CHAPTER IV

RIGHT TO LIFE AND PERSONAL LIBERTY

The Indian Constitution, in Part III, guarantees certain fundamental freedoms to citizens, or the negative obligations of the State not to encroach upon such rights. The right to life and personal liberty is one of such important rights. The Constitution makers took three long years to decide on the nature and scope of this right. A perusal of the Constituent Assembly debates reveals how the founding fathers in order to ensure favourable conditions in the pursuit of happiness, fought for the right to life and liberty for all persons.

CONSTITUENT ASSEMBLY AND PERSONAL LIBERTY

The Constituent Assembly of India considered comprehensive system of fundamental liberties to be drawn as a part of the Constitution. The Constituent Assembly began its deliberations on December 9, 1946. The first achievement was the adoption of the 'Objective Resolution' on January 22, 1947, moved by Pandit Jawaharlal Nehru on December 13, 1946. It laid

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2. The Assembly was constituted of the representatives elected by the Provincial Legislatures and those of the princely states according to the scheme evolved by the result of the visit of Cabinet Mission in 1946.
down the fundamental propositions on the basis of which Constitution of India had to be framed. It provided that people of India would be guaranteed freedom of thought, expression, belief, faith, worship, association and vocation. This was 'the first' step towards giving shape, in the printed and written form to one of the dreams and aspirations of a nation. The Constituent Assembly elected on January 24, 1947, an Advisory Committee on Fundamental Rights, Minorities etc. Sardar Vallab Bhai Patel was elected its Chairman.

**DELIBERATIONS OF THE "SUB COMMITTEE ON FUNDAMENTAL RIGHTS":**

At the first meeting of the Advisory Committee on Fundamental Rights held on February 27, 1947, it had before it preliminary notes on Fundamental Rights prepared by B.N. Rau (The Constitution Adviser) and a comprehensive note submitted by Professor K.T. Shah, Alladi Kishnaswami Ayyer, K.M. Munshi, Sardar Harnam Singh. Dr. B.R. Ambedkar had also prepared notes, memoranda and draft on Fundamental Rights and presented them to the sub-committee.

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4. Cl.(5) of the Objective Resolution. Id, p.59.
8. Id, pp.67,69, 81, 84.
In his notes, B.N. Rau outlined the nature of the problem and analysed the scope of various rights as embodied in the Constitutions of some of the more important countries of the world. He issued a note on the personal liberty clause. He said that the clause should not be vague and should not allow the courts a wide scope to enforce it and further it should not be a meaningless guarantee against the oppressive law. He expressed the opinion that, particularly in view of the constitutional development in the United States of America, the rights should not be absolute and the State should be expressly empowered to impose restrictions on their exercises.

Professor Shah pleaded the president for empowering the courts to protect the personal liberty of all persons and not of citizens alone.

Dr. Ambedkar prepared a long list of fundamental rights. He observed that their necessity was recognised in all the old and new Constitutions. He pointed out that the rights incorporated in his draft were borrowed from the Constitutions of various countries particularly those where

9. Id at 30.
10. Id p.32.
12. Supra note 7, pp.36-55.
the conditions were more or less analogous to those existing in India. He said that "No state shall deprive any person of life, liberty and property without due process of law." He said that Supreme Court shall have the power to issue a writ of habeas corpus on the application of the aggrieved and right to apply for a writ shall not be abridged except in cases of rebellion or invasion where public safety requires it.

K.M. Munshi included the right to liberty in the chapter on Right to Freedom as no person shall be deprived of his life, liberty or property without due process of law. Article 5(1) (e) which elucidated the 'due process clause' guaranteed to every person right to be informed within 24 hours the grounds of detention and the authority who is detaining him.

Between March 24 and March 31, 1947, the Sub Committee had discussions and later it prepared its final draft report which was submitted to the Advisory Committee on April 16, 1947. The provisions relating to 'personal liberty' were contained in clause 12 and clause 28. Clause 12 provided that no person shall be deprived of his life, liberty or property without due process of law nor shall any person be denied the equal treatment of the laws within the

13. Id. p. 87.
territories of the Union, provided that nothing herein contained shall prevent the Union legislature from legislating in respect of foreigners. (15)

DELIBERATIONS OF THE ADVISORY COMMITTEE

The Advisory Committee met on April 21, 1947 to discuss the final draft report submitted by the Sub Committee. When the two clauses (12 and 28) came up for consideration, clause 28 was deleted without any discussion presumably because the committee felt that the expression 'due process of law' in clause 12 was wide enough to cover within its scope the contents of clause 28. (16) Then Advisory Committee prepared an interim report and submitted it to the Constituent Assembly on April 23, 1947, (17) in which the proviso to the right to personal liberty was dropped and now this clause was read as "No person shall be deprived of his life or liberty without any due process of law nor shall any person be denied the equality before the law within the territories of the Union." And the words equal treatment of laws were substituted by the words equality before the law. (18)

DRAFT CONSTITUTION PREPARED BY B.N. RAU:

In pursuance of the recommendations and decisions of the Constituent Assembly on the interim report, B.N. Rau,

17. Id. p.293.
prepared a draft Constitution. In that, he included:
"No person shall be deprived of his life or personal liberty without due process of law nor shall any person be denied equality before the law within the territory of the Federation."

It was said that clause 16 of the Draft Constitution of October, 1947, restricted the scope of the expression 'liberty' by adding the word 'personal' before it. Rau justified the change on the ground that the word liberty by itself might be construed very widely unless it was qualified by the word 'personal'.

DELIBERATIONS OF DRAFTING COMMITTEE

On August 29, 1947, the Assembly appointed a Drafting Committee to scrutinise the draft constitution prepared by B.N. Rau, giving effect to the decisions taken already in the Assembly in the draft constitution as revised by the committee. Dr. Ambedkar was elected as Chairman of the Committee.

The Drafting Committee took up the matter again during its meeting of January 1948 and at the same time its member tried to omit 'due process' clause. The reason for removing 'due process' clause was an increasing conviction that preventive detention provided the best weapon against the communal violence that had rocked northern India during the past years. Justifying its decision to support 'due process' with the phrase according to procedure established by

law, the Drafting Committee said merely that the latter was more specific.\(^{(22)}\)

After a detailed scrutiny of the Constitutional Adviser's draft of the Constitution and other materials, notes, reports and memoranda placed before it, the Drafting Committee submitted to the President of the Constituent Assembly, a revised draft Constitution on February 21, 1948. Article 15, contained the right to personal liberty. It read as "No person shall be deprived of his life or personal liberty except according to procedure established by law nor shall any person be denied equality before the law or the equal protection of the law within the territory of India.\(^{(23)}\)

SECOND READING OF THE CONSTITUTION IN THE CONSTITUENT ASSEMBLY

On November 4, 1948, Dr. Ambedkar introduced in the Constituent Assembly for its consideration a reprint of the Draft Constitution along with the amendments recommended by the Committee members of the Assembly and the notes of Shri Rau.\(^{(24)}\) The Assembly then asked the Drafting Committee to redraft the Constitution in the light of amendments adopted and recommendations made. Accordingly, the committee redrafted the Constitution and submitted it to the President of the Assembly on November 3, 1949.\(^{(25)}\) In this new draft

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\(^{(22)}\) Text of Draft Constitution, foot note 1, p. 8.

\(^{(23)}\) Supra note 19, pp. 509, 523.


constitution, former article 15(26) became article 21 in the Constitution of India which inter alia provided(27) "No person shall be deprived of his life or personal liberty except according to procedure established by law."

It is obvious from the above description that the right of liberty was considered by the makers of the Constitution a very valuable right in a democratic policy. It was, therefore, given the status of a fundamental right. But the most conflicting question before the Constituent Assembly was that whether liberty should be secured by the phrase 'procedure established by law'. After a long discussion, our framers adopted the phrase 'procedure established by law' as it was realised that 'due process' was a vague term and its interpretation differed among different judges. Thus, now the person can be deprived of his liberty only according to procedure established by law. This is indeed a guarantee against detention by arbitrary or capricious power of the executive. So the framers of the Indian Constitution preferred to use, 'Procedure established by Law' because in their considered opinion, "due process" was anambiguous and unwieldy concept.

THIRD READING OF THE CONSTITUTION IN THE CONSTITUENT ASSEMBLY

The Constituent Assembly started the third reading of the Constitution on Nov. 17, 1949. It was not a clause-to-
clause but general discussion. No amendment was made in the revised Draft Constitution. Dr. Ambedkar valued the liberties guaranteed in the Constitution by issuing a caution that they should in no way be laid at the feet even of great men. (28) Dr. Rajendra Prasad, the President of the Constituent Assembly said that a democratic Constitution was ready for India and its great working would depend on men of calibre, ability, honesty, integrity and characters. (29)

MEANING OF PERSONAL LIBERTY:

Different interpretations have been given to the expression 'personal liberty'. Blackstone (30) has emphasised on the freedom of movement to be the essence of the liberty of person. He states: "Personal Liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct."

Another approach in defining liberty of person is adopted by Dicey. According to him: (31)

"The right to personal liberty means in substance a person's right not to be subject to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification."

Dicey's definition is, as is obvious, more concerned with the negative aspect of personal liberty that is, with the

28. Id at pn.973.
29. Id. at 993.
kind of restraints which take away from physical coercion and restraint in a way not authorised by law.

The difference between the approaches of Blackstone and Dicey is quite marked. While to Blackstone, the freedom of movement (a positive aspect) is the basic element of the liberty of person, to Dicey protection from imprisonment or physical coercion is the necessary condition of liberty of person.

Lord Denning has given another view, on the liberty of person, (32) he observes:

"By personal freedom I mean the freedom of every law abiding citizen to think what he will, to say what he will and to go where he will on his lawful occasions without let or hinderance from any other person."

HOW HAVE THE INDIAN COURTS INTERPRETED THE RIGHT TO PERSONAL LIBERTY?

In the very first year of Indian Constitution, the issue of 'personal liberty' came up before the Supreme Court. A.K. Gopalan V. State of Madras (33) is the case which is said to have made legal history, arose out of a petition for a writ of habeas corpus against the detention of A.K. Gopalan, a communist in Madras jail. He had been from time to time under detention since December 1947, though finally acquitted of the charges in respect of which he had been sentenced

32. Lord Denning, Freedom Under Law, 5 (1949)
33. AIR. 1950 S.C. 27.
to imprisonment by the Courts. While still under detention under the orders of the State Government, on 1st. March 1950, Gopalan was served with an order made under section 3(1) of the Preventive Detention Act (IV of 1950). He challenged the legality of this order contending that Preventive Detention Act is unconstitutional contravening the provisions of Article 21 and 22.

The Supreme Court of India has examined the scope of article 21 on different occasions to find out the limits within which the guarantee of personal liberty is available to the people of India.

The Apex court gave a restricted interpretation to the expression 'personal liberty' in Gopalan's case. It observed that the expression 'personal liberty' means only liberty relating to or concerning the person or body of the individual. This restricted interpretation was not followed by Supreme Court in latter cases. Interpreting the term 'personal liberty' in a most restricted form, Mukherjea J., observed that personal liberty is the antithesis of physical restraint or coercion. He agrees with the definition given by Dicey that personal liberty means, "a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification". In Indian Constitution the

Maneka Gandhi v. Union of India AIR 1978 SC 597.

35. Supra note 33 at 97.
expression personal liberty has been deliberately used to restrict it to freedom from physical restraint of a person by incarceration or otherwise. Chief Justice Kania was of the view that personal liberty meant 'liberty of the physical body'. He reluctantly included the right to eat, sleep or work as one pleases in that concept. Kania C.J., gave a little wider interpretation to the term personal liberty because he observed that personal liberty includes not only the freedom from bodily restraint but also those rights which go to make human personality.

Das J., interpreted personal liberty to say that, as such, it includes not only the freedom from bodily restraint but also all those rights which go to make the human personality. Some of these are separately dealt with in the Constitution. But in the context of the language and scheme of arrangement of the fundamental rights in the Constitution, their lordships were of the opinion that Article 21 regulates only such attributes and contents of personal liberty as have not been protected by Article 19 especially. It was also observed by Sastri, J. that, "whatever may be the generally accepted connotation of the expression 'personal liberty', it is used in Article 21 in a sense which excludes the freedoms dealt

36. Id at 99.
37. Id at 37
38. Ibid.
39. Id at 110.
40. Id at 71.
within Article 19." The majority of judges laid emphasis upon the word 'personal' in the expression 'personal liberty' and the crux of this view was to be found in the judgement of Justice Sastri.

In his dissenting judgement, Fazl Ali J. on the other hand thought that the right to move freely throughout the territory of India guaranteed by article 19 was the same as the power of locomotion to move one's person to whatsoever place one's inclination may direct. Consequently, any law which deprived a person of his personal liberty was to be subject to the limitations both of articles 19 and 21 to the extent they may be applicable.

In Kharak Singh v. State of U.P. the Supreme Court again reviewed the term 'personal liberty' and lifted it from the restrictive interpretation of the majority judgement in Gopal's case. In the present case, the petitioner had been acquitted of a charge of dacoity but the police was keeping surveillance on him in accordance with the police regulations. The petitioner was required to inform his movements to the police and the police also knocked the door of his house every night to make sure that he was in his home. He had challenged the police regulation on the ground that the 'domiciliary visits' by the police to his house at night interfered with his personal liberty and so must be in accordance with the requirements of

41. Id at 54.
42. AIR 1963 SC 1295.
article 21. The Supreme Court accepted the contention of the petitioner that 'domiciliary visits' violated his personal liberty. It was observed:

"Having regard to the terms of article 19(1) (d), we must take it that the expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded, its narrowest interpretation would be that article 21 comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison. We do not hold that the term was intended to bear only this narrow interpretation, but on the other hand consider that 'personal liberty' is used in the article as a compendious term to include within itself all varieties of rights which go to make up the personal liberties, of man other than those dealt within the several clauses of article 19(1)...."

The Supreme Court of India while examining the scope of 'Personal Liberty' relied upon the decisions of the United States Supreme Court in Munn V. Illinois\(^4\) and Wolf V. Colorado\(^5\) i.e. 'an unauthorised intrusion into a person's home and the disturbance caused to him thereby is the violation of the

\(^4\) Id. p.1300
\(^5\) (1876) 94 U.S. 113.
common law right of man - an ultimate essential of ordered liberty. The Supreme Court held in Kharak Singh case that the freedom of living in one's home without disturbance is a part of the concept of personal liberty. Accordingly, the domiciliary visits under Reg.236 of Ch.xx of the U.P. Police Regulations, which authorised Police to visit the house of the petitioner at night to make sure that he was in home, would be violative of personal liberty and which could be constitutional under art.21 only if there was an enactment of the legislature to sanction them.

