I RIGHT TO FREEDOM : GENERAL

‘Freedoms are opportunities essential to the development of personality’, said Laski. The key of principle of justice demands that all individuals must be entitled to a minimum of freedom so to enjoy certain sphere of private life without any kind of control or restraint, in order to fully develop their individuality, to make them feel that they have a life of their own to live.

The founding fathers of the Indian Constitution, recognising the paramount place of the individual in society and in state, endeavoured to incorporate adequate provisions in the Sacred document in order to ensure his personal rights of freedom. The right to freedom is guaranteed to Indians by Articles 19 to 22 of the Constitution. Right to Freedom is also guaranteed in the form of Freedom of Religion by Articles 25 to 28 of the Constitution.

2. To quote Justice H. R. Khanna: "The defense of liberty consists in the "negative" goal of warding off interference. To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals, to block before him every door but one, no matter how noble the prospect upon which it opens, or how benevolent the motives of those who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live." Making of India’s Constitution by Khanna, H.R. (1981) P 32; J.S. MILL in History of European Political Philosophy by Bhandari Z.R. (1963) P 447.
3. As rightly said by Palkhivala: "Our Constitution is primarily shaped and moulded for the common man. It is a Constitution meant not for the ruler "but the ranker, the tramp of the road, who voluntarily surrender a part of their internal sovereignty" Democracy And Freedom by Palkhivala, Nana PP 17-18;
4. Right to Freedom is also guaranteed in the form of Freedom of Religion by Articles 25 to 28 of the Constitution.
that are enjoyed by the citizens in a free State. Articles 20 to 22, secure both to citizens and non-citizens certain Constitutional guarantees with regard to Right to life and personal liberty which can be taken away in the manner prescribed therein. Infact, these three Articles deal with penal laws whereunder the personal liberty or safety of an individual can be interfered with in the interest of society. Guaranting these freedoms, the architects of the Constitution also attempted to strike a balance between the liberty of the individual on the one hand and the security of the State on the other. As being the product of a compromise of two extremes, says Pylee, the Articles dealing with the Rights to freedom were required to be put under certain restraints, both for their proper

Originally, Article 19 (Art. 13 of the Draft Constitution) guaranteed "Seven Freedoms" to all citizens, which are namely: (i) Right to freedom of Speech and expression; (ii) Right to assemble peaceably and without arms; (iii) Right to form associations or unions; (iv) Right to move freely throughout the territory of India; (v) Right to reside and settle in any part of the territory of India; (vi) Right to acquire, hold and dispose of property (this is no longer fundamental Right after 44th Amendment Act, 1978); (vii) Right to practice any profession, or to carry on any occupation, trade or business.

6. Article 20 provides certain protections to persons accused of crimes. These are: (a) Protection against Export facto law; (b) Protection against Double Jeopardy; (c) Prohibition against selfincrimination.

Article 21 guarantees Right to life and personal liberty to all persons.

Article 22 deals with protection of a person against arrest and detention in certain cases; Also see views of Justice Patanjali Shastri on Right to freedom in A.K. Gopalan v. State of Madras. AIR 1950 SC 27 at PP 69-70; of Justice Mukherjea at p. 109; Justice Das's views at pp 113-114 See infra for details of this case.

7. To quote Granville Austin: "That fundamental rights, while protecting individual freedom, were not to prevent State intervention in the interests of the social revolution became evident in the drafting of several rights provisions." See The Indian Constitution, Cornerstone of A Nation by Austin, G. (1972 Indian Ed.) P 64.
enjoyment and for preservation of the infant Indian democracy. \(^8\)

In the Constituent Assembly, it was agreed that the rights could best be limited by attaching Provisions to the particular right and by providing for the rights to be suspended in certain circumstances. \(^9\) Shri Alladi K. Ayyar in a letter to B.N. Rau urged that, "all fundamental rights guaranteed under the Constitution must be subject to public order, security and safety," even though such a provision might to some extent neutralise the effect of these rights. \(^10\) And the "right to freedom" drafted by the sub-committee on fundamental Rights agreed to qualify each right with the proviso that the exercise of these rights be subject to 'public order and morality'. \(^11\) The sub-committee also agreed to Mr. Ayyar's suggestion of including separate clause relating to the need of imposing limitations on the right to freedom in situations of grave emergency and danger to the security of the State. \(^12\)

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8. See *India's Constitution* by Pylee, M.V. PP 92-93. To quote Pylee: "Having achieved Political freedom only recently the urge to exercise unfettered right to freedom was very much there. At the same time, there was also the realisation that the State had been brought into existence, was an infant State and if the newly-won Freedom was to be guaranteed by a stable political order it depended on the continued existence of that instant State which had yet to pass through many troubles. Therefore, the State should be preserved even if that entailed the abridgement to some extent of the rights guaranteed."


10. Ibid P 212. Infact, Shri A.K. Ayyar and Shri K.M. Munshi were two staunch advocates of the limitation of rights in the sub-committee on fundamental Rights.

11. Prof. K.T. Shah criticised the use of the term "Public Order and Morality", as he felt these were 'vague expressions', and change connotations substantially from time to time. Ibid.

12. Through Article 279 of the Draft Constitution (now 358 of the Constitution), it was established that if any law repugnant to freedoms of Draft Art. 13 (now Art. 19) were

Contd...
drafting committee further widened the scope of limitations on these freedoms under Art. 13 as provided by the Interim Report on Fundamental Rights. It laid down that restrictions could be imposed "in the interest of general public" and "any other matter which offends against decency or morality" or undermine the authority or foundation of the State". After having detailed discussion on each article, the Draft Committee finally guaranteed various freedoms to Indians Citizens, non-citizens through Articles 19 to 22, of the Constitution. This way, in India, the 'Right to freedom' differs from American 'Right to freedom', where the freedoms have been guaranteed in absolute form and this task has been left to the Courts to impose restraints on these freedoms. Repeating the criticism levelled against the restrictions, Dr. Ambedkar observed:

"What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms, and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of Police Power, it permits the State directly to impose limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute."[14]

passed during the emergency, the law should to the extent of this repugnancy be void when the emergency comes to an end. According to Dr. Ambedkar, Article 279 did not suspend the rights; but only made permissible certain state actions CAD IX pp 180-185.

13. See Judicial Review of Fundamental Rights by Reddy, P. Sarojini PP 110-111; Supranote 08 PP 221-222, 226;

14. Ibid pp 40-41, Shri Ayyar also expressed the similar views.
Out of seven freedoms guaranteed by the Key Article 19, Freedom of Speech and Expression is the most vital, fundamental and indispensable one, on which depends the existence of every other right, and therefore, its ambit has been expanded to a great extent through the judicial interpretations, making it grow far ahead of the imagination and design of its founding fathers.\(^{(15)}\)

II. FREEDOM OF SPEECH AND EXPRESSIONS (INCLUDING PRESS)

(A) Background, Meaning and Purpose:

Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Infact, freedom to air one’s views is the life line of any democratic institutions and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.\(^{16}\)

Right of freedom of speech and expression holds a pre-eminent position in all democratic countries of the world and it lies at the base of Anglo-American jurisprudence, Since best way to air one’s, personal thoughts is to express them, freedom of expression is vital part of free speech. Eversince the advent of art of writing, the views are exchanged mainly through writing medium.

\[\text{\textbf{15. To quote Laski; "A political system in which the pivot is the right of the citizen to be articulate about his wants clearly requires to safeguard his articulateness". Supranote 01 PP 118-119.}}\]

\[\text{\textbf{16. Life Insurance Corporation of India V. Prof. Manubhai D Shah (1992) AIR SCW 3099.}}\]
The great emperor Ashoka used to publish the Imperial Edicts on rocks and Pillars, also in the form of small pictures drawn on the walls of temples, some of which exist even today. This system appears to have continued till Mughal period. During the Mughal period, newswriters were appointed in different administrative units whose main function was to send reports to the head quarters about the administration though rarely the correct news reached the Emperor. Of all the Mughal rulers, Aurangzeb is stated to have allowed greater freedom to the newswriters. Though the circulation was extremely limited, yet the system of communicating news was very good and maintained some kind of communication link between the rulers and the ruled, but so far there was no printing press and all the news used to be hand written. (16-A)

During the British period of Indian history the first newspaper called the Bengal Gazette was published by an English man Mr. James Augustus Hicky in 1780. This was followed by other newspapers like The Indian Gazette and Calcutta Gazette and Oriental Advertiser. But all these newspapers had commercial objective in mind and devoted more space to official advertisements of the Company. Initially the English Press in India was not vociferous, had no trouble with the government but gradually it became quite vocal in criticising the administration

of the Company. First Censorship on the press was imposed in 1799 by the Governor General Marquess of Wellesly.\(^{(17)}\) Raja Ram Mohan Roy\(^{(18)}\) and Mr. James Buckingham played a significant role in freeing the press from the imposed shackles. Lord Macaulay was asked by Lord Metcalfe, the acting Governor General in the absence of Lord William Bentick, to draft a new Act so to give more independence to an individual to print without permission & he drafted \textit{Registration of Press Act 1935} which repealed most of the existing Regulations, and was a step forward in freedom of the press.

But after the Mutiny of 1857, the British government through \textit{The Press Act of 1857} reintroduced the retrograde features of the licensing regulations of 1823. After Mutiny, Lord Canning, the Viceroy of India, attempted to improve the relations between the press and the government by founding the Editor's Room where the journalists were at liberty to look into official papers involving public interest. This was very significant step, something similar to later Freedom of Information Acts, as enacted in USA and other European Countries. With the birth of the Indian National Congress in 1885, the Indian Press entered a new phase and newspapers both in English and Indian languages received a great spurt from 1858 to 1877.\(^{(19)}\)

\begin{itemize}
  \item 17. Ibid - P 11.
  \item 18. Mr. Ram Mohan Roy is known as the draftsman of "The Areopagitica of the Indian Press". He castigated the Regulation of 1799 and demanded "unrestrained liberty of publication" in his above appeal to the Calcutta Supreme Court, though it was rejected, Ibid - PP 12-13.
  \item 19. Ibid PP 14-15.
\end{itemize}
But the passage of Vernacular Press Act 1878 by Lord Lytton, (20) acted as a major blow to language newspapers as it imposed many checks on free flow of information. This retrogressive Act was repealed in 1881 by Lord Ripon. Further stringent measures were introduced in the first half of the 20th Century when the Press Act 1910 was passed empowering the Government to demand security from newspapers publishing any matter which might be considered to be obnoxious at the discretion of the Government.

During freedom struggle after the first World War, the Indian Press, particularly 1920 onwards played a significant contribution in awakening the political consciousness of the Indians. Mt. Gandhi exerted a powerful influence on the promoters of newspapers and his Young India, and Harijan played a Yeoman’s role in expanding the horizons of press freedom(21)

Even after the enactment of Government of India Act 1935, the attitude of the British Government towards the press particularly in the matter of freedom of information and comment was not encouraging. The Indian leaders, fighting for independence of India, through various meetings and reports like Moti Lal Nehru Committee Report (1928) and of the Sapru Committee Report (1945), raised voice for freedom of the press as one of

20. The first Press Commissioner was appointed during the tenure of Lord Lytton.

21. Ibid 15 The other outstanding names who worked for the press freedom are of Tilak, Gokhale, Lala Lajpat Rai, Aurobindo-Ghosh etc.
the basic freedom. The Objective Resolution as adopted by the Constituent Assembly, also mentioned of freedom of thought and expressions as one of the basic freedoms.

The founding fathers of Indian Constitution attached great importance to the freedom of speech and expression, which is regarded in all democratic Countries of the world as the very foundations, the indispensable condition, for the existence of every other right.

In the Draft report of the Sub committee on fundamental rights, five specific rights of the citizens were formulated in the form of Cl. (9) to cl (14), and the foremost was (1) the right to freedom of speech and expression, which has been prescribed both in Mr. Munshi’s & Dr. Ambedkar’s drafts. The initial draft of sub committee as well as the drafts of both Munshi and Ambedkar also mentioned about right to secrecy of correspondence, and this suggestion met an opposition of Shri. A.K. Ayyar who felt that its inclusion as a fundamental right might seriously affect the provisions of the Indian Evidence Act

22. See Supra Ch. II (for objective Resolution) Also see Freedom of the Press; Some Recent Trends by Justice Venkata Ramiah, E.S. (Endowment Lecture 1984, Advocates Association in Bangalore) PP. 1 to 16.

23. See Press Law (Tagore Lecturers) by Mudholkar, J. R. (1975) PP 1-2; Also see "Freedom of the Press, its contents and facets" by Sorabjee, Soli J in The Right to Be Human (Ed) by Buxi, Upendra P 173.

24. Mr. Munshi’s draft also included the guarantee of freedom of the press subject only to such limitations imposed by the law of the union as might be necessary in the interests of public order or morality; whereas Dr. Ambedkar’s draft provided for freedom of speech and of press in an absolute terms. Supranote 09 P 211.
and would give all private correspondence the rank of a State Paper. He believed that the provisions of Indian Post Office Act were quite sufficient for safeguarding the secrecy of private correspondence and there was no need to insert them in Constitution. Mr. K.M. Panikkar supported Mr. Ayyar's contentions and said that any such guarantee would restrict unnecessarily the powers of the executive machinery. And Mr. Ayyar's suggestion was accepted by the Advisory Committee when it deleted sub-clause (d) of Cl. 10 of the Draft Article on April 21, 1947.

Mr. Ayyar also showed dissatisfaction with clause (9) on the ground that specific reference to "obscene, slanderous and libellous utterances" in the restrictive proviso to the "Freedom of Speech and expression" in subclause (a) might effect adversely section 153-A(26) of the Indian Penal Code and might give rise to objection that "Preaching class hatred" was not caused, & so it was necessary to specifically mention it in the proviso, "to stifle any tendency on the part of the people to promote it" Mr. Ayyar was supported by Shri Rajagopalachari but opposed by Mr. Munshi, Bakshi Tek Chand & S.P. Mookerjee who favoured the

25. Ss. 120 to 127 of the Indian Evidence Act deal with the secrecy of Correspondence.

26. Section 153-A of the I.P.C. states: "Whoever by words, either spoken or written, or by visible representation, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of the citizens of India shall be punished with imprisonment which may extend to two years, or with fine, or with both".
retention of the draft as recommended by the Sub-Committee. (27) Mr. Mookerjee's contention was that the insertion of the words "Class hatred" would be dangerous in so far as it might be abused by a party in power construing as 'class or communal hatred" even a simple expression of opinion against it. Mr. Tek Chand also felt that there was no section in the whole of the Indian Penal Code which had been more abused by the Government of the time than section 153-A with its sanction for prosecuting people on the ground of creating 'Class hatred" (28) The Draft Article 13 as finalised by the Drafting Committee after detailed deliberations in Oct. 1947, guaranteed to all citizens seven freedoms subject to restrictions and the first one was freedom of speech and expression under Cl. (a) subject to restraints imposed by Cl. (2) & which did not exclude the word 'Libel' or 'Slander' as desired by Shri Ayyar. (29)

27. The draft Cl.(10) (that consolidated Cl.9 to 14 under single provision) as recommended by the sub-committee read as follows: "There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be, is threatened;
(a) The right of every citizen to freedom of speech and expressions.
The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law. Supra note 08 P 313.

29. Article 13 of the Draft Constitution read as (1) subject to the other provision of this Article, all citizens shall have the right;
(a) to freedom of speech and expression;
(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or present the state from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the state. Ibid PP 217-218.
When this Draft Constitution was circulated for eliciting comments and reactions, various amendments and suggestions were made in regard to the Art. 13.(30) For instance, Jaya Prakash Narayan wanted the article to be redrafted containing express provision among others relating to freedom of the press and secrecy of postal, telegraphic and telephonic communications. In reply to this proposition, B.N. Rau held; "It is hardly necessary to provide specifically for freedom of the press as freedom of expression provided in sub-clause (a) of Clause (1) of Article 13 will include freedom of the press. It is also hardly necessary to include secrecy of postal, telegraphic and telephonic communications as a fundamental right in the Constitution itself as that might lead to practical difficulties in the administration of the Posts and telegraph department. The relevant laws enacted by the Legislature on the subject (the Indian Post Office Act 1898, and the Indian Telegraph Act 1885) permit interception of Communications sent through Post, telegraph or telephone only in specified circumstances, such as on the occurrence of an emergency and in the interests of public safety". (31)

Further demand for the separate mention of the "Freedom of the Press" in Cl. (1) of Art 13 was made by K.T. Shah, Damodar Swaroop Seth and K.M. Lahiri and some other members. (32) And replying to the debate in the Assembly Dr. Ambedkar

31. Ibid pp 219-220;
32. C.A.D. Vol VII 712, 715-25, 458-59. For D.S. Seth's proposal see P 712 - where he submitted for the inclusion of freedom of the press explicitly in 13 (1)(a) by saying that, "the present is the age of the press and the press is getting more powerful today"; Prof. K.T. Shah's view P 715, while proposing for inclusion of freedom of press", Prof. Shah expressed astonishment for omission by draftsmen to insert explicitness this in the Draft Constitution, Mr. S.L. Saksena also wished to include 'Freedom of the Press' in Art 13 (ixa) at P 763.
explained "The Press is merely another way of stating an individual or a citizen". The press has no special rights which are not to be given or which are not to be exercised by the Citizen in his individual capacity. The editors or managers are all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of expressions, and in my judgement therefore no special mention is necessary for freedom of press at all". He felt that freedom of the Press was included in "freedom of expression.

Another change proposed in freedom of speech clause by majority of members including Munshi was to redraft the Clause(2) of Art. 13 so as to omit the word "Sedition". Moving amendment to this regard, Mr. Munshi suggested that the word "Sedition", as also used in the "notorious Section 124-A" of the Indian Penal Code, had been the bane of freedom fighters in Pre-Independence India, and had been grossly misused by the British Government. The gist of Mr. Munshi’s amendment was that an attack on the Government could not be made an offense under the law except when the freedom of speech was so exercised as to tend to overthrow the state itself of otherwise undermine its security. Mr. Munshi also proposed replacing the words "undermines the authority or foundation of the state" in Cl. by the words "undermines the security of, or tends to overthrow, the State". Both these proposals were finally accepted by the Assembly. (34) 

33. Ibid PP 779-830; Dr. Ambedkar fully endorsed the views of Mr. Ananthasayanam Ayyangar in this regard at PP 777-778.

34. C.A.D. Vol VII PP 730-31. Majority of the members unanimously hailed Mr. Munshi’s amendment to delete the controversial word "Sedition" from the Cl. (2);
Assembly also accepted the amendment proposed by Mr. M.L. Chattopadhyay who wanted the deletion of the words "subject to the other provisions of this article," at the beginning of Cl. (1) on the ground that they were necessary. (35) Several members including Hukum Singh Khandelkar, D.S. Seth, M.A. Baig staunchly raised the view for the deletion of restrictive clauses (2) to (6) of Draft Art 13, which had virtually rendered the general provision guaranteeing free enjoyment of the right nugatory, losing their original flavour. They questioned the desirability of vesting supreme authority in the legislature to impose limitations on these freedoms and moved various amendments stressing the role of the judiciary as the guardian of individual freedom. For instance Sardar Hukum Singh observed that the "Constitutional protection to the individual against the Coercive Power of the State" under Cl. (1) has been made illusory by Cls. (2) to (6) of Article 13. He proposed making the judiciary the arbitrator in cases of conflict between the fundamental right of an individual and a restrictive action of the state. (36) But his

35. Ibid P 713; Similar proposal for deletion of the words "Subject to ...." along with all sub clauses (2) to (6) of Art. 13 was made by Shri L.N. Sahu, at P 774;

36. C.A.D. Vol. VII PP 732-4 Sardar Hukum Singh also made reference of America where the Power is vested in the Supreme Court to resolve all disputes pertaining to individual's fundamental freedoms and their encroachment by legislatures and this way confidence is rightly reposed in the judiciary;

Also see H.J. Khandelkar's views P 765; Shri A.K. Ghosh's view PP 769-770 etc.
suggestion was not accepted. On the other hand, K.T. Shah suggested an amendment laying great emphasis on the rights and diluting the restrictive clauses and not favored the complete omission of the restrictive clauses. But majority of the members were for the retention of the restrictive clauses feeling that these were not only essential but were also dictated by the needs of the time. They recognised the role of the judiciary as the interpreter of the Constitution, but also laid stress on the desirability for legislative Control of the right to freedom. Mr. K.L. Hanumanthia observed that the legislature being the representative of the people, there was hardly any reason for fear from it, and he also explained the reason for the limitations by saying that these are required to check violent man from having his way under the colour of these rights.

Speaking on the same line, Mr. Brajeshwar Prasad also held;

"Individual freedom is risky in a community where more than 80 percent of the People are sunk in the lowest depths of Poverty, illiteracy, communalism and provincialism. It is sheer illusion to think that the personal rights of the individual can be firmly secured if these are laid down in the Constitution in clear language without any reservations and safeguards. It is not entirely due to the wickedness or ignorance of Constitution makers that there are restrictions on individual rights. The legacy of Centuries of backwardness and foreign misrule cannot be wiped out by one stroke of the Pen.

37. Ibid P 714; In the similar manner, Shri T.T. Krishna machari also welcomed the approach of Drafting Committee by saying that there can be no absolute right and every right has got to be abridged in some way or other under certain circumstances, at P 771.

38. Supranote 08 P 223-24; Ibid p 749 for Sardar B.S. Munn’s view.

39. C.A.D Vol. VII 754-55; P 750 for (Seth Govind das’s view); Kazi Syed Karimuddin at P 756.
Constitutional guarantees merely facilitate the achievement of personal rights, which are essentially of an inward character, to be secured by the exercise of reason and proper conduct.  

Finally, accepting Pt. Thakurdas Bhargava's amendment qualifying word "reasonable" to the word restriction so to make the Supreme Court the final arbiter, and this way putting back soul in the Article 13 which according to few members had become lifeless due to limitations imposed on it, the Assembly, passed Right to Freedom.

As already stated out of all the six freedoms guaranteed by Article 19, Freedom or speech and expression has got a pride places it has not only been included in Art 19(1)(a) but also has been referred to in the Preamble of the Constitution. Even in the Constituent Assembly, Several members hailed the guarantee of free speech and expression as the 'most important article', 'the crux of fundamental rights', 'the charter of liberties' etc.

40. Ibid PP 760-761; Similarly Shri. Algu Rai Shastri felt that "Along with freedom responsibility is essential", and held that legislators being representatives of the people would never try to misuse these restrictions which are in the interest of the people. For him "Freedom by its nature implies limitations and restrictions" at PP 767-68.

41. Ibid P 739.

42. Article 13 of the Draft Constitution is now Article 19 of the Indian Constitution.

43. Article 19 (1)(a) reads as All Citizens shall have the right (a) to freedom of speech and expression; The Preamble of the Constitution, apart from other things, secure to all citizens "liberty of thought, expression". Shri. T.T. Krishnamachari called it 'the most important article.

44. See C.A.D. Vol VII P 771; also see Shri Ananthasayanam's views at P 777; Prof. S.L. Sakena called it 'Charter of liberties' at P 763; Shri Kazi. S. Karimuddin hailed it as "the life of the Draft Constitution" at P 756.
Unlike her Americal Counterpart, the Indian Constitution has used the phrase ‘Freedom of Expression’ in the free speech clause, and it includes freedom of publication of books, musical performances and use of radio, T.V. film and stage. It also includes expressing one’s views through paintings, drawings, medium of dance, puppet shows, cartoonings, gestures, public gatherings & processions etc. According to Justice Mathew Right to freedom of expressions exists independently of Article 19(1)(a). To quote Justice Mathew: "As the freedom of expression concerning public affairs is indispensable to the operation of the democratic system, it is a necessary implication from the provisions of the Constitution establishing it".45

Further, deviating from American Constitution, the framers of Indian Constitution didn’t expressly include freedom of the Press in Article 19(1)(a) 46 and this omission on the part of the framers have remained debated till today. But judicial interpretation of this Article has led to the inclusion of freedom of the Press in the guarantee of freedom of speech and expression.47 In the very first case decided on this issue,


46. The founding fathers in their wisdom were of the opinion that it was unnecessary to make an express mention of the Press as the language employed eg. freedom of speech and expressions clearly covered freedom of the press.

47. Free Press, which is neither under control of the executive or not subjected to censorship, is a vital element in a free democratic State. It stands as a permanent means of communications and control between the people and their elected representatives in Parliament and Government. See Journal of the International Commission of Jurists Vol. (VIII) PP 132-33.
Justice Patanjali Sastri of the Supreme Court observed:

"Freedom of Speech and of the Press lay at the foundation of all democratic Organisations, for without free political discussions no public education, so essential for the proper functioning of the process of popular government, is possible".48

Referring to the term "Freedom of speech and expressions", the First Press Commission Stated in its report:

"This freedom is stated in wide terms and includes not only freedom of speech which manifests itself by oral utterances, but freedom of expression, whether such expressions is communicated by written word or printed matter. This, freedom of the Press, particularly of newspapers and periodicals, is a species of which the freedom of expressions is a genus. There can, therefore, be no doubt that freedom of the Press is included in the fundamental right of the freedom of expression guaranteed to the citizens under Article 19(1)(a) of the Constitution".49

The Supreme Court has also observed again in one of the recent cases that "..... the words "freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media i.e. periodicals, magazines or journals or through any other communication channel eg. the radio and the television. In any set up, more so in a democratic setup dessemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2).50

Further, speaking about the usefulness of freedom of Press

48. Romesh Thapar v. State of Madras AIR 1950 SC 124. Facts in brief are that the Government of Madras banned the entry into or the circulation, sale or distribution in the Madras State of any part thereof the newspaper entitled "cross Roads" by invoking its powers u/s 9(1-A) of the Madras Maintenance of Public Orders Act, 1949. This was done for the purpose of securing public safety and for the maintenance of Public Order.


50. Supranote 16.
earlier, the Court observed in *Express Newspapers* case that:

".... The purpose of the Press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements. Freedom of the Press is the heart of social and political intercourse. It is the primary duty of the Courts to uphold the freedom of the Press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate...." 51

In the earliest case of *Romesh Thapar*, the apex Court also stated in clear terms that "... there can be no doubt that freedom of speech and expression includes freedom or propagation of ideas, and that freedom is ensured by freedom of circulation, liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation, the publication would be of little value." 52

Indeed, the freedom of thought and expression including the freedom of the Press, are basic to a democratic form of Government which proceeds on the theory that free exchange of thought and public discussion can solve the problems of Government.

Further, speaking about the importance of freedom of the Press in a democratic society, Justice Venkataramiah (as he then was) in *Express Newspapers* case in 1985, pointed out that according to learned writers freedom of expression had four social purposes to serve: (1) It helps an individual to attain self fulfillment; (2) It assists in the discovery of truth; (3) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides mechanism by which it would

51. *Indian Express Newspapers* (Bombay) Pvt. Ltd. v. U.O. 1 AIR 1986 SC 515; Also see *Printers (Mysore) Ltd. v. Asstt. Commercial Tax Officer* (1995) AIR SCW 204; (1994) 2 SCC 2134, the apex court reiterated that freedom of Press has been placed on a higher footing than other enterprises........ It has always been a cherished right in all democratic countries. Therefore, it has rightly been described as the Fourth Estate. The democratic credentials of a State are judged today by the extent of freedom the Press enjoyed in that State".

52. Supranote 48 (emphasis added).
be possible to maintain a reasonable balance between society and social change. All members of society should be able to form their own belief and communicate them freely to others. In sum, the fundamental principle involved here is the 'right to know'.

Limitations on Freedom of Speech and Expressions and its judicial interpretation: Role of Indian Supreme Court and Deviations made:

In India, Freedom of Speech and expression including freedom of Press is not unqualified, absolute right. It is subject to various limitations, imposed on it by the framers of the Constitution in Article 19(2). Originally, the Cl. (2) of Article 19 did not provide protection to 'public order' as such, and interalia only safeguarded laws as related to matters undermining the 'security of the state' or over throwing it.

The expression 'public order' as one of the limitation on free speech clause of clause (1) of Article 19 was added in the Cl. (2) of Art. 19 of the apex Court's verdicts in Romesh Thapar and Brij Bhushan cases respectively.

(i) Public Order, Security of State and Free Press: The Romesh Thapar case, decided by the Justice Patanjali Sastri

53. Supra 51 at P 686. In brief the Court reiterated unequivocally that freedom of the Press is the very soul of democracy.

54. To quote Story: 'Without any limitation whatever, what is an 'inestimable privilege in a free government might become the scourge of the republic; See Constitution by Story (6th Ed.)

55. Hence, there is difference from the first Amendment to the U.S. Constitution which guarantees freedom of Speech and Press without any limitation, enacts an absolute prohibition and this led to evolving of exceptions by judicial decisions which have limited the scope of such exceptions with increasing stringency; See Constitutional Law of India by Seervai, H.M. Vol I (1991) P 710.

56. Originally Cl. (2) of 19 read as, "Nothing in subclause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or present the state from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the State".
establishing the point that freedom of speech and expression includes in its ambit propagation of ideas and free circulation, struck down Sec. 9(1-A) of the Madras Maintenance of Public Order Act, 1949, on the ground that unless the law restricting freedom of speech and expression is directed solely against undermining the security of the state or at overthrowing it, such law could not fall within the reservation under Cl. (2) of Art. 19, even though the restrictions which it sought to impose may have been conceived generally in the interest of public order. In the course of judgement, the Court also pointed out that the framers of the Constitution have placed "very narrow and stringent limits .... speech and expression" even though a freedom of such amplitude (framers) ... may well have reflected, with Madison ....... that luxuriant growth than, by pruning them away, to injure the vigour of those yielding the Proper Fruits". The Court further held that the impugned law, which authorised imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order, fall outside the scope of authorised restrictions under Cl. (2) and was, therefore, void and unconstitutional.57 In his historic dissent Justice Fazal Ali stated that though construed literally, the Act, 1949 may justify restrictions even in case of trivial offences, in the context of the Act, it could only relate to serious offences affecting 'public order'. Explaining the omission of the word 'Sedition' in Cl. (2) of Act 19, Justice Fazal Ali stated that it had given rise to a conflict of judicial opinion between the federal court and the Privy council, and the framers of the Constitution avoided the word by using words wide enough to include sedition as an offence affecting public order.

57. Supra note 48. The issue to be decided by the Supreme Court was; whether the above said impugned Act, 1949 was a law relating to any matter which undermines the security of the State or aims to overthrow the State.
Again, in *Brij Bhushan’s* case, striking down the order of Chief Commissioner Delhi, passed in pursuance of the power conferred by S. 7(1)(e) of the *East Punjab Public Safety Act, 1949*, whereby the weekly ‘Organiser’ was asked to submit for scrutiny before publication all communal matters news and views about Pakistan, including pictures and cartoons till further orders, as unconstitutional, the Summit Court said;

"There can be no doubt that the imposition of Pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the right of freedom of speech and expression declared by Art 19(1)(a)".\^58 In brief the court declared Pre-censorship invalid. Justice Fazal Ali stuck to his dissent in *Romesh Thappar* case. Both in *Romesh Thappar* and *Brij Bhushan’s* case, the majority of the judges held that the terms "Public order" and "Public Safety" cover much wider field than the words "undermines the security of, or tends to overthrow the state," as used in the Constitution. And, unless a law restricting freedom of speech and expression is directed ‘solely’ against the undermining of the security of the State or the overthrow of it, such law could not fall within the reservations of Cl. (2) of Art. 19 although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. In other words, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the right of freedom of speech and expression.\^59

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58. *Brij Bhushan v. State of Delhi* A.I.R. 1950 S.C. 129. The Court also held that creating internal disorder or rebellion would affect public order and public safety.

These two verdicts of the apex court led to the Constitution (First Amendment) Act 1951, whereby, the Parliament, in a way accepting the dissent of Justice Fazal Ali in Romesh Thappar & Brij Bhushan cases, inserted specifically, The word "Public Order" in Article 19(2) alongwith two other words namely 'friendly relations with foreign states' and 'Incitement to an offence'. Further, the word "Reasonable" has been added to permissible legislative restrictions, which means that the Courts will be entitled to examine whether the restrictions imposed are reasonable or not. This way the first amendment, 1951 enlarged the scope of legislative abridgement of this right and has made the Cl. (2) of Art. 19 exhaustive in nature and this amendment was made with retrospective effect, from 1950, this way invalidated the decisions of Romesh Thappar and Brij Bhushan cases respectively.

This retrospective operation of the amendment Act, 1951 was considered by the Supreme Court in Shailabala Devi's case, wherein Justice Mahajan for the Court pointed out that the decision in Romesh Thappar and Brij Bhushan had been misapplied more than once in the lower Courts and in any event had no application after the First Amendment Act 1951, which introduced the words "Public Order" in Article 19(2). It was also observed that Speeches or Expressions on the part of an individual which incite or encourage commission of violent crimes, such as murder, cannot but be matters which would undermine the security of the

State and come within the ambit of law sanctioned by Art. 19(2). 61

Now, after the interpretation placed by the apex court on the term "Public Order" in the above discussed cases of Romes Thapar and Brij Bhushan and after the Constitutions 1st Amendment Act, 1951, freedom of speech and expression can be curbed on the following grounds namely; (a) Security of State (b) Friendly Relations with Foreign States (c) Public Order (d) Decency or Morality; (e) Contempt of Court (f) Defamation (g) Incitement of an offence &; (h) Sovereignty and Integrity of India. This last head was added in 1963 by the 16th Amendment Act so to enable the state to impose reasonable restrictions on the right to freedom of speech and expression in the interest of the ‘Sovereignty and integrity of India’. 62

Subject to all these limitations, the Indian Supreme Court has liberally interpreted the freedom of Speech and expression including the freedom of Fourth Estate and has added new

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61. Referring to the Madras Maintenance of Public Order Act, 1949, the apex court observed; "Whatever ends the impugned Act may have been intended to subserve and what aims its framers may have had in view, its application and scope could not, in the absence of delimiting words in the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State nor was there any guarantee that those authorised to exercise the powers under the Act would, in using them, discriminate between those who act prejudicially to the security of the state and those who do not" Ibid.

62. Actually, there was an apprehension that right to freedom of speech and expression as mentioned in the Constitution authorised a citizen to propagate a view that a State in the Union of India had a right to secede from the Union. This fear was substantiated with the formation of Political Party i.e. D.M.K. in the Old Madras State (now Tamilnadu) which asserted such a right and this led to 16th Amendment in the Constitution. See Constitutional law of India by Tope, T.K. (1992) P 119.
dimensions to it—not ever imagined or intended by the founding fathers and which are discussed below under following heads.

The expression 'Public Order' as added by the 1st Amendment Act 1951 in Act 19 (2), being very wide, has remained a subject of judicial scrutiny many times. In Virendra’s case, Chief Justice Das for the Court, upholding the restrictions imposed on the subjective satisfaction of the Government, relating to imposition of Pre-censorship under Sec. 2 (1) (a) of the Punjab Special Powers Press Act 1956 in the wake of communal tension that had arisen due to the partition of the Punjab on linguistic basis, observed:

"Quick decision and swift and effective action must be of the essence of those powers and the exercise of it must, therefore, be left to the subjective satisfaction of the Government charged with the duty of maintaining law and order. To make the exercise of these powers justiciable and subject to the judicial scrutiny will defeat the very purpose of the enactment."63

Following the test of reasonableness as laid down in V.G. Row’s case, Justice Das also held that while considering the

63. Virendra v. State of Punjab and another (1958) S.C.R. 308 at P 320-31. In this case the Constitution validity of Section 2(1)(a) and 3(1) of the Punjab special Powers Press Act 1956 was impugned. Exercising powers there under, certain notification were issued by the State Government, prohibiting the publication in the above two newspapers of any article relating to "Save Hindu agitation" for a period of two months and also prohibited the bringing into Punjab of newspapers from Delhi to combat propaganda relating to "Save Hindu agitation".

64. State of Madras v. V.G. Row AOR 1952 SC 196 In this case Justice Sastri laid down test of reasonableness of restrictions & said that in order to be reasonable, the restrictions must have a reasonable relation to the object which the legislation seeks to achieve and must not be in excess of that required for arriving the object.
reasonableness of an impugned restriction upon the Press, the Court must take into account factors like the abuse by the Press of its Power, The powerful influence of newspapers good or bad on their readers, the large circulation etc. Further, the court pointed out that even if the officer conceivably abuses the power conferred on him what will be struck down is not the statute but the abuse of power. And power is vested in the state Government, which was charged with the duty of preserving law and order in the State, to arrive at decision, on the basis of present all material facts, as to what anticipatory actions must be taken for the prevention of the threatened or anticipated breach of the peace. Therefore, the determination of the time and the extent to which restrictions should be imposed on the Press must of necessity be left to the judgement and discretion of the State Government, the Court is wholly unsuited to measure the seriousness of the situation in as much it cannot be in possession of materials which are available only to the executive Government.

