RIGHT TO HUMAN DIGNITY OF CONVICT UNDER SHADOW OF DEATH AND FREEDOMS BEHIND THE BARS IN INDIA: A REFLECTIVE PERCEPTION

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Abstract

Criminal law is a coercive law which not only fixes liability for an offence and labels the offender as a convict but also imposes deprivations in terms of liberty through incarceration. However, a convict prisoner cannot be denuded of his fundamental rights and freedoms - they may suffer shrinkage due to the fact of incarceration but they never fade away. The constitutional and statutory protections follow the convict in the prison as well. Human dignity which inheres in human beings has been referred to, and often relied upon, by courts in India to humanize administration of criminal and penal justice to make it more humane. The courts have been evolving the human dignity jurisprudence within the penal system. This becomes even more significant in case of convicts sentenced to death. The death row convict is doomed to die within the precincts of prison and the fundamental freedoms that must be made available to him becomes a very vital issue - should he be given separate confinement, should there be a time limit for his execution, is undue delay in execution permitted, should he be necessarily allowed to meet his family and friends before the Judgment Day , is he entitled to conjugal rights and right to procreation *etc.* The courts in India have been grappling with these issues and have put article 21 of the Constitution to good use and this paper is an attempt to delineate dignity rights which must be made available to the convict prisoners, including the death row convicts, in the criminal justice system.

I Introduction

CRIMINAL LAW is perceived as an instrument of social control. It criminalises the conduct which, in the opinion of the state authority, is harmful or poses threat to certain interests ^ that the state authority wants to preserve or protect. State ensures obedience of its penal law by coercive punitive measures. It provides for punishment in case of its violation. Punishment,^ in

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For categories of these interests and the corresponding offences see K I Vibhute, *PSyi Pillai s Criminal l^aiv* ch. 1 (LexisNexis Butterworths, 12"' edn, 2014).

Lhree major elements involved in the notion of punishment are: (i) it is imposed by someone in authority over the person punished; (ii) it involves the infliction of something unpleasant on the recipient, whether causing positive physical pain or

this sense, is a societal reaction to the wrong-doer and involves infliction of pain or suffering by the state authority.

Theoretically, punishment provided for a particular offence should correspond to the harm that would plausibly result from conduct of the perpetrator. Ideally, stipulation of punishment in penal law involves quantification and scaling of both the harms , the harm plausibly result from the prohibited human conduct (in the form of crime) and the harm to be inflicted (in the form of punishment) on the wilful perpetrator, by the legislature.

Punishment, which inflicts pain and sufferings against will of its recipient, is an evil in itself, and hence, it needs some justification. The hitherto advanced and accepted aims or objectives of punishment are: retribution, deterrence, prevention, incapacitation, and reformation. These justifications, in due course of time, have emerged as theories of punishment. However, no single theory, stand alone, can claim that the purposes and objectives of punishment mentioned therein are conclusive.^ A combined reading of all the theories of punishment in one breath, however, reveals that punishment involves the balancing of retribution, deterrence and reformation.^ Justification of

deprivation of something which the victim desires (such as liberty or association of dear ones) to have; and (iii) it entails the actual or supposed commission of an offence. See, P J Fitzgerald, *Criminal I^m and J'unishment* (Oxford, 1962) 199; H L A Hart, *J'unishment and Responsibility* ch. 1 (Oxford, New York, 2008).

See generally, Andrew Ashworth, *Sentencing and Criminal* (Oxford, 4"' edn., 2005); Raymond Paternoster, How Much Do We ReaUy Know About Criminal Deterrence 100 *Journal of Criminal I^am and Criminology* 765 (2010); Christy A Wisher, Incapacitation and Crime Control: Does a Lock Em-Up Strategy Reduce Crime? 4 *Justice Quarterly* 513 (1987); Walter Moberly, *The Ethics of Punishment* (Faber, London, 1968); Jean Hampton, An Expressive Theory of Retribution in Wesley Craig (ed), *Retribution and its Critics* (Franz Stelner, Stuttgart, 1992); Ted Honderich, *Punishment: the Supposed Justifications Revisited* (Pluto Press, 2005); Michael Lensnoff, Two Justifications of Punishment 21 *Philosophical Quarterly* 141 (1971); Feinberg, The Expressive Function of Punishment 50 *The Monist* 397 (1966); Nigel Walker, *Sentencing in a Rational Society* (Penguin, 1972); Frank Pakenham Longford, *The Idea of Punishment* (G Chapman, 1961); Albert W Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next 70(1) *the University of Chicago Tam Rev* 1 (2003); Andrew Ashworth and Julian Roberts, Sentencing: Theory, Principle, and Practice in Mike Maguire, Rod Morgan *et.al* (eds). *The Oxford Handbook of Criminology* 866 (Oxford, 5"' edn., 2012).