The minority view expressed by Subha Rao J. in Kharak Singh went a step further. It was said that in Gopalan's case, it had been recognised that personal liberty is antithesis of physical restraint or coercion. But the expression coercion in the modern age cannot be construed in a narrow sense and as the civilisation advances, psychological restraints are more effective than the physical ones. At the same time, minority view held that the right to personal liberty takes in not only a right to be free from restrictions placed on his movements but also from encroachments on his private life. As such any interference with the right to privacy would also be a breach of personal liberty. So the minority judgement defined the right of personal liberty in article as the,

"right of an individual to be free from restrictions and encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures." (46)

46. Supra note 42, pp. 1306-1307.
The new interpretation provided by the Supreme Court prompted the Bombay High Court to hold in Jethwani V. Kazi & Banerjee (47) that the right of a person to go abroad was clearly a part of personal liberty guaranteed by article 21. Article 19(1) (d) only guaranteed the freedom of movement within the territory of India. As such, the right to travel abroad was part of the personal liberty to be regulated in the matter of deprivation (refusal of passport) by article 21. This meant that before the government refused a passport, there must be a legislation authorising the government to do so in the conditions valid under article 21.

It would be observed that the above decision follows the case, Kent V. Dulles (48) in which the Supreme Court of U.S.A. had held that travel is part of the liberty guaranteed by the Vth Amendment, and therefore, is subject to the due process of law.

The decision given in the Jethwani's case was later on confirmed by Supreme Court in Satwant Singh Sawhney V. Assistant Passport Officer (49). The Supreme Court held that this expression i.e. personal liberty includes the right of locomotion and to travel abroad. It was also held that a person could not be denied a passport to travel abroad by mere executive action. If the State desired to put

47. AIR 1966 Bom. 54.
restrictions on foreign travel by citizens, the State would have to enact a law seeking to restrict such liberty as required by art.21.

In the case of R.C. Cooper V. Union of India\(^{50}\) the majority said that the assumption in Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the objects and the form of the state action need be considered and the effect of the laws on fundamental rights of the individual in general will be ignored, cannot be accepted as correct. So this case denoted a deviation from that narrow construction given in the Gopalan's case to the term personal liberty basing on the theory of exclusivity between article 19 and 21 of the Constitution. This theory of exclusivity was abandoned in R.C. Cooper's case. It was said in this case that if a person is deprived of his personal liberty, article 19 will also come in picture.

It is submitted that this means that a law depriving a person of his 'life' or 'personal liberty' made by an appropriate legislature can also now be challenged on the ground that it deprives a person of his fundamental right under article 19.

\(^{50}\) (1970) 2 S.C.C. 298.
RIGHT TO LIFE

The expression 'human rights' embraces the rights of man both as individual and as a member of society. Their aim is to promote individual welfare as well as social welfare. Most fundamental of all human rights that man can aspire for is "right to life." Denial of this basic right means denial of all other rights because none of other rights would have any utility and existence without it. So this right has been stressed by International, (51) Regional(52) and National(53) documents.

The National struggle for freedom was largely directed against racial discrimination and to secure basic human rights for all individuals. The Indian National Congress at its special session held in Bombay in 1918, and there it made a demand for writing into the Government

51. Article 3 of the Universal Declaration of Human Rights declares that "Everyone has the right to life, liberty and security of Person."

52. Article 2(1) of the European Convention for the Protection of Human Rights, 1950. provides, "Everyone's right to life shall be protected by law".

53. Article 21 of Indian Constitution provides that "no one shall be deprived of his life or personal liberty except according to the procedure established by law." See also, 5th Amendment to American Constitution; Article 16 of the Constitution of Burma; Article 2 of the Constitution of Czechoslovakia; Article 74 of the Constitution of Danzig; Article 40(4) of the Constitution of Eire.
of India Bill 'a declaration of rights of the people of India as British citizens', including therein, among other things guarantees in regard to equality before law, protection in respect of liberty, life and property.  

With the advent of independence, the Constitution of India recognised and acknowledged fundamental rights which were so long struggling for recognition. These fundamental rights were finally incorporated in Part III of the Indian Constitution and right to life is the most precious fundamental right amongst all these human rights. Article 21 of the Indian Constitution provides,

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

The right to life guaranteed by Article 21 of the Constitution of India is not merely a fundamental right, it is a basic human right. Justice H.R. Khanna rightly observed that sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of truth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life arbitrarily without the authority of law was not the gift of the Constitution. It was a necessary corollary
of the concept relating the sanctity of life and liberty, it existed and was in force before the coming into force of the constitution.(55)

Although right to life is basic and most fundamental of all the other rights, yet the term 'life' has not been defined in the Constitution and therefore we must turn to judiciary for its interpretation. The Summit Court in *Kharak Singh* (56) held that the word 'Life' as it occurs in 5th and 14th amendment of the U.S. Constitution correspond to Article 21 of the Indian Constitution. It means not only continuance of person's animal existence, but a right to the possession of each of his organs, his arms, legs etc.

In *Allgever v. Louisiana* (58) the U.S. Supreme Court held that "life, includes all personal rights and their enjoyment embracing the use and enjoyment of faculties, acquiring useful knowledge, the right to marry, establish a home and freedom of worship, conscience, contract, occupation, speech, assembly and press." Article 21 prevents the State from treating human life as that of any other animal and it is now well established that the word 'life' occurring in Article 21 has right to status (59) and spiritual

57. Id at 1302.
58. (1897) 165, U.S. 578.
It also includes the right to basic necessities of life, life with human dignity, freedom from police atrocities and immunity from cruel and degrading treatment.

Justice Iyer attaches great importance to the right to life. He says it should not be extinguished merely on the ground that accused has committed a murder. Depriving a person of his right to life is nothing else but a murder. If a State deprives a person of his right to life, it also commits a murder. An accused can be deprived of his right to life only if he is an hardened criminal and only if there are chances of his committing a murder again. Special reasons must be laid down by the Judge pronouncing death sentence that why accused is being deprived of his right to life (i.e. why is he being hanged) and why life-imprisonment is not given to him. He suggests that instead of depriving a person of his life, efforts should be made to rehabilitate the accused by giving him lessons in transcendental meditation which helps in releasing tension and other stresses that led the accused to commit murder.

He observed that life is not vegetable existence nor ascetic isolation, but vigorous social life and the enjoyment

61. Francis Mullin V. Union Territory of India. AIR 1979 SC 746, para 7.
63. Bhagalpur Blinding Case.
64. AIR 1979 SC 916.
65. Hira Lal Mullick's Case. (1977) 4 SCC 44.
of basic minima of creature comforts which make life livable. He laid down that the classic definition of Field J. holds the field in the Indian jurisdiction too.

i.e. *"By the term 'Life', something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of the arm or leg or putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyment is prohibited by the provision in question if its efficacy be not frittered away by judicial decision"."

The importance of right to life has been once again reiterated by Justice Krishna Iyer. He has pleaded that the death sentence given to Satwant Singh and Kehar Singh found guilty of P.M.'s murder be commuted to life-imprisonment. He has further argued that if the death sentence is commuted to life-imprisonment, it would be in the public interest.

Does the right to life include the right to livelihood? This question came for consideration before the Supreme Court in re Sant Ram's case The Supreme Court held that the

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69. AIR 1960 SC 932.
word 'life' in Article 21 could not be construed so widely as to include the freedom to earn livelihood. Such a freedom is included in Article 19 (1) (g) or to some extent in Article 16. The Supreme Court reiterated this view in A.V. Nachane V. Union of India\(^{70}\) and B. Bapi Raju V. State of A.P.\(^{71}\)

It is submitted that the purpose of providing living wages to workers under Article 43 is to ensure good life. Whenever there are famines, floods or other unfortunate natural calamities, free food etc. is supplied to the victims from all sources to provide them some relief. The right to eat should also be deemed to be included in the right to life which would be possible if the people have the right to earn the livelihood, which ultimately may amount to the right to work, as is being demanded by the people in the country.

Justice Bhagwati however laid down in Francis Coralie\(^{72}\) case that right to life includes the right to live with human dignity and that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms with fellow human beings. Of course the magnitude and contents of the components

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70. AIR 1982 SC 1196.
71. AIR 1983 SC 1073.
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 basic necessities of life. (73)

Till now the apex court held that the right to life
does not include right to earn livelihood. But in the recent
case (74) it has changed its views and enlarged the sphere
of right to life and included the right to earn livelihood
also in the right to life under Article 21 of the Constitution.
The summit court held that the right to life guaranteed
under Article 21 includes the right to earn a livelihood
necessary for sustaining life and as earning a livelihood
depends upon residence near the place of occupation, a person
has a right to reside somewhere near that place and cannot
be evicted therefrom except according to "procedure established
by law." The court further laid down right to life which
is guaranteed by Article 21 includes the right to livelihood
and since they will be deprived of their livelihood if they
are evicted from their slum and pavement dwellings, their
eviction would tantamount to deprivation of their life and
hence unconstitutional. (75)

Justice Iyer also came to the same conclusion i.e.
right to earn livelihood is included in the right to life.

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73. Id at 753.
AIR 1986 SC 180.
75. Ibid.
Justice Iyer says, we have to search in the Indian Constitution for the clear articulation of rights and duties whereby the pavement dweller or urban refugee may derive rehabilitative justice in the matter of the essentials of life. Article 14, 19 and 21 offer sanctuary in the private situation of pavement dwellers. Article 14 says that state shall not deny to any person the equal protection of the laws. The language is wide and forbids class discrimination. May be, reasonable classification, founded on intelligible differentia may be permissible if the differentia has a rational relation to the object sought to be achieved by the statute in question. The crucial point to remember is that discrimination is anathema. It is true that the legislature may have to classify when dealing with the complex problems that arise out of infinite variety of human relations. What can never be overlooked is that the selection should be based on substantial criteria, and more important must be reasonable. When the law classifies people with property and without property and throws the proletariat and protects the propertiat, reasonableness is at stake in the context of social justice. Therefore, it can never be reasonable when weighed in the scales of constitutional values, if property unlimited is classified as one category and poverty unlimited is classified as another category. We cannot hold that those who do not have an inch of land of their own should perish in the sea on the strength of property classification. On the other hand any legislation which speaks of trespass, civil or criminal
of inviability of property ownership, private or public must project a benign plan whereby equalisation and elimination of disparity is the objective, and thus follows the conclusion that, property law to be valid must provide a ceiling, urban and agrarian, take out the surplus, habilitate the landless and freeze the situation unless Operation Rehabilitation becomes real.\(^{(76)}\) Justice Iyer further observed that public authority has public responsibility to provide for basic needs of everyone first and then for community facilities e.g. construction of parks, playgrounds or pavements. If a law provides for a physical ejectment, it must take into consideration the accommodational needs of the pavement dwellers, because physical accommodation which deprives livelihood is nothing short of starvation.\(^{(77)}\)

It is submitted that keeping in view the present position where lots of people flock to the cities from villages in search of jobs, if government starts providing accommodation to each and everyone, there would be hardly any place in the city to move around and that would lead to polluting the atmosphere where people won't be able to breathe properly. It is not practically possible.

The meaning of term right to life has been further extended in case of State of H.P. v. Umed Ram. where it was

\(^{76}\) Justice Krishna Iyer, **Supra** note 67 at 67,68.

\(^{77}\) Ibid.

\(^{77a}\) State of H.P. v. Umed Ram. AIR 1986 SC 847.
held by the majority that every person is entitled to life as enjoined in Article 21 of the Constitution and in the facts of this case read in conjunction with Article 19(1)(d) of the Constitution and in the background of Article 38(2) of the Constitution that every person has right under Article 19(1) (d) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Accordingly there should be road for communication in reasonable conditions in view of our Constitutional imperatives and denial of that right would be denial of the life. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication. (77b)

So it was rightly held by Supreme Court that right to life does not merely mean an existence, but it must include all those things which make a life liveable e.g. right to earn livelihood, right to reside somewhere near the place of occupation and right to the way also through which one can reach to the place of occupation.

(77b)Id at 851.
The expression 'Personal Liberty' got its full meaning in *Maneka Gandhi V. Union of India.* In this case, the court has given the widest possible interpretation. It is only with the decision in *Maneka case* that a new era of development has been ushered in. The decision stands as beacon-light adding new dimensions to the interpretation of the fundamental rights. Article 21 reads:

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

If this article is expanded in accordance with interpretative principle indicated in *Maneka Gandhi,* it will read as follows:

"No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."

The impact of *Maneka* is very significant in the development of the concept of personal liberty by projecting the concept of reasonableness into the procedure established by law in Article 21. This concept which witherto remained limited in content for the last nearly three decades received a wider scope and amplitude in *Maneka.* The decision marks the rising trend of 'due process' in the horizon of Indian law.

78. AIR 1978 SC. 597.
80. Supra note 78.
Projection of natural law concept into article 21 is a new dimension to personal liberty, and this will lead to future development of Indian Jurisprudence in the lines of that in the United States wherein the judiciary had over the years exercised the power to incorporate new rights into the Constitution.

Maneka has paved the way for realising new vistas of personal freedoms like right to speedy trial, right to bail, right to appeal, right to humane treatment inside prison, right against torture, right to live with basic human dignity and right to compensation to the victims.

The Supreme Court read the 'right to legal aid' into Article 21, while this is specified in Article 39A in the directive Principles of the State Policy.

Justice Bhagwati in Maneka(81) held that the expression 'personal liberty' in Article 21 is of wider amplitude covering a variety of rights which go to constitute personal liberty. Some which have been raised to the status of distinct fundamental rights and given additional protection under Article 19. He relied particularly in R.C. Cooper's case, (82)

81. (1978) 1 SCC 248 at 280.

82. (1970) 2 S.C.C. 298. Till this case the reasonableness of the 'law' under Article 31(2) providing compensation was not to be tested under art. 19. But in this case, the law laying down the manner of giving compensation in long term bonds to nationalised banks was held unreasonable under Article 19 holding the technique was neither compensation nor conducive to the concept of reasonableness.
which denoted a deviation from that narrow construction given in the Gopalan's case\(^{83}\) to the term 'personal liberty' basing on the theory of exclusivity between two articles in the Constitution.

**THE RIGHT TO TRAVEL ABROAD:**

The right to travel is the life blood of any dynamic society. If this right had not been recognised from olden times, the world would not have been in its present form with less barriers among states and people. This right had a long juristic history. The origin of the right to go abroad may be traced back to 1215 A.D. Article 42 of the Magna Carta provided that in future, it shall be lawful for any man to leave and return to the kingdom unharmed and without fear except in time of war.\(^{84}\) Blackstone regarded the subject as having a general common law right to leave the realm subject to the prerogative right of the crown to retain him by writ of *Ne Exeat Regno*.\(^{85}\)

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83. *Supra* note 33. The theory of exclusivity was projected by the majority. In interpreting fundamental rights it was held that when a person is detained in accordance with procedure prescribed by law, as mandated by art.21, the Protection conferred by various clauses of article 19(1) was not available to him. In other words art.19(1) and 21 were mutually exclusive. This approach is negatived in Kharak Singh's case AIR 1963 SC 1295 by the minority and in *R.C.Cooper* by majority.