On this basis, the Court held that the restrictions imposed by Section 2(1)(a) were reasonable within the meaning of Article 19(2) as the expression "In the interest of" employed in the said provision made the protection very wide when social interest in public order is greater and imposition of reasonable restrictions on freedom of speech and expression becomes imperative in the prevailing situation. Moreover, the Court held that restriction imposed by Section (2) were for a limited period only & was subject to review and modification or rescission upon a representation being made to the Government. Earlier in Ramji
Lal Modi's case, the apex court had observed that Article 19(2) "..... protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression 'in the interest of public order', which is much wider than 'for maintenance of' public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restrictions, 'in the interests of public order', although in some cases those activities may not actually lead to a breach of public order".

Mr. Seervai says that one of the conclusions to be drawn from Ramji Lal case & Virendra's cases is that if an activity has a tendency to cause public disorder it can be penalised even though in some cases that activity may not result in a breach of Public Order.

In another controversial decision, the apex court, through Justice Subba Rao concluded that (i) Public Order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradiction to national upheaval, such as revolution, civil strife, war affecting the security of the State, and (ii) there must be proximate and responsible nexus between the speech and public.

65. Ramji Lal Modi v. U.P. (1957) S.C.R. 860; In this case the editor, Printer and Publisher of a newspaper was convicted for publishing out article with the deliberate & malicious intention of outraging the religious feelings of Muslims. Section 295 of IPC was impugned as violating Article19(1)(A) and it was argued that insults to the religion or religious belief of a class of citizens of India may not lead to public disorder in some cases, and hence, a law, making such insults punishable could not be described to be in the interest of public order.

66. Supra note 55 Seervai, H.M. P 788.
order and that it must not be hypothetical or problematical or too remote in the chain of its relation with public order.\textsuperscript{67}

Applying these tests to the facts of Dr. Lohia's case, the Court held that under the impugned law even innocuous speeches are banned by threat of punishment and hence there is no proximate connection between such so-called instigation and public order sought to be protected in the impugned section and fundamental rights could not be controlled on such hypothetical or imaginary considerations. The majority Court also observed that, "All these grounds mentioned therein (i.e. security of State etc.) can be brought under the general head 'Public Order' in its most comprehensive sense. But the juxtaposition of the different grounds indicates that they must be intended to exclude each other. Public order is something which is demarcated from the others. In that limited sense, it could be postulated that Public Order is synonymous with Public Peace, Safety and tranquility".\textsuperscript{68}

67. \textbf{Superintendent, Central Prison Fatehgarh v. Ram Manohar Lohia}, AIR 1960 SC 633. Dr. Lohia had been prosecuted under S. 3 of \textit{U.P. Special Powers Act, 1932} for instigating cultivators not to pay enhanced irrigation rates to the Government. It was argued that the impugned Section was inconsistent with Art. 19(1)(a) & is void. Hence, the issue was whether the said S.3 embodied reasonable restrictions in the interests of public order and was safeguarded by Art. 19(2) of the Constitution. The Court concluded that unless there is a proximate connection between the instigation and public order, the restriction is neither reasonable nor is it in the interest of public order & thus struck down S. 3 of the said Act as violating the Art. 19(1)(a) of the Constitution.

68. \textbf{Justice Hidayatullah} (as he then was) while considering the meaning of the expressions "law and order", "Public Order" and "Security of State", posed the analogy of three concentric circles "law and order represents the largest circle within which is the next circle representing 'Public Order' and the smallest circle represents the security of State. It is then easy to see that an act may affect public order but not security of the State.Ibid.
Criticising the majority judgement of Justice Sudba Rao in Dr. Lohia's case, Mr. Seervai, an eminent Indian Jurist prayed for its overruling as being "Clearly wrong and productive of public mischief", & held in the course of his submission that; "The earlier Sup. Ct. decisions were right and the correct question to ask was : Have the prohibited activities a tendency to create a breach of Public Order? And it is immaterial that in some cases, there is no breach of Public Order. To say that an exhortation to disobey the law by refusing to pay taxes or other government dues would not have a tendency to affect public order, would be to run counter to the facts of history not in one, but in a number of countries". Mr. Seervai agreed with the views expressed Justice Chaturvedi in this case where Mr. Justice, while distinguishing between the Americal authorities, and the test of "Present and clear danger", as lead downs there and Indian position, said that India Constitution contains different provisions relating to freedom of speech and on this basis rightly held that "an exhortation to the members of the public not to obey the laws in general, or any particular law, was likely to disturb the State of tranquility prevailing among the members of the Public, and the preaching of disobedience of valid

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69. Thus, according to Mr. Seervai, friendly advice not to pay the liabilities because they are disputed or not due, cannot fall within the terms of the section read in the light of the preamble, for the advice or opinion which is forbidden by the Act must be limited to those which can be described as incitement to an illegal refusal to pay liabilities. Supra note 55 Seervai, PP 789-790.

But Mr. M.C. Setalvad considered approach of the majority as more liberal in judging the legislation u/a 19(2). See Supra note 16 Grover, A.N. P 22.
laws was meant to disturb the Public tranquility ....".  

But, in a later case of **Ram Manohar Lohia** the apex court held that 'law and order' does not mean the same thing as 'Public Order. Now, whether an act relates to 'law and order' or to Public Order depends upon the effect of the act on the life of the community. Public Order includes Public Safety as laid down in **Romesh Thappar** case & **Brij Bhushan** cases. It includes both safety external and internal disturbances.  

While interpreting the term 'Public Order', under Cl. (2) of Art. 19, the apex court has also construed it in the light of provisions of the Indian Penal Code and Criminal Procedure Code. In the earlier case of **Babu Lal Parate** the Court had held that Section 144 of the Criminal Procedure Code does not infringe the provision of Article 19(2) as on the whole the Section was meant to present disorders, obstructions, and annoyances in Public interest, and therefore,

70. Justice Agarwala along with Justice Desai quoted extensively from American decisions on the first Amendment to the U.S. Constitutions & held that the impugned restrictions were not in the interest of Public Order, because 'the words 'in the interest of Public Order' mean 'for the maintenance of Public Order', a conclusion which cannot be sustained in view of the clear distinctions made between the two expressions in the Sup. Ct. judgements considered above. Ibid PP 788-789.

71. **Ram Manohar Lohia v. State of Bihar** AIR 1966 SC 740. This case was with reference to rules under the Defense of India Act.


73. **Bahulal Parate v. State of Maharashtra** AIR 1961 SC 884. In this case S. 144 of the Cr.P.C. was challenged on the ground it imposed unreasonable restrictions on the right to freedom of speech and expression as it conferred wide and unguided powers on the District Magistrate. The Petitioner invoked test of clear and present danger as laid down in **Schenck**'s case see Supra Ch. V, also see **Madhu Limay v. S.D.M.** (1970) 3 SCC 746.
in the interest of Public Order, but these wide powers should be used only for the purposes mentioned in it. The Court rejected the 'clear and present danger' test by saying that the frame work of our Constitution was different from that of the United States which does not have provisions corresponding to Article 19(2) to (6) of the Indian Constitution. The Court further held that since the power exercised be Magistrate u/s 144 Criminal Procedure Code is subject to judicial review and only in emergent situation, it is valid, not obstructive of Article 19(1)(a).  

Similarly while discussing the constitutionally of the 'Sedition' under S. 124 A of the Indian Penal Code, the apex court in Kedar Nath case upheld S. 124 A by observing that the provisions of the Section read as a whole, alongwith the explanations, make it reasonably clear that the Section aims at rendering penal only such activities as are intended to or have a tendency to create disorder or disturbance of public peace by resort to violence. The section strikes a correct balance between the fundamental rights of individuals and the interests of Public Order. Hence, so long as the provisions of the Section were confined to acts involving tendency or intention to create diorder or disturbance of law and order or incitement to

74. The Court followed this decision in Ram Manohar Lohia case of 1966. Supra note 71.

75. Kedar Nath v. State of Bihar (1962) Supp. (2) SCR 769. By Section 124-A, any written or spoken words etc. which have implicit in them the idea of subverting government by violent means, which are compendiously included in the term revolution, have been made penal. But the Section excludes from its purview the strong words used to express disapprobation of the measures taken by the Government with a view to their improvement or alteration by lawful means with object of improving the lot of the people and which does not incite in any way feelings of enmity and disloyalty against Government.
violence, it would be protected by Cl. (2) of Art. 19. This way the Court put a limit on the width of the ambit and scope of the section and resolved the conflict as arisen from the opinions of federal Court and Privy Council respectively in Majumdar’s case and Bal Gandadhar Tilak & Bhalerao cases, and followed the Federal court ruling in Majumdar’s case, and held that it was well settled that if two views of constitutional provision were possible, that view ought to be adopted which would validate the provision, in preference to the view which would invalidate it. Further, in Santokh Singh case, while upholding the validity of section 9 of the (Punjab Security of the State Act 1953), as not violative Article 19(2), the Court observed that anything which tended to overthrow the State must necessarily be prejudicial to the security of the State. It was accepted completely that right to freedom of speech was very valuable cherished right, but ‘Public Order’ and ‘Security of the State’ could be ignored at the peril of the Country.

76. Niharendu Dutt Majumdar V.R. AIR 1942 FG 22 Chief Justice Gwyer held that mere criticism or even ridicule of the Government was no offence unless it was calculated to undermine respect for the Government in such a way as to make people cease to obey it and obey the law, so that only anarchy can follow ... public order is the gist of the offence.

But the Privy Council over ruled this decision when in R.V. Sadashiv Narayan Bhalerao (1947) 74 I.A 89, it followed the views Justice Strachey in Balgandad har Tilak case (1898) 22 Bom 112 and held that the offence of ’Sedition’ was not confined to only incitement to violence or disorder. Supra note 55 Seervai, HM 717-719

77. Santokh Singh v. Delhi Administration AIR 1973 SC 1091. It was observed that if Section 9 of the impugned Act and Article 19(2) were read together the only matter impugned related to offending speech, words or other publication which tends to overthrow the State. This additional matter fell within the expression “incitement to an offence prejudicial to the security of the State contained in Section 9 of the Act and Article 19(2).
(ii) Prior Restraints and Free Speech (Including Tax).

Since freedom of speech can not be unrestricted, sometime imposition of prior restraints particularly on the press become essential in order to check it from acting in an unreasonable or arbitrary manner. And imposition of tax on the press, in particular on the newspaper industry, being restraint on the freedom of press, has to be used very judiciously by the Government so as not to unnecessarily curb freedom of press. 78

In *Indian Express Newspapers (Bombay) Pvt. Ltd.* 78-A case, the Court held that though Press was not free from taxation yet, the Government should be very cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters. To quote: "... The imposition of a tax like the custom duty on news print is an imposition of tax on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself of the world around him ....." The Court held that imposition of tax restriction which checks the circulation of the paper is not valid, and another reason behind the levying tax being based on the consideration by the Finance Minister of certain writings in newspapers being piffles' is further not reasonable as not based on a true test, and so, is outside the constitutional limitations. It virtually amounts to pre-censorship.

78. Infact tax imposed on newspaper is a tax not on fundamental right of freedom of speech and expression of newspaper industry as guaranteed under Art. 19(1)(a) and (2) but it is on their other fundamental right relating to freedom to engage in any profession, occupation, trade, industry or business as guaranteed under Art. 19(1)(j). See Supranote 62 p 131.

78-A Supra note 51. In this case the imposition of import duty and the levy of auxiliary duty on newsprint was challenged on the ground of infringement of the freedom of Press as it imposed a burden beyond capacity of the newspaper industry & also affected the circulation of the newspapers and periodicals. Also see *Express Newspapers V. U.O.I.* AIR 1958 Contd....
In *Sakal Papers (P) Ltd.* case, the Summit Court through Justice Mudholkar reasserted that the freedom of speech and expression include the freedom of the press and it could not be restricted for the purpose of regulating the commercial aspect of the activities of newspapers, and observed: "... The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved. No doubt, the law in question was made upon the recommendations of the Press Commission but since its object is to affect directly the right of circulation of newspapers which would necessarily undermine their power to influence public opinion it cannot be regarded as a dangerous weapon which is capable of being used against democracy itself". Further in *Bennett Coleman and Co.* case the majority through Justice Ray (as then was) held that the freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views. If the law were to single out press for laying down prohibitive burdens on it that would restrict circulation, penalise freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2)". On this SC 578, upholding the constitutionality of the (Working Journalists Act 1955). Whereby the service conditions of employees of newspaper industry were regulated, The Court refuted the contention of the petitioners that this Act would adversely affect financial position of newspaper which might be forced to close down.

79. *Sakal Papers (P) Ltd. v. U.O.I.* AIR 1962 SC 305. Here, the validity of newspaper (Price and page Act 1956) was involved which empowered the Central Government to regulate the prices of newspapers in relation to their pages and size and also to regulate the allocation of space for advertising matters. Also the validity of the Daily Newspaper (price and page order 1960) made by the Central Government under the Act 1956 was involved whereby the maximum no. of the pages that might be published by the newspaper was fixed according to the price charges. The apex court struck down both the Act and the order as void, being violative of Article 19(1)(a) of the Constitution.

80. *Bennet Coleman and Company v. U.O.I.* AIR 1973 SC 106. The case involved the validity of the newsprint control order which fixed the maximum number of pages which a newspaper could publish. The objective behind the order was to help small newspapers to grow and to check monopoly of big newspapers. It was challenged as violative of fundamental rights guaranteed in Arts 19(1)(a) & 14 of the Constitution.
basis, the Court held that compulsory fixing page limit under the newsprint policy is not reasonable restriction within the ambit of Article 19(2) and it abridges the Petitioner's right of the freedom of speech and expression by preventing a common ownership unit from starting a new edition or a new newspaper & thus deprive not only the petitioners of their economic viability but will also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and including the area of coverage for news and views. The Court further held that: "The freedom of Press entitles newspapers to achieve any volume of circulation (But) the newsprint control policy was in effect a newspaper control policy and .... is ultravires of the import control Act and the Import Control Order".

In the case, the Court rejecting the contention of the government that the object of the newsprint policy was to regulate and control the newsprint and not to control newspapers, applied the "direct and inevitable effect" test viz. and held that the direct effect of the impugned law was to abridge a fundamental report & hence violative of Article 19(1)(a).

ii (a) Films and Prior Restraints

Freedom of expression which includes freedom of communication including movies, is legitimate and constitutionally protected and cannot be held to ransom by an intolerant group of
people. In *Rangarajan* case,\(^\text{81}\) justifying the screening of the Tamil film dealing with reservation policy, the apex court innovated right to 'think out', right to form opinion', and right to advocate one's views' through democratic means as a part of freedom of speech and expression in democracy. The Court further speaking about the necessity of pre-censorship on movies in present times stressed upon the requirements of it being reasonable based on the standards of an ordinary man of common sense and prudence. To quote: "...... Movie motivates thought and action and assures a high degree of attention and retention. In view of the scientific improvements in photography and production the present movie is a powerful means of communication. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market place just as does the newspaper or magazines. The board should exercise considerably circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular should not be allowed to be sacrificed in the juice of social change or cultural assimilation. But this does not mean that the censors should have an orthodox or conservative outlook. Far from it, they must be responsible to social change and they must go with the current climate. However, the censors may display more sensitivity to movies which will have a markedly deleterious effect to lower the moral standards of those who see it.\(^\text{81-A}\)

\(^{81}\) S. *Rangarajan v. P. Jagjivan Ram* (1989) 2 SCC 574 Censor refused to give 'U' Certificate to a Tamil film on the ground that the movie might create adverse demonstrations and might lead to violence as it suggested that the existing method of reservation on the basis of Caste is bad and reservation on the basis of economic backwardness is better. The Court rejecting the Censor's Certificate held "There is nothing wrong contrary to Constitution in approving the film for public exhibition .... To say that one should not be permitted to advocate that view goes against the first principle of our democracy. If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2) freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence.

\(^{81-A}\) Ibid (emphasis added).
Thus the Court held that, "It is the duty of the State to protect the freedom of expression since it is a liberty against the State. The State cannot plead its inability to handle the hostile audience problem." It was also rightly observed that there should be a compromise between the interest of freedom of expression and social interests. The Court cannot simply balance the two interests as if they are of equal weight.

Following the above views, the Court upholding the M.P. High Court decision of directing Doordarshan to telecast respondent’s award winning film on the Bhopal Gas Disaster titled 'Beyond Genocide', reiterated that Prior-restraints, regardless of their form, are frowned upon as threats to freedom of expression since they contain within themselves forces which if released have the potential of imposing arbitrary and at times direct conflict with the right of another citizen. "Censorship by prior restraints, therefore, seems justified for the protection of the society from the ill effects that a motion picture may produce if unrestricted exhibition is allowed. Censorship is thus permitted to protect social interests enumerated in Article 19(2) and Section 5-B of the Cinematograph Act. But such censorship must be reasonable and must answer the test of Article 14".82

ii(b) Commercial Advertising and Prior-Restrains :- Recently, in an upprecedent farreaching judgement, the apex court three judges Divison Bench through Justice Kuldip Singh has ruled that the publication of "Commercial advertisements is a part of the fundamental right to free speech and expression."83 Delivering this judgement, the Court held that the Mahanagar Telephone Nigam...

82. Supranote 50.

83. "Ads part of freedom of speech" News report in The Tribune Aug. 5, 1995. 'In this case appellant Tata Press Ltd. filed an appeal against Bombay High Court judgement which set aside a trial court order rejecting a plea by the Union Government for a permanent injunction against the Company from publishing the "Tata Press Yellow Pages.
Ltd. or the Union of India cannot restrain the appellant, Tata Press Limited, from Publishing "Tata Yellow Pages", Comprising paid advertisements from businessmen traders and professionals."

The Court further observed that the Government had the right to regulate or prohibit a "Commercial speech" which was deceptive, unfair, misleading or untruthful under the clause (2) of Article 19 of the Constitution. Hence, commercial Speech is a part of free speech guaranteed under Article 19(1)(a) and it could not be denied by creating a monopoly in favour of the Government or any other authority. The Court rejecting the Union Government's contention that a purely commercial advertisement was meant for the furtherance of trade and commerce and, as such was outside the concept of freedom of speech and expression, said that advertising was the corner stone of our economic system, it could be viewed as the life blood of the free media, paying most of the costs and thus making the media widely available.84

Through this landmark verdict, the apex court has repudiated its own earlier judgement in the Hamdard Dwakhana85 case where a Constitution Bench had unanimously ruled that,

84. Ibid, while discussing this case, the full text of judgement was not available.

85. Hamdard Dwakhana (WAKF) Lal Kuan v. U.O.I. AIR 1960 SC 554. The case involving the validity of the Drug and magic Remedies (Objectionable Advertisement Act, which put restrictions on ads. of drugs in certain cases and prohibited ads. of drugs having magic qualities for curing diseases. The Court upheld that validity of the Act by saying that an ads. no doubt are a form of speech but every ad. is not a matter dealing with the free speech and expression of ideas and in the case the object of the ads. was the commendation of the efficacy, value and importance in treatment of particular diseases by drugs and medicines and not propagation of ideas. Hence the Act has imposed reasonable restrictions in the interest of general public, and so is valid as its object was the prevention of self-medication and self-treatment.
"commercial advertisement, which had an element of trade or commerce do not relate at all to freedom of speech or propagation of ideas’. While deciding the **Tata yellow Pages** case, perhaps the Court has also drawn strength from the **Indian Express Newspapers’** case of 1986 where the court described the **Hamdard Dawakhana** ruling as "too broadly stated".85-A

It is submitted that this judgement treats laissezfaire as the reason d’etre of free speech and waxes eloquent on the indispensability of the ‘free flow of commercial information’ in a democratic economy. Today with the invasion of electronic media in the form of Cable T.V., the Constitutional clout accorded by the Court to commercial speech cannot but have disastrous consequences for the psychology of the people especially of young generation who remain glued to the T.V. Sets and lap up commercial ads as keenly as the elder generation hears the evening news. Justice **Mathew** observed in one of his speeches that: "If the raison d’etre of the mass media is not to maximise discussion but to maximise profits or to be a close preserve of government, inquiry should be directed to the possible effect of such a fact on constitutional theory. The phrase (freedom of the press) must now cover two sets of rights and not one only. With the rights of editors and publishers to express themselves, there must be associated a right of the public to be served with substantial and honest basis of facts for its judgement of public affairs. Of these two, it is the latter which today tends to take precedence and importance. The freedom of the press has to change its point of focus from the editor to the citizen".86

85-A) In a way the present judgement of Tata yellow pages reflects what justice Mathew observed in his dissent in **Bennett Coleman & Co. Ltd.** case. "With the concentration of mass media in a few hands, the chance of an idea antagonistic to the idea of proprietors of the big newspapers getting access to the market has become very remote. The mass media’s development of an antipathy to ideas antagonistic to their novel or popular ideas makes the theory of market place of ideas too unrealistic what is therefore required is an interpretation of Article 19(1)(a) which focusses on the idea that restraining the hand of the Government is quite useless in assuring free speech if a restraint on access is effectively secured by private groups".

86. Supranote 45 at p. 106.
(iii) **Decency or Morality or Obscenity and Free Speech**

Under Cl. (2) of Article 19, the right to freedom of Speech and expression can be abridged in the interests of decency or morality. Section 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency and morality by prohibiting the sale or distribution or exhibition of obscene words etc. in Public Places. But it does not lay down any test to determine obscenity. In the earlier case of *Ranjit D. Udeshi*, the Indian Supreme Court followed the obsolete English test of obscenity as laid down by Chief Justice Cockburn in *Hicklin's case*. The learned Justice Cockburn said: "I think the test of obscenity is ..., whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character".

While applying this test, Justice Hidayatullah observed: "The laying down of the true test is not rendered any the easier because art has such varied facts and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the impression, left on the reader." Thus, "injudging whether a picture or an article fell below the standards of taste

87. *Ranjit D. Udeshi v. State of Maharashtra* AIR 1965 SC 881 (Popularly known as Lady Chatterley's Lover case). The question that arose was whether the unexpurgated edition of Lady Chatterley's Lover by D.H. Lawrence could be exhibited for sale. The appellant was convicted u/s 292 I.P.C. for being in possession, for purpose of sale, of this novel.

prevailing in contemporary society, were factors to be taken into account.\textsuperscript{89}

Infact, the test of obscenity is a question of degree and varies with the moral standard of the community in question. But mere use of abusive language, which has no suggestion of obscenity to the persons in whose presence they are uttered, would not come under the clause of Decency or morality.

This ground of Decency or morality equally applies in cases of films as the standards in the case of films are similar to those for publications. And in the case of films, the apex court has upheld the validity of pre-censorship in the famous \textbf{K.A. Abbas} case.\textsuperscript{90} Chief Justice Hidayatullah, affirming his views of \textbf{Udeshi}'s case, held that Pre-Censorship of films and classification of films into "U" and "A" does not violate Article 19(1)(a). Following the general principles laid down in \textbf{Udeshi case}, the Court held that censorship of films is constitutional

\footnotesize{\textsuperscript{89} Quoted from Grover's book Supra note 16 PP 177-178. While dealing with cases in which it was felt by the council that the purpose of publishing the impugned writing or nude or Semi-nude pictures in newspaper, magazine or periodicals means the arousing of prurient interest in young minds & not linked with development of science or art in any way, the council censures such publication even on the assumption that obscenity in the sense in which it was used in S.292 of the I.P.C. does not in terms apply. Also see \textbf{Kartar Singh v. State of Punjab} AIR 1956 SC 545.}

\footnotesize{\textsuperscript{90} \textbf{K.A. Abbas v. U.O.I.} AIR 1971 SC 481. The petitioner challenged the action of the Board of Film Censors in rejecting a "U" Certificate for his film "A tale of Four Cities" The Court held that S. 5B (2) of the \textbf{Cinematograph Act 1952} is valid, does not impose unreasonable restrictions & only enabled the Government to lay down principle to guide the Censoring Authority.}
under certain circumstances but in addition to this, a direction to emphasise the importance of art. to a value judgement by the censors is also necessary. In deciding the constitutionality, the whole law and the regulations under it will have to be considered. This way, the apex court laid down that; "Motion pictures must be treated differently from other films of art and expression, because of a motion picture’s instant appeal both to the sight and to hearing, and because a motion picture had become more true to life than even the theatre or any form of artistic representation. Its effect particularly on children and immature adolescents, was great".

Mr. Seervai has submitted that the reservation for artistic representation is correct, but is unlikely to offer any practical guidance to the censor who must form his own opinion about the artistic ability of the members of the audience who are likely to see the film.91

Whereas Mr. Mudholkar has submitted that in lieu of a glorious tradition of our country, the Court did right thing in adopting the Hicklin’s test in Udeshi’s case & keeping it open for the Court to examine each impugned publication.92 But criticising the Court’s approach in applying century old Hicklin Test, Mr. Shukla has rightly submitted that the Court has erred in not rejecting this obsolete rule which lays down a vague and arbitrary standard for judging obscenity and has a tendency to

91. Supra note, 55 Seervai, H.M. at P 793.; Also see Article "Media Explosion has loosened censorship" The Tribune Nov. 19, 1994.

92. Supranote 49 Mudholkar at p. 44.
curtail the right to freedom of speech". Mr. Shukla further says that "if the word 'obscenity' is given as wide a meaning as was given in the Hicklin case, there is a danger that many a literary work will not be available to the reading public. It would also curtail the right of its author to produce. When Section 292 was enacted, Indian Citizens enjoyed no fundamental Rights. But after the coming into force of the Constitution, if Section 292 is allowed to stand as it is, the meaning of "obscenity" has to be narrowed down". 93

The Indian Press Council, which is bound to follow the apex court’s decisions, have number of times dealt with charges of obscene writings in newspapers. In its 1970 & 1972 annual reports, the council has expressed the view that "obscenity" as well as "taste" cannot be strictly defined and are to be judged in relation to the totally of the circumstances. 93-A

The Court further discussed in detail the concept of obscenity in Chandra Kant case where Justice Venkataramiah observed; "what we have to see is that whether a class; not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds". 94

In this case, the Court declared that the duty of the Court was to consider the obscene matter by taking an overall view of the entire work.


Justice Reddy in this case rightly pointed out that the concept of obscenity would differ from Country to Country. It was also recognised that the charge of obscenity must be judged by seeing whether in the changed conditions in our country, the impugned material would be taken to be such as may tend to debate or debauch the minds of the reader. (The Cable T.V. Networks (Regulation) Ordinance 1994), now in force in the country, requires that the programmes carried on the encrypted channels confirm to the provisions of the (Cinematographic Act, 1952) Now all films telecast by foreign satellites television networks on their encrypted/pay channels have to be in accordance with a legal requirement. It is submitted there is no doubt that invasion of foreign Satellites in India resulting in multiple Choice channels available to the viewers such as Star TV, ATN, CNN, Zee, Jain etc, a lot of trash in the name of entertainment is available especially the programmes on music channel and Star Plus etc. are not good for the viewership of young generation, there is an urgent need for regulating such programmes through independent regulatory body. Censorship is not the answer to this. 94-A

Earlier, in 1986, in well known Prajapati case, the apex cou


95. Samresh Bose V. Amal Mitra A.I.R 1986 SC 971 Prajapati a noel by Samaresh Bose published in 1967 for the first time, was challenged U/S 292 of the IPC by a lawyer of Cal. High Court Mr. Mitra before Presidency Magistrate, Calcutta which dismissed his suit on the ground that whole novel was not obscene as alleged and directed that few pages which were obscene must be deleted from the novel & fined the author & publisher of the novel both for Rs.201 each. The accused appealed to the Cal. H.C. which upheld Judgement of Trial Court. Against this the accused made appeal to the Supreme Court.
deviating from its conventional outlook and reversing the verdict of Calcutta High Court, the Court held that Prajapati is not obscene and declared that books containing any reference to kissing, description of the female body and suggestions of acts of sex by themselves may not have a depraving effect and on these counts may not be considered obscene" Distinguishing between vulgarity and obscenity, the apex Court further held that; "The mere fact that the language used was vulgar would not be sufficient to render the book obscene", and thus, the Court made liberal application of the standards of obscenity to the facts of the standards of obscenity to the facts of this case. Expanding the ambit of obscenity the Court said that vulgar writing is not necessarily obscene, for, vulgarity arouses feeling of disgust and revulsion, but does not have the effect of depraving, debasing or corrupting the minds.

In another significant verdict on film-censorship, the Summit Court innovated 'Right to unpopular speech' as being part of the right to speech. The Court held that it is the duty of the State to protect and defend those who exercise this right to unpopular speech.96

96. The film in question was Tamil film Ore Oru Gramathille Also see article, "The Right to Unpopular Speech" by Dhavan, Rajeev Indian Express April 27, 1989.
Further in *Odyssey Communications (P) Ltd.* case, the apex Court held that the right of citizens to exhibit films on Doordarshan subject to the terms and conditions to be imposed by it, is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a) subject to Article 19(2). And if a person wants to challenge exhibition of any T.V. film or serial on general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross --- It may, however, be said at once that treating with sex and nuding in art and literature cannot be regarded as evidence of obscenity without something more," and thus, the Court kept artistic works outside the purview of obscenity.

The Court concluded that "--- treating with sex in a manner offensive to public decency and morality --- judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the results". Thus, a balance has to be maintained between freedom of speech and expression and public decency and morality, but when the latter is substantially transgressed the former must give way.

97. *Odyssey Communications (P) Ltd. v. Lokvidya Sanghatana* AIR 1988 SC 1642. The case had come up before the Court against an interim stay order of the High Court as a result of which 12th and 13th episode of the T.V. serial "Honi-Anhoni" could not be telecast on the scheduled dates. The objection raised was that such serial was likely to spread false or blind beliefs among the members of the public. Vacating the stay order, the apex Court held that the H.C. had overlooked that the issue of an order of interim injunction would infringe the fundamental right of the producer of a serial. And besides, there was no prima -facie evidence of gross prejudice.
Defamation and Free Speech

It is one of the grounds under Art. 19(2) whereby the freedom of speech and expression as guaranteed in Art 19(1)(a) can be reasonably restricted. Defamation is both a tort and Criminal offence. Defamatory speech is unprotected speech as right to free speech does not entitle one to infringe the right of others. So if some one’s speech causes harm to other person, it is defamatory speech unless it is proved that such speech was made for public good or in public interest or its truthfulness stands established. Unlike America where the criminal law of defamation is altogether abolished, in India still civil and criminal proceedings for defamation are entirely separate and independent proceedings, with different requirements and components and the remedies are cumulative, not alternative.98

Further, unlike America, where defamation proceedings are banned, in the absence of actual malice, by public officials for any libel arising out of the performance of their official duty, in India it is not so. It is submitted that unless the Indian law on defamation is evolved on the pattern of American law, Indian defamation law will simply continue to be used to stifle investigative journalism. In 1988, the Government made an unsuccessful attempt to put ban on ‘investigate journalism’ through the Defamation Bill. Since the gist of the Bill was to

98. S.499 of Indian penal code deals with criminal law relating to defamation. It defines defamation as : whoever by words, either spoken or intended to be read or by signs or by visible representations, makes or publishes any imputation concerning any person intended to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person is said, to defame that person. Further section 499 & 500 of the penal code discuss four explanations and ten exceptions to this above general rule.

Civil law relating to defamation is still uncodified in India.
prevent investigative journalism, especially where governmental corruption was concerned, it created furore and ultimately had to be withdrawn.\(^99\)

(V) Right to Privacy & Freedom of Speech:

Alike America, in India, the right to privacy is one of the unenumerated rights that has been considered as an aspect of the right to free speech and expression. In India, Justice Mathew in Govind's case in 1975,\(^{100}\) after going through various landmark rulings of U.S. Supreme Court, after tracing the origin of right to privacy, recognised the right to privacy as a fundamental right, a part of freedom of speech, freedom of movement and right to personal liberty. But this right is not absolute and has to find its limitations through the process of case by case development.

To quote Justice Mathew: "----- privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test---".

On this basis the Court held that the domiciliary surveillance regulation was within the constitutionally permissible zone of restriction on privacy.

\(^{99}\) Similarly in J&K, the J&K special powers (Press) Bill 1989 was to be enacted imposing a virtual pre-censorship on newspapers. It was another attempt to muzzel the press and created furore & finally withdrawn by the state government after recommendation of the press council. See supranote 16 Grover, A.M. 186.

In *Govind case*, the Court deviated from its earlier stand in *Kharak Singh*,\(^{101}\) case where the majority took the view that there was no right of privacy as guaranteed by the Constitution.

Finally, in the recent *R. Rajagopal*\(^{102}\) case, Justice Jeevan Reddy for the Court examined in detail a question concerning the freedom of press vis-a-vis the right to privacy of the citizens and concluded that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "Right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages".

But the Court added a rider to the above-said rule that publication concerning the privacy become unobjectionable only if such publication was based upon public report, including Court records. It said: "This is for the reason that once a matter

\(^{101}\) *Kharak Singh v. State of U.P.* (1964) I.S.C.R. 332. AIR 1963 SC 1295. Here Justice 'Subba Rao' in his dissent laid down that though our Constitution does not expressly declare a right to privacy as a fundamental right, the said right is an essential ingredient of personal liberty.

\(^{102}\) *R. Rajagopal v. State of Tamil Nadu and others* AIR 1995 SC 264 at pp 275-276. In this case Tamil Magazine *Nakkheeran* sought a direction from the apex court to the Tamil Nadu Government not to intervene with the publication of the autobiography of Autoshanker, a condemned prisoner, wherein he alleged having close nexus with several bureaucrats & other officials of the state government, some of whom were alleged to have participated in several of heinouscrimes committed by him. This disclosure created panic in the official circle & they used third degree treatment against the petitioner and the magazine’s printing press was burnt to prevent publication of what was perceived as damning material. Hence, appeal by Nakkheran to the Supreme Court.
becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others".

Significantly, the Court made it clear that the right to privacy is not available to public officials with respect to their acts and conduct, relevant to the discharge of their official duties. This is so even where the publication was based upon facts and statements which were not true, unless the official established that the publication was made by the press with reckless disregard for truth.103

On the basis of the aforesaid principles, the Court allowed the petitioners to publish the autobiography of a condemned notorious prisoner, Auto Shankar in so far as it appears from the public records, even without his consent or authorisation. But the Court stopped petitioner publisher publishing more than that as it would amount to invasion on his right to privacy. The Court further held that: "the State or its officials cannot prevent or restrain the said publication".104

It is submitted that this landmark verdict of the Summit Court on the right to privacy vis-a-vis the freedom of expression has rendered yeoman service to Indian democracy. The Court has rightly struck the balance between the right of the individual and the collective rights of a democratic society. And now significantly, it no longer be a crime to publish information which may later prove to be wrong as long as a media person is able to prove that his reported news is being printed after a reasonable verification of the facts.

103. Ibid p 276.
104. Ibid p 277.
(VI) Contempt of Court and Freedom of Speech

Under Article 19(2) State can also impose reasonable restriction on freedom of speech and expression on the ground of contempt of Court. The object behind this check is to enable the judiciary to function effectively without fear or favour. Explaining the concept of the contempt of court, the apex court of India in the well-known Barada Kanta Mishra case, through Justice Palekar, who an behalf of Chief Justice Ray and Justice Chandrachud, observed that:

"Contempt of court is disobedience to the court, by acting in opposition to the authority, justice and dignity thereof. It signifies a wilful disregard to disobedience of the court's order, it also signifies such conduct as tends to bring the authority of the court and administration of Justice into disrepute". 106

105. The term Contempt of Court though mentioned in Arts 19(2), 129 and in entry 77, List I of Sch. 7 of the Constitution yet is not defined constitutionally. The term has been defined in the 'Contempts of Courts Act 1971' as follows:

Unless the context otherwise requires: (a) "Contempt of court" means civil contempt or criminal contempt; (b) "Civil contempt" means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court; (c) "criminal contempts" means the publication (whether by words, spoken or written, or by signs or by visible representations or otherwise of any matter or the doing of any other act whatsoever which - (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or (ii) prejudices or interferes tends to interfere with, or obstructs or tends to obstruct, the administration of Justice in any other manner.

106. Barada Kanta Mishra v. Bhim Sen Dixit AIR 1974 SC 710 In this case Art. 235 was considered in the context of a criminal contempt of court. In this case appellant, a senior judicial officer was convicted & sentenced under the contempt of courts Act, 1971 by a full Bench of Orissa High Court. His conviction upheld by the Supreme Court on the ground that contemptuous allegations levelled by the appellant in his letters to the Government and to the High Court with reference to the administrative functions of High Court amounted to criminal contempt.
Justice Palekar further held that: "vilificatory criticism of a judge functioning as a judge even in purely administrative or non-adjudicatory matters amounts to criminal contempts", Moreover, "The right of appeal does not give the right to commit contempt of court, nor can it be used to bring the authority of the High Court into disrepute and disregard. If the language used amounts to contempt of court it will become punishable as criminal contempt". 107

According to Mr. Seervai though the verdict had no purport to laydown the whole law of contempt, yet in his concurring ruling Justice Krishna Iyer (for himself and for Justice Bhagwati) rightly referring to R.V. Commr. of Police of the Metropolis Ex per Justice Blackburn, held that contempt of court could not be used to stifle freedom of speech.

