CHAPTER-IV

RIGHT TO LIFE AND LIBERTY- EMERGING JUDICIAL TRENDS

A very fascinating development in the Indian Constitutional Jurisprudence is the extended dimensions given to Article 21 by the Supreme Court in the post Maneka1 era. The Supreme Court has asserted that in order to treat as a Fundamental Right it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes in the country entail the recognition of new rights. The law in its eternal youth grows to meet the demands of the society2.

Moreover, it has now become a judicial strategy to read Fundamental Rights along with Directive Principles with a view to define scope and the ambit of the former. Mostly Directive Principles have been used to broaden and to give depth to some Fundamental Rights and to imply some more rights there from for the people over and above what are expressly stated in the Fundamental Rights. The biggest beneficiary of this approach has been Article 21. By reading with Directive principles, the Supreme Court has derived there from a bundle of rights.

Since Maneka Gandhi, Article 21 has proved to be multi-dimensional. This aspect of Article 21 is brought out by the following judicial pronouncements. This extension in the dimensions of Article 21 has been made possible by giving an extended meaning to word 'life' and ‘liberty’ in Article 21. These two words in Article 21 are not to be read narrowly. These are organic terms which are to be construed meaningfully.

1 AIR 1978 SC 597.
2 M.P.Jain, Constitutional Law of India, (2003),p 1309
I Role of Public Interest Litigation in Expansion of Right to Life and Personal Liberty

The Council for Public Interest Law set up by the Ford Foundation in U.S.A. defined the public interest litigation as follows:\(^3\)

Public interest litigation is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary marked place for legal services fail to provide such services to significant segments of the population and to significant interests. Such groups and interest include the poor environmentalists, consumers, racial and ethnic minorities and others.

Public interest litigation is the name given to the right of any member of public, having sufficient interest to maintain an action for judicial redress of public injury arising from the breach of public duty or violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such Constitutional or legal provisions.\(^4\)

Public interest litigation is therefore the new device by which public participation in judicial review of administrative action is being assured. Justice P.N. Bhagwati thinks that it is essentially a co-operative or collaborative effort on the part of the petitioner, the state or the public authority and the Court to secure observance of Constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.\(^5\)

So the philosophy of public interest litigation lies in that where a legal wrong or legal injury is caused to a person or to a determine class of persons by

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\(^4\) S.P. Gupta v. Union of India, AIR 1982 SC 149.

\(^5\) Ibid.
reason of violation of any Constitutional or legal rights of such person or
determinate is burdened with by imposition of any such rules and regulations in
contravention of any Constitutional or legal provision or without the authority
of law and such person or class of determinate person are unable to approach
the Court for relief due to poverty and other disabilities, any member of the
public can maintain an application for an appropriate direction, order or writ in
the High Court under Article 226 of the Constitution and in case of breach of
any Fundamental Right of such person or determinate class of persons, in the
Supreme Court under Article 32 seeking redressal. Prof. U. Baxi distinguished
law professor insisted on using the term social litigation instead of public
interest litigation.

Traditionally, a petition could be filed by a person who has suffered
infraction of his rights and is ‘an aggrieved person. Exception is made in case
of a petition for habeas corpus where a relative or friend could file a petition on
behalf of the person in detention. Peter cane has suggested that standing is only
an issue in private law matters. In public law matters grant of remedy depends
upon considerations of public policy. In public law matters the Courts will hear
and grant the remedy if they are satisfied that the public interest demands that
such remedy be granted.

Public Interest Litigation was originated in U.S.A. where the movement
enjoyed constant upward trend from the period 1960s to 1976, when it reached
its peak. But after 1976 the declining trend set in and the advocates, people,
media and even intellectuals became increasingly Skeptical of the role of
judicial activism in connecting Government abuses by the use of public Interest
litigation devise. The court started limiting the litigation to conventional Anglo
American private law model with regard to the matters of standing class
representation and’ directions’ as relief.

7 U. Baxi, Taking Suffering Seriously: Social Action Litigation in India, D.L.R., Vol. 8 & 9:
8 Peter Cane, Administrative Law, (1986), p. 156.
The British rule bequeathed to India a colonial legal heritage. The Anglo Saxon model of adjudication insisted upon observance of procedural technicalities such as locus standi and adherence to adversarial system of litigation. The result was that the Courts were accessible only to rich and the influential people. The marginalized and disadvantaged groups continued to be exploited and denied basic human rights. The emergency period (1975-1977) further witnessed colonial Nature of the Indian legal system. During emergency state repression and governmental lawlessness was widespread. Thousands of innocent people including political opponents were sent to jails and there was complete deprivation of civil and political rights. The post emergency period provided an occasion for the judges of the Supreme Court to openly disregard the impediments of Anglo Saxon procedure in providing access to justice to the poor. Two judges of the Supreme Court Justice V. R. Krishana Iyer and Justice P.N. Bhagwati recognized the possibility of providing access to justice to the poor and the exploited people by relaxing the rules of standing. In the post emergency period when the political situations had changed, investigative journalism also began to expose glory scenes of governmental lawlessness, repression, custodial violence, drawing attention of lawyers, judges and social activist. Public Interest Litigation emerged as a result of an informal nexus of pro-active judges, media persons and social activist.\(^9\)

Bhagwati J. in *S.P. Gupta v. Union of India*\(^{10}\) allowing petitions of lawyers against a circular of the Ministry of Law and Justice on ground of violation of or threat to the independence of the judiciary, held thus:

Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the

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10. AIR 1982 SC 149.
Constitution or the law and seek enforcement of such public duty and observance of such Constitutional or legal provision.\textsuperscript{11}

Bhagwati, J further observed, it is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the Constitutional objectives.\textsuperscript{12}

Proposition laid down in \textit{S.P. Gupta’s case}\textsuperscript{13} was repeated in \textit{Bandhua Mukti Morcha v. Union of India} \textsuperscript{14} in the specific context of Article 32 by Bhagwati J. where a person or class of persons to whom legal injury caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bonafide can move the Court for relief under Article 32 ... So that the fundamental rights may become meaningful not only for the rich and the well to who have the means to approach the Court but also the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resource unable to seek judicial redress. In exercising this liberal approach, the Court has to act with great deal to caution and circumspection so that its process is not misused for settling old scores or enmity by the petitioner against the respondent.\textsuperscript{15}

Until \textit{Maneka Gandhi v. Union of India}\textsuperscript{16} fundamental rights were viewed merely as imposing negative obligation on the State that if it takes certain action in violation of a fundamental rights such action be struck down by Court. But in \textit{Maneka Gandhi’s case} the Supreme Court for the first time interpreted the right guaranteed by Article 21 as a positive right and after that in

\begin{itemize}
  \item \textsuperscript{11} Ibid. at p. 216 (Para 23).
  \item \textsuperscript{12} Ibid.
  \item \textsuperscript{13} Ibid.
  \item \textsuperscript{14} AIR 1984 SC 802, 813 (Para 11).
  \item \textsuperscript{16} AIR 1978 SC 597.
\end{itemize}
various decisions human rights jurisprudence flowed from the Supreme Court.\(^\text{17}\)

The Supreme Court in *Bandhua Mukti Morcha v. Union of India*\(^\text{18}\) observed that Public Interest Litigation is considered as an instrument which extends legal aid to the poor masses and weaker sections of the society. In a country like India where more than 26 percent of people live below poverty line and 35 percent of the people are illiterate, liberalization of standing helps in protection of rights, particularly right to life under Article 21, of a person or class of person who are unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position. The Supreme Court liberalized rule of locus standi to give relief to under trial prisoners, amelioration of the condition of women in protection homes release and rehabilitation of bonded labour, health protection, environment protection etc.

II Quality of life is inherent in right to life and personal liberty as expounded by the judiciary

a) Living with Human Dignity

A grand step was taken by the Supreme Court of India in expanding the scope of Article 21 does not mean merely animal existence but living with human dignity. The Court has observed in *Francis Coralie v. Administrator, Union Territory of Delhi*\(^\text{19}\) thus:

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\(^{18}\) AIR 1984 SC 802.

\(^{19}\) AIR 1981 SC 746 at 753.
But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expressions of the human self.

Another broad formulation of the theme of life with dignity is to be found in Badhua Mukti Moreha v. Union of India. Characterizing Article 21 as the heart of fundamental rights, the Court gave it an expanded interpretation to live with human dignity, free from exploitation. It includes protection of health and strength of workers, men and women and of the tender age of the children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions of work and maternity relief. These are minimum conditions which must exist in order to enable a person to live with human dignity. No Government can take any action to deprive a person of the enjoyment of these basic rights.

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20 AIR 1992 SC 38.
In Chameli Singh v State of U.P.\textsuperscript{21} the Supreme Court, while dealing with Article 21, has held that the need for a decent and civilized life includes the right to food, water and decent environmental. The Court has observed:\textsuperscript{22}  

In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibits his growth. All human rights are designed to achieve this object. Right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society ...

Right to life under Article 21 not only include right to live with human dignity but also include right to a decent burial or cremation after death of a person.

In Ashray Adhikar Abhiyan v. Union of India,\textsuperscript{23} the Supreme Court impliedly recognized the right of homeless deceased and unclaimed dead bodies to a decent burial or cremation.

In Budhadev Karmaskar (I) v. State of West Bengal\textsuperscript{24} the Supreme Court came to rescue of sex worker and her right to live with dignity. There was brutal murder of a sex worker. It was observed by the Supreme Court that sex workers are also human beings and no one has a right to assault or murder them. A person becomes a prostitute not because she enjoys it but because of poverty. Society must have sympathy towards the sex workers and must not look down upon them. They are also entitled to a life of dignity in view of Article 21 of the Constitution.

\textsuperscript{21} AIR 1996 SC 1051.
\textsuperscript{22} Ibid, at 1053.
\textsuperscript{23} (2002) 2 SCC 27
\textsuperscript{24} 2011 Criminal Law Journal 1684.
Right against cruel inhuman and degrading treatment is the part and parcel of right to dignity which also includes right against mental torture. In a landmark case Selvi vs. State of Karnataka\(^{25}\) it was held by the Supreme Court that narco analysis, polygraph, BEAP tests as methods of interrogation impair subjects decision making capacity which is an affront to human dignity and liberty. Moreover these test results may prompt investigating agencies to inflict mental pain on test subject. It was further held that these impugned tests can not also be permitted on the reasoning that infliction of some pain or suffering is unavoidable in practice of medicine and that law also permits it in the form of punishments which are prescribed for various offences. The Court also relied upon Universal declaration of Human Rights, 1948, Article 5- International Covenant on Civil and Political Rights 1966. Article 7- U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Articles 1 & 16 U.N. Body of Principles for the Protection of All persons under any Form of Detention or Imprisonment 1988- Principles 1,6 and 21- Geneva Convention Relative to the Treatment of Prisoners of War 1949 Article 17-Evidence Act, 1872 Sections 24 to 26. It was further held that these tests intrude upon a person's mental privacy and are therefore impermissible in law. Protection of mental privacy is available to an accused and victim of an offence.

b) Right to Shelter

The Right to shelter was expected as a part of the right to life.\(^{26}\) It is however the Constitutional Bench decision in Olga Tellis v. Union of India\(^{27}\) which has put life and vigour to this requirement, because in that case the right to dwell on pavements or in slums was expected as a part of the right conferred by Article 21. In this case, portraying the plight of nearly half of the population of Bombay city who live on pavements and slums emits filth and squalor, the

\(^{25}\) (2010) SCC 263

\(^{26}\) Francis Coralie v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.

\(^{27}\) AIR 1986 SC 180.
validity of the provisions of Bombay Municipal Corporation Act, which provided for their eviction from their squat shelters without being offered alternative accommodations and without the opportunities of hearing, was challenged as violative of Article 21 of the Constitution. Although they did not contend that they have the right to live on pavements but they contended that they have a right to live, a right which can not be exercised without the means of livelihood. It was contended that they have no option but to flock to big cities like Bombay, which provided the means of bare subsistence. In short, their plea was that the right to life is illusory without a right to the protection of the means by which alone life could be lived. The eviction of pavement and slum dwellers would lead in a vicious circle to the deprivation of their employments, their livelihood and therefore to the right to life. As what Douglas J. in Baksey v. Board of Reagentes\(^2\) has said, ‘the right to work I have assumed was a most precious liberty that a man possess.’ Man has indeed as much right to work as he has to live to be free and to own property. To work means eat and it also means to means of living.

The right to live and the right to work are integrated and interdependent. If a person is deprived of his job as a result of his eviction from slum or a pavement his very right to life is put in jeopardy. The economic compulsions under which these persons are forced to live in slums or on pavements impart to their occupation the character of their fundamental rights. They did not claim fundamental rights to live on pavements, but they claimed right to live, at least to exist and asked whether right to life includes the right to livelihood. The Court replied in affirmative and observed:

The right to life conferred in Article 21 is wide and far reaching. It does not mean merely that life can not be extinguished or taken away as imposition and execution of the death sentence except according to the procedure established by law. This is but one of

\(^2\) (1954) 347 MD 442.
the facet of right to life. An equally important facet of this right is a right to livelihood because no person can live without the means of living i.e. the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life is to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of his effective content and meaningfulness but it would make life impossible to live. That which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life.

In *Ram Prasad v. Chairman Bombay Court Trust* the Court observed that we realize that the problem of hutment dwellers is a human problem and the removal of hutment is bound to cause an untold hardship and misery to the occupants.

In *Shantisar Buiders v. Naravan Khimalal Totane* the Court observed: ‘Basic needs of man have traditionally been accepted to be three viz. food, shelter and clothing. The right to life guaranteed in any civilized society would take within its sweep the right of food, the right to clothing, the right to decent environment and reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.

The Urban Land Ceiling Act in sections 20 and 21 exempt urban land subject to the condition of constructing houses for weaker sections by builders. The Supreme Court has recognized the right to shelter as an inbuilt right to life.

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29  AIR 1989 SC 1306.  
30  AIR 1990 SC 630.
under section 21 and has upheld the validity of exemption and gave directions to effectively implement the scheme.

In several other cases, the Court has read the right to shelter in Article 19(1)(d) and Article 21 to guarantee right to residence and settlement. Protection of life guaranteed by Article 21 encompasses within its ambit the right to shelter to enjoy the meaningful right to life. The right to residence and settlement is regarded as a fundamental right under Article 19(1)(e) and it is a facet of inseparable meaningful right to life under Article 21. Food, shelter and clothing are minimal human rights.

Again in *Chameli Singh v. State of Uttar Pradesh*\(^{31}\) the Supreme Court has emphasized upon the right to shelter and has expounded its own concept of a shelter. The Court has observed:

Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. So as to have easy access to daily avocation, the right to shelter, therefore, does not mean a mere right to a roof over one’s head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live, should be deemed to have been guaranteed as a fundamental right.....

The Court has observed in *U.P. Avas Evam Vikas Parished v. Friends Co. Op. Housing Society*\(^{32}\) that right to shelter is a fundamental right, which

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31 AIR 1996 SC 1051.
springs from the right to residence assured in Article 19(I)(e) and right to life under Article 21 of the Constitution.

Article 25(1) of Universal Declaration of Human Rights, 1948 in which housing has been specifically recognized as one the rights related to living. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, 1966 also recognizes housing as a part of the right to adequate standard of living.

c) **Right to Means of Livelihood**

William Shakespeare in Merchant of Venice says 'you take my life when you take the means whereby I live'.

But in *Sodan Singh v. New Delhi Municipal Committee*\(^{33}\) it was held that right to carry on any trade or business is not included in Article 21. The petitioners, hawkers doing business on the pavements of roads in Delhi, had claimed that their rights were being violated under Article 21. However, the Court has held that *Olga Telli's* case is not applicable in this case.

In *Delhi Development Horticulture Employee’s Union v. Delhi Administration*,\(^{34}\) the Supreme Court has held that daily wages workmen employed under Jawahar Rozgar Yojna has no right of automatic regularization even though they have right to work for 240 or more days. The petitioners who were employed on daily wages in Jawahar Rozgar Yojna filed a petition for their regular absorption as employee in the Development Department of Delhi Administration. They contended that right to life included the right to livelihood and therefore right to work. The Court held that although broadly interpreting and as a necessary logical corollary, the right to life would include the right to livelihood and therefore right to work but this country has so far not found feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity

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34 AIR 1992 SC 789.
to guarantee it, and not because it considers it any less fundamental to life. It has also been placed in the directive principles in Article 41 which enjoins upon the State to make effective provisions for securing the same, within the limits of its economic capacity and development. The Court observed that a good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back door entry in the employment are in need of the particular jobs.

In *All Indian Imam Organisation v. Union of India*, the Supreme Court directed the wakf boards to pay remuneration to the whole time Imam. The Court ruled that the right to life enshrined in Article 21 means the right to live with human dignity. Therefore, the Imams are entitled to get remuneration. The Court rejected the argument of the Wakf Board that their financial position is not such that they could cope with the obligation of paying salary to the Imams with the remark that financial difficulties of the Institution cannot be above fundamental rights of a citizen.

Some other decisions which touched the question of livelihood are *State of Maharashtra v. Chandrabhan* in which payment of subsistence allowance at the rate of Rs. 1 per month was held to be violative of Article 21 and the Court also observed that this amount can never sustain a civil servant for even a day, much less for a month. Suspension for a long period without concluding the departmental proceedings within a reasonable period and with reasonable diligence has been held to be violative of this Article.

In *O.P. Gupta v. Union of India*, the Court pointed out that the expression ‘life’ does not connote animal existence or a continued drudgery through life. In *K. Nagraj v. State of Andhra Pradesh*, the reduction of retirement age from 58 to 55 was not held to be violative of Article 21 by

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35 AIR 1993 SC 2086.
36 AIR 1983 SC 803.
37 AIR 1987 SC 2257.
38 AIR 1985 SC 551.
stating that the retirement age does not take away livelihood, it merely limits the right to hold office to a stated number of years. The Court pointed out that if reduction in retirement age was held to be violative of this article, it will become impermissible to fix the age of retirement at all. In *T. Venkata Reddy v. State of A.P.*, the abolition of part-time job was not regarded as the deprivation of right to life. In *State of Maharashtra v. Besanti Bai* the validity of land ceiling laws was also not regarded to have the effect of depriving a person of his life and also the compulsory retirement as in *State of Sikkim v. Sonam Lama* but termination of service of a permanent employee merely by giving notice was held to be violative of Article 21 in *Delhi Transport Corporation v. D.T.C Mazdoor Congress*.

In *D.K. Yadav v. J.M.A. Industries*, the Supreme Court has held that right of life in Article 21 includes the right to livelihood and therefore termination of services of a worker without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal. The procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and so it must be right, just and fair and not arbitrary, fanciful or oppressive. In this case the applicant was removed from service by the management of the J.M.A Industries Ltd. On the ground that he had willfully absented from duty continuously for more than 8 days without leave or prior permission from the management and therefore, deemed to have left the services of the company under clause 12(2) (iv) of the certified standing order. The Labour Court upheld the termination of the appellant from service as legal. The Supreme Court has held that the right to life enshrined under Article 21 includes right to livelihood and therefore before terminating the services of an employee or workman fair play requires that a reasonable opportunity should be given to explain the case.

Article 21 clubs life with liberty, dignity of a person with means of livelihood

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39 AIR 1985 SC 724.
40 AIR 1986 SC 1446.
41 AIR 1991 SC 534.
43 (1993) 3 SSC 258.
without which the glorious content of dignity of person would be reduced to animal existence. The Court set aside the Labour Court’s decision and rejecting the termination of the worker, ordered his reinstatement with 50% back wages.

The Supreme Court has ruled in *M.J. Sivani v. State of Karnataka*\textsuperscript{44} that regulation of video games does not violate Article 21. It is true that Article 21 protects livelihood but its deprivation can not be extended too far or projected or stretched to the avocation, business or trade injuries to public interest or has invidious effect on public morale or public order. Therefore, regulation of video games or prohibition of some video games or pure chance or mixed chance and skill are not violative of Article 21 nor is the procedure of regulation unreasonable, unfair or unjust. It is true that the owner of the video games earns his livelihood assured under Article 21 but no one has the right to play with the credulity of the general public or the career of young and impressive age school or college going children by operating unregulated video games.

A regulation conferring power on the authority to terminate the services of a permanent and confirmed employee by issuing a notice without assigning any reasons and without giving him a hearing has been held to be wholly arbitrary and violative of Article 21 in *D.T.C. v. D.T.C. Mazdoor Congress*.\textsuperscript{45} Sawant J. has explained the position thus:

The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival beat their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premixes and uncertain applications. That will be a mockery of them.

\textsuperscript{44} AIR 1995 SC 1770.
\textsuperscript{45} AIR 1991 SC 101
In Anthony’s case, the Supreme Court has insisted that when a Government servant or one in a public undertaking is suspended pending the holding of a department disciplinary inquiry against him, subsistence allowance must be paid to him. The Court has emphasized that a Government servant does not surrender his right to life under Article 21 or the basic human rights. Non-payment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee. Right to work has not yet been recognized as a Fundamental Right.

Right to livelihood is higher than a mere legal right. It is an integral part of right to life under Article 21 although it has not been incorporated by specific language in Part III by the framers of the Constitution. The legislative scheme of the 2005 Act clearly places the 'right to livelihood' at a higher pedestal than a mere legal right. It was reiterated by the Supreme Court in Centre for Environment & Food Security v. Union of India.

In Budhadev Karmaskar (I) v. State of West Bengal the Supreme Court has dealt with the right of a sex worker or prostitute to have means of livelihood. It has observed thus:

A woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body.

Central and State Governments were directed to prepare schemes for giving technical/vocational training to sex workers and sexually abused woman in all cities in India.

48 (2011) 5 SCC 676.
III Right against Police atrocities is protected under Article 21 as expounded by the Supreme Court.

a) Against Torture

What is in the Name? Rose will not lose its charm if not called as a rose. This saying might be true before police came into existence i.e. centuries ago. Police, although not literally means torture, mental, physical and economic pain when it comes to atrocities. Not always but without it no law and order can be attained in the society. But it is ironical that with ever increasing tempo of world movement for protection of human rights, nations of the world are using torture as a weapon to subdue, suppress and stifle the human rights of living in freedom. If torture is used as an instrument to suppress human rights, the scourge and menace to international peace will continue to exist.

Torture should be understood to mean that anything done by acts, words or conduct which lowers human dignity would amount to torture. We took almost two decades to recognize right to live with human dignity in the right to personal liberty under Article 21.

In Kharak Singh’s case, Suba Rao J. has held that by the life as used in the Article 21 is something more than animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits, mutilation of the body or amputation of an arm or leg or putting out of an eye or the destruction of any other organ of the body through which man communicates with outer world.

This was again accepted in Sunil Batra v. Delhi Administration Bhagwati J held the aforesaid observation that the deprivation which is inhibited by Article 21 might be total or partial neither any limb or faculty can be totally destroyed nor can it be partially damaged. Further deprivation is not an act which is complete once for all. It is a continuing act and so long as it is a

51 AIR 1978 SC 1681.
continuing act so long it lasts, it must be in accordance with procedure established by law.

Thus, right to life includes right to live with human dignity. It is implicit in right to personal freedom and it accords protection against torture or cruel inhuman or degrading treatment.52

The Supreme Court has in several cases condemned police brutality and torture on prisoners, accused persons and under trials. In this connection, the Supreme Court has observed in Raghubir Singh v. State of Haryana53 that we are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law violate their human rights.

The Supreme Court has stressed that police torture is disastrous to our human rights awareness and humanist Constitutional order. The Court has squarely placed the responsibility to remedy the situation on the State. In the words of the Court: -the States, at the highest administrative and political levels, we hope, will organize special strategies to prevent and punish brutality by police methodology. Otherwise the credibility of the rule of law in our Republic vis-à-vis the people of the country will deteriorate.

In Prithipal Singh v State of Punjab,54 the Supreme Court held that police atrocities are always violative of constitutional mandate, particularly Article 21 and 22. Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities would amount to acceptance of systematic subversion and erosion of the rule of law. If there is material on record to reveal police atrocities, Court must take stern action against erring police officials.

53 AIR 1980 SC 1087 at 1088.
In *Francis Coralie Mullin v. Union Territory of Delhi*, the Supreme Court has condemned cruelty or torture as being violative of Article 21 in the following words: ....any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with the procedure prescribed by law, but no law which authorizes and no procedure prescribed by law, which leads to such torture or cruel inhuman or degrading element can never stand the test of reasonableness and non-arbitrariness it would be plainly unconstitutional and void as being violative of Articles 14 and 21. It would be seen that there is implicit in Article 21 the right to protection against torture or cruel inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by International Covenant on Civil and Political Rights.

In *Sheela Barse’s case* the Court has given directions ensure protection against and maltreatment of women in police lock-up. Example there should be separate lock-ups for female suspects guarded by female constable interrogation of females should be carried out only in the presence of female constables, The incidents of brutal police behaviour towards persons detained on suspicion of having committed a crime is a common occurrence in India. There has been public outcry from time to time against custodial deaths. The Supreme Court has now ruled that it is a well recognized right under Article 21 that a person detained lawfully by the police is entitled to be treated with dignity befitting a human being and that legal detention does not mean that he would be tortured or beaten up. If it is found that the police has ill-treated a detainee, he would be entitled to monetary compensation under Article 21.

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55 AIR 1981 SC 746.
The Court has given an expansive definition of ‘torture.’ According to the Court ‘torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to make her submit to the demands of the police.’\textsuperscript{58}

b) Against Hand Cuffing

\textit{Maneka Gandhi}’s case gave it a new direction and laid down that Article 21 was not only a restriction on the unburied power of the executive, but it was also a restriction on the law making power. It laid down that not merely there should be procedure but also be responsible, fair and just otherwise the law would be violative of Article 21.

This right is available to a person even when is in detention. A person behind bars is not a person without human dignity.\textsuperscript{59} Today the sweep of human right to personal liberty and life is very wide. In words of Justice Bhagwati in Maneka’s case:

'Personal liberty is one of the widest amplitude and covers a variety of rights which go to constitute personal liberty of man some of them have been raised to the status of distinct fundamental rights given the protection under Article 19, while the rest are included in Article 21.\textsuperscript{60}

In \textit{Sampat Prakash v. State of J & K}\textsuperscript{61} in reference to the scope of the preventive detention, the Supreme Court observed:

...The restrictions placed on a person preventively detained must, consistently with effectiveness of detention, be minimal.

In \textit{D. Bhuyan Mohan v. State of A.P.}\textsuperscript{62} Chandrachud J observed:

\begin{itemize}
\item[59] Satwant Singh Sawhney v. A.P.O. New Delhi, AIR 1967 SC 1836.
\item[60] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
\item[61] (1969) 3 SCR 547.
\item[62] AIR 1974 SC 2092.
\end{itemize}
Convicts are not by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in prison house entail by its own force the deprivation of fundamental freedoms like the right to move freely through out the territory of India or right to practice a profession. But the Constitution guaranteed by Article 21 that he should be deprived of his life and personal property except according to procedure established by law.

Thus human rights - conscious Supreme Court on several occasions has made weighty pronouncements decrying and severely condemning the conduct of escort police in handcuffing the prisoners and under trials without any justification.

As in Sunil Gupta v. State of M.P.63 One key questions which arose for consideration was whether petitioners on being arrested were subjected to torture and treated in a degrading and inhuman manner by handcuffing and parading them through the public through fare during transit to the Court in the utter disregard to the judicial mandates declared in a number of decisions of the Supreme Court and whether they were entitled for compensation.