The passport Law in India had a chequered history.\(^{(86)}\)

Part III of the Constitution of India does not say anything specially about the right to travel abroad. But since 1967, the Supreme Court tried to locate this right in the compendious term 'personal liberty' in Article 21.\(^{(87)}\) This was done in Satwant Singh's case in which Chief Justice Suba Rao speaking for majority observed that the possession of passport whatever may be its meaning or legal effect was a necessary requisite for leaving India for travel abroad.\(^{(88)}\) This was in fact an epoch-making pronouncement. In A.K. Gopalan it had been held that personal liberty would primarily mean only liberty of physical body and that rights under Article 19(1) did not directly come under that description but were rights accompanying the freedom of liberty of person.\(^{(89)}\) This line of construing personal liberty was disapproved in Satwant Singh which was directly followed in Maneka Gandhi V. Union of India.\(^{(90)}\) The Supreme Court has not only

\(^{(86)}\) Before 1967, there was no statute governing the issuance of passport. The Indian Passport Act (ct.34 of 1920) and rules framed thereunder in 1950 were limited to the requirement of passport only in case of a person desiring to enter India from abroad. In order to put an end to the judicial controversy that existed after the inception of the guaranteed fundamental rights in the Constitutional context, in 1967 the Passport Act was enacted. The Act is designed to regulate only the departure or exist of persons from India. The 1920 ct continues to govern the matters relating to entry into India. Both the Acts constitute the comprehensive Passport Laws of India.

\(^{(87)}\) Supra note 49 at 1836.

\(^{(88)}\) Id at 1839.

\(^{(89)}\) Supra note 40 at p.33 (per Kania CJ)

\(^{(90)}\) Supra note 78.
upheld its earlier decision that the right to travel abroad (and hence entitled to passport) was a 'fundamental right which could not be arbitrarily denied but has laid great emphasis on the procedural safeguards to be complied with before an individual is deprived of his personal liberty.

In this case, the petitioner was issued passport on 1st. June, 1976 under the Passport Act, 1967. On July 4, 1977, the Passport Officer, Delhi, intimating to her that it has been decided by the Government of India to impound her passport under section 10(3) (c) of the Act 'in public interest' and she was therefore, required to surrender her passport within seven days from the receipt of the letter. She wrote a letter to the passport office requesting him to furnish a copy of the statement of reason for making the order. The Government of India declined "in the interest of general public" to furnish the reasons for its decision. The petitioner filed a writ petition under Article 32 of the Constitution challenging the validity of the said order on the following grounds:

1) Section 10(3) which empowers the passport authority to impound a passport 'in the interest of the general public' is violative of article 14, since it confers vague and undefined power on the passport authority.

2) Section 10(3) (c) is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded.
iii) Section 10(3) (c) is violative of Article 21, since it does not prescribe 'procedure' within the meaning of that Article and if it could be said that there is some procedure prescribed, it is arbitrary and unreasonable.

iv) Section 10(3) (c) is violative of Article 19(1) (a) and (g) since it permits imposition of restrictions not provided in clauses (2) or(6) of Article 19.

The reasons for the order were, however, disclosed in the counter-affidavit filed on behalf of the government. The disclosure stated that the petitioners' presence was likely to be required in connection with the proceedings before a Commission of enquiry. Regarding the opportunity to be heard, the Attorney General filed a statement that the petitioner could make a representation in respect of impounding passport and that the representation would be dealt with expeditiously.

The Supreme Court, by majority held that the Government was not justified in withholding the reasons for impounding the passport from the petitioner. Delivering the majority judgement, Mr. Justice Bhagwati asked, "Does Article 21 merely require that there must be semblence of procedure, however, arbitrary and fanciful, prescribed by law before a person can be deprived of the personal liberty or the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? ... Is the prescription of some sort
of procedure enough or must the procedure comply with any particular requirement? He then held that the procedure contemplated in Article 21 could not be unfair or unreasonable. And this principle of reasonableness which was an essential element of equality of non-arbitrariness, pervaded Article 14 and the procedure contemplated in Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. Hence, any procedure which permitted impairment of individual's right to go abroad without giving him a reasonable opportunity to be heard could not, but be condemned as unfair and unjust. The order withholding reasons for impounding the passport was, therefore, not only in breach of statutory provisions (Passport Act) but also in violation of the rule of natural justice embodied in the maxim "audi alteram partem" (that no one shall be condemned unheard) although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply this omission of legislature. The power conferred under Section 10(3) (c) of the Act on passport authority to impound a passport is a quasi-judicial power. The rules of natural justice would, therefore, be applicable in the exercise of this power. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice. Fairness in action, therefore, demands that an opportunity to be heard should be given to the person affected. A provision requiring giving of such
opportunity to the affected person can and should be read by implication in the Passport Act, 1967. If such provisions were held to be in the Act by necessary implication, the procedure prescribed for impounding passport would be right, fair and just and would not suffer from the vice of arbitrariness or unreasonableness."

It must therefore be held that 'the procedure established by the Act for impounding a passport is in conformity with the requirement of Article 21 and is not violative of that Article.

However, in view of the statement of the Attorney General, that the Government is agreeable to consider the representation which would be made by the petitioner, it was by the majority of the Supreme Court (Beg. J.dissenting), that the defect of the order was removed and the order was, therefore, passed by the passport authority in accordance with the procedure established by law. It is clear from the language of article 21 that the protection provided by it is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law. In the instant case, the petitioner was deprived of her right to go abroad in accordance with the procedure established by law (Passport Act, 1967). The procedure prescribed by the Act is not arbitrary or unreasonable. The Act lays down proper guidelines for the exercise of the powers by the passport authority. The power conferred on the passport authority is not unguided or unfettered. The grounds denoted
by the words 'in the interest of the general public' have a clearly well defined meaning and cannot be said as vague or undefined. These words are in fact taken from Article 19(5) of the Constitution. Section 10(3) (c) of the Passport Act is therefore, not violative of Article 14, 19(1)(a) or (g) or Article 21.

As regards the argument that the right to go out of India is an integral part of the right to freedom of speech and expression, the Court held, that the right to go abroad cannot be regarded as included in freedom of speech and expression guaranteed by Article 19. In fact, the right to go abroad is clearly not a fundamental right under any clause of Article 19(1). However, the court held that it was not necessary that a right must be specifically named in Article 19. Even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that Article if it is an integral part of a named fundamental right to or partakes of the same basic nature and character as that of fundamental right. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right.

It is heartening to note that Justice Krishna Iyer, who wrote most of the judgements on personal liberty during
that year i.e. 1978, has used Maneka skillfully to enrich and enlarge the concept of personal liberty in Art.21 e.g. projection of reasonableness of law and concept of natural justice in 'procedure established by law', right to speedy trial, right to bail, right to humane treatment inside prisons, right against torture, right to live with basic human dignity, and right to compensation to the victims. Justice Iyer sums up the term personal liberty somewhat in this way:

"Personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of man is at the root of article 21. Absent liberty, other freedoms are frozen." (91)

Among the concurring judgements Justice Iyer's opinion merits special notice. He observed that my concurrence with the argumentation and conclusion contained in the judgement of my learned brother Bhagwati J. (as he then was) is sufficient to regard this supplementary, in one sense a mere redundancy. But in another sense not, where the vires of law, which arms the central Executive with wide powers of potentiality imperilling some of the life giving liberties of the people in a pluralist system like ours, is under challenge

91. Id at 657.
and more so when the ground is virgin, and the subject is of growing importance to more numbers as Indians acquire habits of trans-national travel and realise the fruits of foreign tours, re-viving in modern terms, what our forefathers effectively did to put Bharat on the cosmic cultural and commercial map. And when precious heritage of free trade in ideas and goods, association and expression, migration and home-coming now crystallised in Fundamental Human Rights is alleged to be hamstrung by hubristic authority, my sensitivity lifts the veil of silence.\(^{92}\) He further observed that such is my justification for breaking judicial lock-jaw to express sharply the juristic perspective and philosophy behind the practical necessities and possible dangers that society and citizenry may face if the clauses of our Constitution are not bestirred into court action when a charge of unjustified handcuffs on free speech and unreasonable fetters on right of exit is made through the executive power of Passport impoundment.\(^{93}\)

Justice Iyer said that liberty of locomotion into alien territory cannot be unjustly forbidden by the Establishment and passport legislation must take processual provisions which accord with fair norms, free from extraneous pressure and by and large complying with natural justice. Unilateral arbitrariness, police dossiers, faceless affiants, behind-the-back

92. \textit{Id} at 652.

93. \textit{Ibid}.
material, oblique motives and the inscrutable face of an official sphinx do not fill the 'fairness' bill subject, of course, to just exceptions and critical contexts. This minimum once abandoned the Police State slowly builds up which saps the finer substances of our Constitutional jurisprudence. Not parity but principle and policy are the key stone of our Republic.(94)

He further said that, to deny freedom of travel or exist to one untenably is to deny it to any or many likewise, and the right to say 'aye' or 'nay' to any potential traveller should, therefore, not rest with the minions or masters of government without being gently and benignly censored by constitutionally sanctioned legislative norms if the reality of liberty is not to be drowned in the hysteria of the hour or the hubris of power. According to him, locomotion in some situations necessarily involved in the exercise of the specified fundamental rights as an associated or integrated right.(95)

Although he generally agrees with Bhagwati J. (as he then was) he goes far beyond the Bhagwati opinion on Article 21. Bhagwati J. followed Gopalan(96) when he held that article 21 safeguarded the right to passport from executive action and not from legislative action. But Krishna Iyer J.

94. Id at 660.
95. Id at 663.
96. Supra note 33.
held:

"Procedural safeguards are the indispensable essence of liberty. In fact, the history of procedural safeguards and the right to a hearing has a human right ring. In India because of poverty and illiteracy, the people are unable to protect and defend their rights. Observance of fundamental rights is not regarded as good politics and their transgression as bad politics. (97)

He also held that if Gopalan on Article 21 remained intact, procedural safeguards, as a result of article 22, would be available only to deprivation of personal liberty through punitive or preventive detention. Deprivation of other rights forming part of personal liberty and the right to life, more fundamental than any other right, and paramount to the happiness, dignity and worth of the individual, would not be entitled to any procedural safeguards. He, therefore, agreed with the dissent of Fazl Ali J. in Gopalan and held that 'procedure in Article 21 means fair not formal procedure and law is reasonable law and not any enacted piece. (98) Mohd. Ghouse, has expressed the limitation of Maneka's decision in the following words: (100)

97. Supra note 78 at 658-59.
98. Id at 660. In sum Fazl Ali, J. struck the chord which does accord with a just processual system where liberty is likely to be the victim. May be the learned Judge stretched it a little beyond the line but in essence his norms claim my concurrence."
99. Supra note 78.
100. Mohd. Ghouse, XIV ASIL 422 (1978)
In case of Maneka, procedure is impregnated with principles of natural justice. It has, thus, freed procedures from Gopalan. But Gopalan on law is intact. The result is that the substantive rights poured into personal liberty and the principles of natural justice woven into procedure are available only against the executive. The legislature is even now not subject to Article 21. Kharak Singh (101) has highlighted the hollowness of this development. So a legislative not subject to article 21, can cock a snook at the substantive rights in personal liberty and the procedural safeguards in procedure. The liberalism pervading the construction of personal liberty and 'procedure' becomes real and meaningful only when law is freed from Gopalan. The nightmarish experience and the macabre developments of 1975 teach us the valuable lesson that the executive can acquire a complete stranglehold over the legislature to make it enact draconian laws. Article 21, even after Maneka, cannot at least prohibit enactment of such laws. In Maneka only Krishna Iyer J. seems to be alive to this fact. He alone treats law as a reasonable law:"

Now that the court has read principles of natural justice into Article 21, *travaux preparatoires* cease to be an obstacle to a liberal interpretation of that article. There is nothing in it to prevent the court from construing law as reasonable law. On the otherhand, as long as Gopalan on law stands, the right to life and personal liberty, most fundamental of all the fundamental rights, will be the weakest rights. In fact they may not be fundamental rights at all if we hold that without the authority of law the executive cannot encroach on fundamental rights. Further, it will be very strange indeed, if article 21 leaves a legislature free to dispense with 'fair play in action' while authorising deprivation of life or liberty. It will be a subversion of a fundamental right if it is held that Article 21 contemplates

101. *Supra* note 42.
deprivation of life or liberty through 'a foul-play in action'. Thus the court may construe personal liberty in an evolutive sense, procedure as fair play in action and law as reasonable law. Only Krishna Iyer J. has construed article 21 on these lines.

It is most unfortunate that Bhagwati J. was unwilling to apply regreshingly liberal interpretation of the fundamental rights to the facts of the case. The main weakness of his opinion is the dichotomy between the interpretation and application of the interpretation of Articles 14 and 19. According to him reasonableness in Article 19 and equality in Article 14 enjoins arbitrariness and embody principles of natural justice and that the \textit{audi alteram partem} rule is devised by the courts to prevent misuse or abuse of administrative power. Again, according to him section 10(3)(c) did not embody the rule of \textit{audi alteram partem}. "In the interest of the general public" covered much more than the restrictions permissible under article 19(2). The challenged order had impounded the petitioner's passport for an indefinite period without giving her reasons and also an opportunity to state her case. This order from the central government was not subject to appeal. A logical result of the regreshing liberalism and the superb reasoning process of his construction of fundamental rights was that section 10(3)(c) section 11 and the challenged order were unconstitutional. But, the activism of Bhagwati J. gives way to passivism at this
stage. He reads *audi alteram partem* into section 10(3)(c) to save it from unconstitutionally. Even then the order would be unconstitutional. He saves the order, too, by saying that an *ex post facto* opportunity would be enough here. He also lays that after a statutory exclusion of the *audi alteram partem* "no more question remains". He reads down, "in the interest of the general public" to make Section 10(3)(c) *intra vires* Article 19(2). He employs the high authority theory to sustain section 11. In short, the construction of fundamental rights is based on judicial activism and the application of the construction is based on judicial passivism. This mixture of activism and passivism in Bhagwati J. (as he then was) opinion does not emerge as judicial statesmanship.

Fortunately, however, Krishna Iyer in several cases and Desai J. in one case decided during 1978, have reiterated and even improved upon the Bhagwati opinion on the application of the interpretation of the fundamental rights. However, the Bhagwati opinion on the application of the interpretation of the fundamental rights needs a review before a judge finds the ratios only in the latter part of the judgement and dismisses the rest of it as *obiter dicta*.

One more right i.e. right to contest or vote has been added by Andhra Pradesh High Court under Article 21 of the

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102. *Supra* note 78 at 624.
Constitution of India in K.Venkata Ramana Reddi's case. In this case, Rules framed under Sree Venkataswara University Act by the Government provided that a teacher of an affiliated college shall not contest election to any legislative body, or local authority unless he resigned and that resignation has been accepted. The petitioner, who was a teacher in a private college filed nomination papers for election to the State Legislative Council after informing the management of the college. The management suspended him from service under the said rule.

The court held that the right to contest or vote is a valuable right and the petitioner is entitled to exercise it, a rule which seeks to punish him for doing so, has to be struck down as an unreasonable restriction upon his fundamental right under Article 21 of the Constitution. It is not well settled that the guarantee of Article 21 is not confined to mere freedom from physical restraint but that it takes in all those aspects of life which go to make a man's life meaningful, complete and worth living.