Caldwell, *Criminology* 403 (Ronald Press, New York, 1956).

punishment lies in its effects on the society, its contribution to the prevention of crime, and to the social re-adjustment of the criminal.^

Punishment can never be the same for all the offences in a nation as it corresponds to the gravity of the resultant prohibited consequence of human conduct and the importance attached to the interest involved therein. Form and extent of punishment vary from crime to crime. Depending upon penal policy of a state, it also varies from nation to nation.

The Indian Penal Code, 1860 (hereinafter IPC or Code), the major criminal law of India, like any other penal law, creates offences and provides punishment therefor. The forms of punishment enumerated in the IPC are:'' death; imprisonment for life; rigorous imprisonment; simple imprisonment; forfeiture of property;^ fine,^ and solitary confinement.'

A careful peep into these forms of punishment reveals three broad forms: (i) extinction of life of the convict (death sentence); (ii) incarceration (for a determinate or indeterminate period with or without compulsory hard labour, or for non-payment of fine,^" or in an isolated prison-cell) and (iii) pecuniary (payment of fine or forfeiture of property). The first two forms of punishment, *i.e.,* death sentence and imprisonment, which have grave implications on life (of the convicts sentenced to death) and liberty (of the convicts sentenced to death and imprisonment for life or a term of longer duration), and bearing on theme of the present paper, deserve a brief schematic explanation.

Death sentence is confined to a few selectively grave offences and that too as an alternate to imprisonment for life" or with rigorous imprisonment

5 *Supra* note 2, *Hart,* cli. *2; P J Fit^erald* at 201 *et* seq.

6 Indian Penal Code, 1860, s. 53.

7 *Id,* ss. 126, 127, 169.

8 Imposition of fine under the IPC reveals four patterns: (i) fine as the sole punishment and its amount is limited (ss. 137, 155, 171-177, 278 and 283) or unlimited (ss. 294 and 157); (ii) fine as an alternative punishment, but its amount is limited; (iii) fine as an additional imperative punishment, but its amount is limited; and (iv) fine is both an imperative punishment and its amount is unlimited (ss. 123-124, 126-134, 380, 444 and 475). Where no sum is expressed to which fine may be extended, the amount of fine to which the offender is liable to pay is unlimited. However, such an amount should not be excessive (s. 63).

9 *Supra* note 6, s. 73 and 74.

10 *Id.,* s. 64. Ss. 65-69 deal with different contours of the sentence of imprisonment in default of payment of fine.

11 *Id.,* ss. 121, 132, 194, 195A, 302, 305, 307, 364A, 376A, 376E and 396. Death penalty may also be imposed on a person who is found guilty of criminal conspiracy to

for ten years plus fme.^^ There is no offence in the Code that is subject to mandatory death sentence." Imposition of death sentence is made almost impossible" and is subject to approval by the concerned high court." Further,

commit any of these offences. See s. 120B, IPC. Some of these provisions (like s. 376A and s. 376E) exhibit the latest expansion of the sentence of death.

12 *Id.,* ss. 132, 194, 305, 396, IPC.

13 *Id.,* s. 303, provides for mandatory death sentence for murder by a life-convict, is declared unconstitutional by the Supreme Court on the ground that it offends arts. 14 and 21 of the Constitution. See *Mithu* v. *State of Punjab,* AIR 1983 SC 473. However, s. 307(2), dealing with attempt to commit murder by a convict under sentence of life imprisonment, provides for death sentence if hurt is caused in attempting murder. Some of the *^ost-Mithu* Acts also provide for mandatory death sentence. See, for example, the Suppression of Unlawful Acts against Safety of Marine Navigation and Fixed Platforms on Continental Shelf Act, 2002, s. 39g(i); The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 s. 3(2)(i) and The Arms Act, 1950 s. 27(3).