Infact the Framers of the Constitution, aware of law relating to Contempt of Court, desired such law to be operative only if it withstands the test of reasonableness as laid down by them in Article 19(2) of the Constitution.108

Further, in the Perspective Publication case, Justice Grover, after reviewing the authorities, extracted five propositions from them and made a distinction between a mere libel or defamation of a judge and a contempt of court and laid down a test. The test would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or proper administration of law by the Court. It is only in the latter case that it will be punishable as contempt. --- Alternatively the 107. Ibid

108. (1968) 2 Q.B.150 In this case Lord Denning held: "Nor will we use (the contempt jurisdiction) to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself---" Supranote 55, Seervai, H.M. pp 724 & 74.
test will be whether the wrong is done to the judge personally or it is done to the public. It was also held that truthfulness or factual correctness is a good defence in an action for libel, but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognized.109

Whereas, the apex court in its earlier ruling in B.R. Reddy case, through Justice Mukherjee adopting a distinction between libel and contempt as made by the privy council in Bahamas case has held that:"---- a libel attacking the integrity of a Judge may not in the circumstances of a particular case amount to contempt at all, although it may be the subject matter of libel proceedings." 110

Mr. Mukherjea further held that :" if the allegation were true obviously it would be to the benefit of the public to bring them into light. But if they were false, they cannot but undermine the confidence of the public in the administration of Justice and bring the judiciary into disrepute". And in the said case, the appellant contended that he had published the article in newspaper in good faith, believing the allegations to be true. But since he had not attempted to substantiate his allegations he did not act with reasonable care and caution, so "he cannot be said to have acted bonafide, even if good faith can be held to be a defence at all in a processing for contempt. 109

Perspective publications (P) Ltd. V. State of Maharashtra (1969) S.C.R. 779 at 791-792. The case arose out of an article which the High Court held contained a clear imputation of dishonesty to a judge trying a libel action.' Followed in C.K. Dapahtry v. O.P. Gupta (1971) Supp. S.C.R. 76. For detail see Seervai, H.M. Supranote 55 pp 740-743. where Mr. Seervai has labelled it as unsatisfactory decision.

Bathina Ramakrishna Reddy v. State of Madras (1952) SCR 426 the case dealing with contempt of court in a newspaper article; Also see Brahma Prakash Sharma v. State of U.P. AIR 1954 SC 10. Justice Mukherjea held that in considering whether a defamatory statement amounted to contempt, the Court had to consider all the surrounding circumstances and materials before it. 110
On the basis of this observation of Justice Mukherjea, Mr. Seervai in his submission in *Perspective Publications* case has criticised Justice Grover ruling for overlooking Reddy case which being verdict of five Judges was binding on him. Hence, he called the judgement of Justice Grover as per incuriam and so clearly wrong on the issue whether truth is a complete defence.

In various cases, the apex court has held the party guilty of contempt of court on the basis of his verbal or written speech. For instance, the apex Court even held the Chief Minister of Kerala guilty of Contempt of Court for describing the judiciary at a press conference, as an instrument of oppression and judges being "guided and dominated by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor".  

Recently, the Summit Court also convicted Mr. Mishra, Chairman of Bar Council of India for criminal contempt of Court as he levelled aspersions against judges of Allahabad High Court Judges while pleading before them in a case.

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111. E.M.S. Nambodripad v. T.N. Nambiar *AIR* 1970 SC 2015; Also see *L.D. Jaikwal v. State of U.P.* (1984) A.S.C. 1374 where Senior Advocate had presented a written application to a special judge couched in scurrilous language in putting that the judge was a "connapt judge" held guilty of contempt a\& was sentenced to simple imprisonment for one week and fine of Rs. 500; *Charan Lal Sahu v. U.O.I.* *AIR* 1988 SC 107 --- Petitioner used unsavoury language in a petition causing aspersions on the apex court. He was held guilty also see Ch. III supra.

112. See for detail Supra Ch. II; The apex Court also showed its activism when it directed Shiva Sena Supreme Mr. Bal Thackery to apologise unconditionally to the Summit Court for his utterances against some judges regarding the presidential referred of the Ayodhya issue to the Supreme Court. See *The Tribune* Dec. 21, 1995 for "Year of judicial activism".
In another significant judgement of M.R. Parashar v. Forooq Abdulla case, Chief Justice ChandraChud made significant observation in relation to Criminal Contempt of Court and freedom of speech. He stated that in matters involving allegations of Criminal Contempt of Court, the Court had to perform the role of prosecutor and judge. Further emphasising the importance of free speech and constructive criticism his lordship observed:

"------ the right of free speech is an important right of the citizen, in the exercise of which he is entitled to bring to the notice of the public at large the infirmities from which any institution suffers ---- Indeed, the right to offer healthy and constructive criticism which is fair in spirit must be left unimpaired in the interest of public institutions themselves. Courts do not like to assume the posture that they are above criticism and their functioning needs no improvement. But it is necessary to make it clear that though law does not restrain the expression of disapprobation against what is done in or by courts of law, the liberty of free expression is not to be confounded with a licence to make unfounded allegations of corruption against the judiciary. The abuse of the liberty of free speech and expression carries the case nearer the law of contempt."

Further, the Court through Justice S. Mukharji held that reasonable and fair criticism, not intervening with the administration of justice and not bringing administration of justice into contempt does not amount to criminal contempt. The contempt jurisdiction should not be used by judges to upheld their own dignity. In the free market place of ideas, criticism

113. M.R. Parashar v. Farooq Abdulla (1984) A S.C. 615 (emphasis supplied). the report published in the Kashmir Times stated that the C.M. Farooq Abdulla had made certain statements, which if the C.M. had in fact made, would have been a clear contempt of court. Allegation denied by the C.M. in his affidavit since there was no record of his speech, the apex court held that in a case of criminal contempt the charge of contempt must be proved beyond reasonable doubt; Also see National Textile Workers Union V.P. R. Ram Krishnan AIR 1983 SC 75 the apex court dealt with a case of scurrilous charges against four judges of the Madras H.C.
about the judicial system or the judges should be welcomed, so long as criticisms do not impair or hamper the "administration of Justice".114

In certain cases the apex court though initiated the contempt proceedings against the editors of two newspapers, yet later on dropped them "for reasons to be recorded later".115

(VII) Privileges of Legislature and Freedom of the Press: -

With regard to the issue of supremacy between the privileges of legislature under Arts. 105 and 194 of the Constitution and the freedom of speech and expression as guaranteed by Article 19(1)(a) including freedom of press, as

114. P.N. Duda v. P. Shivshankar AIR 1988 SC 1208 (1215-1217) The Petitioner complained that a speech made by respondent law Minister on the occasion of the Silver Jubilee of A.P. Bar Council amounted to criminal contempt of Court. For detail discussion on the case by Mr. Seervai who has called it wrong judgement and productive of public mischief & prayed for its overruling" as the Court not held Shiv Shanker guilty of contempt of court see Supranote 55 Seervai, H.M. pp 755 - 760 Also see D.N. Taneja v. Bhaian Lal (1980) 3 SCC 26 for interpretation of Article 19 (i) (a) and Section 15 of the Contempts of Courts Act.

115. See S. Mulgaonkar Re AIR 1978 SC 727. The accuracy of Chief Justice of India Mr. Beg’s account of the confidential letter which he wrote to Chief Justices of the High courts suggesting that a code of conduct laying down rules for the guidance of judges should be drawn up by them in a conference. was disputed by Mr. Mulgaokar in his article in the Indian Express March 1, 1978. Also see Sham Lal, Re AIR 1978 SC 485 amended notice issued to The Times of Indian on Jan 11, 1978 to show cause why proceedings for contempt should not be initiated against it in respect of a news item on the apex court’s verdict in the Habeas Corpus case, but proceedings were dropped as the majority judges felt that it was not a fit case in which formal proceedings for contempt should be initiated.
early as 1959, the apex court by majority in the well known **Searchlight**¹¹⁶ case through Chief Justice **Subba Rao** ruled that the privileges enjoyed by a House of Parliament or a State Legislature under Articles 105(3) and 194(3)¹¹⁷ respectively on the analogy of the House of commons in England were not subject to Article 19(1)(a). The House, therefore, had full authority to prohibit the publication of any report of its debate or proceedings even though the prohibition violated the provisions of Article 19(1)(a). The Court also pointed out that any inconsistency between these articles and Article 19(1)(a) could be and ought to be resolved by the rule of harmonious construction. Moreover Art 19(1)(a) contained provisions of a general nature which must yield to the special provisions of Article 105() or 194(3). However, it was made clear by the apex court in **S.M. Sharma Vs. S.K. Sinha** AIR 1959 SC 395. The entire speech of MLA of Bihar Assembly including the expunged portion was published by the Newspaper **Searchlight**. The matter was referred to the committee of privileges of the House. The editor moved the apex court under Article 32 on the ground that under the guarantee of freedom of speech in Art 19(1)(a) he was at liberty to publish, whatever he wanted except such restrictions as might be imposed by law under Art 19(2). Also see **Gunpati Keshavram Reddy V. Nafisul Hussain** AIR 1954 S.C. 636 case relating to publication of certain derogatory aspersions on the speaker of UP Legislative Assembly in the Bombay weekly **The Blitz**.

¹¹⁶ Article 105 (1) & (2) and 194 (1) & (2) specifically lay down two privileges namely : (1) freedom of speech in Parliament or State legislature and (ii) Publication of proceedings of Parliament. But these are subject to (a) the provisions of the Constitution and to (b) rules and standing orders relating to procedure of Parliament, or legislature. In this context Articles 118 & 121 refer to restriction on the freedom of speech. For instance Article 121 forbids discussion in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties except when impeachment motion against that judge is discussed.
court that if the Parliament or a state legislature enacted law under Articles 105(3) or 194(3) respectively to define its privileges then such a law would be subject to Article 19(1)(a) and a competent Court could strike down that law under Art 13 of the Constitution if it violated or abridged any of the fundamental rights.\textsuperscript{118}

It is submitted that this part of the judgement has created a right general impression that neither the Houses of Parliament nor the State legislatures would be interested in codifying legislative privileges as then they would be liable to challenge under the various articles containing the fundamental rights.

The most significant verdict of the Summit Court on this subject of legislative privileges is that given in \textit{Keshav Singh's} case.\textsuperscript{119} Here the Court by majority of 6 to 1 speaking through Chief Justice \textit{Gajendragadkar} explained that unlike England, where the House of Commons being a superior Court of record and not

\begin{itemize}
\item \textsuperscript{118} See Supranote 16 Grover A.M. pp 127.
\item \textsuperscript{119} In \textit{Re Keshav Singh AIR} 1965 SC 745. Keshav Singh printed and published, along with others pamphlets against MLA of U.P. Assembly. The speaker of the House directed his arrest for a week for contempt of House. Writ of Habeas corpus on his behalf filed in All High Court and Court ordered for his release on bail. This led to the House passing a resolution holding Keshav Singh, his advocate and two judges who passed his release order guilty of contempt of House and directed their appearance before the house. This led to a petition by two judges in the Allhabad High Court and the full of H.C. stayed the implementation of the resolution of the House. As the matter got complex, the President of India referred the matter to the apex court for its advisory opinion under Article 143.
\end{itemize}
simply a legislature, enjoy the privilege of committing a person for contempt, Parliament and State legislatures in India are not Courts of record. Therefore, they cannot enjoy these powers which are enjoyed by the House of Commons. Moreover, in India though the legislature has the power to punish anyone for its contempt, yet this power is subject to judicial review and is not conclusive privilege of legislature. The Court further held that the grounds on which a legislature’s order of committee for contempt can be questioned by the Courts are very limited. Article 19(1)(a) does not control legislative privileges. It is mainly under Article 21 that Courts can review the order of committal for contempt. In other words, if the person committed has not been given the right to hearing or that the principles of natural justice have been ignored or if the action taken by the legislature is malafide or perverse, the Courts can look into the order of committal by the legislatures.

It is submitted that the apex Court has done a remarkable job by solving the conflict between the legislature and the judiciary and by giving an edge to judiciary over legislature by making act of exercise of legislative privilege subject to judicial review.

In another case, Chief Justice Hidayatullah of the apex Court observed that it was of the essence of Parliamentary system of government that people’s representatives should be free to express themselves without fear of legal consequences. What they said was only subject to discipline of the rules of Parliament,
the good sense of the members and the control of proceedings by the speaker. 120

But in this case when the Supreme Court sent a notice of lodgement of the appeal to the members and the Speaker of the Lok Sabha, the Speaker advised the members to ignore the notice. This clearly indicates that members of legislature can make any statement about any body, who will have no legal remedy at all. It is submitted that this is not desirable act on the part of the legislators who are nothing but the representatives of the people.

As far as the aspersions on members of the House of legislature or Parliament are concerned, there are number of cases where the press has been held guilty of contempt of the house for making offensive vulgar remarks about the legislators and the important issues like Eenadu Privilege Issue, 121 Kovai Malai Mirasu of Tamil Nadu, once again have highlighted the urgent need of codification of legislative privileges. And now

120. **Tej Karam Jain v. Sanjiva Reddy** AIR 1970 SC 1573. In this cases damages had been claimed in a suit for defamatory statements on the floor of the House. Sich defamatory remarks were made by some MPs in the lok Sabha against Sankaracharya.

121. The Chief Editor of a Telegu Newspaper Eenadu was found guilty of contempt of the A.P. legislative council for publishing certain defamatory article against House in his newspaper. The House ordered his arrest, he approached the Court which granted him stay, but the council discussed this matter and during discussion majority of the members expressed the view that the house was supreme in the matter of privileges and the Court had no place in the matter, and so Editor should be arrested & brought before the House for admonition. But unfortunately before the apex court could give its verdict in this case, the A.P. Legislative council opted for a show of legislative power. **The Hindustan Times** March 30, 1984 Eenadu Privilege Issues.
after the 44th Amendment Act (1979) where by changes are introduced in both Articles 105 and Art 194, it should be possible for the legislature to codify its privilege as under the amendment, the privileges etc. shall be those of that house and its members immediately before the coming into force of Fourty-Fourth (amend) Act 1979.

Time and again the demand for codification of privileges has been made at various quarters at different interval of times. Even the framers of the Constitution never intended that the privileges should not be defined by law. The members of the constituent Assembly like Sir A.K. Ayyar, Dr. Ambedkar, Dr. Rajendra Prasad have advocated for the codification of the privileges of the legislature.122 Recently, Mr. Justice Krishna Iyer and Venod Sethi in their book dedicated to the memory of the great parliamentarian, S. sathyamurthi, have contended that the people’s fundamental rights cannot be abridged by Parliament in the guise of privileges and have reemphasised the codification on the privileges of legislature by saying that "Silence is guilt where speech is duty".123

122. The Press council of India’s First and Second Annual Reports strongly expressed itself in favour of codification of law of privileges. In 1967, a demand in this direction was also made in Rajya Sabha. See Supranote 16 pp 139-140.

(VIII) Right to know, Right to Free Access to Information and Free Speech.

Further, one of the main road-blocs in the way of investigative journalism is not having free access to official information due to the existence of obsolete colonial Official Secrets Act, 1923\(^{124}\) in particular section 5 of the impugned Act which is the most inhibiting factory in the matter of obtaining information relating to the exercise of governmental and executive functions which impinge on the day to day life of the citizens. In today’s information age, when knowledge has become the most important source of power, there is need for an open government in India on the pattern of Western democracies including the USA where the Freedom of Information Act 1967 is there to protect the right of the press. In India, the need of right to know, right to access to information was firstly projected by the apex court in 1975 while dealing with the case of State of U.P. Vs. Raj Narain, where Justice Mathew observed:

\(^{124}\) The Official Secrets Act 1923 was enacted to consolidate the law relating to official secrets and deals with offences like spying and wrongful communication of Secret information.

Section 5 of the said Act is very wide in sweep whereunder it is an offence if any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, or note, document or information which relates to or is used in a prohibited place or relates to anything in such a place or which has been entrusted in confidence to him by any person holding a governmental office, wilfully communicates the same to any person other than a person to whom he is authorised to communicate or it is his duty to communicate. The section also punishes not only the correspondent, editor, printer and publisher of the newspaper who publishes an official secret in any form but also every director & officer of the company or corporation with whose knowledge and consent such secret was published. See for detail Supranote 49 Mudhol Kar. pp 64-66.
"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries -- The right to know, which is derived from the concept of freedom, though not absolute, in a factor which should make one wary, when secrecy is claimed for transactions which can at any rate, have no repercussion on public security." 125

But the Court did add that this right to have access to information is not unfettered but is subject to reasonable restrictions as specified in Art. 19(2).

Though the full potential and implication of Justice Mathew's verdict were not immediately adopted by judges, jurists and journalists, it was only in 1981, in the celebrated Judges Transfer case126, the apex Court, elevated right to know and 'Right to access to information'to the status of a constitutional right. Through a liberal interpretation of the guarantee of the Freedom of speech and expression the Court held that certain unarticulated rights are imminent and implicit in the enumerated guarantees. To quote Justice Bhagwati:

"The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the government must be the rule and secrecy an exception justified only where the strictest, requirements of public interest so demand. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest" 127


126. S.P. Gupta v. U.O.I. AIR 1982 SC 149. (emphasis added) on of the question involved was with regard to the claim for privilege laid by the Government of India in respect of disclosure of certain documents including correspondence between the CJI and the C.J. of Delhi High Court in connection with confirmation of Justice Kumar who was an additional Judge of the Del. High Court.

127. Ibid.
It is submitted that this verdict has firmly planted the seed of Freedom of information in India. Now the need is to nurture it carefully discreetly so that it can attain full and study growth and become effective tool of democratic control. This verdict is the outcome of judicial activism of the Court and is deviation from the original design of the founding fathers who could not probably have foresen the rapid changes in the society that has made it, a part of global village.

(IX) Broad Casting Media, Cable TV and Free Speech And Right to Information.

Of all the mediums of communication, broadcasting media that is T.V. and Radio plays a major role in transmitting information to the masses. The present technological revolution has so advanced that through satellites, the same programme can be watched by the viewers throughout the world at a same time. Infact the world has become a global village and people have the right to seek information, right to know freely and fully of the current and contemporaneous events. It is an important aspect of the freedom of free speech and expression. And, freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc.128

128. See Supranote 16 Grover, A.M. pp 60-64.

Article 10.1 of the European Convention of Human Rights states as follows: -

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
The electronic media today has superseded the print media in dissemination of information since the former like the television being both audio and visual appeal, has a more pervasive presence.

Further, unlike the print media, there is a built in limitation on the use of electronic media because the airwaves are a public property and so, are owned or controlled by the Government. It must be pointed out here that unlike in the United States, in India broadcasting media is at present owned and controlled by the Central Government.

But, in the recent landmark verdict in **Cricket Association of Bengal case**, Justice P.B. Sawant speaking for himself and on behalf of Justice S. Mohan held that the government had no right to monopolise broadcasting. To quote:

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129. Ever since its inception in 1959, the Government's monopoly of broadcasting was justified on the grounds that such a medium was (a) exhorbitant to establish and run, (b) that it must be used to inform and educate us, (c) that it could not be left to the mercies of private parties which would exploit it for either commercial or entertainment purposes or fissiparous ones. See "Some court comfort" by Bajpai, Shailaja *Indian Express* Feb. 19, 1995.

130. *Secretary, Ministry of Information & Broadcasting, G.O.I. Vs. Cricket Asscn. Bengal & others AIR 1995 SC* 1236 at p 1259-60 Case involving claim by Cricket Association of Bengal & BOCI for telecasting particular cricket matches (Hero Cup Tournament 1993) for particular hours of the day and for certain particular duration. Association did not make any claim on frequencies owned by D.D. but only sought permission from MIB (Ministry of Information and Broadcasting) and Doordarshan to uplink signals generated by Association to Satellite of an agency. The permission denied on ground of Limited frequencies. The Supreme Court held it improper without merit, displaying a deliberate. Obdurate approach of the Doordarshan authority.
"Broadcasting is a means of Communication and, therefore, a medium of speech and expression. Hence in a democratic polity, neither any private individual, institution or organisation nor any Government or Government organisation can claim exclusive right over it. Our Constitution also forbids monopoly either in the print or electronic media. However, the monopoly in broadcasting and telecasting is often claimed by the Government to utilise the public resources in the form of the limited frequencies available for the benefit of the society at large. It is justified by the Government to prevent the concentration of the frequencies in the hands of the rich few who can monopolise the dissemination of views and information to suit their interests and thus infact to control and manipulate public opinion in effect smothering the right to freedom of speech and expression and freedom of information of others. The government sometimes claims monopoly also on the ground that having regard to all pervasive presence and impact of the electronic media, it may be utilised for purposes not permitted by law and the damage done by private broadcasters may be irreparable. There is much to be said in favour of this view and it is for this reason that the regulatory provisions including those for granting licences to private broadcasting where it is permitted, are enacted."131

Similarly in his separate concurring judgement, Mr. Justice Jeevan Reddy has rightly made it clear by observing that the broadcasting media should be under the control of the public as distinct from Government. To further quote from Mr. Jeevan Reddy’s verdict:

131. Ibid at p 1311. The case involved four principal issues namely : (a) whether an organiser or producer of any event had the right to get the event telecast through an agency of his choice, national or foreign; (b) whether this was especially so when no demand on the frequencies owned, commanded or controlled by the Government was made; (c) Whether an organisation could be prevented from creating terrestrial signals and denied uplinking facilities and (d) what were the conditions that the government could impose. In brief the main legal question was related to airwaves.
"From the standpoint of Article 19 (1)(a), what is paramount is the right of the listeners and viewers and not the right of the broadcaster --- whether the broadcaster is the state, public corporation or a private individual or body. A monopoly over broadcasting, whether by government or by any body else, is inconsistent with the free speech right of the citizens. The free speech right of the citizens is better served in keeping the broadcasting media under the control of public control by public means control by an independent public corporation or corporations, as the case may be formed under a statute" 132

Therefore, as per the Court's verdict no monopoly of broadcasting media can be conceived as it is not permitted by Article 19 (2). Mr. Jeevan Reddy even suggested that Parliament should replace the obsolete Telegraph Act with a law placing the broadcasting media in the hands of public corporation or Corporations.133

132. Ibid pp 1306 - 1307 (emphasis added).

133. Ibid p 1309. Indian Telegraph Act was enacted in 1885. But that time there was neither Radio or T.V., though radio or T.V. fall within the definition of telegraph in Section 3 (1). Except section 4 and the definition fo the expression "Telegraph" no other provision of the Act appears to be relevant to broadcasting media.
Thus, the Court has also acknowledged that airwaves and frequencies are "a public property" and that their use has to be controlled and regulated by "a public authority in the interest of the public and to prevent invasion of their rights". To quote further from Justice 'Reddy's' concurring verdict: "Airwaves being Public property must be utilised to advance public good. Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motives. There is a far greater likelihood to these private broadcasters indulging in mis-information, dis-information and manipulation of news and views than the government - controlled media, which is at least subject to public and parliamentary scrutiny". 134

This way, the Court observed that the right to receive and impart information does not include right to impart information by using airwaves which is a public property under Article 19 (1) (a) and better remain in public hands in the interest of the very freedom of speech and expression. Mr. Justice Jeevan Reddy also pertinently observed that saturation of the space with communication satellites enabling provision for any number of channels and frequencies, "cannot be a ground for enlarging the scope of Art. 19 (1) (a)". 135

134. Ibid p 1307.

135. Ibid 1307, 1310-11, Also see Justice P.B. Sawant and Justice S. Mohan's Similar views at p 1282.
On the basis of above observation, the apex court also concluded that a right to establish and operate a private TV Station does not flow from Art. 19(1) (a), such a right is not implicit in it and can only be conferred by Act of Parliament, and if such Act is made, it should be consistent with the right of free speech of the citizens. And till the law on broad casting media is passed by the Parliament, the organiser of sporting event or (other event) has to approach the nodal Ministry as specified in 1993, which alongwith AIR or Doordarshan may grant such permission to organisers to engage private broad casting agency for such telecast, keeping in view the merits of the event and public interest.

Mr. Justice P.B. Sawant (for himself and on behalf of Justice S. Mohan) also observed.

"---- the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. a telecaster desires to telecast a sporting event, it is incorrect to say that the free speech element is absent from his right ---- The Promotion of sports also includes its popularization through all legitimate means ----- while pursuing their objective of popularising the sports by selecting the best available means of doing so, they incidentally earn some revenue, will not convert either of them into commercial organisations or the right claimed by them to explore the said means, into a commercial right or interest" 136.

136. Ibid p 1266. Justice Jeevan Reddy also said :

"A game of cricket like any other sports event provides entertainment --- and entertainment is a facet, a part of free speech.----- (But) from the standpoint of Article 19 (1) (a) what is paramount is the right of the listeners and viewers and not the right of the broadcaster ---- whether the broadcaster is the state, public corporation or a private individual body" at pp 1292, 1306.
On this basis, Mr. Justice P.B. Sawant further observed that:

"---- If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as possible, the access which enables the right be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Art 19 (2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures".137

On this basis, the Court also concluded that viewer’s right to be informed adequately and truthfully must be protected by establishing representative centralised agency.

It is submitted that the Court did right in underlining the need for an independent and autonomous public authority to regulate the use of airwaves and frequencies in public interest. The thrust of the verdict is towards, ending of the government monopoly in broadcasting and handing it over to a public authority. The Court through right interpretation of Article 19(1)(a) has said that nobody has the right to monopolise the print or electronic media as per the Indian Constitution. But it is quite wondering why it has taken us more than 35 years since inception of to challenge the government’s stranglehold.

137. Ibid. at p 1267. (emphasis added).
In the age of cable and satellite broadcasting, India too needs to strengthen the information media both quantitatively and qualitatively so that it decisively improves the quality of democratic life. As Broadcasting is being regulated worldwide by insisting on an autonomous public authority to oversee broadcasting in the country, the Indian apex court has started the process of decentralisation by removing broadcasting from direct government control.

This verdict of the apex court has also breathed new life into the Prasar Bharati Bill granting autonomy to AIR and Doordarshan, as the government was reportedly contemplating the virtues of permanently shelving it on the ground that since it had whole heartedly welcomed private participation in the media and that since Indian Satellite, cable channels were springing up in every neighbourhood, autonomy for AIR and Doordarshan was irrelevant. Because if Doordarshan is to remain up to date, if it is to withstand competition it needs to be freed from government interference, professionalised at once, decontroled and decentralised. Hence, there is an urgent need of replacing Doordarshan by an independent authority as suggested by the apex court, comprising of professionals who can replace bureaucrats and sycophants. As also suggested by eminent veteran journalist Mr. Bidwai, this independent body must be placed under the control of a neutral body of well-trained journalists, it should be mandated to promote quality entertainment. He has also proposed of setting up a watch dog panel at the same time to
deal with the issues of ethics in TV - from coercion of cable operators, to unethical advertising and pornography.118

In brief, it can be said that the above discussed ruling of the Supreme Court will hopefully witness the beginning of a new era in broadcasting. It is a milestone in the extension of free speech and expression to the government controlled electronic media.119 The Government must realise that too much control and interference in the electronic media mainly can only be counter-productive. To repeat it, the government must set up an autonomous regulating body to be called the Broadcasting Authority of India, to ensure professionalism and quality

138. See "Dirty Satellite wars wanted : A TV Policy" by Bidwai, Praful The Tribune June 6, 95.

139. Meanwhile the Rajya Sabha has already passed the Cable T.V. Networks (Regulation) Bill 1994, which seeks to legitimise and standardise cable networks which were mushrooming in a haphazard manner. The bill seeks to regulate the operation of cable television networks making it mandatory for the operators to follow the specified programme & advertising code with stringent penalty of time and improvement. Since the Bill has not become Act so far, the President of India meanwhile has re-promulgated an ordinance which seeks to regulate the operation of cable television network in the country. It is known as the New cable T.V. Networks (Regulation) Ordinance 1995, replacing the earlier ordinance of Sep. 1994. this ordinance empowers the Central Government to prohibit the operation of cable television networks in public interest The Tribune Jan 18, 1995.

But the Cable TV Bill, does not seek to put any fetters on cable operation. According to Government it is not an attempt to stifle the freedom of choice and expression or force the people to watch only Doordarshan as alleged by some quarters.

Also See The Tribune Dec. 14, 1994, The government would also consider setting up a monitoring body of eminent persons, including experts and members of Parliament for ensuring the Bill was not misused in anyway.
programming on Indian T.V. and Radio. It is high time the government should start thinking on fresh lines to meet the new challenges from foreign channels in a decisive and effective manner.\textsuperscript{140}

(X) National Anthem, Freedom of Silence and Free Speech:

In another unique verdict, striking down the Kerala High Court ruling, the apex Court through Justice *O. Chinappa Reddy* ruled that there is no provision in law which obliges anyone to sing the national anthem nor is it disrespectful to the national anthem if a person stands up and does not join in the singing.\textsuperscript{141}

To quote: "-----No person can be forced to join in the singing of the national anthem if he has a genuine and conscientious religious objection".

\textsuperscript{140} As per the news report quoting the information and Broadcasting Secretary Mr. Bhaskar Ghosh, states that the law Ministry's interpretation of the Supreme Court directive is that the people must have the freedom to receive and communicate information and this means that they must have access to all available means. Therefore, according to the Government, the new public authority to be constituted would allot licenses and frequencies of transmission to selected private parties. In other words, while the government's monopoly of the airwaves will be diluted its stranglehold on AIR and Doordarshan will continue and this is not good, is against the spirit of judgement of the apex Court.


\textsuperscript{141} \textit{Bijoe Emmanuel v. State of Kerala} AIR 1987 SC 748. In this case, three children of Jehovah’s witnesses sect in Kerala were expelled from the School for refusing to sing the national anthem contravening the circular issued by the DPI Kerla which made it compulsory for students in the School to sing the national anthem. These children used to stand up respectfully at the time of singing of national anthem but not joined in singing as according to them their religious faith did not permit them to join any rituals except if be in their prayer to Jehovah, their creator. They were expelled and challenged their expulsion in Kerala High Court which upheld their expulsion on the ground that it was their fundamental duty under Article 51-A to sing the national anthem. Therefor appeal to the Supreme Court.
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is submitted that National interests which are more important than the individuals beliefs must be taken into account while disposing of the review petition, we must not forget that one of the main factors for the present crisis in our country is lack of patriotism, love for our country, the feeling which was the only strength of our freedom fighters, whose sacrifices made our country free from the British yoke in 1947. It is humbly submitted that through proper amendment in the Constitution, the tooth be added to the toothless fundamental duties as enumerated in Article 51-A by 42nd Amendment Act, 1976. Unless these are made enforceable like fundamental rights, they only act as a toothless paper tiger. It is right time to give new dimension to the concept of Secularism and Nationalism by considering Nationalism as the only religion, faith of ours. Unless from our heart and soul, we start feeling ourselves as Indians first and Hindu, Sikh, Muslim, Christian secondally, we can not find solution to the present problems and restore our country’s ancient glory and making her fulfill her destiny as being spiritual guide of humanity at large as envisioned by the greatest saint philosopher of the 20th Century Sri Aurobindo. The verdict of the Supreme Court in National Anthem’s case is a deviation from the original design of the founding fathers of the Constitution implicitly reflected in the very Preamble of the Constitution.

It is also added that submission made by eminent jurist Mr. Seervai calling the verdict of the Supreme Court a right one unswayed by public clamour or prejudice, on the ground that Constitution secures to every citizen the dignity of the
individual and the unity and integrity of the nation does not give counternance to laws or executive acts, which bred hypocritcs, is not wholly correct. The above reason on which it is based is right but the submission upholding the verdict of the Court correct is wrong.

(XI) Territorial extent of Free Speech:

Fundamental Right to freedom of speech and expression as guaranteed under Art. 191 (1) (a) is not subject to geographical Limitation. It can be exercised freely both within and outside India. And if State attempts to place barrier to it, it is infringement of Art. 19 (1) (a).

In the historic case of Maneka Gandhi the apex Court held that the right to freedom of speech and expression has no geographical limitations. It carries with it the right to gather information as also to speak and express one self at home and abroad and to exchange ideas and thoughts with others both in India and abroad. The Court rejected the contention of the respondent Government that the fundamental rights guaranteed by the Constitution were available only within India. But the Court

142. Maneka Gandhi v. U.O.I. AIR 1978 SC 597. In this case constitutionality of certain provisions of the Passport Act were considered at the instance of the petitioner, a journalist.

See for detial infra. Ch. VI. Parts C.
held that the right to travel abroad though a valuable right, it cannot be claimed as an integral part of the freedom of expression guaranteed by Art 19(1)(a) that as a result, a journalist cannot claim exemption from passport regulations on the ground that it would violate his freedom of expression. But the Court also held that on certain occasions, such denial of passport to a journalist can amount to violation of freedom of expression under Art 19(1)(a) or his freedom to carry on a profession under 19(1)(g) for instance, where he has sought the passport for carrying on his profession of journalism or for studying or teaching abroad.

(XII) Demonstration, Picketing and Free Speech:

Demonstrations or picketing are visible representations of one’s ideas and are protected as a form of free speech provided they are not violent and disorderly. In the earlier Kameshwar Prasad case, the apex Court observed as follows: "Broadly stated a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is a communication of one’s ideas to others to whom it is intended. It is in effect therefore, a form of speech. There are forms of demonstration which would fall within the freedom guaranteed by Art 19(1)(a) and 19(1)(b). A violent and disorderly demonstration would not obviously be within Art. 19(1)(a) and (b) __". 143

The Court concluded that Government Service rule

143. Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166. Question of, validity of rule 4-A of Bihar Govt. Servants’ conduct rules 1956 barring govt. servant to take part in any strike or demonstration in connection with any matter pertaining to his condition of service, was involved.

O.K. Ghosh v. E.X. Joseph AIR 1963 SC 812, applied in Radheyshyam v. P.M. G Nagpur AIR 1965 SC 311 held there is no fundamental right to strike. Contd...
prohibiting strikes is valid but prohibiting demonstration is violation of Art. 19(1)(a) and (b).

(C) Conclusion:

To sum up, it can be stated that Indian Supreme Court has expanded the ambit of freedom of speech and expression in the Post Maneka Gandhi case era. Today, the Court has made right to know Right to keep silence, Right to unpopular speech in a case of prior-censorship on films as part of free speech. Very rarely now the Court in the name of restraints impose prior-checks on the media. In the recent revolutionary verdict, the Court on the pattern of American decision have declared airwaves as public property and has giving priority in a way to viewer’s right, has recommended for setting up of representative centralised agency, has stood for autonomy of Broadcasting media. Further by declaring commercial advertisement as a part of free speech, the Indian Supreme Court has come a long way from laissez-faire era and has stood for the need of free flow of commercial information. The Court has also extended right to privacy in the domain of freedom of speech and expression by allowing publication of a biography based upon public reports. But in all these cases the Court has not permitted freedom of speech to the extent of ignoring reasonable restrictions as specified in Art. 19(2). The deviations made by the apex Court through its activist role are in the direction of maintaining balance between the right of the individual and the society sofar.

Also see Railway Board v. N. Singh AIR 1969 SC 96C Held that freedoms guaranteed by Art. 19(1)(a) and (b) do not include the right to exercise them in properties belonging to others.
III. RIGHT TO LIFE AND PERSONAL LIBERTY:

(A) BACKGROUND:

The concept of Right to life and Personal liberty alike other basic rights is also not the gift of the west to India. Ancient Indian scriptures, in particular, the 'Vedas' speak of significance of human life and also mention about various liberties enjoyed by the people mainly freedoms of body, life and human dwelling.144

The Indian legal philosophy having its roots in metaphysics contributed four dimensions to the concept of personal liberty, namely, Artha, Kama, Dharma and 'Moksha', and incorporated these in the law code of that time. Out of these four aspects, 'Dharma' regulated civil and political rights.145.

In medieval India, this ancient concept of personal liberty was further polished by the new religions of Hindus namely Jainism and Buddhism, who emerged as a reaction against rigid prevailing Brahmanism which created class inequalities in the society. King Ashoka, the follower of Buddhism, worked for the protection of the human rights like equality, fraternity and liberty. But after the advent of Muslim rule in India, there was suppression of the basic human rights and non-Muslims Indians were treated like slaves. Thus, 'liberty' of the people though

144. See Civil Liberties by Mukherji, P.B. (1968) PP 22-23; Sri Aurobindo has also discarded the view that the concept of personal liberty was derived from west and said it was very much contribution of classical sages of Indian Culture and of Vedantic thought.