Justice Krishna Iyer speaking for himself and Chinnappa Reddy J. in Prem Shankar Shukla v. Delhi Administration64 rightly emphasized that handcuffs should not be used as a matter of routine but only in the rarest of rare cases and when the person was desperate, rowdy or involved in non-bailable offence. Justice Krishna Iyer rightly observed:

"The guarantee of human dignity which forms part of our Constitutional culture, and the positive provision of Article 14, 19 and 21 spring into action when we realize that to manacle a man

63 (1990) 3 SCC 119.
64 AIR 1980 SC 1535: In case of Khet Mazoor Chetna Sangarsh Samiti v. State of M.P., AIR 1995 SC 31; no person in India can be handcuffed without permission of the Magistrate."
is more than to modify him, it is to dehumanize him and therefore to violate his very personal hood, too often using the mask of dangerousness and security: He further observed; handcuffing if prima facie inhuman and therefore, unreasonable, is over harsh and at the first flush, arbitrary, absent fair procedure and objective monitoring to inflict irons is to resort to zoological strategies repugnant to Article 21. To prevent the escape of an under trial, measure should be just and cannot by itself be castigated. But to kind a man hand and foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand for hours in the Court is to torture him, defile his dignity, vulgarize society and foul the soul of our constitutional culture.'

Chinappa Reddy J. in *Bhim Singh v. State of J & K*\(^{65}\) observed that police officers should have greatest regard for personal liberty of citizens and accordingly directed the government of J & K to take appropriate action against the erring escort party for unjustly and unreasonable handcuffing the petitioners, yet with regard to the prayer of claim for suitable and adequate compensation, it was observed that it is open to the petitioners to take appropriate action against the erring officials in accordance with law and in that case the Court in which the claim is made, can examine the claim not being influenced by any observations made in the judgment. It was also observed that one of the telling ways in which the violation of that right can reasonable be prevented and due compliance with the mandate of Article 21 secured, is to punish its violators in the payment of monetary compensation by way of exemplary cost. Thus following Rudal Shah’s case,\(^{66}\) exemplary damage of Rs. 50,000/- was awarded in Bhim Singh’s case.\(^{67}\)

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\(^{65}\) AIR 1986 SC 494; for detail see, infra Sec. xv of this Chapter.

\(^{66}\) AIR 1983 SC 1086.

\(^{67}\) AIR 1986 SC 494.
In fact every judgment has a generative power. It begets in its own image. And every precedent has a directive force for future guesses of the same and the similar nature. Thus, the question of law directly arising in the case should not be dealt with apologetic approach. The law must be made more clear and effective as a guide to behavior. It must be determined with reasons which carry convictions within the Courts profession and public.

The *Supreme Court in Sheela Barsey v. State of Maharashtra*[^68] dealt with the question of treatment of women in police lock ups and issued certain directions. Some of which are to following effect:

1. Females suspects should be kept in separate selected lock ups guarded by female constables and they should not be kept in the same lock ups in which the male are detained.
2. Interrogation of women should be carried out only in the presence of women police officers/constables.
3. Sessions Judge must be periodically visit police lock ups to ascertain the condition of police lock ups and providing an opportunity to the arrested persons to air their grievances.
4. The Magistrate before whom the arrested person is produced should enquire from him whether he has any complaints of torture or maltreatment in police custody and inform him about his right to be medically examined.

As was said by Krishna Iyer J. that words and pledge are a long distance away and the gaping gap between pledge and performance may sadly sap credibility. As happened to the business tycoon Rajan Pillai who died while in police custody. Rajan Pillai had a Court case pending in Singapore and when he came here. The Singapore Government asked for his extradition. He was arrested and was presented in the extradition Court. The media and police made

[^68]: AIR 1983 SC 378.
such a type of the matter that he was treated like a hard core criminal. The pending case in Singapore was of income tax and contempt of Court. He was suffering from the liver cirrhosis, heart attack and he presented a jail application on medical grounds but was rejected on flimsy that this a common practice and on face of the person he did not even looked like an ill person. After two days serving in the judicial lockup (Tihar Jail) he died due to brain hemorrhage and that left a big question mark on our police and judiciary? Whatever guidelines may be given but every case is a history in itself. Very rarely in a case is a precedent on facts as the same are always different in the time and texture. The police officers and judge must pay the price of such irresponsible behavior after all they were the persons responsible for choosing such a fate for Rajan Pillai and many others.

No Police life style which relies more on fists than on wits, on torture more then on culture, can control crime because means boomerang on ends and refuel the vice which it seeks to extinguish.

The State must re-educate the constabulary out of there sadistic arts and inculcate the respect for human person a process, which must begin more by example than by percept, if the lower rungs are really to emulate. If any policeman is found to have misconduted himself no sense of police solidarity in-service comity should induce the authorities to hide the crime. Condign action, quickly taken is surer guarantee of community credence than burling about that, all is well with the police the critics are always in the wrong.69

Nothing is more cowardly and unconscious able than a person in police custody being beaten up and nothing inflicted a deeper wound on our Constitutional culture than a state official running berserk regardless of human rights. The Article 21 with its profound concern to life and limb will become dysfunctional unless the agencies of the law in the police and prison establishments have sympathy for the humanist creed of that Article.

In *Citizen for Democracy v. State of Assam*\(^{70}\) the Supreme Court expressed serious concern over the violation of the law laid down by that Court in Prem Shanker Shukla’s case against handcuffing of under trial or convicted prisoners by the police authorities. In the instance case Mr. Kuldip Nayar an eminent journalist in his capacity as President of Citizen for Democracy through a letter brought to the notice of the Court that the seven TADA detenues lodged in the hospital in the State of Assam were handcuffed and tied with a long rope to check their movement. Security guards were also posted outside the hospital. The Court treated the letter as a petition under Article 32 of the Constitution and held that handcuffing and in addition tying with ropes of the patients-prisoners who are lodged in the hospital is inhuman and in violation of human rights guaranteed to an individual under international law and the law of the land. Where a person is arrested by the police without warrant and the police officer is satisfied on the basis of the above guidelines that it is necessary to handcuff such a person he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate. The Magistrate may grant the permission to handcuff the prisoner in rare case.

c) **Against Custodial Death**

Custodial deaths are matters which are no longer heard with shock. People are shockproof, only that family suffers which undergoes such trauma. The daily reports show that incidence of human rights violations is on the increase around the world.\(^{71}\) Police stations have become a nightmare for the accused and suspects. As far as custodial deaths are concerned there was a grim admission by the Delhi Police is an answer to the Rajya Sabha question that a hundred deaths had occurred in the past five years in Delhi police stations. The guilty policeman is generally transferred till the fuss and fury is over or at the

\(^{70}\) (1995) 3 SCC 743.

\(^{71}\) According to Amnesty International and other Human Rights Organizations more than 3 million people have been extra-judicially done away worldwide since 1970. See David Milton, *In Defence of Human Rights*, Indian Express, Chandigarh, Dec. 9, 1991, p.6.
very worst he may be suspended from the police force for a while and then reinstated. It is very rarely that a policeman is sentenced to imprisonment for killing a person in custody.\textsuperscript{72}

The Apex Court in a case\textsuperscript{73} came out heavily on the police over a custodial death. In his case the deceased was arrested on a complaint of theft of a buffalo. He died in police custody and this body was thrown under a bus to make it appear that he had died in an accident. K.J. Reddy J. and N.P. Singh J. rejected the police version and held that once it was established that the police had taken some one in custody then it is their responsibility to show how that person stepped out of custody. This puts an end to the police stories of escape and unexplained disappearance of citizens arrested by them formally and informally. In this case it was also found that the deceased and his father were not told the grounds of their arrest as well as whether their offence was bailable or not. It is also not known whether the accused was produced before the Magistrate within 24 hours of being taken into custody as mandated by Constitution.

It is unfortunate that in this case the Supreme Court did not order payment of compensation to the victim’s family despite the fact that it had already laid down this as a fundamental right in \textit{Nilbati Behra v. State of Orissa}.\textsuperscript{74} In this case the issue was whether compensation could be awarded to petitioner whose young son Suman Behra had died in police custody, in a writ petition under Article 32 for the enforcement of fundamental right to life. The Court held that relief of compensation on contravention of fundamental rights was claim under public law, an acknowledge remedy for enforcement and protection of fundamental rights and to which the defence of Sovereign immunity was inapplicable. The Court was at pains to emphasize that such a claim was distinct from and in addition to the remedy in private law for

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\textsuperscript{72} Talveen Singh, Enemies of the People, Indian Express, Chandigarh, Sept. 19, 1993, p.6.
\textsuperscript{73} Krishna Mahajan, Policement in the Dock, Indian Express, Chandigarh, May 3, 1993, p.7.
\textsuperscript{74} (1993) 2 SCC 746.
\end{flushleft}
damages for the tort resulting from the contravention of the fundamental right. The Court felt obliged to forge new tools for enforcing Fundamental rights like the award of monetary compensation in appropriate cases because according to Court the contrary view would render the Court powerless and the Constitutional guarantee a mirage and may in certain situations, be an incentive to extinguish fire.\textsuperscript{75}

If the Court is powerless to grant any relief, except punishment to the wrong-doer and recovery of damages under law by the ordinary process, which means inordinate - delays defeating the ends of Justice.

Moment a case is registered it becomes the duty of the police to investigate the same.\textsuperscript{76} There is a natural tendency to involve the accused in number of cases and frame as many charges as possible against him. The performance of the police is usually judged by the rate of convictions it obtains and property it recovers from the criminals during course of investigation. Most cases of custodial violence relate to property offences because the police think violence helps it in obtaining confession and recovering property. Thus torture is inflicted just to hide professional incompetence or to take monetary benefits or as an act of self-promotion by the policemen.

The presence of torture in criminal justice system is a slur on the fair name of democracy. It is unconstitutional and unethical and violative of human dignity.

Most of the victims are poor people belonging to the weaker sections of society with little or no power of social, political and financial to help them. They are the persons who are unaware of their legal and Constitutional rights. The rights not to be tortured are non-negotiable.

\textsuperscript{75} Soli J. Sorabjee, Judicial Compensation when Fundamental Freedom Suffer, Bold Steps are Needed, Indian Express Chandigarh, August 30, 1993.

\textsuperscript{76} Police takes cognizance under section 154 CrPC. An FIR is registered and investigation taken up under sections 156/157 of CrPC.
This was again followed in *Afjal & Am v. State of Haryana and others.*

Where police official illegally detained the minors in the police stations and to exculpate the erring police officers their parents and family members prevaricated the facts. Their conduct denies itself the remedy of liquidated charges for illegal detention personally against the erring official. The Court held it as abuse of the process of Court and ordered the inquiry against the forged signatures of Deputy Superintendent of Police and notices issued to the advocate for his unbecoming conduct in making two diagrammatically opposite statements and it is deprected.

The offence of custodial deaths is aggravated by the fact that it is committed by a person who is supposed to protect the citizens and he misuses his uniform and authority to brutally assault them while in his custody. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behavior.

The need is to develop a sense of discipline amongst the police personnel by properly educating them and revamping their training programmes. It is a well known fact that our police conventionally adopts third degree methods and terror operation is the heritage of British Raj when the police force was employed to sub serve the selfish design of Britishers at the cost of the humanity. Long ago, we severed the ties of British Raj but the system still haunts us.

In a landmark judgment in *D.K. Basu v. State of West Bengal* the Supreme Court has laid down detailed guidelines to be followed by the Central and State investigating and security agencies in all cases of arrest and detention. The matter was brought before the Court by Dr. D.K. Basu, Executive Chairman of the Legal Aid Services, a non-political organization, West Bengal through a public interest litigation. He addressed a letter to the Chief Justice drawing his attention to certain news items published in the

77 1995 (I) SCC 103.
78 AIR 1997 SC 610.
Telegraph and Statesman and Indian Express regarding deaths in police lockups and custody. This letter was treated as a writ petition by the Court.

In *K.H.Shekarappa v State of Karnataka*\(^7\), the police officials were convicted for custodial death of one prisoner and causing injuries to other by sticks. It was proved on the record that the deceased had died because of cruel thrashing by police officials. The conviction recorded by trial Court and upheld by the High Court of Karnataka was not interfered with by the Supreme Court.

Custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law Kuldip Singh and Dr. A.S. Anand J.J. observed.

Dr. Justice Anand who delivered the said judgment on behalf of the Court held that any form of torture or cruel, inhuman or degrading treatment, would fall within the inhibition of Article 21 of the Constitution whether it occurs during investigation, interrogation or otherwise.

The Court held that the precious right guaranteed under Article 21 of the Constitution could not be denied to convicts, under trials, determines and other prisoners in custody except according to the procedure established by law, which must be just, fair and reasonable, not unjust, fanciful or oppressive.

In *Parkash Kadam v Ramprasad Vishwanath Gupta*,\(^8\) the Supreme Court has held that fake encounters are nothing but cold-blooded brutal murders by persons who are supposed to uphold the law. Where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases.

In *Mehboob Batcha v State*,\(^9\) the police officials were convicted for the murder of a prisoner and also gang rape of the wife of deceased. The evidence disclosed the inhuman and savage manner in which the deceased and the victim

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\(^7\) (2009) 17 SCC 1
\(^8\) (2011) 6 SCC 189 : AIR 2011 SC 1945 : (2011) 2 SCC (Cri) 848
\(^9\) (2011) 7 SCC 45 : (2011) 3 SCC (Cri) 70
were treated. The Supreme Court upheld the conviction recorded by trial Court and affirmed by the High Court.

It was realised by the Supreme Court that compensation to the family of the deceased/victim of custodial death be also given. In Commr. V Shivakka(2), the High Court granted compensation of Rs. 3 lacs, which was found as inadequate by the Supreme Court. The petitioners were directed to pay compensation of Rs. 10 lacs to the family of victim of custodial death.

In Prithipal Singh v State of Punjab, the Supreme Court held that police atrocities are always violative of constitutional mandate, particularly Article 21 and 22. Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities would amount to acceptance of systematic subversion and erosion of the rule of law. If there is material on record to reveal police atrocities, Court must take stern action against erring police officials.

d) Freedom from Domiciliary Visits

In Kharak Singh’s case, the Court was called upon to determine whether right to privacy formed a part of personal liberty under Article 21. The police’s domiciliary visits and surveillance subjected the petitioner, who was tried and discharged for dacoity. To determine the validity of domiciliary visits and surveillance the Court examined whether the right to privacy was a part of personal liberty, was a compendium of rights that go to that in the American 14th and 5th Amendments. It said that the Constitution aimed at the preservation of the cherished human values aimed to the preservation of the man.

Relying on Wolf v. Colorado case it held that the common law rule that everyone’s house was his castle expounded a concept a personal liberty which did not rest upon a theory which had ceased to exist. It held that domiciliary

82 (2011) 12 SCC 419.
visit but not surveillance was repugnant to personal liberty. As the police regulation authorizing domiciliary visit did not have the force of law, it was held to be unconstitutional.

In his dissenting opinion Subba Rao J. rejected the test of directness of impact formulated in Gopalan’s case and denied that each fundamental right was separate island entirely upon itself and held that personal liberty and freedom of movement overlapped each other. He asserted that not only physical but also psychological restraints on fundamental rights might be unconstitutional. He held that for the petitioner constantly shadow by a policeman the whole country was a jail.

About 12 years later in Govind’s case question was raised again before the Court that whether domiciliary visits and surveillance were Constitutionally valid. In this case unlike in Kharak Singh, law authorized domiciliary visit and surveillance. The petitioner alleged that the police visited his house by day and by night, picketed his house and the approaches thereto, kept a watch on his movements and often called him to the police station to harass him. The respondent state pleaded that surveillance was restricted to person like the petitioner who are addicted to crime. The Court had to decide whether, as claimed by the petitioner the right to privacy emanated from the right to personal liberty and the right to freedom of movement.

Justice Mathew turned to the American decisional law to identify the content and extent of the right to privacy and the social values underlying it. In America though James has argued, in vain, before a colonial Court that freedom of one’s house was an essential of liberty that a man must secure in his house a price and that the law violating that liberty was an instrument of slavery and villainy, the framers of American Constitution did not guarantee in the bill of rights a specific right to privacy, but with the advancement of science

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and technology privacy of the individual was more vulnerable then before to the invasion by the Government.

Privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interested is shown to be superior. 88

In Malak Singh v. State of Punjab 89 the appellants in that case did not even plead that they had a right to privacy. The Court rejected their plea that the inclusion of their names in the surveillance register of the police without being given an opportunity to defend themselves was unconstitutional and violation of the principles of natural justice, as they had never been convicted, placed on security for good behavior or proclaimed as offenders. The Court merely said that compliance with the principles of natural justice would defeat the very purpose of surveillance.

It is necessary, however, that in an appropriate case the Court may review and reconsider its decisional law to hold that privacy is a part of personal liberty read with freedom of movement and that law trenching on privacy should also lay down a fair procedure. The new Constitutionalism that the Court gave in recent years justifies such a course of action. Further Article 12 of the Universal Declaration of Human Right’s, Article 17 of the covenant and Article 8 of the European Convention of Human Rights recognize and protect the right. The Nordic Conference of Jurists and legal experts emphasized that the right to privacy is paramount to human happiness. Further the rights of privacy has also been recognized within the scope of Article 21. In State of Maharashtra v. Madhukar Narayan Mardikar 90 the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes. The right to privacy has now become established in India,
but as a part of Article 21 and not as an independent right in itself, as such a right, by itself has not been identified under the Constitution. The Court has however refused to define privacy saying as a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. This means that whether the right to privacy can be claimed or has been infringed in a given situation would depend on the facts of the said case and the view the Court takes of the matter.

In view of the international trend, the claim that our Constitution be it said to its glory, has embodied most of the articles contained in the Universal Declaration of Human Rights sounds empty if the Constitution allows the police in India to hear the street whisper in the closet. Right of privacy in more detail will be discussed in Sub Chapter XIII of this chapter.

IV Rights of undertrials are protected under Article 21 as expounded by the Supreme Court.

a) Speedy Trial

In Kautilyan Arthashastr,a, Kautiliya writes all urgent matters shall be heard at once and shall not be put off for themselves when postponed, become difficult or even impossible to settle. In the absence of a specific fundamental right to speedy trial and safeguard in respect of bail, the problems of under trials were bound to arise. In its seventy - eighty report, the law commission of India said that on January 1, 1995, 57.6% of the prisoners were under trials.

In Hussainara Khatoon v. State of Bihar when a social worker-cum lawyer Kapila Hingorani moved the Supreme Court on behalf of an under trial for habeas corpus, the respondent State of Bihar made shocking disclosure that there were about 22,000 under trials in Bihar jails comprising of about 80% of the prison population and duration was about from a few months to ten years.

92 AIR 1979 SC 1360.
In certain cases the duration of imprisonment exceeded, the maximum period of imprisonment prescribed by the offence they were charged with. There were also destitute men and women, victims of crime and witness required in some cases. Justice Bhagwati observed:

Law has become an instrument of injustice and they are helpless victims of the legal and judicial system. It is a crying shame on the judicial system, which permits incarceration of men and women for such longs of the time without trial. Are we not denying human rights to these nameless persons who are languishing in jails for offences which perhaps they might ultimately be found not to have committed.

He observed that the neglect of these persons by everyone connected with their imprisonment has reduced them to forgotten specimens of humanity. He said that their crime was poverty. Justice Bhagwati reprimanded the State of Bihar for keeping the under trials in jails and held that now a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would therefore have to go through a trial without legal assistance, cannot possibly be regarded as fair and just. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the Courts, process that he should have legal services available to him.

This has become possible after the epoch making decision in Maneka Gandhi’s case\textsuperscript{93} in which it was observed by justice Bhagwati that the procedure visualized by this Article has to be right, just fair and reasonable and not arbitrary, oppressive or fanciful. In Kadra Pehadiya v. State of Bihar\textsuperscript{94} Bahgwati J. stated in para 2 on noting that the period of three years took for a trial to begin following committal to the Court of Sessions, which was regarded as shocking and disclosing something wrong with in the entire system.

\textsuperscript{93} Maneka Gandhi v. Union of India, AIR 1978 SC 597.
\textsuperscript{94} AIR 1982 SC 1167.
Three more years are passed but they are still rotting in jails, not knowing what is happening to their case. They are perhaps reconciled to their fate, living in a small world of their own, cribbed, cabined and confused with in the four walls of the prison. The Constitution has no meaning and significance, and human rights have no relevance for them. It is crying shame upon our judicial system which keeps man in jail for years on end without a trial.

There is no need to elaborate on this aspect of personal liberty after the decision on *Abdul Rehman Antulay v. R.S. Naik* in which a Constitutional Bench speaking through Jeevan Reddy, J. has traversed the entire ground. Let it be said with respect that the judgment is illuminating and exhaustive. All the aspects of the matter that have any relevance to speedy trial were canvassed before the Court and the Bench did full justice to the submissions.

To make the right of speedy trial meaningful enforcing and effective there ought to be an outer limit beyond which continuance of proceedings ought to be held violative of Article 21. In this connection it was submitted that having regard to the prevailing circumstances, a delay of more than 7 years ought to be considered as unreasonable and unfair - this period of 7 years must be counted from the date of registration of the crime till the conclusion of the trial, re-trial ought not to be ordered beyond this period and the proceedings should be quashed.

In *Madheshwar Dhari v. State of Bihar* in which High Court put an outer limit of 10 years for offences punishable with capital sentence and 7 years for other offences. But speedy means how much speedy? How long a delay is too long? It was noted that even the U.S. Supreme Court has refused to draw a line. The outer limit even did not function in the United Kingdom.

The Court summarized the right of speedy trial as under:

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95 AIR 1992 SC 1701.
96 AIR 1986 Patna 324.
(1) Fair, just and reasonable, procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. It is the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages. namely the stage of investigation, inquiry, trial, appeal, revision and re-trial.

(3) The concerns underlying the right of speedy trial from the point of view of the accused are

(a) The period of remand and pre - conviction detention should be as short as possible.

(b) The worry, anxiety, expenses and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial should be minimal.

(c) Undue delay may result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non availability of witness or otherwise.

(4) Delay is known as the defence - tactic. Non - availability of witness disappearance of evidence by lapse of time really work against the interest of the prosecution. Frivolous proceedings taken merely for delaying the day of reckoning can not be treated as proceedings taken in good faith.

(5) While determining whether undue delay has occurred one must have regard to all the attending circumstances including nature of offence, number of accused and witnesses the work load of the Court concerned, prevailing local conditions and so on what is called systematic delay. A realistic and practical approach should be adopted in such matters instead of a pedantic one.
Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell J. in Barkar it can’t be said how long a delay is too long in a system where justice is supposed to be swift but deliberate. The same ideal has been stated by Justice While in *U.S. v. Ewell* in the following words: - the Sixth Amendment right to a speedy trial is necessarily, relative, is consistent with delays and has orderly expedition, rather than mere speed, as its essential ingredients and whether amounts to an unconstitutional deprivation of rights depends upon all the circumstances.

We can not recognize or give effect to what is called the demand rule. An accused can’t try himself, he is tried by the Court at the behest of the prosecution. Hence an accused’s plea of denial of speedy trial can’t be deflected by saying that the accused has demanded a speedy trial. If in a given case he did make such a demand and yet he was not tried speedily, it would be plus point in his favour but the mere non - staking for a speedy trial can not be put against the accused.

Ultimately the Court has to balance and weigh the several relevant factors - balancing test or balancing - process and determine in each case whether the right to speedy trial has been denied in a given case.

When the Court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the other conviction shall be quashed. It is also open to the Court to make such other appropriate order - including order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

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98 (1996) 15 Law Ed. 2nd 627.
(10) It is neither advisable nor practice to fix any time – limit for trial of offences. Any such rule is bound to be, qualified one. Such rule can not be evolved merely to shift the burden or proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay.

(11) An objection based on denial of right to speedy trial and for relief on that account should first be addressed to the High Court. Even if the High Court entertains such plea ordinarily it should not stay the proceedings except in case of grave and exceptional nature. Such proceedings in High Court must however, be disposed of on a priority basis.

It is a primary principle of criminal law that imprisonment follows the judgment and not precedes it. To keep under - trials in prolonged detention in a torture is an affront to all civilized norms of human dignity. Any meaningful concept of individual liberty must view with distress patently long period of imprisonment, before a person waiting trial could receive the attention of the administration of justice.

In Santosh De v. Archana Guha99 the Supreme Court quashed the prosecution on the ground of inordinate delay as the trial for corruption of a Government servant was kept pending for 14 years. The case was filed in 1978 against Director of Mines, Government of Bihar under the Prevention of Corruption Act. As the Bihar Government refused to give permission to prosecute him, no charge sheet could be filed for several years but the prosecution was kept pending. The Supreme Court quashed the prosecution saying that the long delay was caused entirely and exclusively because of the fault of the prosecution and it has not been able to explain the reasons for delay.

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99 AIR 1994 SC 1229.
The unexplained long delay in commencing trial by itself infringed the right of the accused to speedy trial.

In *Union of India v. Ashok K. Mitra*, there was delay in trial but it was not attributable only to the prosecution and the respondent himself had contributed to the delay. Refusing to quash the prosecution in the instant case, the Court observed that the respondent could not be allowed to take advantage of his own wrong and take shelter under ‘speedy trial’ to escape from prosecution.

The Supreme Court has observed in *Common Cause’s case* that even persons accused of minor offences have to wait their trials for long periods if they are poor and helpless, they languish in jails as there is no one to bail them out.

The very tendency of criminal proceedings for long periods by itself operates as an engine of oppression. Accordingly to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21, the Court issued certain general directions for releasing the under trials on bail or personal bonds where trials had been pending for one year or more.

A Government employee was prosecuted and convicted on certain charges of corruption. The prosecution started in 1985 on the basis of events which occurred in 1983. In an appeal, the Supreme Court found in 1997 in *Mansukhlal’s case* that the sanction given by the Government for his prosecution was invalid. The Court barred initiation of fresh prosecution against the appellant. The Court observed that normally when the sanction order is held to be bad the case is remitted back to the authority for reconsideration of the matter and to pass a fresh order of sanction in accordance with law. But in the instant case the incident is of 1983 and therefore after a lapse of fourteen years, it will not, in our opinion, be fair and

100 AIR 1995 SC 1976
just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as part of right to life, philosophizes early end of criminal proceedings through a speedy trial.

In 1982-83 an FIR was filed against a Government employee alleging that he acquired disproportionate assets by misusing his official position. An investigation was undertaken but no prosecution was launched till the year 2000 as the permission for the same was not granted by the Government till then. The Supreme Court quashed the proceedings saying that further prosecution would be travesty of justice. The Court asserted that under Article 21, as interpreted in Antulay’s case every citizen has a right of speedy trial of the case pending against him.

While the Supreme Court insists on speedy trials, it has refused to set any maximum time-limit within which a trial must be completed as it is not possible to lay down any time schedule for conclusion of criminal trials. The Supreme Court has observed recently in Ramachandra: it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings.

In Anil Rai v. State of Bihar reiterating that all possible delays in conclusion of trials must be avoided, the Supreme Court has issued guidelines to the High Courts and other Courts to expeditiously deliver the judgment after the conclusion of the arguments at any stage of a criminal case.

In P. Ramachandra Rao v. State of Karanataka it was held that the right to speedy trial flowing from Article 21 encompasses all stages from accusation to final verdict.