14 Death sentence, an alternative to life imprisonment, needs to be awarded only in the rarest of rare cases, only when the alternative option is unequivocally foreclosed and collective conscience of the community is shocked. See *Bachan Singh* v. *State of Punjab,* AIR 1980 SC 898; *Machi Singh* v. *State of Punjab,* AIR 1983 SC 957; *Brajendra Singh* v. *State of Madhya Pradesh,* AIR 2012 SC 1552; *Santosh Kumar Singh* V. *State of Madhya Pradesh,* AIR 2014 SC 2745. Further, when the conviction is for an offence punishable with death or in alteration with imprisonment for life or imprisonment for a term of years, it becomes obligatory on part of the sentencing judge to give special reasons for awarding death sentence. There should be some reasons for not awarding life imprisonment. See s. 354(3), CrPC. See, for example, *yisgar* v. *State of Uttar Pradesh,* AIR 1980 SC 898; *Sunil Damodar Gaikmad* v. *State of Maharashtra* (2013) 4 Crimes 119; *Prem Kaur* v. *State of Punjab* (2013) Cr LJ 2973 (SC); *Shankar Kishanrao Khade* v. *State of Maharashtra,* (2013) 5 SCC 546; *Sandesh Kailash Abbang* v. *State of Maharashtra* (2013) 2 SCC 479. The statutory requirement of giving special reasons for awarding death sentence is not a mere empty formality. See *State of Maharashtra* v. *Goraksha Ambaji Adsul* (2011) 7 SCC 437.

15 Death sentence cannot be executed unless it is approved by the high court, (s. 366(1), CrPC) . The high court, if it deems necessary, may carry further inquiry or take additional evidence on any point having bearing on the guilt or innocence of the convict. It may carry such inquiry or take evidence itself or direct the sessions court to do so (s. 367(1), CrPC). It may confirm the death sentence or pass any other sentence warranted by law or annul the conviction or acquit the convicted person or order a new trial, (s. 368, CrPC). The order of confirmation of the sentence of death or imposition of any new sentence needs to be passed by a bench of at least two judges of the high court (s. 369, CrPC). A person, whose order of acquittal, on appeal, is reversed, convicted and sentenced him to death (or imprisonment for life or to imprisonment for a term of ten years or more) by the high court, has a right to prefer an appeal to the Supreme Court (s. 379, CrPC). However, no appeal, as a matter of right, can be preferred to the Supreme Court by the convict whose sentence of death is confirmed by the high court under s 368 of the CrPC. It can be

the IPC" and the Code of Criminal Procedure, 1973 (Cr PC)" allow the appropriate government," without consent of the offender, to commute it to any other punishment provided under the IPC." The President of India and the Governor of a state are conferred with the constitutional power to pardon or commute sentence, including death sentence, of any convict.^"

The IPC provides for four forms of penal confinement: (i) imprisonment for life; (ii) rigorous imprisonment; (iii) simple imprisonment, and (iv) solitary confinement. Offender sentenced to imprisonment for life is required to remain in prison till his last breath (subject to legally permissible remission)^^ and to

done only when the high court, in exercise of its powers under art. 134(l)(c) of the Constitution, grants leave to appeal to the Supreme Court or when the Supreme Court, by exercising its powers under art. 136 of the Constitution, grants special leave to appeal to it. See *K Govindsmamy* v. *Government of India^* AIR 1990 Mad 204; *Chandra Mohan Timari* v. *State of Madhya Pradesh,* AIR 1992 SC 891. Review petition in case of death sentence, unlike other review petitions, needs to be heard in an open court by a bench consisting of at least three judges. See *Mohd Arif @ Ashfaq* V. *Registrar, Supreme Court of India* (2014) 9 SCC 737.

16 *Supra* note 6, s. 54.

17 Criminal Procedure Code, 1973, s. 433(a).

18 Appropriate government is defined in IPC, s. 55A and CrPC, s. 432(7).

19 For finer points of law on this aspect see *Union of India* v. *S Sriharan* (2015) 13 SCALE 165.

20 Constitution of India, 1950, arts.72 and 161. The power conferred on the President of India and the Governor under these constitutional provisions is absolute and it cannot be fettered by any statutory provisions of the CrPC *{i.e.,* ss. 432,433, 433A) or prison rules. But the President or the Governor, as the case may be, is obliged to act on advice of the respective council of ministers and to exercise his power reasonably. See *Maru Ram* v. *Union of India* (1981) 1 SCC 107; *State (NCT of Delhi)* V. *Prem Raj* (2003) 7 SCC 121; *Ramraj @ Nahhoo @ Bhinu* v. *State of Chhattisgarh,* AIR 2010 SC 420; *Shatrughan Chauhan* v. *Union of India* (2014) 3 SCC 1. The manner of the exercise of the power and the order rejecting mercy petition of a convict can be challenged, *inter alia,* on the ground that the President or the Governor, as the case may be, has not applied his mind or not considered all the relevant materials or considered irrelevant materials, influenced by some political or extraneous considerations, or exercised his powers arbitrarily. However, there exists limited judicial review of the exercise of the constitutional power. See *Epuru Sudhakar* v. *Government of Andhra Pradesh* (2006) 8 SCC 161; *Narayan Dutt* v. *State of Punjab* (2011) 4 SCC 353. Judicial interference becomes necessary when the exercise of the clemency power lacks due care and diligence and has become whimsical. See *Shatrughan Chauhan* v. *Union of India* (2014) 3 SCC 1.