145. Ibid pp 24-25.
recognised in ancient and medieval India yet the real quest for liberty emerged in the modern times during the Indian national movement against British rule.\textsuperscript{146}

The British Government passed various repressive Acts\textsuperscript{147} from time to time to suppress the civil liberties of Indian people. Infact, the British rulers shared no respect for the basic human freedoms of Indian people and this period is known as the darkest period in the history of personal liberty.\textsuperscript{148} Due to several efforts made by the Indian Leaders in the form of passing of various resolutions in Indian National Congress to this regard from 1917 to 1922 followed by 'Moti Lal Nehru Committee Report 1928' which specifically laid down fundamental right to life and liberty of the Indian people and finally 'Sapru Committee's' recommendation in 1945 for inclusion of fundamental rights in the future Constitution of India, ultimately after India's independence from the British yoke in 1947, the concept of Right to life and Personal Liberty was crystallised in the Constitution.

\textsuperscript{146} Ibid

\textsuperscript{147} For instance the Rowlatt Act of 1919 was destructive of individual rights U/S 124A of the Indian Penal Code various national leaders were quite often arrested for the offence of sedition. Even the much discussed Government of India Act 1935 did not include civil rights of the people. Further, the Defence of India Act 1939 was passed during Second World War where under the power was given to the centre govt. to frame rules for the purpose of detaining suspected persons for the defence of India and orders passed under this Act were not subject to judicial review and where under number of arrests and detentions were made. This Emergency Act was widely criticised.


of India by the Constituent Assembly.\textsuperscript{149}

The framers of the Indian Constitution, took almost three long years to decide on the nature and scope of right to life and personal liberty. A complete examination of the debates of the Constituent Assembly shows how the founding fathers fought for the right to life and liberty for all persons.

In the ‘sub committee on fundamental rights’ setup under the Advisory Committee on fundamental rights, B.N. Rau, the Constitutional adviser, issued a note on the personal liberty clause on Sep. 2, 1946. In this note he expressed his wish that this clause should not be vague and the Courts must be given the power to enforce it so that it should not be a meaningless guarantee against oppressive laws.\textsuperscript{150}

Prof. K.T. Shah in his comprehensive note made a plea for empowering the Courts to protect the personal liberty of all persons and not of citizens alone.\textsuperscript{151}

On the other hand, Alladi Krishna Swami Ayyar felt that the question before the Assembly was whether to adopt the American model or any other Constitution. Referring to the Constitution of United States, he observed that the American

\textsuperscript{149} See \textit{Fundamental Rights and Constitutional Remedies} Vol.I by Ramachandran, V.G. (1964) p 1. See also infra Ch. IV.


\textsuperscript{151} Ibid at 42 Mr. Shah classified rights as political, civil economic and social. For him, the political rights were rights of citizens while the civil rights were of all men. He also said that these rights should be exercised subject to the laws of various communities as well as special law necessary during emergency like war, and should not be unconditional at pp 42-55.
Supreme Court had drawn a line between personal liberty and the need for social control and thus imposed checks on social control as well as personal liberty as in the United States, the "due process clause" was used either to expand or to limit the scope of the provisions guaranteeing personal liberty.152

K.M. Munshi in his draft provided that "No person shall be deprived of his life, liberty or property without "due process of law".153

Similarly Dr. Ambedkar's draft stated that the State should not deprive any person of life, liberty or property without "due process of law".

Infact, the sub-committee on fundamental rights was faced with the problem of balancing individual liberty vis-a-vis social control as balance was necessary both for the fulfillment of individual's personality and the peace of society. The sub-committee after discussing the subject matter of right to life and personal liberty, by five votes to two, with two abstentions, decided to retain the "due process" clause in its classic form.154

152. Ibid pp 67-68.
153. Ibid pp 75-79 In Article 5 (1) (e) of Munshi's draft also found mention of "due process clause" and in this he laid down guarantee to every person the right to be informed about the grounds of his arrest with in twenty hours. He also laid down provisions against prolonged pre-trial detention, excessive bail & its unreasonable refusal, inhuman punishments etc.
154. Ibid at pp 84-88 at p. 86. Dr. Ambedkar prepared a long list of fundamental rights in which he included the right to life, liberty and pursuit of happiness and he incorporated these rights after studying the Constitution of different countries.
Commenting on the report of the sub-committee, B.N. Rau expressed the apprehension that by borrowing clauses 11 and 29 respectively from the fifth, fourteenth, sixth and eighth Amendments of the United States’ Constitution, there is likelihood of opening of vast flood gates of litigation immediately following upon the Constitution. 155

To meet this difficulty, Mr. Rau proposed an additional clause 27-A by which state was empowered to limit by law the rights guaranteed by sections 11, 16 and 27 of the draft if the exigencies of common good so required. 156

And, finally, the copy of the draft report of the sub-committee on fundamental rights was submitted to the Advisory Committee on 3 April, 1947. The Sub-committee had also made suggestions in its report to incorporate right of liberty of person and security of person and dwelling from unreasonable searches and seizures and from search without warrant. But the Advisory committee deleted these from the list of rights as it was felt that such rights might help the criminals and would have impact on the working of Indian Evidence Act, 1892. It was also rejected on the ground that adequate safeguards for such search and seizure were already provided under the Code of Criminal Procedure. 157

155. See Supranote 06 Austin G.in P.84. Also see supranote 150 ibid at 139 & 141. The matters was discussed from 24 March, 1947 to 31st March, 1947. The sub-committee included two clauses in its draft namely clause 11 which provided: "No person shall be deprived of his life, liberty or property without due process of law" and clause 29 which said "No person shall be subjected to prolonged detention preceding trial, to excessive bail, or unreasonable refusal thereof, or to in human or cruel punishment.

156. Ibid Rao, B. Shiva pp 151-152. He borrowed 27-A from the Irish Constitution.

157. Ibid at pp. 159, 172.
In its final report to the Advisory Committee, submitted on 16 April, 1947, the sub-committee reproduced clauses 11 and 29 as clauses 12 and 28 without making any changes except that the "legal equality" provision was also included in clause 12.158

Before the Advisory Committee met under the chairmanship of Vallabhbhai Patel to discuss the final draft report of the sub-committee on fundamental rights, Shri Ayyar expressed his intention to Mr. Patel about making some amendments in the draft report. He explained to the committee about the implications of adopting "due process" clause of American Constitution by citing example from America where this clause had "chequered history", and which though initially was applied only to procedural laws yet lateron was extended to substantive rights also. Briefing the Advisory Committee regarding the fluctuating approach of American courts in interpretation of this vague phrase "due process", Mr. Ayyar expressed fear that if this approach followed by the Indian Judiciary, it might stand on the way of "expropriatory legislation".159 Though personally he was not against the "due process" clause and showed his willingness for its retention yet he cautioned the Advisory Committee about its inherent dangers.

158. Clause 12 provided: "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 territory of the Union, provided that nothing herein contained shall prevent the Union legislatures from legislating in respect of foreigners" Ibid at pp 151-52.

159. Ibid pp 240-241 Mr. Ayyar cited example of President Roosevelt's New Deal legislation, wherein Judges gave interpretation in the direction of social utility, while in other cases, the interpretation was given in the direction of individual property. He said that in India if judges were having inclination to property, they might put a wide construction upon the words so as to hamper "social legislation" But if the judges were imbued with modern ideas, they might give a more liberal interpretation.
To quote Shri Ayyar: "It is a matter of fundamental right which is going to bind the future Constitution of India. Whatever decision is reached, it is better that we are fully alive to the implications of what we are doing, personally I am for the retention of the clause"160

But Mr. G.B. Pant opined for using the right to liberty in a limited sense. He said that the "due process" should be understood only in a procedural sense. He proposed for making changes in this vague "due process" clause which might result into different interpretation full of contradictions and observed:

"The future of this country is to be determined not by the collective wisdom of the representatives of the people, but by the fiats of those elevated to the judiciary. The words "due process of law" should be altered. The language should be foolproof so that every judge may be expected to give the some sort of ruling. We should not put in words which give rise to controversies --- which will place the fate of the people of this country on the whims and vagaries of the judges"161

But Pt. Pant's views were not accepted by the other members of the advisory committee, in particular by K.M. Munshi, Dr. Ambedkar, Shri Ayyar & Rajagopalachari. Opposing the view of Pt. Pant, Mr. Munshi said that "Due process of law" only meant that the legislation which was brought forward was a proper and necessary legislation to secure the end in view and it was not extravagant as alleged by Mr. Pant, with respect to each particular situation. Further refuting the view of Mr. Pant that through the "Due Process' clause judges will replace legislature,

161. Ibid at 243-244. Mr. Pant Proclaimed that, "to fetter the discretion of the legislature will lead to anarchy".
Mr. Munshi stated that American Supreme Court had never ignored rather applied every time these canons/principles whether the legislation was a proper one or not, and has allowed socialistic legislation and even allowed detention to some extent in times of war.162

Disagreeing with Pt. Pant’s views, Dr. Ambedkar, observed that there was no need to give ‘carte blanche’ to the government to detain with a ‘facile provision’.163 On April 30, 1947, the Constituent Assembly discussed the personal liberty clause164 as reported upon by the Advisory Committee & it adopted the provision without any amendment.165

In the light of the Advisory Committee’s recommendations, B.N. Rau was entrusted with the task of preparing a draft Constitution and he included in it clause 16 providing for "due process" although he qualified "liberty" with the adjective personal before it. The draft section provided:

"No person shall be deprived of his life or personal liberty without the due process of law, nor shall any person be denied equality before the law within the territories of the federation".166

162. Ibid at p 244.
163. Ibid p 234.
164. Clause (9) read as: "No person shall be deprived of life, or liberty, without due process of law nor shall any person be denied the equal treatment of the laws within the territories of the Union" Ibid p 247.
165. CAD Vol. III p 457.
After preparation of the draft, Rau was asked to proceed to the USA, Canada, Eire and Britain to have consultation with jurists, constitutionalists and statesmen on the draft Constitution of India. In the USA, Justice 'Felix Frank-furter' of the American Supreme Court told him that the "due process" clause in that section was both undemocratic and unfair & burdensome to the judiciary because it gave the judges power of voting legislation enacted by the representatives of the nation.167

After his return, Rau proposed amendment to his draft Constitution favouring the phrase, "according to the procedure established by law" in place of the "due process" clause.168

Infact, the process for elimination of the "due process" clause had started even before it was adopted in May 1947. While commenting on the report of the sub-committee on fundamental Right, B.N. Rau had remarked that how substantive interpretation of "due process" might interfere with legislation for social purposes. And in Advisory Committee, on 21 April, 1947, procedural difficulties of due process were highlighted by Mr. Ayyar and Rajgopalachari, whereas Rau always remained advocate of substantive meaning of "due process" and not procedural, but the supporters of due process would have preserved it for procedural safeguards, primarily against arbitrary Executive action.169

The Constituent Assembly appointed the Drafting Committee

167. Ibid. Mr. Rau also had meeting with Justice Hand of the Federal Circuit Court of Appeals who expressed the view that all the fundamental rights should be moral precepts and not legal fetters of the Constitution.

168. Ibid p. 313 The phrase "procedure established by law" was basically borrowed from Article 31 of the Japanese Constitution.

169. Supra note 06. Austin, G. pp 102-103.
on Aug. 29, 1947, to examine the Draft constitution of B.N. Rau. Out of the seven members of the Drafting committee, "Due process" was supported by Munshi, Ayyar, Ambedkar and Saadulla. But after several meetings with Rau it was Ayyar who got convinced of the dangers inherent in substantive interpretations of due process and lateron became one of the most outspoken opponents of the clause. And, finally with Ayyar’s vote, the Drafting committee omitted the expression "without due process law" and added the expression "except according to procedure established by law" in the Article 16 of the revised Draft Constitution. It is believed that main factor for removing due process was growing belief that preventive detention could be used as the best weapon against the growing communal violence. But the Drafting Committee justified its removal on the ground that the phrase "according to procedure established by law" was more specific.

In response to this Draft Constitution as submitted by the Drafting committee to the Assembly, several amendments were moved by around twenty members, seeking making right to personal liberty justiciable. Twelve of these had reinserted due process, and the remaining eight had replaced 'procedure established by law' by 'save in accordance with law'.

170. Mr. M.G. Ayyangar did not support "Due process", N.M. Rau’s views are not known, and Khaitan, a close associate of Patel, may be presumed to have opposed it.

171. Ibid p. 104.

172. The right to personal liberty as included in Article 15 of the Draft Constitution 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". Ibid.

173. Ibid

174. Ibid.
Thus when on Dec. 6, 1948, the discussion started on Article 15 in the Constituent Assembly, the advocates of 'due process' made a severe attack. Mr. 'K.M. Munshi' said that the inclusion of 'due process' would enable the Courts to strike a balance between individual liberty and social control. It would also check the ruling political parties from extending their jurisdiction in curtailing and invading the said rights.175

Similarly Shri 'Kazi Syed Karimuddin' also moved an amendment for deleting the word 'personal' used before the word 'liberty' and for substituting the phrase "without due process of law" for "except according to procedure established by law; & said:

"If the words "according to procedure established by law" are enacted, there will be very great injustice to the law Courts in the country, because as soon as a procedure according to law is complied with by a Court, there will be an end to the duties of the court and if the court is satisfied that the procedure has been complied with, then the judges cannot interfere with any law which might have been capricious, unjust or inquitos. The clause, as it stands, can do great mischief in a country which is the storm centre of political parties and where discipline is unknown..."176

Shri 'M.A. Baig' also moved an amendment for deleting the expression "except according to procedure established by law, but he favored to replace it by the phrase "save in accordance with law"177

176. Ibid pp 842-43. Amendment No. 523 was moved by Karimuddin (emphasis added).
177. Amendment No. 526 was moved by Mr. Baig Ibid pp 844-46.
Giving justification for such change Mr. Baig said that:

"there must be the right of the citizen to go to a Court to prove that the ground on which he has been arrested is wrong and he is innocent". Any law taking away this right should be invalid.178

On the other hand, Pt. Thakur Das Bhargava supported the use of "without due process of law" in Art. 15 as proposed by Karimuddin but he opposed the deletion of the word 'personal' as used before the word 'liberty'. He said, "By using these words "without due process of law" we want that the Courts may be authorised to go into the question of the substantive law as well as procedural law. and he believed that if this amendment was carried out then: "the Courts will have the right to go into the question whether a particular law enacted by Parliament is just or not, whether it is good or not, whether as a matter of fact it protects the liberties of the people or not." He said that if the Supreme Court came to the conclusion that the law was unjust, unreasonable, then in that case, the courts would hold the law to be such and it would cease to have any further effect.179. He observed that if this amendment was carried out, it would constitute the bed rock of our liberties. To quote: Pt. Bhargava:

178. Ibid; Mr. C.C. Shah supported the amendment, which says that the words without 'due process of law' should be substituted for the words 'except in accordance with the procedure established by law' at p. 848; Pattabhi Sitaramayya recommended for the substitution of the words "save in accordance with law" for the words except according to procedure established by law".

179. According to Mr. Bhargava, the word "law", meant what was understood by the Japanese and other Constitution, that is, Universal principles of Justice Ibid pp 846-47.
"This will be a Magna-Carta along with Article 13 with the word 'reasonable' in it. This is only victory for the judiciary over the autocracy of the legislature. Infact, we want two bulwarks for our liberties. One is the legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panic, the judiciary will save us from the tyranny of the legislature and the executive.\(^{180}\)

Infact Mr. Bhargava wanted the judiciary to be exalted to its right position of palladium of Justice and the people to be secure in their rights and liberties under its protecting wings.

Another advocate of 'due process clause' in the Assembly was Z.H. Lari who felt that not only in the interest of proper functioning of legislatures but also in the interest of individual liberty, the 'due process' should find place in the Constitution and he expressed the hope that the Supreme Court in India will recognise the limits of individual liberty as well as the necessities of the State while interpreting this clause. He also observed that if the clause 15 is accepted without due process then the whole Constitution becomes lifeless. Otherwise, the article as it stood, being lifeless would make the whole Constitution lifeless. He prayed that accepting this amendment would earn the Assembly the gratitude of future generations.\(^{181}\)

\(^{180}\) Ibid At p. 848. Mr. K.C. Sharma also moved an amendment seeking the substitution of the words "without due process of law" for the words "except according to procedure established by law" as he felt that the former phrase, having its roots in Anglo American law, does not lay down a specific rule of law as not being defined both in the English and the American Constitutions. It only implies a fundamental principle of justice and has a necessary limitations on the powers of the state, both executive and legislative. This phrase means is to guarantee a fair trial both in procedure as well as in substance. Substantive law must be just and appealable to the civilised conscience of the community at p. 850.

\(^{181}\) Ibid pp 855-56.
But supporting the draft provision, 'Shri Alladi Krishna Swami Ayyar', opposed the inclusion of 'due process' clause by saying had the expression been understood according to its original content and according to the interpretation of English judges which interpretation merely suggested the due course of legal proceeding according to the rules and forms established for the protection of rights, there would have been no difficulty at all. But the expression, as developed in the U.S. Supreme Court, he felt, had acquired a different meaning and import in a long course of American judicial decisions which lack uniformity & have inconsistency in regard to the interpretation of 'due process'. He observed: "Three gentlemen or five gentlemen, sitting as a Court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature"^182

He further expressed faith in the house that it would take into consideration the various aspects of this question, the future progress of India, the well-being and the security of the state, the need of maintaining a minimum of liberty, the need for co-ordinating social control and personal liberty before arriving at a decision.

Surprisingly, Mr. Ayyar supported the draft on the same arguments like "Due process" being impediment in the way of social legislation, on which he had earlier rejected it in 1947. Commenting on this, G. Austin said that this change of mind in Ayyar's earlier stand "was one of the sorriest performances ever put on by the Assembly leadership"^183

^182. Ibid p 853.
^183. Supra note 06 Austin, G. p 106.
'Dr. Ambedkar' requested for the postponement of further consideration of the draft article for the time being and it was accepted by all the members. Again, when article 15 was taken up for consideration on Dec. 13, 1948, 'Dr. Ambedkar' presented both the positive and negative points of both the phrases "due process" and "procedure according to law". According to one view, the legislature might be trusted not to make any law which would abrogate the fundamental rights of man. And the second view was that it was not possible to trust the legislature which being subject to party prejudices and considerations, might commit error by making a law which might abrogate fundamental rights of a citizen. Thus, elaborating the dangers of both sides, Dr. Ambedkar stated that it was very difficult to come to any definite conclusion. He said: "It is rather a case where a man has to sail between Charybdis and Scylla, and I, therefore, would not say anything. I would leave it to the house to decide in any way it likes".184

Finally, all the amendments for retaining the 'due process clause' in Article 15 were defeated and this article was passed without the "due process clause".185

The non-inclusion of "due process" evoked unfavourable public reaction. To meet the public criticism and to compensate for what was done in passing article 15, Article 15-A was

184. Ibid at pp 1000 - 1001

185. 'Dr. Ambedkar' informed the Assembly in September 1949 that, "No part of our Draft Constitution has been so violently criticised by the public outside as Article 15" C.A.D. Vol. IX p.1497.
introduced by Dr. Ambedkar in the Assembly on Sep. 15, 1949. The first two clauses of this article included two fundamental principles of Justice which were already part of Criminal Procedure Code.\textsuperscript{186}

This Article in essence contained the substance of "due process". And after a long debate, wherein several amendments were proposed by several members like Thakurdas Bhargava, Purnima Banerjee H.V. Kamath, Deshmukh, J.R. Kapoor, Shri Ayyar,\textsuperscript{187} this new draft article 15-A was adopted. Finally, while revising the draft articles 15, the drafting Committee renumbered draft articles and 15-A as articles 21 and 22 respectively.

Article 21 was adopted without any further alterations by the Assembly in Nov. 1949. But Article 22 was criticised severely, mainly on the ground that the cases of preventive detention as referred to the Advisory Board under clause (4) did not appear to be subject to the maximum period of detention prescribed by Parliament by law and the requirements as to the communication of grounds of detention not applied to persons detained as preventive detenus. Ultimately, the Drafting committee’s amendments as moved by Shri Krishamachari were adopted and Article 22 of the Constitution assumed its present form whereby not only period of detention under Preventive detention is prescribed which is initially three months but also any person detained under such laws, must be informed at the earliest possible the grounds of his detention.

\textsuperscript{186} See Sections 60, 61, 81 and 167 of the Criminal Procedure Code, 1898 now in Criminal procedure Code 1973 these sections are renumbered as Sections 56, 57, 76 and 167 respectively. For Amendment 15-A; See Ibid pp 1496-97.

\textsuperscript{187} Ibid pp 1498-1508, 1510-1511, 1515-1517, 1512-1514, 1541-1552, 1535-1538.
On 26th Nov. 1949, the discussion in the Constituent Assembly was concluded & the Constitution of India was adopted. Now under Article 21 of the Constitution "No person shall be deprived of his life or personal liberty except according to procedure established by law".

This smallest article of eighteen words is the mother of all other rights because nothing is more significant to an individual than his life and liberty. The beauty of this article lies in the fact that it is granted by our founding fathers to all natural persons including both citizens and aliens.188

Further careful reading of this article reveals that the marginal note talks of "life" and "personal liberty" whereas the test refers to life or personal liberty. The word ‘and’ is conjunctive, that is, the act of joining together, whereas the word ‘or’ is disjunctive. But to carryout the intention of the legislature it may be necessary to read "and in place of the conjunction or andvice-versa. In the context of Article 21 if the two words "Life" & "Liberty" were treated in the light of marginal note then it would have limited the scope of this provision as then the protection of this Article would have been made available in those cases only where the deprivation of personal liberty ultimately deprives the life of an individual. Surely, this was not the intention of the framers of the

188. This view can be inferred from the use of the words 'his' and 'personal' in the article. Similar view was taken by the American Supreme Court while referring to the 'due process' clause. See Western Turf Association v. Greenburg 204 U.S. (1907) 359.

Constitution of India who wanted to guarantee right to life or personal liberty to all persons subject to procedure established by law.

Ever since the inception of the Constitution of India, the Indian Supreme Court scrutinised the expressions "procedure established by law", 'life & "personal liberty" several time and through interpretation have quitey widened the ambit of these terms.

(B) JUDICIAL INTERPRETATION OF ARTICLE 21 : ROLE OF INDIAN SUPREME COURT AND DEVIATIONS MADE :

(1) Procedure Established by Law : As already seen above, the architects of the Indian Constitution were well aware of the flexible and indeterminate nature of the terms "Due process of law" and "save in accordance with law", and therefore, they rejected these expressions for more specific phrase "procedure established by law" This phrase came up before the Indian Supreme Court for judicial interpretation in the very first year of Indian Republic in the landmark Gopalan's case. In this case majority opinion was that : "Procedure established by law" means procedure prescribed by the law of the State which includes Parliament and the State Legislature" said Chief Justice Kania

190. Supranote 05. The petitionioner a communist leader, had been under detention since 1947 and while being under detention order of State Govt. on 1 March 1950, he was served with fresh detention order under s.31 of Preventive Detention Act, 1950 He chlanged his detention as being violative of his right to personal liberty as guaranteed by article 21.

Majority opinion was delievered by Chief Justice Kania, and Patanjali, Shastri, Mukherjee, Das JJ.

191. Ibid at 61, Justice Patanjali Sastri’s views at p. 72.
It was also held that "law" meant "enacted law" and "procedure" meant "procedure" laid down by enacted law. Chief Justice Kania stated: "The word "established" according to Oxford Dictionary means to fix, settle, institute or ordain by enactment or agreement. The word 'established' itself suggest an agency which fixes the limits. According to the dictionary this agency can be either the legislature or an agreement between the parties. There is, therefore, no justification to give the meaning of 'jus' to "law" in Article 21". Justice Kania further stated that the word "due" in the "due process" of law in the American Constitution was interpreted to mean "just" by the Supreme court in America. The deliberate omission of the word "due" from article 21 lent strength to the contention that the justiciable aspect of law, that is, to consider whether it was reasonable or not by the Court, did not form part of the Indian Constitution and on this basis, he concluded that: "By adopting the phrase "procedure established by law" the Constitution gave the legislature the final word to determine the law".

Justice Patanjali Sastri also holding the majority opinion, said that "procedure established by law" must be taken to refer to a procedure which has a statutory origin. It cannot be on the basis of vague and uncertain concepts as the immutuable and universal principles of natural justice.

Further interpreting "law" as "positive or "state made law", Justice Shastri observed that accepting the view that word

192. Ibid p. 39
193. Ibid.
194. Ibid at 72.
'law' in Article 21 stood for the 'Jus naturale' of the civil law, and making the phrase according to procedure established by law equivalent to due process of law in its procedural aspect "would have the effect of introducing into our Constitution those "subtle and elusive criteria" implied in that phrase which it was the deliberate purpose of the framers of our Constitution to avoid".  

Interpreting the term "procedure" as the manner and form of enforcing the law, Justice Mukherjee felt that the framers of the Indian Constitution deliberately avoided the use of similar American or Japanese clauses and held:

"It appears to me that when the same words are not used, it will be against the ordinary canons of construction to interpret a provision in our Constitution in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country, where not only the language is different, but the entire political conditions and Constitutional set up are dissimilar".  

His lordship further observed that in article 21, the word law" has been used as "state-made law" and not as "an equivalent of law in the abstract or general sense embodying the principles of natural Justice "The Article presupposes that the law is availed and binding law under the provisions of the Constitution"

195. Ibid at 73.  
196. Ibid at 102.  
197. Ibid at 103 at p. 102 His Lordship also said that "the word "established" ordinarily means "fixed or laid down" and if "law" means not any particular piece of law but the indefinite and indefinable principles of Natural Justice which underlie positive system of law, it would not at all be appropriate to use the expression "established" for natural law or natural justice cannot establish anything like a definite procedure.
Another plurality judge, Mr. Justice Das said that: "The word "procedure" in Article 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. His lordship further observed that the word "established by law" mean "enacted by law" and so "law" must mean "State-made law" and cannot possibly mean the Principles of natural justice. In his words "I find it difficult to let in principles of natural justice as being within the meaning of the word 'law' having regard to the obvious meaning of that word in other articles".

In brief, Justice Das rejected the introduction of American 'due process' in Article 21 of the Constitution because he felt that the word "due" did not find place in article 21 so as to qualify the procedure. He also allayed the apprehension that acceptance of the word "established by law" as "enacted by law" would give supremacy to the legislatures as "it has been cut down by Article 21 which delimits the ambit and scope of the substantive right to life and personal liberty by reference to a procedure and by Article 22 which prescribes the minimum procedure which must be followed.200

But, in his dissenting opinion Justice Fazal Ali said that "procedure established by law" does not only mean procedure

198. Ibid at 114.
200. Ibid pp 118-119.
prescribed by the law of the state but also includes principle of natural justice.\textsuperscript{201} He emphasised that a procedure which was inherited from the British legal system and followed for a very long time, was the procedure contemplated in the article. He referred to the word 'established' as "followed for a long time". He felt that the word law has been used both in the American "due process" clause and in Article 21 of the Indian Constitution.\textsuperscript{202} He further said that in the U.S.A., the word 'law' does not mean merely state-made law or law enacted by the state and does not exclude certain fundamental principles of Justice which inhere in every civilized system of law and which are at the root of it. His lordship finally observed that procedure meant, "certain definite rules of procedure and not something which is a mere pretence for procedure"\textsuperscript{203}.

Justice Mahajan also expressed in his dissening opinion that article 21 laid down substantive law as giving protection to life and liberty in as much as it said that these could not be deprived except according to "procedure established by law". He felt that article 21 gave complete immunity against the exercise of despotic power by the executive, and gave immunity also against invalid laws which contravened the Constitution. This way the article negatived the idea of fantastic arbitrary and

\textsuperscript{201} Ibid p 60.

\textsuperscript{202} Ibid 61 Justice Fazal Ali said that Article 21 of the Indian Constitution was derived from the Japanese Constituion which itself was framed under American influence, and that time the trend in America was towards "procedural due process". Hence, Indian expression "procedure established by law" could be examined in the light of American "Procedural due process" at p. 57.

\textsuperscript{203} Ibid 61.
oppressive forms of proceedings. 204

Mr. Venod Sethi & Mr. Jariwala criticised the minority opinion. According to Mr. Sethi Firstly 'law' is preceded by the word 'established' which does not suggest a law with changing contents, but the enacted law. Secondly, the word "due" does not find any place in the personal liberty clause, so the principles of natural justice cannot be brought within the term "law". And, finally the term cannot be given any expanded meaning as it has been specifically defined in Article 13. 205 And it cannot be said to include in its scope natural law or principles of natural justice. Hence, there seems to be no justification to give the meaning of just to 'law'. 206

According to Mr. C.M. Jariwala if the word "law" under article 21 would be allowed to include principles of natural justice, then some of the principles incorporated under article 22 would become redundant and such interpretation would be against the principles of harmonious construction. 207

It is submitted that the majority opinion in Gopalan's case is the reflection of narrow interpretation. This being the first case where the apex Court had to construe the expression "procedure established by law" the Court interpreted it merely as state made law and enacted law excluding the principles of

204. Ibid at 84.

205. Article 13 defines 'law' so as to include any ordinance, order, bye-law, rule, regulation, notification or usage having in the territory of India the force of law.


natural justice from its ambit. The verdict not only denied procedural safeguards to right to life, the basic right of an individual freedom but also to right to personal liberty by making procedural safeguards available only to the targets of preventive and punitive detention. Whereas, the minority view is correct and be appreciated for including the principles of natural justice in the meaning of the term 'procedure established by law'. These principles of natural justice are recognized by all the civilized systems of the world and ought to be followed by all the organs of the government while framing as well as interpreting any law, principle. Further, declaration of a statute unconstitutional by the Courts if it is repugnant to the principles of natural justice, does not lead to any vagueness or unreasonableness as rightly stated by Justice Fazal Ali in his dissenting opinion. Because it is the duty of the judiciary to protect people from the impact of the harsh laws of the legislature affecting the fundamental right to life and personal liberty of the people.208

Gopalan’s narrow interpretation of the term ‘procedure established by law’ was followed on in number of subsequent cases.209

208. See Right to life and personal liberty in India by Bansal, V.K.(Dr.)(1987) pp 178-179; Also see Role of the Supreme Court with Regard to the Right To Life and Personal Liberty by Jaswal, Nishta (Dr.) (1990) pp 56-57.

209. See Collector of Malabar v. E. Ebrahim Hajee A.I.R. 1957 SC 688; Ram Chander Prasad v. State of Bihar AIR 1961 SC 1624 at 1630; But in Lakhanpal v. U.O.I. case AIR 1958 SC 163 There was a slight change in the judicial attitude where though the detenue was not given any right to represent at the time of review of his case, yet the Court held that the detenue must be given such an opportunity on the ground of principles of natural justice.
In popularly known as Habeas Corpus case, Chief Justice Ray in his majority verdict observed that the expression "procedure established by law" under article 21 meant "some step or method or manner of procedure leading up to deprivation of personal liberty". His lordship further stated that "law" means enacted or statute law & under article 21 would include all post-constructional statutes including the Act (MISA 1971) in question. (Hence), law could not be a bare law authorising deprivation of personal liberty but such a law must be substantive and procedural law authorising such deprivation and he said, that the founders of the Constitution had criminal procedure code in mind which has substantive as well as procedural provisions. But at the time of enacting article 21, the founding fathers only included the right to "personal liberty" according to procedure and did not frame the constitutional mandate that "personal liberty" could not be taken except according to law.

Justice Beg, Justice Bhagwati also held in their separate majority opinion that law means "statutes law", "or state-made law". Justice Beg following the majority opinion of Gopalan case did not accept the respondent's suggestion that the Court

210. **A.D.M. Jabalpur v. Shukla** AIR 1976 SC 1207. In this case various respondents challenged the validity of proclamation of Emergency by the President u/a 352 made on 25th June, 1975, which led to detention of respondents under section 3 of the Maintenance of Internal Security Act 1971. They filed writ of Habeas corpus in various High Courts which were examined by High Courts. Hence, the State made appeal to the Supreme Court.

211. Ibid at pp 1226, 1231 On this basis, Justice Ray held that the Act in issue was valid law and it had laid down procedure of applying the law, which could not be challenged as being violative of articles 21 & 22 respectively of the Constitution.

212. Ibid at pp 1289; at 1361.
could test what the "procedure established by law" ought to be, that is "jus" and said that what was deliberately excluded from the purview of "procedure established by law" could not be introduced through a back door. Thus his lordship held that article 21 only meant to keep the exercise of executive power, in ordering deprivations of "life" or "liberty" within the bounds of power prescribed by procedure established by the legislation.\textsuperscript{213}

Justice Khanna in his lone dissent observed that before any person could be deprived of his "life" or "personal liberty" by any public authority, two requirements must be fulfilled. Firstly, power must be conferred by law upon such authority to deprive a person of his life or liberty; and secondly, the law must also prescribe the procedure for the exercise of such power. And, such procedure, necessarily postulated the existence of the substantive power. When right to move any Court for enforcement of right guaranteed by article 21 was suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it would not have the effect of permitting an authority to deprive a person of his life or personal liberty without the exercise of such substantive power.\textsuperscript{214}

\textsuperscript{213} Ibid

\textsuperscript{214} Ibid pp 1276-1277 In this case, the apex court by 4-1 majority held that in view of the Proclamation of internal emergency no person had any locus standi to move any writ petition under article 226 before a High Court for Habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by malafides factual or legal or has based on extraneous consideration.
In reply to the respondents contention that inspite of the presidential order, rule of law would apply, Chief Justice Ray held that the Constitution was the rule of law and nobody could rise above the rule of law in the Constitution. He said there could not be any pre-Constiution or post-Constiution rule of law which could run counter to the rule of law embodied in the Constitution, nor could there be any invocation to any rule of law to nullify the Constitutional provisions during the times of emergency. Similarly Justice Bhagwati did not agree for the separate and distinct existence of the rule of law apart from article 21 because, according to him, "once it is expressly incorporated in the Constitution and formed part of it, it could not have any existence independent of the Constitution unless it were also enacted as a statutory principle by some positive law of the state.

In brief, the plurality did not think of principles of natural justice as part of 'procedure established by law' and followed the narrow approach as laid down in Gopalan's case. Further, through their verdict, these judges in Habeas corpus case gave a sort of supremacy to the executive by reposing absolute confidence in it, by upholding the presidential order of internal emergency suspending operation of article 21 violating all procedural requirements relating to "life" and "personal liberty" Only Justice Khanna upheld the sanctity of rule of law principles and left open and intact the High Court, writ jurisdiction even during emergency.

215. Ibid pp 1224, 1235.
216. Ibid at 1366
Unfortunately, the Habeas Corpus negative decision was further followed by the Summit court in Bhanudas case.\textsuperscript{218}

But the position changed with the landmark case of Maneka Gandhi which can be said to be the mother of 'Fair and reasonable procedure' in the Indian Constitution.\textsuperscript{219} Giving reply to the contention of the petitioner that impounding a passport without affording reasonable opportunity to the holder of the passport to be heard in defence, violates the requirement of 'right of fair or just', procedure prescribed by the Passport Act 1967 and thus infringes her right to personal liberty as guaranteed by article 21 of the Constitution, Justice Bhagwati on behalf of himself, Untawalia and Murtaza Fazal Ali JJ, stated in the majority view that:

"---Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement

\textsuperscript{219} Supranote 142 AIR 1978 SC 599. In this case the passport of the petitioner was impounded by the Central government on the ground that it was in the interests of the general public under Section 19(3)(c) of the passports Act. But no reasons for impounding the passport was furnished. The petitioner challenged the validity of the order on the ground that it violated her fundamental rights as guaranteed under Articles 14, 19 and 21 of the constitution. She contended that right to travel abroad was part of her right to personal liberty under Article 21.
of the requirement of Article 21. The principle of audi-alteram partem which mandates that no one shall be condemned unheard, is part of the rules of natural justice.\textsuperscript{220}

But the Justice Bhagwati held that the procedure 'established' by the Passports Act 1967 for impounding a passport was in conformity with the requirement of Article 21 as it presented a procedure which was right fair and just and not suffered from the vice of arbitrariness or unreasonableness. His lordship also observed that:

"Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable ----- we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21"\textsuperscript{221}.

