CHAPTER – VI

PROTECTION OF PRISONERS' FUNDAMENTAL RIGHTS:
THE JUDICIAL RESPONSE
Especially in a welfare democratic country, ruled by a Constitution, the demands are too heavy on the judiciary from the side of the people, as it is the judiciary who has to protect the surrendered right of the people for the common benefit so that no inroads are being made into their cherished liberties. Especially in this chapter, the judicial response as to the prisoners’ rights has been exhibited. The Indian Constitution does not enumerate any sort of fundamental rights to the prisoners specifically. The judicial offices, however, through the process of Judicial Activism have expanded the scope of the various freedoms enshrined in part III of the Indian Constitution and also extended their applicability to the prisoners. This has resulted into the evolution of certain minimum rights and safeguards for the prisoners. For the purpose of analyzing the judicial approach of Indian judiciary with the help of deciding cases these recognized rights may be dealt under the following headings:

[A] **Prisoners Right of Physical Protection**

The due process clause in America has been so widely used by the courts that not only commercial enactments under the ‘commercial clause’ but even the laws regarding criminal administration were included in it. So far as the rights of the prisoners are concerned, the centre of legislation for these rights has been that; does the American constitution follow a person into prison?
The American Supreme Court, after hesitating in a number of cases\(^1\), ultimately answered positively\(^2\) and gave a way for the individuals to challenge the law made by state on the ground of fairness and unreasonableness even from the jail premises. Moreover, it was also laid down that a prisoner remains a person inside the four walls of a jail. Justice Douglas Struck a humanistic note, when he said in a leading case\(^3\) that —

> "Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process."

So, in America, the court started giving relief to the inmates as constitutional protections; one of the major concepts which has come out is that of prisoners’ physical protection. This right has been extended to cover all cases of cruel and unusual punishments. In Louisiana Francis\(^5\) case, the four judges of the majority laid down that the Fourteenth Amendment would prohibit, by its due process clause the execution by a state in a cruel manner. Similar guidelines were given in the wolf case\(^6\) and in the Hetto case\(^7\) also.

The impact of these American decisions along with certain declarations for the protections of the individuals by the United Nations Organization can be seen on the Indian Supreme Court. In 1978, the Supreme Court of India was ultimately convinced in the Maneka Gandhi\(^8\) case that ‘the procedure established by law’ in Article 21 includes a fair and

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\(^1\) Powell v. Alabama, 287 US 545  
\(^2\) Gideon v. Wain Wright, 372 US 335.  
\(^4\) Id, at 827  
\(^6\) Wolf v. Colored, 338 US 25 (1949)  
\(^8\) Maneka Gandhi v. Union of India, AIR 1978 SC 597.
reasonable procedure and not a mere semblance of procedure or a mere piece of legislation enacted by state prescribing any sort of procedure for the deprivation of life or personal liberty of the subjects. That is to say, the Supreme Court accepted after a long period of 28 years the argument that the 'law' as contained in Article 21 of the Indian Constitution denotes a fair and reasonable law which was raised in the Gopalan case.

However, one of the major defects in the Indian Criminal System is that it has given unfettered powers to the police and prison authorities in certain matters. This power has been generally misused by the authorities to oppress the inmates. A number of shocking incidents like Bhagalpur incident of blindings, Prem Chand's incidence of physical assault and under trial 'death' incidents in the jail, has been reported.

In the latest report of the Amnesty – International, it is stated that in at least hundred countries the 'rule of law' is seldom followed and that the torture and ill-treatment of prisoners is so widespread that it deserves more than a passing reference. India has also been placed among these countries where police brutality is common.

The Supreme Court of India has tried and is still trying to provide the minimum physical protection to the inmates. Article 21 as read after the

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9 Id, at 660
11 Sunil Batra (II) v. Delhi Administration, AIR 1980 SC 1579
12 The Tribune, 'Tortured Prisoners', April 3, 1984
Maneka Gandhi case\textsuperscript{13} has tested the procedure as well as law prescribing that procedure against the principles of natural justice.

(i) Electric Surveillance

In the \textit{D. B. M. Patnaik}\textsuperscript{14} case, a number of Naxalites prisoners raised the contention that the living wire mechanism outside the jail offends their right to liberty as enshrined in Article 21, as it creates a sense of intimidation in them, hence amounts to cruel and unusual restriction on their right contained in Article 21. The argument raised on behalf of the appellant was that it is unconstitutional to electrify the outer walls of jail because "a prisoner attempting to escape is, by the use of that mechanism, virtually subjected to a death penalty. On the other hand, the maximum punishment under Section 224 of the Indian Penal Code for that offence is two years imprisonment."\textsuperscript{15} It was further argued that if the court allowed and approved such inhuman devices one day the prison will become the cremation grounds.

The Supreme Court after considering the concept of the physical protection of the prisoners said that the prisoners have no right to run away from the prison. If they try to do some unauthorized act, naturally, they will meet the consequences. So far as electric wire mechanism is concerned, it is justified on the ground that Naxalites had tried to escape from the jail, hence, security mechanism are tightened. However, Supreme Court made an important observation in this case. It stated:

\textsuperscript{13} Supra, note 8; see also \textit{Francis Coralie Mullin v. U.T. Delhi} AIR 1981 SC 746, \textit{Kharak Singh v. State of U.P.}, AIR 1963 SC 1295
\textsuperscript{14} \textit{D.B. M. Patnaik v. State of A.P.}, AIR 1974 SC 2092
\textsuperscript{15} \textit{Id}, at 2094.
“Convicts are not, by mere reason of the conviction, denuded of all fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison—house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to move freely throughout the territory of India or the right to practice “profession”. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the constitution guarantees other freedoms under article 19 and 21.”

(ii) Physical Assault

In the *Sunil Batra* case, the Supreme Court discussed the physical protection rights of the prisoners at greater length. This is an underline case in which a simple handwritten letter, enumerating the grievances of the inmates addressed to one of the judges of the Supreme Court, was ultimately transformed by the Supreme Court in a writ of habeas corpus petition in order to provide the speedy remedy.

In this case one of the major incidence of torture was that one prisoner has developed the tear of anus due to the forced insertion of stick by some prison official. The prisoner’s medical examination further corroborated the fact of his being tortured by warden.

Justice Krishna Iyer after considering the importance of socialization and rehabilitation of the prisoners laid down that any type of the physical infliction apart from assaults and pushing a prisoner into solitary confinement, denial of a necessary amenity, transfer to a distant prison where visits of friends and other relatives become impossible, allotment of the degrading labour, assigning him to a desperate or tough gang will amount to punitive and is an infringement of the personal liberty as

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16 *Id*, at 2094, see also *Supra*, note 11.
17 *Supra*, note 11.
contained in article 21. The procedure prescribed by the law for a deprivation of any type of liberty guaranteed by the fundamental rights must be 'fair and reasonable'.

Such types of acts committed by the prison authorities not only offend the test of reasonableness under Article 19 but are also hit by Article 21.

The Supreme Court speaking on the concept of the writ of *habeas corpus* petition said that it can't be denied on the basis of procedural or other formal technicalities. It laid down that –

The court is always ready to correct injustice but it is no practical proposition to drive every victim to move the court of a writ knowing the actual hurdles and the prison realities. True technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for a habeas corpus, if the basic facts are found; still the awe and distance of courts, the legalities and mystique, keep the institution unapproachable. More realistic is to devise a method taking the healing law to the injured.\(^\text{18}\)

(iii) **Hand Cuffing and Bar Fetters**

In *Prem Shankar Shukla\(^{19}\)* case, the Supreme Court considered the concepts of handcuffing of prisoners. The Punjab Police Manual\(^{20}\) stated

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\(^{18}\) *Supra*, note 11  
\(^{19}\) *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535  
\(^{20}\) *Id*, Para 26, 22.