21 See *Gopal Vinayak Godse* v. *State of Maharashtra,* AIR 1961 SC 600; *Md Munna* v. *Union of India,* AIR 2005 SC 3440; *Smamy Shraddananda @ Murali Manohar Mishra* V. *State of ¥iarnataka,* AIR 2008 SC 3040; *Mohd Arif supra* note 15; *S Sriharan,supra*

do hard labour.^^ However, appropriate government, in its discretion and without consent of the convict, may commute the sentence of life imprisonment to simple or rigorous imprisonment for a term not exceeding 14 years.^^ Simple imprisonment and rigorous imprisonment are distinct from each other. The former, unlike in the latter one, the convict is not required to undertake any work during his confinement. In the latter form of imprisonment the convict is put to hard labour as a rule. The Code has adopted three patterns offences that are made punishable by these two forms of imprisonment. Some offences are subjected exclusively to either simple^^ or rigorous^^ imprisonment. While, some of the offences are made punishable by both the forms of imprisonment (simple or rigorous) as an alternate to each-other, and thereby leaving it to the sentencing court, in its discretion, to opt for either of the two (wholly simple or rigorous) or both (partly simple and partly rigorous).^'' The Code also provides for a minimum term of imprisonment^^ (thereby curtailing the judicial discretion of the sentencing court in quantifying the term of imprisonment) and maximum term of imprisonment^^ (that sentencing court can award). Solitary confinement, another penal form of confinement wherein the convict is kept in isolation from his fellow prisoners and under intensive vigil, is believed to be torturous and detrimental to physical and mental health of the convict.^' The IPC allows

note 19. See also. Law Coininission of India, 39tli Report on Punishment for Imprisonment for Life under the Indian Penal Code, 1860 para 23 (Ministry of Law & Justice, Government of India 1968).

22 *KM Nanavati* v. *State of Maharashtra,* AIR 1962 SC 605; *State of Madhja Pradesh Y. Ratan Singh,* AIR 1976 SC 1552; *Naib Singh* v. *State of Punjab,* AIR 1983 SC 855; *Mohd Munna and Kartik Biswas* v. *Union of India,* AIR 2005 SC 3440; *ILameshbhai Chandubhai Kathode* v. *State of Gujarat,* AIR 2011 SC 803.

23 *Supra note* 6, s. 55, and s 433(b), *supra* note 17, s. 433A.

24 *Supra* note 6, ss. 168, 169, 172-176, 178-180, 223, 225A, 228, 291, 341, 500-502 and ss. 509 & 510.

25 *Id,* ss. 194, 449.

26 *Id,* s 60.

27 The minimum term of imprisonment is provided in IPC, 1860, s. 376(1) (7 years); s 376(2) (10 years); s 376A (20 years); s. 376B (2 years); s. 376C (5 years); s. 376D (20 years); s. 397 (7 years) and s. 398 (7 years). The minimum term of imprisonment is 24 hours (s. 510).

28 The maximum term of imprisonment that may be awarded is 20 years. *Supra* note 6, s 57.

29 See Stuart Grassian, Psychiatric Effects of Solitary Confinement 22 *Washington University Journal of I^am and Pol* 325 (2006); Elizabeth Bennion, Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far too Usual Punishment

the sentencing court, having the power to award rigorous imprisonment, to order that the offender, sentenced to rigorous imprisonment, be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced but not exceeding three months on the whole.^^

Punishment provided under the IPC, thus, takes varied forms like the extinction of life (death sentence), intentional infliction of physical pain (in the form of hard labour), mental pain (through solitary confinement), proprietary deprivations (in the form of fine or confiscation of property) or other deprivations (isolation from his dear ones or fellow persons by imprisonment). More painful penal forms, among the forms of punishment in vogue, are death sentence and imprisonment, wherein convicts sentenced to death (until execution of the death sentence) to imprisonment (for life or for a longer term) are detained and made to do hard labour.