The concept of personal liberty is ever-widening. It did not remain there only where it was left by Justice Iyer. The host of decisions of the Supreme Court on Article 21

Sheel Barse V. State of Maharashtra AIR 1983 SC 373.
Bandhua Mukti Morcha V. Union of India. AIR 1984 SC 802.
after Maneka with the help of public interest litigation, have unfolded the true nature and scope of Article 21. The trend of expanding the concept of personal liberty by Justice Iyer in Maneka was continued by him in Sunil Batra and Prem Shankar Shukla cases also. In Sunil Batra, the Supreme Court acknowledged the right of one prisoner to move it in regard to the alleged torture of another prisoner. Initially, the court did not interfere with the internal prison administration but after till Supreme Court began to highlight the much neglected field of prison jurisprudence. The court condemned the practice of keeping under-trials along with the convicts. The Court also laid down that the use of third degree methods is torture and violative of right to human dignity implicit in Article 21. The court further expressed its indictments over the practice of victimising a prisoner by forcing him to do particularly harsh and degrading jobs. The court in Sunil Batra by invoking Article 21 protected the basic freedoms of the helpless prisoners and thereby opened a new chapter towards civilising our prison system.

In Prem Shankar Shukla (105) the Court banned the routine hand-cuffing of prisoners as a Constitutional mandate (106).

105. AIR 1980 SC 1535.
106. The Court laid down that "Hand-cuffing is prime-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." Id at 1541.
and declared the distinction between classes of prisoners as obsolete. Justice Iyer maintained that in extreme circumstances, where prisoner is a security risk, desperate rowdy or involved in non-bailable offences, handcuffs should be used. Escorting authority must record the reasons for doing so otherwise the procedure will be unfair and bad under Article 21.

After the retirement of Justice Iyer Supreme Court continued to launch its crusade to protect the fundamental right of the under-trial prisoners and that was done with the help of public interest litigation. The Court accepted the letters or telegrams sent to it and awarded relief to under-trial prisoners who were languishing in jails for over 2 to 3 decades. The court pointed out that personal liberty is one of the most precious rights of a human being and it cannot be allowed to be smothered by bureaucratic or judicial inadequacy or inefficiency.

Further dimensions have been given to right to personal liberty through Public Interest Litigation in Sheela Barse's case, which complained custodial violence to women prisoners.

107. The Court observed that it is arbitrary and irrational to classify prisoners for purposes of handcuffs, into 'B' class and ordinary class. No one shall be fettered in any form based on superior class differentia, as the law treats them equally. Id. at 1542.


109. Id. at 343.
in the police lock-up. In this Supreme Court laid down
several directions for making legal aid available to
indigent prisoners.\(^{110}\)

The Supreme Court in its two important decisions in
Bandhua Mukti Morcha\(^{111}\) and Neerja Chowdhary\(^{112}\) has
further widened Article 21. In the former case, the court
recognised the right of the bonded labourers to live with
human dignity. The court in the instant case read the
directive principles (clause (e) and (f) of Art. 39,\(^{41,42}\))
into Article 21 of the Constitution to make the right to
live with human dignity meaningful to the working class
of the country.\(^{113}\) Neerja Choudary went a step further
to glorify Article 21 in securing effective rehabilitation
to the freed labourers.

These number of decisions of the Supreme Court
beginning with Sunil Batra (II) and ending with Neerja
Choudary have amplified the new horizons of the personal
liberty. The Supreme Court while expanding the concept of
personal liberty with the help of public interest litigation
has improved the prison jurisprudence, secured the release
of undertrial prisoners, prompted the court to lay down

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111. Bandhu Mukti Morcha V. Union of India. AIR 1984 SC 802.
113. Id at 811-12.
directions to protect women in police lock up against torture, strengthened its hands to make legal aid available to indigent prisoners and to ameliorate the plight of the bonded labourers living in bondage and finally rehabilitating the freed labourers. All these cases has strengthened the roots of Article 21 to save the basic human rights of the individuals. It is hoped that in the time to come, Court will continue with its efforts in nurturing personal liberty to protect the interest of the masses who have no access to the courts.

**IMPACT OF MANEKA ON PRISON JUSTICE**

'Justice' is the recognition of dignity and divinity in every human being. The worth of a society comes into picture only when the dignity of its members is recognized. If a person commits crime, it does not mean that by committing a crime, he ceases to be a human being and that he can be deprived of all human dignity. So even the prisoners have human rights, no doubt limited by their offence.

Before Maneka's case\(^{114}\) came into picture, the condition of the prisoners was quite miserable. If we go back to Gopalan's case\(^{115}\) we find that a person could exercise his fundamental right only if his person was free, that means a prisoner had no right to exercise his fundamental

\[^{114}\text{Supra note 78.}\]
\[^{115}\text{Supra note 33.}\]
rights since his person was not free. However, a liberal view was taken by Subha Rao J., when he approved the following observations of Field J., in Muun V. Illinois in Kharak Singh V. State of U.P. (116)

"By the term 'life' in Article 21 something more is meant than mere animal existence. The inhibitions against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of any arm or leg, or putting out of an eye or destruction of any other organ of body through which the soul communicates with the outer world."

In the case of State of Maharashtra V. Prabhakar Pandurang (118) the prisoner had written a scientific book while in prison but he was not being given the right to get it published. The Supreme Court in this case took somewhat liberal view and held that the freedom of expression of a detenu is not totally curtailed, and if a prisoner has written a scientific book, he has a right to get it published and the government has no right to refuse permission to do so.

In Patnaik (119), the Supreme Court changed its views partially towards the condition of prisoners. The court held in this case that the convicts are not 'denuded of' all the fundamental rights by reason of their conviction. But, by reason of their imprisonment, they are automatically

116. (1877) 9 U.S. 113.
117. (1964) 1 SCR 332.
118. AIR 1966 S.C.424.
deprived of certain fundamental rights. They are entitled to the right guaranteed under Article 21 that they will not be deprived of their life and liberty except according to procedure established by law. The court also observed that there is no fundamental right to escape, so the posting of guards outside the jail or installation of high voltage live-wire mechanism on the jail walls to prevent the escape of prisoners do not violate their fundamental rights.(120)

These cases show that in India, there was a limited freedom of prisoners and little recognition of their dignity. Maneka has its impact upon the prison justice administration, an area not so far, much cared by the judiciary. Modern criminologist view crime as a pathological aberration and today reformation has become the object of penal pharmacopea. The courts far from their traditional role of detecting, convicting and duly sentencing the guilty, have reached the stage of ordering or suggesting remedial measures to rehabilitate the criminal. The Indian Supreme Court has now begun to take an active lead in this respect. It was laid down in Maneka(121) that any one could be deprived of his life or liberty if adherence was made to "the procedure established by law". In short, Article 21 was

120. Id. pp.2094,2095, 2097.
121. Supra note 78.
thought to have contained only a guarantee against the executive action unsupported by law. So it was laid down in this case that Article 21 was not only a restriction on the unbridled power of the executive, but it was also a restriction on law-making power. It laid down that not merely there should be procedure established by law, but the procedure must also be reasonable, fair and just, otherwise law would be violative of article 21.

So far as prison justice is concerned, Justice Krishna Iyer has given very serious thought to it. His decisions have made the Supreme Court the sentinel of people's rights and have protected even prisoner from oppression. But at the same time some of his decisions are not practically possible which would be dealt later.

In Mohd. Giasuddin's case the Supreme Court dwelt at length on the mode of treatment of criminals in prisons, the principles of punishment and other allied matters. In this case, stressing on the rehabilitation of a criminal, Justice Iyer observed: that man is subject to more stresses and strains in this age than ever before, and a new class of crimes arising from restlessness of the spirit and frustration of ambition has erupted. The Police billy and the prison drill cannot "minister to a mind diseased" or tone down the tension, release the repression, or unbend the
perversion, each of which shows up as debased deviance, violent vice and behavioural turpitude. The human today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence. He considers, therefore, that a therapeutic, rather than an in terror, outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind.

The facts in Charles Sobhraj\(^{(123)}\) are interesting. In this case, the convict (who was a foreigner) who committed many crimes in different countries, had also many cases pending against him in India. He had a record of an escape and one attempt of suicide. When in jail, he went on hunger strike, then medical men took care of him. He was kept in a high security ward. He demanded that he should have better companions in jail and that he should be moved to a ward where there is greatest relaxation. The superintendent of jails turned down his request on the ground of security and that rules do not permit granting his request. He filed petition under Article 32 of the Constitution of India.

The Supreme Court dismissed the petition. The order of the court was delivered by Justice Iyer. He said that the petitioner being a foreigner cannot claim the protection of article 19 since it applies to citizens only. He further

\(^{123}\) Charles Sobhraj V. Superintendent Central Jail, Tihar, (1978) 4 SCC 104.
laid down that fair procedure is the soul of Article 21 and reasonable restrictions are the essence of Article 19(5). If the prisoner has the right to protection under Arts. 14, 19 and 21, there must be co-relation between deprivation of freedom and legitimate function of a correctional system. But when an inmate is cruelly restricted in a manner which supports no such relevant purpose, the restriction becomes unreasonable and arbitrary. Justice Iyer says, Criminal law permits the deprivation of personal liberty on his conviction of an offence, but it does not authorise his torture in jail. He is entitled to humane conditions even inside the prison. (124) Here his views are coherent with the views laid down in Patnaik's case that by the conviction, fundamental rights are restricted to some extent and not fully.

In Sunil Batra I (125) and Sunil Batra II (126), the court had occasion to discuss in depth the scope of prisoners' right and their constitutional roots. Judicial blinkers had earlier kept prisoners out of their vision; and Article 21, which with the new ferment of thought relative to human rights, became the spring board for judicial activism. The court in this path-finding holding, had to speak powerfully, profoundly, philosophically and at the same time concretely. The abuses which abounded in many central prisons in the country and the

circumstance that the voice of the victim could not be heard outside made it essential for the court to expound the new penology founded on the constitutional norms. Justice Iyer observed:

"When prison trauma prevails, prison justice must invigilate and hence we broaden our 'habeas' jurisdiction. Jurisprudence cannot slumber when the very campuses of punitive justice witness torture." (127)

The contribution of Justice Iyer regarding solitary confinement and bar feters is refreshing.

The most important case on this is Sunil Batra v. Delhi Administration I. (128) In this case, the Supreme Court was concerned with two prisoners, one of them Sunil Batra, under death sentence was put in solitary confinement, pending his appeal in the High Court; the other charged with serious offences was put under bar feters. Granting relief to both the prisoners, Krishna Iyer, J. observed:

"Prisons are built with stone 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 an onerous duty to ensure that during detention and subject to the constitution, freedom from torture belongs to the detenu." (129)

Justice Iyer says that Part III of the Constitution does not part company with the prisoners at the gates. Therefore, it is clear that prisoners continue to enjoy fundamental rights

127. Ibid.
128. Supra note 125.
129. Id at 520.
even when they are in custody. Their link with the Constitution is not severed. Reasonable restrictions can be imposed. Justice Iyer further observed that the procedure for restrictions should be seen under Article 21, its reasonableness should be tested under Article 19(5) and if the authority is used arbitrarily, it would be "anathema" for Article 14.

Justice Iyer is against solitary confinement imposed by the jail authorities. Explanation to paragraph 51 of the Jail Manual defined solitary confinement:

"Solitary confinement means such confinement with or without labour as entirely excludes the prisoners both from sight of, and communication with, other prisoners."

Krishna Iyer believes that when sections 73 and 74 of the Penal Code make solitary confinement a substantive punishment which can be inflicted only by a court of law, it cannot be left to the discretion of the prison authorities. (130) According to him, it can be imposed only in exceptional cases where the convict is such dangerous character that he must be segregated from other prisoners. (131) He says if there are a plurality of the jail inmates, the death-sentencee will have to be kept separate from the rest in the same cell and this segregation can be achieved by placing the prisoner under the charge of a guard by day and by night. It is submitted that practically this is not possible to place every prisoner under the charge of a guard. He further

130. Supra note 125, p.532.
131. AIR 1978 SC 1675 at 1728.
says, if discipline needs it, the authority shall be entitled to and the prisoner shall be liable to keeping within the same cell. He is right in holding that 'functionally' the separation is authorised, not obligated. (132) So he holds that otherwise solitary confinement should be avoided because it has a degrading and dehumanizing effect on the prisoners and that the consequences of the solitary regime has been maddening. (Submitted that if a dangerous criminal is allowed to mix with other freely, this would also have dehumanizing effect on others. Britannica Book of the Year records: So many convicts went mad or died as a consequence of the solitary regime. (133) It was argued in Sunil Batra I that he has been put in statutory confinement and not solitary. Justice Iyer rightly turned down this contention. He explained:

"If solitary confinement is a revolt against society's human essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label nor logomachy but a working technique of justice."

He rightly takes into account the dehumanizing effect of solitary confinement in the words:

"To see a fellow being is a solace to the soul, communication with one's own kind is a balm to the aching spirit. Denial of both with complete segregation superimposed is the journey to insanity. (135)

In this case, Justice Desai agreed with Justice Iyer that if the prisoner is kept under solitary confinement not as a result

132. Id at 170.
134. Supra note 131, p.1700.
135. Id at 1704.
of violating prison discipline but only on the ground of his being a death sentence, it would be violative of Article 20(2) and Articles 14 and 19. He has warned that if by imposing solitary confinement there is total deprivation of comraderie amongst co-prisoners comingling and talking, it would offend Article 21. (136) He remarked:

"Solitary confinement has a degrading and dehumanizing effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it." (137)

In Sunil Batra II also, Justice Iyer considering the effect of solitary confinement observed:

"Inflictions may take many protean forms apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and more dreadful sometimes, transfer to a distant prison where visit or society of friends or relations may be snapped; allotment of a degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgement is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied." (138)

He further observed that any harsh isolation from society by long, lonely, cellular detention is penal and so must be inflicted only consistently with fair procedure. (139)

In Kishore Singh Ravinder Dev V. State of Rajasthan, (140)

136. Id. p.1728.
137. Ibid.
138. Supra note 126 at 1594.
139. Id at 1595.
140. AIR 1981 SC625 at 628.
Justice Iyer again took into account the degrading solitary confinement keeping in view Sunil Batra. He observes that 'flimsy grounds like 'loitering' in the prison", "behaving insolently and in uncivilized manner", "tearing off his lottery ticket", cannot be the foundation for the torturesome treatment of solitary confinement. So we see that Justice Iyer is against solitary confinement but at the same time says that if convict is of dangerous character then he must be segregated from others.

While keeping in view the human rights and recognizing human dignity, Krishna Iyer forbids putting any prisoner in bar fetters. He holds that "life and liberty" are precious values. Arbitrary action which tortuously tears into the flesh of living man is too serious to be reconciled with Articles 14 or 19.\(^1\) So section 56\(^2\) of Prison Act which allows confining under bar fetters in some cases must be governed by the imperatives of Articles 14, 19 and 21.