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that every undertrial who is accused of non-bailable offence punishable with three years prison term shall be routinely hand cuffed; the Supreme Court said that this rule is violative of Articles 14, 19 and 21. The court laid down that only those prisoners should be handcuffed when there is clear and present danger of escaping. This too, must be based upon the clear and unambiguous conduct and nature of the accused established with the help of relevant written record.\textsuperscript{21}

One of the major questions which was involved in this case was that whose subjective satisfaction will be applied to decide the question that whether the prisoner should be handcuffed or not? The Supreme Court held that undoubtedly the matter lies within the decision of the authorities responsible for the custody of prisoner concerned.\textsuperscript{22} There is, however, a room for the supervision of that authority and undoubtedly the courts can exercise that supervisory jurisdiction by laying down that authority should informed the court regarding the handcuffing of the custodian and the reason too.\textsuperscript{23}

The Supreme Court further laid down that the combined effect of Article 21 and 19 along with Article 5 of the Universal Declaration of Human Rights has been that a prisoner cannot be tortured of be degraded to inhuman treatment.

Article 5\textsuperscript{24} provides-

\begin{footnotesize}
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\item \textsuperscript{21} Supra note 19, at 1535-36
\item \textsuperscript{22} Ibid.
\item \textsuperscript{23} Ibid.
\item \textsuperscript{24} Universal Declaration of Human Rights, 1948.
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“No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment”.

Article 10\textsuperscript{25} reads-

“With humanity and with respect for the inherent dignity of the human person.”

The Supreme Court laid down that ‘handcuffing’ is \textit{prima facie} inhuman and, therefore, or harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring to inflict ‘irons’ is to resort to zoological strategies are repugnant to Article 21.\textsuperscript{26}

The court undisputedly admitted the claim of the state that handcuffing is used only to secure that prisoner should not escape from the custody.\textsuperscript{27} It laid down that in order to prevent a prisoner from escaping; the state cannot bind a man’s hand and foot, fetter his limbs with hoops of steel, shuffle him along in the street and stand him for hours in the courts. These acts amount to torture, defile the dignity of a prisoner, vulgarize society and foul the soul of our constitutional culture.\textsuperscript{28}

In the \textit{Sobhraj} Case,\textsuperscript{29} a foreigner under trial prisoner pleaded that the order of the Superintendent of jail putting him in to bar fetters since the date of his detention, in spite of the recommendation that the bar fetters should be removed, is hit by Article21. It was further pleaded that Section 56 of the Prisons Act under which prison authorities has been given

\footnotesize{\textsuperscript{25} International Convention on Civil and Political Rights.  
\textsuperscript{26} \textit{Supra} note 19.  
\textsuperscript{27} \textit{Id.}, at 1541  
\textsuperscript{28} \textit{Id.}, at 1541  
\textsuperscript{29} Charles Sobhraj \textit{v. Suptd. Tihar Jail, New Delhi, AIR 1978 SC 1514.}}
uncontrolled powers to put a person into bar fetters is unconstitutional being hit by Articles 14 and 21.

It was held by the Supreme Court that Section 56 of the Prisons Act is not unconstitutional as it prescribes certain preconditions for its applicability. In the present case these conditions did not exist, hence, this section has no applicability in the present case. The provision of bar fetter is not applied to general cases but to extreme cases when there is no other alternative left to secure the safe custody of a prisoner.

The court also stated that the continued bar fetters for days, reduces a prisoner from human being to a mere animal and amounts to cruel and unusual punishment which is not only prohibited by the Human Rights Declaration but is also hit by Article 21 where any unfair and unreasonable procedures are being condemned.

(iv) Solitary Confinement

The Supreme Court discussed the concepts of solitary confinement and its object vis-à-vis the right of the individuals guaranteed by Article 21 of the Constitution, in the Sunil Batra30 case. The petitioner, who was an accused and was lodged in the Tihar jail, complained that in spite of the fact that his death sentence is subject to confirmation by the High Court and possible appeal to the Supreme Court, he has been put in solitary confinement. It was contended on behalf of the petitioner that Section 30 of the Prisons Act does not empower the prison authorities to put a prisoner into solitary confinement because it, itself amounts to substantial

30 Sunil Batra (I) v. Delhi Administration, AIR 1978 SC 1678
punishment and to award a substantial punishment is the business of the courts of law and not that of the prison officials.

The Supreme Court after considering the matter at a considerable length laid down that Section 30 was never made for inflicting the solitary confinement as punishment. Heavy deprivative measures like solitary confinement results into a complete stripping of the relations of the prisoner with outsiders as well as with inmates. The freedom of talking, mixing, mingling and sharing company with the co-prisoners are included in the broad and wide sweep of the personal liberty as contained in Article 21 of the Indian Constitution. Hence, putting a person into solitary confinement amounts to an infringement of right to life and personal liberty as provided in the part III of the Indian Constitution.31

The Supreme Court further laid down that Section 30 of the Prisons Act cannot be held unconstitutional as it prescribes a procedure which is fair and reasonable, however, solitary confinement is not covered by this provision and this measure should be considered as substantial punishment in the ordinary cases.32

In the Kishore Singh33 case, the Supreme Court through Justice Krishna Iyer and Justice Pathak confirmed its earlier ruling regarding the use of solitary confinement by holding that it offends the spirit of the constitution, if applied without any judicial control. To inflict heavy punishment on prisoners, on flimsy ground like ‘loitering’, behaving insolently and in an uncivilized manner, tearing of his history-ticket and like

31 Id, at 1676.
32 Id, at 1676
incidences without giving the prisoner concerned a reasonable opportunity of being heard, can’t be regarded as ‘fair, just and reasonable’ within the sense of Article 21 of the Indian Constitution. The Supreme Court issued directions to the state that the police and prison officials should be educated regarding the high values of humanity and they should respect the constitution and the human beings.

(v) Death Penalty

In the *Jagmohan Singh* case, it was argued on behalf of the petitioner before the Supreme Court that the death penalty is violative of Article 19 and 21 of the Indian Constitution, because -

(a). The death sentence puts an end to all fundamental rights contained in Article 19. Therefore, the law which prescribes capital punishment is unreasonable and is not in the interest of general public.

(b). The discretion of judges, as to award and not to award capital punishment is not based on any guidelines or standards, is unfettered, unanalyzed and uncontrolled, hence, hit by Article 14 of the Constitution.

(c). Section 302 of the Indian Penal Code is vitiated due to the fact that it left wide discretion to judges to choose between two alternative punishments that is death sentence and life imprisonment, which is an essential legislative function and the judiciary has nothing to do with that.

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34 Ibid.
35 Ibid.
(d). The law does not provide a specific procedure for the trial of the factors and circumstances crucial for making the choice between the capital punishment and imprisonment for life. Since the trial under the criminal procedure code is only regarding the guilt, hence the absence of the ascertaining procedure violates the norms of Article 21 of the Indian Constitution.37

In the Rajendra Prasad38 case, it was again pleaded before the Supreme Court that capital punishment cannot be justified in each and every case of murder under Section 302 of the Indian Penal Code. The intention of the legislature for introducing this punishment was for its restricted application, that is to say, for only those hard and professional criminals who deliberately kill the human beings. It was further contended on behalf of the petitioner that the arbitrary discretion given to the judges for choosing between the two alternative punishments for murder is uncontrolled, unfettered and unanalyzed, hence, offends the test of reasonableness under Article 14 of the Indian Constitution which condemns the arbitrariness.