At this juncture, it also becomes necessary to take a pause to recall that the Constitution of India guarantees a set of freedoms to citizens of India^^ and the right to life and personal liberty to every person.^^ It mandates the state not to, except according to procedure established by law, deprive a person of his right to life or personal liberty. Article 21 of the Constitution says: No person shall be deprived of his life or personal liberty except according to procedure established by law. Article 21, which is considered a repository of human rights, has received widest possible positive human rights-flavoured interpretation from the constitutional courts. The courts have

90 *Indiana l^aiv Journal* 741 (2015). Plausibly with a view to overcome the evil of arrest, the Prisons Act ,1894, s. 29 mandates that a medical officer must visit the prisoner confined in solitary confinement for more than twenty-four hours at least once.

30 However, the period of solitary confinement cannot exceed to: (i) one month if the term of imprisonment does not exceed six month; (ii) two months if the term of imprisonment exceeds six months but does not exceed one year; and (iii) three months if the term of imprisonment exceeds one year. Further, the execution of solitary confinement is subject to a set of statutory restrictive conditions. It, in no case, can exceed seven days in any one month of the whole imprisonment awarded with intervals between the periods of solitary confinements of not less than seven days. In case the sentence of imprisonment is less than three months, solitary confinement cannot exceed fourteen days at a time and the interval between the periods of solitary confinement must not be less than fourteen days. *Supra* note 6, ss. 73 and 74, IPC. See also, *Kanhir Singh Sehgal \. State of Punjab^* AIR 1962 SC 510.

31 *Supra* note 20, art. 19.

32 *Id.,* art. 21.

read in it numerous contours of life in order to make a life meaningful and worth living." A few decades back, the Supreme Court has ruled that the right to life cannot be restricted to mere animal existence. Life in article 21 means something more than just physical survival. The right to life includes the right to live with human dignity^^ and all that goes along with it. Every act that offends or impairs human dignity, therefore, constitutes deprivation of the right to live.^^ Right to live with dignity is the fundamental right of every citizen and the state is under the constitutional duty to provide at least minimum conditions ensuring human dignity.^" Dignity of an individual can be preserved only through the rights to liberty and equality."

Procedure established by law, depriving life or personal liberty of a person, has to be fair and just. It, by no means, can be fanciful, capricious, oppressive, or arbitrary." The high value of human dignity and the worth of human person enshrined in article 21, read with articles 14 and 19, obligates the state not to incarcerate except under law which is fair, just and reasonable in its procedural essence."

Against the backdrop of the forms of punishment provided under the Code and the constitutional perception of freedoms and human dignity of an individual, a question as to whether convicts sentenced to death (but waiting in the death-row for its execution and thereby living under the shadow of death) and to imprisonment with hard labour (making the prison as a compulsive abode for them) have the right to be treated as human beings

33 See, for example, *PUDR* v. *Union of India^* AIR 1982 SC 1473; *Bandhua Mukti Morcha* v. *Union of India^* AIR 1984 SC 802; *Olga Tellis* v. *Bombay Municipal Corporation^* AIR 1986 SC 180; *Siik Das* v. *Union Territory of Arunachal Pradesh^* AIR 1986 SC 991; *Centre for Legal Research* v. *State of Kerala,* AIR 1986 SC 1322; *State of Himachal Pradesh* v. *Umed Ram,* AIR 1986 SC 847; *Delhi Transport Corpn* V. *DTC Ma^door Congress,* AIR 1991 SC 101; *Unni Krishanan* v. *State of Andhra Pradesh* (1993) 1 SCC 645 and *Vishakha* v. *State of Rajasthan,* AIR 1997 SC 3011.

34 Reference to dignity of an individual is made in Preamble to the Constitution. No other provision, including art. 21, of the Constitution makes mention of human dignity. Nevertheless, human dignity is a clear value of our Constitution. See *Kishore Singh Ravinder Dev* v. *State of Rajasthan,* AIR 1981 SC 625.

35 *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi,* AIR 1981 SC 746.

36 *Vikram Deo Singh* v. *State of Bihar,* AIR 1988 SC 1782.

37 *Minerva Mills Ltd Y. Union of India,* AIR 1980 SC 1789.

38 See *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597; *supra* note 35; *Charan Lai Sahu Y. Union of India,* AIR 1990 SC 1480.

39 *Jolly George Varghese Y. Bank of Cochin,* AIR 1980 SC 470.

(till they are put to gallows or detained behind iron bars inside the high prison walls) and to enjoy basic freedoms that have nothing to do with their conviction or incarceration, becomes interesting and deserves attention. The query posed basically revolves around an inquiry as to whether convicts sentenced to death or imprisoned with hard labour cease to be human beings *sans* human dignity during incarceration and thereby disentitle themselves from, or invite restrictions on, asserting freedoms or rights or claims based on, or emanated from, humanity or human right or human dignity. Response to the poser will reveal the status [(in)humane] accorded to, and rights conferred on, convict carrying death sentence over his head or languishing in a peno-correctional institution.