In R.D. Upadhya v. State of Andhra Pradesh\textsuperscript{107} the Supreme Court had called upon all the State Governments and Union Territories, through their respective counsel to furnish information with regard to steps taken for creation of more Courts and appointment of judicial officers, for filling up of existing vacancies in the subordinate judiciary, about construction of new Court buildings and providing of infrastructure for those Courts. The Supreme Court has held that speedy trial is a fundamental right of the under-trials. Because of existing vacancies and shortage of Judges, this right is being frustrated.

In P. Ramachandra Rao v. State of Karnataka\textsuperscript{108} the question arose before the Supreme Court as to whether it was permissible, advisable and feasible to specify any time frame for concluding the trial. On further consideration it was found that desirability of laying down any time limit for criminal proceedings had already been negatived by an earlier Constitution Bench's decision in Abdul Rehman Antulay's case\textsuperscript{109}. In view of the diverse opinion the matter was referred to seven judge Bench.

Of late the media has undertaken the responsibility of speedy trial. Worried with the said situation the Supreme Court in M.P.Lohia v. State of West Bengal\textsuperscript{110} observed that:

'Media should perform the acts of journalism and not as a special agency for the Court. It should be ensured that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused. There is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom. Media to ensure that the distinction between trial by media and informative media should always be maintained. The trial by

\textsuperscript{107} (2009)17 SCC 561
\textsuperscript{109} (1992) 1 SCC 225.
\textsuperscript{110} 2005(1) RCR (Criminal) 987.
media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections.'

Recently in a landmark case *Lalita Kumari v. Government of Uttar Pradesh*, the Supreme Court has held that:

'The insertion of sub-section (3) of Section 154 of the Code of Criminal Procedure by way of an amendment, reveals that intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused. The maxim *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register. Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the 'procedure established by law' and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law.

b) Right to Bail

In *Babu Singh v. State U.P.*, the Apex Court speaking through Krishna Iyer, J. observed that personal liberty deprived when bail is refused, is too precious a value of our Constitutional system recognized under Article 21 because of which the power to negotiate it must be exercised not casually, but

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111 (2014) 2 SCC 1
112 AIR 1978 SC 527.
judicially with lively concern for the cost of the individual and the community. It was observed that to glamorize impressionistic orders as discretionary may on occasions, make a litigative gamble decisive of a fundamental right. After all personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in them of procedure established by law. The last four words of Article 21 are the life of that right; refusal to grant bail amounted to deprivation of personal liberty of accused persons.

The question arose that whether some constraints and conditions should be stifled or laid down in exercise of power of granting anticipatory bail under 438 of the Code of Criminal Procedure, it was answered in *Gurbaksh Singh v. State of Punjab*\(^{113}\) that order to meet the challenge of Article 21, the procedure must be fair, just and reasonable and so word may not be read in the section to make it unjust or unfair. If a bail order imposes unjust condition, that could be hit by this Article through Gurbaksh Singh’s case was related to pre-arrest bail it was observed that what was stated shall apply to cases of post-arrest bail also.

An aspect related to speedy trial is about the release of an accused on bail in case of delay. In this matter *High Court of Patna in Anurag v. State of Bihar*\(^{114}\) and *Orissa High Court in Leti v. State of Orissa*\(^{115}\) laid down important propositions.

In *Anurag’s* case, it was held that delay in hearing even appeals is an independent factor, which has to be borne in mind while considering the question of grant of the bail to the convict dehorn the individual merit of each case. Sandhawlia Chief Justice speaking for the Bench observed that if the High Court was not in position to hear the appeal of an accused within a reasonable period of time, it must ordinarily release the accused on bail even in cases of capital charge pending before it. The full bench however, did not put

\(^{113}\) AIR 1980 SC 1632.

\(^{114}\) AIR 1987 Patna 274.

any time limit. which however. has been done by division bench of Orissa High Court in Leti’s case, according to which in run-of- the mill cases, if an appeal is not disposed of by the High Court within the period of 3 years from the date of filling, the accused should be released on bail where cogent personal reasons exist, in the first instance of temporary period of 3 months and after watching the performance of the convict, the period of the bail may be extended till the disposal of the appeal. The fixation of time limit was felt necessary by the Court, because there were chances of discriminating treatment being meted in such cases, which are otherwise similarly situated. While fixing the time limit of three years, the State and other local factors were taken into consideration.

In this connection in Hussainara Khatoon’s case the accused can be released on personal bond of the accused without sureties and without any monetary obligation was brought to the fore, because of inability of large number under trial prisoners to produce sufficient financial guarantee for their appearance indicating at the same time the factors which may be borne in mind while determining whether the accused has roots in the community which is most important consideration in this context.

According to the International Commission of Jurists, a leading, Human Rights organization, there are four grounds on which the accused may not be released on bail:

1. In case of very grave offence.
2. If the accused is likely to interfere with witnesses or impede the course of justice.
3. If the accused is likely to commit the same or any other offence
4. If the accused may fail to appear for trial.

For no other reason can the accused be put in a lockup.
Imposing unjust or harsh conditions, while granting bail is violative of Article 21. Ordinarily in cases under TADA release of under trials on bail is extremely restricted. But the Supreme Court has ruled that even in TADA cases, where there is no prospect of a trial being concluded within a reasonable time release on bail may be necessary as this can be taken to be embedded in the right to speedy trial under Article 21.

Anticipatory bail is a statutory right and it does not arise out of Article 21. Anticipatory bail can not be granted as a matter of right as it can not be considered as an essential ingredient of Article 21. The Supreme Court has suggested that liberal use of parole be made. Parole is conditional release of a prisoner after he has served a part of the sentence imposed on him.

In *Ranjit Singh Brahmajeetsing Sharma v. State of Maharashtra and Another*, the Supreme Court has held that the restrictions on the power of Court to grant bail should not be pushed too far. If the Court, having regard to the material brought on record, is satisfied that in all probability the applicant for bail may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regard his likelihood of not committing an offence while on bail must be constructed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such expansive meaning is given even likelihood of commission of an offence under Section 279 of Indian Penal Code. may debar the COURT from releasing the accused on bail. A statute, should not be interpreted in such a manner as would lead to absurdity.

The Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and

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118 2005 (5) SCC 294
119 Ibid (Para 38).
just and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

The Court remarked that an under trial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape. In *Prem Shankar Shukla v. Delhi Admn.*\(^{121}\) the Supreme Court has made the following observations:

…..the Punjab Police Manual in so far as it puts the ordinary Indian beneath the better class breed (Paras 26.21-A and 26.22 of I Chapter XXVI) is untenable and arbitrary and direct that Indian humane shall not be dichotomized and the common run discriminated against regarding handcuffs. The provisions in Para 26.22(1)(a) that every undertrial who is accused of a non-bailable offence punishable with more than 3 years’ prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21 .... The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the Court where the victim is produced.... Handcuffs are not summary punishment vicariously imposed at police level, at once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed undertrial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of undertrial custody is thus

\(^{121}\) (1980) 3 SCC 526 : 1980 SCC (Cri) 815.
contrary to the unedifying escort practice. (SCC p. 540, para 31)

.......Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law.... The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the Court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorizes stringent deprivation of life and liberty. (SCC pp. 539-40, para 30)

c) Long Pre-trial Confinement

A very grievous aspect of the present day administration of criminal justice is the long pre-trial incarceration of the accused persons. The poor persons have to languish in prisons awaiting trial because there is no one to give bail for them. This perpetrates great injustice on the accused person and jeopardizes his personal liberty. Thousands of accused persons languish in jails awaiting trial for their offences. Sometimes an under-trial may remain in prison for much longer than even the maximum sentence which can be awarded to him on conviction for the offence of which he is accused.

This adversely affects the rights of the under trials who are presumed to be innocent till proven guilty. This also leads to overcrowding in prisons. One reason for this state of affairs is the irrational law regarding bail which insists on financial security from the accused and their sureties and thus the poor and indigent persons can not be released on bail as they are unable to provide financial security. Consequently they have to remain in prison awaiting their trial. Thus even persons accused of bailable offences are unable to secure bail.
The Supreme Court has criticized long incarceration of under trials and has sought to rectify the deplorable situation. Commenting on the deplorable situation, the Court has observed:

It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial....

The Court has declared that after the dynamic interpretation of Article 21 in Maneka Gandhi, there is little doubt that any procedure which keeps such large numbers of people behind bars without trial so long can not possibly be regarded as reasonable just and fair so as to be in conformity with Article 21. It is necessary that the law enacted by the legislature and as administered by the Courts must radically change its approach to pre-trial detention and ensure ‘reasonable, just and fair’ procedure which has creative connotation after Maneka Gandhi’s case. The Court has ordered release of many such under trials as have remained in prison longer than even the maximum punishment which could have been imposed on them for their offences under the law.

Personal liberty is used in Article 21 as a compendious term to include within itself all varieties of rights which goes to make up the personal liberty of man other than those dealt within several clauses of Article 19 (I), while Article 19 (1) deals with particular species or attributes of that freedom, personal liberty in Article 21 takes on and comprises the residue as held in Sidharam Satingappa Mahetre v. State of Maharashtra. It was further held that:

'Just as liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important. A Large number of under trials are languishing in jail for a long time even for allegedly committing very minor offences. This is because Section 438 of the Code of Criminal

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122 Hussainara Khatoon v. Home Secretary, Bihar, AIR 1979 SC 1360.  
123 (2011) 1 SCC 694
Procedure has not been allowed in its full play. The Constitution Bench in *Sibia*\(^{124}\) case clearly mentioned that Section 438 of Cr.P.C is extraordinary because it was incorporated in Cr.P.C, 1973. Before that other provisions for grant of bail were Sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some Courts of smaller strength have erroneously observed that Section 438 Cr.P.C should be invoked only in exceptional or rare cases.'

d) **Right to Free Legal Aid**

The Supreme Court has taken a big innovative step forward in humanizing the administration of criminal justice by suggesting that free legal aid be provided by the State to poor prisoners facing a prison sentence.

In *Khatri v. State of Bihar*,\(^{125}\) the Supreme Court again emphasized that the State Governments cannot avoid their Constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability.

The obligation to provide free legal service to the poor accused arises not only when the trial begins but also when he is for the first time produced before the magistrate. It is that stage that the accused gets its first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody and so the accused needs competent legal advice and representation at that stage. The accused can also claim free legal aid after he has been sentenced by a Court, as he is entitled to appeal against the verdict.

The Court has further emphasized that it is the obligation of the magistrate or judge before whom the accused is produced to inform him that he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. The Court has taken the

\(^{124}\) (1980) 2 SCC 565
\(^{125}\) AIR 1981 SC 928.
view that the right to free legal service would be illusory for an indigent accused unless that trial judge informs him of such rights. Since more than 70% of the people in the rural area are illiterate and even more than that percentage of the people are unaware of the rights conferred to them by law, it is essential to promote legal literacy as part of the programme of legal aid. It would be a mockery of legal aid if it were to be left to poor ignorant and illiterate accused to ask for legal services.

Legal aid would become a paper promise and it would fail in its purpose. The trial judge is therefore obligated to inform the accused that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State.

The Court has further explained that question of providing the free legal aid the accused persons in Suk Das case.

In _Suk Das v. Union Territory of Arunchal Pradesh_, the appellants and four other persons are charged with an offence under section 506 read section 34 of IPC. The appellants being poor could not engage a lawyer to represent at the trial. They were convicted by the Sessions Court. In appeal to the High Court they pleaded that they had not been given the assistance of a lawyer but the High Court dismissed the appeal on the ground that they had made no request for providing legal aid and that in the facts and circumstances of the case it could not be said that the failure to provide them legal assistance vitiated the trial. The matter then came before the Supreme Court by way of appeal.

The main question for the Court to consider in _Suk Das’s_ case was whether fundamental right could be denied lawfully to an accused person if he does not apply for free legal aid. The Court has now pointed out that the bulk of the Indian people living in rural areas are illiterate and are not aware of their rights. Even literate people do not know what their rights are under law. In circumstances it would make a mockery of legal aid if it were to be left to a

126 AIR 1986 SC 991.
poor, ignorant and illiterate accused to ask for free legal service. Legal aid would be an idle formality if it was to be denied upon a specific application by such poor or ignorant person for such legal assistance.

The Court has reiterate Right to Bail the Khatri ruling in which it was held that in a case where if on conviction a sentence of imprisonment would be imposed and social justice requires that the accused be given legal aid, the magistrate is under a legal obligation to inform the accused that if he is unable to engage the service of a lawyer due to poverty or indigence he is entitled to obtain free legal services at the cost of the State. In Suk Das’s case the conviction of the appellant was quashed by the Supreme Court because the accused remained unrepresented by the lawyer and so the trial became vitiated on account of fatal Constitutional infirmity.

The Supreme Court has ruled that the trial judge is under an obligation to inform the accused that if he is unable to engage the service of a lawyer due to poverty or indigence he is entitled to obtain free legal services at the cost of the State. Failure on the part of the trial judge to inform the accused that he is entitled to free legal aid and inquire from whom wherever he wants a lawyer to be provided at the cost amounts to violation of fundamental rights of the accused and thus the trial is vitiated on account of fatal Constitutional infirmity which means his conviction must be set aside.

In Mohd.Ajmal Amir Kasab v. State of Maharashtra\textsuperscript{127} the Supreme Court has observed:

'Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, for entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the Court to provide him with a lawyer before commencing the trial. But the failure to provide a lawyer to the accused at the pre-trial stage may not

\textsuperscript{127} (2012) 9 SCC 1; (2012) 3 SCC (Cri) 481.
have the same consequence of vitiating the trial, unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial.'

Mohd. Ajmal Amir Kasab had refused to accept the services of Indian lawyers and demanded lawyers from his own country Pakistan taking the plea that he was having right to be represented by 'lawyer of his own choice'. When no legal aid came from Pakistan, he finally accepted the services of Indian lawyer. He took the plea that it was violative of his right under Article 21 of the Constitution of India. The plea of Mohd. Kasab was rejected by the Supreme Court holding the there is no question of any violation of any of the rights of the appellant under the Indian Constitution.

The Supreme Court has now clarified that free legal assistance at the cost of the State is a fundamental right of a person accused of an offence involving jeopardy to his life or personal liberty. This requirement is implicit in the requirements of a reasonable, fair and just procedure described in Article 21.

e) **Fair Trial**

Right to fair trial is an integral part of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India and that the fundamental right under Article 21 was inalienable and there can be no question of any waiver of the right by any person. Reference can be made to the decisions in *Zahira Habibullah Sheikh (5) v. State of Gujarat*¹²⁸, *T. Nagappa v. Y.R. Muralidhar¹²⁹*, *Noor Aga v. State of Punjab¹³⁰, NHRC v. State of Gujarat¹³¹* *Jayendra Vishnu Thakur v. State of Maharashtra¹³²* and *G.

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The Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political rights, 1966 to which our country is a signatory, visualize a social order in which human dignity and honour can not be whistled down by the authorities without a rational process of law.\(^{136}\) There also exists the standard minimum rules for treatment of prisoners which provide elaborate and detailed guidelines for the routine protection of the rights of persons consigned to jail, whether by detention or by imprisonment. Besides, there is the declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, which was adopted by General Assembly in 1975.

In Manu Sharma v. State (NCT of Delhi)\(^{137}\), the right of fair trial guaranteed to an accused was discussed by the Supreme Court observing that:

"The concept of fair disclosure would take in its ambit furnishing a document which the prosecution relies upon whether filed in the Court or not. Subject to exceptions like sensitive information and public interest immunity, the prosecution should disclose any material which might be exculpatory to the defence. Non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice as no prejudice had been caused to the right of the accused to fair trial."

In A.S.Mohammed Rafi v. State of Tamil Nadu Rep., by Home Dept. and others\(^{138}\), the Supreme Court discussed the right of fair trial of an under trial.

\(^{135}\) (1985) 3 SCC 545 (pp. 569-70, paras 28 and 29)
\(^{136}\) Arts of Universal declaration of Human Rights 1948 and Article 7 of International Coeint of Civil and Political Rights 1966 provide no one will be subjected to torture or to cruel in human or degrading treatment or punishment
\(^{137}\) (2010) 6 SCC 1 : AIR 2010 SC 2352
\(^{138}\) 2011 (1) SCC 688 : 2011 AIR (SC) 308.
Several Bar Associations all over India had passed resolutions that they will not defend a particular person or persons in a particular criminal case or they will not defend a person who is alleged to be terrorist or a person accused of a brutal or heinous crime or involved in a rape case. It was held by the Supreme Court thus:

'In our opinion, such resolutions are wholly illegal, against all traditions of the bar and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by the society, has a right to be defended in a Court of Law and correspondingly it is the duty of the lawyer to defend him.'

Recently, in *Rajesh Talwar and another v. Central Bureau of Investigation and another*¹³⁹, the Supreme Court has held that:

'Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to meet out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic Fundamental Right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution...'
V   **Right of Prisoners under the ambit of Article 21 as expounded by the Supreme Court.**

a)   **Human Rights**

The Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political rights, 1966 to which our country is a signatory, visualize a social order in which human dignity and honour can not be whistled down by the authorities without a rational process of law.\(^1\)

There also exists the standard minimum rules for treatment of prisoners which provide elaborate and detailed guidelines for the routine protection of the rights of persons consigned to jail, whether by detention or by imprisonment. Besides, there is the declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, which was adopted by General Assembly in 1975.

It has been rightly said that conviction for a crime does not render a non-person whose rights are subjected to whim. Prisoners are still persons entitled to all Constitutional rights curtailed by procedure that satisfy all requirements of due process.\(^2\)

Mr. Justice Marshall expressed himself explicitly as:

A prisoner does not shed his basic Constitutional rights at the prison gate and interest of the inmates in freedom from imposition of serious discipline in a liberty entitled to the due process protection.\(^3\)

In *D. Bhujan Mohan v. State of A.P.*\(^4\) Chandrachud, J. observed, Convicts are not, by mere reason of the conviction, denuded of all the fundamentals rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in prison house entail by

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140 Arts of Universal declaration of Human Rights 1948 and Article 7 of International Covent of Civil and Political Rights 1966 provide no one will be subjected to torture or to cruel in human or degrading treatment or punishment


143 AIR 1947 SC 2092.
its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or right to practice a profession. Even the convict is entitled to some precious rights guaranteed by Article 21 that he should not be deprived of his life except according to procedure established by law.

In *Sunil Batra v. Delhi Administration*\(^{144}\) the Supreme Court was concerned with two prisoners, one of them Sunil Batra under death sentence was put in solitary confinement pending his appeal to the High Court; the other charged with serious offences was put under bars and fetters. This litigation is not ad-junction on particular grievances of individual prisoners but broad delivery of social justice. It goes beyond mere moral weightlifting or case by case correction but transcends into forensic humanization of a harsh legal legacy which has for long hidden from judicial view. It is the necessary task of the Court. When invited appropriately, to adventure even into fresh areas of agony and injustice and to inject humane Constitutional ethic into imperial statutory survivals, especially when the prison executive, thirty years after independence, defends the alleged wrong as right and legislatives, whose members over the decades are not altogether strangers to the hurtful features of the jails; are perhaps preoccupied with more popular business than concern for the detained derelicts who are a scattered voiceless, noiseless minority. It is unhappy, reflection charged with pessimism and realism that Courts have come and gone but the prisons largely managed to preserve the macabre heritage to treat the prisoners.

Krishna Iyer J observed that prisons are built with stores of law and when human rights are hashed behind bars, Constitutional justice impeaches such law. In this sense, Courts which sign citizens into prisons have enormous duty to ensure that during detention and subject to the Constitution, freedom from torture belong to the detune.

\(^{144}\) AIR 1978 SC 1675.
The ratio in *A.K. Gopalan’s case* where the Court by majority adopted restrictive construction and ruled out the play of fundamental rights for anyone under valid detention was upturned in R.C. Cooper’s Case.

In *Maneka Gandhi’s* case the Court has highlighted this principle in the context of the Article 21 itself. Constitution has no ‘due process’ clause or the VIII Amendment bit in this branch of law after the cooper and *Maneka Gandhi’s* cases the consequence are the same? So the law is that for a prisoner all fundamental rights are an enforceable reality, through restricted by the fact of imprisonment. The omens are hopeful for the imprisoned humans because they can enchantingly invoke *Meneka Gandhi’s* case and its wake Articles 14 and 21 to repeat the deadening impact of unconscionable incarceratory inflictions based on some lurid legislation text or untested tradition.

And what is ‘life’ in Article 21 is well explained in *Kharak Singh’s* case Subha Rao J well quoted Field, J in *Munn. v Illinois* to emphasize the quality of ‘life’ covered by Article some thing more than mere animal existence. This is very much applicable to the prisoners may be they are behind the bars but the bars are not too strong that they can barter away the human dignity.

Again in *Sunil Batra* (II), Krishna Iyer J observed the Court process casts the convict into the prison system and the deprivation of his freedom is not a blind penitentiary but a be-lighted institutionalization geared to social good.
In this case an instance of perverted torture came to public light. A warden of the prison inserted a rod in the anus of a prisoner with the view to extort money from him. Another fact brought to the notice of the Court was that under trials were kept along with the criminals. On the latter aspect the Court gave an example that how cruel it would be if one went to the hospital for a check up and by being kept with contagious cases came home with a new disease? The Judge on the former aspect said that jails are in real the arena of tension, torture, trauma and the crime of violence, vulgarity and corruption. There is a large network of criminals, officials and the non-officials in the home of correction drug-racket alcoholism smutting violence and theft. It was further held that integrity of physical person and his mental personality is important right of a prisoner and must be protected from all kinds of authorities. The Court gave following directions to the Central and State Governments and jail authorities:

1. That the prisoner’s torture was illegal and they shall not be subjected to any such torture until fair procedure is completed with.
2. No corporal punishment or personal violence on the prisoners inflicted.
3. Lawyers should be given all facilities to interview and to have confidential communications with prisoners subject to discipline and security consideration.
4. Grievance deposit boxes shall be maintained in jails.
5. District Magistrate and Sessions Judge shall inspect jails every weekend, make inquiries into grievances remedial and take suitable actions.
6. No solitary or punitive cell, no hard labour or dilatory charge, denial of privileges and amenities, no transfer to other prison as punishment shall be imposed without judicial approval of the Sessions judge.
In *Mohd Giassudin v. State of A.P.*\(^{153}\) the Court also held the long period of imprisonment must be converted into a spell of healing spent in an intensive care ward of penitentiary and this can be achieved by giving him congenial work which gives job satisfaction and not ‘jail frustration’ and further criminalization. Therefore the Court directed that the appellant must be assigned work not of monotonous, mechanical, degrading type, but of a mental, intellectual or like type mixed with the little manual labour.

In *Rakesh v. Superintendent, Central Jail, New Delhi.*,\(^ {154}\) the Court expressed it’s concern towards protection of prisoners from physical assault by fellow prisoners or warden from moral stress by being forced to assist in falsification and manipulation for canteen sales misappropriation, from discrimination in being subjected to hard labour of a harsh type if he did not object the 8 class bosses or senior officers. It also protected them from pressure against transmitting grievances to the Sessions Judge through the grievance-box or directly to Court by post. Emphasizing the need of touch sympathy not only for the present petitioners but also for those who are not able to communicate their grievances, the Court observed, the human canvas has to spread wider, the diagnosis has to be deeper and the recipe must sensitize the environment.

The reformist and activist Court banned imposition of solitary confinement which would be an additional and inhuman punishment, except when it is permitted under the Constitutional mandate prescribed by the Supreme Court that when no other alternative is left with the authorities regarding security purposes. The human rights saviour Apex Court secured the humans, the existence out of the zoological existence by forbidding the subjection of the prisoners to bars fetters and handcuffs. But if extremely necessary then they have to follow the reasonable restriction given by the Court.

\(^{153}\) AIR 1977 SC 1926.

\(^{154}\) (1981) 1 SCC 420.
The human thread of the jail jurisprudence that runs rights through is that no prison authority enjoys amnesty for unconstitutional and forced farewell to fundamental rights is in institutional outrage in a system where stone walls and iron bars shall bow before the rule of law. Since life and the liberty are at stake the gerontocracy of the jail. Manual shall have to come to the working terms with paramount of fundamental rights.155

The prison regulations imposing restrictions must be just, fair and reasonable. The following human rights are available to the prisoners:

1. No prison official should be allowed to go beyond mere imprisonment or deprivation of locomotion such as to assault detenues or otherwise do the things not covered by the sentence. If he does so he acts in violation of the rights of human dignity.

2. Punishment of the rigorous imprisonment merely obliges the convict to do hard labour but it does not mean that they can be compelled to harsh labour and thus a vindictive officer victimizing a prisoner by forcing him particularly harsh and degrading jobs is violating not his right of human dignity.

3. Any harsh isolation of prisoners from society by long, lonely cellular detention is penal, it must be inflicted consistently with fair procedure.

4. Visits to prisoners by family and friends are a solace, only a dehumanized system can deprive vicarious delight and depriving prisoner - inmates of this human amnesty. A sullen, forlorn prisoner is a dangerous criminal in the making and there is no reason why the right to be treated as a human be the right of every prisoner. The subject of consideration of security and discipline, liberal visits by family members, friends and legitimate callers should be considered as a party of rights to human dignity.

5. Since to fetter prisoners in irons is inhuman and unjustified, this should be restored to only when the safe custody is otherwise impossible. Thus, routine resort to handcuff and irons is barbaric and against human dignity and social justice. Flimsy grounds like loitering in the prison behaving ‘insolently and in uncivilized manner, tearing of his history sheet can’t be the foundation for the torture, some treatment of solitary confinement and cross bar fetters.

6. Pushing the prisoner into the solitary cell, denial of necessary amenities and more dreadful sometime transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to desperate or tough gang and a like amount to torture and infraction of fundamental rights to life.

7. Use of third degree methods is torture and violative of right to human dignity. All freedoms belong to him: to read and write, to exercise and recreation; to meditation and chart to creative comforts like protection from extreme cold and heat to freedom from exterior comforts like protection from indignity as nudity, forced sodomy and other unbearable vulgarities, to movement within the prison campus subject to requirement of discipline and security to the minimal joys of self-expression to acquire skills and techniques and all other fundamental rights tailored to the limitations of imprisonment.\textsuperscript{156}

b) **Prisoner’s Grievances**

The Supreme Court has emphasized that a prisoner, whether a convict, under trial or detune, does not cease to be a human being and while lodged in jail he enjoys all his fundamental rights including the right of life guaranteed by the Constitution. Even when a person is convicted and deprived of his liberty in accordance with the procedure established by law, a prisoner still retains the

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residue of Constitutional rights.\textsuperscript{157} Articles 14, 19 and 21 “are available to prisoners as well as freeman. Prison walls do not keep out Fundamental Rights.”

The Supreme Court has assumed, under Article 32, jurisdiction to consider prisoner’s grievances of ill treatment. In \textit{Charles Sobraj},\textsuperscript{158} the Court has ruled that it can intervene the prison administration whenever Constitutional rights or statutory prescriptions are transgressed to the injury of the prisoner.

\textbf{VI Capital punishment vis-a-vis right to life under Article 21- An appraisal of controversy and related issues.}

Human life is perhaps the most precious gift of the nature, which many describe as the Almighty. This is the reason why it is argued that if you cannot give life, you do not have the right to take it. Many believe that capital punishment should not be imposed irrespective of the nature and magnitude of the crime. Others think that the death penalty operates as a strong deterrent against heinous crimes and there is nothing wrong in legislative prescription of the same as one of the punishments. The debate on this issue became more intense in the second part of the 20th century and those belonging to the first school of thought succeeded in convincing the Governments of about 140 countries to abolish the death penalty.

