts at appropriate times. For instance, where a person sentenced to simple imprisonment with 'B' class treatment is put by the jail authorities under rigorous improvement with 'C' class treatment, or where a prisoner is subjected to brutal treatment, prisoners are able to approach the court for the redressal of their grievance.

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

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

New Dimensions of Reformative Jurisprudence

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

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

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

In Vijayakumar all the accused persons who were around seventeen years were sentenced to $2 \frac{1}{2}$ years imprisonment by the sessions court for robbing a bank with non-violent use of crude pistols and country bombs. The High Court enhanced the sentence to seven years rigorous imprisonment. Eventhough the full bench of the Supreme Court did not interfere in the sentence passed, Justice Krishna Iyer gave various guidelines with regard to the treatment of prisoners to reduce their criminal tendencies. Justice Krishna Iyer pointed out that the court has responsibility to see that punishment serves social defence.50

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

50. Id., p.1847.
of inhumanity inflicted on a prisoners but by reformation and healing whereby the creative potential of the prisoner is unfolded. These values have their roots in Article 19 of the Constitution which sanctions deprivation of freedoms provided they render a reasonable service to social defence, public order and security of the state".

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

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

\footnote{51. Id., p.1488. 52. \textit{Supra}.}
and to families, even participative prison projects and controlled community life. He observed: 53

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

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

53. Id., p.1725.
54. Supra.
fetters under the power of Section 56 of the Prisons Act 1894 has to be made after application of mind of the peculiar and special characteristic of each case. The nature and length of each sentence or the magnitude of the crime committed by the prisoner do not seem to be relevant for the purpose. Putting prisoners in bar fetters continuously for a long period is a cruel and unusual punishment which is anathema to the spirit of the Constitution.

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

55. Section 56 of the Prisons Act 1894 reads:— "Whenever the superintendent considers it necessary (with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the state government so confine him".

56. Although the concept of rehabilitation has profoundly shaped American sentencing and correctional policies, a constitutional right to rehabilitation remains unrecognised by the United States Federal Courts. In sharp contrast, a number of European nations include rehabilitation as a constitutional mandate. Further, customary international law establishes a duty of rehabilitation as expressed, for example, in the 1955 United Nations Minimum Rules for the Treatment of Prisoners and the American Convention of Human Rights”. Edgar do Rotman, "Do Criminal Offenders have a Constitutional Right to Rehabilitation?", 77 The Journal of Criminal Law and Criminology, (1986), p.1023.
sentencing court has duty to visit prisons at intervals and to see that the convicts are treated according to law and in conformity with the norms of modern penological and correctional systems. There must be a procedure in the sentencing court itself for receiving complaints from convicted persons if their rights are infringed in jail. The present system of sentencing a person and forgetting him for ever should change. Effective improvement in prison justice administration is possible if the judiciary has a say in the treatment of offenders in jail.

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

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

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

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

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

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

59. Criminal Procedure Code 1973, Section 363 provides for furnishing a free copy of the judgment to the accused. See infra n.
and nominal punishment verging on decriminalisation of serious social offences".

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

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

61. In the landmark case Maneka Gandhi v. Union of India, Bhagawathi, J. has explained this. "Does article 21 merely require that there must be some semblence of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that, procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the constitution which confers certain fundamental rights. Is the prescription of some sort of procedure enough or must be procedure comply with any particular requirement? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. A.I.R. 1978 S.C. 597 at p.622.
foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Procedure must be rule out anything arbitrary, freakish or bizzare. Procedural safeguards are the indispensable essence of liberty. The history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human right ring. Procedure in Article 21 means fair, not normal procedure law is reasonable law, not any enacted piece.\(^6\)

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

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

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

sentencing a person to a prison term. In the event of any such copy being sent to the jail authorities for delivery to the prisoner by the appellate, revisional or other court, the official concerned has to see that it is delivered to the sentence and after that must obtain a written acknowledgement thereof from him.

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

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

These guidelines are applicable from the lowest to the highest court where a deprivation of life and personal liberty is in substantial peril.
Of the rights mentioned two have got special significance in Hoskot. The first requirement is service of a copy of the judgment to the prisoner in time to file an appeal and the second requirement is the provision of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are state responsibilities if we give a wider interpretation to Article 21.63

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

63. Article 21 says:- "No person shall be deprived of his life and personal liberty except according to the procedure established by law".
Criminal Procedure Code. Jail Manuals will have to be updated to include these principles also.

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

64. Criminal Procedure Code, Section 363 reads:- "(1) When the accused is sentenced to imprisonment, a copy of the judgment shall, immediately after the pronouncement of the judgment, be given to him free of cost.
(2) On the application of the accused, a certified copy of the judgment, or when he desires, a translation in his own language if practicable or in the language of the court, shall be given to him without delay, and such copy shall, in every case where the judgment is applicable by the accused, be given free of cost. Provided that where a sentence of death is passed or confirmed by the High Court, a certified copy of the judgment shall be immediately given to the accused free.

65. Article 39A reads:- "The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

66. Criminal Procedure Code 1973, section 304 provides for legal aid to the accused at state expense in certain cases.
principles given in Article 39A of the Constitution.

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

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

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

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

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

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

\textsuperscript{69} A.I.R. 1981 S.C. 928.
quite some time. While considering the grievances of prisoners the court held

"The state is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State".

Another question raised in Khatri v. State of Bihar71 was whether the state was liable to pay compensation to the blinded prisoners for violation of their fundamental rights under Article 21 of the Constitution.

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

70. Id., p. 931.
than in accordance with procedure established by law was implicit in Article 21. The court was reluctant to grant relief in the form of compensation. The court held:

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

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

72. Id., p.1074.
Hoskot, the two Sunil Batra cases and the decision in Francis Coralie Mullin were but extensions of the principle first enunciated in Prabhakar Pandurang.

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