II Basic freedoms and human dignity of convict-prisoners

Before articulating right to human dignity of a convict under shadow of death sentence and basic freedoms of offenders imprisoned with hard labour and the rights derived therefrom, let us address to two preliminary, but significant, questions, *namely,* (i) do convict-prisoners retain their fundamental rights and freedoms after conviction?, and (ii) do they have the constitutionally ascribed right to human dignity and to be treated as human being during their incarceration (as a death-row prisoner or custody convict-prisoner)?

Do convicts retain their fundamental rights and freedoms?

Convict-prisoners, in spite of their guilt and penal confinement, cannot be said that they are stripped off their fundamental rights. Their liberty, of course, is curtailed, but it is not put behind the bars . They still deserve to be treated in prison with humanity and as human beings.^" Every person, irrespective of his anti-social behaviour and culpability therefore, is a human being and is entitled to be treated with humanity, dignity, respect, kindness and compassion he deserves. His culpability for wrong behaviour does not deprive him of his humanity nor does it entitle the reactors thereto to treat him with contempt, disrespect, humility and inhumanity. He, no matter how

40 International Human Rights instruments stress that all persons deprived of their liberty are to be treated with humanity and with respect for inherent dignity of the human person, recognition of inherent dignity is the foundation of freedom, justice and peace, and every person has the right to be recognised everywhere as a person before law. See The International Covenant on Civil and Political Rights, 1966 (art. 10); International Covenant on Economic, Social and Cultural Rights, 1966 (Preamble), and the Universal Declaration of Human Rights, 1948 (art. 6).

despicable his prior actions are, needs to be treated with dignity and as human being, and not as an object/^ A convict is kept in prison as a punishment and not for punishment. His right to dignity, in fact, precludes any unwarranted deprivation of liberty, privacy, torture and inhuman treatment. Detention merely takes away the right to freedom of movement outside the prison. His other rights still stick to him even though he is behind the bars. Humiliating and de-humanising treatment in penal custody, or denying these rights to him, therefore, infringe his right to dignity. The dignity is the quintessence of human rights and denial thereof amounts to denial of human rights.

The apex court has ruled that prisoners have enforceable liberties, devalued may be but not demonetised . Raising and responding the question as to whether prisoners are persons, the Supreme Court has asserted and affirmed that prisoners are persons . Answering the query in negative, the court felt, is to convict India and its Constitution of dehumanisation and to repudiate the world legal order, which recognises rights of prisoners.^^ The court also ruled that prison laws do not swallow up the fundamental rights of the legally unfree and reminded itself and other courts to, as sentinels on the *qui-vive,* guard freedom behind bars of prisoners.^^ Prisoners, though restricted by the fact of imprisonment, do retain with them certain fundamental rights and freedoms.^^ Prison inmates, subject to certain restrictions and prison discipline, do have the right to associate with their fellow prisoners; the right to communicate, through letters and interview, with others;^^ and the right to write and publish.^'' The Supreme Court, almost four decades ago, with assertion, observed: ^^

> Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner s shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under sentence or under-

41 Lynn S Branliani, The Mess Were in: Five Steps Towards the Transformation of Prison Culture 44 *Indiana L Rev* 703 (2011).

42 *Si/nil Batra (II)* v. *Delhi Administration,* AIR 1980 SC 1579, para 28

43 *Sunil Batra* v. *Delhi Administration,* (1978) 4 SCC 494, para 17

44 See, generally, *Rama Moorthy* v. *State of Karnataka,* AIR 1997 SC 1739.

45 *Supra* note 35.

46 See *State of Maharashtra* v. *Prahhakar Pandurang Sanga^iri,* AIR 1966 SC 424; *D Bhuvan Mohan Patnaik* v. *State of Andhra Pradesh,* AIR 1974 SC 2092.

47 *Supra* note 43, para 57. See also, *supra* note 35.

> trial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (article 19) become chimerical constitutional claptrap. The operation of articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether. For example, public addresses by prisoners may be put down but talking to fellow prisoners cannot. Vows of silence or taboos on writing poetry or drawing cartoons are violative of article 19.