In India death was prescribed as one of the punishments in the Penal Code and the same was retained after Independence. However, keeping in view the old adage that man should be merciful to all living creatures, the framers of the Constitution enacted Articles 72 and 161 under which the President or the Governor, as the case may be, can grant pardons, reprieves, respites or remission of punishment or suspend, remit or commute the sentence of any person convicted of any offence and as will be seen hereinafter, the President

\textsuperscript{157} \textit{T.V. Vatheeswarn v. State of Tamil Nadu}, AIR 1983 SC 361.
has exercised power under Article 72 in a large number of cases for commutation of the death sentence into life imprisonment except when the accused was found guilty of committing gruesome and/or socially abhorrent crime.

The campaign for the abolition of capital punishment led to the introduction of a Bill in the Lok Sabha in 1956 but the same was rejected on 23-11-1956. After two years, a similar resolution was introduced in the Rajya Sabha but, after considerable debate, the same was withdrawn. Another attempt was made in this regard in 1961 but the resolution moved in the Rajya Sabha was rejected in 1962. Notwithstanding these reversals, the voters of no capital punishment persisted with their demand. The Law Commission of India examined the issue from various angles and recommended that the death penalty should be retained in the statute book. This is evinced from the 35th Report of the Law Commission, the relevant portions of which are extracted below:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.

It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument based on the irrevocable nature of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and
education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture. India cannot risk the experiment of abolition of capital punishment. The Constitutionality of capital punishment was examined by the Constitutional Bench in *Jagmohan Singh v. State of U.P.*\(^{159}\)

Deprivation of life is Constitutionally permissible if that is done according to procedure established by law. In the face of these indications of Constitutional postulates it will be very difficult to hold that capital sentence was regarded per se unreasonable or not in the public interest.

The Constitutional validity of Section 302 IPC, which prescribes death as one of the punishments, was considered by the Constitutional Bench in *Bachan Singh v. State of Punjab*\(^{160}\). By a majority of 4:1, the Constitutional Bench declared that Section 302 IPC was Constitutionally valid.

While dealing with the argument that Section 302 violates Article 21 of the Constitution, Sarkaria J. referred to the judgment in *Maneka Gandhi v. Union of India*\(^{161}\) and observed: (*Bachan Singh case*\(^{162}\), SCC pp. 730-31, para 136)

\[\ldots\] Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications also in the Constitution which show that the Constitution-makers were fully cognizant of the existence of the death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in List III-Concurrent List-of the

\[\text{Notes:}\]
\[159\] (1973) 1 SCC 20: 1973 SCC (Cri) 169.
\[160\] (1980) 2 SCC 684 : 1980 SCC (Cri) 580
\[161\] (1978) 1 SCC 248.
Seventh Schedule, specifically refer to the Indian Penal Code and
the Code of Criminal Procedure as in force at the commencement
of the Constitution. Article 72(1)(c) specifically invests the
President with power to suspend, remit or commute the sentence
of any person convicted of any offence and also in all cases
where the sentence is a sentence of death. Likewise, under Article
161, the Governor of a State has been given power to suspend,
remit or commute, inter alia, the sentence of death of any person
convicted of murder or other capital offence relating to a matter
to which the executive power of the State extends. Article 134, in
terms, gives a right of appeal to the Supreme Court to a person
who on appeal, is sentenced to death by the High Court after
reversal of his acquittal by the trial Court. Under the successive
Criminal Procedure Codes which have been in force for about
100 years, a sentence of death is to be carried out by hanging. In
view of the aforesaid Constitutional postulates by no stretch of
imagination can it be said that the death penalty under Section
302 of the Penal Code, either per se or because of its execution
by hanging, constitutes an unreasonable cruel or unusual
punishment. By reason of the same Constitutional postulates, it
cannot be said that the framers of the Constitution considered the
death sentence for murder or the prescribed traditional mode of
its execution as a degrading punishment which would defile the
dignity of the individual within the contemplation of the
Preamble to the Constitution. On parity of reasoning, it cannot be
said that the death penalty for the offence of murder violates the
basic structure of the Constitution.
a) **Constitutionality of Capital Punishment**

Capital punishment means extinguishing life, it is a deprivation of life par challenged, can this be included in Article 21, which makes the life full of dignity can the state take that life with having Article 21 ringing in their ear but in vainly.

In *Jagmohan Singh v. State of U.P.*\textsuperscript{163} the Constitutionality of death sentence was exclaimed but at that time when this case came up the old act was in practice and it was in section 367(5), Criminal Procedure Code the normal rule was to sentence the accused of death on the conviction of the murder and to impose lesser sentence of imprisonment of life for reasons to be recorded in writing and also there was with reference to the sentence. But this was amended\textsuperscript{164} and these words were deleted.

After *Jagmohan*’s case came the case of *Ediya Anamma v. State of A.P.*\textsuperscript{165} in which Krishna Iyer J. observed let us crystallize the positive indicators against the death sentence under Indian Law currently where the murder is too young or too old, the clemency of penal justice helps him. Where the offenders suffer from socio - economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, within extenuating impact may in special cases, induce the lesser penalty. Extraordinary features in the judicial process such as that the death sentence has hung over the head of the culprit excruciatingly long may persuade the Court to be compassionate.

In *Dalbir Singh v. State of Punjab*\textsuperscript{166} the Court reduced the death sentence to one of life imprisonment despite the accused were guilty of four murders, on the ground that counting of causalities is not the main criterion for

\begin{footnotesize}
\begin{enumerate}
\item[163] AIR 1973 SC 947.
\item[165] AIR 1974 SC 799.
\item[166] AIR 1979 SC 1384.
\end{enumerate}
\end{footnotesize}
sentencing them to death because the sole focus on the crime and the total farewell to the criminal and his social personal circumstances were regarded as mutilation of sentencing justice.

The grisly and gruesome nature of murders, the hopeless and helpless state of the victims, the fiendish modus operandi of the accused and the grans and garps of the dying all taken together say that they betray an extremely depravity of character warranting death sentence.

Afterwards case of *Bachan Singh v. State of Punjab* 167 came before a Constitutional Bench, which changed the outlook, thinking of people in the matter of capital punishment. It was held that death sentence was not violative of Article 21 but stated that it ought to be imposed in the rarest of rare cases which is demanded by a real and abiding concern for the dignity of human life through laws instrumentally.

Rarest of rare case can be said of that case when the alternative option is unquestionably foreclosed. Article 21 expanded and read for the interpretation purpose clearly brings out the implication that the founding fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fare, just and reasonable procedure established by valid law. Entry 1 and 2 in List 111 - concurrent List - of the Indian Penal Code and the Code of Criminal Procedure as in force at the commencement of the Constitution. In the Code of Criminal Procedure still a sentence of death is to be carried out by hanging. In view of the aforesaid Constitutional postulates by no strength of imagination can it be said that penalty under section 302 penal code, either per se because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment. By reason of the same Constitution postulates, it cannot be said that the framers of the Constitution considered the death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment, contemplation. On parity of reasoning it can’t be said

167 AIR 1980 SC 898.
that death which would defile the penalty for the offence of murder violates the basic structure of the Constitution.

Also in Article 6 clause (1) and (2) of the international convent on Civil and political right to which India acceded in 1979 do not abolish or prohibit the imposition of death penalty in all circumstances. All that is required is firstly death penalty shall not be arbitrarily inflicted, secondly it shall be imposed only for most serious crimes in accordance with the law, which shall not be an exposed factor legislation go beyond what is provided in the Constitution, Indian Penal Code and the Code of Criminal Procedure. Thus the requirements of these clauses are substantially the same as the guarantee or prohibitions contained in Article 20 and Article 21.

In Rajendra Prasad v. State of U.P.\textsuperscript{168} Krishna Iyer J. observed that the main emphases of our judgment is on this poignant gap in human rights jurisdiction within the limits of penal Court, impregnated by the Constitution. To put it pithily, a world order voicing the worth of human person, a culture legacy charged with compassion and interpretative liberation from colonial callousness to life and liberty, a concern from social justice as setting the rights of individual justice, interest with the inherited text of the Penal Code to yield the goals desired by the Preamble and Article 21. It was also held that there must be such extraordinary option to the Court but to execute the offender if State and society are to survive. If he is an irredeemable murderer, like a bloodthirsty tiger, he is to quit his terrestrial tenancy.

Most of the cases in which death sentence was given after 1980 are rarely cases which shook the conscience of the people. The assassinations of Prime Minister Smt. Indira Gandhi\textsuperscript{169} and retired chief of Army Staff General

\textsuperscript{168} AIR 1979 SC 916.
\textsuperscript{169} AIR 1988 SC 1883.
Vaidya\textsuperscript{170} murder of Sanjay and Geeta Chopra\textsuperscript{171} the death sentence was awarded on the touchstone of the Bachan Singh criterion.

In \textit{Munnawar Hamal Shah v. State of Maharashtra}\textsuperscript{172} the appellants committed a series of murders and the extreme penalty of death was upheld having regard to the magnitude of the gruesome nature of the offences and the manner of perpetrating them. It was further pointed out that any leniency shown in the matter of sentence would not only be misplaced but also would certainly give rise to and foster a feeling of private revenge among people leading to destabilization of the society. In \textit{Ranjit v. U.T. of Chandigarh}\textsuperscript{173} was also a case where even though the appliance were to commit the crime in question with the motive if Yen Dutta and revenge and both of them acted in a cruel manner in inflicting as many as 32 injuries with knives on the deceased, the same was not regarded as appropriate for death sentence.

\textit{Darshan Singh v. State of Punjab}\textsuperscript{174} however found the Apex Court upholding the death sentence, because the attack was so cruel in as much as the appellant had chopped the neck of the deceased, had given repeated blows by gandasa on the body of another deceased who was a young girl, indeed his own uncle’s daughter which had been done to see that she did not escape. The brutality of the crime prevailed on the judges to approve the penalty of death.

So, scanning through a number of clauses in the infliction of death sentence is done keeping in view various factors:

1. Manner of commission of murder.
2. Motive for commission of murder.
3. Anti-social or the sociality abhorrent nature of the crime.
4. Personality of victim of murder.

\textsuperscript{170} 1992 (3) SCC 700.
\textsuperscript{171} AIR 1981 SC 1572.
\textsuperscript{172} AIR 1983 SC 585.
\textsuperscript{173} AIR 1983 SC 45.
\textsuperscript{174} AIR 1988 SC 747.
A balance sheet of aggravating and mitigating circumstances has to be drawn up and a balance had to be struck and if taking an overall global view the conclusion be that the circumstances of the case are such that death sentence is warranted, the Court should proceed to do so.

Death sentence was awarded to the accused persons in Shiv Ram v. State of Uttar Pradesh,175 The Court observed: totality of circumstances outweighed the mitigating circumstances ... sentence of life imprisonment to these six accused persons would be totally inadequate in the facts and circumstances of this case. The proved facts of this case unmistakably indicate that the present case squarely falls within the ambit or ‘rarest of rare’ case.

On the other hand, in Shaikh Ayub v. State of Maharashtra,176 the Supreme Court reduced the death sentence into imprisonment for life. The accused had murdered his wife and his children. The Court felt that he had done so because of unhappiness and frustration and not because of any criminal tendency.

The Supreme Court has in Allauddin Mian v. State of Bihar,177 reiterated the proposition that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence.

In Surja Ram v. State of Rajasthan178 the appellant killed his real brother, his two minor sons, aunt and nearly killed his brother’s wife and daughter while asleep. There was no provocation for the ghastly act. The Supreme Court refused to interfere with the death sentence passed on him by the sessions judge and the High Court. The Supreme Court observed” ... it appears to us that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a

175 AIR 1988 SC 49.
176 AIR 1998 SC 1285.
177 AIR 1989 SC 1456.
178 AIR 1997 SC 18.
crime has been committed are to be delicately balanced in a dispassionate manner and that punishment must also respond to the society’s cry for justice against the criminal.

In *Ram Singh v. Sonia & Ors.* (2007)\(^{179}\), the Hon’ble Supreme Court once again held that:

> It would be a failure of justice not to award the death sentence in a case where the crime was executed in the most grotesque and revolting manner.

In *C. Munniappan v. State of Tamil Nadu*\(^{180}\), the Hon’ble Supreme Court held:

> Stressing upon the manner of commission of offence, if extremely brutal, the diabolical, grotesque killing, shocking to the collective conscience of the society, the death sentence should be awarded.

In *Ajit Singh Harnam Singh Gujral v. State of Maharashtra*\(^{181}\), the Hon’ble Supreme Court further held that;

> The distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former, the latter belongs to the category of the rarest of rare cases and hence death sentence should be given.

In *Sunder v. State*\(^{182}\), the Hon’ble Supreme Court held:

> The following factors would be the aggravating circumstances:

\(^{179}\) (2007) 3 SCC 1.
\(^{180}\) (2010) 9 SCC 567.
\(^{181}\) (2011) 14 SCC 401.
\(^{182}\) (2013) 3 SCC 215
a) The accused have been held guilty of two heinous offences, which independently of one another, provide for the death penalty;

b) no previous enmity between the parties, no grave and sudden provocation which compelled the accused to take the life of the prosecutrix;

c) extreme mental perversion;

d) the manner in which the victim was murdered and the approach and method adopted by the accused, disclose the traits of outrageous criminality in the behaviour of the accused;

e) well planned and consciously motivated crime;

f) extreme misery caused to the aggrieved party.

In *Alister Anthony Pareira v State of Maharashtra*183 the Supreme Court’s observations are relevant. The Court observed in paras 84-85 thus:

84. Sentencing is an important task in the matters of crime. Out of the prime objectives of criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The Courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

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85. The principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of law proportion between crime and punishment bears most relevant influence. In determination of sentencing the crime-doer, the Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.\(^{184}\)

The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to society’s cry for justice against the criminal.\(^{185}\)

These observations are reiterated in *Guru Basavaraj v. State of Karnataka*\(^{186}\) But in *Haresh Mohandas Rajput v. State of Maharashtra*\(^{187}\) the Court had extended its list thus:

The rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of the rarest of the rare case. There must be no reasons to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence.

The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an

\(^{184}\) (2012) 2 SCC 648, 674.
\(^{185}\) Ibid, 678, para 92.
\(^{186}\) (2012) 8 SCC 734 ; (2012) 4 SCC (Cri) 594.
\(^{187}\) (2011) 12 SCC 56 ; (2012) 1 SCC (Cri) 359.
accused does not act on any spur of the moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal grotesque, diabolical revolting and dastardly manner, where his act affects the entire moral fiber of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. See C. Municiappan v. State of T.N.\textsuperscript{188}, Dara Singh v. Republic of India\textsuperscript{189}, Surendra Koli v. State of U.P.\textsuperscript{190}, Mohd. Mannan v. State of Haryana.\textsuperscript{191} and Sudam v. State of Maharashtra.\textsuperscript{192}

The Supreme Court’s observations on the purpose of punishment and its mode for imposing various punishments made in \textit{Shailesh Jasvantbhai v. State of Gujarat}\textsuperscript{193} are relevant. They run as follows:

...Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of order should meet the challenges confronting the society. Friedman in his \textit{Law in a Changing Society}\textsuperscript{194} stated that: State of criminal law continues to be-as it should be-a decisive reflection of social consciousness of society. Therefore in operating the sentencing system, law should adopt the corrective

\begin{itemize}
\item \textsuperscript{188} (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402.
\item \textsuperscript{189} (2011) 2 SCC 490 : (2011) 1 SCC (Cri) 706.
\item \textsuperscript{190} (2011) 4 SCC 80 : (2011) 2 SCC (Cri) 92.
\item \textsuperscript{191} (2011) 5 SCC 317 : (2011) 2 SCC (Cri) 626.
\item \textsuperscript{192} (2011) 7 SCC 125 : (2011) 3 SCC (Cri) 56.
\item \textsuperscript{193} (2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499.
\item \textsuperscript{194} Friedman, \textit{Law in a Changing Society} (University of California Press, 1959) 165.
\end{itemize}
machinery or deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be and tempered with mercy where it warrants to be.  

It may be appropriate if the sentencing Court examines the circumstances in which the offender came to commit the offence in the light of facts collected on his personality and the social situation and adduce reasons for its choice of punishment keeping in view the need for prevention of crime-the primordial purpose of punishment.

At present it is sad to see the Appellate Courts’ referring and examining the evidence of witnesses as if they are trial Courts. At least at the level of the Supreme Court this practice should be avoided in as much as the High Courts are the final Courts for evidence. It is unfortunate that in many judgments in criminal cases there is no coherence in discussion of facts or law. This is particularly so at the stage of awarding sentence. The discussions on facts and law should lead to the logical conclusion of the acceptance of a particular purpose-theory of punishment and it should be supported with convincing reasons.

The present practice of adducing reasons for a harsher punishment and then awarding a lesser punishment on the basis of the fragile plea that the accused was young, poor, drunk, capable of reforming, etc. might not go well with the society at large.  One should remember that the legislature in its wisdom expressed its preference for a punishment reflected in the statutory provisions which also incorporate element of judicial discretion. Though it may be possible to argue for modulation, it is equally important to remember that the judiciary should not try to rewrite the law. Nor should the Courts avoid analysis and application of the theories of punishment to actual factual

196 The Supreme Court's reasoning in its recent decision in Sandesh v. State of Maharashtra, Criminal Appeal No. 1973 of 2011 decided on 13-12-2012 (SC)
situations with a flurry of English words like, adequate, just, appropriate proportionate etc. The quagmire in judicial reasoning should be done away with.

b) Mode of Execution of Death Sentence

In Deena alias Deen Dayal and Ors. v. Union of India\textsuperscript{197} the petitioners challenged the constitutional validity of Section 354(5) the Code of Criminal Procedure on the ground that hanging a convict by rope is a cruel and barbarous method of executing death sentence, which is violative of Article 21 of the Constitution. It was observed by the Supreme Court that:

"The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan, the Japanese Supreme Court held that execution by hanging does not correspond to cruel punishment inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly unaccompanied by intense physical torture and pain.

\textsuperscript{197} AIR 1983 SC 1155.
Having given our most anxious consideration to the central point of inquiry, we have come to the conclusion that, on the basis of the material to which we have referred extensively, the State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by Section 354(5) of the Code of Criminal Procedure does not violate the guarantee right contained in Article 21 of the Constitution. The material before us shows that the system of hanging which is now in vogue consists of a mechanism which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension. The chances of an accident during the course of hanging can safely be excluded. The method is a quick and certain means of executing the extreme penalty of law. It eliminates the possibility of a lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system of hanging, as now used, avoids to the full extent the chances of strangulation which results on account of too short a drop or of decapitation which results on account of too long a drop. The system is consistent, with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation of brutality of any kind. It is obvious from a reading of the aforesaid decision that the method of hanging prescribed by Section 354(5) of the Code was held not violative of the guaranteed right under Article 21 of the Constitution on the basis of scientific evidence and opinions of eminent medical persons which assured that hanging is the least painful way of ending the life. However, it is the contention of learned counsel for the respondents that owing to dearth of experienced hangman, the accused are being hanged in violation of the due procedure.

The Court didn’t accept the contention and after examining all other methods prevalent in worlds of taking lives, the Bench came to the conclusion that hanging in operations in large parts of the civilized world and consists of a
mechanism which is easy to assemble and is free from anything that would unnecessarily sharpen the poignancy’s of the prisoners apprehension and is quick in certain eliminating at the same time the possibility of lingering death, because of unconsciousness which supervises almost instantaneously after the process is in the motion and the death follows as a result of dislocation of cervical vertebrae. It was observed that this process of execution is being with decency and decorum without involving degradation and brutality of any kind.

In *Attorney General of India v. Lachma Devi*\(^{198}\) public hanging was regarded as barbaric and violative. The Rajasthan High Court held that execution of the death sentence by public hanging at stadium ground or the Ram Lila ground of Jaipur after giving widespread publicity in the media about the date, time and the place of execution was violative. As the barbaric crime doesn’t have to be visited with a barbaric penalty, such as public hanging which was also regarded as disgrace and shamed on any civilized society which no society will tolerate.

c) **Delay in Execution of Death Sentence**

The right to life is the most fundamental of all rights. The right to life, as guaranteed under Article 21 of the Constitution of India, provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Death sentence is imposed on a person found guilty of an offence of heinous nature after adhering to the due procedure established by law which is subject to appeal and review. Therefore, delay in execution must not be a ground for commutation of sentence of such a heinous crime. On the other hand, the argument of learned counsel for the petitioners/death convicts is that human life is sacred and inviolable and every effort should be made to protect it. Therefore, in as much as Article 21 is available to all the persons including convicts and continues till last breath if they establish and prove the supervening circumstances, viz., undue delay in

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198 AIR 1986 SC 467.
disposal of mercy petitions, undoubtedly, Supreme Court, by virtue of power under Article 32, can commute the death sentence into imprisonment for life.

The right of a victim to a fair investigation under Article 21 has been recognized in State of West Bengal v. Committee for Democratic Rights, West Bengal199, the Supreme Court observed as:

Thus, having examined the rival contentions in the context of the Constitutional scheme, we conclude as follows:

(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State...

In Smt. Triveniben v. State of Gujurat200, the Supreme Court, in para 22, appreciated the aspect of delay in execution of death sentence in the following words:

199 (2010) 3 SCC 571

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It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being infringed. It is well settled now that a judgment of Court can never be challenged under Article 14 or 21 and therefore the judgment of the Court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in *Naresh Shridhar Mirajkar v. State of Maharashtra* and also in *A.R. Antulay v. R.S. Nayak*. The only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent Court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent Court while finally passing the verdict. It may also be open to the Court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict
also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also.

India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of Supreme Court in Vishaka v. State of Rajasthan\textsuperscript{201}, international convents to which India is a party are a part of domestic law unless they are contrary to a specific law in force. It is this expression 'cruel and degrading treatment and/or punishment' which has ignited the philosophy of Vatheeswaran (supra) and the cases which follow it. It is in this light, the Indian cases, particularly, the leading case of Triveniben (supra) has been followed in the commonwealth countries. It is useful to refer the following foreign judgments which followed the proposition:


iv) \textit{Attorney General v. Susan Kigula}, Constitutional Appeal No. 3 of 2006 – Supreme Court of Uganda.

v) \textit{Herman Mejia and Nicholas Guevara v. Attorney General}, A.D. 2000 Action No. 296 – Supreme Court of Belize.

It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and

\textsuperscript{201} (1997) 6 SCC 241
documents filed in the Court, preparation of the note for approval of the minister concerned and the ultimate decision of the Constitutional authorities. In \textit{Triveniben (Supra)}, further held that in doing so, if is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the Constitutional authorities have failed to take note of/consider the relevant aspects, the Supreme Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the convict himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal declarations and directions issued by the United Nations.

The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention, preventive or punitive. In this line, although the convicts were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanizing effect on the convict. Delay caused by circumstances beyond the prisoners’ control mandates commutation of death sentence. In fact, in \textit{Vatheeswaran (Supra)}, particularly, in para 10, it was elaborated where amongst other authorities, the minority view of Lords Scarman and Brightman
in the 1972 Privy Council case of *Noel Noel Riley v. Attorney General*202, by quoting 'sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another.' The appropriate relief in cases where the execution of death sentence is delayed, the Court held, is to vacate the sentence of death. In para 13, the Court made it clear that Articles 14, 19 and 21 supplement one another and the right which was spelled out from the Constitution was a substantive right of the convict and not merely a matter of procedure established by law. This was the consequence of the judgment is *Maneka Gandhi v. Union of India*203 which made the content of Article 21 substantive as distinguished from merely procedural.

India is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR). A large number of United Nations international documents prohibit the execution of death sentence on an insane person. Clause 3(e) of the Resolution 2000/65 dated 27.04.2000 of the U.N. Commission on Human Rights titled 'The Question of Death Penalty' urges 'all States that still maintain the death penalty ...not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person'.

Certainly, a series of Constitutional Benches of the Supreme Court have upheld the Constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the Constitutional mandate and not in violation of the Constitutional principles.

It is well established that exercising of power under Article 72/161 by the President or the Governor is a Constitutional obligation and not a mere prerogative. Considering the high status of office, the constitutional framers did

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203 (1978) 1 SCC 248
not stipulate any outer time limit for disposing the mercy petitions under the
said Articles, which means it should be decided within reasonable time.
However, when the delay caused in disposing the mercy petitions is seen to be
unreasonable, unexplained and exorbitant, it is the duty of the Supreme Court
to step in and consider this aspect. Right to seek for mercy under Article 72/161
of the Constitution is a Constitutional right and not at the discretion or whims
of the executive. Every constitutional duty must be fulfilled with due care and
diligence; otherwise judicial interference is the command of the Constitution
(2010) 3 SCC 571 for upholding its values.

Retribution has no constitutional value in our largest democratic
country. In India, even an accused has a *de facto* protection under the
Constitution and it is the Court’s duty to shield and protect the same. Therefore,
it has been made clear that when the judiciary interferes in such matters, it does
not really interfere with the power exercised under Article 72/161 but only to
uphold the *de facto* protection provided by the Constitution to every convict
including death convicts.

In *T.V. Vetheeswaran v. State of Tamil Nadu*204 it was held that if there
was delay exceeding two years in the execution of death sentence the convict
would be entitled to invoke Article 21 and demand quashing of sentence of
death. The cause of delay in the execution being immaterial.

But in *Sher Singh v. State of Punjab*205 the Court agreed with the former
decision by stating that prolonged delay in the execution of a death sentence
was an important consideration for invoking Article 21 for judge that whether
sentence should be allowed to be executed or should be converted into sentence
of imprisonment. Prolonged detention to await the execution of the death
sentence is unfair, unjust and unreasonable procedure and the only way to undo
the wrong is to quash the death sentence. The Court held that this cannot be
applied as a rule in every case and each case should be decided on it’s own

204    AIR 1983 SC 361.
205    AIR 1983 SC 465.
facts. The Court should consider whether the delay was due to conduct of convict, the nature of offence, it’s impact on the society; it’s likeliness of repetition, before deciding to commute the death sentence into a life imprisonment. In the instant case the delay was found due to the conduct of the convict and therefore it was held that the death sentence was not liable to be quashed. Accordingly the Court overruled the decision in the previous case.

But when there is a delay in the execution of the death sentence of more than two years and the conduct and behavior of the convict, evident from the report of the jail authorities that he was showing general repentance it was held that death sentence should be commuted to life imprisonment.\(^{206}\)

In the *Triveniben v. State of Gujarat*,\(^ {207}\) the Supreme Court set the matter at rest and held that undue long delay in the execution of death sentence will entitle the condemned person to approach the Court for conversion of death sentence into life imprisonment, but before doing so the Court will take into consideration the nature of delay and circumstances of the case. No fixed period of delay could be held to make the sentence of death un-executable.

It was observed in the *Madhu Mehta v. Union of India*\(^ {208}\) on the delay that as between funeral fire and mental worry, it is the latter which is more devastating for funeral fire bums only the dead body while the mental worry bums the living one.

In *Jumman Khan v. State of Uttar Pradesh*,\(^ {209}\) the Court has thus ruled that if undue long delay occurs in execution of the death sentence, the condemned person can approach it under Article 32. The Court will examine the nature of the delay caused and the circumstances which ensured after the sentence was finally confirmed. The Court may consider the question of inordinate delay in the light of all the circumstances of the case to decide

\(^{206}\) *Javed Ahmed v. State of Maharasthra*, AIR 1985 SC 231,

\(^{207}\) AIR 1989 SC 1335.