The Supreme Court, by majority, admitted the contentions of the petitioner and laid down that the capital punishment is cruel and should be retained only for white collar – offenders who are dangerous for the peace of the society and otherwise, to award death penalty in each and every case of murder is unreasonable and does not fulfill the aims of modern criminal justice.39

37 Id, at 948.
38 Rajendra Prasad v. State of U.P., AIR 1979 SC 916
39 Id, at 960
It is submitted that the minority judgment appear to be more justified because of the fact that the essential legislative functions are not to be delegated to the judicial chambers.

In the *Bachan Singh*\(^{40}\) case, the judicial discretion of awarding or not to award the capital punishment under Section 302 of the Indian Penal Code, is unjustified and unreasonable, hence, is hit by Article 19 and 21 of the Indian Constitution more so, there is no utility of the capital punishment in the modern era when there is a strong demand for the reformatory aspect of the punishment.

The Supreme Court upheld the validity of capital punishment by majority. It laid down that the capital punishment was never considered by the legislature as a degrading method used to “defile the dignity of the individuals”, hence, it is not tenable that death penalty for the murder cases under Section 302 of the Indian Penal Code is violative of the basic structure of the Constitution.\(^{41}\)

Justice Bhagwati, however, in his minority judgement said “Section 302 of the Indian Penal Code, in so far as it provides for imposition of the death penalty as an alternative to life imprisonment is *ultra vires* and void as being violative of Article 14 and 21 of the constitution, since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of the death sentence.”\(^{42}\)

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\(^{41}\) *Id*, at 901.

\(^{42}\) *Id*, at 935.
It is submitted that the Supreme Court after initial hesitations and confusions, ultimately tried to curtail the scope of capital punishment and ultimately reached a stage in the Deena case that the capital punishment should be inflicted in the ‘rarest of rare case’.

[B] Right to Fair Procedure

In the Gopalan case, one of the main contentions raised by the petitioner, was that the phrase “procedure established by law” as contained in Article 21 of the Indian Constitution includes a ‘fair and reasonable’ procedure and not a mere semblance of procedures prescribed by the State of the deprivation of life or personal liberty of the individuals. The Supreme Court, perhaps more influenced by peculiar circumstances existing at that time, reject the argument of the appellant who was a ‘detenue’ under the preventive detention laws, held that the ‘law’ means a law made by state and the courts are not competent to enquire into the reasonableness or otherwise of that law.

The Concept of ‘fair and reasonable’ procedure as argued in the Gopalan case was again raised after 28 years in the Maneka Gandhi case. In this case, the petitioner raised contention on the same line of thinking as was raised in the Gopalan case. The Supreme Court gave the wide import to the words ‘personal liberty’ and the ‘procedure established by law’ The main issue which was considered by the Supreme Court in this case was that “Does Article 21 merely require that there must be some semblance of

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43 Deena v. Union of India, AIR 1983 SC 1155
44 Supra note 10.
45 Id, at 28.
46 Supra note 10.
47 Supra note 8.
48 Supra note 10
procedure, however arbitrary and fanciful, prescribed by the law before a person can be deprived of the personal liberty or the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?"\(^{49}\)

The Supreme Court laid down that the phrase ‘procedure established by law’ speaks of fair, just and reasonable procedure and not merely a semblance, arbitrary of fanciful procedure and more so, the mere prescription of some kind of procedure is not enough to comply with the mandate of Article 21.\(^ {50}\) It is further laid down by the court that the principles of ‘natural justice’ are included in the ‘fair and just’ procedure which is implied in the broad sweep and content of Article 21 of the Indian Constitution.

The wide interpretation given by Supreme Court to the concept of personal liberty and the procedure established by law ultimately provided a sound basis for pleading in the courts against the arbitrary and fanciful actions of the state.

(i) Right to Bail

In the *Babu Singh*\(^ {51}\) case, it was argued before the Supreme Court that the refusal to grant bail without any reason and in the circumstances where all the five male members of the appellant’s family are in jail, amount to unreasonable and against the canons of the natural justice. The Supreme Court after considering the whole matter, granted bail to the appellant upon certain condition and laid down that the rejection of bail in these circumstances amount to unreasonable deprivation of the liberty of the individuals, as their appeal to be not rejected when the procedure followed

\(^{49}\) *Id*, at 676-77.

\(^{50}\) *Id*, at 660.

by the state is not justified and there are not grounds why the appellant should not be granted bail.

Undoubtedly, granting or withholding the permission to grant bail is purely discretionary. This discretion, however, is not unfettered in the sense that it is judicial discretion and it is supposed to be exercised on certain justified principles. The concept of judicial discretion was beautifully stated by Benjamin Cardozo-

The judge, even when he is free, is still not wholly free. He is not innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from justified principles. He is not yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life, wide enough in all conscience is the field of discretion that remains.\(^\text{52}\)

In the present era, it is submitted that the concept of human rights has influenced all spheres and perhaps the bail too. The bail should be granted to the persons when there is no reasonable apprehension regarding the accused that he will run away and will avoid the appearance before the court. The ultimate aim of the penal statutes is to save the society from the assaults of the accused as well as to make him a good citizen, capable of living in the law abiding society. Bail can be very useful tool for socializing an inmate. Moreover, the bail applicant shall be able to prepare his defence more efficiently than one who remains in jail custody. This not only promotes the social and public justice but also avoids the considerable public expenses in

\(^{\text{52}}\text{Id, at 781. Referred by Justice Krishna Iyer.}\)
keeping the under trial in custody, where no danger or disturbance or disappearance on the face of the record.

The court in the Babu Singh\textsuperscript{53} case, stated following guidelines which may be considered while granting or refusing the bail:

(1) Whether the granting of bail shall defeat the ends of justice.
(2) The past conduct of man and the fact that the bail applicant is habitual offender or not other social circumstances.
(3) The bail should not be denied if one of the court has found the accused innocent and the other party has appealed.
(4) The safety of the accused and period of time which he has spent in jail vis-à-vis the maximum imprisonment for which he can be sentenced, if guilt is proved, should be given due consideration.\textsuperscript{54}

(ii) Right to be Represented in Court

In the Hoskot\textsuperscript{55} case, the appellant was convicted for the offences of attempting to issue counterfeit University degree. The appellant was Reader, holding a Ph.D. degree in science. The Sessions court in this case, took a very lenient view while trying the appellant and sentenced him to simple imprisonment till the rising of the court. The state appealed to the High Court. The High Court, after considering the appeal and the fact that the convict was a responsible person of society, enhanced the punishment to 3 year imprisonment. The petitioner filed special leave petition in the Supreme Court after 4 years and at that time he had undergone his full term

\textsuperscript{53} Supra note 55.
\textsuperscript{54} Id. at 778-79
of imprisonment. The reason given by the petitioner for delay was that he was given the copy of the judgment only after 4 years. The Supreme Court although dismissed the special leave petition because of the settled practice of not interfering with the concurrent findings of the two lower courts. The court however, laid down that any practice which restricts or unable a person to exercise his right to appeal amounts to unfair and is against the principles of natural justice and hence, is hit by article 21. The court enumerated two ingredients of the fair procedure:

1. That the convict should be provided a copy of judgment within a reasonable period so that he may exercise his right to appeal.
2. That the free legal aid should be provided to the person concerned if he somehow, is not able to arrange the same owing to his disableness or poverty.56

In the S. Bhowmick case57, the Supreme Court again discussed the concept of legal aid and fair procedure. The Supreme Court laid down that the right to ‘free legal service’ is an essential ingredient of fair and reasonable procedure as implicit in the right of personal liberty contained in Article 21 of the Indian Constitution. The obligation of the State to provide for ‘free legal service’ to a person can not be done away with by saying that it is unable to provide the same due to financial and administrative reasons. It is also the duty of the court to see and inform the accused that he has a right to legal service, even if he does not ask for the same.58

56 Id, at 1549.
(iii) **Right to Speedy Trial**

The concept of fair procedure also includes a reasonable speedy trial. The system of criminal administration of justice is a bit more technical; hence, delay is caused in deciding the cases. The reasons which can be attributed to the delay are, firstly the incompetent judicial staff, secondly inefficient police system and thirdly, the technical procedure followed in the courts.