Fundamental rights do not flee the person as he enters in prison, they may suffer shrinkage necessitated by the incarceration.^^ Prisoner wears the armour of basic freedom even behind bars .^' No iron curtain can be drawn between him and the Constitution.^" Imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, courts will refuse to recognise the full panoply of part III of the Constitution enjoyed by a free citizen.^^ Every prison sentence is a conditioned deprivation of life and liberty, with civilised norms built in and unlimited trauma interdicted.^^ Prisoner is not, by mere reason of conviction, denuded of all the fundamental rights which he otherwise possesses or entitled thereto. A compulsion under the authority of law, following upon a conviction, to live in a prison entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to practice a profession. Only such restrictions, as permitted by law, can be imposed on the enjoyment of the fundamental rights by him. Prisoner can be stripped off only those rights that entail from the custodial sentence.^^ He retains all rights enjoyed by free citizens except those lost necessarily because of his custodial confinement. Deprivations and freedoms not necessitated by the fact of incarceration and the sentence of court-to read and write, exercise, meditation and chant, comforts like protection from extreme cold and heat, freedom from indignities like compulsory nudity, forced sodomy and other unbearable

48 *Supra* note 43, para 4.

49 *Id.,* para 213.

50 *Supra* note 42, para 31.

51 *Charles Sobraj \. Superintendent, Central Jail, Tihar, New Delhi,* AIR 1978 SC 1514, para 4.

52 *Id.,* para 8.

53 *D Bhuvan Mohan Patnaik, supra* note 46, para 6.

vulgarity, movement within prison campus subject to requirements of discipline and security, the minimum joy of self-expression, to acquire skill and techniques and all other fundamental rights tailored to the limitations of imprisonment-belong to him.^^ He does not cease to be a human being and continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted and deprived of his liberty in accordance with the procedure established by law, he still retains the residue of fundamental rights.^^

It is, thus, evident that a person confined in prison does not become a non-person. He, subject to limitations imposed on him because of incarceration, is entitled to fundamental rights and freedoms, which, in essence, emanate from inherent humanity and human dignity. Denial or curtailment of these rights and/or illegally aggravating his suffering in the process of incarceration not only offend his right to human dignity but also entitle him to take recourse to apt legal measures. Right to life and personal liberty, right against arbitrary action, and fundamental freedoms assured under the Constitution, remain unaffected by his incarceration and the state is obligated to ensure that these constitutional rights are not infringed.^" Prisoner, like a free man, has the right to live with dignity and enjoy freedoms that are not curtailed or denied because of his custody. Freedom behind the bars is a part of the constitutional tryst and the index of our collective consciousness."

The right to human dignity and to be treated as a human being during incarceration

Prisoner has a right to be treated as a human being and with humanity during his confinement in a prison. By his anti-social behaviour and the consequential incarceration, he does not cease to be a human being. He, because of custodial confinement, is neither deprived of his liberty nor humanity and dignity. His right to human dignity, on which the whole edifice of the so-called human rights and human rights jurisprudence is premised and evolved, and to be treated as a human being, in spite of his incarceration, remains intact. He has the right to freedom of thought, conscience, and

54 *Supra* note 42, para 23.

55 *State oj Andhra Pradesh* v. *Challa Kamkrishna Reddj* (2000) 5 SCC 712.

56 *Rudal Sah* v. *State of Bihar,* AIR 1983 SC 1086.

57 *Supra* note 43, para 223.

religion. He has the right to preserve his culture, religion and language.^^ He has a right to communicate with his family and the outside world.^' Any arbitrary interference with his correspondence with his family and others violates his right to privacy.'^" He cannot be discriminated against another. Every prisoner is equal before law and deserves, without discrimination, equal protection of the law."He cannot be subjected to intentional unauthorised severe physical or mental pain or suffering or to cruel, degrading or inhuman treatment or punishment.''^ The idea of human dignity and humanity completely prohibits the infliction of any cruel, inhuman or degrading punishment, including corporal or mental punishment or placing in a dark cell the inmate."^ If he is punished with death sentence, it needs to be carried out with inflicting the minimum possible suffering."^

In India, article 21 of the Constitution guarantees every person that he cannot be deprived of his life or personal liberty except in accordance with procedure established by law. One of the pertinent facets of the constitutional right to life and personal liberty enshrined in article 21 of the Constitution is human dignity *f*^ The right to human dignity has many elements. The first and foremost is that human dignity of each human being as a human being . Human dignity is said to be infringed the moment a person s life, physical or mental welfare is harmed. In this sense, torture, humiliation, forced labour, amongst others, go against human dignity.

In administration of criminal justice, many rights of the accused are derived from his dignity as human being. Even after conviction and confinement in a custodial penal or non-penal institution, like prison or corrective or protective homes, human dignity does not lose its relevance. Living in human conditions as human beings, without humiliation or torture, amongst others, are seemingly

58 Universal Declaration of Human Rights, 1948 (UDHR), art. 18; International Covenant on Economic and Political Rights (ICCPR), art. 8 and 27.