\(^{208}\) AIR 1989 SC 2299.

\(^{209}\) AIR 1991 SC 345.
whether the execution of the sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death non-executable and to this extent Vatheeswaran has now been overruled.

In *Shivaji Jai Singh Babbar v. State of Maharashtra*,\(^{210}\) the death sentence was commuted into life imprisonment because of undue delay in disposal of the mercy petition. But same proposition was not followed in *Dhanjoy Chatterjee* case.\(^{211}\)

In *Mohd.Ajmal Amir Kasab v. State of Maharashtra*\(^{212}\) the death sentence awarded to convict was confirmed by the Supreme Court observing that:

'Putting the matter once again quite simply, in this country death as a penalty has been held to be constitutionally valid, though it is indeed to be awarded in the 'rarest of rare cases when the alternative option (of life sentence) is unquestionably foreclosed'.

Now, as long as the death penalty remains on the statute book as punishment for certain offences, including 'waging war' and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty in this case would amount to obdurately declaring that this Court rejects death as lawful penalty even though it is on the statute book and held valid by constitutional benches of this Court.'

\(^{210}\) AIR 1991 SC 2147.
\(^{212}\) (2012) 9 SCC 1; (2012) 3 SCC (Cri) 481.
In *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, the delay caused in execution of death sentence was not taken to be a valid ground to commute the punishment of death sentence to life imprisonment. The Supreme Court observed thus:

'when State Government and Central Government had made their recommendations within a reasonable time but a substantial portion of eight years' delay in disposal of mercy petitions was attributable to an unending spate of petitions filed on behalf of the petitioner, by various persons in India and internationally and also due to pressure brought upon Government in the form of representations made by various political and non-political functionaries and organizations, there was no valid ground for judicial interference with Presidential order confirming death sentence of petitioner herein.'

On 21.1.2014 fourteen writ petitions against the dismissal of mercy petitions filed by the family members of the convicts came up for hearing before Full Bench of the Supreme Court in Writ Petition (Criminal) No. 55, on 19.12.1997 two accused were ordered to be convicted under Section 302/34 Indian Penal Code for which they were awarded death sentence, which was confirmed by Allahabad High Court on 23.2.2000. Their criminal appeal was dismissed on 2.3.2001. On 9.3.2001 and 29.4.2001 the mercy petitions filed by them were dismissed which were addressed to Governor/ President of Indian. On 18.4.2001 review petition was dismissed. After long wait for a number of years after following the cumbersome procedure, the mercy petitions were dismissed by the President on 8.2.2001. On 5.4.2013 the petitioners heard the news report that their mercy petitions were rejected by the President of India. The petitioner asserted that they did not receive any written confirmation till date. On 6.4.2013 the petitioners authorized their family members to file urgent petitions before the Supreme Court and execution of death sentence was stayed.
Details of the custody were called. Till that date the petitioners had suffered custody of 17 years 2 Months and the custody suffered after sentence of death was 16 years. The total delay since filing of mercy petition till the prisoner was informed of rejection of mercy petition by the President was 12 years and 02 months. The delay in disposal of mercy petition by the President was 11 years and the delay in communicating rejection by the President was 04 months. In all the other thirteen writ petitions the similar record was called and the delay was varying from one year to eleven years in disposal of the mercy petitions by the President. In *Shatrughan Chauhan and another versus Union of India and others* 214 thirteen petitions for commuting the death sentence of different convicts into life imprisonment, it was observed by the Full Bench of the Supreme Court that the delay in disposal of mercy petition is undue and unexplained. The petitioners have made out a case for commutation of death sentence into life imprisonment.

Navneet Kaur wife of Devender Pal Singh Bhullar, a death convict had filed Review Petition(Criminal) No. 435 of 2013 in Writ Petition (Criminal) No. 146 of 2011 on 13.8.2013 praying for setting aside the death sentence imposed upon Devender Pal Singh Bhullar by commuting the same to imprisonment for life on the ground of supervening circumstance of delay of eight years in disposal of mercy petition. It was dismissed on 13.8.2014. Navneet Kaur (Petitioner) filed Curative Petition against the dismissal of Review Petition. Vide judgment dated 31.3.2014, the Supreme Court applying the ratio in *Shatrughan Chauhan and another versus Union of India and others* commuted the death sentence imposed on Devender Pal Singh Bhullar into life imprisonment both on the ground of unexplained/inordinate delay of eight years in disposal of mercy petition and on the ground of insanity.

In Writ Petition No.56 of 2013 Peoples’ Union for Democratic Rights pleaded for guidelines for effective governing of the procedure of filing mercy

214 2014(1) Recent Apex Judgments (R.A.J.) 476 : 2014 (1) RCR (Criminal) 741
petitions and for the cause of death convicts. It was observed by the Supreme Court that:

It is well settled law that executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death-row prisoners, till the very last breath of their lives. We have already seen the provisions of various State Prison Manuals and the actual procedure to be followed in dealing with mercy petitions and execution of convicts. In view of the disparities in implementing the already existing laws, we intend to frame the following guidelines for safeguarding the interest of the death row convicts:

1. **Solitary Confinement:** In *Sunil Batra* (supra) it has been held that solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the prison manuals of the States provide necessary rules governing the confinement of death convicts. The rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution.

2. **Legal Aid:** There is no provision in any of the prison manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Various judgments have held that legal aid is a fundamental right under Article 21. Since Article 21 inheres right in a convict till his last breath, even after rejection of the mercy petition by the President, the convict can approach a writ Court for commutation of the death sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid should be provided to the convict at all stages. Accordingly, Superintendent of Jails are directed to intimate the
rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

3. **Procedure in placing the mercy petition before the President**: The Government of India has framed certain guidelines for disposal of mercy petitions filed by the death convicts after disposal of their appeal by the Supreme Court. As and when any such petition is received or communicated by the State Government after the rejection by the Governor, necessary materials such as police records, judgment of the trial Court, the High Court and the Supreme Court and all other connected documents should be called at once fixing a time limit for the authorities for forwarding the same to the Ministry of Home Affairs. Even after sending the necessary particulars, if there is no response from the office of the President, it is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision.

4. **Communication of Rejection of Mercy Petition by the Governor**: No prison manual has any provision for informing the prisoner or his family of the rejection of the mercy petition by the Governor. Since the convict has a constitutional right under Article 161 to make a mercy petition to the Governor, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition should be communicated forthwith by the Governor to the convict and his family in writing or through some other mode of communication available.

5. **Communication of Rejection of the Mercy Petition by the President**: Many, but not all, prison manuals have provision for informing the convict and his family members of the rejection of mercy petition by the President. All States should inform the prisoner and their family members of the rejection of the mercy petition by the President. Furthermore, even where prison manuals provide for informing the
prisoner of the rejection of the mercy petition, this information is always communicated orally, and never in writing. Since the convict has a constitutional right under Article 72 to make a mercy petition to the President, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the President should forthwith be communicated to the convict and his family in writing.

6. **Right to receive copy**: Death convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor.

7. **Minimum 14 days notice for execution**: Some prison manuals do not provide for any minimum period between the rejection of the mercy petition being communicated to the prisoner and his family and the scheduled date of execution. Some prison manuals have a minimum period of 1 day, others have a minimum period of 14 days. It is necessary that a minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition.

8. **Mental Health Evaluation**: In some cases, death-row prisoners lose their mental balance on account of prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

9. **Physical and Mental Health Reports**: All prison manuals give the Prison Superintendent the discretion to stop an execution on account of the convict’s physical or mental ill health. It is, therefore, necessary that after the mercy petition is rejected and the execution warrant is issued, the Prison Superintendent should satisfy himself on the basis of medical reports by Government doctors and psychiatrists that the prisoner is in a fit physical and mental condition to be executed. If the Superintendent is
of the opinion that the prisoner is not fit, he should forthwith stop the
execution, and produce the prisoner before a Medical Board for a
comprehensive evaluation and shall forward the report of the same to
the State Government for further action.

10. **Furnishing documents to the convict:** Most of the death row prisoners
are extremely poor and do not have copies of their Court papers,
judgments, etc. These documents are must for preparation of appeals,
mercy petitions and accessing post-mercy judicial remedies which are
available to the prisoner under Article 21 of the Constitution.

11. **Final Meeting between Prisoner and his Family:** While some prison
manuals provide for a final meeting between a condemned prisoner and
his family immediately prior to execution, many manuals do not. Such a
procedure is intrinsic to humanity and justice and should be followed by
all prison authorities.

12. **Post Mortem Reports:** Although none of the Jail Manuals provide for
compulsory post mortem to be conducted on death convicts after the
execution yet it must be made obligatory.

VII **Right to die is not inherent in right to life under Article 21-
Related issues and controversy.**

a) **Suicide**

In *State of Maharashtra v. Maruti Sripati Dubal* the it was held that
section 309 IPC which punishes attempt to commit suicide, is violative of
Article 21 of the Constitution. Article 21 takes care of not only protection
against arbitrary deprivation of life but also takes care of positive life to enable
an individual to live with human dignity. It logically follows that right to live
will include also right to die or to terminate one’s life.
Though suicide or attempt to commit suicide is not a feature of a normal life but of abnormality. Mental disease and imbalances, unbearable physical pains, very cruel or unbearable conditions of life make it painful to live are most of the various circumstances which lead to suicide.

Various examples from the historical texts were given as which validate the commission of suicide ego Joahrs (mass suicides or self immolation) of ladies from the royal houses to avoid being dishonored by the enemisate, samadhi, atamarpana (self-sacrifice) have always been acclaimed with reverence.

A contrary view was also given by Andhra Pardesh High Court in *Chenna Jagadeshwar v. State of Andhra Pradesh*\(^{216}\) on the point that can the parents who are responsible for the life of their children can terminate it because they have created it? If Article 21 confers on a person the right to live a dignified life, does it also confer a right not to live if the person chooses to end his life? If so, then what is the fate of the provisions in the Penal Code making attempt to commit suicide penal?

In *P. Rathinam v. Union of India*,\(^{217}\) a two-judge bench of the Supreme Court took cognizance of the relationship/contradiction between S. 309 Indian Penal Code and Article 21. The Court ruled that the right to life embodied in Article 21 also embodied in it a right not to live a forced life, to his detriment, disadvantage or disliking. This view constituted an authority for the proposition that an individual has the right to do as he pleases with his life and to end it if he so pleases. A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. The Court urged that the world life’ in Article 21 means right to live with human dignity and the same does not merely connote continued drudgery. Thus, the Court concluded that the right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

\(^{216}\) 1988 CrLJ 549.

\(^{217}\) AIR 1994 SC 1844.
The Bench even called for the deletion of section 309 Indian Penal Code labeling it as cruel, irrational which results actually in punishing an individual twice. Section 309 Indian Penal Code according to the Court, violates Article 21 and is therefore void. This is necessary to humanize the law. In the opinion of the Court attempted suicides are a medical and social problem and the best dealt with by non-customary measures. The Court emphasized that attempt to commit suicide is in reality a cry for help and not for punishment.

The above was a radical view and could not last for long. The Rathinam ruling came to be reviewed by a Constitutional bench of the Supreme Court in *Gian Kaur v. State of Punjab*\(^{218}\) The question arose that if attempt to commit suicide is not regarded as penal then what happens to someone who abets suicide. Abetment to commit suicide is made punishable in section 306 Indian Penal Code. But then, if the principal offence of attempting to commit suicide is void as being unconstitutional vis-à-vis Article 21, then how could abetment there of be punishable logically speaking.

The factual setting in *Gian Kaur* was as Gian Kaur and her husband were convicted under section 306, I.P.C. for abetting the commission of suicide of Kulwant, their daughter-in-law. It was argued that section 306 Indian Penal Code was unconstitutional as section 309 Indian Penal Code had already been declared unconstitutional in Rathinam. It was argued that the right to die having been included in Article 21 (Rathinam), and section 309 Indian Penal Code having been declared unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of his fundamental right under Article 21. That is sufficient to declare section 306, Indian Penal Code as unconstitutional being violative of Article 21. This argument led to their consideration of the Rathinam ruling and its eventual overruling.

The Court has ruled in *Gian Kaur* that Article 21 is a provision guarantying protection of life and personal liberty and by no stretch of

\(^{218}\) AIR 1996 SC 946.
imagination can extinction of life be read to be included in protection of life. The Court has observed further: .... Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and therefore incompatible and inconsistent with the concept of right to life.

The Court thus has ruled that section 309 Indian Penal Code is not unconstitutional. Accordingly, section 306 I.P.C., has also been held to be Constitutional.

This controversy whether right to die is included in right to life was again raised in a decided case Aruna Ram Chandra Shanbaug v. Union of India,\textsuperscript{219} and it was reiterated that right to die is not included in right to life and moreover (active) euthanasia and assisted suicide were held illegal.

b) **Euthanasia/Mercy Killing**

According to Euthanasia Britannica\textsuperscript{220} An allied practice morally acceptable holds that the life of the dying patient suffering intolerable and intractable pain should not be needlessly prolonged by extra ordinary mean.

Recently the term has come to mean deliberately terminate life to prevent unavoidable suffering. This is of two kinds as passive Euthanasia or mercy killing is putting to death a person who disease or extreme old age can not have a meaningful life.

Passive Euthanasia: Many physicians consider it good medical practice not to artificially prolong the life of suffering person whose disease is inevitably fatal, instead they provide comfort and relief to the patients awaiting death. It is said, dying with decency and dignity. Active Euthanasia: In U.S. taking active measures to end someone’s life is a capital crime, punishable by life imprisonment. In most of the countries mercy killing is considered as a crime.

\textsuperscript{219} (2011) 4 SCC 454
A debate in this regard is going on, as life in Article 21 means to life with dignity must also take ‘to die with dignity’ in it’s fold. This is perhaps gaining ground as was noted in *Bijaylakshmi v. Managing Committee*\(^221\) of working women’s hostel. It must be included in the Article 21 as it is one of the various facets of the life. What that is so impossibly hard so death should be taken as short out to various problems.

In *Gian Kaur*,\(^222\) the Supreme Court has distinguished between euthanasia and attempt to commit suicide. Euthanasia is termination of life of a person who is terminally ill, or in a persistent vegetative state. In such a case, death due to termination of natural life is certain and imminent. The process of natural death has commenced, it is only reducing the period of suffering during the process of natural death. This is not a case of extinguishing life but only of accelerating conclusion of the process of natural death which has already begun. This may fall within the concept of right to live with human dignity upto the end of natural life. This may include the right of a dying man to die with dignity when his life is ebbing out. But this can not be equated with the right to die an unnatural death curtailing the natural span of life.

Recently,\(^223\) euthanasia became a hot topic of discussion after former national chess champion Venkatesh died, without being allowed to be in control of his death or his body afterwards. He wanted to donate his organs but the Andhra Pradesh High Court turned that down, his right to die with dignity he had gone through prolonged muscular dystrophy) was not granted.

In *Aruna Ram Chandra Shanbaug's case* passive euthanasia has been held to be permissible with guidelines that a team of three doctors directed to be appointed to examine petitioner's physical and mental condition so as to

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223 Hindustan Times, New Delhi, December 26, 2004, p.10
enable the Court to get corrected facts. High Courts and State Governments were directed to provide all help and facilities to appointed doctors to carry out said examinations.

VIII Right to life and personal liberty in context of women- Emerging judicial trends

The Beijing Declaration and Platform for Action, inter alia, states:

… Violence against women both violates and impairs or nullifies the enjoyment by women or their human rights and fundamental freedoms.

… In all societies to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture.

a) Abortion

Abortion\textsuperscript{224} is one of the subjects that have been discussed extensively in both national and international level. It has become a controversial issue all over the world. Everybody is in dilemma whether a mother has a right to terminate her pregnancy at any time she wishes or an unborn child has a right to life.

The right to life is a very broad concept and is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution which says that 'no person-shall be deprived of his life and

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\textsuperscript{224} Abortion is the termination of a pregnancy by the removal or expulsion from the uterus a fetus or embryo resulting in or causing its death. Abortion can be classified into two types which are the following:

1. Spontaneous Abortion – An abortion which results due to the complications during pregnancy and which occur unintentionally is called spontaneous abortion. It is also termed as miscarriages.
2. induced abortion has also been divided into two types:
   (a) Therapeutic abortion – An abortion which is induced to preserve the health of the mother when her life is in danger or when it is found that the child if born will be a disabled one at time it is termed as therapeutic abortion.
   (b) Elective abortion – An abortion induced for any other reason is known as elective abortion. Both embryo and fetus mean unborn child.
personal liberty except according to procedure established by law.' Person here includes both man and woman. Among various rights which are available to a woman, the right to abortion is also believed to be one of the most essential and fundamental right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life.\textsuperscript{225} But the question always arises whether an unborn child should be considered as a human being and be given the status of a person or not. There are various aspects such as religious, ethics, moral and legal values that rule over the aspect of right to abortion. Abortion is severely condemned in all religions. But in spite of that always the question arises whether the mother has a right to abortion or the child has a right to life. Ronald Dworkin has made a detailed study on the issue of abortion. He did not accept the extreme position taken by the derivative claimers of prohibition of abortion that the fetus is a complete moral person from the moment of conception.\textsuperscript{226} Hence the unborn has the right to live and abortion is a murder or nearly as wrong as murder.

According to Dworkin a fetus has no interest before the third trimester.\textsuperscript{227} A fetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before then. The scientists have agreed that fetal brain will be sufficiently developed to feel pain from approximately the twenty sixth weeks\textsuperscript{228}: Thus, whether abortion is against the interest of a fetus must depend on whether the fetus itself has interests, not on whether interests will develop if no abortion takes place. Something that is not alive does not have interests. Also, just because something can develop into a person does not mean

\textsuperscript{225} Roe V. Wade 410 US 113(1973)
\textsuperscript{227} Ibid He says that ‘not everything that can be destroyed has an interest in not being destroyed’
\textsuperscript{228} See Clifford Grobstein, Science and the Unborn: Choosing Human futures (Basic Books, 1988) p.13
it has interests either. Once a fetus can live on its own it may have interests. This is only after the third trimester.\textsuperscript{229}

In \textit{Shashikala’s case}\textsuperscript{230} a two Judge Bench of Madras High Court held that a minor girl has the right to bear a child. In this case a 16 years old minor girl, Shashikala become pregnant and wanted to have the child against the opposition from her father. The father had filed a case against her in the Court seeking permission to have the pregnancy medically terminated on the ground that she was legally and otherwise also too young to bear the child. It was argued that this was determinant to the health of a minor mother and also has a wider social consequence. On the other hand the public prosecutor, defending the case of the girl had argued that she had the right to bear the child under the border right to privacy. Even a minor had a right to privacy under Article 21 of the Constitution. He argued that Indian Constitution does not make any distinction between major and minor in so far as fundamental rights were concerned. He argued that Shashikala was a mature minor and conscious of the consequences of the bearing and delivering the child. The Court accepted that Shashikala was a minor but did agree with the petitioner’s father that the delivery in the case of the minor’s was fraught with dangerous medical consequences. 'The younger the mother; the better the birth.' Quoted extensively from English and American decision the bench held that in the case of mature and understanding minor the option of the parent or guardian is not relevant. The judges also quoted chapter and verse from the Christian, Islamic and Hindu Texts to show that destruction of human life even in the mother’s womb has no moral sanction.

Once it is assumed or established that human life begins at or near conception and that fetus is a person during almost the entire first trimester of pregnancy. As already stated that Article 21 of our Constitution may be


\textsuperscript{230} AIR 1994 Mad. 147.
interpreted to mean in appropriate case, that with respect to life, the word person applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development.

If the existence of life of an unborn person is recognized by the state it is with certain inalienable rights including the right to continuance of life. It becomes the obligation of the State it has already discriminated against persons who are fetus by offering them less or no protection than other persons.

It may be objected that the State has already discriminated against unborn child by treating the killing in the womb as causing miscarriage under section 312 and 313 of the Indian Penal Code and as ‘termination of pregnancy’ under the Medical Termination of Pregnancy Act 1971 rather than ‘murder’ and by providing a lesser penalty for the crime of ‘causing miscarriage’ than for the crime of ‘murder.’ This distinction made by criminal law denies the fetus equal protection.

A pregnant woman should have personal liberty to destroy any fetus on her own if she finds it intolerant. To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self-respect and dignity. The fetus may have a right to life, but not a right to be kept in a woman’s body against her will.

In future the legislative or the judiciary will have to resolve the conflict between the two: a pregnant woman’s personal liberty right to destroy fetus in her womb under any circumstances at any time and the claim of the State to protect the right to life of the unborn on the basis of the growth of the scientific knowledge and the recognition of the fetus as a living person with in the womb.

Though the word person in Article 21 does not apparently include an unborn person it is certainly not true that the unborn is not a legal person for the other purposes. It would be unjust and unfair if the fetus has the right to get
partition of the coparcenary property or joint family property reopened and yet has not right to be protected from abortion.

When does the life begin has not been recognized under any Statute. So by analyzing and comparing the Constitutional provisions of USA and India it is found that a woman has a right to choose to have abortion and her right prevails over the right of an unborn.

India should make the abortion laws liberal and any law relating to abolition of abortion is nothing but a clear violation of a woman’s right. It violates women’s rights to health, right to dignity, right to liberty and right to privacy. Abortion must be legally permitted in order to protect the most basic rights of women.

State should take steps to protect the maternal health all the times and unborn child after viability.

b) Sexual Harassment

There is no uniform law in this country to curb eve-teasing effectively in or within the precinct of educational institutions, places of worship, bus-stands, metro stations, railway stations, cinema theatres, parks, beaches, places of festival, public service vehicles or any other similar place. Eve-teasing generally occurs in public places which, with a little effort can be effectively curbed. Consequences of not curbing such a menace are, needless to say, at times disastrous. There are many instances where girls of young age are being harassed, which sometimes may lead to serious psychological problems and even committing suicide. Every citizen in this country has the right to live with dignity and honour which a fundamental right is guaranteed under Article 21 of the Constitution of India. Sexual harassment like eve-teasing of women amounts to violation of rights guaranteed under Articles 14, 15 as well. We notice that in the absence of effective legislation to contain eve-teasing, normally, complaints are registered under Section 294 or Section 509 IPC.
Section 294 IPC says that:

“Obscene acts and songs.-'Whoever, to the annoyance of others-

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.'

It is for the prosecution to prove that the accused committed any obscene act or the accused sang, recited or uttered any obscene song, ballad or words and this was done in or near a public place, it was of obscene nature and that it had caused annoyance to others. Normally, it is very difficult to establish those facts and seldom complaints are being filed and criminal cases which take years and years and often people get away with no punishment and filing complaint and to undergo a criminal trial itself is an agony for the complainant, over and above the extreme physical or mental agony already suffered.

Section 509 IPC says:

'Word, gesture or act intended to insult the modesty of a woman.-' Whoever, intending to insult the modesty of any woman, utters any word, makes any sound gesture or exhibits any object intending that such word or sound shall be heard or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both.'

The burden is on the prosecution to prove that the accused had uttered the words or made the sound or gesture and that such word, sound or gesture was intended by the accused to be heard or seen by some woman, Normally it is difficult to establish this and seldom a woman files complaints and often the wrongdoers are left unpunished even if the complaint is filed since there is no
effective mechanism to monitor and follow up such acts. The necessity of a proper legislation to curb eve-teasing is of extreme importance even the Tamil Nadu legislation has no teeth.

Eve-teasing today has become a pernicious, horrid and disgusting practice. The Indian Journal or Criminology and Criminalistics (January-June 1995 Edition.) has categorized eve-teasing into five heads viz.:

(1) Verbal eve-teasing
(2) Physical eve-teasing
(3) Psychological harassment
(4) Sexual harassment and
(5) Harassment through some objects.

In Vishaka v. State of Rajasthan231 the Supreme Court has laid down certain guidelines on sexual harassment. In Rupan Deol Bajaj v. Kanwar Pal Singh Gill232 the Supreme Court has explained the meaning of modesty in relation to women. More and more girl students, women, etc. go to educational institutions, work places, etc., their protection is of extreme importance to a civilized and cultured society. The experiences of women and girl children in overcrowded buses, metros, trains, etc. are harrendous and a painful ordeal.

In the same manner the Supreme Court has made a novel use of Article 21 to ensure that the female workers are not sexually harassed by their male co-workers at their place.

In Vishaka v. State of Rajasthan,233 the Supreme Court has declared sexual harassment of a working woman at her place of work as amounting to violation of rights of gender equality and right to life and liberty which is a clear violation of Articles 14, 15 and 21 of the Constitution.

233 AIR 1997 SC 3011.
Article 21 guarantees right to life with dignity. Accordingly, the Court has observed in this connection:

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Sexual harassment also violates the victim’s fundamental right under Article 19 (1) (g) to practice any profession or to carry out any occupation, trade or business. Thus, Article 32 is attracted. Recently the Parliament has passed The Sexual Harassment of Women at work place (Prevention, Prohibition & Redressal) Act 2013, (14 of 2013) on 22.4.2013 to provide protection against sexual harassment of women at work place and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith in order to protect their right to life and to live with dignity under Article 21 of the Constitution of India and right to practice any profession or to carry on any occupation, trade or business which includes a right to safe environment free from sexual harassment.

c) Rape - Position in India

In India, at present days in comparison to whole of world, the occurrence of rape is so and so worse that it creates a negative attitude towards our present system of democratic governance and hatred heart towards executive set up. In the year 2001, the Decan Herald posed that out of 68 rapes only 1 case is reported (i.e. 1:68) and the sexual harassment case the ratio is 1:10,000. The National Family Survey reports that one to five women face domestic violence from their husbands. The Global statistic says between 20% to 50%. 234

It is a shame for our whole society irrespective of caste and creed to mention that in upper part of 2012 and early first quarter of 2013 and

particularly after Delhi Vasant Vihar Gang Rape case on 16 December, 2012. Even if after such incidents Delhi and its NCT witnessed seven rape and gang rape within 24 hours. Many incidents of rape are noted in North India in respect to other parts of India. But India does not sleep in a deep sleep. Every spectrum of society, NGOs, social activists, judicial activism shouted against the increased trend of such heinous crime of rape so that the Government of India passed the Criminal Law (Amendment) Act, 2013 on 21 March, 2013 which followed and repealed the ordinance proclaim by the President of India on a new law and a new approach to the rape law. This new rape law is based on western approach of Sexual Offence Act particularly the new Sexual Offences Act of 2003 in England.

The Indian Penal Code, sections 375, 376 and 376A to 376D vide Criminal Law (Amendment) Act, 2013 (13 of 2013) with effect from 3rd February, 2013 dealt with the offence of rape.

The offence of rape is an unlawful sexual intercourse between a man and a woman without the woman’s consent and against her will. The offence of rape requires both mens rea (motive of offender) and actus reus (act of offender). The offence of rape requires both these two elements. It furthers needs that the man intends to have sexual intercourse knowing that the woman does not consent to such intercourse. The actus reus refers to the penetration per vaginam\textsuperscript{235} to constitute the offence of rape.