In the *Hussainara Khattoon*\(^59\) case, a number of under trials filed a petition for the writ of habeas corpus in the Supreme Court, who was in the jails of Bihar for many years waiting for their trial. Some of these under trials have spent such time in jail, for which they can be sentenced, if guilt is proved against them. The Supreme Court laid down that the right to a reasonable speedy trial was a necessary ingredient of the right contained in Article 21 of the Indian Constitution. Speedy trial is considered as the essence of criminal justice. In America, the concept of the 'speedy trial' has been expressly stipulated in the Sixth Amendment, which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial.

Justice Bhagwati\(^60\) also stated the concept in following words –

> Although, unlike the American Constitution, speedy trial is not specifically enumerated as a fundamental right, however, it is implicit in the broad sweep and content of Article 21 as interpreted in the Maneka Gandhi case.

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\(^{59}\) *Hussainara Khattoon v. Home Secretary, Bihar*, AIR 1979 SC 1360.

\(^{60}\) *Supra* note 55.
The Court held that the procedure which does not ensure a reasonable speedy trial can not be regarded as a 'fair and reasonable procedure'.

The Supreme Court further laid down that the under trial prisoners who remained in jail without trial for period longer than the maximum term for which they could have been sentenced, if convicted, their continued detention was illegal and is a violation of their fundamental right contained in Article 21 of the Indian Constitution. The Court further approved the concept of free legal aid service to indigent persons in this case.

The concept of speedy trial was once again highlighted in the Sunil Batra case, when the Supreme Court considered a simple hand written letter enumerating the grievances of the inmates of Tihar Jail, as a petition for the writ of habeas corpus and relief was provided ignoring the procedural formalities.

The Supreme Court in this case delivered a historical judgment by laying down that the justice cannot be denied simple because of the procedural hurdles. It is the duty of the Courts to take the cognizance of the information received by them from any reasonable source regarding the tortures and tyrannies committed on the individuals and to provide relief to them as soon as possible. The ultimate aim of law is to provide justice and the procedure is laid down to seek justice smoothly. The relief cannot be denied to the inmates when it appear that there are gross incidences of torture and violence because of the technicalities of the procedure, otherwise, the real purpose of law will be frustrated. The Supreme Court

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61 Id.
62 Supra note 11; see also Vakil Prasad Singh v. State of Bihar, AIR 2009 SC 1822.
63 Id, at 1595.
again triggered off its machinery to protect a prisoner in Tihar Jail on the basis of a telegram addressed to one of the Supreme Court in the Prem Shankar Shukla case relief was provided to the inmate.

Similarly in the Kishore Singh case Supreme Court once again converted a telegram into a petition for the writ of habeas corpus to provide the quick remedy to the inmate who was illegally bar fettered.

The Madras High Court following the judgment in the Hussainara Khatoon case delivered a far reaching judgment in the Jagan Nath Naidu case. In this case Justice S. Ratnavel Pandian directed all magistrates in the State to quash investigation into criminal cases where the police had kept First Information Reports pending and not bothered to frame charge sheets within six months from arrest. The Court also directed that all accused in such cases should be immediately acquitted and all proceedings against them should be immediately stopped. The court, however, restricted the applicability of this order to only those cases in which the police had not the specific permission from the concerned magistrate to continue the investigation beyond six months.

(iv) Right of under trials and ‘Detenues’ for Separate Treatment

The under trials and ‘preventive detenues’ require a separate treatment because no guilt has been proved against the latter. The preventive detenues are simply kept in jail as a preventive measure which is not by way

64 Supra note 19.
65 Supra note 33.
66 Supra note 63.
of punishment. But the system of prisons particularly in our country has not been able to achieve its purposes for which it was established. Generally the under-trials as well as detenues are treated like convicts and kept with them. As a book\textsuperscript{68} stated:

One of the most horrendous aspect of jail sentence is the fact that not only are the young housed with the older offenders, but those awaiting trial share the same quarters as convicted inmates. The latter individuals have little to lose in seeking sexual gratification through assault, for they have to serve their time any way.... As matter now stand, sex is unquestionable the most pertinent issue to the inmate life behind bars .... There is a great need to utilize the furlough system in corrections. Men with good record showing good behaviour should be released for weekends at home with their families and relatives.\textsuperscript{69}

So, there is a need for providing special status of the under trials and detenues. In the \textit{Sunil Batra}\textsuperscript{70} case, the Supreme Court discussed the problems of the prisoners in wide prospective Justice Krishna Iyer condemned the practice of keeping under trials and detenues with convicts and reacted against this practice in the following words:

The under trials who are presumable innocent until convicted, are by being sent to jail, by contamination made criminals – a custodial perversity which violates the test of reasonableness in Article 19 and of fairness in Article 21. How cruel would it be if one want to go to a hospital for a check up and by being kept along with contagious cases came home with a new disease! We sound the tocsin that the prison reform is a constitutional compulsion and its neglect may lead to drastic court actions.\textsuperscript{71}

(v) \textbf{Right to Compensation}

\textsuperscript{69} \textit{Id}, at 1604.
\textsuperscript{70} \textit{Supra note} 11.
\textsuperscript{71} \textit{Supra note} 10.
If a person is being deprived of his personal liberty by unfair or illegal procedure consequences of such detention will enable him to get the compensation from the court against the negligence of the state. The right to get compensation against his illegal and unfair deprivation of liberty has been recently discussed in the *Rudal Sah*[^72] case. In this case the petitioner was acquitted by a criminal court of Muzaffarpur on June, 03, 1968, continued to be in jail for 14 long years till he was finally released on October 16, 1982. He petitioned in the Supreme Court against his illegal detention. Generally, the matter would have ended there because the accepted judicial remedy against illegal detention is release from the custody. But in this case, the petitioner asked the court to grant compensation for this illegal detention, medical treatment and rehabilitation.

Delivering the historical judgment in this case, the Supreme Court once again contributed to the human rights campaign, granting monetary compensation to an under privileged citizen against the gross negligence and unjustified act of the state. In this case, the Supreme Court not only rejected the plea of the state for (act of the state) not to be held liable but also laid down that the above defence is no more good when the state is engaged in multifarious activities and the doctrine that was laid down in the *Kasturi Lal*[^73] case, is no more a good law in modern times.[^74]

It is the general trend of the courts to not to grant monetary compensation and other damages like medical treatment and rehabilitation to the victims who were detained illegally due to negligence of the State, by

[^74]: Dr. N.R. Madhav Menon SCs Breakthrough Judgment, the Hindustan Times, November 10, 1983
writs but in this case the Supreme Court has cost off that dictum by granting monetary compensation to victim.