He holds that the power to confine in iron can be constitutional only if it is hemmed in "with several restrictions like security of the prison and the integrity of the person."\(^3\) He views that reasonableness under Article 19 requires that the prisoner who suffers may be

\(^{1}\) Sunil Batra I. V. Delhi Administration AIR 1978 SC 1715.
\(^{2}\) Section 56 of Prison Act provides that Superintendent of Prison could confine a prisoner in irons if it was necessary to do so for ensuring his safe custody.
\(^{3}\) Supra note 131.
satisfied by the higher official about the necessity to fetter him. (144)

In Sunil Batra, Additional Solicitor General argued, dangerousness of the prisoner in case he escapes. So he favours his fetters in order to prevent such escape. Krishna Iyer answers the fears of the Additional solicitor General in the following words:

"Chaining all prisoners, amputing many, caging some, can all be fobbed off, if every undertrial or convict were painted as a potentially dangerous maniac. Assuming a few are likely to escape, would you shoot a hundred prisoners or whip everyone everyday or fetter all suspects to prevent one jumping bail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the Constitutional play." (145)

Justice Desai holds the view that "Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and, therefore, before such erosion can be justified, it must have the authority of law." (146) He views that putting bar fetters for a long time would not even be justified under section 56 of Prisons Act. (147)

Justice Iyer has taken the matter of bar fetters to a logical extent in Prem Shankar. (148) According to him

144. Ibid.
145. Ibid. p. 174.
146. Ibid. p. 1733.
147. Ibid. p. 1735.
unless the State can prove that the prisoner is so dangerous that there is no practical way except to fetter him, he should not be put in iron. He rightly observes:

"It is sadistic, capricious, despotic and demoralising to humble a man by menacing him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. (149)

Revised Police standing Order 44 laid down that handcuffs should not be used in routine. They are to be used only where the person is desperate, rowdy or is involved in non-bailable offence. It also laid down that the persons holding good social position should not be ordinarily handcuffed. But Justice Iyer said that the provisions for handcuffing a person involved in non-bailable offence are violative of Articles 14, 19, and 21 of Constitution, and if the escorting authority has to do it, then it must record simultaneously the reasons for doing so, (150), otherwise the procedure would be unfair under Article 21, which insists upon fairness, reasonableness and justness in the procedure. (151) Justice Iyer strongly disapproved of the elitist concept forbidding handcuffing of only a better class prisoner. He said there should be no dichotomy between poor and rich prisoners regarding handcuffing of only a better class prisoner. He said there should be no dichotomy between poor and rich

149. Id. at 1542.
150. Id at 1543.
151. Id. at 1547.
prisoners regarding handcuffing.\(^{(152)}\)

Justice Pathak agrees with Justice Krishna Iyer when he says that the restraints like putting bar fetters cannot be imposed to a degree greater than is necessary to prevent his escape.\(^{(153)}\)

Justice Iyer continues to maintain the same view in *Sunil Batra II* when he says:

"To fetter prisoners in irons is an inhumanity unjustified save where safe custody is otherwise impossible. The routine resort to handcuffs and irons bespeaks a barbarity hostiles to our goal of human dignity and social justice.\(^{(154)}\)"

In Kishore Singh also he holds that our fetters should be imposed in 'rarest of rare'\(^{(155)}\) cases for 'convincing security reasons' and must comply with 'natural justice'.\(^{(156)}\)

In *Sunil Batra II*, Krishna Iyer extends the rights of prisoners to certain other areas also. He holds the view that the sentence pronounced to a prisoner should not be illegally exceeded and he should not be 'victimised' to do 'hard and degrading jobs' because it would be violative of Article 19.\(^{(157)}\) He also favours prevention of sex-excesses and orders that the young jail inmates must be separated and freed from exploitation by adults\(^{(158)}\) but the same is not

\(^{(152)}\) Id. at 1544, 1546.
\(^{(153)}\) Id. at 1546.
\(^{(154)}\) *AIR* 1980 S.C. 1595.
\(^{(156)}\) Id. 630.
\(^{(157)}\) Supra note 154, p. 1594.
\(^{(158)}\) Id. at 1595.
being followed by prison authorities and the young offenders and adult criminals are still put together.\(^{(159)}\) Another step in civilising the prison jurisprudence in this case is that the Court condemned the practice of keeping the undertrials along with convicts which was a practice before this case came before Supreme Court. The new area in which Justice Iyer has entered in this case is the right of the prisoners to be visited by their relatives and friends. He favours their visits but subject to search and discipline and other security criteria. He lays down:

"Visits to prisoners by family and friends are a solace in insulation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity.\(^{(160)}\)"

Justice Bhagwati agreed with Krishna Iyer on this issue in a case\(^{(161)}\) when he observed other right to life enshrined in Article 21 cannot be restricted to mere animal existence. It includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human-beings.

Justice Iyer in his book 'A CONSTITUTIONAL MISCELLANY' says that judicare and medicare must go together while dealing with offender patient. Criminalisation is the

\(^{159}\) Dehumanised prisons' \textit{The Tribune}, Feb.27,1985, p.4.
\(^{160}\) \textit{Supra} note 154 at 1595.
consequence, not of genetic or inherent wickedness, but caused by frustration, provocation, humiliation, unfulfilled passion, unresolved tension and so on, the common denominator being maladapted stress, acute or chronic. This may happen to anyone. Therefore, medical participation, activist fashion, is plain sense in sentencing operation. Once we agree that, in broad terms, a criminal is a pathological person who has yielded to a desperate craving, accumulated stress or sudden impulse, it follows that the sentencing role must serve a curative goal. Patients are treated, not by judges aided by lawyer, but by doctors aided by nurses. He further observes that sentencing objectives are primarily reformatory, not woundingly punitive. But at the same time he realises that robed bretheren go by traditional tortures with sadistic severity.\(^{\text{162}}\)

Justice Krishna Iyer has a soul of reformist and it distinguishes him from other persons. The reformist in him believes that the prison torture is not the 'last drug in the justice pharma copoeia' but a confession of failure to do justice to living man.\(^{\text{163}}\) He takes offenders as patients and prisons as hospitals or correctional houses. So he says that instead of segregating prisoners from the community they should be reformed by making a part of it so that upon


his return to the society the offender must not only be willing but also be able to live a law abiding and self supporting life. He encourages social workers to do their duty and rehabilitate the prisoners. He lays stress on rehabilitation of prison laws, and reorientation of prison staff.

The Punjab prison manual requires the District Magistrates to visit and inspect jails situated within the limits of their districts from time to time. (164) Elaborating on this requirement, Krishna Iyer has explained that the District Magistrate should meet the prisoners separately to know if they have any grievance. The presence of wardens or officials must be avoided. He must ensure that his enquiry is confidential although subject to natural justice and does not lead to reprisals by jail officials. In this context, Justice Iyer further says that 'Grievance Box' be placed in jails so that the inmates could put in their complaints and the District Magistrates could take care of them.

Dr. Balram K. Gupta doubts whether it could be implemented in letter and spirit because it is inhibited with hurdles. District Magistrates are too pressed for time and the prison officials may not cooperate. And visits by Magistrates once in a while will not be sufficient. A regular independent agency is needed to exercise constant vigilance. So he

164. For details regarding these visits, para 41,42,44,47,49 and 53 of Punjab Prison Manual be referred.
suggests that there is urgent need to provide for 'prison ombudsman'.

Justice Iyer suggests that State should take early steps to prepare in Hindi, a prisoners’ handbook and circulate copies to bring legal awareness home to inmates. Periodical jail bulletins stating how improvements and habilitative programmes are brought into the prison may create a fellowship which will ease tensions. The State should take steps to keep up to the standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. He further suggested that a correctional-cum-orientation course is necessitous for the prison staff, inculcating the constitutional values, therapeutic approaches and tension free management.

Judicial conferences and sentencing workshops and institutional training for trial judges, Law Schools giving special law course in sentencing and correctional processes, exposure of judges to advanced psychological and neurological and other medical theories and practices relevant to justicing, and creation of sentencing Boards with medical and other components are some of the experiments which hold out promise for the future.

Justice Iyer is of the view that prisoners should be given some work to do inside the prisons and in return they


166. Supra note 162 at 164.
should be given reasonable wages. Out of these wages he should bear the responsibility for the sufferings he has inflicted. (167)

It is heartening to know that a nine-member committee headed by V.R. Krishna Iyer was set up by the Government in May, 1986 to look into the problems of women in custody. The Krishna Iyer committee has urged the Union Government to adopt a national policy on justice to women in custody. The Committee recommended certain beneficial provisions for women in the administration of criminal and correctional justice. It outlines the broad objectives and procedures which should regulate the custody of women. The committee has proposed remedial steps to counter the recognised discrimination against women. The ameliorative measures include safeguards to protect the personal legal rights of women at the time of arrest and while in custody; directives for handling of women by the police arrest; amenities to meet the special needs of women in police lock-ups and in other custodial situation; and separate modalities for dealing with women by way of women's courts and women prison courts. (168)

Krishna Iyer's efforts of reforming the conditions of the prisoners can be clearly seen in Blaise Pascal's idea of justice because Justice is what he wants for the prisoners:

167. Id at 173.
"Justice without power is inefficient, power without justice is tyranny.... Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just." (169)

It is submitted that Krishna Iyer has given a new turn to the attitude towards prisoners by his judgements. His approach may give rise to a question whether the improved conditions of the prisoners would encourage those, who are economically similarly situated, to commit crime and in that case Krishna Iyer's humanistic and reformistic approach would have an unfortunate effect. But at the same time, it can be said that society has not succeeded in ridding itself of crime by prison torture. So the humane view should be such that the assured minimum existence should be at a middle level rather than not to have it. Krishna Iyer also did not forbid the curtailment of human rights and liberties to some extent.

Inspite of all the suggestions made by Justice Iyer, it is sad to know that there are hardly any jails in the country where the directions given by the Supreme Court are scrupulously observed. ill-treatment of prisoners, ill-kept registers, corruption, over-crowding and a callous disregard for the basic human rights of the inmates are the hallmarks of the prison administration. (170)


PROCEDURE ESTABLISHED BY LAW

Article 21 makes it clear that a person can be deprived of his life or personal liberty only according to the 'Procedure established by law'. This expression in Article 21 is the result of deliberate choice by the Constituent Assembly in place of the phrase 'due process of law'.

The expression 'procedure established by law' came for judicial scrutiny in A.K. Gopalan's case. The Supreme Court was divided on the meaning of these words. The majority was of the view that 'procedure established by law' must mean the procedure prescribed or enacted by the State which included Parliament and the State Legislatures. That means any procedure whether arbitrary or oppressive was to be upheld if it had a legislative sanction, thus simply reiterating the Austinian concept of law. Article 21 was interpreted as the protective umbrella only against executive action, and possibly also against judicial action, but not against any legislative action unless it was shown that the legislature, in depriving a person of his life or personal liberty, has transgressed any other relevant mandatory provision of the Constitution.

The minority opinion delivered by Justice Fazl Ali was that it should mean 'due process established by law'. He insisted in his dissenting view that principles of

171. Supra note 33.
natural justice applicable to American 'due process' clause must be followed while interpreting Article 21 of the Indian Constitution. (172)

Jariwala (173) did not agree with the opinion of Justice Fazl Ali. He held that if principles of natural justice are allowed to be read in Article 21, then some of the principles incorporated under Article 22 would become redundant. Such interpretation would be against the principles of harmonious construction. Secondly, the draft Constitution of India provided for the incorporation of the principles of natural justice under Article 15. (174) When the words used in personal liberty clause were 'due process of law' but this idea was dropped at the final stage and now the words used are 'procedure established by law'. Moreover, even if the expression is a borrowed one, it does not mean that the clause shall be governed by the developments under those constitutions from where it has been borrowed. This view, it is submitted is not correct and is now outdated in view of the rightly adopted liberal views by Supreme Court and particularly of Justice Iyer.

In the case of Kharak Singh (175) and Satwant Singh (176)

172. Id. at 60.
174. Article 15 of the Draft Constitution.
175. Supra note 42.
176. Supra note 49.
no doubt Supreme Court gave somewhat wider interpretation to the expression 'personal liberty', but it gave the same interpretation to the expression 'procedure established by law' as was given in Gopalan. Thus from Gopalan till Maneka, the apex court did not include principles of natural justice in the expression 'procedure established by law' and declined to imply the implication of 'due process' which are notice, opportunity to be heard, impartial tribunal and orderly course of procedure.

It was only in Maneka's case where majority held that the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable and not fanciful, oppressive or arbitrary.\(^\text{178}\) The Supreme Court substantially introduced the principles of natural justice in the procedural protection under Article 21. It is in this case, Justice Krishna Iyer clearly held that 'Law' under Article 21 must be 'reasonable law'. In case, the law is not reasonable, its validity can be questioned before the courts in the context of Art.21.

In a firm language, Justice Iyer said that the compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority, by three quick readings of a bill with the

177. \textit{Supra} note 78.
178. \textit{Id} at 613.
requisite quorum, can prescribe any unreasonable modality and thereby sterilise the grandiloquent mandate. "Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not by necessity import into those weighty words an adjectival rule of law; civilised in its soul, fair in its heart and fixing those imperatives of procedural protection without which the processual tail will wag the substantive head.

Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art. 21 has to be fair, not foolish and carefully designed to effectuate, not to subvert, the substantive right itself. Thus 'procedure' must rule out any thing arbitrary, freakish or bizarre. The quality of fairness in the process is emphasised by the strong word "established", which means "settled firmly", not wantonly or whimsically.

If procedure is rooted in the legal consciousness of the community, it becomes "established" procedure. And "law" leaves little doubt that it is normally regarded as just since law is the means and justice is the end. (179)

So according to him, 'Procedure' in Article 21 means fair, not formal, procedure. "Law" is reasonable law, not any enacted piece. (180) He further laid down that let us not forget that Article 21 clubs life with liberty and when

179. Id at 658.
180. Id at 659.
interpret the colour and content of 'procedure established by law' we must be alive to the deadly peril of life being deprived without minimum processual justice, legislative callousness despising 'hearing' and 'fair opportunities of defence.' (181)

Maneka's case has been the turning point and a spark thrower of a new revolution in the sphere of personal liberty. Post Maneka era has been the most fertile period in which the concept of personal liberty and the expression 'procedure established by law' has acquired newer heights and experienced all-side growth. Thus, Article 21, whose potential was never discovered in the past was ultimately pulled out of its deep slumbers and harnessed to engineer social justice which is one of the goals proposed to be attained by the Constitution.

The immunity of legislative action as previously upheld was immediately withdrawn and it was held to be as much questionable as an executive action. Every piece of legislative enactment, it was held, must be reasonable, fair and just and must not be arbitrary, oppressive and fanciful. Maneka's case brings coordination between courts and the executive. It gives birth to rule of law and concedes powers to judiciary to strike down laws which violate the principles of natural justice. This is really a healthy

181. Id at 660.
and welcome trend.

Maneka's decision has energised Article 21. The potent interpretation given in this case has helped in determining the future cases. With the help of this decision, number of new aspects have been brought within the ambit of Article 21 e.g. natural justice, free legal services, public interest litigation, capital punishment in rarest of


rare cases, protection from torture inside the prison\(^{186}\), right to bail,\(^{187}\) and speedy trial\(^{188}\) etc. are inalienable elements of reasonable fair and just procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. It was Justice Iyer who greatly stressed on all these elements in most of the cases decided and articles and books published by him.