The case of Phul Singh v. State of Haryana\textsuperscript{236} it was held that the offence of rape signifies in common terminology as the ravishment of a woman without her consent, by force, fear or fraud or the carnal knowledge of a woman by force against her will. In other words rape is a violation with violence of the private person of a woman, an outrage by all means.\textsuperscript{237}

Section 375 of Indian Penal Code defines rape and section 376 prescribes its punishment. Prior to amendment of 2013, Section 376A makes husband punishable for intercourse with his wife during judicial separation and sections 376B to 376D provide punishment for custodial rape. However, by the Criminal Law (Amendment) Act 13 of 2013 major changes have been incorporated in Section 376 Indian Penal Code and specific categories have been created by virtue of Section 376A which provides for punishment for causing death or resulting in persistent vegetative state of victim, Section 376B provides for punishment for sexual intercourse by husband upon his wife during separation, Section 376C provides for punishment for sexual intercourse by a person in authority and Section 376D provides for punishment for gang rape.

Post Nirbhaya's Gang Rape case in Delhi vide the Criminal Law Amendment 2013, the Indian Penal Code, the Code of Criminal Procedure, 1973, the Indian Evidence Act,1872 and the Protection of Children from Sexual Offences Act,2012 have been amended after considering the inadequacy of rape law. The Parliament of India amended extensively the rape law provisions by incorporating more stringent penal provisions. Prior to these amendments also inadequacy of rape law was expounded by the Supreme Court of India in various cases.238

While showing the concern about devastating increase in rape cases and cases relating to crime against women in the world both at National and International level, it was held by the Supreme Court in *State of Uttar Pradesh v. Munesh*239 that although statutory provisions provide strict penal action against such offenders, it is for Courts to ultimately decide whether such

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239 (2012) 9 SCC 742
incident has occurred or not. Courts should be more cautious in appreciating evidence and accused should not be left scotfree merely on flimsy grounds.

In another case *Pushpanjali Sahu v. State of Orissa*\(^{240}\) it was held that rape is a crime not only against the person of a woman but a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the 'Right of life' contained in Article 21 of the Constitution. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

The Supreme Court in case of *State of Punjab v. Gurmit Singh*\(^{241}\) refused to question about the character of prosecutrix (victim of rape) in cross examination.

The Supreme Court in a case\(^{242}\) confirmed the admissibility of evidence by way of video conferencing.

In *Bhupender Sharma v State of Himachal Pardesh,*\(^{243}\) the Supreme Court observed that in the judgments, be it of High Court or a trial Court, the name of the victim should not be mentioned and the name should be replaced by 'victim'.

The Supreme Court in case of *State of Karnataka v. Krishnappa*\(^{244}\) held that in addition to strengthening the rape law, it was necessary to have a cooperative victim, professional investigation, diligent prosecution, expeditious trial and sensitive judges to ensure proper investigations, trial and conviction in sexual crimes.\(^{245}\) Protection of society and deterring the criminal is the avowed

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\(^{240}\) (2012) 9 SCC 705


\(^{245}\) See Kiren Bedi 'What use is law if the victim herself does not want any action taken?' *Times of India*, November 25, 2002.
object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of such heinous crimes of rape on innocent helpless girl of tender years and respond by imposition of proper sentence, public abhorrence of the crime needs retention through imposition of appropriate sentence by the Court.

The Supreme Court in *State of Punjab vs Gurmeet Singh*,\(^\text{246}\) where three accused after abducting the victim, subjected her to sexual intercourse forcibly, held that the act was against her will and it amounted to rape within the meaning of section 375 of Indian Penal Code punishable with its section 376.

The word 'consent' can change the shape of offence in case of rape or sexual assault. In *Rao* case,\(^\text{247}\) it was observed that:

Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable complaint in quiescence nonresistance and passive giving it cannot be deemed to be consent to exempt a man of the charge of rape.

In *Mango Ram’s* case,\(^\text{248}\) the Supreme Court held thus:

Submission of body under the fear or terror cannot be construed as a consented sexual act, consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and ascent. Whether there was consent or not,
is to be ascertained only on a careful study of all relevant circumstances.

Most importantly the Supreme Court in a case\(^{249}\) held that:

1. Consent given by a woman believing the man’s promise to marry her would fall within the expression 'without her consent' *vide* clause (iii) to section 375 of Indian Penal Code, only if it is established that from the very inception the man never really intended to marry her and the promise was mere hoax,

2. when prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused’s promise to marry her and the accused’s promise was not false from its inception with the intention to seduce her to sexual act, clause (ii) to section 375 of Penal Code is not attracted and established. In such a situation the accused would be liable for breach of promise to marry for which he will be liable for damages under civil law;

3. false promise to marry will not *ipso facto* make a person liable for rape if the prosecutrix is above 16 years of age and impliedly consented to the act.

In case of *Uday v. State of Karnataka*\(^{250}\) it was observed that the consent given by prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact.

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The consent procured by putting the woman under fear of death or hurt is no consent in law.\textsuperscript{251}

Consent of a woman of unsound mind or under the influence of intoxication is no consent.\textsuperscript{252}

The consent of mentally retarded woman is no consent.\textsuperscript{253}

A woman under 16 years of age is considered incapable of giving consent for sexual intercourse.\textsuperscript{254}

Rape has been held to be a violation of personal fundamental right guaranteed under Article 21. Right to Life means the right to live with human dignity. Right to Life would therefore, include all those aspects of life which go to make a life meaningful, complete and worth living.

Rape is a crime against basic human rights and is also violative of the victim’s most cherished the fundamental right, namely the Right to life contained in Article 21.

The Supreme Court has ruled that it has power to award interim compensation to the victim of rape at the time of before the final conviction of the offender. In \textit{Bodhisattwa Gautam v. Subhrachakraborty},\textsuperscript{255} the Supreme Court has observed:

Rape is a crime not only against the woman, it is a crime against the entire society. It destroys the entire psychology of a woman.


\textsuperscript{255} (1996) 1 SCC 490.
and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is crime against human rights and is violative of the victim’s most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21. Again, it will be seen that the Court used Article 21 against private parties.

In State of Punjab v. Ramadev Singh, the Supreme Court has ruled that rape is a crime against basic human rights and is also violative of the victim’s most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution of India. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is a better statutory armour in cases of crime against woman than long clauses of penal provisions, containing complex exceptions and provisos.

In Om Prakash v. State of Rajasthan, the Judgment and order dated 19.08.2010 passed by the High Court of Rajasthan at Jodhpur in SB CRR No.597 of 2009 was under challenge at the instance of the appellant Om Prakash who is a hapless father of an innocent girl of 13 years who was subjected to rape by the alleged accused-respondent No.2 Vijay Kumar @ Bhanwroo who has been allowed to avail the benefit of protection under Juvenile Justice (Care and Protection of Children) Act 2000, although the Courts below did not record a finding that he in fact, was a juvenile since he had not attained the age of 18 years on the date of incident. Leave has been granted after condoning the delay.

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256 AIR 2004 SC 1290.
257 G.S. Singhvi, Gyan Sudha Misra - Criminal Appeal No. of 2012 - (Arising out of S.L.P.(Crl.) No. 2411/2011)
In *Delhi Domestic Working Women’s Forum v. Union of India & Ors.*,\(^{258}\) the Supreme Court found that in the cases of rape, the investigating agency as well as the subordinate Courts some times adopt totally indifferent attitude towards the prosecutrix and therefore issued following directions in order to render assistance to the victims of rape:

1. The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim’s advocate would not only be to explain to the victim the nature of the proceeding, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant’s interests in the police station represent her till the end of the case.

2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

5. The advocate shall be appointed by the Court, upon application by the police at the earliest convenient moment, but in order to ensure that

\(^{258}\) (1995) 1 SCC 14
victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the Court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

Undoubtedly, any direction issued by the Court is binding on all the Courts and all civil authorities within the territory of India. In addition thereto, it is an obligation on the part of the State authorities and particularly, the Director General of Police and Home Ministry of the State to issue proper guidelines and instructions to the other authorities as how to deal with such cases and what kind of treatment is to be given to the prosecutrix, as a victim of sexual assault requires a totally different kind of treatment not only from the society but also from the State authorities. Certain care has to be taken by the doctor who medically examined the victim of rape. The victim of rape should generally be examined by a female doctor. Simultaneously, she should be provided the help of some psychiatric. The medical report should be prepared expeditiously and the doctor should examine the victim of rape thoroughly and give his/her opinion with all possible angle e.g. opinion regarding the age taking into consideration the number of teeth, secondary sex characters and
radiological test, etc. The Investigating Officer must ensure that the victim of rape should be handled carefully by lady police official/officer, depending upon the availability of such official/officer. The victim should be sent for medical examination at the earliest and her statement should be recorded by the investigating officer in the presence of her family members making the victim comfortable except in incest cases. Investigation should be completed at the earliest to avoid the bail to the accused on technicalities as provided under Section 167(3) the Code of Criminal Procedure and final report should be submitted under Section 173 the Code of Criminal Procedure at the earliest.

(d) **Section 114-A of the Evidence Act vis-a-vis Rape laws.**

Recently in a case titled as *Radha Krishan Nagesh v State of Andhra Pradesh*\(^{259}\) it was held that while appreciating the evidence of the prosecutrix, the Court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Similar view has also been expressed by the Supreme Court in *Rajinder versus State of Himachal Pradesh*\(^{260}\) observing that:

> 'In the context of Indian culture, a woman-victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in case of sex crime may be

\(^{259}\) 2013 (11) SCC 688

\(^{260}\) 2009(16) SCC 69
based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.

In *O.M. Baby v State of Kerala* the Supreme Court held as follows:

A prosecutrix of a sex offence can not be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence can not be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an

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261 (2013) 1 SCC (Cri) 658 (SCC pp.368-69, paras 17-18).
adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.'

In *Vijay versus State of Madhya Pradesh*,262 the Supreme Court has placed very heavy reliance on the provisions of Section 114-A of the Evidence Act, making a reference that it came by an amendment in the year 1988 and further made an observation that the appellant-accused in that case did not make any attempt to rebut the said presumption. In fact, the provisions of Section 114-A of the Evidence Act were not attracted in the facts of that case for the reason that the conditions provided for its attraction were not available/attracted in that case.

The issue in respect of applicability of Section 114-A of the Evidence Act has been considered by the Supreme Court in *Ranjit Hazarika v State of Assam*263 and *Raju v State of Madhya Pradesh*.264 while observing that:

'Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of the rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may take for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her

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262 (2010) 8 SCC 191
263 (1998) 5 SCC 635
264 (2009) 3 SCC (Cri) 751
statement to base conviction of an accused. The evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding."

IX Right to life and personal liberty in context of children- Emerging judicial trends.

a) Female Infanticide

It is unfortunate that for one reason or the other the practice of female infanticide still prevails. One of the reasons may be the problem faced by the parents during marriage coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in society. The traditional system of female infanticide whereby female child was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted.265

Further in Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India,266 the Supreme Court has admitted that:

.... in the Indian society, discrimination against the girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mindset or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that a number of persons condemn discrimination against women in all its forms and agree to pursue, by appropriate means, a policy of eliminating discrimination against

women, still however, we are not in a position to change the mental set-up which favours a male child against a female. Advanced technology is increasingly used for removal of foetus (may or may not be seen as commission of murder but it certainly affects the sex ratio). The misuse of modern science and technology by preventing the birth of a girl child by sex determination before birth and thereafter abortion is evident from the 2001 census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat which are economically better off.

In Voluntary Health Association of Punjab v. Union of India\(^2\)\(^6\)\(^7\) the Supreme Court realized that the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 [Act 57 of 1994] was not being properly implemented by the various States and Union Territories in its true letter and spirit to achieve objects and reasons for which the Act has been enacted. The Act clearly provides for

1. prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;

2. prohibition of advertisement of prenatal diagnostic techniques for detection or determination of sex;

3. permission and Regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;

4. permitting the use of such techniques only under certain conditions by the registered institutions; and

5. punishment for violation of the provisions of the Act.

\(^2\)\(^6\)\(^7\) (2013) 4 SCC 401.
b) **Children**

Children who form 42% of India’s population are at risk on the streets, at their workplace, in schools and even inside their own homes. Every year thousands of children become victims of crime - whether it is kidnapping, violent attacks or sexual abuse.

According to National Crime Records Bureau and NJRC, crime against children increased by 3.8% nationally (14,975 cases in 2005 from 14,423 in 2004); Child rape increased by 13.07% (4026 cases from 3542 in 2004); Madhya Pradesh reported the highest number (870) followed by Maharashtra (634). Together they accounted for 37.3% of rape cases. Delhi tops the list of 35 Indian cities on crime against children (852 cases of violence against children in 2005, 27% of all cases) followed by Indore (448), Pune (314) and Mumbai (303). 1327 children were reported murdered in 2005 up from 1304 in 2004 (an increase of 1.8%); Uttar Pradesh reported the highest number (390) accounting for 29.4% of cases. Nearly 45,000 children go missing every year; more than 11,000 are never traced.\(^{268}\)

Offences against children need a humanitarian legislative approach. As was opined by the Supreme Court in *Bandhua Mukti Morcha v. Union of India*\(^ {269}\)

The child of today cannot develop to be a responsible and productive member of tomorrow’s society unless an environment which is conducive to his social and physical health is assured to him. Every nation developed or developing links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of

\(^{268}\) <http://www.azadindia.org/social-issues/crime-children.html>

life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood socially, economically, physically and mentally the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The founding fathers of the Constitution therefore, have emphasized the importance of the role of the child and the need of its best development. Dr. Bhim Rao Ambedkar, who was far ahead of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law.

(c) Constitutional provisions

There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation.

These provisions have been inserted into the Constitution to ensure the welfare and well being of children in the country without which it would not be possible for the nations to progress as a whole. The Constitution of India provides a comprehensive understanding of child rights. A fairly comprehensive legal regime exists for their implementation. India is also a signatory to several international legal instruments including the Convention on the Rights of the Child (CRC).
Article 15(3) of the Constitution has provided the State with the power to make special provisions for women and children.

Article 21-A of the Constitution mandates that every child in India shall be entitled to free and compulsory education up to the age of 14 years. The word life in the context of Article 21 of the Constitution has been found to include Education and accordingly the Supreme Court has implied that Right to Education is in fact a fundamental right.

(d) Sexual abuse of children

The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. A 2007 study by the Ministry of Women and Child Development (MWCD) found that 53.22% of India’s children have experienced some form of sexual abuse. Against this background, the lack of specific provisions for child sexual abuse in our criminal law is a serious lacuna.

Sexual abuse of children can occur in a number of different settings. Children can be sexually abused by family members (incest) or by strangers (extra-familial). A more precise categorization of the term for Indian context is made under the Prevention of Offences against the Child Bill, 2009 wherein sexual abuse of children has been classified under various heads and accordingly The Protection of Children from Sexual Offences Act, 2012 is passed to provide for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of children. It came into force on 14.11.2012. However, child has been defined in The Protection of Children from Sexual Offences Act, 2012 as any person below the age of 18 years.

Although section 377 Indian Penal Code dealing with unnatural offences, prescribes seven to ten years of imprisonment, such cases can be tried in a Magistrate’s Court, which can impose maximum punishment of three years. If the abuse is repeated several times it affects children more severely
and this contingency has been taken care of under the Protection of Children from Sexual Offences Act, 2012 vide section 6 which talks about punishment for aggravated penetrative sexual assault. Section 509 Indian Penal Code dealing with word, gesture or act intended to insult the modesty of a woman, extends to minor girls also. Moreover, The Prevention of Children from Sexual Offences Act, 2012 also provides for punishment for sexual harassment, use of child for pornographic purposes, abetment of offences against children.

The gravity of the offence under section 509 Indian Penal Code, dealing with obscene gestures, is less. Yet even in such cases, the child’s psyche may be affected as severely as in a rape. The matter had come to the Supreme Court in *Sakshi v. Union of India* 270, where a Public Interest Litigation was filed with growing concern, the dramatic increase of violence, in particular, sexual violence against women and children as well as the implementation of the provisions of the Penal Code, namely, Sections 377, 376 and 354. The Supreme Court gave the following directions in holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in Court should be allowed sufficient breaks as and when required.

(e) **Child delinquency and neglected children or juvenile**

The Juvenile Justice Act, 1986 was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or

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delinquent juveniles and for the adjudication of such matter relating to disposition of delinquent juveniles. The Act sought to achieve a uniform legal framework for juvenile justice in the country as a whole so as to ensure that no child, in any circumstance, is lodged in jail and police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts to deal adequately with the subject.

The object of the Act, therefore, is to provide specialist approach towards the delinquent or neglected juveniles to prevent recurrence of juvenile delinquency in its full range keeping in view the developmental needs of the child found in the situation of social maladjustment. That aim is secured by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent or neglected juveniles.

As per Indian law, the Juvenile Justice (Care and Protection of Children) Act, 2000 defines a “juvenile” as a person below the age of 18 years. The Act intends to provide care and protection to juveniles, who violate laws in India. The Act intends to settle the issues in the best interest of children and not with an intention to punish them under criminal law. This Act is a comprehensive legislation that provides for proper care, protection and treatment of children in conflict with law and children in need of care and protection by catering to their development needs and by adopting a child friendly approach. It conforms to United Nations Convention on the Rights of the Child and other relevant national and international instruments.

A clear distinction has been made in this Act between the juvenile offender and the neglected child. It also aims to offer a child increased access to justice by establishing Juvenile Justice Boards and Child Welfare Committees. The Act has laid special emphasis on rehabilitation and social integration of the children and has provided for institutional and non-institutional measures for care and protection of children. The institutional alternatives include adoption, foster care, sponsorship, and aftercare.
Neglected Juvenile which is more relevant has been defined in Section 2(1) to mean a juvenile who:

2. (I)(i) is found begging; or

(ii) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute;

(iii) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile; or

(iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life;

(v) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain;

In order to understand the Juvenile Justice Act and how juveniles have to be safeguarded the decision of the Supreme Court in Hari Ram v. State of Rajasthan.\(^\text{271}\) stands out as a classic case wherein the Supreme Court has dealt in detail qua safeguarding the rights of juveniles. Furthermore, the Juvenile Justice (Care and Protection of Children) Act, 2000 has been amended by The Juvenile Justice (Care and Protection of Children Amendment Act, 2011 (12 of 2011) with effect from 1.1.2012. Recently in Jitendra Singh alias Babboo Singh verus State of Uttar Pradesh\(^\text{272}\) it was held that accused can take the plea of being juvenile at any point of time even for the first time in the Supreme Court itself. There was as such no bar on the juvenile as to when he will raise the plea of being juvenile. It testifies the intent of the legislature behind passing the Juvenile Justice Act which is a beneficial legislation.

One of the landmark judgments in the sphere of child and minor welfare is Sheela Barse v. Union of India.\(^\text{273}\) In the case, the Supreme Court made an


\(^{272}\) (2009) 3 SCC (Cri) 751.

\(^{273}\) (1986) 3 SCC 596 : 1986 SCC (Cri) 337.
order issuing various directions in regard to physically and mentally retarded children as also abandoned or destitute children who are lodged in various jails in the country for safe custody. The Court directed the Director General of Doordarshan as also the Director General of All India Radio to give publicity seeking cooperation of non-governmental social service organizations in the task of rehabilitation of these children. The Court declared that it was extremely pained and anguished that these children should be kept in jail instead of being properly looked after, given adequate medical treatment and imparted training in various skills which would make them independent and self-reliant.  

(f) Adoption

Supreme Court laid down a law governing the inter-country adoption in *Laxmi Kant Pandey v. Union of India.* In this case a letter was written by an Advocate complained about the malpractices of the Social Organizations and the Voluntary Organizations. The Supreme Court gave the guidelines for the matter of inter-country adoptions as there was no uniform law in the country about the adoptions. The petitioner sought directives to the Government of Indian Council of Social Welfare (ICSW) and the Indian Council of Child Welfare (ICCW) to carry out their obligations in the matter of adoptions of Indian Children by foreign parents. The apex Court, relying on existing Constitutional safeguards, international conventions and the Guardians and wards Act, 1890, laid down a number of principles and norms that adoption agencies had to observe while giving a child in adoption to foreign parents. The Court has held, The Indian agencies through which an application of a foreigner for taking a child in adoption is routed must, before offering a child in adoption, make sure that the child’s parents have relinquished the child for adoption and submit a document of surrender to Court. The agency that

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275 AIR 1984 SC 469.
276 Ibid (Para 22).
offers a child for adoption must prepare a detailed child study report with the help of professional social workers, providing all details such as the child’s health, physical, intellectual and emotional development, the social worker’s assessment of the child and the reason for placing the child for inter-country adoptions, a health report by a registered medical practitioner, information of the biological parents, and so on. The adopting foreigner should be provided report before they decide on adopting the child.\textsuperscript{277} Before entertaining an application for guardianship, the Court should give notice to the ICCW and the ICSW for scrutiny of the application. The foreigner, who is appointed guardian of the child, should submit to the Court as also the agency that processed the application for guardianship quarterly progress reports of the child along with the latest photograph for the first two years and once every six months for the next three years.\textsuperscript{278}

Children don’t exactly specifically have their own problems. Their own problems revolve around honey bees, butterflies, games etc. but when they are pressurized by the so-called master of culture, tradition of things which their parents should be condemned as in \textit{Gaurav Jain v. Union of India}.\textsuperscript{279} A public interest litigation in the form of writ petition was filed at the instance of an advocate where it was prayed that separate schools and hostels should be created for the children of the prostitutes. The Supreme Court the savior of the fundamental rights while showing interest towards such God chosen children that no such schools should and can be created and it is in the interest of such children and of the society at large that the children of the prostitutes should be segregated from their mothers and be allowed to mingle with others and become a part of the society.

Various, numerous, varying judgments of the Supreme Court have provided foundation stone for the enactment and implementation of various

\textsuperscript{277} Ibid (Para 20).
\textsuperscript{278} Ibid (Para 23).
\textsuperscript{279} AIR 1990 SC 292.
laws for the welfare of children. It has tried to make right to live with human
dignity meaningful and a living reality for all the future of our country.

(g) Surrogacy

A standard surrogacy arrangement involves a contract for the surrogate
to be artificially inseminated, carry a foetus to term and relinquish her parental
rights over the child once born. In some countries around the world, surrogacy is legally recognised only if it is non-commercial.

India’s first gestational surrogacy took place in 1994 in Chennai. In 1997, a woman from Chandigarh agreed to carry a child for Rs.50,000 in order to obtain medical treatment for her paralysed husband. In 1999, a villager in Gujarat served as a surrogate for a German couple. In 2001, almost 600 children in the United States were born through surrogacy arrangements. In comparison, in India, it is estimated that the number of births through surrogacy doubled between 2003-2006 and estimates range from 100-290 each year to as many as 3000 in the last decade. A major case involving the issue of surrogacy before the Supreme Court was Baby Manji Yamada v. Union of India.

Recently, in Exploitation of children Orphanages in RE v. Union of India and others, while issuing directions to a number of States and Union Territories to complete process of Constitution of State Commission for
protection of child rights and to complete the framing of necessary rules and notifications to make them functional for protection of child rights under the Act 2005. It was also held that the rights of children can be secured adequately only if the monitoring and controlling provisions contained in the three Acts, namely the Commission for Protection of Child Rights Act, 2005, the Right of Children to Free and Compulsory Education Act, 2009 and the Protection of Children from Sexual Offences Act, 2012 read with the Juvenile Justice (Care and Protection of Children) Act 2000 are fully implemented.'

X Right to pollution free environment under Article 21.

In the Odyssey from virtue to vice from renaissance to senselessness and from calm to chaos, man has unmistakably earned nature’s verdict of guilty. Among the myriad charges, the most serious and proved is the one of defilement of mother nature in a frenzy emulating oedipus complex who failed to solve the sphinx’s riddles.

The Ratlam Municipality v. Vardichand\textsuperscript{288} is a monumental judgment where Supreme Court followed the activist approach and provided flesh to the dry bones of statutory provisions. In this case the residents of a locality within the limits of Ratlam Municipality tormented by stench and stink causes by open drains and public excretion by nearby slum dwellers, moved to the Magistrate and when it came in the Supreme Court, it appreciated the activist movement and further observed that even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision.

Although Supreme Court did not point out the specific fundamental right under which a State can be compelled to respect the dignity and decency of the people but Supreme Court had Article 21 in it’s mind which guarantees right to life which are necessary for the enjoyment of life, it includes living
with decency and dignity. The Court further observed about the Ratlam Municipality that:

The grievous failure of local authorities to provide the basic amenities of public conveniences drives the miserable slum dwellers to ease in the streets. On the sly for a time and openly thereafter becomes a luxury and dignity are non negotiable facets of self governing bodies.

It is very clear that Supreme Court treated the right to live in a healthy environment as a part of Article 21.

In *Rural Litigation and Entitlement Kendra v. State of U.P.*\(^{289}\) the Court ordered certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. The Court had appointed a committee for the purpose of inspecting certain lime stone quarries. The Committee had suggested to close certain kinds of queries having regard to the adverse impact of the mining operations conducted in them and caused adverse effects on the health and safety of the workers.

This is a social obligation of every citizen enshrined in Article 51 A (g) of the Constitution to preserve nature and to maintain the balance. Law alone can’t help in restoring a balance in the biospheric disturbance. Nor can funds help effectively. The situation requires a clear perception and imaginative planning. It also requires sustained efforts and result oriented strategic action.

Being of this view, exploitation of limestone from Himalayan range was prohibited by ordering closure of certain quarries because it was found the lining operation had led to cutting down of forest and digging of limestone and allowing the waste to roll down or be carried down by rain water and effect the agricultural land of the villagers as it is located in outskirts of the hills.

\(^{289}\) AIR 1985 SC 652.
In *Subhash Kumar v. State of Bihar*\(^{290}\) the Supreme Court gave the mandate that pollution free air and water are necessary for fuller enjoyment of life and it is a Fundamental Right under Article 21 of the Constitution. We may not even spread our water resources and the menace of water pollution has gone to the extent that even tap water treated with chlorine is not fit for drinking when we realized, the enormity of the Pollution of Water (Prevention and Control of Pollution) Act 1974\(^{291}\) but in the absence of sincerity on part of the people who can be instrumental under the Act and public awareness, the desired improvement in that situation has not been achieved. The river Yamuna continues virtually a slush carrying channel as the drinking water for Delhi is being recycled repeatedly. Other rivers are also becoming shallow slimy pools that are active only in releasing deadly mists and stupefaction. The untreated sewage sludge and slurry of the riparian cities are daily released in those rivers and pollute them beyond retrieval.

In *M.C. Mehta v. Union of India*\(^{292}\) the petitioner, through a writ petition drew the country’s attention of the senseless pollution of Ganga by Kanpur tanneries. The Supreme Court held that industrialization, urbanization explosion of the natural resources, depletion of traditional sources of energy and raw materials and search for new sources of energy and raw materials, the destruction of multitude of animal and plant species for economic reasons were counted as factors, which have contributed to environmental deterioration. The Court ordered the closure of tanneries unless they take the step to have the treatment plant. Although the closure of tanneries may bring unemployment and loss of revenue but life, health and ecology are more important.

In *M.C. Mehta v. Union of India*\(^{293}\) another significant case, due to the leakage of Helium gas from Shriram Chemical Plant in Delhi, compensation was demanded as due to the inconvenience, death & injuries to lungs, eyes etc.

\(^{290}\) AIR 1991 SC 420.
\(^{291}\) Act No.6 of 1974.
\(^{292}\) AIR 1988 SC 1037.
\(^{293}\) AIR 1987 SC 1086.
In this case again the Court treated the right to live in healthy environment as a part of the fundamental right of life. The Court pointed out that an enterprise which is engaged in the hazardous or inherently dangerous industry which poses a potential threat to health and Safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity, which it has undertaken. A right to life is the most fundamental of all fundamental rights. A person can not enjoy right to life with human dignity unless he has a pollution free or health environment to live in.