This case opened the gates of the High Courts and the Supreme court for claiming the monetary compensation through writs. The Supreme Court gave reasons in the support of its decision in this case in the following manner:

Article 21 which guarantees the right to life and personal liberty will be denuded of its significant content if the powers of the Supreme Court were limited to the passing orders of release from illegal detention. One of the telling ways in which the violation of that right can be prevented and due compliance with the mandate of Article 21 be secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to the fragrant infringements of fundamental rights can’t be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful act of instrumentalities which act in the name of public interest and which present for their protection for the powers of the state as shield.

Respect for the individuals’ rights is the true bastion of democracy. Therefore, the State must repair the damage done by its officer to the petitioner’s rights. The judiciary has not let its ink dry over the case and a plethora of cases thereafter followed in which Court directed to the State to pay compensation to the victims of custodial death, illegal arrest torture, unreasonable hand-cuffing etc... So whenever any case of custodial violence has been brought before the Court, it has always taken a serious note of it and given various directions for streamlining the police. In addition to it the Courts have resorted to the methodology of compensating the individual.

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75 Id.
Most of the democratic legal systems have laws regarding the preventive detention. Article 21 of the Indian Constitution, Fifth Amendment of the USA Constitution, Article 31 of the Japanese Constitution and Article 8 of the German Democratic Republic, all provide for the protection against the arbitrary deprivation of the liberty of the individuals.

The Drafting Committee after critically examining the provision not only substituted the expression ‘except according to procedure established by law’ for the words ‘due process of law’ but also qualified the word ‘liberty’ with personal for the reason that former would be more ‘specific’ and perhaps more definite and certain than the vague and elastic phrase as ‘due process of law’. There was great controversy over the drafting of this valuable provision and supporters of ‘due process’ perhaps liked it to preserve this clause for its procedural safeguards, primarily against the executive action.

It may be submitted that in spite of a lot of controversy, Article 21 and Article 22 that finally emerged from the Constituent Assembly left the legislature virtually supreme in respect of the individual’s right to life and personal liberty, because it was influenced by the abnormal conditions prevailing in the country at that movement. However, the Supreme Court of India has beautifully reconciled the concept of liberty with preventive detention in order to meet the changing needs of the society.

(i) Preventive Detention
The aim and object of the ‘preventive detention’ is to restrict a person from doing certain act which he may otherwise commit. The weapon of preventive detention is usually applied by the state as a precautionary measure in order to establish peace in the society. However, the ‘preventive detention’ differs from ‘punitive detention’ as its purpose is not to punish a person but to prevent him from doing an act likely to be committed by him. The execution of the preventive detention laws is generally coupled with the wide powers to the executive which need not has to wait for the actual commission of an offence, nor any charge need be made, if there is reasonable apprehension or doubt that the person is likely to commit an act which otherwise he is not supposed to commit and the act is prejudicial to certain objects also, which the legislation providing for such detention had in view, he may be detained. So ‘preventive detention’ means detention without any trial by court.

Though the measure of preventive detention is against the canons of criminal jurisprudence, yet the executive also can not afford to sit with folded hands and watch the explosion of a bomb disturbing the peace of the society.

The framers of Indian constitution were well versed with the concept of ‘preventive detention’. The object which they had in mind at that time was to curb the communal riots and subversive movements after the partition of British India.

There are a number of provincial and other Statutes passed by different states for the preventive detention. The make of constitution have
empowered the parliament and state legislatures\textsuperscript{77} to legislate on the preventive detention. Parliament is also empowered to use the preventive detention measures for certain reasons connected with the defence, foreign affairs or the security of the nation.\textsuperscript{78}

The first and important ground for preventive detention is the defence of India or every part thereof including the preparation for defence and all such acts as may be conducive in time of war to its prosecution and after its termination of effective demobilization.

Another important ground for preventive detention is in matters of 'foreign affair'. The preventive detention power regarding the 'foreign affair' provides that the foreign affairs will include all matters which bring the union into relation with any foreign country.

'Security of India' is also one of the major grounds for preventive detention laws. This power is only to be exercised when security of India as a whole is threatened and not the security of any particular state. 'Security' means the condition of being protected from not exposed to danger, safety or apprehension.\textsuperscript{79}

(ii) Orders of Detention

The general trend of the detaining authorities have been that it uses the general form of order of detention without disclosing the ulterior motive. Once it has complied with the procedural aspect of law regarding the preventive detention orders, the courts generally do not interfere in the

\textsuperscript{77} The Indian Constitution, VII Schedule entry 9 list III.
\textsuperscript{78} \textit{Ibid}, entry 9 list I.
\textsuperscript{79} \textit{Ibid}.
detention. The courts cannot declare the law unconstitutional merely on the ground that the order of detention in each case has been delegated to the subjective satisfaction of the executive.\textsuperscript{80} No doubt that due to the factors mentioned above it has been a very tedious job for the detenues to establish the malafides on behalf of the authorities. But in a series of cases, the malafides has been proved.

In the \textit{Puskhar}\textsuperscript{81} case, it was held by the Supreme Court that the constitutional requirement, that the grounds must not be vague is to be strictly complied with. Even if one of the grounds among several grounds mentioned in the detention order is vague, then the detention is not in accordance with the procedure established by law and is therefore, illegal.\textsuperscript{82}

In the \textit{Magan Gope}\textsuperscript{83} case, the petitioner was detained on the ground that while engaged in the act of smuggling on a particular day, he, along with his associates attacked a party of home-guards at about 7 p.m. The court quashed the order holding the matter to be relevant to "law and order" and not to "public order".

(iii) Recent Judicial Trends and Prisoners

1. Emergency and Preventive Detention

In 1975, the President of India declared a grave emergency and a number of fundamental rights as contained in Articles 14, 21 and 22 were also suspended. A large number of petitioners filed the petition for the writ of habeas corpus in the various High Courts.

\textsuperscript{80} \textit{Rameshwar v. D.M.A.}, AIR 1964 SC 334.
\textsuperscript{81} \textit{Pushkar Mukherjee v. State of West Bengal}, AIR 1970 SC 852.
\textsuperscript{82} \textit{Id.}, at 859.
\textsuperscript{83} \textit{Magan Gope v. State of West Bengal}, AIR 1975 SC 953.
In the *S. Shukla*\(^8^4\) case the state raised a preliminary objection to the maintainability on the ground that in view of the Presidential order no person can file petition for the writ of habeas corpus as their fundamental rights has been suspended. The High Court however, rejected the preliminary objection for one reason or another.

It was contended by the prisoners who were detained preventively, before the Supreme Court that article 21 is not sole repository of right to life and personal liberty. It was argued that personal liberty is not a conglomeration of positive rights but is merely a negative concept denoting an area of free action and does not confer any right and hence outside the scope of article 359(1).

The Supreme Court in its majority judgment rejected the contentions and held that Article 21 is sole repository of right to life and personal liberty. However, Justice H.R. Khanna, in his minority opinion laid down that Article 21 is not the sole repository of the right to life and personal liberty. Even in the absence of Article 21 in the constitution, the state has got no power to deprive a person of his right to life and personal liberty without the authority of law. That is the basic assumption of the rule of law in every civilized society.\(^8^5\)

2. **Practice of Keeping Detenues and under trials with Convicts**

In the *Sunil Batra*\(^8^6\) case, it was laid down by the Supreme Court that the practice of keeping under trials and prisoners with convicts in jail not

\(^{84}\) *A.D.M. Jabalpur v.S. Shukla* AIR 1176 SC 1207.