Justice Bhagwati also laid emphasis upon the fact of giving broad, liberal interpretation to the fundamental rights keeping in account their importance. To quote Justice Bhagwati:

\begin{quote}
"Natural Justice, a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action ------ The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected".
\end{quote}

\textsuperscript{220} Ibid pp 624-625 Rest of the Judges like Chief Justice M.H. Beg, Y.V. Chandrachud, Krishna Iyer and P.S. Kailasam J.J. concurred with this view. Further, emphasising upon the growing significance of natural justice principle, His lordship Bhagwati observed:

\begin{quote}
"Natural Justice, a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action ------ The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected".
\end{quote}

\textsuperscript{221} Ibid p. 622 (emphasis added).
"The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.222

It is submitted that in Maneka Gandhi case by making principles of natural justice as an essential part of the procedure established by law, has expanded the scope of Article 21 so much that any action which is unjust, unfair or unreasonable would invite wrath of Article 21 of the Constitution and would not stand against its onslaught. Infact, as said by Prof. Upendra Buxi, Article 21 was reborn in Maneka and once reborn Justices decided on a vigorous breast feeding fo the new infant: they did not let a single occassion to go by in which due process interpretation of Article 21 could not be nurtured into a giant infant.223

But in Maneka's case, the apex Court kept Gopalan's interpretation fo the term "law" intact by saying that "law" meant "enacted law" or state-made law.224

222. Ibid p. 622. This observation was made by Justice Bhagwati after taking into account the leading judgements of the Supreme Court on 'personal liberty' such as Kharak Singh Satwant Singh, R.C. Cooper, S.N. Sarkar cases etc. See Infra for detail of these cases.

223. The Indias Supreme Court and Politics by (Buxi, Upendra (1980) p. 128, Also see Supranote 208 where Dr. V.K. Bansal has also beautifully summarised the Maneka's verdict by saying that: "It demolished the structure of Gopalan and redesigned the whole castle to house the most important right to life and personal liberty, fortified it in such a manner that it cannot be easily trespassed" at p 179.

224. Supranote 219 at p. 659.
It was only Justice Krishna Iyer who though concurred with the verdict of Justice Bhagwati, yet added something in defining term 'law' and said that 'law' is reasonable law, not any enacted piece. Infact, Justice Krishna Iyer was the only one who voiced for adoption of substantive as well as procedural fairness under Article 21. His lordship construed the term "procedure established by law" in such a manner so as to reach the conclusion that "law" and "procedure" must be fair just and reasonable. In the words of Justice K. Iyer:

"Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex-necessitate 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 absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? --- Processual justice is writ patently on Art. 21. It is too grave to be circumvented by a black letter ritual processed through the legislature"225.

Further Mr. Justice Iyer stated "What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word "established" which means settled firmly not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'law' leaves little doubt that it is normale regarded as just since law is the means and justice is the end".226

In breif, it is submitted that the Maneka's ruling keeping the needs of society & dynamics of law in view has given new dimension to article 21. It not only liberalised interpretation of procedure from that of Gopalan but kept the 'law' of Gopalan intact resulting in keeping still legislature subject to Article 21.

226. Ibid (emphasis added)
Justice Chandrachud though shared opinion of Justice Bhagwati on the meaning of the term 'procedure established by law' but he cautioned of not introducing American 'due process' clause into article 21 and said:

"The content which has been meaningfully and imaginatively poured into "due process of law", may, in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression --- Our Constitution too strides in its majesty but --- without the due process clause"227

Justice Chandrachud made reference to the apex Court decision in All India Bank Employees Association.228 wherein it was mentioned that one right leading to another and that another to still other, was productive of a "grotesque result".

Justice Kailasam, in his separate majority verdict following Justice Mahajan's views in Gopalan's case, held that:

"The procedure established by law" must be taken to mean as the ordinary and well established criminal procedure, that is to say, those settled usages and normal modes of proceedings, sanctioned by the criminal procedure code which is a general law of criminal procedure, in the country229

But Justice Kailasam's statement that "Rules of natural Justice cannot be equated with Fundamental Rights", made with reference to the apex Court's ruling in J.N. Sinha's case,230

227. Ibid p. 616
228. All India Bank Employees Association case AIR 1952 SC 171
230. Ibid 689; U.O.I. v. J.N. Sinha AIR 1971 SC 40 wherein the Court held "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental rights".
gave a surprising shock why the advancements in administrative law on the techniques of judicial control of administrative action could not be woven into a fundamental right encompassing procedural fairness.\textsuperscript{231}

The verdict has brought into Indian Constitutional Jurisprudence the principle of procedural as well as substantive due process on American Pattern. It is submitted that by making the concept of natural justice as one of the necessary element of law, the Summit Court has in away admitted the American "due process of law"\textsuperscript{232} into our Constitution which as has been seen, was never intended by the founding fathers of the Constitution. Only Justice Kailasam refused to equale the principles of natural Justice with fundamental rights.

But it is also submitted that incorporation of principles of natural justice into "procedure established by law" is only available against the executive. As also rightly said by Dr. Nishtha Jaswal, the liberalism pervading the construction of "personal liberty" and "procedure" becomes real and meaningful only when law is freed from \textit{Gopalan}. And to enrich "procedure" and enlarge "personal liberty" without treating "law" as reasonable law, is try to construct top floors first. Therefore, as interpreted by Justice Krishna Iyer in \textit{Maneka's} case, the term "law" must be interpreted as a reasonable law in order to check the executive becoming all powerful and sometimes despotic as happened in 1975 during Internal Emergency in India. There is a

\begin{itemize}
  \item \textsuperscript{231} Supranote 208 Jaiswal, Nishtha p. 126.
  \item \textsuperscript{232} The Supreme Court itself quoted the observations of Justice Magarry who described natural Justice "as distillate of due process of law". .pa
\end{itemize}
need for balanced construction of expressions like 'procedure' 'law' and 'personal liberty' in order to make Article 21 a real palladium of liberty.\textsuperscript{233} It cannot be denied that \textit{Maneka's} landmark ruling, has proved to be evolutionary in the growth of Indian constitutional law. This historic judgement represents a mini-Magna Carta" for the Indian people. After \textit{Maneka} article 21 has become counterpart of "procedural due process", basically. In \textit{Hoskot's} case, Justice K. Iyer directly speaking of procedural fairness by quoting his own view in \textit{Maneka} observed:

"Procedure established by law" are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion, 'procedure' means 'fair and reasonable procedure' which comports with civilised norms like natural justice rooted firm in community consciousness --- not primitive processual barbarity nor legislated normative mockery"\textsuperscript{234}

But the Court further widened its ambit when it favoured both procedural due process as well as substantive due process by treating Justice Krishna Iyer's opinion in \textit{Maneka} as majority view, in the \textit{Sunil Batra (I) case} & \textit{Sunil Batra (ii) case} respectively.\textsuperscript{235}

Infact, Justice Iyer's opinion in \textit{Maneka} case has been treated as majority opinion by Justice Bhagwati also in subsequent cases like \textit{Bachan Singh} and \textit{Francis Coralie} cases respectively\textsuperscript{236}. In \textit{Bachan Singh's} case Justice Bhagwati observed

\textsuperscript{233.} Supranote 208 Jaswal, Nishtha, 162.
\textsuperscript{235.} Sunil Batra (I) v. Delhi Administration AIR 1978 SC 1675 (Justice Desai delivered the majority opinion See at p. 1732); Sunil Batra II v. Delhi Administration AIR 1980 SC 1579 see infra for detail.
"The words 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law. Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21".237

Infact, Maneka's expansion of scope of 'procedure established by law' was being reiterated by the Summit court in number of other cases like. Jolly George Verghese, M/s Kasturi Lal, Nandlal.238 cases till the other dark verdict delievered by the court in A.K. Roy's case, a case under 'National Security Act, 1980 which was contended to be struckdown as being violative of people's fundamental liberties. But Chief Justice Chandrachud, delievering the majority opinion, (by four to one majority) upheld the constitutional validity of the NSA and the Ordinance preceding the Act by saying that the Court could not invalidate on the specious ground that it was calculated to interfere with the liberties of the people. Pointing out to the fact that England and America did not resort to preventive detention was

237. Ibid at p. 1340. In Francis Coralie case Justice Bhagwati remarked :

"In Maneka Gandhi's case --- this Court for the first time opened up a new dimension of Article 21 and laid down that article 21 is not only a guarantee against executive action unsupported by law, but also a restriction on law-making. -- The position now is that Article 21 --- requires that procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise". Ibid at p. 750.


known to the framers of the Indian Constitution and yet they provided for it in the Indian Constitution, held:

"The power to judge the fairness and justness of procedure established by a law for the purpose of Article 21 is one thing --- The power to decide upon the justness of the law itself is quite another thing : that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution". 240

This way A.K. Roy's verdict was again a step backward in the evolution of Article 21. Another shocking fact is that Justice Bhagwati, the crusader of 'due process' in Maneka was party to the narrow construction of the Article 21 in the present NSA case. Even Justice Desai who in Sunil Batra's 241 ruling had spoken in favour of both substantive & procedural due process as part of the Indian Constitution, also joined hands in this deadly verdict. But in Bachan Singh's 242 case (the judgement of which was delivered after A.K. Roy's ruling) Justice Bhagwati in his minority opinion had given the example of law of preventive detention to prove the existence of "due process". It is submitted that this is really frustrating trend reflecting inconsistency on the part of the judges, on whom the public banks upon for getting justice.

Again, the Court recognized the entry of 'due process' as part of Article 21 in Ranjan Dwivedi's 243 case but did admit that it was difficult to hold in view of Maneka and E.P. Royappa etc. that the substance of the American doctrine of 'due process' had not still been infused into the conservative test of Article 21.

240. Ibid
241. Supranote 235.
242. Supranote 236.
It is rightly submitted by Dr. Nishtha Jaswal that the holdings of the Court are self-contradictory. Though, the Court now admits that American "due process" is part of article 21 yet it is not willing to consider what is American "due process clause".244

But in another significant verdict, Justice Chandrachud followed Maneka’s interpretation of Procedure established by law, and observed:

"Procedure which is unjust or unfair in the circumstance of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it --- The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it".245

Further in Kehar Singh’s case Justice Oza even pointed out "procedure as was on the day on which the Indian Constitution was adopted. And the effect of "procedure established by law" cannot be taken away by amending the existing statute (criminal procedure code in this case).

244. Supranote 208.


Infact, the post-Maneka's period of the apex Court is full of cases expanding the scope & ambit of article 21 by giving interpretation on basis of just, fair & reasonable procedure, and this way revolutionising article 21, deviating considerably from the original intent of the Constitution. One positive outcome of this activist approach was the liberalisation of the rule of 'locus standi' paving the way for public interest litigation concept. This concept in fact is the gift of activist Justice Krishna Iyer to India when in 1976 in *Mumbai Kamgar Sabha* case, he observed:

"----- Public interst is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitutdinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjective law---"

Through this concept of public interest litigation the court relaxed strict rule of standing and allowed standing to any member of the public having sufficient interest in the proceeding for the case and thus made possible to police the corridors of powers and prevent violations of law". In the *Judges Transfer* case, Justice Bhagwati, giving comprehensive exposition to his concept of public interest litigation, held:


"It must not be forgotten that procedure is but a hand maiden of Justice and the cause of Justice can never be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cost aside the technical rules of procedure in the exercise of its dispensing power and treat the latter of the public minded individual as a writ petition and act upon it. The Court has to innovate new methods and devise new strategies for the purpose of providing access to Justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning."  

But Justice Bhagwati did warn the court to be careful to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the executive and the legislature by the Constitution.

In brief, it can be stated that the concept of public interest litigation, an outcome of judicial activism of the apex court, has given a new impetus to article 21 of the Constitution. To allay the misconception fear of misusing of this concept and thereby opening of flood gate of litigation, the Court laid down directions regarding public interest litigation in Sheela Barse's case and said that the "rights of those who bring the action on behalf of the others must necessarily be subordinate to the interests" of those for whose benefit the action is brought. 

250. Ibid at 189 (emphasis added).

(II) INTER-RELATION BETWEEN ARTICLE 21 AND OTHER FUNDAMENTAL RIGHTS:

The issue of relationship of article 21 with other fundamental rights in particularly those guaranteed by Articles 14, 19 & 22 has passed through two main phases. Firstly, following the doctrine of 'exclusivity', the apex Court in Gopalan's case propounded the view that fundamental rights guaranteed under various articles are mutually exclusive, have no relation with each other as they deal with different subject matters. The Court by the majority verdict declined to include the freedoms under Article 19(1) in a case where the validity of a law laying procedure for the deprivation of personal liberty under Articles 21 and 22 respectively is under attack and said Article 19 should be read as a separate complete code.253

Only Justice Fazal Ali in his dissenting opinion did not accept the doctrine of exclusivity and opined: "---It can be said that Articles 19, 20, 21 and 22 do not to some extent overlap with each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention which is dealt with in Article 22 also amounts to deprivation of personal liberty which is referred to in Article 21 and is a violation of the right to freedom of movement dealt within Article 19 (1) (d)."254

252. Supranote 05.

253. Ibid see Chief Justice Kania's views at p. 37, Justice Patanjali Sastri at pp 69-70; Justice Das at pp 113-114; Justice Mukherjee at p. 94; Justice Mahajan at p. 85.

254. Ibid.
Gopalan's narrow interpretation was further carried on by the Summit Court in cases like Ram Singh's\textsuperscript{255} Kochunni\textsuperscript{256} Kharak Singh,\textsuperscript{257} Satwant Singh's\textsuperscript{258} till the arrival of decision in Cooper's\textsuperscript{259} case where the Court departed from the doctrine of 'exclusivity' and held that the fundamental rights conferred by Part III were not distinct and mutually exclusive. In this popularly known Bank Nationalisation case, reversing its views of Gopalan's case Justice Shah disagreed to the approach that Article 22 was a complete code. Justice Shelat rightly explained the impact of Cooper in subsequent S.N. Sarkar\textsuperscript{260} case by saying:

\begin{itemize}
  \item \textbf{255.} Ram Singh v. State of Delhi AIR 1951 SC 270. Here the court held that the law which authorises deprivation of personal liberty did not fall within the purview of article 19 and its validity was to be measured on its compliance with the requirements of article 21 and not to be judged by the criteria indicated in article 19.
  \item \textbf{256.} Kochunni v. State of Madras AIR 1960 SC 1080. Though the Court did follow Gopalan's doctrine of exclusivity yet there was indication of desire for change from Gopalan's verdict from the following lines of judgement where the Court observed: "Had the question been resintegra, some of us would have been inclined to agree with the dissenting views expressed by Fazal Ali but we are bound by this judgement" at 1095.
  \item \textbf{257.} Kharak Singh v. State of U.P. Supranote 101. The minority view of Justice Subba Rao & Shah was that personal freedom & freedom of movement were overlapping rights and if a person's right under article 21 was infringed, then the State could rely upon a law to sustain the action but that would not be a complete answer unless the said law satisfied the test laid down in article 19(2).
  \item \textbf{258.} Satwant Singh v. A.P.O. New Delhi AIR 1967 SC 1936 at 1944 Chief Justice Subba Rao speaking for the majority followed the doctrine of exclusivity. See infra for detail.
  \item \textbf{259.} R.C. Cooper v. U.O.I. AIR 1970 SC 564.
\end{itemize}
"Though Cooper's case dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan's case to be incorrect."

The healthy/positivist approach started in Cooper further attained maturity in the landmark Maneka Gandhi's case wherein after completely and elaborately examining the inter-relationship of Articles 14, 19 and 21, Justice Bhagwati concluded that all these articles are inter-dependent, mutually inclusive and held:

"The law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. --- (If) a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14."

Justice 'Krishna Iyer' also beautifully expressed the inter-relationship of different fundamental rights and observed:

"----- no article in Part III is an island but part of a Continent and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and likewise cardinal rights in an organic Constitution which makes man human have a synthesis. The proposition is indubitable that article 21 does not, in a given situation, exclude Art. 19 if both rights are breached"

261. Supranote 142.

262. Ibid at 623. (emphasis added).

263. Ibid at p. 662.
Similarly Chief Justice Beg pointed out:

"Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of right which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. ----- Isolation of various aspects of human freedoms, for the purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection."

After Maneka, this well settled law that fundamental rights especially under Articles 14, 19 & 21 are inter-dependent on each other was followed by the apex Court in number of cases like Sunil Batra, Hoskot till the Bachan Singh case where again the Court retreated to narrow interpretation and held that article did not deal with right to life which was included in article 21 and that the freedoms in article 19 were subject to the restrictions in clauses (2) to (6) of that article and held:

"If the impact of the (challenged) law on any of the rights in clause (1) of Art 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of article 19 will not be available for judging its validity."

But again the Court returned to Cooper & Maneka position in Sunil Batra II, Francis Coralie Mulin Javed Ahmed cases.

264. Ibid at p. 606 (emphasis added).

265. Supranote 235, Supranote 234,

266. Supranote 236

266-A Ibid at p. 915.

267. Supranote 235 (Justice K. Iyer’s view)

268. Supranote 236 wherein Justice Bhagwati held that the law of preventive detention had to pass the test not only of article 22 but also of Article 21.

269. Javed Ahmed v. State of Maharashtra AIR 1985 SC 231 held that Articles 14, 19 & 21 are not mutually exclusive rather sustain, strengthen and nourish on each other. Also see views by Seervai, H.M. Supranote 217 at pp 35-36
Unfortunately, the Summit Court again went anti-clock wise in *Sodan Singh's* case when it divorced the relationship between articles 19 and 21 by stating that right to hawk is a fundamental right guaranteed under article 19(1)(g) and is subject to reasonable restrictions under article 19(1) to (6) but it is not a part of livelihood and so, not attracts article 21 of the Constitution.

But, the Court soon turned the clock in the right direction when it held in *D.K. Yadav's* case that the procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and so it must be right, just and fair.

(III) "DIRECT AND INVITABLE EFFECT TEST AND ARTICLE 21"

With regard to the application by the Court of the test or yardstick for determining whether a statute violates fundamental right, the apex Court has come a long way since the *Gopalan’s* days where the Court laid stress merely upon the approach of considering the directness of the legislation and not upon its effect. In this case the Court in a way propounded the theory that the object and form of state action determines the extent of protection which may be claimed by an individual and the validity of such action has to be judged by considering whether it is directly in respect of the subject covered by any particular article of the Constitution or touches the said article only incidentally or indirectly. The test to be applied in this theory was what was the object of the authority in taking

270. Supranote 246. See infra for detail.

the action; what was the subject matter of the action and the fundamental right to which it was related?^7^ 272

But this approach was rejected by the Court in Cooper's^273^ case wherein overruling Gopalan, Justice Shah observed:

"It is not the object of the authority making the impairing the right of a citizen nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief" ---- We are of the view that the theory that the object of the state action determine the extent of protection which the aggrieved party may claim is not consistent with the Constitutional scheme. Such freedom has different dimensions".

Maneka Gandhi’s case further extended the criterion of directness to the operation and effect of impugned legislation and Justice Bhagwati for the majority observed:

"It is possible that in a given case the pith and substance of the state action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and, in that case, the state action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the state action but in testing the validity of the state action with reference to the fundamental rights, what the Court must consider is the direct and inevitable consequence of the state action. Otherwise, the protection of the fundamental rights would be substantially but surely eroded"^274^.

After Maneka, validity of test of Direct & Indirect


273. Supranote 222 at p. 596 (emphasis added)

274. Supranote 142 at p. 635.
inevitable effect was examined by the Court in Bachan Singh's\textsuperscript{275} case wherein Justice Sarkaria speaking for the majority, acknowledged that the test of direct and indirect effect has never been totally abandoned by the Court but "only the mode of its application has been modified, and its scope amplified by judicial activism to maintain its efficacy for solving new constitutional problems in tune with evolving concepts of rights and obligations in strident democracy".

**IV. "PERSONAL LIBERTY", MEANING AND DEVIATIONS**

In the earliest case of Gopalan, following a literal principle of interpretation, the apex Court narrowly construed the term 'Personal Liberty', and held that it only meant liberty relating to, or concerning the person or body of the individual and in this sense it was antithesis of physical restraint or coercion. Justice Mukherjee quoting Prof. Dicey an authority on the subject who said 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 of legal justification" opined that,"this negative right of a not being subject to any form of physical restraint or coercion that constitutes the essence of personal liberty"\textsuperscript{276}

But Justice Das interpreted the term "Personal liberty" little liberally when he held : "Personal liberty does not mean only liberty of the person but it means liberty or the rights attached to the person (juspersonarum) --- There is no reason to suppose that in Article 21 of our Constitution the expression 'personal liberty' has been used in the restricted sense in which Blackstone used it in his commentaries --- (It has been used in Art. 21 wherein for the

\textsuperscript{275.} Supranote 236 at p. 912.

\textsuperscript{276.} Supranote 05 pp 96-97.
first time the issue as to the proper meaning and scope of the expression 'personal liberty' came up for consideration before the Supreme Court, the majority opined that the term "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art 19(1)" 277

But the minority judges Justices Subba Rao & Shah rejected this approach of the majority by explaining that the right to personal liberty means not only a right to be free from restrictions placed on his movement but also freed from encroachments on his private life, as such any calculated interference with the right of privacy would also be a breach of personal liberty. They further said that it is incorrect approach that freedom of movement is carried out of personal liberty rather "Both are independent fundamental rights, though there is overlapping --- The fundamental right of life and personal liberty has many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the state can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men" 278

Infact, the majority of judges laid emphasis on the fact that the founding fathers in the Constituent Assembly deliberately qualified the word "liberty" by personal making it narrower concept therefore, Justice Patanjali Sastri held that:

"Whatever may be the generally accepted connotation of the expression "personal liberty", it is used in Art. 21 in a sense which excludes the freedoms dealt with in Art. 19" 279

277. Ibid at pp 1306-1307.
278. Ibid at p. 110.
279. Ibid at p. 71.
But in dissenting opinion, Justice Fazal Ali observed that:

"The expression 'personal liberty' and 'personal freedom' have a wider meaning and also a narrower meaning. In the wider sense, they include not only immunity from arrest and detention but also freedom of speech, freedom of association etc. In the narrower sense, they mean immunity from arrest and detention. The juristic conception of 'personal liberty' when these words are used in the sense of immunity from arrest is that it consists of freedom of movement and locomotion."

This narrower, restrictive interpretation of the expression 'personal liberty' was not followed by the Summit court in its later rulings. For instance, in Kharak Singh's case the majority of the judges observed that the phrase 'personal liberty' is used 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 Art. 19(1). The adjective 'personal' is used in Article 21 only to distinguish its scope from that of Article 19, which already covers some varieties of liberty.

But in their minority opinion Justice Subba Rao along with Justice Shah held that both Art. 19 and Art. 21 are independent fundamental rights, though there is overlapping. Many attributes of 'personal liberty' are found also in Art. 19. And, right to personal liberty means not only a right to be free from restrictions placed on his movement but also freedom from encroachments on his private life.

280. Ibid at p. 53.
281. Supranote 101 see infra for details.
282. Ibid at pp 1306-1307.
This minority opinion was made a majority view by the apex court in subsequent \textit{Bank Nationalisation case} and the wave length for comprehending the scope and ambit of the fundamental rights set out in this case was further given impetus in \textit{Maneka Gandhi's} case where Justice Bhagwati for the majority of the Court observed that:

"The expression 'personal liberty' in Art. 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19".\textsuperscript{284}

Chief Justice Beg gave a wide explanation of 'personal liberty' on basis of Black-stone's philosophy of natural or absolute rights, and held:

"I think that both the rights of 'personal security' and of 'personal liberty' recognised by what Black stone termed "natural law" are embodied in Article 21 of the Constitution".\textsuperscript{285}

\textbf{Deviations of personal liberty}:

After landmark judgement of \textit{Maneka Gandhi}, the Summit Court has considerable enlarged the ambit and scope of the protection guaranteed by Article 21, which probably never had been intended by the architects of the Indian Constitution. Some deviations made in 'personal liberty' by the Supreme Court are as follows:

\begin{itemize}
\item \textsuperscript{283} Supranote 222.
\item \textsuperscript{284} Supranote 142 at p. 622
\item \textsuperscript{285} Ibid at p. 608. \textsuperscript{Blackstone} explained personal liberty and personal security as follows: "This personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclination may direct without imprisonment or restraint, unless by due process of law. The right of personal security consists in person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation" at p. 607-608.
\end{itemize}
(a) Liberty to Travel Abroad:

Since liberty to travel abroad is not explicitly included in Article 21 and in Article 19 (1)(d) relating to freedom of movement, this issue was first time examined by the Summit Court in *Satwant Singh Sawhney*\(^{286}\) case, where in Chief Justice Subba Rao speaking for majority of 3-2 judges held that:

"The expression "personal liberty" in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it in as much as it is specially provided in Art. 19. It follows that under Art. 21 of the Constitution no person can be deprived of his right to travel except according to procedure established by law".

But rejecting the majority view, Justice Hidayatullah on behalf of himself and Justice Bachawat stated in the minority opinion that:

In any event, there is no absolute right to demand a passport because that is not a right to personal liberty even in the Blackstonian sense. The passport being a political document, is one which the state may choose to give or to withhold. A person is ordinarily entitled to a passport unless, for reasons which can be established to the satisfaction of the Court, the passport can be validly refused to him. Since an aggrieved party can always ask for a mandamus if he is treated unfairly it is not open, by straining the Constitution, to create an absolute and fundamental right to a passport where none exists in the constitution.\(^{287}\)

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286. *Supranote 222.* The facts in brief were petitioner, doing business of import & export, was denied passport and he challenged the constitutionality of denial order contending that the right to travel abroad was part of his fundamental right to personal liberty under Art. 21 of the Indian Constitution and its denials deprived him of this right. His contention upheld by the plurality of judges.

Chief Justice Subba Rao delivered the majority verdict on behalf of himself, Justices Shelat and Vaidialingam respectively.

In this case one point of similarity observed both by the majority and the minority judges was that they all agreed about the existence of fundamental right of equality in the obtaining of a passport but there was no fundamental right to the granting of a passport. But the only point of difference was that where as the majority felt that the executive might discriminate while exercising the power to grant or not to give a passport, the minority felt that there was no discrimination because the government had to scrutinise the credentials before granting the passport.

Commenting upon the verdict of the majority, it was rightly said by Mr. Srivastava and Mr. Chaturvedi that the majority verdict shows the need of society for such right and to preserve the lofty ideal of "one world and one government". Indeed, the majority verdict added new dimensions to the right to personal liberty.

The process started in Satwant Singh's case culminated lastly in the Maneka Gandhi's case. Where the apex Court exhaustively looked into the aspect of right to travel abroad as an attribute of right to personal liberty and majority of the judges including Chief Justice Beg and Justice Bhagwati observed that Article 21 includes in its ambit the right to go abroad and


289. See "Right to Travel Abroad - A personal Liberty" by Srivastava, Suresh & Chaturvedi, K.N. in 4 Kurukshetra Law journal (1978) at p. 109. In 1967 Parliament passed Passport Act 1967 regulating the right to travel abroad as well as the right to enter India by laying down the procedure for obtaining a passport and also the grounds on which it may be refused or revoked or impounded.

290. Supranote 142.
right to get passport. In this case, the Court went a step ahead from *Satwant Singh's* case where while recognising the right to travel abroad, the Court laid stress upon 'the need of enacted law to regulate the right to travel abroad, in *Maneka's* case the Court held that such enacted law must be just, fair and not arbitrary, fanciful or oppressive. Where it is not possible to give reasonable opportunity before confiscation of the passport, it must be given immediately thereafter, otherwise it will be violation of Art. 21. Chief Justice Beg held:

"It seems to me that there can be little doubt that the right to travel and to go outside the country which orders regulating issue, suspension or impounding and cancellation of passports directly affect must be included in the right to personal liberty"291

(b) RIGHT TO PRIVACY/RIGHT TO BE LET ALONE:

As already seen in the discussion of freedom of speech that the right to privacy is not expressly included in the Indian Constitution. But the traces of this concept of privacy can be found in the ancient Indian society where certain matters such as related to sex, worship and family matters were suggested to be kept secret from disclosures.292 In the Constituent Assembly, whatever discussion took place in relation to Article 21, it was mainly in 'due process' context. Only while discussing draft

291. Ibid p. 603; see Justice Bhagwati's view at pp 621-622.

Article 14, Mr. K.S. Karimuddin had proposed addition of a clause which in substance was similar to the right to privacy and against search and seizure as guaranteed in the Fourth Amendment of the American Constitution. Accepting the Amendment proposed by Mr. Karimuddin, Dr. Ambedkar called it as a useful provision which should find place in the Constitution and held:

"There is nothing novel in it because the whole of the clause as suggested by him is to be found in the criminal procedure code so that it might be said in a sense that this is already the law of the land. It is perfectly possible that the legislatures of the future may abrogate the provisions specified in his amendment but they are so important so far as personal liberty is concerned that is is very desirable to place these provisions beyond the reach of the legislature and I am therefore, prepared to accept his amendment."

But finally, this amendment was not adopted by the constituent Assembly.

Though the Right to privacy was not intended to be part of Art. 21 by the framers of the Indian Constitution, yet this right has been discussed by the Summit Court since its very inception and has ultimately been made an integral part of right to personal liberty through liberal interpretation method.

Initially, the apex Court, considered the right to

293. Article 14 now is Article 20 of the Indian Constitution.

The proposed clause (4) to be added in draft Article 14 reads as follows:

"(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized" C.A.D. Vol. VII p. 794.

294. Ibid p. 796.

295. Ibid pp 840-842.
privacy in context of police surveillance and domestic visits by police personnel at night. In the well-known Kharak Singh's case, Justice Ayyangar speaking for the 4-2 majority Court held that the right of privacy was not guaranteed under our Constitution and so any attempt by the State to ascertain the movement of an individual by periodical enquiries made by the police officers, to collect reports of his movements and records of history sheets all of which invaded his privacy were not as infringement of any fundamental right guaranteed by the Indian Constitution.

But in their strong dissenting opinion Justice Subba Rao (as he then was) and with whom Justice Shah concurred, held that the right to privacy was an essential ingredient of personal liberty. His lordship interpreted "personal liberty" in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restriction were directly or indirectly brought about by calculated measures. Describing a movement under the scrutinising gaze of policemen as a constricted movement, the minority held:

"---A movement under the scrutinising gaze of policemen, cannot be described as a free movement. The whole country is his jail --- The petitioner under the shadow of surveillance is certainly deprived of his freedom. He can move physically but he cannot do so freely, for all his activities are watched and the shroud of surveillance cast upon him perforce endangers inhabits in him, and he cannot act freely as he would like to do".

296. Supranote 222 in this case the Supreme Court was to consider the constitutionality of the provision of the U.P. Police Regulations 236, where under the petitioner, an accused in dacoity case but later on was released for want of evidence, was kept under police surveillance including Domiciliary visits at night to keep check on him. The Court struck down sub clause (b) of Regulation 236 as violative of Article 21 of the Indian Constitution on the ground there was no law on which the same would be justified.

297. Ibid at p. 1306.
But the Court held that this right to privacy is not absolute in nature and reasonable restrictions on the basis of compelling public interest may be imposed. But the Court held that this right to privacy is not absolute in nature and reasonable restrictions on the basis of compelling public interest may be imposed.298

It is submitted that Justice Mathew rightly revitalised the right to privacy by recognising it as a fundamental right to personal liberty and further strengthen it by saying that this right should be developed through the process of case by case development. But the actual result of this landmark ruling got underscored when the Court upheld the reasonableness and validity of domiciliary visits under Police Regulations.299 However, Govind’s case staunchly laid it down that Art. 21 safeguards the right to privacy and promotes the individual’s dignity, the view which was further endorsed by the apex court in the historic Maneka Gandhi’s case.300

It is submitted that the minority opinion was the right approach whereby impliedly the support was rendered to right to privacy or the right to be let alone as being a fundamental freedom guaranteed under Art. 19 and 21. But unfortunately, the majority judges did not accept this view at that time.

Even ten years before Kharak Singh’s ruling, Justice Jagannadas speaking for the Court in Sharma’s case had also observed while deciding the issue: whether the protection from self-incrimination could be so liberally construed as to cover some aspects of the right to privacy as well that:

298. And the Court upheld the provisions of the police Act as reasonable restriction on the right to privacy which was a fundamental right implicit into Art. 21.
299. Supranote 45.
300. Supranote 100
301. Supranote 142.
When the Constitution makers have thought fit not to subject such regulation to constitutional limitation by recognition of a fundamental right to privacy analogous to the American 4th Amendment, we have no justification to import it, into a totally different fundamental right by some process of strained construction.  

Commenting upon Right to Privacy in the light of these two cases, Mr. Nariman has rightly observed that it was thought that privacy as a fundamental right had been buried or more appropriately burnt to cinder. But the ashes of lost freedoms are ever smouldering.

But in the decade of 70's the apex Court gave a foot hold to right to privacy in the fundamental rights chapter when in the landmark Gobind's case, Justice Mathew speaking for the Court established that the right to privacy is a fundamental right and like its American counterpart, included it into liberty clause. Defining this right, Justice Mathew observed that any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child bearing. His lordship further held that:

"The drastic inroads directly into the privacy and indirectly into the fundamental rights of a citizen will be made if these regulations were to be read widely. To interpret the rule in harmony with the Constitution is, therefore, necessary and canalisation of the powers vested in the policy by the two regulations become necessary if they are to be saved at all".

303. Ibid at p. 304.
304. "The right to be let alone, a fundamental right" by Nariman, F.S. Indian Advocate vol II (1979) p. 80.
305. Supranote 100 In this case the petitioner who was subject to police surveillance through M.P. Police Regulations N. 855-856 Government regulations framed under the Police Act, challenged the constitutionality of these regulations on the ground that these violate his right to privacy and personal liberty under Art. 21. The Court held that the police surveillance would infringe the petitioner's right to privacy and personal liberty indirectly.
306. Further, in an attempt to define privacy, Justice Mathew in one his article felt that it was difficult to find Contd...
Further, in Malak Singh's case, Justice Chinappa Reddy further gave impetus to right to privacy when speaking for the Court, he observed that:

"It may be necessary to keep discrete surveillance over bad character and habitual or potential offenders, asserted that 'surveillance' may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty and the freedom of the movement. That cannot be permitted."

(b-i) Interception of communication: A threat to Right to Privacy:

One of the serious threat to this newly evolved right to privacy has been through interception of communication in modern times. The development of highly sensitive micro information gathering devices can cause invasion of personal privacy. The ongoing technological development in the field of computers and electronics and telecommunication has invaded so much the life of people that today it is very difficult to maintain personal privacy and to identify the violation of this right for the purpose of taking legal action. In India, the decisions of the apex Court on this point are very few and not very recent ones. Words to express adequately the value involved in the legal notion of privacy. See "The Right to be letalone" by Mathew, K.K. (1979) 4 SCC (jour) 1.

307. Malak Singh v. State of Punjab AIR 1981 SC 760 the point in issue was: whether a person whose name was included in the surveillance register had right to opportunity to be heard before such inclusion.

The Court held that though the rule of natural justice was not attracted yet the court laid down the guidelines regarding the mode of police surveillance making the law clear on the subject. And on the basis of the relevant records, the Court was satisfied that there was sufficient ground for the inclusion of the petitioners name in the surveillance register.
In the late 1960’s the Supreme Court in case of Yussuf Ali Ismail Nagree, held that the right to privacy was not violated if the telephonic conversation of the appellant was tapped without his knowledge. The telephonic conversation of an innocent citizen would be protected by Courts against wrongful and high handed interference by tapping the conversation. Whereas no unlawful or irregular method was adopted in obtaining the tape recording of conversation, this could be used in evidence. But the Court laid down two principles for guidance for admission of such evidence. First, it must be genuine and free from tempering or mutilations. Second, the Court should secure scrupulous conduct and behaviour on behalf of the police as the police officer is more likely to behave properly, if improperly obtained evidence is to be viewed with care and caution by the judge. The Court also said that Art. 21 contemplates ‘procedure established by law’ with regard to deprivation of life or personal liberty.

It means that the tape recording of the conversation of an accused or suspect may be allowed but innocent honest citizens should be protected against undue harassment, blackmail or unjustified intervention in their privacies.

Further, In reply to question whether evidence procured in an improper or illegal manner can be admitted in evidence? Will it not be taking advantage of intrusion into privacy?, The Supreme court held in Bai Radha’s case that an illegality in

308. Yussaf Ali Ismail Nagree v. State of Maharashtra AIR 1968 SC 147 In this case the admissibility in evidence of the tapped conversation without knowledge of the parties was challenged; Also see Rama Reddy v. V.V. Giri (1971)I SCR 399, the Court held that tape record conversation is admissible provided first, the conversation is relevant to the matter in issue, secondly, there is identification Contd...
conducting search will not affect the admissibility of evidence collected during such search. Again in Megraj’s case the Court said that a document procured through illegal means may be admitted in evidence if it is relevant and genuine.

The learned author Dr. S. N. Jain has proposed that in India we should follow the American rule of excluding such evidence to check officials, from adopting illegal methods of obtaining evidence or it may be left to the discretion of the Court to admit or not any such evidence in a case, on its facts and circumstances.