In *T. Damodar Rao v. S.O. Municipal Corporation, Hyderabad*\(^\text{294}\) Justice P.A Chaudhary of Andhra Pradesh High Court observed:

It would be reasonable life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature’s gift without which the life can’t be enjoyed.

In *Kinkri Devi v. State*\(^\text{295}\) the Himachal Pradesh High Court held that there is a Constitutional duty of the State and also of the citizens not only to protect but also to improve the environment. The neglect or the failure abides by the duty is nothing but short of a fundamental law which the Government and citizens are bound to uphold and maintain.

In *L.K. Koolwal v. State*\(^\text{296}\) the Rajasthan High Court observed that maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizens and it amounts to slow poisoning and reducing the life of the citizens because of the hazards created, if not checked.

Pollution is another civilization misdemeanor. The penalty and implication for disturbing nature’s balance and losing steps with cosmos human

\(^{294}\) AIR 1988 AP 171.

\(^{295}\) AIR 1988 HP 4.

\(^{296}\) AIR 1988 Raj 2.
megalomania sans frontiers and human stubbornness in sticking to stupidity is squarely responsible for the degeneration of the outer manifestation and this grave lapse puts a question mark over the wisdom or otherwise of our notion of progress and designation of values and virtues. Outer pollution is not an isolated phenomenon or a solitary human misdeed but perhaps the most lurid blunder beyond the pages of History which ultimately can lead to the signaling the final exit. Whatever may be and can be written on the statue books for the protection of the environment for a real enjoyment of life enshrined in Article 21 as what solution adopted by U.N. General Assembly on 29-10-1982 which declared that:-

1. Mankind is a part of nature and life depends on the uninterrupted functioning of the natural systems, which ensure the supply of energy and nutrients.

2. Civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievements and living in harmony with nature gives man the best opportunities for the development of his creativity and for rest and recreation.

In Subhash Kumar v. State of Bihar mentioned above, it has been held that public interest litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in the right to life under Article 21 of the Constitution.

The increasing awareness in public and judiciary augurs well for the creation of a atmosphere in which the authorities might realize their responsibilities in their sphere and where right to life can be enjoyed in a proper environment, free of danger of disease and infections.

In A.P. Pollution Control Board v. M.V. Nayudu, the Supreme Court has made very valuable suggestions for improvement of the adjudicator
machinery under the various environmental laws. The main burden of these suggestions is that in all environmental Courts, tribunals and appellate authorities, there should be a judge of the rank of High Court or a Supreme Court sitting or retired, and a scientist or a group of scientists of high ranking and experience so as to help a proper and fair adjudication of disputes relating to environment and pollution.

Further, a provision ought to be made for an appeal to the Supreme Court. The present day system of adjudication is not satisfactory. The scientific and technological issues arising in environmental matters are extremely complex and therefore there is need for technical persons well versed in environmental laws to handle these issues.

The following are some of the well-known cases on environment under Article 21:

In *M.C. Mehta v. Union of India*,\(^{298}\) the Supreme Court issued several guidelines and directions for the protection of the Taj Mahal, an ancient monument, from environmental degradation.

In *Vellore Citizens Welfare Forum v. Union of India*,\(^{299}\) the Court took cognizance of environmental problems being caused by tanneries which were polluting all water resources, rivers, canals, underground water and agricultural land. The Court issued several directions to deal with the problem.

To protect the rapidly deteriorating quality of air so as to protect the health of the people in Delhi, which is a facet of Article 21 of the Constitution\(^ {300}\) the Supreme Court has directed that the entire fleet of public transport buses be run on CNG and not diesel. The Court has put a ban on running of diesel buses in Delhi.

\(^{298}\) AIR 1997 SC 734.
\(^{299}\) AIR 1996 SC 2721.
\(^{300}\) This matter has come before the Court several times e.g. *M.C. Mehta v. Union of India*, AIR 1998 SC 2663: *M.C. Mehta v. Union of India*, AIR 2001 SC 1948: *MC Mehta v. Union of India*(2002) 4 SCC 356.
In *M.C. Mehta v. Kamal Nath*\(^{301}\) the Supreme Court laid down the doctrine of public trust. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legally duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Thus the public trust doctrine is a part of the law of the land.

In the present case, large area of the bank of river Beas which is part of protected forest has been given on a lease purely for commercial purposes to the motels. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. Therefore, the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. The lease transactions are in patent breach of the trust held by the State Government. Therefore, the motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. Explaining the implication of the 'Polluter Pays' principle, the Supreme Court has held that the 'Polluter Pays' principle is a man’s paying for the cost of pollution. The polluter is under an obligation to make good the drudge caused to the environment. Under the principle, the polluter may be directed to pay damage not only for restoration of ecological balance but also to pay damages to the victims who have suffered because of ecological disturbance. The Court may also award exemplary damage against the polluter so as to deter others from causing pollution. The Court has characterized pollution as a tort a civil wrong against the society.\(^{302}\)

In *Indian Council for Environment-Legal Action v. Union of India*\(^{303}\) some industrial units were polluting water and air in the vicinity by discharging trade effluent. On 'Polluter Pays' principle, the Supreme Court directed the

\(\text{AIR 2000 SC 1997.}\)
\(\text{Ibid.}\)
\(\text{(2011) 5 SCC 676.}\)
industries to pay a sum of Rs.37.385 crores towards cost of remediation. The parties dragged litigation for 15 years by filing applications on frivolous grounds. The Supreme Court imposed a cost of Rs.10 lacs on the ground that no litigant can drive benefit from the mere pendency of a case in Court of law. The parties were directed to pay the amount with compound interest at the rate of 12%.

In *T.N. Godavrman Thirumalpad* case\(^{304}\) the duty of Government to protect environment was emphasized. Right to live was held as a right to an environment adequate for health and well being.

Recently the Supreme Court in a case\(^{305}\) declined to relax its ban on bursting of crackers between 10 p.m. and 6 a.m. during Dussehra, Deepavali and other festivals. A Bench comprising Chief Justice R.C. Lahoti and Justice Ashok Bhan while giving a series of directions in the case relating to noise pollution rejected the argument advanced on behalf of cracker manufactures that if the ban was enforced, it might ruin their industry and the order should be modified to the extent that bursting of crackers might be allowed during the night time during Dussehra, Deepavali and other major religious festivals. The Court in its earlier order had directed the authorities to ensure that fireworks or loud speakers were not used at any time in silence zones (within 100 meters area) such as public or private hospitals, nursing homes or other institutions for receptions and treatment of the sick/wounded, educational institutions, religious places and Courts. The Bench also issued a series of guidelines, including restrictions on use of loudspeakers in public places at night to bring down the decibel levels as also the noise levels of motor vehicles. The Bench issued several guidelines to the police for implementing the order and for creating awareness among the public.\(^{306}\)


\(^{305}\) The Hindu, July 19, 2005, p. 13.

\(^{306}\) Ibid.
**Right to clean water and Article 21**

Right to clean water is the most important right from the angle of environment protection and pollution control and this right has been upheld by the Supreme Court as a part of Right to Life. It is held by the Supreme Court in catena of cases that it is Government job to provide clean water to citizens and directions have been issued to Ministry of Urban Development and Poverty Alleviation, Government of India' Directions have also been issued by the Supreme Court for management of disposal of effluent and discharge of sewage and industrial solid waste in compliance of the safety norms and the standards.

**XI Health vis-a-vis right to life and personal liberty.**

The traditional notion of healthcare has tended to be individual-centric and has focused on aspects such as access to medical treatment, medicines and procedures. The field of professional ethics in the medical profession has accordingly dealt with the doctor-patient relationship and the expansion of facilities for curative treatment. In such a context, health care at the collective level was largely identified with statistical determinants such as life expectancy, mortality rates and access to modern pharmaceuticals and procedures. It is evident that such a conception does not convey a wholesome picture of all aspects of the protection and promotion of health in society. There is an obvious intersection between health care at the individual as well as societal level and the provision of nutrition, clothing and shelter. Furthermore, the term public health has a distinct collective dimension and has an inter-relationship with aspects such as the provision of a clean living environment, protections against hazardous working conditions, education about disease prevention and social security measures in respect of disability, unemployment, sickness and injury and special emphasis is laid on elements such as women’s reproductive health and the healthcare of children.  

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There is a foundational logic for health concerns to be addressed through the language of human rights. While professional ethics in the medical profession have retained an individual-centric focus on curative treatment, the evolution of international human rights norms pertaining to health has created a normative framework for governmental action.\(^{308}\) It may be useful to quote Jonathan Mann, a doctor who led the efforts to develop the interface between health and human rights.

'Modern human rights, precisely because they were initially developed entirely outside the health domain and seek to articulate the societal preconditions for human well-being, seem a far more useful framework, vocabulary and form of guidance for public health efforts to analyse and respond directly to the societal determinants of health than any inherited from the biomedical or public health traditions'.\(^{309}\)

The broader notion of the right to health emphasises its interlinkages with rights and regulations relating to the protection of life and liberty, privacy, education, housing, transport, environmental protection and labour standards among others. In this respect, 1993 Vienna Declaration and Programme of Action had emphasised the fundamental interrelatedness between civil and political rights on one hand and economic, social and cultural rights on the other hand. The said Declaration specifically provides:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of

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\(^{309}\) Cited from, Jonathan Mann et al., Health and Human Rights: A Reader (New York: Routledge, 1999) at p. 444.
States regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\textsuperscript{310}

World Health Organization (WHO) issues the International Health Regulations from time to time as a guiding framework for domestic policies. These regulations have further strengthened the link between human rights and health. For instance, Article 3(1) of the same states: ‘The new International Health Regulations shall be implemented with full respect for the dignity, human rights and fundamental freedoms of persons.’\textsuperscript{311}

In India, the theory of the interrelatedness between rights was famously articulated in \textit{Maneka Gandhi}\textsuperscript{312} decision. This became the basis for the subsequent expansion of the understanding of the protection of life and liberty under Article 21 of the Constitution of India. The Supreme Court of India further went on to adopt an approach of harmonization between fundamental rights and directive principles in several cases.

With regard to health, a prominent decision was delivered in \textit{Parmanand Katam v. Union of India}.\textsuperscript{313} In that case, the Court was confronted with a situation where hospitals were refusing to admit accident victims and were directing them to specific hospitals designated to admit medico-legal cases. The Court ruled that while the medical authorities were free to draw up administrative rules to tackle cases based on practical considerations, no medical authority could refuse immediate medical attention to a patient in need. The Court relied on various medical sources to conclude that such a refusal amounted to a violation of universally accepted notions of medical ethics. It observed that such measures violated the protection of life and liberty.

\begin{itemize}
\item \textsuperscript{311} World Health Assembly, “Revision of the International Health Regulation,” WHA 58.3 (May 23, 2005).
\item \textsuperscript{312} \textit{Maneka Gandhi v. Union of India}, (1978) 1 SCC 248.
\item \textsuperscript{313} (1989) 4 SCC 286 : 1989 SCC (Cri) 721.
\end{itemize}
guaranteed under Article 21 and hence created a right to emergency medical treatment.314

Another significant decision which strengthened the recognition of the Right to Health was in Indian Medical Assn. v. VP Shantha.315 In that case, it was ruled that the provision of a medical service (whether diagnosis or treatment) in return for monetary consideration amounted to a service for the purpose of the Consumer Protection Act, 1986. The consequence of the same was that medical practitioners could be held liable under the Act for deficiency in service in addition to negligence. This ruling has gone a long way towards protecting the interests of patients. However, medical services offered free of cost were considered to be beyond the purview of the said Act.

With regard to access and availability of medical facilities, the leading decision of the Supreme Court was given in Paschim Banga Khet Mazdoor Samity v. State of WB.316 The facts that led to the case were that a train accident victim was turned away from a number of Government-run hospitals in Calcutta, on the ground that they did not have adequate facilities to treat him. The said accident victim was ultimately treated in a private hospital but the delay in treatment had aggravated his injuries. The Court realized that such situations routinely occurred all over the country on account of inadequate primary health facilities. The Court issued notices to all State Governments and directed them to undertake measures to ensure the provision of minimal primary health facilities. When confronted with the argument that the same was not possible on account of financial constraints and limited personnel, the Court declared that lack of resources could not be cited as an excuse for non-performance of a Constitutionally mandated obligation. The Court set up an Expert Committee to investigate the matter and endorsed the final report of the

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said Committee. This report contained a seven-point agenda addressing several issues such as the upgrading of facilities all over the country and the establishment of a centralised communications system amongst hospitals to ensure the adequacy and prompt availability of ambulance equipment and personnel. Some commentators have argued that by recognizing a governmental obligation to provide medical facilities the Court has created a justifiable right to health.

Without doubt, considerations of availability and access to medical facilities are the paramount challenge in our country. In recent years, considerable investment has been made for the expansion of the Government-run health care infrastructure and the establishment of more medical and paramedical educational institutions. However, the enhancement of the scale of medical facilities is not a sufficient strategy by itself. While private sector investment in establishing full-fledged hospitals has to be encouraged, there must be adequate safeguards to ensure that the same also benefits the poorer sections and those in rural areas. The concern with an increasingly privatized health care sector is that it may cater largely to urban patients with high purchasing power. In this respect, administrative and legal interventions may be required to ensure proper access to existing facilities. An integrated approach to advancing public health recognizes its relationship with policies for economic development and addressing social inequalities. Medical professionals should also take on the responsibility of catering to the needs of the weaker and underprivileged sections. It must be recognized that access to medical facilities is often pendent on determinants of social status such as caste, gender and class.

In an era where health risks assume a transnational character, it is important for all countries to ensure effective engagement at an international level. Over the last decade, we have all heard of the threats posed by infectious diseases such as the mad cow disease and avian flu. The growth of HIV/AIDS
continues unabated despite increasing investment in AIDS control measures such as awareness campaigns, the provision of contraceptives and increased supply of anti-retro viral drugs. In such a scenario, the importance of the international human rights discourse cannot be understated. Governmental and private measures at the domestic level need further support from international collaborations such as the transfer of medical technology, personnel and medicines. The right to health cannot be conceived of as a traditional right enforceable against the State. Instead, it has to be formulated and acknowledged as a positive right at a global level—one which all of us have an interest in protecting and advancing.

(a) HIV Positive Person

No law has yet been enacted in India defining the rights and duties of HIV infected persons. Therefore, the Courts are seeking to fill in the legal gap by their decisions. Within last few years, several pronouncements have been made by the Supreme Court and the High Court concerning such persons.

In *Mr. X v. Hospital Z*, the Supreme Court was called upon to decide a very crucial question in the modern social context, viz. can a doctor disclose to the would be wife of a person that he is HIV positive? Does it infringe the right to privacy of the person concerned? The Court has answered both of these questions in the negative. The Court has observed that the lady proposing to marry such a person is also entitled to all human rights, which are available to any human being.

The right to life guaranteed by Article 21 would positively include the right to be told that a person with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Moreover, when two fundamental rights clash, viz., that of the person concerned (right to privacy) and that of they would be life (to live a healthy life also guaranteed by Article 21) the Right which would advance the public morality or public

317 AIR 1999 SC 495.
interest, would alone be enforced through the process of Court. The Court has observed defining the rights of such persons.\textsuperscript{318}

The patients suffering from the dreadful disease like AIDS deserve full sympathy. They are entitled to all respect as human beings. Their society cannot and should not be avoided which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them. Sex with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot insist that person to achieve that object.\textsuperscript{319}

The Bombay High Court has in MX of \textit{Bombay v. Mis. ZY}\textsuperscript{320} considered the important question whether the State can deny job opportunities to a HIV Positive person. In that case a casual labourer was denied work because the tested HIV Positive. The Court has pointed out that because of Article 21, no person can be deprived of his right to livelihood except according to procedure established by law. Such a procedure established by law has to be just, fair and reasonable.

(b) Right to Medical Care

In \textit{Paschim Banga Khet Mazdoor Samity v. State of West Bengal},\textsuperscript{321} A labourer (mazdoor) fell from a running train and was seriously injured. He was sent from one Government hospital to another and finally he had to be admitted in a private hospital where he had to incur an expenditure of Rs.17,000/- on his treatment. Feeling aggrieved at the callous attitude shown by the various Government hospitals, he filed a writ petition in the Supreme Court under Article 32.
The Court has ruled that the Constitution envisages establishment of a welfare State and in a welfare State the primary duty of the Government is to provide adequate medical facilities for the people. The Government discharges this obligation by running hospitals and health centers to provide medical care to those who need them. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance.\textsuperscript{322}

But in \textit{State of Punjab v. Ram Lubhaya Bagga}\textsuperscript{323} the Supreme Court has recognized that provisions of health facilities cannot be unlimited observing that it has to be the extent finance permit. No country has unlimited resources to spend on any of it’s projects.\textsuperscript{324}

(c) \textbf{Blood Banks}

In \textit{Common Cause, A Registered Society v. Union of India},\textsuperscript{325} the Apex Court highlighted the serious deficiencies and shortcomings in the matter of collection, storage and supply of blood through the various blood centers operating in the country, especially in the context of incidence of HIV infected cases. The Court directed the Government to establish National Council of Blood Transfusion as a registered society. The Court also directed the States to establish similar bodies. The Court suggested that the blood banks ought to be licensed under the Drugs Control Act.

Only around 45 percent of the seven million units of blood that the country needs every year is met through voluntary donation. Replacement donation or blood donated by a person, usually a friend or relative of a patient, as replacement for the blood given to the patient accounts for the rest of the demand. This situation has led to various malpractices in blood transfusion services, which go on unchecked in the absence of a single institutional

\begin{flushleft}
\textsuperscript{322} Ibid at 2429.  \\
\textsuperscript{323} AIR 1998 SC 1703.  \\
\textsuperscript{324} Ibid at 1711.  \\
\textsuperscript{325} AIR 1996 SC 929.
\end{flushleft}
structure to control blood banks ‘replacement’ donation has apparently become another form of professional donation. In *Common Cause, A registered society v. Union of India,* the Supreme Court has made it mandatory for blood banks to obtain licences and banned professional blood donation. The Supreme Court has further held that Government should establish blood transfusion councils at the central and state levels; consider the advisability of enacting legislation to regulate the collection, processing, storage, distribution and operation of blood banks in country provide income tax exemption to donations made to the National and State Blood Transfusion Councils.

Except for the legislation the Government has complied with all directives of the Supreme Court. Professional donation was banned in January 1998 but it took two years to bring the ban into effect as the infrastructure to implement it had to be put in place. The Government has set up, as directed by the Court, a National Blood Transfusion Council (NBTC) as the apex policy making body for blood transfusion services. Subsequently, State Blood Transfusion Councils (SBTC) were also set up. But these bodies have an advisory role only and exercise no control over the blood banks. These are in addition to the Drug Controller and this multiplicity of authority has resulted in poor monitoring of blood banks.

**XII Right to privacy is part and parcel of Article 21 as expounded by the Supreme Court.**

India, the world’s largest democracy, is also one of the most dynamic, with its socio-economic landscape being transformed and its upwardly mobile middle class burgeoning. Attendant to this sea change has been an increased level of societal intrusion into the citizens’ private space, manifest in the functioning of the Indian media. The right to privacy in India is, in many senses, archaic, outdated and not in tune with the complexities of today’s India.

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327 Supra, note 234.
It is an opportune time to envisage the future evolution of the right to privacy - a cornerstone of modern life.

The law does not determine what privacy is, but only what situations of privacy will be afforded by legal protection.\(^{328}\)

The right to privacy, though curiously absent in the Constitution of India derives its ambiguous basis from the right to life and personal liberty, as enshrined in Article 21, thereby being interpreted as an unarticulated fundamental right. Convergence of technologies has spawned immense concerns as to privacy rights and data protection, owing to the facile accessibility and communicability of personal data.

The foundation for the right to privacy was first laid down in 1964 in what is now commonly referred to as \textit{Kharak Singh's case}.\(^{329}\) The Supreme Court held that though our Constitution does not expressly refer to the right to privacy, but the foundation can be traced from the right to life in Article 21, thereby equating the right to privacy with Article 21. The Court in \textit{Kharak Singh's}\(^{330}\) held that:

\hspace{1cm} ....nothing is more deleterious to a man’s physical happiness and health than calculated interference with his privacy.\(^{331}\)

However, following decisions of \textit{Munn v. Illinois}\(^{332}\) and \textit{Wolf v. Colorado}\(^{333}\), in \textit{Gobind v. State of M.P.}\(^{334}\) the Supreme Court qualified the right to privacy and held that a violation of privacy could be possible under the sanction of law, wherein Mathew, J. as Lord Denning indicated, envisaged its gradual development thus:

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\(^{331}\) \textit{AIR} 1963 SC 1295, 1306, para 31.
\(^{332}\) 24 L Ed 77: 94 US 113 (1876)
\(^{333}\) 93 L Ed 1782 : 338 US 25 (1949)
\(^{334}\) (1975) 2 SCC 148 : 1975 SCC (Cri) 468.
The right to privacy in any event will necessarily have to go through a process of case-by-case development.\textsuperscript{335}

The scope and ambit of the right of privacy or right to be left alone came up for consideration before the Supreme Court in \textit{R. Rajagopal v. State of T.N.}\textsuperscript{336}, popularly christened \textit{Auto Shankar case}. In this case the right to privacy of a condemned prisoner was in issue where a Tamil publication \textit{Nakheeran} was under pressure to stop the publication of the autobiography of a convict, as it was felt that it would defame many public officials involved. However, the Supreme Court allowed publication and asked the officials to file for defamation, after publication. It said that the writings having been based on public records, therefore in public domain and hence they cannot be given protection of the right to privacy after their being noted down in public records. This judgment is important because, had the judgment been in the contrary, many possible publications regarding the Government and its actions could have been censured.

In the judgment of the Supreme Court in \textit{Amar Singh v. Union of India}\textsuperscript{337}, Amar Singh, a politician, had challenged the authorized tapping of his phone connections and in the interim had obtained a gag-order restraining the media that had obtained access to the conversations from publishing them. Rather than vindicating Mr. Singh’s right to privacy or the right to free speech of the press, the judgment is premised on two procedural grounds. Firstly, that any person who makes an affidavit in Court must state the full facts that he knows to be true and point out the sources of his information. Secondly, that no person must come to the Court with unclean hands. The Supreme Court, in \textit{Amar Singh's Case}\textsuperscript{338}, ingeniously and rightly refused to go into the said issue in view of the petitioner not having come to the Court with clean hands. Even though it was a choice opportunity for the Supreme Court to lay down the law

\textsuperscript{335} Lord Denning, \textit{What Next in Law.}
\textsuperscript{336} (1994) 6 SCC 632.
\textsuperscript{337} (2011) 7 SCC 90.
\textsuperscript{338} (2011) 7 SCC 90.
on the subject, it was lost due to the misdeeds of the petitioner himself during the proceedings.

The Constitution does not merely speak of human rights protection. It is evident from the catena of judgments that it also speaks of preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment. Our Constitution professes for collective life and collective responsibility on the one hand and individual rights and responsibilities on the other hand. In *Kharak Singh v. State of U.P.*\(^{339}\) and *Gobind v. State of M.P.*\(^{340}\) the Supreme Court held that right to privacy is a part of life under Article 21 of the Constitution which has specifically been reiterated in *People’s Union for Civil Liberties v. Union of India.*\(^{341}\)

Right to privacy has been held to be a fundamental right of a citizen being an integral part of Article 21 of the Constitution of India by Supreme Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy. However, right of privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right. *Malak Singh v. State of Punjab*\(^{342}\) *State of Maharashtra v. Madhukar Narayan Mardikar,*\(^{343}\) *R. Rajagopal v. State of T.N.*\(^{344}\) *People’s Union for Civil Liberties v. Union of India*\(^{345}\), *Mr. ‘X’ v. Hospital ‘Z’*\(^{346}\), *Sharda v. Dharmpal*\(^{347}\), *People’s Union for Civil Liberties v. Union of India*\(^{348}\), *District Registrar and

\(^{339}\) AIR 1963 SC 1295 : (1963) 2 Cri LJ 329.  
\(^{345}\) (1997) 1 SCC 301.  

In Ram Jethmalani v. Union of India, this Court dealt with the right of privacy elaborately and held as under: (SCC pp. 35-36, paras 83-84)

Right to privacy is an integral part of right to life. This is a cherished Constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner....The solution for the problem of abrogation of one zone of Constitutional values cannot be the creation of another zone of abrogation of Constitutional values.

....The notion of fundamental rights, such as a right to privacy as part of right to life is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

The Courts have always imposed the penalty on disturbing peace of others by using the amplifiers or beating the drums even in religious ceremonies. (vide Rabin Mukherjee v. State of W.B., Burrabazar Fire Works Dealers Assn. v. Commr of Police, Church of-God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn and Noise Pollution (7), In re.) In the later judgment the Supreme Court issued several directions including banning of using the fireworks or fire crackers except between 6:00 a.m. and

349 (2005) 1 SCC 496.
352 (2011) 8 SCC 1: (2011) 3 SCC (Cri) 310.
353 AIR 1985 Cal 222.
354 AIR 1998 Cal 121.
10:00 p.m. There shall no use of fire crackers in silence zone i.e. within the area less than 100 metres around hospitals, educational institutions, Courts and religious places.

It is in view of this fact that, in many countries there are complete night curfews (at the airport i.e. banning of landing and taking off between the night hours), for the reason that the concept of sound sleep has been associated with sound health which is an inseparable facet of Article 21 of the Constitution. Various statutory provisions prohibit the arrest of a judgment-debtor, a woman in the night and restrain to enter in the night into a constructed area suspected to have been raised in violation of the sanctioned plan, master plan or zonal plan for the purpose of surveyor demolition. (See Section 55 of the Code of Civil Procedure, Section 46(4) CrPC and Sections 25 and 42 of the U.P. Urban Planning and Development Act, 1973.)

Recently, in a landmark case titled as Suresh Kumar Koushal and others v. NAZ Foundation and others,357 the Hon’ble Supreme Court has expounded the right of privacy vis-a-vis Article 21 of Indian Constitution upholding that Section 377 of IPC does not suffer from the vice of unconstitutionality.

XIII Right to Safety against Crime vis-a-vis Article 21

Several crimes like sexual assault on women, kidnapping, stalking, eve teasing etc., are committed by using vehicles thereby making them instruments in crimes. Moreover, their inside view is partially obstructed by printed or black shaded glass panes. Recently a Public Interest Litigation in this regard was filed for issuance of directions sought for enforcing 100% visibility. While deciding this issue in Avishek Goenka v. Union of India358 the Supreme Court has held thus:

‘Pasting of black films or any other films or any other material on glass panes of vehicles is banned and safety glasses meeting
requirement of Rule 100(2) of Motor Vehicles Rules permitting benchmark visibility only permitted to be used. Police Chiefs were warned of contempt action if Supreme Court directions were not scrupulously enforced'.

XIV RIGHT TO EDUCATION IS NOW EXPLICIT UNDER ARTICLE 21-A INSERTED BY THE CONSTITUTION (86TH AMENDMENT) ACT, 2002

a) Position Prior to The Constitution (86th Amendment) Act, 2002

A well nurtured child is most likely to be good nurturing parent. A child brought up without love or human emotional relationship is bound to be incomplete and worse traumatized in later life.