\(^{85}\) *Id*, at 1252-53.

\(^{86}\) *Supra note* 11.
only offends the test of reasonableness in Article 19 but is also hit by the test of ‘just and fair’ of Article 21.

The prisoners and under trials are kept in jail against the canons of criminal jurisprudence as the guilt is not proved against them. Because they are detained as a preventive measure and hence, enjoyed a special status as compare to convicts.

3. Law and Preventive Detention

In the Srilal Shaw\textsuperscript{87} case, the petitioner was issued order of detention under Maintenance of Internal Security Act, 1975, for alleged unlawful possession of some railway property. It was argued unlawful possession of some railway property. It was argued on behalf of the petitioner that since he can be easily prosecuted under the ordinary penal law, there was no need of the preventive detention. The Supreme Court upheld the contention of the appellant and laid down that the detention was illegal. It was observed further, by the Supreme Court that when there is no apparent reason that why the executive has chosen a special course of action in the form of preventive detention against the normal criminal procedure, thus the prisoner is certainly entitled to sympathy of the court.\textsuperscript{88}

4. Right to be represented by Counsel

In the Balchand Chorasia\textsuperscript{89} case, the government decline to consider the representation of the detenue filed by his counsel on the ground that it was not filed by the prisoner, himself. The Supreme Court after considering the

\textsuperscript{87} Srilal Shaw \textit{v.} State of West Bengal, AIR 1975 SC 393.
\textsuperscript{88} \textit{Id}, at 394.
\textsuperscript{89} Balchand Chorasia \textit{v.} Union of India, AIR 1978 SC 297.
matter in wider perspective and applying the principle of natural justice held that the lower court was wrong in construing that the representation was not made by the detenue himself. The court further observed that in matters where the liberty of the individual is concerned and a highly cherished right is involved, the representation should be construed liberally and not technically so as to frustrate or, defeat the concept of liberty which is guaranteed by Article 21 of the constitution. As the representation was not considered by the government and the right of the detenue to be represented by the counsel, hence, the order of detention is vitiated and the detenue is entitled to be released.

In *Nand Lal* case, the order of detention passed by the detaining authorities was challenged on the ground that the procedure was unfavorable to the prisoners. The procedure adopted by the Advisory Board in allowing legal assistance to the state but denying such legal assistance to the prisoner was both arbitrary, unreasonable and against the principles of ‘fair trial’ hence, is hit by Articles 14 and 21 of the Indian Constitution.

**[D] Political, Social and Cultural Rights**

By the progress of time as the rights of prisoners related with physical protection were recognized, then with the feeling that prisoner is not only creature of flesh and blood but being a complete human being he has full fledged thoughts about his political system and he has contact with the society as well as cultures of that society, a new trend of thinking came in the mindset of Indian Judiciary and the journey which was started by the

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90 *Id.*, at 297-98.
93 *Id.*, at 2043-44
judiciary under the name of judicial activism is being continued by it in giving the recognition of those rights of prisoners also which were related with Political, Social and Cultural side of one's life. And these responses of judiciary may be dealt under these headings.

(i) **Political Rights of Prisoners**

Romans like Plato not only separated state and individual but also recognized that each has definite rights and duties. In Indian Constitution also embodies a similar type of philosophy by guarantying certain fundamental rights in Part III of the Constitution. Fundamental rights are generally termed as cherished rights and may be pleaded as a cause of action and right to remedy for the infringement of a fundamental right is fundamental in itself.

The right to life and personal liberty as envisaged in Article 21 of the Indian Constitution is most fundamental. It states –

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

The expression “life” and “personal liberty” as used in Article 21 are of wide import. The Supreme Court in the *Kharak Singh* case observed that the ‘right to life’ does not mean the mere animal existence but also right to live with full possession of his organs – his arms, legs etc. Article 21 of the Indian Constitution laid down that a person can be deprived of his life or personal liberty only under a law passed by the competent authority for the

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96 *Id*, at 1295-96
deprivation of either or both and laying down a specific procedure for such deprivation. It means that the individuals can be detained preventively or punitively by a law passed by competent legislature. But a person who has been deprived of his personal liberty by a valid law either punitively or preventively still enjoys right to life as well as right to freedom (except freedom of movement). No doubt, the traditional theory was that once a person was deprived of his liberty under proper authority, he was not entitled to enjoy any other rights as only free men were capable of enjoying, except those, if any, which allowed by the laws regulating the prisoners.

But in more modern and civilized societies, this concept has changed a lot. As Universal Declaration of Human Rights says-

All human beings are .... equal in dignity. Everyone has the right to recognition everywhere as a person before the law.

Now after the adoption of these types of resolutions on human rights, a man does not cease to be human being even behind the prison bars, and is therefore, entitled to those minimum rights which are inseparable from human dignity. In other words the International Charters have laid down emphasis on the proposition that there is a basic level on which all human beings must be treated by the law as equal, irrespective of other conditions and must, therefore, on no account be degraded below the standard of human dignity.

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97 Article 1.
98 Article 6.
Under Article 19, six freedoms are guaranteed to the citizens of India. Prisoners are also citizens, as jail custody does not restrict their right of citizenship. Hence, these freedoms are equally available to prisoners. But 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 prisoner because of his incarnation, but other freedoms like ‘freedom to speech and expression’ and ‘freedom to become a member of an association’ are available to the prisoner.

Keeping in view the above line of thinking, let us examine the scope of certain political freedoms of the prisoners like ‘freedom of expression’, ‘freedom of association’ and ‘freedom of participate in the general elections’ in the constitution practice.

1. Freedom of Expression

Freedom of thought and expression is one of the important political freedoms generally granted to the subjects in democratic countries. Indian constitution also speaks of this freedom vide Article 19(1)(a). However, the freedom is not absolute in the sense that clause (2) of Article 19 enumerates certain grounds for permissible restrictions on these freedoms. Scope of this freedom and its availability to the prisoners for the first time was discussed by the Supreme Court in *P. Pandurang Sanzgiri*\(^{100}\) case. In this case the petitioner was detained by the Government of Maharashtra under Rule 30(1)(b) of the Defence of India rules, 1962, in the Bombay District Prison in order to prevent him from acting in a manner prejudicial to the defence of India, public safety and maintenance of public order. He wrote a book in

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Marathi under the title “Anucha Anatarangaat” (inside the atom) with the permission of the government. The learned judges of the High Court who had gone through the table of contents of the book, expressed their opinion on the book thus—

We are satisfied that the manuscript book deals with the theory of elementary particles in an objective way. The manuscript does not purport to be a research work but it purports to be a book written with a view to educate the people and disseminate knowledge regarding quantum theory.\(^{101}\)

The book is, therefore, purely of scientific interest and it can not possibly cause any prejudice to the defence of India, public safety and maintenance of public order. In September 1964, the prisoner applied to the government of Maharastra seeking permission to send the manuscript out of the jail for publication but the government rejected the request. He again applied to the superintendent of the jail for permission to send the manuscript out and that too was rejected. There after, he filed a petition under Article 226 of the Constitution in the High Court of Maharastra for directing the state to permit him to send out the manuscript of the book written by him for its publication. The state in its counter affidavit did not alleged that the publication of this book would be prejudicial to the objects of the Defence of India Act, but averred that the government was not required by the law to permit the prisoner to publish books while in detention. The High Court of Bombay 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 prisoner to carry on his activities within the conditions governing his detention. It further laid down that there were no rules prohibiting a prisoner for sending a book outside the jail with a view to get it

\(^{101}\) Id, at 425.
published. The High Court directed the state to send the manuscript of the book to his wife for publication.