It is submitted that in today’s advanced information and computer age, the great responsibility lies on the Court to strike a balance between the interest of the society and the interest of the individual’s right to privacy while dealing with any tapped conversation in evidence. The individual must also be given the opportunity to verify that particular in formation supplied & stored in computer must be used always for the particular purpose only so that his freedom to privacy is not infringed.

(b-ii) Matrimonial Rights and Privacy:

Apart from cases of privacy related to police surveillance or interception of communication, the Indian Supreme Court has also considered indirectly the right to privacy in the

of voice, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape; Also see R.M. Malkani v. State of Maharashtra AIR 1973 SC 153, where tape recorded conversation regarding demand of bribe was admitted in evidence.

sphere of matrimonial conjugal Rights in the sole landmark case of Saroj Rani. This case was decided in the light of two divergent opinions of two different High Courts on this point.

Firstly Justice Chaudhary of the Andhra Pradesh High Court in T. Sareetha's case, extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation. Relying on western sexologists, the High court held that the sexual autonomy was necessary for the enjoyment of life and personal liberty and it includes freedom to choose partner for sexual act on this basis, the Court stuck down section 9 of the Hindu Marriage Act to be violative of Article 14 and 21 of the Constitution. Calling this remedy of restitution of Conjugal rights as 'savage' 'barbarous' and 'uncivilised' Justice Chaudhary held it to be violative of right to privacy and human dignity under Art. 21 and in the Indian Society this remedy is an engine of oppression on the hands of the husbands despite the availability of this remedy to both spouses. The High Court further held that by granting this remedy to the husband against the wife, wife would be coerced by a judicial decision to submit herself against her will to sexual intercourse by the decree holder. And this forced sex is degrading to her dignity, privacy and is also 'monstrous to her spirit' as it offends the integrity of a person.

The conjugal rights means the right of the husband or the wife to the society of the other and it is inherent in the very institution of marriage itself and not the creature of statute. But in India under Section 9 of Hindu Marriage Act, 1955, it has been incorporated as a statutory remedy and its purpose is to preserve the institution of marriage. Though the decree of restitution of Conjugal rights, the withdrawing party is ordered to return to the conjugal fold, so that consortium is not broken.

312. The conjugal rights means the right of the husband or the wife to the society of the other and it is inherent in the very institution of marriage itself and not the creature of statute. But in India under Section 9 of Hindu Marriage Act, 1955, it has been incorporated as a statutory remedy and its purpose is to preserve the institution of marriage. Though the decree of restitution of Conjugal rights, the withdrawing party is ordered to return to the conjugal fold, so that consortium is not broken.

One year later, in contrast to this revolutionary verdict of Andhra High Court, the Delhi High Court took Contrary view in the Harvinder Kaur's case. Justice Rohtagi while delivering the judgement held that, one great flaw of Andhra High Court verdict was that it regarded marriage as a legalised means of sexual satisfaction and not as a partnership for life. To remove this flaw, Delhi High court upheld the validity of section 9 on the round that the main idea of this section, is to preserve the marriage by cohabitation and consortium and not to enforce merely sexual intercourse which is only one of the attributes of marriage and not the Summum-bonum.

Justice Rohtagi even opposed the introduction of the Constitutional Law in the matrimonial matters saying that "introduction of constitutional law in the home is most inappropriate. It is alike introducing a bull in a china shop - In the privacy of the home and the married life neither Article 21 nor Article 14 has any place. In a sensitive sphere which at once most intimate and delicate, the introduction of the cold principles of Constitutional law will have the effect of weakening the marriage bond".

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316. Ibid at p. 70 What the Hon'ble Justice Rohtagi wanted was that there should not be a sudden break of marriage and that the parties must be given a 'cooling off' period before they reach the point of no return.

316-A) Ibid at p. 75 The learned Judge relied on English ruling of Bal four v. Balfour on this point (1919) 215 G.B. 571. He expressed the view that the "domestic community" does not rest on contracts sealed with seals and sealing wax nor on constitutional law. It rather rests on that kind of moral cement which unites and produces "two-in-oneship".
And, finally the Supreme Court set at rest the controversy regarding the constitutional validity of section 9 of the Hindu Marriage Act when Justice S. Mukherjee in Saroj Rani’s case upheld the Delhi High court judgement in Harvinder’s case and observed that section 9 of the Hindu Marriage Act could not be declared as violative of article 21 of the Constitution, if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.  

It is submitted that though the apex Court did not directly consider the question of wife’s rights to privacy yet it took the right step by upholding the view of Justice Rohtagi of Delhi High Court. Since the main object behind the enactment of section 9 has been to preserve the institution of marriage and sufficient safeguards are present in the said section itself to check it from being a tyranny, the Court followed the correct approach by upholding the validity of this section. This approach is perfectly in tune with "procedure established by law" in Article 21 of the Constitution as interpreted in Maneka’s case as Section 9 followed the ‘fair’ just and reasonable approach in tune with “procedure established by law” in Article 21 of the Constitution as interpreted in Maneka’s case.

317. Supranote 313 at pp 1568-69.

318. The significance of the concept of conjugal rights has been high-lighted by the Law Commission in its 71st Report on the Hindu Marriage Act, where it was stated that "the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all misery that has to be faced in life, an experience of the joy that comes from enjoying in common things of the matter and of the spirit and from showering love and affection on one’s offsprings. Living together is a symbol of such sharing in all its aspects”. See Hindu Law by Mulla (15 thed) 567.

319. Supranote 142.
procedure in its attempt to bring the spouses together and permit cessation of the sacred marital bond only when the things have reached to that extent that there is no use of continuing such bitter marital relationship.320

It is further submitted that the learned Justice Rohtagi has erred in his reasoning slightly by opposing the introduction of the Constitutional law in the matrimonial matters on the ground that it would weaken the marital bond. We must not forget that the Constitution in our parliamentary system of government is the basic and the foremost document and it is expected that all other statues, regulations, laws are made in consonance with this sacred document. Any statute that violates any fundamental right of an individual is subject to judicial review. And family matters, to major extent are codified by the Parliament in order to protect the basic rights and liberties of the people in our society. Therefore, the assertion of the learned Justice Rohtagi to exclude, family matters from the reach of Constitution is baseless.

Secondly, Justice Rohtagi’s contention that the object of the remedy of Restitution of conjugal rights is not merely sexual intercourse, is right only to some extent. As rightly said by Dr. Paras Diwan, "How many people (young or not very young) will accept cohabitation minus sexual intercourse. For that one has to be Brahma Kumari".321

It is further true that right to privacy as a part of right to personal liberty is not an absolute right as when a girl and a boy enter into matrimonial ties, both have to surrender their respective liberty and privacy to some extent. But, even today, it is quite common, particularly amongst lower class, in the rural India where women due to illiteracy, ignorance cannot raise their wise against injustices, that husband still holds superior position, imposes or tries to impose his will on the wife who humbly submits to her master wishes. In all matters relating to family planning, wife does not have right to decide. Taking into account all these prevailing realities of inequal status of women, having no individual identity, it is submitted that there is need to give recognition to right to privacy of the women - in matrimonial relations, only then her rights and privileges would be protected, and in the real sense, she would achieve the status of equality with her husband and her personality would also be strengthened in toto.

(b-iii) Unchaste Woman’s Right to privacy:

Perhaps, keeping this aspect of woman’s dignity in mind, the apex Court in a commendable verdict of Madhukar Narayan Mardikar case, extended the right to privacy under Art. 21 of the Constitution to an unchaste women. Speaking for the Court, Justice Ahmadi (the present C.J.I.) reversing the Bombay High Court ruling, observed that:

322. State of Maharastra v. M.N. Mardikar AIR 1991 SC 207. In this case the respondent police inspector visited the house of one Banubai, an unchaste women, in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force and then she raised an alarm. As a results her husband and neighbours collected...
"Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. --- We, therefore, find it difficult to agree with the High Court that merely because Banubi is a woman of doubtful reputation it is unsafe to rely on her testimony".

The Supreme court also refuted the Bombay High Court’s observation that it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person as wrong. On the contrary, the Court held that she was honest enough to admit the dark side of her life. Her evidence was also corroborated in material particular.

It is submitted that the Court has played a positive role in this case and has established it beyond doubt that there is a legal right to privacy. But there is urgent need to make it a separate right subject to the exceptions constitutionally. Because to treat it as part of Art. 21 would create difficulty in the emerging complexities of society. Already, various aspects of privacy in relation to marriage, sex and family have been interpreted under the garb of human dignity and enjoyment of life. If the present trend continue then alike America, in India also problems will arise particularly in the area of family law. For instance problem can arise on the issue of abortion if one out side the hut-ment. She filed a complaint against him. When he was prosecuted he told the Court that she was a lady of easy virtue and hence her evidence was not to be relied on.
spouse refuses consent for it and the other spouse goes ahead for it on the ground of his or her right to privacy as a part of human dignity and personal liberty. Further, if tomorrow to check the population growth, the state impose compulsory sterilization in the larger interest of society, can such a law stand the test of individual liberty under Article 21.

Moreover the right to privacy is also covered under certain clauses of Art. 19(1)(a), (d) or (g), which taken together protect only the privileged communications, personal productions and business or trade secrets etc. Similarly Article 20(3) covers an important aspect of privacy protecting the so called accused from being compelled to give evidence against himself in the criminal proceedings. All these reflect that today the contents of right of privacy are uncertain, undefined there are no common standards to determine the norms of privacy causing confusion. Whatever norms have been laid down are the outcome of the Courts rulings. There is an urgent need to adopt a new perspective of this right defining the essence and scope of this right through Constitutional amendment. It should be recognised as a separate fundamental right subject to reasonable restrictions imposed on the ground of 'in the interest of general

324. In an important verdict in Sushil Kumar v. Usha AIR 1987 Del 86, the Delhi High Court allowed the husband's petition for divorce on the ground of cruelty within the meaning of section 13(1) (1a) of the Hindu Marriage Act, 1955 on the ground that the termination of first pregnancy by the wife deliberately without the husband's consent amounts to cruelty to husband. This judgement raised crucial issue as whether a woman has the right of control over her own body which includes a right to limit and space pregnancies. See "Abortion : A socio legal outlook" by Kaur, Arvind and Marwah, Shalini in P.U.L.R. Vol. 39 (1992) p. 202.
public health, morality or prevention of crime.\textsuperscript{325}

(c) **Right to Reputation and Personal Liberty:**

Indirectly, the right to reputation has been recognised as a part of right to personal liberty\textsuperscript{326} by the Summit Court in Sowmithri Vishnu's case.

The Court held that victim of adultery is entitled to defend her reputation in proceedings under section 497 of the Penal code.\textsuperscript{327}

(d) **Indigent judgement debtor's right to Freedom from Arrest:**

The right of not to be imprisoned for inability to fulfil a contractual obligation by an honest judgement debtor is not specifically guaranteed as a fundamental right in the Indian Constitution. But this right has been recognized under section 11 of the International Covenant on Civil and Political rights. When this question arose before the Indian Supreme Court in Jolly George Verghese\textsuperscript{328} case that whether a person can be imprisoned on the ground that he has failed to discharge his contractual obligations and whether such imprisonment amounts to deprivation of his personal liberty in Article 21 without fair and reasonable

\textsuperscript{325} Supranote 292 Dwivedi, B.P. at p. 119. In Israel the Parliament enacted the protection of privacy law in 1981. This can be taken as an example of the recognition of a general right to privacy; Also see B.P. Singh Sehgal's "The right to privacy : Anover view" in Law Judiciary And Justice in India Ed by Sehgal, B.P. Singh (1993) pp 171-179 at pp 178-79.

\textsuperscript{326} Both under Law of tort and Law of crimes (S. 499 of Indian Penal code) any person making any defamatory statement against another is liable for action.

\textsuperscript{327} Smt. Sowmithri Vishnu v. U.O.I. AIR 1985 SC 1618. In this case the petitioner challenged proceedings under section 497 IPC on the plea that though she is not a party to the proceedings, her reputation is being affected. She contended that section 497 of the penal code does not confer any right on the wife to prosecute the woman with whom her husband has committed adultery and so her right to privacy is getting affected.

\textsuperscript{328} Supranote 238.
procedure, the majority of the Court held that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is a violation of Article 21 of the Constitution. Justice Krishna Iyer, speaking for the majority Court observed that:

"Where the judgement debtor if once had the means to pay the debt but subsequently, after the date of decree, has no such means or he had money on which there are other pressing claims, it is violative of Article 11 of the International Covenant to arrest him and confine him in jail so as to cover him into payment."329

Mr. Justice Krishna Iyer further held that:

"-----To be poor, in this land of Daridra Narayana (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his willful failure to pay inspite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness.---- The high value of human dignity and the worth of the human person enshrined in Article 21 read with Article 14 and 19, obligates the State, not to in -carcerate except under law which is fair, just and reasonable in its procedural essence". 330

(V) Right to Life

Meaning and its Deviations

Alike 'personal liberty' right to 'life' is the basis of all other rights enjoyed by an individual. Prof. K.T. Shah, one of the members of the Constituent Assembly, said in his note on fundamental rights that the right to life does not merely mean the sanctity of life rather means the fullest opportunity to develop one’s personality and potentiality to the highest level possible in the existing stage of our civilization.331 Mere right

329. Ibid 474. The Court held that India being party to the International covenant on civil and political rights, is bound by it as it is a part of the law of the land must be respected by the Municipal Court. But the Court did not strike down section 51 of the C.P.C. dealing with Court's power to enforce execution of decree by arrest and detention in prison but remitted the case for reconsideration in the light of the above interpretation.

330. Ibid 475 (emphasis added).

331. Supranote 150 at p. 41
to exist will have little value if it is to be bereft of any opportunity to develop or to bring out what is every man or woman. Being the basis of all other rights, the right to life requires adequate and effective protection, guarantee or safeguard included in the Constitution. And finally along with ‘personal liberty’ right to life found place in Article 21 of the Constitution.

Interpreting the term ‘Right to life’, Justice Ayyangar held in Kharak Singh’s case that the right to life does not mean the continuance of a person’s animal existence but a right to the possession of each of his limbs and faculties by which life is enjoyed”. Thus, every limb or faculty through which life is enjoyed is protected by article 21 and this includes the faculty of thinking and feeling also. Under this article, every kind of deprivation, total or partial, permanent or temporary is prohibited.\textsuperscript{332}

In Umed Ram Sharma’s\textsuperscript{333} case, the Summit Court further held that the right to life includes the quality of life as understood in its richness and fullness by the ambit of the Constitution. Access to road was held to be an access to life itself in that state.

In Sunil Batra (1) case, the Constitution bench of the Court, while considering the effect of solitary confinement on death sentence awardee prisoner held that the quality of life

\textsuperscript{332}. Supranote 101 The Court followed American Supreme Court ruling of Munn V. Illinois case.

\textsuperscript{333}. State of H.P. V. Umed Ram Sharma AIR 1986 SC 847 the Court held that in the Public interest litigation case, the Court has power to take affirmative action by issuing specific directions in cases of governmental inaction or lethargy to perform the functions under the law. The Court upheld the High Court’s jurisdiction to complete the construction of a road in a poor Harijan Basti.
covered by Article 21 is something more than the dynamic meaning attached to life and liberty.334

After Maneka Gandhi's case, the Court's judicial activism has also given birth to following rights as part of right to life as guaranteed under Art. 21 of the Constitution.335

(a) Right to live with human dignity & right to livelihood:

In 1981 Francis Coralie Mullin336 case, giving the expansive interpretation to right to life, Justice Bhagwati, (as he then was) held that "right to life also includes within its scope and ambit the right to live with basic human dignity and the State cannot deprive any one of this precious and invaluable right because no procedure by which such deprivation may be effected can ever be regarded as reasonable, fair and just. This right to life includes right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, the mixing and coming line of with fellow human beings. Every act which offends or impairs human dignity would constitute deprivation protante of this right to live". Further, in another significant case of Bandhua Mukti

334. Supranote 235; Also followed in Board of Trustees of the port of Bombay v. D.R. Nadkarni AIR 1983 SC 109.
335. Supranote 219.
336. Supranote 236 at 753. Also see Charles Sobraj v. Supdt. central Jail, Tihar New Delhi AIR 1978 SC 1514 held that right to life includes right to human dignity; People's Union for Democratic Rights v. U.O.I. AIR 1982 SC 1943. (Asiad case) where Justice Bhagwati held that right and benefits conferred on the workmen employed by a contractor under the provisions of the contract labour (regulation and abolition) Act 1970 and Inter State Migrant workmen (Regulation of employment and conditions of service) Act, 1979 are clearly intended to ensure basis human dignity to work-men and not ensuring these basic rights of workmen under these social welfare legislations would clearly be aviolation of Art. 21.
Morcha\textsuperscript{337}, the Court held that the right to live with human dignity, enshrined in Article 21, derives its life breath from the directive principles fo the state policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42.

Infact the founding fathers of the Indian Constitution were quite aware of the fact that without social justice, the content of political freedom is impaired, and that without adequate protection for social and economic rights, constitutional guarantees of what are known as "classical individual liberties" such as the right to equality, liberty of person and freedom of speech etc. may lose much of their significance.\textsuperscript{338} And for this they included various provisions, though in the category of non-justicible rights, as directions to the State to work for social and economic welfare of the people of India and right to livelihood, right to work is specifically

\begin{itemize}
\item \textsuperscript{337} Supranote 249 at pp 811-812. The case arose under the Bonded labour system (Abolition) Act 1976. The Court held that the lack of adequate arrangement to rehabilitate the released bonded workers would amount to denial to the rights to live with human dignity and such violative of Article 21; Also see \textit{Neeraja Chaudhari V. State of M.P.} AIR 1984 SC 1099. Where Justice Bhagwati directed for the indentification, release and suitable rehabilitation of the bonded labourers in pursuant to the Bonded labour system (Abolition) Act 1976 enacted in pursuant to the Directive Principles of state policy. The Court held that investigative journalism can play an important role in identifying the various bonded labourers.
\item \textsuperscript{338} See Supranote 08 Rao, B. Shiva at p. 319 Moreover already in the fourth centurty B.C. Kautilya a in his \textit{Artha-Sastra} has said that it is duty of the king to provide for the orphan, the dying, the infirm and the helpless with maintenance etc.
\end{itemize}
included under Articles 39 (a), 41, 42, 43, of the Constitution and all these articles clearly show the grave concern of the inner conscious of the framers of the Constitution about the right to work, right to earn livelihood.

But, earlier interpretation given to the word "life" by the Supreme Court does not equate the right to life to right to livelihood. In Sant Ram's case, rejecting the contention that the word "life" in Article 21 includes "livelihood", the constitution bench of the court observed:

"--- The question of livelihood has not in terms been dealt with by Article 21 of the Constitution. That question is included in the freedom enumerated in Art. 19, particularly cl. (g) or even in Art. 16 in a limited sense, but the language of Art. 21 cannot be pressed into and of the argument that the word "life" in Art. 21 includes livelihood also"341

The Sant Ram's traditional approach followed again by the Summit Court in cases of Nachane and Bengulla

339 Article 39 (a) lays emphasis on state's obligation to secure right to an adequate means of livelihood to all the citizens. Article 41 speaks of State's duty to secure the right to work to people. Art 42 directs the state to make provision for securing just and human working conditions. Art 43 speaks of providing living wages to workers which includes in addition to the bare necessities of life, such as food, shelter and clothing, provisions for education of children, insurance etc.

340. In Re Sant Ram case AIR 1960 SC 932. In this case, exercising of the power given under rule 24 of the Supreme court rules, the Registrar of the Court issued notice to the appellant and another person to show cause why their names be not included in the list of touts. This notice was challenged by the appellant on the ground, inter-alia, that it contravenes article 21 of the Constitution as by the inclusion of his name in the list of touts, he was deprived of right to livelihood which is included in the right to life.

341. Ibid at p. 935.

342. A.V. Nachane v. U.O.I. AIR 1982 SC 1126 at 1131 held that employees cannot claim a right to have a settlement for payment of bonus as life does not include "livelihood", 


Bapi Raju\(^{343}\). But strangely speaking, in Chandrabhan\(^{344}\) case which was decided by the Court before the case of Bapi Raju, the Court had held that subsistence allowance falls under the head of livelihood as employment falls under livelihood and on this ground, struck down a law providing one rupee per month as subsistence allowance as violative of, interalia, article 21 of the Constitution as it amounted to deprivation of life.

And this right to livelihood as a part of right to "life" in article 21 was finally given a status of fundamental right in revolutionary and realistic judgement of the Summit court in the famous Pavement Duellers\(^{345}\) case. In this case Chief Justice Chandrachud delievering the judgement on behalf of five judges Constitutional bench observed that:

"The right to life includes right to livelihood --- The sweep of the right to life conferred by Art. 21 is wide and far-reaching --- If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of deprivning a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation."

The Court also held that: "Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to..."

\(^{343}\) Bengulla Bapi Raju V. State of A.P. AIR 1983 SC 1073.

\(^{344}\) State of Maharashtra V. Chandrabhan AIR 1983 SC 803.

\(^{345}\) Supranote 245. In this case social worker Olga Tellis filed a public interest litigation on behalf of pavement dwellers in Bombay for their right to be protected against eviction from their 'squalid' shelters without being afforded alternative accomodation. She challenged the validity of certain sections of the Bombay Municipal Corporation Act 1988 on the ground that the removal of Pavement dwellers under the Act would deprive them of their right to livelihood, as violative of Art. 21. The

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be in accordance with the procedure established by law, if the right to livelihood is not regarded as part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life".346

Speaking on the relationship between Fundamental rights and Directive principles of State policy, the Court declared:

"If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life".347

Further elaborating on Olga Telis case in another landmark ruling of Delhi Development Horticulture Employees’ Union the apex Court speaking through Justice P.B. Sawant stated beautifully while deciding on the nature of right to livelihood that:

"This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles Art. 41 of which enjoins upon the state to make effective provisions for securing the same within the limits of Court held that the right to livelihood is part of Art. 21 but it can be curbed or curtailed by following just and fair procedure. Upholding the constitutionally of the sections of the impugned. Act, the Court said that these imposed reasonable restrictions on the right of livelihood of pavement & slum-dwellers in the interest of the general public as public streets are not meant for carrying on trade or business. But taking humanistic view, the Court gave certain time for removal of these pavement dwellers.

346 Ibid at pp 193-194.
347. Ibid at p. 194; Also see Delhi Municipal Corpn. V. Gurnam Kaur AIR 1989 SC 38.
its economic capacity and development”. Thus even while giving the direction to the state to ensure the right to work, the Constitution makers thought it prudent not to do so without qualifying it.

In brief, the Court has held through various rulings that Article 21 (clubs) life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. In recent case of M.S. Sivani Justice K. Ramaswamy speaking for himself and on behalf of Justice Hansaria dismissing the petition that getting of licence to non business of video games under the state governments Act or notification or order and to be regulated thereby is violative of fundamental rights under Articles 19(1) (g) and 21 of the Constitution, held that:

348. Delhi Development Horticulture Employees’ Union V. Delhi Administration AIR 1992 SC 789 In this case petitioner, daily wagers employed in the Jawahar Rozgar Yojna filed a petition for their regular absorption as a regular employees in the Development Department of the Delhi Administration. They contended that right to life includes the right to livelihood and therefore, right to work. The Court rejected their contention of automatic regularisation even though they have put in work for 240 or more days. Only directed the respondent Delhi Admn. to keep them on a panel and give them preference in employment whenever they occur. Ibid at p. 395 (emphasis added); All India Imam Organisation v. U.O.I. AIR 1993 SC 2086 The Ccourt also held that Imams, "in charge of religious activities of Mosques are entitled to emolument even in absence of statutory provision in the wakf Act, as they have right to live in accordance with Art. 21 of the constitution; D.K. Yadav v. J.M.A. Industries Supranote 271 the Court held that "right to life enshrined under Art. 21 includes the right to livelihood" and hence, termination of the service of a respondent industries worker who remained wilful absent from duty continuously for more thus 8 months, without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal. The procedure prescribed for depriving a person a livelihood must meet the challenge of Art. 14 and so it must be right, just and fair and not arbitrary, fanciful or oppressive and must be in conformity with rules of natural justice. In this case, setting aside the labour court award, the Court ordered reinstatement of
"It is true that the owner or person in charge of the video game, earn livelihood assured under Article 21 of the Constitution but no one has right to play with the credulity of the general public or the career of the young and impressive age school or college going children by operation unregulated video games. --- Right to life under Art. 21 does protect livelihood, but its deprivation cannot be extended too far or projected or stretched to the avocation, business or trade injurious to public interest or has insidious effect on public morale or public order. therefore, regulation of video games or prohibition of some of video games of pure chance or mixed chance and skill are not violative of Article 21 nor is the procedure unreasonable, unfair nor 'unjust'.

"In brief, the court ________ animal existence"

It would include all that given meaning to a man's life e.g. his tradition, culture, heritage and protection of that heritage in its full measure.

Earlier, in Vikram Deo Singh Tomar case, the Summit Court issuing directions to the respondent State in public interest litigation case, to take immediate steps for the welfare of inmates of 'Care Home Patna', held again that 'the right to live with human dignity' is the fundamental right of every citizen and the state is under duty to provide at least the minimum conditions ensuring human dignity.


350. Supranote 251 The case highlighted the plight of female inmates of the 'Care Home Patna' who were compelled to live in inhuman conditions in old dilapidated building, having no medical care and were surviving on in human conditions.

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In *Shanti Star Builders* case, the apex Court observed that the right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. Further pointing out the difference between the needs of an animal and a human being for shelter, the Court held that for the animal, it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.351

(b) **Right to Health, Medical aid, and right to live in Healthy Environment**

Since the well accepted principle of life speaks of 'healthy mind in a Healthy body', lack of health denudes a

Also see *S.R. Kapoor v. U.O.I.* AIR 1990 SC 752. The Court directed the respondent government to take over the management of mental diseases hospital in Shahadra and improve its working conditions. The Court reiterated that the deprivation of job was not deprivation of their right to life and liberty; Also see

*Bombay Hawker’s Union v. Bombay Municipal Corp* AIR 1985 SC 1206 upholding the reasonableness of the restrictions imposed on the hawkers in the public interest by the provisions of Bombay Municipal Corporation Act, the Court pointed out that no one has any right to do his or her trade or business so as to cause nuisance, inconvenience to other members of the public.

person's ability to earn livelihood and offends his dignity. The health and strength of the worker is an integral facet of right to life and denial thereof means violation of Art. 21. Health of the worker enables him to enjoy the fruit of his labour keeping him physically fit and mentally alert for leading a successful life, economically, socially and culturally. Recently recognising the right to health to a worker as a part of his right to life, Justice K. Ramaswami, speaking for the Court observed in Consumer Education and Research Centre case that:

"The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also a robust health and vigour without which worker would lead life of misery it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights to the workmen. Therefore, we hold that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related to Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of persons".

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352. Vincent Pari Kurlangara v. U.O.I. case the Court also held that the right to maintenance and improvement of public health is included in the right to live with human dignity enshrined in Art. 21. In a welfare state this is the obligation of the state to ensure the creation and sustaining of conditions congenial to good health (1987)2 S.C.C. 165.

RIGHT TO MEDICAL AID/DOCTORS' OBLIGATION TO GIVE MEDICAL AID:

Earlier, in significant case of Parmananda Katara the Summit Court directed even private doctors or hospitals to extend service to protect the life of the patient, be an innocent or a criminal liable for punishment in accordance with law. The Court held that it is the professional obligation of all doctors, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under the Criminal Procedure Code as Art. 21 of the Constitution casts the obligation on the state to preserve life. In order to make everyone aware of this ruling of the Court, the Court not only issued directions for adequate publicity of this decision through national media and its publication in all legal journals but also directed to send copies of this judgement to the Medical council of India who will further send it to all affiliated medical colleges.

It is submitted that this is very valuable judgement given by the apex court and if it is followed by doctors in its true spirit, it would help in saving the lives of number of people who die in accidents due to note getting immediate medical aid by the doctors on the ground that they are not authorised to treat medico-legal cases without first complying with legal formalities.

Right to Pollution Free Environment:

Another closely related issue with regard to right to health is right to live in pollution free, healthy, clean environment. Today for survival of the human being, there is need

to maintain ecological balance by stopping degradation of the natural environment and destruction of life's support system like air, water, food etc. Keeping this factor in account, the U.N. General Assembly passed a resolution on Dec. 15, 1972, laying stress upon the need of active co-operation among the state in the field of human environment.354

Originally, the Indian Constitution did not contain any direct provision regarding the protection of natural environment. Probably the founding fathers of Indian Constitution thought it negligible problem and perhaps for that reason the term "environment" has not been used anywhere in the original Constitutional document. But careful examination of various provisions of Part IV of the Constitution shows that Articles 47, 48 and 49 are, in a way, relate to environment. But being "Directive principles of State policy" these are non-justiciable rights but the principles laid down in these provisions are nonetheless fundamental in the governance of the country.355


355. Article 47 directs the state to consider improvement of public health as one of its primary duties.

Article 48 directs the state to endeavour to organise agriculture & animal husbandry on modern & scientific lines.

Article 49 confers obligation on the state to protect monuments & places & objects of national importance from being spoiled, disfigured, destructed etc.
Gradually, the increase in the public awareness of the environment crisis, led to the inclusion of Article 48-A and fundamental Duties relating to environment protection in the form of Article 51A (g) through the Constitution (Forty-second) Amendment Act, 1976.356

And impetus to these toothless paper-tiger constitutional provisions was given by the Summit Court in the well-known case of Ratlam Municipality357. In this case following the activist approach Justice Krishna Iyer and Justice O. Chinappa Reddy observed that : "Public nuisance because of pullutants being discharged by big factories to the detriment of poorer section is a challenge to the social Justice, component of the Rule of law". Ratlam Municipality case was followed by R.L. and E. Kendra358. Shriram Fertilizer Gas leak359 cases and Ganga Water

356. Article 48-A directs the state to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 51A (g) confers duty on every Indian citizen to protect and improve the natural environment including forests, lakes, rivers & wild life, & to have compassion for living creatures.

357. Supranote 248 at p. 1623 In this case the residents of a locality in the Ratlam Municipality limits tormented by stench and stink caused by open drains and public excretion by nearby slumdwellers moved the magistrate u/s 133 of Code of Criminal procedure, 1973, to require the Municipality to do its duty to remove all the nuisances caused by in adequate & improper drainage system. The Magistrate issued directions to Municipality to draft a plan within 6 months for removing nuisance. In appeal, the session court reversed the order but the High Court held Magistrate’s order & lastly the Supreme Court also affirmed them. Also see Govind v. Shanti Sarup AIR 1979 SC 143 where the apex Court used section 133 of Cr.Pr-code to preserve the environment free from pollution in the interest of "health, safety and convenience of public at large".

358. Rurallitigation and Entitlement Kendra v. State of U.P. AIR 1985 SC 652. In this case the Court ordered the closure of lime stone quarries in Dehra-Dun Mussoorie area. The Court though realised the fact that closure of quarries would cause financial hardship to lessees yet it held that this much price has to be paid for protecting & safeguarding the right of the people to live in a healthy environment.
In the famous Bhopal gas Tragedy case, the Summit Court one again showed its deep concern for the life of the people and directed the government to immediately provide interim relief for the victims of the poisonous gas leaked from the Union carbide factory at Bhopal.

Again in another case, while directing the Union Carbide corporation to pay a sum of U.S. Dollar 470 millions to the Indian government in full settlement of all claims and liabilities related to and arising out of the Bhopal Gas disaster, the Supreme Court also laid stress upon the need to evolve a national policy to safeguard national interests from ultra

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359. **M.C. Mehta v. U.O.I.** AIR 1987 SC 965 Here considering the impact of polluting the healthy environment by poisonous chlorine gas leakage from the Shriram Chemical Plant in Delhi which resulted in death of a person and largely affected other people, the court allowed public interest litigation filed by Delhi legal Aid Board & Bar Association for compensation from the management for the violation of right to life as enshrined in Article 21 of the Constitution.

360. **M.C. Mehta v. U.O.I.** AIR 1988 SC 1037. In this public interest litigation case, considering the problem of pollution of Ganga water by the affluent discharge from the tanneries in Kanpur, the Court observed that since polluted water affects the health and life of the people, issued directions by way of affirmative action, for compliance by the Kanpur Municipal corporation and other concerned authorities.

361. **Union Carbide Coron. v. U.O.I.** AIR 1989 SC 1069. Recently, expressing anguish and annoyance over discontinuing of interim relief to victims of the Bhopal gas tragedy even before disbursement of actual compensation awarded by the claim commissioner has taken place, Chief Justice Ahmadi told Additional Solicitor-General Mr. V.R. Reddy during the hearing of a public interest petition alleging malpractices in the grant of compensation, that "the victims of the tragedy cannot be killed like this for want of money. Your decision to grant the victims compensation seems to be only on paper and paper cannot be chewed for food. Paper cannot get the suffering victims their daily requirements". The Court also directed Mr. Reddy to give an undertaking on

Contd...
hazardous pursuits of economic gains. Also pointing out the criticism of M.C. Mehta principle that perhaps, ignored the emerging postulates of tortious liability whose principal focus is the social limits on economic adventurism, the Court held that there are certain things that a civilised society simply cannot permit to be done to its members, even if they are compensated for their resulting losses. This way, the right to live in a healthy environment cannot be violated by anybody under the plea that if any harm is caused then the injured party shall be suitably compensated.

Further upholding the validity of Bhopal Gas Leak Disaster (Processing of claims) Act, 1985 Justice K.N. Singh obvered:

"In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48-A and 51(g). It is the duty of the State to take effective steps to protect the guaranteed constitutional rights".

The perusal of the above cases makes it clear that how the apex court has indirectly, though not expressly treated the right to live in a healthy pollution free environment as Supreme and a part of right to life, the thing which had never been intended by the founding-fathers of the Indian Constitution. Today any person can file a direct petition to the Summit Court for the enforcement of his right to live in pollution free environment and it is hoped, that in future judiciary will keep affidavit by next thursday that payment of interim relief would not be halted till the actual payment of compensation take place. See *The Tribune* Dec. 7, 1995.

363. Supranote 360.
364. Supranote 363 at p. 283.
365. Supranote 111 at 717. Also see this case in Supra Ch. III.
on playing activist role to protect us against environment pollution.366

(c) RIGHT TO EDUCATION

The Court further went a step ahead when it held in landmark case of Mohini Jain367 that the right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The Division Bench comprising of Justice Kuldip Singh and Justice R.N. Sahai observed that :

"Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life.---- The right to education flows directly from right to life. --- The State government is under an obligation to make an endeavour to provide educational

366. Also see The Tribune March 25, 1991 p. 3. Report on UGS sponsored seminar on "Environmental Protection Agenda for inter disciplinary Approach", Also see Subhas Kumar v. State of Bihar AIR 1991 SC 420 where the Court observed that PIL is maintainable for ensuring enjoyment of pollution free water and air which is included in the right to live under Art. 21 of the Constitution. Recently in an epoch making intervention, the apex court once again directed the closure of 84 UP Industries which have been circumventing its earlier directives to install pollution control devices in their units located in Agr, Mathura, Meerut, Saharanpur etc thereby causing pollution to the environment of the area and major rivers of the region. See The Tribune Jan 23, 1995; Further the court issued an ultimatum to some polluting units in W.B. to relocate themselves within 3 months or face the music The Tribune May 17, 1995.

367. Mohini Jain v. State of Karnataka (1992) 3 SCC 666. In this case the petitioner a resident of Meerut, U.P. had challenged the validity of a Notification issued by the government under the Karnataka Educational Institutions (Prohibition of capitation fee) Act 1984 which regulated tuition fee to be charged by the private Medical Colleges in the State. The petitioner was denied admission on the ground that she was unable to pay the exorbitant tuition fee; Earlier in State of A.P. v. Lavu Narendranth AIR 1971 SC 2560 at 2567 the Court held that deprivation of personal liberty if done by a valid procedure established by law, does not affect fundamental right under Art. 21 in any manner. The court held that refusal of an application to enter a medical college can not be said to affect one’s personal liberty. Mohini Jain's decision is deviation from Lavu’s case ruling.
facilities at all levels to its citizens"368

It is submitted that this has been remarkable verdict as the Court in a way has opened the door for all classes of citizens to get the benefit of education. Condemning charging of capitation fee, the Court rightly called it as nothing but a consideration for admission and a patent denial of a citizen’s right to education under the Constitution.