In Sunil Batra v. Delhi Administration,\(^{189}\) while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Justice Iyer held that although our Constitution does not have a 'due process' clause as in its U.S. counterpart, the same consequences would follow after Maneka. He held:

"for what is primitively outrageous, scandalizing unusual or cruel and rehabitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."

\(^{186}\) Charles Sobhraj V. Superintendent Central Jail, Tihar (1978) USCC 104.
Sunil Batra I. V. Delhi Administration AIR 1978 SC 1675.
Prem Shankar V. Delhi Administration AIR 1980 SC 1535.


\(^{188}\) Hussainara Khatoon cases.

\(^{189}\) 1978 (2) SCR 621.
He further held that even a prisoner cannot be denied the fundamental rights guaranteed by the Constitution. Stone walls do not shut out these rights. He upheld the right of a prisoner to secure the services of a lawyer of his own choice even at the time of police interrogation. In *Nandini Satpathi V. P.L. Dani* (190) he held: 'Under Article 22 (1) - the right to consult an advocate of his choice shall not be denied to any person who is arrested. Article 20(1) and (3) may be telescoped by making it prudent for police to permit the advocate of the accused to be present at the time he is examined. If the accused expresses his desire to have his lawyer by his side at the time of examination, the facility shall not be denied because by denying the facility the police will be exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project.' (191)

In *G. Narsimhulu V. Public Prosecutor, A.P.* as Chamber Judge in the Summit Court, Justice Iyer had the opportunity to enumerate the relevant criteria for grant or refusal of bail in the case of a person who has been convicted and has appealed or whose conviction has been set aside but leave to appeal has been granted by the Supreme Court against the acquittal.

190. AIR 1978 SC 1025.
191. Id at 1027.
192. AIR 1978 SC 429.
'Personal liberty, deprived when bail is refused, is so precious a value in our constitutional system recognised under Article 21, that the crucial power to negate it is a great trust exercisable and casually but judicially, with a rively concern for the cost to the individual and the community. For, after all, the personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in the clear terms of procedure established by law, the last four words of Article 21 being the life of that right." The significance and sweep of Article 21 makes deprivation of liberty a matter of grave concern permissible only when the law authorising it is reasonable, even handed and geared to the goals of community good and state necessity spelt out in Art.19.

In re the Special Court's Bill 1978, Iyer J., in his concurring judgement observed:

"The price of unanimity is not taciturnity where individual articulation may make distinct contribution. The greatest trauma of our times, for a developing country of urgent yet tantalising imperatives, is the dismal, yet die-hard poverty of the masses and the democratic, yet graft-riven, way of life of power-wielders. Together they blend to produce gross abuse geared to personal aggrandizement, suppression of exposure and a host of other crimes. The human right's dimension of Article 21 have a fatal effect on legislative truncation of fair procedure. The contribution of Maneka's case to humanization of processual justice is substantial. 'Classify or perish', is the classic test of valid exemption from inflexible equality under the Constitution."

193. In re the Special Court's Bill 1978.
In Jolly Verghese V. Bank of Cochin (194) an appeal was made by judgement debtors, whose personal freedom was in peril because a court warrant for arrest and detention in the civil-prison was chasing them for non-payment of an amount due to a bank - the respondent which had ripened into a decree and had not yet been discharged. Justice Iyer, defined the parameters of section 51 CPC, and held: "The question is whether under such circumstance the personal freedom of the judgement debtors can be held in ransom until repayment of the debt. and if Sec.51 read with 021, r. 3, CPC does not warrant such a step whether that provision of law is constitutional tested on the touchstone of fair procedure under Article 21 and in conformity with the inherent dignity of the human person in the light of Article 11 of the International Covenant on Civil and Political Rights.

Equally meaningful is the import of Art.21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Art.21 read with Arts. 14 and 19 obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence."

The trend of reading 'due-process' in Article 21 of the Indian Constitution was initiated by Krishna Iyer and Bhagwati JJ. and continues unabated.

194. AIR 1980 SC 470.
In Sunil Batra, Desai J. also observed as follows:

"The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Art.21 would not be satisfied. If it is arbitrary it would be violation of Article 14." (196)

After that in Bachan Singh's case, upholding the constitutional validity of death penalty, Justice Sarkaria, speaking for the majority echoed the same views with greater force and pointed out that if Article 21 is understood in accordance with the interpretation put upon it in Maneka's case, it will read to say that:

"No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law." (198)

Looking to the catena of cases since Maneka the Supreme Court became very forthright in the interpretation of Article 21, which led Chandrachud CJ, speaking for the majority, in Mithu v. State of Punjab to say as follows about the relation of the legislative vis-a-vis judiciary with regard to the procedures:

"These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that is for the legislature to provide the punishment and for the courts to impose it." (200)

196. Id at 498.
197. AIR 1980 SC 898.
198. Id at 930.
199. AIR 1983 SC 473.
200. Id at 475.
Mohd. Ghouse expressed his fears regarding the element of dueness which has been introduced after Maneka in Article 21. He observed that this is limited to only executive action and not to legislative actions. (201)

It is submitted that this view of Professor Ghouse is not well-founded. The ratio of Maneka decision is that 'procedure established by law under Article 21 means such procedure which is reasonable, just and fair and not arbitrary or fanciful. In view of this, it is not open to the Parliament or the legislatures to prescribe any procedure which it deems necessary, in order to curb the right to personal liberty. On the other hand, the legislature is now constitutionally warranted to tailor the procedure in such a manner that it meets the requirement of being reasonable, just and fair. If the Courts find that the procedure laid down by the legislature does not conform to the requirements of reasonableness, surely after Maneka's decision they would be legitimate in declaring such procedure violative of Article 21 of the Constitution. In this manner, the element of 'dueness' which has been introduced in Article 21 by Justice Iyer and Bhagwati is not limited to only executive action, it also extends to legislative actions.

Justice Bhagwati followed Gopalan on the construction of "law" in article 21. He was, probably of the opinion

that as law has to lay down a fair and reasonable procedure, it was not necessary to construe law in article 21 as Jus. But Justice Krishna Iyer held in his concurring opinion in *Maneka* that "law" in article 21 meant "reasonable law". The difference between the two opinions is that under the former only procedural reasonableness whereas under the latter substantive reasonableness also was open to judicial review. And this view by Justice Iyer was followed by Supreme Court in *Mithu v. State of Punjab* (202) and *T. Sareetha v. Subbaiah* (203) which has further widened the scope of Article 21. In these cases it was held that it is no longer confined to procedural protection only. It extends to substantive laws also. In *Mithu's case*, the court invalidated section 303 of Indian Penal code because it provides a mandatory death without providing for a fair opportunity of hearing to the offender and a reasonable and just procedure. The court in *Sareetha's case* observed:

"After Mithu's case, it is not easy to assert that Article 21 is confined any longer to procedural protection only. Procedure and substance of law now commingle and overlap each other, to such a degree rendering that a finding of any law than can competently establish a valid procedure for the enforcement of a savage punishment impossible" (204).

So we see that the trend of reading "due process of law" in Article 21 which was set by Justice Iyer continues to be

202. AIR 1983 SC 473
203. AIR 1983 AP 356.
204. Id at 372.
unabated.

After going through all these cases, it can now be said without any fear of contradiction that while Kharak Singh's and Satwant Singh's cases and few others broadened the scope and ambit of the right of personal liberty. Maneka's singular contribution is that it made a breakthrough on the procedural front, which has remained tied down to Gopalan for the last three decades and the credit for this goes to Justice Krishna Iyer and Bhagwati J. In fact, after making a judicious use of Article 21, they emphasised that the principle of reasonableness, inherent in equality "pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14." The net result is that Article 21, coupled with Article 14, warranted that the procedure, whether for impounding a passport or for granting pre-trial bail, or for effecting a speedy trial or for granting free legal aid to the indigent, should be right, fair, just and reasonable and not just arbitrary, fanciful or oppressive."

M.S. Sharma aptly says that inspite of all the judicial activism displayed so far on the procedural front, the law is still not completely free from legislative oppression.

205. Supra note 42.
206. Supra note 49.
207. Supra note 73 at 624.
It continues to be 'lex' whether reasonable or not, simply passed by a competent legislature. So it is implicit that personal liberty though free from the unreasonable procedure of the executive still continues to be within the reach of legislature, which is generally inhibited with political expediency. The future does not seem to be bright on this side because with one party-rule and the institution of 'whin', being made use of so religiously in India for quite some time past, there is no relief in sight from the legislative handedness, if it may be so called. But at the same time, making a dispassionate study and deep analysis of the decisions given so far, the prospective socialist mood of the Indian judiciary is clear and the day does not seem to be far away when the 'law' in Article 21 will also be treated as 'reasonable law' (as stressed by Justice Iyer) through the self-same lately growing 'due-process' jurisprudence. Almost three decades back Fazl-Ali J. in Gonalan interpreted law as reasonable law and almost after 28 years the same was revived by Justice Krishna Iyer and later on followed in Sunil Batra and Sithu's case(209) which evince bright hope that 'law' in Article 21 is on the border of being treated as reasonable law.(210)

203. Sunra note 197.
209. Sunra note 199.
CAPITAL PUNISHMENT:

The controversy over capital punishment is not new. Its roots lie deep in human history and its battles have been waged quite on and off for almost two centuries. If death penalty were to be awarded for homicide everywhere in the world, an alarming figure of humanity would be annihilated every year. This might not have raised much concern in olden days when death penalty was resorted to frequently but in the present age when human life and human dignity have come to be respected most, such a shocking destruction of mankind has got to be weighed in all its perspective.

The Constitution of India belongs to 'we, THE PEOPLE OF INDIA'. This means that even those who are criminals and condemned to death would also be governed by it. The Constitution is first and foremost a social document, and it changes with the change of time. In order to keep pace with the vital changes which takes place in a growing society, it has got to be flexible to accommodate them all. A never ending debate has been going on the world over as to whether capital punishment be retained or abolished. Since the Indian courts cannot segregate themselves from the rest of the world, the constitutionality of capital punishment has been examined under the Indian system in this background. This issue has been examined by Indian Summit court number of times. It has been consistently of the view that capital punishment is constitutionally valid. It would be relevant to examine the Indian position in this regard.
The Law Commission of India in its 35th report in 1967 concludes:

"Having regard to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its areas, to the diversity of its population and to the permanent need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment."

The three important cases that came before Supreme Court regarding capital punishment are Jagmohan, Rajendra and Bachan Singh. In Jagmohan Singh V. State of U.P. the appellant was sentenced to death for murder. He claimed protection under Article 19(1) on the ground that death sentence put an end to all rights guaranteed under it and therefore it was unreasonable and not in the interest of general public.

Secondly in the absence of any 'procedure established by law' in matter of death sentence, the protection given by article 21 was violated. So far as the first contention was concerned, the Supreme Court held that Article 19(1) did not directly deal with the freedom to live. As regards protection of Article 21, the court held that there is a procedure established by law, according to which the order is passed by the court.

The sentence, therefore, did not infringe article 21 of the

214. Supra note 211.
Constitution.

In Rajendra Prasad v. State of U.P. (215) Krishna Iyer, J. (for majority) observed that after the decision of Supreme Court in Jagmohan Singh's case (216), the constitutional validity of capital punishment was not open to doubt. However, he expressed the view that the only consideration for inflicting capital punishment was not the nature of the crime but the concern for the criminal and unless it was shown that he was a risk to the survival of the society, special punishment would not be justified. But in United States in Greg v. Georgia (217) and two companion cases, Profitt v. Florida and Jurek v. Texas (219) the court refused to declare the death penalty unconstitutional in all circumstances.

Justice Potter Stewart rightly observed that we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken away deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction suitable to the most extreme of crimes.

Justice Iyer in Rajendra's case further laid down that the death penalty is not physically but psychologically brutal. He referred to the long period between sentencing

215. Supra note 212.
216. Supra note 211.
and execution as a lingering death. This view was once before also stressed by Justice Iyer in *Setag Anama's case* (220) where he observed that the prolonged agony has ameliorative impact, thus death-penalty should be converted into 'life-imprisonment, and the same was followed in *T.V. Vatheeswran's case* (221). In this case it was held by Supreme Court that prolonged detention to await the execution of death sentence is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death. Making all reasonable allowances for the time necessary for appeal and reprieve, delay exceeding two years should be considered sufficient to entitle the person to invoke Article 21 and demand quashing of death sentence converting into life imprisonment.

Submitted that the fixation of time-limit of two years does not seem to accord with the common experience of the time normally consumed by the litigation process and the proceedings before the executive. The court must find out why the delay was caused and who is responsible for it. If it is not done, the law laid down by the court will become an object of ridicule by permitting a person to defeat it, by resorting to frivolous proceedings to delay its implementation. This time-limit of two years laid down in *Vatheeswran's case* was rightly overruled in *Sher Singh's case* (222) where Apex Court laid down that

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220. AIR 1974 SC.
221. AIR 1983 SC 361.
222. AIR 1983 SC 465.
usually cases involving murders take more than two years, hence time limit of two years is not correct. Because in such cases rich people will go scot free by delaying the proceedings for more than two years by taking undue advantage of their positions whereas the poor people will become victims of such a law.

Justice Iyer further laid down in Rajendra's case that extraordinary grounds alone constitutionally qualify as special reasons as leave no option to the court but to execute the offender if state and society are to survive. One stroke of murder hardly qualifies for this drastic requirement however, gruesome the killings or pathetic the situation, unless the inherent testimony oozing from that act is irrevocable that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a blood thirstily tiger, he has to quit his terrestrial tenancy.\(^{223}\)

Krishna Iyer says that by punishing the individual, the focus is not on the individual as an individual but in fact the goal is 'salvaging' him for the society.\(^{224}\) He finds the goal in the words of Tolstoy: "The seeds of every crime are in each of us!"\(^{225}\) It means that

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223. Supra note 212.
224. Supra note 212 at 929.
society - the collection of individuals is diseased and not any individual. He hopes that the moment it is realised, murder will be rooted out of the mind of man. And in order to reform the society, there should be 'full unfoldment' of personality of every individual. He believes that murder can be rooted out only due to such 'material and ethical conditions' of just society and not by 'penal cannibalism.'(226)

Sen, J. in his dissenting judgement disagreed with Krishna Iyer, J. and upheld the validity of death sentence. He opposed the guidelines of Iyer, J. which according to him would render the death penalty practically a dead letter.(227)

Seervai has supported the minority judgement of Sen J. and has submitted that the majority judgement (delivered by Justice Iyer) is not only clearly wrong and productive of public mischief, but is subversive of the judicial function and should be overruled.(228)

Krishna Iyer believes in the reformatory and rehabilitatory role of penology. Therefore, he does not believe that life should be extinguished by way of penalty for crime. He believes that higher cultural and social norms do not favor the killing of a person by operation of law except in cases of brutal murders of hapless and helpless victims. He again confirmed his reformatory opinion in Dalbir Singh V. State.