In the Indian Constitution, the provisions for child protection were however not ignored. Article 24 prohibits the employment of children of the age under fourteen years in mines and factories. Article 15 (3) provides that special provisions for women and children can be made by the State. Article 39 provides for the rights of health and growth with freedom and dignity. None can take exceptions to the spirit of these declarations, what have been sadly lacking are the implementation of all such laws and the tangible realization of far-seeing and well-drafted ideas.

Judiciary has taken up the effort to try to give the child the best environment and resources as in Mohini Jain v. State of Karnataka better known as Capitation fee case, a Division Bench observed that 'Right to Education' comes within the fold of Article 21. According to them right to life is the compendious expression for all those rights, which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct that the individual is free to pursue. The right to education flows directly from the right to life. The right to life under Article 21 and the dignity of an individual can not be assured unless it is accompanied by

359 (1992) 3 SCC 666.
the right to education. The State Government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens. The fundamental rights guaranteed under Part III of the Constitution of India including right to freedom of speech and expression and other rights under Article 19 can not be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The right to education, therefore, is concomitant to the Fundamental Rights enshrined under Part III of the Constitution. The State is under an obligation at all levels for the benefits of the citizens. The educational institutions must function for advantage of the citizens.

But this view was criticized strongly and again this point came before a constitutional bench in *Unni Krishnan v. State of Andhra Pradesh.* In this case the Court held that right to education up to the primary stage alone is a Fundamental Right. This view was taken by referring to Articles 41, 45 and 46 of the Constitution, most particularly Article 45 which finds its place in Part IV of Directive Principles stating that the State shall endeavor to provide within a period of ten years from the commencement of this Constitution for free and compulsory education for all children until they complete the age of fourteen years, which was the meaning given to the expression 'Primary Education'

Jeevan Reddy J speaking for self and Pandian J. observed that a true democracy is where education is universal, in which people understand what is good for them and the nation and know how to govern themselves. Paucity of resources however stood in the way of enlarging the field of Fundamental Right to Education, which was, therefore, kept confined up to primary stage.

b) **The Constitution (86th Amendment) Act, 2002**

This amendment added a new Article namely 21-A in Part III which runs as - 'The State shall provide free and compulsory education to all children of
the age of six to fourteen years in such manner as the State may, by law, determine.'

Article 45 was amended by variation which now provides that 'The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.'

Article 51A was amended and a new clause (K) was added after clause (G) namely (K)- who is a parent or guardian to provide opportunities for education to his child or as the case may be, ward between the age of six and fourteen years.

The 86th amendment has included ratio of Unni Krishnan Case. It is criticized on the ground that it does not provide anything for higher education. Directive Principles in Article 45 should have provided for the cheap and quality higher education for citizens as a goal.

c) Higher Education

In Mohini Jain's\textsuperscript{361} case, the Court took an extremely expansive view of State obligation to provide education to everyone at all levels. The State should provide adequate number of institutions of higher and professional education as there may be need for. The judgment in Mohini Jain stated certain postulates which though basically sound theoretically and idealistically were hardly viable, feasible and tenable in the present day economic situation of the country, for no State has the financial wherewithal to meet public demand for professional colleges.\textsuperscript{362}

In Unni Krishnan's case the Supreme Court has implied the 'Right to Education' from the 'Right to Life and Personal Liberty' guaranteed by Article 21. As the Fundamental Rights and the Directive Principles are complementary to each other, the content and parameters of this right are to be deduced in the

\textsuperscript{361} (1992) 3 SCC 666.
light of Articles 41, 45 and 46. Therefore, the right to education in the context of these directive means:

(a) every child has a right to free education up to the age of 14 years.

(b) thereafter, his right to education is circumscribed by the limits of the State and its development. The Court has ruled that a citizen has a right to call upon the State to provide educational facilities within the limits of its economic capacity and development.

An eleven Judge Bench\textsuperscript{363} of Supreme Court in \textit{T.M.A. Pai Foundation v. State of Karnataka}\textsuperscript{364} dealt with the right of minorities to establish and administer educational institutions and also dealt with right of non-minorities to establish and administer educational institutions, aided or unaided. Based avowedly on the 'economics and ideology of privatization', the leading opinion of the then Chief Justice of India, B.N. Kirpal (on behalf of himself and Pattanaik, Rajendra Babu, Balkrishnan, Venkatarama Reddi and Pasayat, J.J.), secures for non minority educational institutions a degree of freedom from State and governmental control that they have not enjoyed since independence. The majority has held that 'the scheme framed by the Supreme Court in \textit{Unni Krishnan} case and therefore followed by the Government was one that cannot be called a reasonable restrictions under Article 19(6) of the Constitution. The restrictions imposed by the scheme, made it difficult, if not impossible, for the educational institutions of run efficiently.'\textsuperscript{365} The scheme in \textit{Unni Krishnan}'s case has the effect of nationalizing education in respect of important features viz., the right of private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Government legislating in conformity with the scheme, the private institutions are indistinguishable from the Government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called

\textsuperscript{363} The largest Bench ever constituted to hear a case since \textit{Kesavanand Bharti v. State of Kerala}, AIR 1973 SC 1461.
\textsuperscript{364} (2002) 8 SCC 481.
\textsuperscript{365} \textit{Ibid} Para35.
fair or reasonable. It has been recognized that private educational institutions are a necessity.\textsuperscript{366}

Therefore the decision in \textit{Unni Krishnan's} case in so far as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to University Grants Commission, the Medical Council of India, the Central and State Governments etc. are overruled.\textsuperscript{367} In conclusion, the scheme framed in \textit{Unni Krishnan's} case and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.\textsuperscript{368} This decision has been criticized on ground of being based on ideology of privatization and commercialization higher education and passing away from the concept of welfare State.

The Supreme Court in \textit{Prof. Yashpal v. State of Chhatisgarh},\textsuperscript{369} declared unconstitutional the provisions of the Chhattisgarh Private Sector University Act (Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Vinagan) Adhinayam). As many as 112 self financed private universities were setup under the Act in the past one year, most of them without basic infrastructure, adequate teaching staff or sufficient financial resources.

This judgment reverses a trend towards the commercialization of higher education. Rajeev Dhawan, Advocate for the petitioners said, 'The judgment is important because after the \textit{T.M.A. Pai's} case in 2002 the Supreme Court, enabled a massive commercialization of education, an issue with which the Court continues to struggle. But the Chhatisgarh universities crisis represents the lengths to which this commercialization could go at the cost of education

\begin{footnotes}
\item[366] \textit{Ibid} Para 38.
\item[367] \textit{Ibid} Para45.
\item[368] \textit{Ibid} Para 161.
\item[369] (2005) 5 SCC 420.
\end{footnotes}
and students. This judgment arrests that doubtful tendency insisting on prior quality control so that fake universities do not give false degrees and certificates.\textsuperscript{370}

The Supreme Court in \textit{P.A. Inamdar and others v. State of Maharashtra}\textsuperscript{371} has held that unaided minority and non minority institutions have absolute rights to admit students of their choice in medicine, engineering and other professional courses with Government interference. A seven judge Constitution Bench headed by the former Chief Justice of India R.C. Lohati J., also abolished the State quota and reservation in unaided, private minority and non-minority colleges. The judgment would be effective from the next academic year and all admissions made during 2005-2006 through Court orders and directions of State committees would not be disturbed. The Bench said imposition of the State quota or enforcing reservation policy in unaided professional institutions constituted a serious encroachment on their right and autonomy. The former Chief Justice of India R.C. Lohati J., writing the unanimous judgment, said, 'merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of the reservation policy to less meritorious candidates.\textsuperscript{372} The Court has observed that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institutions. Reiterating the ruling given in \textit{T.M.A. Pai Foundation} case\textsuperscript{373} Justice Lohati said, 'unaided institutions, minority or non-minority, as they are not deriving any aid from State funds, have unfettered fundamental right to choose students and the procedure, subject

\textsuperscript{370} \textit{Frontline}, March 25, 2005, p. 48.
\textsuperscript{371} \textit{The Hindu, August 13, 2005 P. 1; Frontline}, September 9, 2005, p. 28-37.
\textsuperscript{372} \textit{Ibid}.
\textsuperscript{373} Supra, note 190.
to its being fair, transparent and non-exploitative.\textsuperscript{374} The Bench recommended that the admissions be regulated by a centralized common entrance test either at the State or National level and single window procedure. It put a complete ban on collection of capitation fees and profiteering by colleges. It said though every institution was free to device its own fee structure, it could be regulated in the interest of students. The Bench allowed a 15 percent quota for non-resident Indian students in private colleges and permitted them to charge higher fees. Such seats should be utilized only for bonafide Non Resident Indians (N.R.I.) and for their children and merit should not be given the go-by. The amount collected from N.R.I. students should be utilized for students from weaker sections. The Court suggested that legislation be enacted to prevent mis-utilization of such quota or any malpractice referable to N.R.I. quota seats.\textsuperscript{375}

In a nutshell, the seven-number Constitution Bench in \textit{Inamdar's} case revisited the principles laid down in \textit{Pai Fundation's} case and reiterated the nature of educators' right being part of Article 19(1)(g). It also reiterated that the rights of minorities had the protection of Fundamental Right under Article 30(1) in addition to the Fundamental Right under Article 19 (1)(g). Reasserting the ratio on \textit{Pai foundation's} case, the Court asserted that the minority unaided institutions can legitimately claim unfettered fundamental right to choose students to be allowed admission and devise a fair, transparent and non-exploitative procedure for that purpose.

Right to Education as a Fundamental Right

In \textit{Mohini Jain's} case the Supreme Court held that although a right to education had not been guaranteed as a Fundamental Right under Part III of the Constitution, the Article 21 (in Part III of the Constitution of India), Article 38, 39 (a), (f) (in Part IV of the Constitution of India) together makes it clear that the framers of the Constitution made it obligatory for the State to provide

\textsuperscript{374} Supra, note 197.
\textsuperscript{375} \textit{Ibid.}
education for its citizens. Article 21 says 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. The Right to Life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by right to education. Therefore, every citizen has a 'Right to Education' under the Constitution and thus, the State had an obligation to provide educational institutions at all levels for the benefit of all the citizens. All educational institutions whether it was State owned or State recognized were obliged to secure the 'Right to Education'.

In Part IV of the Constitution the Directive Principles of the State policy, the Constitution asks the State to secure social order and minimize inequalities for the promotion of welfare of citizens (Article 38). Article 39 of Part IV talks about directing the State policies to secure adequate means of livelihood of citizens and offer opportunities to children to facilitate their healthy all round development. Reality of the Fundamental Rights under chapter II I will not be realized by illiterate citizens unless Right to Education under Article 41 was ensured to the individual citizen. Therefore, 'Right to Education' was concomitant to the Fundamental Rights provided under Part III of the Constitution. This interpretation received the approval of the constitutional Bench in Unni Krishnan's case and taking cue from the above constructive interpretation by the judiciary, Parliament also did its bit by inserting Article 21A which is couched as an obligation on the State to provide free and compulsory education to all children between the ages of six and fourteen years. Article 21A of the Constitution reads as:

>'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine'.

376 Official Website of Supreme Court of India. Available online at http://www.supremecourtofindia.nic.in
Right to Education Act 2009:

Since Article 21 A imposed an obligation on the State to provide free and compulsory education to all children in the age group of six to fourteen in terms of a law, Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 to provide every child full time elementary education of satisfactory and equitable quality by a formal system. The Act covers within its sweep all recognized schools including those established, owned, controlled or aided by Government or local authority as also the privately managed unaided schools not receiving any kind of aid or grant to meet their expenses and are charged with various obligations and responsibilities under the Act.

Vires of the Right to Education Act

The constitutional validity of the Right to Education Act as also the validity of Articles 15(5) and 21A came to be questioned by privately managed unaided educational institutions. A three-judge Bench of the Supreme Court in Society for Unaided Private Schools of Rajasthan v. Union of India377 vide order dated 6.9.2010 held that in view of the challenge as to the validity of Articles 15(5) and 21A of the Constitution of India, the matter needed to be referred to a Constitution Bench of five Judges. This course was rightly adopted in view of the mandate of Article 145(3). In its final judgment in Society's case, the Court by a majority of 2:1 upheld the provisions of Right to Education Act in so far as they apply to non-minority privately managed unaided educational institutions inter alia, by relying upon Article 21 A and 15 (5) of the Constitution of India without going into the validity of the said constitutional provisions themselves. As regards the institutions established, run and managed by minorities, covered within the purview of Article 30 (1) the provisions of the Right to Education Act have been held to be ultra vires the Constitution and therefore served.

377 (2012) 6 SCC 102
Recently, in *Environment & Consumer Protection Foundation v. Delhi Administration*\(^{378}\), the Supreme Court has pointed out importance of qualified teachers and basic infrastructure vis-a-vis Article 21 in context of Right of Children to Free and Compulsory Education Act 2009. In *Adarsh Shiksha Mahavidyalaya v. Subhash Rahangdale*,\(^{379}\) the Supreme Court has reiterated the importance of well equipped and properly trained teachers in the context of Right to Education Act and Article 21 A. In another landmark case *Manohar Joshi v. State of Maharashtra*\(^{380}\), the Supreme Court has stressed upon the fact that primary education is duty and responsibility of municipalities and State Government and it is necessary for achieving full literacy.

Dangerous consequences including violation of equality, secularism and fraternity which are the basic features of our Constitution and body politic will have to be kept in view while allowing unaided institutions run by minority out of the purview of the Act and requiring non-minority aided institutions to abide by the rigours of the Right to Education Act.

It is suggested that provisions of Article 21A as interpreted by the majority opinion of three-judge Bench in *Society's case*, to protect the vires of Right to Education Act of 2009 and also need re-examination by a Constitution Bench of five Judges. The nature, scope and extent of right conferred by Article 21A needs to be examined.

**Article 41 of the Constitution of India vis-a-vis Article 21A:**

Recently, in a case *Sambhavana v. University of Delhi*\(^{381}\) while referring to the United Nations Convention on the Rights of Persons with Disabilities which has become operative with effect from May 2008 and the same has been ratified by India, it gives emphasis on development of human potential, sense

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\(^{378}\) (2012) 2 SCC 287  
\(^{379}\) (2012) 2 SCC 425.  
\(^{380}\) (2012) 3 SCC 619  
\(^{381}\) (2013) 14 SCC 781
of dignity, self-worth and strengthening of respect for human rights and creativity and further held that:

'A visually impaired student is entitled to receive special treatment. Under the constitutional frame the State has to have policies for such categories of people. Article 41 of the Constitution of India casts a duty on the State to make effective provisions for securing, inter alia, the rights of the disabled and those suffering from other infirmities within the limits of economic capacity and development. It is imperative that the authorities look into the real grievances of the visually impaired people as that is the constitutional and statutory policy.'

XV Compensation for violation of rights to life and personal liberty—emerging judicial trends.

In a case, where life and personal liberty have been violated, the absence of any statutory provision for compensation in the statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from State or its officials functioning under the public safety legislation is, therefore, very high, compared to the statutory powers and supervision expected from the officers functioning under the statutes like the Companies Act, the Cooperative Societies Act and such similar legislations. When we look at the various provisions of the Cinematograph Act, 1952 and the Rules made there under, the Delhi Building Regulations and the Electricity laws the duty of care on officials was high and liabilities strict.
In democracy, the State perform innumerable functions for the welfare of its citizens. Sometimes even the fundamental rights are attacked. Such a situation calls for an adequate mechanism for determining the state liability and compensating the victim. It is, however, strange that the State itself has not bothered to enact a law for determining the citizens’ claims against it. Indian Judiciary has taken an onerous task by evolving in its own way some principles for meeting with the aforesaid situation.\textsuperscript{382}

English common law followed the famous old doctrine ‘king can do no wrong’ which immune the jurisdiction of Courts. The Sovereign immunity came to an end by passing of legislation\textsuperscript{383} in England.

\textit{Rudul Sah v. State of Bihar}\textsuperscript{384} Interim compensation was awarded by way of public law remedy in the case of an illegal detention explained the rationale for awarding such interim compensation thus : (SCC p. 148, para 12).

This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. The order of compensation passed by us is, as we said above, in the nature of a palliative. We cannot leave the petitioner penniless until the end of his suit, the many appeals and the execution proceedings. A full-dressed debate on the nice points of fact and law which takes place leisurely in compensation suits will have to await the filing of such a suit by the poor Rudul Sah.

In \textit{Nilabati Behera v. State of Orissa}\textsuperscript{385} it has been observed that:

\ldots Therefore, when the Court moulds the relief by granting compensation in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental

\begin{thebibliography}{9}
\bibitem{383} The Crown proceeding Act, 1947.
\bibitem{384} (1983) 4 SCC 141 : 1983 SCC (Cri) 798.
\end{thebibliography}
rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making monetary amends under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizens. The compensation is in the nature of exemplary damages awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a Court of competent jurisdiction or/and prosecute the offender under the penal law.

In Sube Singh v. State of Haryana\textsuperscript{386} Supreme Court held: (SCC p. 180c-d)

\textit{It is now well settled that the award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation by way of public law remedy will not come in the way of the aggrieved person claiming additional compensation in a civil Court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal Court ordering compensation under Section 357 CrPC. Award of}

compensation as a public law remedy for violation of fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades.

In *Kasturi Lal Ralia Ram Jain v. State of U.P.*\(^{387}\), drawing distinction between sovereign and non-sovereign functions, the Supreme Court rejected the plea of arrest in violation of the *V.P.* Police Regulations on the ground that the arrest was made as a part of the sovereign powers of the State. *Kasturi Lal*\(^{388}\) was a Constitutional Bench judgment. However, in *N. Nagendra Rao & Co. v. State of A.P.*\(^{389}\), a three-Judge Bench of Supreme Court drew a distinction between the sovereign and non-sovereign functions of the State and held as follows: (SCC p. 235, para 25)

.... No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of the State as a juristic person, propounded in the nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modem social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as sovereign and non-sovereign or governmental and non-governmental is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have

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387 AIR 1962 SC 933.
388 AIR 1965 SC 1039 : (1965) 2 Cri LJ 144.
extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for the sake of the society and the people, the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and rights of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken.

The Court further held: *N. Nagendra Rao & Co.’s case*[^390^], SCC p. 235, para 25)

... The determination of vicarious liability of the State being linked with the negligence of his officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued.

The Court further opined that the ratio of *Kasturi Lal*[^391^] is available in those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a Court of law. The Court opined that the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence.

Article 300(1) of the Constitution of India provides that the Government of India may be sued in relation to its affairs in the like case as the Dominion of India, subject to any law which may be made by Act of Parliament. The Parliament has not made any law and therefore the question has to be


determined as to whether the suit would lie against the Dominion of India before the Constitution came into force.\textsuperscript{392}

The first leading case on this point was \textit{P. \& O. Steam Navigation Company v. Secretary of State for India},\textsuperscript{393} in which Chief Justice Peacock made a distinction between acts done in exercise of sovereign power and acts done in the exercise of non sovereign power. The latter acts are those might be carried on by the private individuals also, not having sovereign power. Maintenance of dockyard was treated a non-sovereign function as it can be done by any private person and hence the Government was held liable for the tortuous action done by its employees while maintaining dockyard. Such distinction was followed by Supreme Court in post Constitutional period.

In \textit{State of Rajasthan v. Vidyawati},\textsuperscript{394} an official jeep driver killed the plaintiff's husband and it was treated as a non sovereign function. But in \textit{Kasturilal Raliaram v. State of U.P.},\textsuperscript{395} the State was immuned from liability for the tortuous act done by its policeman. P.B. Gajendragadkar Chief Justice felt helpless and called on the Government of India to enact a law in this field. The State Liability Bill was introduced in the Parliament in 1967, but it remained as a bill and could never be passed.

In post \textit{Maneka}\textsuperscript{396} period, Article 21 has been given wider and liberal interpretation in order to make it more meaningful right. Right to claim monetary compensation for the violation of the rights in Article 21 has also been recognized in several cases without any reference to the sovereign immunity of the State.

\textsuperscript{393} (1851) 5 Bom. HCR App 1.
\textsuperscript{394} AIR 1962 SC 933.
\textsuperscript{395} AIR 1965 SC 1039.
\textsuperscript{396} \textit{Maneka Gandhi v. Union of India}, AIR 1978 SC 597.
In *Bhagalpur Blinding* case, the Supreme Court has held that State is liable for blinding of prisoners in Bhagalpur by its prison officials. This inhuman act was treated as violation of the fundamental right to life guaranteed under Article 21 of the Constitution. Conceding the State liability, the Court directed the State of Bihar to provide them the best treatment at State cost.

In *Rudal Shah v. State of Bihar*, the Supreme Court has held that the Court has power to award monetary compensation in appropriate cases where there has been violation of Constitutional right of citizens and directed Bihar Government to pay compensation of Rs. 30,000/- to Rudal shah who had to remain in the jail for 14 years because of the irresponsible behaviour of the State Government officers even after his acquittal. Chief Justice Chandrachud said that the State must repair the damage done by its officials to the petitioner. This right to compensation in the nature of palliative for the unlawful acts of instrumentalities who act in public interest and put for their protection the State’s sovereign powers as their shield. In *Sebastian M. Hongray v. Union of India*, the Supreme Court directed the Union of India to pay exemplary costs to widows of two persons detained by the jawans of 21st Sikh Regiment who could not be produced by the respondents even after the direction of the Court nor their whereabouts could be established.

In *Bhim Singh v. State of J & K*, the petitioner, a member of the legislature was wrongfully arrested in order to prevent him from attending the session of the legislature, was awarded compensation for his wrongful arrest and detention.

From the *Kasturi Lal's Case* standards in all these three cases, the servants of the State were performing sovereign as well as statutory functions.

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398 AIR 1983 SC 1086.
399 AIR 1984 SC 571, 1026.
400 AIR 1986 SC 494.
401 Supra, note 259.
yet the Court held the State liable for their wrongs. But all these cases involved deprivation of personal liberty and proceeding for habeas corpus under Article 32 and not a suit for compensation for the torts of the public servants.

The conflict between the concept of sovereign immunity and personal liberty was considered by the Andhra Pradesh High Court in detail in *C.R. Reddy v. State*. The Court viewed that personal liberty should be given supremacy over sovereign immunity. It held that when a citizen is deprived of his life or liberty otherwise than in accordance with the procedure established by law, it is no answer to say that the said deprivation was done by the employees of the State in the due discharge of their sovereign functions. The High Court verdict was upheld in *State of A.P. v. C.R. Reddy* by the Supreme Court saying that the fundamental rights include basic human rights. Right to life is one such right available to a prisoner, whether he be a convict or under trial or detenue. Such rights cannot be defeated by pleading the old and archaic defence of sovereign immunity which has been rejected several times by the Supreme Court.

In *People’s Union for Democratic Rights v. Police Commissioner, Delhi Headquarter*, Delhi Police Commissioner was directed to pay Rs. 75000/- to the family of deceased labourer who was beaten to death by policemen on demanding wages. Similarly, in *Saheli v. Commissioner of Police* the Supreme Court directed to the Delhi Administration to pay Rs. 75000/- as exemplary compensation to the mother of a 9 year old child who died due to beating by the police officer. Again in *Nilabati Behera v. State of Orissa* the Supreme Court awarded compensation of Rs. 1,50,000/- to the mother of the

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402 AIR 1989 A.P. 235.
403 Ibid at 247.
404 AIR 2000 SC 2083.
405 Ibid at 2091.
407 AIR 1990 SC 513.
deceased who died in the police custody due to beating. In People’s Union for Civil Liberties v. Union of India\(^{409}\) People Union for Civil Liberties, filed a writ petition under Article 32 of the Constitution for issuing appropriate direction for instituting a judicial inquiry into the fake encounter by Imphal Police in which two persons were killed, to direct appropriate action to be taken against the erring officials and to award compensation to the members of the family of deceased. The Police authorities denied the allegation of ‘fake encounter’. The Supreme Court held that killing of two persons in fake encounter by the police was clear violation of the right to life guaranteed in Article 21 of the Constitution and the defence of sovereign immunity does not apply in such case. The Court awarded Rs. 1,00,000 as compensation for each deceased.

Thus the recognition of the above mentioned rights by the Supreme Court within the scope of Article 21 and the liberal attitude of the Supreme Court in the matter of grant of compensation has great impact on the quality of life. Supreme Court also awarded compensation to the rape victims on ground of violation of Article 21.\(^ {410}\)

In N. Nagendra Rao & Co v. State of Andhra Pradesh\(^ {411}\), the Supreme Court held that when a citizen suffers any damage due to negligence of the employees of the State, the latter is liable to pay damages and the defence of sovereign immunity will not absolve it from this liability. It was held that in the modern context, the concept of Sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists. The whole question was again examined by Supreme Court in Common Cause, A Registered Society v. Union of India\(^ {412}\) and the doctrine of sovereign immunity was rejected.

\(^{409}\) AIR 1997 SC 1203.
\(^{411}\) AIR 1994 SC 2663.
\(^{412}\) AIR 1999 SC 2979.
Thus the defence of sovereign immunity is now not available to the State whenever its employees commit tort against the citizens. Kasturilal is now overruled and the apex Court has given a new dimension to the State liability principle from Rudal Shah Case.\(^{413}\) A concept of paying the compensation has been evolved that whenever there is violation of fundamental right of life or liberty by any employee of the State, it is vicariously liable for such tortuous act. The remedy of getting damages can be availed both, through writ or through civil litigation.\(^{414}\) Recently in Ankush Shivaji Gaikwad v State of Maharashtra reported in 2013(3) Recent Apex Judgments 478, the Supreme Court has expounded that it is mandatory duty of the Courts to consider the question of award of compensation to victim of crime. However it is discretion of the Court to award or not to award compensation.

**XVI Recommendations of “The National Commission to review of the working of the Constitution”-in context of Article 21**

Pursuant to the President’s address to the two Houses of Parliament assembled together at the commencement of the first session after the thirteenth general election to Lok Sabha, the Government of India, Ministry of Law, Justice and Company Affairs (Department of Legal Affairs), vide its Resolution, dated the 22 February, 2000 resolved to constitute the National Commission to Review the working of the Constitution to make suitable recommendations. The said resolution was subsequently modified by the Government vide its notifications dated 17 March, 2000 and 27 March, 2000. Accordingly, on 23 February 2000, the President of India appointed Justice Shri M.N. Venkalachaliah, former Chief Justice of India as the Chairperson of the Commission and ten persons as the Members of the Commission. The Commission adopted and signed its report on 11 March 2002.

\(^{413}\) AIR 1983 SC 1086.

The Commission makes following recommendations as regards Article 21:

- The existing Article 21 may be re-numbered as clause (1) and a new clause (2) should be inserted thereafter on the following lines:

- (2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

- After clause (2) in Article 21 as proposed in para 3.9, a new clause, namely, clause (3) should be added on the following lines:

- (3) Every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation.

- After Article 21, a new article, say Article 21-A, should be inserted on the following lines:

- 21-A. (1) Every person shall have the right to leave the territory of India and every citizen shall have the right to return to India.

   Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions in the interest of the sovereignty and integrity of India, friendly relations of India with foreign States and interests of the general public.

- A new Article, namely Article 21-B should be inserted on the following lines:

   21 (B) (1) Every person has a right to respect for his private and family life, his home and his correspondence.

   (2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by
clause (1), in the interest of security of the State, public safety for the prevention of disorder or crime, or for the protection of health or morals or for the protection of the rights and freedom of others.

419 A new Article, say Article 2l-C, may be added to make it obligatory on the State to bring suitable legislation for ensuring the right to rural wage employment minimum of eighty days in a year.