The correctness of Mohini Jain’s decision was examined by the Supreme Court in Uni Krishnan’s case. 369 The five judges bench by 3-2 majority partly agreed with the Mohini Jain’s decision relating to right to education being a part of right to life under Art. 21 of the Constitution but they partly overruled it as regard to its content. Justice B.P. Jeevan Reddy speaking for himself and on behalf of Justice S.R. Pandian observed that:

"The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution"370

His lordship further held that the right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development. Further emphasising upon the necessity of private education institutions in the present day context, the

368. Ibid (emphasis added).

369. Uni Krishnan J.P. v. State of A.P. AIR 1993 SC 2178. In this case the petitioners running Medical and Engineering Colleges in the states of A.P., Karnataka, Tamil Nadu & Maharashtra argued that if Mohini Jain decision is correct & followed then they will have to close down their colleges.

370. Ibid at p. 2231 (emphasis supplied).
court rejected reasoning of Mohini Jain's case that charging of any amount in the form of tuition fee must be described as Capitation fee. This way the majority held that admission to all recognised private educational institutions particularly medical and engineering colleges shall be based on merit, but fifty percent of seats in all private professional colleges be filled by candidates prepared to pay higher fee. The Court also evolved a scheme which would provide more opportunities to meritorious students who are unable to pay higher fee prescribed by Government for such colleges. The Court also laid down guidelines for admission and tuition fees.

(d) Right to compensation

In Nilabati Behera case, the Court directed the respondent state of Orissa to pay the sum of Rs. 1,50,000/- to the petitioner as compensation and afurther sum of Rs. 10,000/- as costs to be paid to the Suprem Court legal aid committee.

The only significant addition & deviation made in this case by the apex court from its earlier settled precedent for awarding monetary compensation in Rudulshah's case is that it

371. Ibid at p. 2234.


373. Nilabati Behera v. State of Orissa AIR 1993 SC 1960 at p. 1970. The petitioner sent a letter to the Supreme court for determining the claim of compensation as a result of custodial death of her son about 22 years, in police custody. He suffered multiple injured due to police torture resulting in his death and his body was thrown on the railway track. The petitioner prayed for award of compensation for contravention of fundamental right to life guaranteed under Art. 21. The court treated letter as a writ petition under article 32 of the Constitution.

lifted the State immunity from the purview of Public law. The court made an important observation making explicit distinction between the public law proceedings and private law proceedings, both serving different purposes and held that:

"---- A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from and in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantees of fundamental rights, there can be no question of such a defence being available in the Constitutional remedy--"

In his concurring judgement Justice Dr. Anand also held that:

"The citizen complaining of the infringement of the indefeasible right under Art. 21 of the Constitution cannot be told that for the established violation to the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve "new tools" to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law --- The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much as protector and guarantor of the indefeasible rights of the citizens. The Courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations ---. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interest and preserve their rights. Therefore, when the Court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrong doer and fixing the liability for the public wrong on the state which has failed in its public duty to protect the fundamental rights of the citizen. -- The compensation is in the nature of exemplary damages awarded against the wrong doer or the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on

Dr. Justice Anand gradiloquently stated that convicts, prisoners and under trials have right under article 21 of the Constitution and the State has strict duty to ensure that a person in custody of police not deprived of his right except according to law.

Commenting on this ruling, Dr. Sandhu has rightly submitted that the apex court's observation on the applicability or non-applicability of the sovereign immunity on the basis of remedies does not appear proper, as torts of assault, battery and false imprisonment also do include the cases of unlawful detention and torture and violates human rights. Therefore, according to Dr. Sandhu, the doctrine of sovereign immunity should have no application in a case wherein the remedy of compensation for violation of rights to life or liberty is sought even through a civil suit for damages and in today's set up of welfare state such doctrine of sovereign immunity should be given up. 377

376. Ibid pp 1972 -1973; This case & the earlier cases of RuduAl Shah were in contrast to the court's stand in Kasturi Lal Ralia Ram Jain v. State of U.P. AIR 1965 SC 1039 where in the Court upheld doctrine of sovereign immunity in the case of vicarious liability of the state for the tort of its employees. But that case was confined to the sphere of tortious liability, which is distinct from the state's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defense to the constitutional remedy under Arts. 32 and 226 of the Constitution.

In *Union Carbide Corporation* case, the former Chief Justice Misra had observed that:

"We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future --- there is no reason why we should situate to evolve such principle of liability".

Further, extending this settled law Justice K. Ramaswami speaking for the Court held in *Consumer Education and Research Centre* case that:

"The defence of Sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the state, its servants, its instrumentaries, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the states or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law".

Further expanding the ambit of compensation jurisprudence, the apex Court through Mr. Justice Kuldip Singh and Mr. Justice S. Sagir Ahmad, for the first time has ordered payment of interim compensation for a rape victim in India. Invoking its extraordinary jurisdiction for the protection of the fundamental right to life which the Court said includes "all those aspects of life which to make a life meaningful, complete and worth-living", the Court held if the highest Court had the power to award compensation to a rape victim at the final stage, the court even held that upon payment of compensation to the victim woman, it will be open to the state to recover personally the amount of compensation from guilty police official at p. 119.


379. Supranote 352 at p. 941.
"there is no reason to deny the Court the right to award interim compensation which should also be provided in the Scheme". The Court even ruled that henceforth, the jurisdiction to pay interim compensation will be treated to be part of the overall jurisdiction of the Courts trying the offence of rape which was on offence against basic human rights as also the fundamental right of personal liberty and life.

It is submitted that this is a healthy, landmark verdict adding another feather in the Cap of human rights jurisprudence which will have a deterrent effect on future rapists to not to commit this shameful crime against woman's person. 379-A.

(e) Right to die/Suicide and right to life

Since right to life has both positive and negative aspects, the negative content of this right is right to die or right not to live, particularly when life cannot be lived with dignity or other important contents essential for the sustenance of life are missing from it. Section 309 of Indian penal code provides punishment for attempt to suicide by a person.380

379-A. In this case the Court directed the accused lecturer Bodhisattwa Gautam of Kohima College, who said he was at present unemployed, to pay a girl student to whom he has raped, a sum of Rs.1000 every month as an interim relief, for the crime of fraudulently marrying her and then forcing her to undergo abortion twice, till the pendency of her criminal complaint before the JMIST Class Kohima. (Details of the judgement not available at the time of discussing it here) See The Tribune Dec, 20 1995.

380. Supranote 208 Bansal, V.K. p. 60; Also see "Plea for right not to live vis-a-vis the Indian Constitution by Tewari, G.S. AIR 1988 (Jour) pp 38-43. S.309 IPC reads as : "Whoever attempts to commit suicide and does any act towards commission of such an offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both". 
In a significant judgement on section 309 of the penal code in the context of right to life under article 309, the division bench of the apex Court through Justice Hansaria held that person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. Right to live of which Art. 21 speaks of can be said to bring in its trail the right not to live a forced life.\textsuperscript{381} On this ground, the Court said that section 309 violates Article 21 and so is void & unconsituational and deserves to be effaced from the statute book to humanise our penal law and thus attuning it to the global wave length.\textsuperscript{381} Calling S. 309 as a cruel and irrational provision’ and which may result in doubly punishing a person who has suffered agony and would be undergoing ignominy because of his failure to commit suicide, Justice Hansaria observed that:

"---What is needed to take care of suicide prone persons are soft words and wise counselling (of a psychiatrist), and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor\textsuperscript{383}"

The Court also held that "an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to suicide it causes no harm to others, because of which state’s interference with the personal liberty of the concerned persons is not called for" \textsuperscript{384}

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\textsuperscript{381} P. Rathinam/Nagbhushan Patnaik v. U.O.I. AIR 1994 SC 1844 at p. 1844 Justice B.L. Hansaria delivered the verdict on behalf of himself and Justice R.M. Sahai.
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\textsuperscript{382} Ibid 1854.
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\textsuperscript{383} Ibid at p. 1861 (emphasis supplied)
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\textsuperscript{384} Ibid at p. 1868 (emphasis supplied)
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In this case the Court also overruled Bombay High Court revolutionary verdict in *Maruti Shripati Dubal* case where in Justice Sawant for the Court had held Section 309 unconstitutional not only as being violative of Article 21 but also of Article 14 on the ground that want of plausible definition or even guidelines of attempt to suicide in section 309 made it arbitrary and moreover section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made. The Summit Court refuting the first reasoning of the Bombay High Court held that whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life and is also capable of broad definition. And secondly, so far as treating of different attempts to commit suicide by the same measure in concerned, the same also cannot be regarded as violative of Article 14, in as much as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately.

In this context, the Summit court in *P. Rathinam* case upheld the view taken by division bench of Andhra Pradesh High Court in State of Maharashtra v. Maruti Shripati Dubal 1986 Bom LR P 589. In this a Bombay Police constable who was mentally ill, was refused permission to set up a shop & earn livelihood. Out of frustration, he attempted to set himself afire in the corporation's office room and was arrested u/s 309 of the penal code. His wife filed a case claiming that her husband committed no offence & challenged the constitutionality of S. 309 of the penal code as being violative of right to life & also is barbaric, cruel, irrational and self-defeating and and so, it must be struck down. The Bombay High Court struck down section 309 as being violative of Art. 21. The Bom. H.C. held that the desire to die is not unnatural but merely abnormal & uncommon. They listed several circumstances wherein people may wish to end their lives, including disease, cruel or unbearable condition of life etc. and held that everyone should have the freedom to dispose of his life as and when he desires. Also see "Right to end one's life", by Iyer, Lalita in LEX ET JURIS: The Law Magazine Sep (1986) pp 36-37.
Court which said that since section 309 has only provided the maximum sentence which is upto one year. It provides for imposition of fine only as punishment.\textsuperscript{386}

Reemphasising the fact that Article 21 has enough of positive content in it, the apex Court also distinguished between Euthanasia and suicide and said that latter is logically different from the former and so, the justification for allowing persons to commit suicide is not required to be played down or cut down because of any encouragement to persons pleading for legalisation of mercy killing.\textsuperscript{387}

It is submitted that by making right not to live as part of right to life, the Supreme Court has made another deviation of this right from its original design as intended by the framers of the Constitution. The Court has rightly stressed upon the fact of Art. 21 being having enough of positive content in it and correctly ruled for effacement of S. 309 of the penal code which instead of curing the mental health of suicider awards him punishment and make him suffer more both physically and mentally. Since the Court has already distinguished between suicide and Euthanasia, the judgement will in no way encourage the people to end their own lives.\textsuperscript{387-A}

\textsuperscript{386} Ibid pp 1850-1851 (emphasis supplied) The Court said that Bombay High Court was more involved with Article 21 and violation of it by Section 309 and not with Article 14; \textit{C. Jagadeswar Vs. State of A.P.} 1988 Cr. L.J. 549.

\textsuperscript{387} Ibid at pp 1849 and 1866; the Court also observed that by effacing section 309, we would be attuning this part of our criminal law to the global wave-length.

\textsuperscript{387-A} It is pertinent to mention here that inspite the striking down of Section 309 of the Indian Penal code by the apex court, attempt to commit suicide continues to be a major offence under the Army Act. It is submitted that the Army Act must be in consonance with the law of the land and should be amended accordingly.
f) Death Penalty and Right to Life:

Another area of right to "life" where the apex court through its dynamic approach has introduced certain deviations from the original intent of the founding fathers is awarding of Death-sentence. In the first significant case on this point namely Jagmohan Singh’s case, considering the Constitutional validity of capital punishment, the Constitution bench of the Summit Court headed by Chief Justice Sikri rejected the contention of the petitioner that death penalty is violative of articles 19 and 21, and held that the framers of the Constitution were well familiar with the existence of the death sentence as a permissible punishment under the law. To substantiate this point, the Court gave the example of different constitutional provisions like Article 72(i)(c), 72 (3), 134 & 21. On this basis the Court upheld the constitutionality of death penalty under article 21 as all the above-mentioned constitutional provision provide

388. Jagmohan Singh v. State of U.P., AIR 1973 SC 947 at 950. In this case the petitioner’s contention was that the procedure prescribed under criminal procedure code was confined only to findings of guilt and not awarding death sentence. The 5 judges Constitution bench was comprised of Chief Justice S.M. Sikri, Justices A.N. Ray, I.D. Dua, D.G. Palekar and M.H. Beg.

389. Article 72 (i) (c) gives power to the President of India to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence in all cases where death sentence is awarded.

Article 72 (3) also provides that nothing in sub-clause (C) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a state under any law for the time being in force. Article 134 gives right to appeal to the Supreme Court where the High Court reverses an order of acquitted and sentence a person to death.
the "procedure established by law". Another important point laid down by the Court in this case is that the Court held that both death sentence and life imprisonment are normal sentences and the choice rests in the discretion of the Court, which is to be exercised judicially. 390

But in subsequent case of Rajendra Prasad 391, Justice Krishna Iyer speaking for the majority court made slight deviation when he held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. Showing its abolitionistic approach for death penalty, the Court held:

"It has now become necessary to have a second look at the life versus death question, not for summarising hitherto decided cases and distilling the common factors but for applying the Constitution to cut the Gordian Knot". 392

The Supreme Court also felt that the concept of social justice as projected by Preamble and Part IV of the Constitution has a role to mould the sentence and colours the concept of

390. Ibid at p. 956 The Court remarked that Indian penal code & Cr. A. Code prescribe the maximum punishment and that the fixing of the degree of punishment must be left to the discretion of the judges and that the policy of the law in giving a very wide discretion in the matter of punishment to the judge has its origin in the impossibility of laying down standards. Also followed by Justice Krishna Iyer in Ediga Annamma v. State of A.P. AIR 1974 SC 799 where while adjudging Death penalty as intra vires the Constitution, the learned judge said that : "whatever our view of the social invalidity of the death penalty personal predilections must bow to the law as by this court declared - at p. 805.

391. Rajendra Prasad v. State of U.P. AIR 1979 SC 916 In this case majority judgement was delivered by Justice K. Iyer for himself and on behalf of Justice Desai whereas Justice A.P. Sen gave dissenting view.

392. Ibid at 922.
non-arbitrariness under article 14, 'reasonableness' under article 19 and the 'right to life' under article 21.\textsuperscript{393}

The Court further held that social justice is done to the individual only when his dignity is recognized and the "dignity is defiled when his neck is noosed and strangled".

On this basis, the Court held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under Sec. 354 (3) Cr. P.C. would be violative of Art. 14 which condemns arbitrariness. Justice Iyer pleaded for the abolition of death penalty and retention of it only for punishing "white collar offences". According to the Court ordinary life term is appropriate for murder save where special reasons are found for totally extinguishing the right to life and bidding farewell to the fundamental rights. To quote:

"The sacrifice of a life is sanctioned only if otherwise public interest, social defence and public order would be smashed irretrievably. Social Justice is rooted in spiritual justice and regards individual dignity and human divinity with sensitivity. So, such extra-ordinary 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".\textsuperscript{394}

But Justice Sen in his dissenting opinion, held that the capital punishment is not violative of article 21 because the Court follows the procedure laid down under section 302 of the Indian penal code and upholding constitutionality of death penalty he observed that: "As judges we are not concerned with

\textsuperscript{393} Ibid at pp 932; 938

\textsuperscript{394} Ibid pp 931-932 (emphasis added). Justice K. Iyer opined also that with the agony hanging over the head of a convict, he becomes more a vegetable than remaining a person.
the morale or ethics of a punishment. --- It is not the intention of this Court to curtail the scope of the death sentence under Sec. 302 by a process of judicial construction inspired by our personal views. The question whether the scope of the death sentence should be curtailed or not, is one for the Parliament to decide. The matter is "properly the domain of the legislature, not the judiciary." 395

It is submitted that though in this case the Court rightly tested the death-penalty on the touchstones of equality, reasonableness and fair procedure under Articles 14, 19 and 21 of the Constitution yet the minority judgement of Justice Sen seems to be correct because after the amendment in the Cr. P.C. 396 and the earlier ruling of Jagmohan Singh's case the death penalty is only an exception and the life imprisonment is the rule. The discretion to make choice between the two punishments is left to the Court and not to the Executive.

395. Ibid at 946 Justice Sen even went to the extent of rejecting the weighing of death penalty on the scales of constitutional validity because it would be a trench upon the prerogative of the President or the Governor to grant Pardon or reprieve under articles 72 (1) and 161 in taking itself the task of commutation of a death sentence at p. 959. Justice Sen also condemned the giving of "special reasons u/s 354 of Cr. P.C. by the Court as it would virtually abolish the death sentence at pp. 946-947.

396. Under new Cr. P. Code 1973, Section 354 (3) provides that when the conviction is for an offence punishable with death, or in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence". However, it is not easy to state clearly as to what these special reasons could be. Justice untawalia held that it is neither necessary nor possible to make catalogue of the special reasons which may justify the passing of the death sentence in a case. See Balwant Singh v. State of Punjab AIR 1976 SC 230 at 231.
In another case of Dalbir Singh a Justice K. Iyer delivering the majority judgement, reiterated that imposition of death penalty being violative of individual dignity which is the sublime value of the Constitution and must be abolished. And Justice Sen once again in his dissent condemned the stand and spoke for the retention of death sentence.\textsuperscript{397}

The inconsistencies resulted from the decisions of the Supreme Court were reconsidered by the apex Court in Bachan Singh’s\textsuperscript{398} case where by 4:1 majority, Justice Sarkaria delivering the majority judgement overruled Rajendra Prasad’s decision and upheld the validity of section 302 the penal Code as an alternative punishment for murder and being not violative of Articles 21 19. The Court held that even the framers of the Constitution were well aware of the existence of death penalty. And the expanded interpretation given to the article 21 in Maneka’s case, clearly brought the implication that the founding fathers recognized the right of the state to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by law. Apart from this, the court also made reference of certain other provisions such as Entries (1) and (2) in List III of the Seventh Schedule, Article 72 (1) (C), Article 134 etc. to show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian penal code. And in view

\textsuperscript{397} Dalbir Singh v. State of Punjab AIR 1979 SC 1384 at p. 1386 and 1392; Also see comments on death penalty by Pande, B.B. "Face to face with Death sentence : Supreme court’s legal and constitutional Dilemmas", (1979) 4 S.C.C. 39 at 44; Supranote 208 Jaswal, Nishtha at p. 193.

\textsuperscript{398} Supranote 326.
of these constitutional postulates, the Court held that by no stretch of imagination can it be said that death penalty under section 302 of the Penal Code either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. The Court further felt that due to same constitutional postulates it could not be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning it could not be said that death penalty for the offence of murder violated the basic structure of the Constitution. But the Court held that in accordance with section 354(3) of the Cr. P. Code 1973, the death sentence should be imposed only in extreme cases, in the rarest of rare cases.

In his separate dissenting judgment, delivered surprisingly after the gap of two years, in 1982, Justice Bhagwati (as he then was) held that Section 302 of IPC and section 354(3) of Cr. P.C. violated Articles 14 and 19. Death penalty is unreasonable and arbitrary as no guidelines are

399. Ibid at 930. The Court also referred to the International Covenant of civil and political rights to which India has become party in 1979 and which do not abolish death penalty in all circumstances. It only requires that death penalty should not be inflicted arbitrarily and it should be imposed only for most serious crimes. Held Indian Penal Laws are entirely in accord with international commitment.

400. Ibid at 935-936; Also see Machhi Singh v. State of Punjab AIR 1983 SC 957 where Justice Thakkar while considering the question of cases wherein death sentence can be awarded by applying the rule of 'rarest of the rare cases', observed that motive, manner of commission of crime, its anti-social nature or personality of victim should be the basis for deciding whether the case falls in that category.
Testing the validity of death penalty under the various provisions of the Constitution, Justice Bhagwati observed that: "Our Constitution --- is not a mere pedantic legal text but it embodies certain human values, cherished principles and spiritual norms and recognises and upholds the dignity of man --- It does not treat the individual as a cog in the mighty all-powerful machine of the state but places him at the centre of the Constitutional scheme and focuses on the fullest development of his personality".

In Kehar Singh's case, one of the contention made by the petitioner's counsel was to reconsider the constitutionality of S. 302 of IPC in the light of Justice Bhagwati dissent in Bachan Singh's case. But the Supreme court rejecting this contention, once again upheld the constitutionality of death penalty and held that the Court was bound by the law laid down by the majority judgement in Bachan Singh's case.

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401. AIR 1982 SC 1325 at p. 1337. Justice Bhagwati also stated that the necessary element of the rule of law was that law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people.

402. Ibid at 1336. Justice Bhagwati agreed that the Constitution did not prohibit capital punishment but discarded this penalty on the ground of it being cruel and barbarous and observed that constitutional validity of death sentence could not be appreciated in its proper perspective without understanding the true nature of death penalty. He also said that if we look at the legislative history of the penal laws, we find that in our country there has been a gradual shift against the imposition of death penalty at pp 1341-1343. See for detail comments supranote 208. Jaswal, Nishtha, 200 to 228.

403. Kehar Singh v. U.O.I. AIR 1989 SC 653; Earlier in Kehar Singh v. State Delhi Admn. AIR 1988 SC 1883 the Court awarded death sentence to the petitioner, for assassination of late Prime Minister Smt. Indira Gandhi when he was her security guard, on the ground that this grue some murder can be said to be the "rarest of rare cases" at p.1928 per Justice Roy. Also see Kuljeet Singh alias Ranga v. U.O.I. AIR 1981 SC 1572 where also the division bench had favoured the retention of capital punishment paving the way for hanging of notorious murderers Ranga and Billa.
After **Bachan Singh** case, the apex Court once again stood for abolition of death penalty, when in **Mithu**'s case, Chief Justice **Chandrachud** speaking on behalf of the majority, struck down substantive provision section 303 of the penal code, which prescribed mandatory death sentence for murder committed by person undergoing life imprisonment, as being unconstitutional, violative of Article 14 and Article 21 of the Constitution.

The Court held that death sentence being mandatory under section 303, it snatched from the accused the opportunities to save them under Sections 235 (2) and 354(3) of the Cr. P.C. 1973. Another point raised by the Court was that old must yield to new. When the wave was in favour of reformative theory why to stick to orthodox retributive trends. The Court observed that when section 303 of the penal code was originally enacted, the legislature did not consider that even successive sentences of imprisonment for life were adequate punishment for the offence. This way a savage sentence was anathema to the civilized jurisprudence of Article 21.

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**Mithu v. State of Punjab** AIR 1983 S.C. 473 In this case Justice **Chinappa Reddy** delivered the Separate judgement, whereas Chief Justice **Chandrachud** delivered the judgement for himself and on behalf of **Fazal Ali, Tulzapurkar** and **Vandarajan J.**

**405.** The Court took into account the concept of fair procedure as laid down in **Maneka** & since the procedure by which Section 303 authorised deprivation of life was unfair and unjust, the section was unconstitutional. The court felt that the procedure was established by the legislature, but the last word remained with the court. Ibid at 476.

**406.** Section 235 (2) gives the accused an opportunity to show cause why he should not be sentenced to death, whereas, section 354 (3) makes the Court bound to state special reasons for imposing the death sentence. Ibid at pp. 476-477.

**407.** Ibid at pp 475-476.
It is submitted that the Court has done a great job by striking down section 303 of the Penal code as unconstitutional because it is ridiculous to impose capital punishment merely because a life-convict has committed the offence of murder. This law had no reasonable nexus with the object to be achieved.

**Delay in Execution of Death Sentence:**

Another issue relating to death sentence arose whether delay in execution of death sentence could result into commutation of the sentence. And the Summit Court gave relief to the convicts on this issue by recognizing their fundamental rights under article 21 at ever the execution stage when in *T.V. Vatheeswaran* case, showing its activist approach, it observed that:

"Prolonged detention to await the execution of death is an unjust, unfair and unreasonable procedure. Hence the delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke article 21 and demand the quashing of sentence of death. The cause of delay is immaterial when the sentence is death."  

But this positive approach of the Court was criticised by some on the ground that a Shrewd criminal could adopt various dilatory tactics to prolong his execution and finally plead the delay as a ground for setting aside the death sentences.  

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408. *T.V. Vatheeswaran v. State of Tamil Nadu* AIR 1983 SC 361 at 367 (emphasis added); Before this case Justice Bhagwati in his dissenting opinion in *Bachan Singh’s* case had observed that delay in final sentencing was a mitigating factor which was often taken into account for reducing death sentence to life imprisonment. Supranote 402 at 1381; factor of Delay in execution of sentence was taken into account also by the Court in *Bhagwant Bux Singh v. State of UP* AIR 1978 SC 34; *Sadhu Singh v. State of U.P.* AIR 1978 SC 1506; *State of U.P. v. Sahai* AIR 1981 SC 1442 etc. First time the judicial response to delay factor in execution of sentence can be traced in *Piare Dusadh v. Emperor* AIR 1944 F.C. I when the federal court commuted appellant’s death sentence to life imprisonment as he had been awaiting its execution for over ayear.  

it is submitted that though risk is there yet there is need to cultivate faith in the Supreme court that it would carefully scrutinize the case before making delay "the mitigating factor". 410

But unfortunately, the Summit Court deviated from its Vatheeswaran stand when in Sher Singh’s case411, Chief Justice Chandrachud delievering the verdict held that "if there is delay in execution of death sentence exceeding two years, that by itself does not entile a person under sentence of death to demand quashing of sentence of death, and convert it into a sentence of life-imprisonment"412

Explaining the scope of Art. 21 the Court held that :

"The horizons of Art. 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this court to give to the provisions of our Constitution a meaning which prevent human suffering and degradation. Therefore, Art. 21 is as it is much relevant at the stage of execution of death sentence as in the interregnum between the imposition of that sentence and its execution.413

But the confusion created by these two conflicting verdicts of the Summit Court was finally set at rest in Javed Ahmed’s case when upholding Vatheeswaran’s ruling, the Court made it apparent that in case of delay of 2 years or more in the execution of death sentence, the accused could invoke article 21 for getting the sentence quashed.414

412. Ibid at 471. In this case the division bench comprised of three judges Chief Justice Chandrachand, Justice Tulzapurkar and Vardarajan; Whereas Vatheeswaran ruling was delievered by two judges division bench.
413. Ibid at 470-471 (emphasis added)
But the matter which seemed to have been settled further got deviated when in Triveniben case, the Constitutional bench of the apex court, overruled Vatheeswaran when it held that while the Court has power to commute sentence of death to life imprisonment in case of prolonged delay in execution, no fixed period of delay could be held to make the sentence of death inexecutable and entitle the accused to the lesser sentence of life imprisonment. However, this Court may examine the delay factor in the light of the circumstances of the case and in appropriate cases commute death sentence to the sentence of life imprisonment.

This way, now the Constitution bench has attempted to settle the controversy by holding that no fixed period of delay could be held to be sufficient to commute death sentence into life imprisonment.

Hanging by Rope:

In another significant verdict of Lachma Devi the apex Court held that the execution of death sentence by Public


416. Surprisingly in this case, the apex Court only gave conclusion of its findings initially and gave reasons in detail for its conclusion on 8.2.1989. See AIR 1989 SC 1335. It is submitted that this is not healthy, fair, just trend. The Court must give reasons along with conclusion and not afterwords. See supranote 208 Jaswal, Nishtha p 223; Triveniben followed by the Court in Madhu Mehta v. U.O.I. AIR 1989 SC 2299 the Court commuted death sentence of the accused into life improvement due to inordinate delay of 8 years in disposing of his mercy petition by the President without any sufficient reason;

hanging would be a barbaric practice and hence unconstitutional being violative of article 21. The Court also referred to the Jail Manuals in the Country which do not provide for execution of death sentence by public hanging.

Earlier in Deena’s case, the apex Court had held:

"It is for the Court to decide upon the constitutionaly of the method prescribed by the legislature for implementing or executing a sentence. Whether that method conforms to the dictates of the constitution is a matter not only subject to judicial review but it constitutes a legitimate part of the judicial function".418

Upholding the validity of hanging by rope as prescribed by section 354 (35) of the Cr. P.C. 1973, the Court expressed the view that it was the only method of executing death sentence which was known to the Constituent Assembly and it did not disapprove of this method.419

All these cases suggest the enhancement of the status of human rights, especially the right to life and liberty by the apex Court by holding that no law could permit indignity or barbarity of any kind before death sentence was imposed in the 'rarest of rare' cases. It means that the Court now protects the liberties of an individudual till his last breath of life including those of a condemned prisoner.

418. Deena V U.O.I. AIR 1983 SC 1155 at 1172-1173. In this case the Court held that the method prescribed by S. 354 (5) of the Cr. P.C. 1973 relating to hanging by Rope for executing the death sentence is not violative of Article 21 ofthe Constitution as it lays down fair, just and reasonable procedure and is not barbarous, in human and degrading as alleged.

419. Ibid at 1185. the Court held that some pain is bound to involve in any punishment and supported its view by the Eighth Amendment of the American Constitution that the suffering necessarily involved in the execution of death sentence was not banned by the Eighth Amendment.
VI. **Prisoner's Rights And Right to Life and Personal Liberty**

The question: Whether prisoner is also entitled to fundamental rights as guaranteed by the Indian Constitution, came up before the Supreme Court immediately after the commencement of the Constitution in the landmark **Gopalan** case.\(^{420}\) Replying in negative, the Court held that a 'person' could exercise his fundamental rights only when his 'person' was free. When a person loses his right to personal liberty by way of detention under a valid law enacted by a competent legislature, and so long as he remains under such detention, he ceases to be entitled to enjoy his other fundamental freedoms such as freedom of movement under Art.19 (1)(d).

After fifteen years of **Gopalan’s** verdict, **Prabhakar Panduring’s**\(^{421}\) verdict appeared as a silver lining in the dark clouds. The apex Court tried to liberate the concept of "life" and "personal liberty" by adopting liberalist approach and recognized the prisoner's right to "life" and "personal liberty" to some extent without expressly declaring that a detenue is entitled to the freedoms enshrined in Art. 19, the Court observed that, in the absence of law, a detenue could not be denied the...
permission to send the manuscript out of jail for publication, which is a right under Part 19(1)(a). Thus the Court held that the 'procedure established by law' must be followed not only to deprive a person of his personal liberty under Art. 21 but also to deprive a detenue further of any of his other liberties.

But the winds of change in Judicial approach towards rights of prisoner can be seen from the Patnaik's case, wherein speaking for the Court, Justice Chandrachud (as he then was) observed that, 'no person, not even a prisoner, can be deprived of his life or personal liberty except according to 'procedure established by law'.

The Court held that:

"Though the conviction would deprive the prisoners of their freedom of movement throughout the territory of India or freedom to practise any lawful trade or business yet they are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess, like their right to "life" and "personal liberty".

It is submitted that this partial recognition of prisoners as 'persons' entitled to enjoy basic right to life and personal liberty was indeed a welcome step taken by the apex court who was yet not had adopted fully positive approach.

422. D.B.M. Patnaik v. State of A.P. AIR 1974 SC 20 92. The contention of the petitioners were that the presence of police force on a part of the vacant prison land and fixation of live-wire mechanism atop the walls of the jail to prevent the escape of prisoners is violative of the right to personal liberty of prisoners. The Court held that posting of police guards outside jail and installation of live electric wire mechanism does not violate Art. 21. It does not cause death by itself but causes death only if the prisoner courts death by scaling the wall. No prisoner has fundamental right to escape from the prison at pp.2095, 2097.

423. Ibid at p. 2095

424. Ibid 2094.
Unfortunately, this little bit of activism of the Court received a severe blow when under, what we can say political pressure in the internal emergency period of 1975, it adopted a negative attitude in the well-known Habeas Corpus\(^{425}\) case, and the majority of the Court declared that so long as the order of the president under Art. 359, suspending the right to enforce Art. 21 remains in force, no person (detenue or prisoner) has any locus standi to move any writ petition including the writ of Habeas corpus to challenge the legality of an order of detention on the ground of it being illegal or vitiated by malafide etc. Justice Bhagwati in his majority judgement observed:

"When the enforcement of the right to personal liberty conferred by Art. 21 is suspended by a Presidential order, the detenue cannot circumvent the presidential order and challenge the legality of his detention by falling back on the supposed right to personal liberty, based on the principles of rule of law"\(^{426}\)

Only Justice Khanna\(^{427}\) in his dissenting opinion, held that when right to move any Court for the enforcement of Art. 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, but it cannot have the effect of permitting an authority to deprive a person of his life or personal liberty without the--------------------------

\(^{425}\) Supranote 210.

\(^{426}\) Ibid at p. 1277 (Justice Khanna) also see U.O.I. v. Bhanudas AIR 1977 SC 1027 wherein the Court followed Shukla's verdict. In this case conditions of detention were challenged and the Court held that during emergency there is imposed a blanket ban on the enforcement of these fundamental rights. This case according to Prof. Buxi represents the culmination of the Court's 'can't help, attitude towards detenus and prisoners. Also see supranote 223 Buxi, Upendra at p. 120.

\(^{427}\) Ibid p. 1267; See Chief Justice Ray's views at p. 1235.
existence of such substantive power. And if this approach is not followed then startling consequences would occur.\textsuperscript{428}

It is submitted that the minority opinion of Justice Khanna rightly left open and intact the High Court's writjurisdiction even during emergency and represents humanistic approach. Justice Khanna also showed dis-agreement with the majority opinion that considered Art. 21 as the sole repository of the right to "life" and "personal liberty". He rather observed that this concept of "life" and "liberty" was not novel at the time of drafting of the Constitution. It was not the gift of the Constitution rather the mankind had been cherishing these values since the beginning of the evolution and held:

"Life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land".\textsuperscript{429}

After the lifting of the internal emergency, the Janata Government came into power and made \textit{44th Amendment Act 1978} to the Constitution whereby now article 21 could not be suspended even during emergency.\textsuperscript{430}

\textsuperscript{428.} Supranote 217, Seervai, H.M. at p. 13. Mr. Seervai has supported very closely dissenting opinion of Justice Khanna by observing that the right of a person to move any Court to enforce the fundamental right conferred by article 21 was a distinct and separate right from his right to move to court to order his release on the ground that the law authorising his detention has not been complied with at p. 14. In contrast to Mr. Seervai, Prof. Buxi has criticised the opinion of Justice Khanna, calling him a positivist due to his contention that the right of life and personal liberty pre-existed the Constitution. Supranote 223 at pp 87-88.

\textsuperscript{429.} Ibid see at pp 1254-1255.

\textsuperscript{430.} But unfortunately, in relation to the state of Punjab once again the article 21 was suspended through 59th Amendment This amendment made it possible for the executive to report to lawless law. "See Testing time for Supreme court" by Sahay, S. \textit{The Hindustan Times} May 20,1988; "The 59th Amendment will take away basic rights" by Ahuja, Ajay \textit{The Times of India} N. Delhi May 17,1983.
And this was the period when the apex Court gave the landmark ruling of *Maneka Gandhi* in 1978, widening the scope and ambit of Article 21. In the same year, the Court gave two other historic judgements namely *Charles Sobraj* and *Sunil Batra* cases. In *Sunil Batra* case Justice Krishna Iyer observed: "Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14 or 19 or even by way of abundant caution".

Further recognising the rights of prisoners, Justice *Iyer* remarked:

"In our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinels on the quivive Courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchases by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons'.

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432. Supranote 336. The petitioner had contended that deliberately barbaric and in human treatment was hurled at him. *Sobraj* was fettered with iron on wrists, iron on ankles, iron in between welded strongly and these fetters had hampered his movement all through the day and the right for a period of two years.

433. Supranote 235 The Court had to decide the question whether 'solitary confinement' imposed upon prisoners who were under sentence of death was violative of Arts 14, 19, 20 and 21 of the Constitution. *Batra*, death sentence awardee along with under trial detenue Sabraj challenged validity of ss 30 and 56 of the *Prisons Act* as violative of Arts 14, 19, 20 & 21 of the Constitution. But the Court upheld validity of ss 30 & 56 of the *Prisons Act*.

434. Ibid at 1682.
Similarly Justice D.A. Desai observed:

"---Conviction for a crime does not reduce the person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards" 435

In brief the apex court laid down that a person in custody is not wholly denuded of his fundamental rights. An arbitrary or excessive exercise of the power would be violative of the right to personal liberty. A person should be handcuffed only when there is apprehension of his escape and this apprehension must be based on reasonable grounds and must not be arbitrary.

**Solitary Confinement**:

Similarly the Court held in *Sunil Batra* case that solitary confinement could be imposed only in exceptional cases where the convict was of such a dangerous character that he must be segregated from other prisoners because solitary confinement has a degrading and dehumanising effect on prisoners and constant social isolation represents the most destructive abnormal environment having disastrous effect on the physical and mental health of those subjected to it".436

Justice Desai even remarked that:

"Article 21 forbids deprivation of personal liberty except in accordance with procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute deprivation. 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"437

435. Ibid at 1727. In *Sunil Batra* I case whereas Justice Desai delivered judgement for himself and on behalf of Chief Justice Chandrachud, Justices S. Muraza Fazal Ali and P.N. Shinghal Justice Krishna Iyer delivered separate judgements. But all the judges have the same view point and only for the reason to express their views on certain aspects, they delivered two separate judgements.