226. Ibid.
227. Supra note 212 at 946.
of Punjab, where he says that the remedy lies not in extinguishing the delinquent's life but in measures of reform. He says 'special reasons' must vindicate the sentence and so must be related to why the murderer must be hanged and why life imprisonment will not suffice.

In Inderjeet V. State of U.P. Krishna Iyer, J. held that every 'judge-proof sentence' is not bad. But at the same time his Lordship was of the view that 'if a sentence .... is prescribed as a mandatory minimum and that is too cruel to comfort with Article 21 and too torturesome to be reasonably justiciable, or socially defensible under Article 19, then a case for judicial review may arise.'

This view of Justice Iyer is right up to some extent, because if a sentence is made mandatory then the accused has no other alternative to escape from that sentence. For example, Section 303 IPC has made death sentence mandatory on the prisoner who is already a murderer and who again murders somebody inside the prison. Sometimes it may happen that some inmate of the prison is killed by the jail authorities but in order to save themselves they put this change on some other inmate who is undergoing life imprisonment for murder. Now even if that murderer has not committed the murder within the jail, but still he would be hanged under Section 303 IPC.

229. AIR 1979 SC 1384.
230. AIR 1979 SC 1867.
because within the jail he won't be able to collect much evidence and everything would be hushed up by jail authorities.

So the decision given by Justice Iyer in Inderjeet's case was followed by Justice Chinappa Reddy in Mithu V. State of Punjab. In this case constitutionality of Sec.303 IPC was challenged which provides compulsory death sentence to a person who being under sentence of imprisonment for life, commits murder. The Supreme Court held that Sec.303 IPC violates Article 14 and 21 of the Constitution. Justice Chinappa Reddy observed:

"Section 303 IPC excludes judicial discretion. The Scales of Justice are removed from the hands of the judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrevocable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all the bad laws." (232)

It was laid down in this case that Sec.303 IPC is violative of Article 14 because this section regards life convict to be a dangerous class without any scientific basis and thus violates Article 14 and similarly by completely culting out judicial discretion it becomes a law which is not just, fair and reasonable within the meaning of Article 21.

So it is clear from all the decisions given by Justice Iyer that he favours abolition of death penalty. But

231. AIR 1983 SC 476.
232. Id at 484.
keeping in view the present position where no one values the life of another and daily cold blooded murders are being committed, it would not be wise to abolish death-penalty completely. Although there are chances of some innocent person being hanged but Supreme Court has solved this problem to some extent in Bachan Singh\textsuperscript{(233)} case where it has held that death penalty should be awarded in 'rarest of the rare cases' and more so by the 1973 Amendment where it was provided that life imprisonment is the rule and death penalty an exception to be resorted to for reasons to be stated.

Seervai has supported the minority judgement of Sen, J. and has submitted that the majority judgement (of Krishna Iyer J.) is not only clearly wrong and productive of public mischief, but is subversive of the judicial function and should be overruled.\textsuperscript{(234)}

The matter was again considered by a Bench of five Judges of Supreme Court in \textit{Bachan Singh V. State of Punjab}.\textsuperscript{(235)} Delivering the majority judgement, Sarkaria, J.\textsuperscript{(236)} held that the provision of death penalty as an alternative punishment for murder is not violative of Article 21. He

\begin{enumerate}
\item \textsuperscript{233} \textit{Supra} note 213.
\item \textsuperscript{234} \cite{seervai_constitutional_law_of_india}
\item \textsuperscript{235} \textit{Supra} note 213.
\item \textsuperscript{236} For himself and on behalf of Chandrachud, CJ, A.C. Gupta and U.N. Untwalia, JJ.
\end{enumerate}
observed that article 21 clearly brings out the implication that the Founding Fathers recognised 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. After referring to the International Covenant on Civil and Political Rights, the learned judge did not agree with the guidelines provided by Justice Iyer in Rajendra's case and observed:

"By no stretch of imagination can it be said that death penalty under section 302, IPC, either per se or because of its execution of hanging constitutes an unreasonable, cruel or unusual punishment... it cannot be said that the framers of the constitution considered death sentence or the prescribed traditional mode of its execution as a degrading punishment which would defile 'the indignity of the individual' within the contemplation of the preamble of the Constitution." (238)

However, Justice Iyer's rulings were accepted by Bhagwati J. in his minority judgement where he has opposed the death penalty and has declared it as ultra vires and void as being violative of Article 14 and 21. According to majority

237. Article 6 of the International Covenant on Civil and Political Rights also does not prohibit death sentence. It says: (1) Every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of life. (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime. The repriments of Article 6 are same as those of Articles 20 and 21 of the Indian Constitution.

238. Supra note 173, p.930.
view, even the procedure provided in Criminal Procedure Code for imposing capital punishment for murder and other capital crime cannot be said to be unfair, unreasonable and unjust.

**Delay in Execution of Death Sentence:**

Another question which attracted judicial attention is whether delay in executing death sentence should result in quashing of this sentence, otherwise it would violate Art. 21.

Lord Scarman and Lord Brightman in their minority view in *Noel Ribi, V. A.G.* observed:

"It is no exaggeration, therefore, to say that the jurisprudence of the civilised world much of which is derived from common law principles and the prohibition against cruel and unusual punishment in English Bill of Rights has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another."

Krishna Iyer Justice in *Ediga Anamma V. State of Andhra Pradesh* while pleading for the accused said, 'The Session Judge pronounced the death-penalty on December 31, 1971 and we are now in February, 1974. The prolonged agony has ameliorative impact, thus death penalty should be converted into life-imprisonment. So the Supreme Court agreeing with the observations of Lord Brighton in *Noels' case* and Justice


240 Sunra note 220.
Iyer's observations in *Ediga Anama's case* laid down in *T.V. Vatheeswaran V. State of Tamil Nadu*\(^{241}\) that prolonged detention to await the execution of death sentence is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to, quash the sentence of death. Making all reasonable allowances for the time necessary for appeal and reprieve, delay exceeding two years should be considered sufficient to entitle the person to invoke article 21 and demand quashing of death sentence converting into life imprisonment. The cause for delay is immaterial even if the convict is himself responsible.

The decision was overruled by Supreme Court in *Sher Singh V. State of Punjab.*\(^{242}\) It held:

"The fixation of time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigation process and the proceedings before the executive."

The court must find why the delay was caused and who is responsible for it. If it is not done, the law laid down by this court will become an object of ridicule by permitting a person to defeat it, by resorting to frivolous proceedings to delay its implementation.

To begin with *Rajendra Prasad's case*\(^{243}\) at this stage might be a chronological upset, yet for a functional inference it would be better to consider this landmark decision

\(^{241}\) AIR 1983 SC 361.
\(^{242}\) AIR 1983 SC 465.
\(^{243}\) Supra note 212.
by Justice V.R. Krishna Iyer along with dissenting opinion of Justice Bhagwati (as he then was) in Bachan Singh's case. Justice Iyer, through Rajendra Prasad moves with futurologists wisdom to canalise the sentencing discretion regarding death sentence in its integral perspective lest it should have been declared ultravires in view of articles 14, 19 and 21 of the Constitution of India. Had the spirit of Rajendra Prasad been carried through plurality in Bachan, it would have, perhaps not been a judicial compulsion for Justice Bhagwati to declare S. 302 IPC unconstitutional while dissenting in Bachan.

Justice Iyer's judicial effort in Rajendra was through 'interstitial legislation', to provide constitutional basis to the capital punishment if at all it is to survive in relation to certain restricted types of offences:

"We banish possible confusion about the precise issue before us - it is not the constitutionality of the provision for death penalty but only the canalisation of the sentencing discretion in a competing situation. The former problem is now beyond forensic doubt after Jagmohan Singh, and the latter is in critical need of tangible guidelines at once constitutional and functional." (244)

Justice Iyer in Rajendra, while combining science and romantic theology, superstition and reason and taking help of even Gandhi and Buddha to afford a human context to capital punishment, has also bridged the discriminative gap between conviction and death sentence.

244. Id at 920.
According to Justice Iyer, the extinction of human life could be permitted only where the violator is a social gangrene and nothing less than elimination could serve the penological pursuit. Considered thus, the death penalty could be inflicted in the cases of three categories of criminals that are scientifically beyond any therapeutic treatment:

1) for white-collar offences,
2) for anti-social offences; and
3) for exterminating a person who is a menace to the society i.e. a hardened criminal

If we accept, however, the synthesis emerging out of judicial dialectics along with the present legislative framework, the sphere of death penalty would be reasonably restricted and it would be resorted to in the rarest of rare situations. We lack convincing empirical studies regarding the penological significance of capital punishment which could suggest either its abolition or retention. Even if we have it, the empiricism and legalistics alone cannot decide the issue and it has to be considered in the perspective of basics characteristically inherent in a particular social and political order.

According to Justice Krishna Iyer, when a murderer's neck is noosed and strangled, his (murderer) dignity is defiled and he loses the right to life (enshrined in article 21) and the fundamental freedoms. He also observed that if a sentence is prescribed as a mandatory minimum and that is too cruel to
to comfort with article 21 and too torturesome to be reasonable justifiable or socially defensible under article 19 then a case for judicial review may arise.

Justice Iyer's this point of view regarding hanging by neck was negatived in the case of Deen Dayal and Others v. Union of India. In this case the petitioners who were sentenced to death for the offence of murder in their writ petitions under article 32 assailed the constitutional validity of section 354(5) of the Code of Criminal Procedure which provides that "when any person is sentenced to death, the sentence shall direct that he be hanged by the neck, till he is dead."

It was contended that hanging a convict by rope is a cruel and barbarous method of executing a death sentence and is violative of article 21. Rejecting the challenge to the constitutionality of the said provision, the court held that the method prescribed by section 354(5) of the Code of Criminal Procedure - 1973 for executing a death sentence does not violate the provisions contained in Article 21 of the Constitution. It was observed:

"If a prisoner is sentenced to death it is lawful to execute the punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Humaneness is the hallmark of civilised laws.

245. AIR 1983 SC 1155."
Therefore, torture, brutality, barbarity, humiliation and degradation of any kind is impermissible in the execution of any sentence. The process of hanging does not involve any of these directly, indirectly or incidentally. A two fold consideration has to be kept in the mind in the area of sentencing. Substantively, the sentence has to meet the constitutional prescriptions contained, especially in Art. 14 and 21. Procedurally the method by which the sentence is required by law to be executed has to meet the mandates of article 21. The mandate of article 21 is not that death sentence shall not be executed but that it shall not be executed in a cruel, barbarian or degrading manner. Hanging as a mode of execution is not relentless in its severity." (246)

Justice Iyer believes that Section 302 is silent, so the judges have to speak, because the courts must sentence daily. Merely to say that discretion is guided by well recognised principles shifts the issue to what those recognised rules are. Are they the same as were exercised judicially when Bhagat Singh was swung into physical oblivion? To this Justice Iyer replies in negative and continues to say that the task is to translate in new terms the currently consecrated principles, informed by tradition, methodised by analogy disciplined by system and subordinated to the primordial necessity of order in social life. Moreover, the need for well recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power may even militate against article 21.

Thus Justice Iyer believes that death penalty does violate article 21 by taking away his (murderer's) right to

246. Id at 1186.
life and fundamental freedoms but at the same time admits that brutal murderers of hapless and helpless victims and economic and social criminals may deserve death penalty.

In conclusion we can say that Krishna Iyer believed in the reformatory and rehabilitatory role of penalogy. Therefore, he does not believe that life should be extinguished by way of penalty for crime. He believes that higher cultural and social norms do not favour the killing of a person by operation of law except in cases of brutal murders of hapless and helpless victims. However, he is quite clear regarding the imposition of death-penalty on economic and social criminals. Justice Krishna Iyer despite his sense of humanism does not appear to be wholly abolitionist of capital punishment. He himself admitted in Ediga Anamma:

"The final position as we see it, is neither with the absolute abolitionist nor with the retributicnist. It is relativist and humanist, conditioned by the sense of justice and prevailing situation of the given society." (247)

That is why he preferred the imposition of death sentence in certain cases due to the facts and circumstances of those cases. (248)

247. Supra note 220.

One of the most neglected aspects of criminal justice system is the delay caused in the disposal of the cases and detention of the poor accused pending trial.

It is undesirable that the criminal prosecution should wait till everybody concerned has forgotten all about the crime. Procrastination of trials may sometimes result in injustice because of an unduly prolonged process much of the material evidence may perish as when witnesses die or situations are altered.

Krishna Iyer J. and Bhagwati J. (as he then was) were aware of all these maladies. In Maneka’s case\(^{249}\) these Justices stressed the ‘procedure established by law’, should be just, fair and reasonable and not oppressive or fanciful. If the procedure is not just, fair or reasonable, then it would be violative of Article 21 of the Constitution. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person.

It was through the effort of these Justices that a prisoner could challenge his detention in the jail for a long time by alleging violation of article 21 of the Constitution. Procedural law is expected to quicken and not slow down the pace of justice, but often it acts contrary

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249. Supra note 78.
to this purpose. Also, a delay in justice may sometimes even render the remedy infructuous.

Justice Iyer in Schmitz's case (250) brought forward the importance of speedy trial and observed that a jurisprudence of quick-acting and comprehensive remedies, demanding restructuring and streamlining of the judicative apparatus and imparting operational speed and modernisation of the whole adjectival law and practice, is urgent and important...
The legal instrumentality alone truly sustains the rule of law which delivers justice with inexpensive celerity, finality and fullness. The big right remedy gap is the base of our system.

In another case, (251) Justice Iyer suggested that systematic slow-motion in dispensation of justice must claim the nation's immediate attention towards basic reformation of the traditional structure and procedure. Some delays are unavoidable in the existing court procedure, and therefore, Justice Krishna Iyer makes the following recommendations:

"Commercial causes should, as far as possible, be adjusted by non-litigative mechanisms of dispute-resolution, since forensic processes, dilatory and contentions, hamper the flow of trade and harm both sides, whoever wins or loses the lis." (252)

Justice Krishna Iyer, while dealing with the bail petition in Babu Singh's case remarked:

"Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial' whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings." (254)

In Naraimhulu V. Public Prosecutor (255), Justice Iyer observed that realism is a component of humanism which is the heart of the legal system. We come across cases where parties have already suffered 3, 4 years and in one case over 10 years in prison. These persons may perhaps be acquitted .... difficult to guess. If they are, the injustice of innocence long in rigorous incarceration inflicted by the protraction of curial process is an irrevocable injury and, at the best, law is vicariously guilty of deprivation of citizens liberty, a consummation vigilantly to be vetoed. (256)

Again in Nimeon Sanoma V., Home Secretary, Govt. of Meghalaya (257) Justice Iyer expressed his strong displeasure at the chaotic state of delays in investigations and trials in the following words:

254. Id at 528.
255. AIR 1978 SC 429.
256. Id at 433.
257. AIR 1979 SC 1518.
"Criminal justice breaks down at a point when expeditious trial is not attempted while the affected parties are languishing in jails. The Criminal Procedure Code in §§ 167, 209 and 309 has emphasised the importance of expeditious disposal of cases, including investigations and trials. It is unfortunate, indeed pathetic, that there should have been such considerable delays in investigations by the police in utter disregard of the fact that a citizen has been deprived of his freedom on the ground that he is accused of an offence, we do not approve of this course and breach of the rule of law and express our strong displeasure at the chaotic state of affairs verging on the whole safe breach of human rights guaranteed under the constitution especially under article 21 as interpreted by this Court. (258)

The seed of speedy trial which was sown by Justice Iyer was properly fertilized by Bhagwati J. (as he then was) in later years. In Hussainara (259) Bhagwati J., declared that the right to speedy trial is an essential part of fundamental right to life and liberty enshrined in article 21 of the Constitution and stated that if a person is deprived of his liberty under a procedure which is not reasonable, fair or just, such deprivation would be violative of his fundamental right and secure his release. He further observed that by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21. (260)

258. Ibid.
260. Id. at 1365.
It is submitted that Justice Iyer had been recommending for speedy trial in many cases even before Maneka, but after the case of Maneka, it began to be recognised as a fundamental right. So we can safely conclude that the need for the initiation of speedy trial was for the first time felt by Justice Iyer. Speedy trial is now an important limb of Indian Criminal Jurisprudence. It is covered within the scope of Art. 21. Therefore, any violation of this would amount to violation of Art. 21.