The state appealed against the judgment of the High Court and raised contentions before the Supreme Court that when a person is detained, he loses his freedom; he is no longer a free man and therefore, he can exercise only, such privileges as are conferred on him by the order of detention. In support of this argument the *Gopalan* case was referred. The Supreme Court dismissed the appeal of the state and upheld the judgment of the Bombay High Court, ultimately deciding in favour of the prisoner.

This case shows a good example of progressive interpretation and deviation from the *Gopalan* case where the Supreme Court was not interested in discussing the concept of human rights.

In the *Maneka Gandhi* case, the Supreme Court considered the right of speech and expression of greater strength. The main issue which was involved in this case was whether a journalist has right to go abroad under Article 19(1) (a) and Article 21? Whether the procedure by which the passport of the petitioner was impounded without giving a reasonable opportunity of being heard can be called a ‘fair procedure”?104

The Supreme Court laid down that the procedure as contemplated in Article 21 should not be a mere semblance of procedure but should be ‘just, fair and reasonable’.105

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103 *Supra note 1.*
104 *Id*, at 611.
105 *Id*, at 610-611

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So any procedure which permits the impairment of the individual’s rights without giving him a reasonable opportunity of being heard should be condemned as ‘unfair and unreasonable’. Every activity which is ancillary to and is essential for, the free exercise of a fundamental right is considered to be a part of that fundamental right.\footnote{Id, at 600.}

2. **Prisoners and Press Interviews**

A prisoner also enjoys a right to be interviewed by the press if the press is also willing to take his interview. In the *Prabha Dutt*\footnote{Smt. Prabha Dutt v. Union of India, AIR 1982 SC 6.} case, the petitioner, a journalist wants to take the interview of two professional criminals, *Ranga* and *Billa*. The two aforesaid prisoners were sentenced to death under Section 301 of the Indian Penal Code and the petitions filled by them to the President of India for pardon of the sentence were rejected. The prisoners were willing to be interviewed by the press which wants to interview them. It was held by the Supreme Court that rule 549(4) of the Prison Manual which provides that every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisers as the Superintendent thinks fit. Journalist or newspaper — man is not expressly referred in clause (4) but that does not mean that they can always and without good reasons, be denied the opportunity to interview a condemned prisoner. If in any case, there are weighty reasons for doing so, which will always be recorded in writing, the interview may be refused. But, however in the present case no such consideration has been passed upon the court and the court granted...
permission to take interview to the petitioner and termed them as ‘friends of society’.108

Similarly, prisoners also enjoy the freedom of communication by mail. However, it is a different issue that mails are generally censored by the prison authorities in public interest.

3. **Death Sentence and Freedom of Expression**

The Supreme Court in the famous Ranga–Billa, double murder case, rejected the petitions of the criminals in which they prayed for the suspension of death sentence for a considerable period as they were willing to write certain experiences of jail life. The case would have gone otherwise had they not been professional criminals. A death sentenced prisoner who is willing to write something which is of great scientific, historical or educational value may be given enough opportunity and time to complete his work by suspending the execution of death penalty for a reasonable period.

4. **Freedom of Association**

The most natural privilege of men, next to the right of acting for himself is that of combining this exertion with those of his fellow creatures and of acting in common with them.

In the *Evan*109 case, the Supreme Court of United States of America held that it is the right of the individuals to pick-up his own associates, so as

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108 *Id.*, at 7.
109 *Evan v. Newton*, 151 Ed. 2d 510
to express his preferences and dislikes, and to fashion his private life by joining such groups as he chooses.

In a democratic state where government rests on public opinion, people's faith and consent is not only supposed to respect the liberty of the individuals but is forced by its very nature to recognize the liberty of the individuals to associate with one another, provided that the purpose of such association is compatible with its own purpose and well being as the general and comprehensive association of all individuals. However, its merely a healthy concession given by the democratic state organization that the individuals are allowed to unite in union and societies in party, professional, cooperative, scientific, technical and cultural organizations.\textsuperscript{110}

Article 19(1) (c) of the Indian Constitution speaks of 'freedom of association'. Prisoners being citizen also enjoy this freedom. No doubt, the State can impose reasonable restrictions on the person behind the bar but still they can become member of any organization, social, cultural or political.

Since prisoners can not move outside the premises of jail hence, it is difficult for them to take part in the business of association. As they enjoy the 'freedom of expression' they can express their personal views regarding the working of the organization from jail. A person's membership of an organization ceases to exist if he has been expelled from such organization but on the other hand, if he has not been expelled, the jail authorities have nothing to do with his membership. More detention in jail either preventively or punitively will not dissolve the membership of a person. But

\textsuperscript{110} Id., at 514.
the practical aspect of this freedom is negligible. The reason behind it is that neither the jail authorities and nor the state are interested to improve the condition of the prisoners and more so. The prisoners themselves are so depressed in the jails that they can not think of it. This right is generally asked by eminent political leaders. Who are detained in jail for some reasons, to convey their message in the meetings of the political organization?

In England, however, a demand of prisoners to form a prisoners' union was not considered by the Home office. It can be said that if prisoners want to form a 'prisoners union' for some good purposed, then the jail authorities as well as the state is not supposed to interfere with their right to form association.

5. Election Rights

In a democratic state like India, freedom to vote is one of the basic freedoms. Every Indian citizen who has attained the age of 18 years enjoys the right to vote. The Universal Declaration stats-

"Everyone has the right to take part in the government of his country, directly or through free chosen representatives and the will of the people shall be the basis of the authority of the government; this will shall exposed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure."111

111 Universal Declaration of Human Rights, Article 21.
The Indian Constitution fully satisfied the need of this requirement of the declaration adopting the concept of ‘one person and one vote’ and adult suffrage.

The ‘right to vote’ as well as the ‘right to fight elections’ are enjoyed by the citizens and the citizenship continues inside the premises of jail also.

The prisoners too have these rights but they can be disqualified under Representation of the People Act, if they have been convicted for certain offences mentioned under the Act. However the prisoners and under trials enjoy both rights unrestricted if they otherwise fulfill the conditions of being a voter and being a candidate for election under the Representation of People Act, only those persons have been disqualified from being elected or from being voter, who have been convicted of certain offence involving moral turpitude.

(ii) Social and Cultural Rights of Prisoners

The prison during the last three centuries or so, has involved to the status of an institution of social control. In today’s versions when death penalty, banishment and life transportation are generally called as inhuman and cruel, the institution of prison is certainly more influencing and correct. It not only carries the bearings of the ideals of the period but is also impregnated with the expediencies of organizational science.

However, one of the major defects in the prison custody is that it provides frustration to the prisoners by shielding and cutting them completely from the outer world. So, in order to change the behavior of the
prisoner, it is not only necessary but compulsory for the state that it should provide the maximum attention to the social and culture norms of a prisoner.

For the purposes of socialization of the prisoners it must be seen that the relations of the prisoner should not be wholly cut off from the outer world. The prison authorities should give due consideration to the maintaining and improving the healthy relations between a prisoner and his family members and friends.