437. Ibid at 1733.
Habeas Corpus Writ for Saving Prisoners from Inhuman Treatment:

The dynamism shown by the Summit court further received impetus in *Sunil Batra (No.2)* case when the Court widened the scope of writ of Habeas corpus which before this case could be evoked only for the release of the person from unlawful detention. But now not only the writ can be evoked to save the prisoners from inhuman treatment in prison but also there is no need to follow formal procedure of filing a writ.

Following Patnaik's ruling, the Summit Court reaffirmed that no prisoner should be deprived of his liberties unless "Necessitated by the fact of incarceration" and the sentence of Court. All the other rights like, to read and write, to enjoy and relax, to exercise, to meditate etc. belonged to him.

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438. Supranote 235 In this case the Court treated a letter by a prisoner, Batra, to a judge of the apex court as a writ petition. In this letter, Batra complained that the head warder caused an assault on another prisoner Prem Chand. And despite *Sunil Batra* ruling on "solitary confinement", Prem Chand was sent to solitary cell. In fact now the entertainment for habeas corpus petition through letters has become the part of Court's procedure under the new developing constitutional jurisprudence. See *Sudipt Mazumdar v. State of M.P.* (1983) 2 SCC 258 in which the Supreme Court formulated ten questions, regarding filing writ petition in the form of letter, to be decided by the Constitution bench; Supranote 337, where Justice R.S. Pathak (as he then was) held that receiving of writ petition in the form of letter should not be a rule but he recognized the existence of special circumstances which justified the waiver of the rule, for example, when habeas corpus jurisdiction was invoked.

439. Supranote 422.

440. Surpanote 235 at p. 1593.
Justice Krishna Iyer observed:

"Where the rights of a prisoner, either under the Constitution or under other law, are violated the writ power of the Court can and should run to his rescue. There is a warrant for this vigil. The Court process cast the convict into the prison system and the deprivation of his freedom is not a blind penitentiary affliction but a deligated institutionalization geared to a society good."\textsuperscript{441}

The Court also held that the practice of keeping undertrials with convicts in jails, offended the test of 'reasonableness' under article 19 and fairness in Article 21 because the under trials, who were presumably innocent until convict, would be made criminals by contamination.\textsuperscript{442}

The Court also pointed out that prisons are built with stones of law and so it behoves the Court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate.\textsuperscript{443}

Justice 'Krishna Iyer' also remarked that when a prisoner is traumatized, the Constitution suffer a shock. And when the Court takes cognizance of such violence and violation, it does, like the bound of Heaven, but with unhurrying chase, and unperturbed pace. Deliberate speed and 'majestic instancy' follow the official offender and frown down the out law adventure'.\textsuperscript{444}

\begin{itemize}
  \item \textsuperscript{441} Ibid at p. 1579.
  \item \textsuperscript{442} Ibid at p. 1586.
  \item \textsuperscript{443} In this case the Court also took into account sex excessives and exploitative labour of adolescents undertrials by adult prisons and held that it was inhuman and unreasonable to throw young boys to the "sex-starved" adult prisoners or to do menial jobs for the affluent or tough prisoners and it would be violative of article 19 at p 1595.
  \item \textsuperscript{444} Ibid at p. 1579
\end{itemize}
The Court also fully expressed the view that "right jurisprudence" was important only if it was followed by remedial jurisprudence.\textsuperscript{445} It is submitted that by widening the ambit of writ of Habeas corpus, the Summit Court in \textit{Sunil Batra II} opened doors of Justice for both haves and have-nots and made right to life and personal liberty purposeful.

**Hand Cuffing**

In the same year deciding \textit{Prem Shankar's}\textsuperscript{446} case, Justice Krishna Iyer speaking for the Court added another feather in its cap by regarding the freedom from hand cuffing as being implicit in Article 21. His Lordship Justice Iyer held the hand-cuffing in routine as violative of Art. 21 and held:

"Hand-cuffing is primafacie in human and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monibring to inflict 'irons' is to resort to zoological strategies repugnant to Art. 21."\textsuperscript{447}

The Court held that hand cuffing should be resorted to only when there is 'clear and present danger' of escape breaking out the police control and in special circumstances, the application of iron is not ruled out otherwise armed escort.

\textsuperscript{445} Ibid at 1593.

\textsuperscript{446} \textit{Prem Shankar Shukla v. Delhi Administration} AIR 1980 SC 1535 the Supreme Court treated atelegram as writ petition. In this case, the validity of certain clauses of \textit{Punjab Police Rules 1953 Vol. I} dealing with hand cuffing of under -trial prisoner were challenged as violative of Articles 14, 19 and 21 of the Constitution. \textit{Kishore Singh v. State of Rajasthan} AIR 1981 SC 625. The Court held that bar-fetters should be imposed only in "rarest of rare cases" and only for convincing security reasons - at pp 629-630 see infra for more on case.

\textsuperscript{447} Ibid at p. 1541.
should be sufficient to prevent escape of a prisoner in transit between prison house and the Court house.448

The apex Court also directed the Union of India to frame rules or guidelines regarding the circumstances in which hand cuffing of the accused should be resorted to in conformity with the judgement of this Court in Prem Shankar Shukla and to circulate them amongst all the state governments and the governments of Union Territories.449

Recently again in Khedat Mazdoor Chhna Sangath450 case, Justice S. Mohan speaking for himself and for the former Chief Justice M.N. Venkatachaliah declared police torture and handcuffing of members of public spirited association fighting for rights of tribals as unfair under Art. 21 and directed C.B.I. inquiry against it. Justice Mohan condemned the attitude of judicial Magistrate in not taking any action against hand cuffing of under trial prisoners in the light of the law of land as laid down by the apex court in Prem Shankar and Sunil Gupta cases respectively. To quote Justice Mohan : " ----- We are of the view

448. Ibid at p. 1545; Also see Sunil Gupta v. State of M.P. (1990) 3 SCC 119 In this case the Court directed the government to take appropriate action against the erring escort party for having unjustly and unreasonably handcuffing the petitioner, who were educated persons and social workers and who were arrested for staging a 'dharna' for public cause and refused to come out on bail.

449. At p. 1769; Despite the apex Court’s judgements against hand-cuffing, the issue of alleged hand cuffing of an advocate of Delhi came up before the apex Court also in Aeltmesh Rein v. U.O.I. AIR 1988 SC 1768.

450. Khedat Mazdoor Chhtna Sangath v. State of M.P. AIR 1995 SC 31 The petitioners, the regd. trade Union of tribals in Jhabua district of M.P. challenged the atrocities committed by the respondent police on them and hand cuffing of some of their members by the local administration.
that Magistracy requires to be sensitised to the values of human dignity and to the restraint on power when it allows an inhuman conduct on the part of the police, it exhibits both the indifference and insensitiveness to human dignity and the Constitutional rights of the citizens. There could be no worse lapse on the part of the judiciary which is the sentinel of these great liberties.451

Police Torture

The Supreme Court went a step ahead in promoting 'prisoners' rights jurisprudence when in Kishore Singh’s 452 case, it denounced third degree" methods of the police as violative of Article 21. Speaking for the Court Justice Krishna Iyer held:

"Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a state official running berserk regardless of human rights."453

Further expressing hope that the roots of third degree would be plucked out, his lordship observed "Article 21 with its profound concern for life and will become dysfunctional unless the agencies of the law in the police and prison establishments have sympathy for the humanist creed of that Article"454

451. Ibid at p. 39; In Kadra Pahadiya v. State of Bihar AIR 1981 SC 939. In this case Justice Bhagwati remarked that the under-trials could not be kept in legirons in violation to the decisions of the court nor could they be asked to work outside the jail. Such attitude of jail authorities discloses a sense of callousness and disregard to civilized norms. The court also made a distinction between harsh labour and hard labour and prohibited harsh labour as violative of Art. 21.

452. Supranote 446 In this case constitutionality of Section 46 of the Prison Act and Rajasthan Prison Rules were challenged as violative of Articles 14, 19 and 21 of the Constitution. The Court directed the government to take necessary steps to educate the police so as to, inculcate a respect for the human person and held that long period of solitary confinement and putting bar fetters on the prisoner in jail for several days on flimsy grounds is barbarous and against human dignity.

453. Ibid at p. 628.

454. Ibid at p. 684.
Right to free legal aid to the needy is a Constitutional mandate under Article 21, 22 and 39-a of the Constitution. The state is bound by this mandate and cannot avoid its obligation even by pleading financial inability. In the Post Maneka period, the Court in Hoskot's case, included right to free legal aid as a fundamental right under article 21. The Court emphasised that the lawyer's service constitute an ingredient of fair procedure to a prisoner who is seeking his liberation through the court's procedure. Taking Article 39-A as an interpretative tool of Article 21, the Court observed that the power to assign counsel to the indigent person for doing complete justice was implicit in the Court by virtue of article 142 read

455. Article 22 provides that an accused person must be given the right to consult and to be defended by a lawyer of his own choice.

Article 39-A is in the form of directive principle of state policy providing for free legal aid.

456. Supranote 234. Petitioner, a Reader holding M.Sc and Ph.D degrees, was convicted for the offence of attempting to issue counterfeit university degrees. Following Maneka Gandhi ruling, the apex Court held that 'a single right of appeal' on facts, where the conviction is fraught with long loss of liberty, is basic to civilised jurisprudence. And two ingredients of right of appeal to be complied by the state are (a) service of a copy of judgement to the prisoner in time to enable him to file an appeal and (2) provision of free legal service to an indigent prisoner.
This approach was reiterated by the Court in Hussainara case, where the Court held that if law was not only to speak justice but also deliver justice, legal aid was an "absolute imperative" "equal justice in action" and "delivery system of social justice" and not providing free legal services to such an accused might vitiate the trial as contravening article 21.

Justice Bhagwati held:

"--- We are shouting from house tops about the protection and enforcement of human rights ---- But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed"459

It is submitted that through different judicial decisions of Hussainara Khatoon cases, the apex court really became a champion for the cause of have-nots under trials. But how far

457. Ibid at 1556; Earlier in Janardhan Reddy v. State of Hyderabad AIR 1951 SC 217 which was followed in Tara Singh v. State AIR 1951 SC 441 the apex Court had narrowly interpreted Art. 21 and held that it cannot be made a rule of law that a trial should be held to be vitiated in every capital case when the occured is unrepresented; But in Bashira v. State of U.P. AIR 1968 SC. 1313 the Court became little flexible when it held that the High Court rules regarding the appointment of amicuscuriae in a criminal trial of serious kind was mandatory.


459. Ibid at 1361. Also see Hussainara Khatoon II case AIR 1979 SC 1367 Hussainara Khatoon No. III case AIR 1979 SC 1369 Hussainara IV AIR 1979 SC 1377, Hussainanara V AIR 1979 SC 1819 wherein the Court reiterated the same view and in Hussainarra IV the Court remarked. "It is high time that the State of Bihar took steps to overhaul and stream line its investigative machinery so that no investigation may take more than the bare minimum time required for it and the judicial process may be set in motion without any unnecessary delay. In all Hussainara cases Justice Bhagwati was one of the judges of the Bench.
this galvanizes the insensitive policy maker into meaningless action to build bulwarks against such concentrated colossal injustice, has yet to be seen.460

Further in famous Bhagalpur Blinding case461, the Justice Bhagwati for the Court again stressed upon the fact that the state government cannot avoid its constitutional obligation to provide free legal service to a poor accused by pleading financial or administrative inability and directed all state governments to make provision for grant of free legal service to the poor accused as this right to free legal services was implicit in the guarantee of article 21.

In Ranjan Dwivedi462 case, the Court again said that when

460. Constitutional law-I by Ghouse, Mohammad, XV, AS.I.L. (1979) P. 391 at pp 418-424; Also see Mantoo Majumdar v. State of Bihar AIR 1980 SC 847; Also (Sunil Batra II) supranote 235 at 1586; Kadra Pehadiya supranote 451 at pp 940-941 (in these cases the Court recognized right to speedy trial once again.

461. Khatri v. State of Bihar AIR 1981 SC 928 at pp 930-931. In this case number of suspected under trials criminals were allegedly blinded while being in Bhagalpur prison in 1980. Number of irregularities were brought into light by the Court such as non-production of accused within 24 hours of their arrest before the nearest magistrate. The case depicted a sad picture of under trials.

463. Supranote 243. The question was whether the right to have counsel of one's own choice under article 22(1) includes the right to be assigned a lawyer by the state: Also see Sheela Barse case supranote at 380. Where reiterating the right to free legal aid to a poor accused the Court also gave a clarion call to the advocates to rise for the help of the poor, illiterate, ignorant people of the society when they get involved in the accusation of crime or arrest or imprisonment; Sukdas, U.T. Arunachal Pardesh Supranote 245 991 at pp 993-994. This case further added strength to the right to legal aid as it reminded the state that if comprehensive legal aid programme is not provided, convictions in criminal cases may be held unconstitutional; also see supranote 451 (Kadra Pehadiya case) where the Court held that the petitioners would be provided legal representation by a fairly competent lawyer at the cost of the state, because legal aid in criminal case is a fundamental right under article 21.
the accused was unable to engage a counsel due to poverty or similar circumstances, the trial would not be vitiated unless the State offered free legal aid for his defence to engage a lawyer whose engagement the accused did not object.

The Court also observed in this case that insertion of Article 39-A by the Constitution (Forty-second) Amendment Act, 1976, brought in and the enactment of Section 304(1) of the Code of Criminal Procedure 1973, has brought considerably change in the legal aid movement. Keeping it in account the Court rightly made it incumbent upon the state to provide an indigent accused with a counsel of equal standing "as a matter of processual fair play" and increased the fee of senior counsel for such purposes to Rs. 500 per day and Rs. 250 per day for junior counsel.\textsuperscript{463}

It is submitted that prison Justice and legal aid jurisprudence has achieved the present status of being part of human right jurisprudence only due to activist, reformist role played by the apex court. All these reforms were never intended by the founding fathers of Indian Constitution.\textsuperscript{463A}

\underline{Right to speedy trial}

In Champalal Shah's\textsuperscript{465} case, the Summit Court went a step ahead when it held that in deciding the question whether the accused persons should be given benefit of the delay

\textsuperscript{463} Ibid pp 626-627. But the Court refused to issue mandamus for the enforcement of article 29-A in the case.

\textsuperscript{463-A} In fact Directive Principle in the form of Article 39-A directing the state to provide free legal aid to economically backward classes was added only in 1976 by 42nd Amendment Act.

\textsuperscript{464} State of Maharashtra v. Champalal Shah AIR 1981 SC 1675. Also see review petition decision of the case in Champalal Shah v. State of Maharashtra AIR 1982 SC 791 at 792. The review petition was dismissed by the Court on the ground of having no merits in it.
in trial or not, the Court was entitled to take into account whether the delay was intentional, due to fault of defendant or any other reason. The Court held that the conviction would be quashed being violative of article 21 if the accused was found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself, otherwise there would be no justification to quash the conviction on the ground of delayed trial only.

Commenting on Chamapalal’s verdict, Prof. Baxi said that this case has placed the right to speedy trial on a sounder footing than the interminable nature of the Hussainara proceedings would otherwise allow.465

In Raghubir Singh’s case, deciding the question whether the delay in police investigation was sufficient ground for the Court to hold it as infringement of right to speedy trial, the Court rightly observed that it was ultimately a

See for detail "Right to speedy trial: Geese, Gander and Judicial sauce (state of Maharashtra v. Champa Lal)" in 25 J.I.L.I. (1983) 90 at pp 92-94; Also see Sant Bir v. State of Bihar AIR 1982 SC 1470 where the Court declared the detention of a prisoner as criminal lunatic for almost 16 years without legal justification as illegal and ordered his immediate release; Also see Mathew Areeparmtil v. State of Bihar AIR 1984 SC 1854; Kamladevi v. State of Punjab AIR 1984 SC 1895 & Ram Dass Ram v. State of Bihar AIR 1987 SC 1333 (in all these cases the court ordered release of large number of undertrial, languishing in jails without trial for petty offences).

465. Raghubir Singh v. State of Bihar AIR 1987 SC 149 at pp 155-156. In this accused were being tried for waging war against the state and filed writ petitions under Art. 136 of the Constitution before the Court for quashing the proceedings before the special judge on the ground of violation of their right to speedy trial under Art. 21. The Court found that the delay was caused due to the tactics of the accused, and was the outcome of the nature of the case and general situation prevailing in the country. Also see Diwan Naubat Rai v. State of (Delhi Admn) AIR 1989 SC 542 where the Court directed that trial of case against the accused should go on from day to day.
question of fairness in the administration of criminal justice and a fair and reasonable procedure was what was contemplated by the expression "procedure established by law" in article 21. It depends upon the facts and circumstances of each and every case whether the delay in police investigation would infringe the right to speedy trial.

Finally in the significant judgement of A.R. Antulay case in 1992, the apex Court laid down detailed guidelines for speedy trial of an accused in a criminal case but unfortunately it declined to fix any time limit for trial of offences. The Court held that the right to speedy trial flowing from Art 21 is available to the accused at all stages namely the stages of investigation, inquiry trial, appeal, revision and retrial and this cannot be denied to the accused merely on the ground that he had failed to demand a speedy trial.

Regarding the fixation of time limit, the court observed that it has to be decided by balancing the attendant circumstances and relevant factors, including nature of offence, number of accused and witnesses, the work load of the court etc. Further the nature of offence and other circumstances may be such

467. A.R. Antulay v. R.S. Navak AIR 1992 SC 1630; Addressing a symposium on rural litigation as organised by the Gujarat Government, Chief Justice of India Mr. A.M. Ahmadi said that he would soon introduce plan for providing speedy justice to people. See The Tribune Dec 4, 1994; Also see S.C. Legal aid committee Representing under trial prisoners v. U.O.I. (1994) 6 SCC 731 once again the Court through Chief Justice Ahmadi reiterated that deprivation of personal liberty without ensuring speedy trial violates Art. 21 (in this case large no. of people detained to under Narcotic Drugs and Psychotropic Substance Act (VDPS) for a long period without trial due to non-Constitution of special courts for this purpose.
that quashing of proceedings may not be in the interest of justice. In such case, the Court can make an order that the trial may be concluded within a fixed time and where it is concluded reducing the sentence.

**Right to Socialise:**

Further showing its humanism, the apex Court recognised prisoner's Right to Socialise to meet his family members, friends, even to consult his counsel and to give interview to press in the important verdict of Francis Coralie Mullin case⁴⁶⁸ Examining the categorising of prisoners for the purpose of socialisation and also the basic issues of human dignity of the prisoners, the Court rightly held that:

"Personal Liberty would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Arts. 14 and 21, such prison regulations must be reasonable and non-arbitrary"⁴⁶⁹

In *Prabha Dutt* case,⁴⁷⁰ the Summit Court gave further momentous to prisoners’ right to socialise by allowing the death sentence awardee’s right to be interviewed by the press.

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⁴⁶⁸. Supranote 236. In this case the petitioner, a foreign or detene, was put to serious inconvenience by the jail authorities in meeting her five year old daughter and the lawyer due to cumbersome procedural formalities. This cumbersome procedural requirement of meeting family members and lesser amount of such meetings were challenged as violative of Article 14 and 21 on the ground that the long separation from her kid force her to have just animal existence and also her being discriminated for being foreigner detenu.

⁴⁶⁹. Ibid at 754. The Court also recognized this right to socialize in case of undertrials.

⁴⁷⁰. *Prabha Dutt v. U.O.I.* AIR 1982 SC 6. The prisoner’s death sentence awardee’s right to be interviewed by the press was involved.
sentencees prisoners to give interview to the press and such interviews can be refused in appropriates cases if there were "weighty reasons" for doing so and such reasons must be recorded in writing.471

Right to bail as a part of "personal liberty" was given recognition by the Supreme Court in 1978 in Babu Singhs' case.472 The Court held that 'refusal to grant bail" in a murder case without reasonable ground would amount to deprivation of personal liberty under Art. 21 and observed:

"Personal liberty, deprived when bail is refused, is too precious a value fo our constitutional system recognized under Art. 21 that the crucial power to negate it is a great trust exercisable, not casually, with lively concern for the cost to the individual and the community ---- After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Art. 21 are the life of that human right"473

The Court also rightly held that:

"Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system"474

471. Ibid at pp 6-7; Also see Prabhakar Pandurang case supranote 421.


473. Ibid at p. 529; Earlier in Kashmir Singh v. The State of Punjab AIR 1977 SC 2147 the Court had observed that the practice in this Court of not release on bail a person who was sentenced to life imprisonment can be departed from as "no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice".

474. Ibid at pp 531-532.
The Court said that the judiciary must take sympathetic attitude towards poor and favored for not taking heavy bail from the poor.475 The Court also said that if the poor were to be betrayed by the law including bail law, rewriting of many processual laws was an urgent desideratum but left this task to the Parliament.476

Right to Wages

The reformist approach of the Court is so reflected from the case of Mohammad Giasuddin477 where favouring the importance of "therapeutic" goal of imprisonment, the apex Court held that wages paid to prisoners for work done by them in prison should be reasonable and not trivial. It also directed the State to take into account this factor, while finalising the rules for payment of wages to prisoners, as well as to give retrospective effect to the wage policy.478

475. Moti Ram v. State of M.P. AIR 1978 SC 1594. The Court dealing with Right to bail in context of poor prisoners observed that the best guarantee of presence in Court was "the reach of the law and not the money tag" at p. 1595.

476. Ibid at p. 1601; Also see Hussainara Khatoon's cases Supranote 460 at p. 1369, 1377, 1819.

477. Mohammad Giasuddin v. State of A.P. AIR 1977 S.C. 1926. The Court held that long period of imprisonment must be converted into "a spell of healing spent in an intensive care ward of the penitentiary" and this can be achieved by giving him "congenial work" which gives "job satisfaction" and not "jail frustration" and further criminalisation.

478. Ibid at p. 1935.
Guidelines for Protection of Women and Children prisoners

In significant ruling of Sheela Barse’s\textsuperscript{479} case in 1983, the Supreme Court gave detailed directions for particularly the protection of women prisoners in police lock ups in order to protect them from possible torture or ill-treatment. The Court held that female suspects should be kept in separate police lock ups and not in the same in which male accused are detained and should be guarded by female constables. The Court directed the concerned authorities to inform the arrested person without warrant immediately the grounds of his arrest and his right to apply for bail. The Court issued instructions to the police, to immediately inform the relative or friend of an arrested person about his arrest and directed the magistrate to inform the arrested person about his right to be medically examined u/s 54 of the Code of criminal procedure 1973. The Court also directed the I.G. Prisons and State Board of legal Aid Advice Committee to provide legal aid to the poor and indigent accused male or female) whether they are undertrials or convicted prisoners.

\textsuperscript{479.} \textit{Sheela Barse v. State of Maharashtra} AIR 1983 SC 378. In this case journalist Sheela Barse wrote letter to the apex court complaining of custodial violence to women prisoners in the police lock ups in the city of Bombay. The court directed Director of College of Social work, Bombay to enquire into the conditions of women prisoners in Bombay Jail and the report of the Director social work high lighted not only the deplorable conditions in which the women prisoners were living in the jails but also about their being subject to torture. On the basis of report submitted, the Court issued directions to the state government for improving the lot of female prisoners in jails of Maharashtra; Earlier in Sobraj case the Court had held that if medical facilities and basic elements of care and comfort necessary to sustain life were refused, then the “humane jurisdiction” of the Court would become operational based on article 19” supranote 336 at 1516.

Sheela Barse again approached the highest court of land in 1986, this time seeking Court’s intervention for protection of life and liberty of juvenile prisoners. The Court expressing deep anguish & disappointment over the plight of children in jail held in the light of article 39 (f) which mandates the state to provide opportunities and facilities to children to develop in a healthy manner and in conditions of freedom and dignity that the Children should not be confined to jails because incarceration in jail had dehumanising effect on the children and dwarf their development. The Court directed the States to enforce the Children’s Act within stipulated time and also proposed for having Central legislation on the subject to bring uniformity with regard to the various provisions relating to children in the country instead of having non-uniform procedures followed by different states through their independent Children Acts.

480. Sheela Barse v. U.O.I. AIR 1986 SC 1773. In this case, Sheela Barse moved the Court under Article 32 for the release of children below the age of 16 years detained in jails in different states of the country. She also prayed for direction to the state legal Aid Boards to appoint duty counsel to ensure availability of legal protection for children as and when they were involved in criminal cases and were proceeded against and also for direction to District Judges for their visit in jails within their jurisdiction to ensure that children in custody were properly taken care of. She in this regard, referred to Government’s National Policy for the welfare of children wherein the government speaking of children as national asset have spoken for their full development by providing them equal opportunities of growth.

481. Ibid at pp 1775-1777, 1779. And the Parliament accepting the call of the Judiciary, passed the Juvenile Justice Act 1986 replacing the Children Act 1960 and other state enactments on this subject.
In this case, the Court also directed the State government to setup juvenile courts in each district with a separate cadre of Magistrates who must be suitably trained for dealing with cases against Children. The Court even directed for the speedy trial of cases of children.

A year later, in 1987, Sheela Barse again brought before the Summit Court the matter of children contending that the High Court had failed to consider some contentions advanced by her while giving directions relating to running of the Remand Homes and observation Homes for the Children. In this case the Court laid down certain directions regarding the introduction of dedicated, properly trained social workers in the Children homes for there proper supervision and also reimpressed upon the creation of juvenile Court manned by special judicial officers having "a more sensitive approach oriented out look".

In the well-known Hussainara Khatoon case, the apex court expressing shock over the anguishing state of affairs of undertrial prisoners both men and women, including children in the state of Bihar, made 'right to speedy trial' as an integral

482. Sheela Barse v. Secretary, Children Aid Society AIR 1987 SC 656.

483. Ibid at 659.

484. Supranote 458. In this case number of under trial prisoners languishing in jails of Bihar state, awaiting for years for their trial filed a petition for a writ of Habeas corpus. Justice Pathak though refrained from making any final comment or observation on the legality and propriety of the continued detention of the under trial prisoners whether on the ground of violation of article 21 of the Constitution till the final determination of the petition, yet the Court ordered the Bihar Government to release forthwith the undertrial prisoners on their personal bonds.
part of right to life and personal liberty under article 21, stating that speedy trial, the essence of criminal justice, is implicit in the broad sweep and content of article 21 as interpreted in Maneka Gandhi’s case.

Prisoners Right to Compensation:

The broader interpretation of right to life and personal liberty further yielded fruit when in Bhagalpur Blinding case\(^485\), for the first time considering the issue of granting monetary compensation to the victims of police atrocities, Justice Bhagwati for the Court observed: "Why should the Court not be prepared to large new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental rights of life and personal liberty".

Thus in this case, the Court made its intention clear of not being a silent spectator to the violation of this precious right by the State or its officials and showed its inclination to pay monetary compensation to those whose right to life and personal liberty got infringed. The Court further observed that the State is liable to pay compensation for violating article 21, otherwise article 21 would be reduced to a nullity, "a mere rope of sand"\(^486\).

485. Supranote 462 at p. 930.

486. Ibid; also see Sant Bir v. State of Bihar Supranote 465 and Veena Sethi v. State of Bihar AIR 1983 SC 339. (In both the cases the Court directed immediate release of certain prisoners who were illegally languishing in jail but in both cases the question of compensating the victim of the state lawlessness was left open by the Court).
Rudul Shah's case brought a revolutionary break in the so-called "Human rights jurisprudence" when the Court's activist approach recognised right to compensation for the violation of right to life and liberty under article 21 of the Constitution.

Chief Justice Chandrachud speaking for the Court observed:

"Article 21 will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured is to mulch its violators in the payment of monetary compensation --- The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection of powers of the state as a shield."

Hence, for the first time the Summit Court made it obligatory for the State to pay compensation as a repair for the damages done by its officers to the petitioner's rights and also given power to the government to take actions against guilty officers if it wants to. One of the significant aspect of this verdict was that the Court ignored the legal technicalities to protect the precious rights to life and liberty and also thought of rehabilitation aspect of these unlawfully detained prisoners by directing the state to make adequate compensation wherever necessary.

487. Supranote 374. In this case the Court directed Bihar Government to pay "compensation" of Rs. 35,000 to the petitioner Rudal Shah, who had to remain illegally in the jail for 14 years because of the irresponsible behaviour of the State Government officers even after his acquittal.

488. Ibid at 1089 (emphasis added); Also see Devki Nandan v. State of Bihar AIR 1983 SC 1134 where the Court awarded exemplary costs of Rs. 25,000/- to the petitioner for "intentional, deliberate and motivated harassment" by the government.

489. Ibid at 1088.
Rudul Shah was followed again by the Summit Court in the Sebastian M. Hongray case, where by directing the government to pay Rs. one lakh each to two wives who had filed Habeas corpus petition for the release of their husbands who were taken into custody by the military jawans in the military camp. But the government could not produce them as infact these two men were killed in false encounters. The Court through awarding exemplary costs once again not only gave a reminder to those in power that they cannot get away with murder easily but also for the first time granted exemplary costs on the basis of the complaint filed by a third party, a writ under article 32 filed by a student of J.N.U. at Delhi.

Finally in Bhim Singh’s case while awarding monetary compensation of Rs. fifty thousand to M.L.A. of J&K Assembly, unfortunately in this case the court did not make any reference of its earlier decided cases of Khatri or Rudul Shah in which, though facts varied, yet the Court evolved in those cases the novel concept of granting monetary compensation for the violation of article 21 of the Constitution. It should not be forgotten that under article 141 of the Constitution, the apex Court while delivering any particular ruling also makes law. Hence, it is rightly proposed by Jaswals that the Court should follow a consistent and coherent approach and lay down a specific precedent for the future.


Bhim Singh v. State of J&K AIR 1986 SC 494 at 499 (emphasis added). The petitioner who was a member of J&K Assembly was arrested by the police maliciously in order to prevent him from attending the session of the house. He was not produced before the magistrate within the requisite period. Hence the petitioner alleged that this act of police violated his fundamentals rights as guaranteed under articles 21 and 22(1).
Justice Chinappa Reddy rightly observed that "the custodians of law and order should not become depredators of civil liberties; Their duty is to protect and not to abduct. The Court further observed:

"When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases, we have the jurisdiction to compensate the victim by awarding suitable monetary compensation"\footnote{492}

In all the above cases where the Court has awarded the monetary compensation, the Court did not lay down any basis for quantification of the amount of exemplary costs and for this reason perhaps, the cost of compensation varied in all the cases. It is submitted that the Court should follow a specific concrete criterion while awarding amount of compensation in order to bring certainty in law and to avoid misuse of discretionary power of the deciding judge.\footnote{493}

Earlier, in \textit{Peoples Union for Democratic Rights}\footnote{494}, the Summit Court made an attempt in this direction by laying down the working principle for the payment of compensation to the victims of ruthless and unwarranted police firing, observed:

\begin{quotation}
\footnote{492}{Ibid}
\footnote{493}{S.M. Jain, an eminent scholar says that reason for not quantifying the amount of monetary compensation in \textit{Rudul Shah & Devkeinandan} cases was perhaps the "judges went by their intuition rather than by any rational basis" and also the fact that this was for the first time, the court was evolving a new principle. See "Money compensation for Administrative wrongs through Article 32" by Jain, S.M. 25 J.I.L.I. (1983) 118 at 121.}
\footnote{494}{\textit{Peoples Union for Democratic Rights v. State of Bihar} AIR 1987 SC 355 In this case about 21 people including children died and many more were injured due to the unwarranted firing of the police.}
\end{quotation}
"Ordinarily in the case of death, compensation of Rupees twenty thousand is paid—- we may not be taken to suggest that in the case of death the liability of the wrong does is absolved when compensation of Rs. twenty thousand is paid. But as a working principle and for convenience with a view to rehabilitate the dependents of the deceased such compensation is being paid".495

The Court has also provided the remedy of compensation against the violation of Article 21 by a private person like an industrial enterprise. Expanding the ambit and scope of article 32 further, in well-known Shriram Fertilizer496 case, the Court observed:

"The power of the Court is not injunctive in ambit, that is preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against breach of the fundamental right already committed. If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of its efficiency and render it impotent and futile"497

But the Court made it clear that only in "appropriate cases" the Court would grant monetary compensation as a remedial relief, that is only in those cases where the infringement of the fundamental right is gross and patent or on large scale affecting the fundamental rights of a large number of people or oppressive

495. Ibid at 356.
496. Supranote 359.
497. Ibid at p. 1091. (emphasis added); Also see A.S. Mittal v. State of U.P. AIR 1989 SC 1570 (where the court awarded Rotary Club compensation to each of the victims of eye - operation in the operation eye camp), People’s Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarter (1989) 4 SCC 730 (where the court directed the government to award Rs. 75000/- as compensation to the family of deceased labourer who was taken to police station for doing work and was beaten to death when he demanded wages for his work); Saheli v. Commr. of Police AIR 1990 SC 513 (the court directed Delhi Admn. to pay Rs. 75000/- as exemplary compensation to the mother of a nine year old child who died due to beating by Police official).
on account of their poverty or social economic disability, where the state officials have acted in oppressive manner.

In *Ravi Kant S. Patil* case, once again, the Supreme Court showed its activism when it upholding the Bombay High Court ruling, directed payment of compensation to the petitioner.

In brief, the compensation for the infringement of article 21 is a new remedial relief granted by the Courts under Article 32 or 26 of the Constitution. It is a healthy deviation from the original intent of article 21, where perhaps the framers could not visualise such relief as they did not mention about this while holding discussion on Article 21. The only need now is to evolve the appropriate standards for measuring the quantum of compensation and for deciding the "just and appropriate circumstances for granting "monetary relief" in order to effectively redress the wrong suffered by the victim.

(VII) Conclusion:

Perusal of the above study shows that how the small plant of eighteen words in the form of Article 21 planted by the founding fathers gradually, passing through the different seasons of judicial interpretation, has grown today in a huge tree, spreading out its different branches, thereby safeguarding and providing shelter to the stream of humanity. The architects of the Constitution while framing right to life and personal liberty only restricted their discussions to not introducing American "due process clause" in India and instead incorporated the

expressions "procedure established by law", considering it more specific expression, whereas 'due process' could act as hindrance in the way of social legislation. But initially the majority of members of Drafting committee had favored the inclusion of American "due process clause" and non-inclusion of it merely on the basis of false fear that inclusion of this expression might result in misuse of it met with severe public criticism. In fact, the objective behind inclusion of the expression "procedure established by law" and qualifying the term "personal" before the word "liberty" has been to maintain the supremacy of legislature on the British model in preference to the American doctrine of judicial review of legislation affecting personal liberty. Initially, the Supreme court followed restrictive interpretation of all the expressions "procedure established by law", "liberty", "life" and also interpreted all fundamental rights separately having no nexus with each other. This narrow approach of the apex court began in 1950 in Gopalan’s case and continued till the arrival of Maneka Gandhi’s judgement in 1978. In Maneka liberal interpretation was given to the expression 'procedure established by law' which must now enshrine the principles of fairness, justness and reasonableness. This case also fully accepted the inter-dependence of fundamental rights on each other and this way greatly expanded the scope of Art. 21 affording protection not only against executive action but also against legislation. In the light of Maneka’s historic ruling, the apex court started playing an activist role, became a champion for the safeguarding of the right of the poor, weaker sections of the society. The Court through its liberal interpretation has made very healthy
deviation in the field of right to life and personal liberty which have never been intended by the framing fathers. Right to personal liberty includes right now right to travel abroad, Right to privacy not only from surveillance and search and seizure as intended by the framers but privacy of family life, matrimonial home etc. Now even the Court has recognised the right of an indigent judgement debtor to have freedom from Arrest.

Similarly Right to 'life which' has been formulated in a negative manner in the Constitution has been given positive interpretation by the apex court & now it is more than mere animal existence. It now includes right to live with human dignity, right to livelihood, right to health, Medical care and right to live in healthy pollution free environment. Even right to education has been made part of right to life. Interpreting right to life in its positive sense the Court has even recognised right to die as part of right to life. Similarly death sentence has to be awarded only in the rarest of rare cases. The Court's activism has resulted in off shoot of prisoner's rights jurisprudence. Now the Court has recognised the fact that prisoner also enjoys certain basic right while being in prison subject to reasonable restrictions. The Court has recognised prisoners right to socialise, right to free legal aid, right to speedy trial, right to freedom from handcuffing, from unreasonable solitary confinement and also laid down guidelines for protection of women and children prisoners. The Court has also spoken for the right of the prisoners to live in human conditions, to medical aid. The Court also created revolution
when it recognised the right to compensation for the violation of Article 21 and gave power to the state government to take necessary action against guilty officials whose neglect caused violation of prisoners and undertrials right to life and personal liberty. In a way, the activist approach of the Court has created a sort of totally new. 'Right to life and personal liberty' as has never been visualised by the framing fathers and has even infused the American "due process" in the conservative original text of article 21.