**NATURAL JUSTICE**

Natural Justice is a concept of common law and it is the common law counterpart of the American 'Procedural Due process'. Natural justice represents higher procedural principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual has been very clearly expounded in England by the House of Lords in the famous case, Local Government Board V. Arlidge (261). Lord Hardane observed in that case:

\[(w)\]hen the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. (262)

261. (1915) AC 120.
262. Ibid., p. 132.
Lord Morris in *Wiseman v. Borneman* said, 'natural justice is a 'fair play in action'." (263) He again described it as a majestic conception. (264)

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making power. There is therefore, bewildering variety of administrative procedure. Sometimes the statute under which the administrative agency exercises power lays down the procedure which the administrative agency must follow but at times the administrative agency is left free to devise its own procedure. However, the courts have always insisted that the administrative agencies must follow a minimum fair procedure. This minimum fair procedure refers to the principles of natural justice. Justice Krishna Iyer has been evoking the principles of natural justice in his judgements. (265)

263. (1971) AC 297.
Justice Iyer says that 'Natural Justice is the natural sense of what is right and wrong'. In 1970, he held the view that natural justice like modern physics, is expanding rapidly and becoming even meta-physical, as an inevitable sequel to the insistence of civilised man on civilised processes for affecting a citizen's civil rights i.e. on just means to just ends. (266)

Rules of natural justice are available where there is unreasonableness. These can operate in the areas which are not covered by any law validly made. In the words of Justice Hegde, they do not supplant the law of the land but supplement it. (267) According to Justice Bhagwati, 'Natural justice is a great humanising principle intended to invest law with fairness and to secure justice.' (268) While tracing the history of natural justice Krishna Iyer gives a secular-spiritual touch to it in his words:

"Natural justice is a pervasive facet of secular law where a spiritual touch enlives legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest and not a mystic testament of judge-made law. Indeed from the legendary days of Adam - and of Kautilya's Arthashastra - the rule of law has had this stamp of natural justice which makes it social justice." (269)

266. P.M. Kurien V. P.S. Raghavan AIR 1970 Kerala 142 at 153.
267. AIR 1978 SC 597.
Extent and Application of Natural Justice:

In 1951 (270) Bose J. made an observation: "Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognizable way so that all men know that it is... The thought that a decision in the secret recess of a chamber to which the public have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is obnoxious to civilized men." (271)

Evershed rightly observed:

"The principles of natural justice are easy to proclaim but their precise extent is far less easy to define. (272)

No doubt natural justice is mainly applied by quasi-judicial bodies, but Krishna Iyer wanted to extend it to administrative sphere with cautious limit. He agreed with Justice P.B. Mukherjee that:

"Disciplinary tribunals, on whose findings the whole life's career of a public servant depends, should not in fairness be allowed to remain in this state of primitive procedure and distressing obscurity which are not calculated to offer and foster that sense of security in the service which is fundamental in any ordered society." (273)

271. Ibid.
273. Narinder Nath Bagchi V. Chief Secretary, Government of West Bengal. AIR 1951 Cal. 1.
The courts are often faced with the problem in applied justice. The Supreme Court clarified this feature in a decision reported in 1968.\(^{(274)}\)

"The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authorities, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

Keeping in view this decision, Justice Krishna Iyer observed in 1970 that determination of extent would avoid making natural justice 'a ubiquitous bogie of the Administration and the nostrum in the hands of every afflicted litigant on the one hand and of emasculating its potency and applicability by verbal devices like administrative act, ministerial duty, privilege (not right), disciplined forces, domestic tribunals etc.... on the other.'\(^{(275)}\)

Krishna Iyer rightly holds:

"Natural justice unbound is as bad as its being kept out of bounds." \(^{(276)}\)

While delivering separate judgement in Kurien's case Justice Raman Nayar observed that although the requirements of natural justice must necessarily vary according to the circumstances

\(^{(276)}\) Ibid.
of each case, the test as to whether there has been a violation is simple but difficult in application. The test is same for both the judicial as well as domestic tribunals. The test is that there must be a manifest failure of justice which shocks the conscience. (277)

Lord Morris of Borthy-Y-Gest in his address before the Benthan Club observed:

"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a 'majestic' conception? I believe it does. Is it just rhetorical but vague phase which can be employed, when needed to give a glass of assurance? I believe that it is very much more. If it can be summarised as being fair play in action - who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled if it lacks more exalted inspiration. (273)

Above mentioned observations denote the notion of natural justice determined by justice Krishna Iyer. He has rightly laid down:

"It is fair to hold that subject to certain necessary limitations natural justice is now brooding omnipresence although varying in its play." (279)

277. Ibid. p.150.
279. Supra note 269 at 871.
He has held that if we have understood 'the soul of rule as fair play' then we must hold that it applies to both administrative and executive power. According to him, natural justice operates in the field of administrative action, ordinarily when there is a duty to act judicially.

**Natural Justice - A Component Of Fair Procedure:**

The doctrine of natural justice is a part of the humanist discipline of the executive authorities who affect rights of citizens by their acts. So Krishna Iyer held in 1970 that it was the duty of the courts to keep the executive actions in the 'leading strings of fair procedure'. He fairly laid down that every person should be given the opportunity to explain his conduct, but this opportunity should be 'real and not ritualistic, effective and not illusory and must be followed by a fair consideration of the explanation offered.' (281)

He held in another case decided in 1970 that 'fundamental fairness must be observed even by administrative tribunals, domestic or other, and natural justice must therefore inform their operations'. (282)

In 1974, while examining the invalidatory consequences of violation of natural justice, he viewed that if fair procedure is not used, it would present 'a picture of juristic jungle'- error versus excess of jurisdiction, declaration of invalidity as distinguished from voidable orders being avoided, order void ab-initio and valid till voided retroactively by competent tribunal and the directory-mandatory and ministerial-judicial dichotomies and allied problems. However, in a case decided in 1977 he said that "natural justice cannot be petrified or fitted into rigid moulds".

He also held the same view in another case:

"Natural justice is no unruly house, nor a lurking landmine, nor a judicial cure all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case can be exasperating." (286)

In M.H. Hoskot Krishna Iyer laid down that 'one component of fair procedure is natural justice'. So he held that it is the demand of natural justice (being a component

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286. Ibid p.969.
of fair procedure) that copy of the judgement must be supplied to the prisoner so that he could make appeal in time and provision of free legal services for an indigent prisoner must be made. (233)

In another case (289) where the Punjab Jail Manuals were priced so high that a prisoner could not afford to buy, he said this is an unconscionable action of the Government and further added that 'legislative tyranny may be unconstitu­tional if the State by devious methods like pricing legal publications monopolised by government'. We can better get his idea of natural justice in his words:

"Natural justice is a pervasive doctrine integral to processual fair play in Indian Jurisprudence." (290)

In Sunil Batra II, also following the view that natural justice is a component of fair procedure, he has held that while dealing with prisoners, fair procedure must be followed. So it can be understood that it can only be natural justice which demands that no curtain can be drawn between the prisoner and the constitution.

Following the concept of natural justice as laid down in Sunil Batra (I) and (II), Justice Iyer has expressed in Kishore Singh's case (291) that if special restrictions of a punitive or harsh character have to be imposed for convincing security reasons, it is necessary to comply with natural

289. Union of India V. Satish Chander AIR 1980 SC 600 at 603.
290. Sunil Batra V. Delhi Administration, AIR 1980 SC 1579.
So according to him fairness is the main demand of natural justice, but he remarked that fairness is a 'flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction'. Krishna Iyer has his own way of writing and his words present in a beautiful manner, the fluctuations in the procedural concepts:

"Fairness is not a bull in a China shop or a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more - but nothing less." (294)

This procedural aspect can be tested under the grounds of natural justice:

**Bias**

Lord Hewart's classic dictum is suitable to begin with this ground. He observed:

"Nothing is to be done which created even a suspicion that there has been an improper interference with the course of justice." (295)

In *Dimes v. Grand Junction Canal Co.* (296), it was demonstrated that "if a member of such (judicial) a body is subject to a bias, whether financial or other, in favour of or against either party to the dispute or is in such a position that

292. Ibid. at 630.
294. Ibid.
296. 1852-3 HLC 759.
must be assumed, he ought not to take part in the decision or even to sit upon the tribunal."

In Reg. V. Rand, (297) it was held that a real likelihood of bias must be shown.

In P.M. Kurien, malpractice at examination was alleged against the candidate. College council which included Principal, following the report of enquiry officer according to the procedure, passed the appropriate order. Rejecting the contention of bias against the Principal, Justice Iyer held that a reasonable person would not think in such circumstances that there was a bias. (298)

However, it is submitted that in circumstances in which the authority competent to decide is the very authority to initiate proceedings, the fulfilment to some extent of the double role of prosecutor and judge is inevitable, and it is not to be presumed that a person who has once decided a matter without due hearing would have such a bias in favour of his decision as not to be capable of reaching a fair decision after due hearing.

Krishna Iyer's view against bias can be found in his observation in Nawabkhan:

[297. 1866-1 QB 230.]

[298. P.M. Kurien V. P.S. Raghvan. AIR 1970 Kerala at 155.]
"You must not permit one side to use means of influencing a decision which means are not known to the other side." (299)

Lord Denning also expressed the paramount policy consideration behind this rule:

"Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking, 'the judge was biased.' (300)

It is submitted that justice should not only be done but also seem to be done. Above all, the decision must not be biased on any ground, for example, no man should be a judge in his own cause. And even if the judge is not biased but any party feels that he will be biased due to some reason, justice should be done to that party by not making that man the deciding authority.

AUDI ALTERAM PARTEM

(a) Fair Hearing:

The principle that no body should be deprived of his vested right or be punished without having been given an opportunity to offer an explanation on his behalf is a fundamental principle of the English common law. In *Wiseman v. Borneman* (301) Lord Morris observed that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. This rule has been

299. AIR 1974 SC 1471 at 1475.
300. AIR 1978 SC 873.
301. 1971 AC 297.
reiterated by Lord Denning in *Schnidt V. Secretary of State for Home Affairs.* (302)

In India also this rule has been adopted. In *Nawabkhan,* Justice Iyer considers fair hearing as constitutional requirement and failure to comply with such a duty is fatal. Justice Iyer confirmed his views in *Maneka Gandhi* (304) where he said that when applying the passports Act, over-breadth, hyper-anxiety, regimentation complex and political mistrust etc., the provisions must be humanised by natural justice. He reiterated his decision again in *Mohinder Singh Gill* (305) and *Amrik Singh's* (306) cases also. H.W.R. Wade in his lecture on 'The Mission of the Law' holds that the essential mission of the law in this field is to win acceptance by administrators of the principle that to hear a man before he is penalised is an integral part of the decision making process. (307)

Justice Iyer adopted the Lord Denning's expression to the rule of fair hearing when he says that if the invisible audience sees a man's case disposed of unheard, a chorus of no-confidence will be heard to say, that man had no chance to defend his stance. (303)

303. *Supra* note 304 at 1477.
304. AIR 1978 SC at 666.
305. AIR 1978 SC 851.
306. AIR 1980 SC 1447.
308. *Supra* note 305 at 873.
He beautifully remarked:

"The philosophy behind natural justice is, in one sense, participative justice in the process of democratic rule of law." (309)

Justice Krishna Iyer says regarding rule of audi alteram partem that "the exceptions to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in these exclusionary cases nothing unfair can be inferred by not affording opportunity to present or meet a case. Text book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law life-less absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation." (310)

(b) Reasoned Decisions Or Speaking Orders:

The term 'natural justice' presupposes that justice must have been done, because without substantive justice being done mere trappings of judicial procedure reduce the proceedings to a farce. Obviously, the content of that justice must always depend on the merits of the case. But inspite of this, the citizen who may often be ignorant of the larger issues of law, fact and policy involved in his case, must have the satisfaction that the conclusions arrived at by the tribunal are right and that he has obtained full

309. Ibid at 381.
310. AIR 1978 SC 85 at 872.
justice. With this end in view, a procedural requirement has been developed that the administrative authorities exercising judicial functions must give reasons for their decisions.

Pleading for reasoned decisions, A.S. Misra expresses that man's desire to know the reason for an adverse judicial or quasi judicial order, especially one that injures his interests, must be satisfied. (311)

Lord Caim in Overseers of the Poor of Walsall V. London and North Railway Co. (312) has observed:

"If the court of Quarter Sessions stated upon the face of the order by way of recital, that the facts were so and so, and the grounds of its decisions were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order in the opinion of any party, was not such as to warrant the order, then that part might go to the court and Queen's Bench to remove it by certiorari and when so removed to pass judgement upon it, whether it should or should not be quashed."

According to Robson (313) it facilitates the work of the appellate authority in giving decisions, it also develops the reasoning process of the adjudicator and inculcates in him a sense of fairness.

313. Robson, Justice and Administrative Law, p.381 (1951)
In Bhagat Raja V. Union of India\(^{314}\), where the question arose whether it was incumbent on the Central Government to give any reasons for its decision on review, the court held that if the State Government gives a number of reasons some of which are good and some are not and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances 'speaking order' is called for.

In Ibrahim Kunju, Justice Krishna Iyer held that 'giving reasons for orders is certainly a requirement of natural justice, but this does not mean that every incidental or interlocutory or other similar orders must contain elaborate reasons.'\(^{315}\)

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\(^{314}\) AIR 1957 SC 1606; See also Narain Das V. Improvement Trust Amritsar (1973) 2 SCC 265; Mahabir Jute Mills V. Shibooan Lal Saxena (1975) 2 SCC 818; Tara Chand Khatri V. Municipal Corporation, Delhi (1977) 1 SCC 472 etc. In these cases it is held that it is not always necessary to give 'speaking orders'.

Projection of natural law concept into Article 21 is a new dimension to personal liberty, and this will lead to a future development of Indian jurisprudence in the lines of that in the United States where the Judiciary had over the years exercised the power to incorporate new rights into the Constitution.