The ultimate purpose of imprisonment is to make a prisoner a good citizen. So, keeping in view this object of imprisonment special attention should be paid from the beginning of a prisoner’s sentence regarding his after – release prospective. More so, the prison authorities should allow the outer agencies to contact with the prisoner which will ultimately be useful for the social rehabilitation of the prisoner concerned.

The adverse effects of the non-socialization were stated by Shri Jawahar Lal Nehru on the Naini prison112 in the following words –

For years and years, many of these ‘lifers’ do not see a child or woman or even animals, They lose touch with the outside world completely and have no human contacts left. They brood and wrap themselves in angry thoughts of fear and revenge, hatred, forget the good of the world, the kindness and joy, and live only wrapped up in the evil, till gradually even hatred loses its edge and life becomes a soul less thing, a machine – like routine…from time to time the prisoner’s body is weighed and measured. But how is one to weigh the mind and spirit which wilt and shut themselves and while this was the terrible atmosphere of fear and oppression; people argue against the death penalty and their arguments

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112 Quoted by Justice Krishna Iyer in the Sunil Batra (II) v.. Delhi Administration, AIR 1980. SC at 1713.
appeal to me greatly. But when I see the long drawn out agony of a life spent in prison, I feel that it is perhaps better to have that penalty rather than to kill a person slowly and by degrees."\textsuperscript{113}

(1) **Right to Meet with Family Members and Friends**

The Supreme Court of India recently considered the aspect of socialization of prisoner. In the *Francis Coralie*\textsuperscript{114} case, the honourable court considered the scope of Article 21 for all the categories of prisoners, viz. prisoner, under trials and convicts. In this case the petition was filed by a British National under Article 32 of the India constitution, raising a question in regard to the right of a prisoner to have meetings and interview with her lawyer and members of her family.

The petitioner was arrested and detained in the Central Jail, Tihar, under an order dated November 23, 1979 under Section 3 of the COFEPOSA Act. She preferred writ of habeas corpus, challenging her detention, the Supreme Court, rejected. The petitioner experienced grave difficulty in having interview with her lawyer and the members of her family. Her daughter aged about 5 years and her sister, who was looking after her daughter were permitted to meet only once in a month. The petitioner also wanted to meet the lawyer regarding a criminal proceeding which was pending against her. The procedure for obtaining the interview was very tedious as is required the prior permission of district magistrate and the lawyer can meet only in the presence of a custom officer. The petitioner was

\textsuperscript{113} Ibid.

\textsuperscript{114} *Francis Coralie Mullin v. U.T. Delhi* AIR 1981 SC 746, see also *Suchitra Srivastava v. Chandigarh Administration*, AIR 2010 SC 235.
thus, substantially denied the facility of interview with her lawyer and 
meetings with her kids except once in a month.

This restriction on interview and meeting was imposed by the prison 
authorities under the prison rules. The principal ground on which the 
constitutional validity of these rules was challenged was that these 
provisions were violative of the Articles 14 and 21 of the Indian Constitution 
in as much as they were arbitrary and unreasonable. It was contended on 
behalf of the petitioner that allowing interview and meetings with the 
members of her family only once in a month was discriminatory and 
unreasonable, particularly when the under trials were granted the facility of 
interview with family and friends twice in a week\textsuperscript{115}, and convicted prisoners 
were permitted to have interviews with their relatives and friends once in a 
week.\textsuperscript{116}

The petitioner further argued that a prisoner was entitled under Article 
22 of the Constitution to consult his lawyer.

After going through a detailed discussion on the scope of Article 21 
and the prison rules, the Supreme Court laid down that the ‘right to life’ 
enshrined in Article 21 Cannot be restricted to mere animal existence. It 
means something more than just physical survival. The right to life includes 
the right to live with human dignity and all that goes along with it, namely, 
the bare necessaries of life such as adequate nutrition, clothing and shelter 
over the head and facilities for reading, writing and expressing oneself in

\textsuperscript{115} Rule 559, Manual for the Superintendence and Management of Jails in Punjab. 
\textsuperscript{116} Ibid, rule 550.
diverse forms, freely moving about and mixing and coming ling with fellow human being.\textsuperscript{117}

The decision of the Supreme Court in this case can be taken as landmark as it not only tried to minimize the adverse impact of imprisonment by socializing a prisoner but also make three categories of the prisoners in order of their treatment in jails.

The right to meet with family members can be easily extended to attend the family functions. Prisoners should be allowed to attend these functions by prior permission from the authorities and after furnishing a reasonable security bond, if otherwise it is not objectionable. No doubt that a prisoner is no more a free man, yet he must, as far as possible and practicable, be allowed to meet the family members because it will ultimately help in the social rehabilitation of the prisoner after release.

\textbf{(2) Right to Religion}

The preamble to the Indian Constitution declared India a ‘secular state’. That is, state is neutral towards any particular religion but it protects the faith of all religious institutions. Religious liberty is essential as well as a healthy sign of a democratic state. Harrington State realized in seventeenth century:

Without liberty of conscience, civil liberty cannot be perfect without civil liberty of conscience can not be perfect. It is impossible to grant freedom of worship without granting the freedom of speech, freedom of the

\textsuperscript{117} Supra note 21.
press and the freedom of assembly. Religious liberty cannot exist without civil liberty and vice-versa.\textsuperscript{118}

Freedom of religion or conscience means and includes the assent of state that each person has the right to observe any particular sect or ‘Dharma’. More so, the state is not interested to intrude into the religious convictions of the inhabitant that, there will be no particular civil privilege or legal limitation on the observance of a particular ‘dharma’.

The United States Supreme Court discussed the religious freedom of the prisoners in the \textit{Cruz}\textsuperscript{119} case. In this case a prisoner alleged in his petition regarding the religious discrimination in the prison. It was contended that while prisoner of the other religious sects were allowed certain facilities whereas the Buddhist prisoners were not; the religious material for other sects was made available to the prisoners whereas the Buddhist prisoners were denied of this facility.

It was laid down by the Supreme Court that the state had violated the first and fourteenth amendments by discriminating against the Buddhist religion through denying the plaintiff a reasonable opportunity of pursuing his faith comparable to the opportunity afforded to fellow prisoners who adhered to conventional religious precepts.\textsuperscript{120}

The Indian Constitution through Article 25(1) speaks of ‘freedom of religion’. It provides –

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} Quoted by Jagdish Swarup, \textit{Human Rights and Fundamental Freedoms}, at 327.
\item \textsuperscript{119} \textit{Cruz} v. \textit{Beto}, 405 US. 319 (1972).
\item \textsuperscript{120} \textit{Id} at 319
\end{itemize}
\end{footnotesize}
Subject to public order morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right, freely to profess, practice and propagate religion.

Prisoners are ‘persons’ and neither they lose their citizenship nor other rights which are not covered and prohibited by the prison rules. They can exercise and profess any faith or religion even behind bars. It is the duty of the prison authorities to respect the religious beliefs of the prisoner. An International Declaration states –

If the institution contains a sufficient number of the prisoners of the same religion, a qualified representative of that religion should be appointed of approved. If the number of prisoners justified it and conditions permit, the arrangement should be made on full time basis. ¹²¹

So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance. ¹²²

It is submitted that least consideration is given to the religious beliefs of the prisoners in India. The practical utility of this right has been not realized by the authorities who administer the prison.

¹²¹ Standard Minimum Rules for the Treatment of Prisoners (1955), Rule 41 (1).
¹²² Id, Rule 42.