59 The United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015, rule 8, ESC Res 663C (XXIV), annex 1, UN Doc. A.Conf/6121 (July 13, 1957).

60 *Supra* note 58, UDHR, art. 12; ICCPR, art. 17.

61 *M,* UDHR, art. 7; ICCPR art. 2 and 26 .

62 *Id.,* 58 UDHR, art 5; ICCPR, art.7; Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, 1984, Preamble, art. 2, 7 and 16.

63 *Supra* note 59, rule 31.

64 ECOSOC Res 1984/50 of 25 May 1984, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (para 9).

65 *National I^egal Services Authority \. Union oj India,* AIR 2014 SC 1863.

motivated by, and premised on, the human dignity jurisprudence. Even award and execution of death sentence has to be humane.[66] Human dignity has been frequently referred to, and relied upon, by courts in India to humanise administration of criminal and penal justice and to make it more humane.

The right to life and personal liberty, which takes into its fold the right to live with human dignity and its extended contours, makes the penitentiary system humanised and humane. The right to personal liberty and life, as articulated in the Constitution and extensively added expansive contours by the judiciary, has led to serious implications on the prison administration. Any unauthorised infringement of the right to life or personal liberty, like inflicting torture or humiliating him or engaging him in forced labour, offends his fundamental right to human dignity. Any cruel, inhuman and unusual treatment during his incarceration not only amounts to denial of his right to dignity but also the canons of the right to life and personal liberty guaranteed under the Constitution. Torture and cruel or inhuman treatment or punishment that is degrading and destructive of human dignity is constitutionally prohibited.[67] Even the mode of execution of death sentence has to be less painful.

III Right to human dignity of convict sentenced to death

A person sentenced to death has certain rights derived from his right to human dignity. A few prominent among them are outlined below.

Right against solitary confinement in the garb of separate confinement in isolation

The Prisons Act, 1894 provides for confinement of convicts in isolated cellular rooms in two situations. A prison officer can put a prisoner in a prison cell in isolation from others to discipline him. A prisoner sentenced to death, as a rule, is confined in a cell apart from all other prisoners and is placed by day and night under the charge of a guard.[68] A prisoner does not become a prisoner under sentence of death the moment he is sentenced to death by the sentencing court of sessions. It needs to be confirmed by the high court. He is not under sentence of death even if his death sentence is confirmed by the high court. He is not a prisoner under sentence of death

66 *Shabnam* v. *Union oj India*^ AIR 2015 SC 3648.

67 See observations of P N Bliagwati J in *Bachan Singh* v. *State of Punjab*^ AIR 1982 SC 1325.

68 Prisons Act, 1894, s. 30(2).

until the Supreme Court affirms his sentence and the President/Governor says nay to his mercy petition."'^ Prisoner under sentence of death means the prisoner under a finally executable death sentence .™ Any single-cell confinement prior to rejection of the mercy petition by the President/Governor, therefore, offends article 21 of the Constitution and thereby becomes unconstitutional." The prisoner, sentenced to death, has the right against unauthorised statutory cellular confinement as it violates his right to dignified way of custodial life.

The avowed justification for such an isolated confinement, which in essence amounts to solitary confinement but is non-penal in nature, under the Prisons Act, 1894 is to protect him from self-or-others inflicted injury or preclude him from escaping from the custody. It is also justified on the ground of maintaining discipline and avoiding disorder, fight and other untoward incidents in the prison. It is a separate *sans* close confinement. Custodial isolation of a prisoner awaiting execution is, unlike solitary confinement *(i.e.,* the complete isolation of the prisoner from all human society so that he has no direct intercourse or sight of any human being) a mere close confinement *{i.e.,* a custody to safely secure the production of the body of the prisoner on the day appointed for his execution). It is just a statutory confinement of a prisoner awaiting execution, and not a solitary confinement . The former, which is distinct from the latter, is permissible. Such a separate confinement, therefore, is not hit by the fundamental right to life and liberty, and it, the Supreme Court ruled, is *intra vires* to the Constitution."

Solitary confinement as punishment and separate but not close confinement in cellular prison are closely saved from declaring them unconstitutional. Nevertheless, the Supreme Court has asserted that solitary confinement should be resorted to in very exceptional cases of unparalleled atrocity or brutality."

Prison authorities, the apex court ruled, in no case, are allowed to put a prisoner in solitary confinement as it is impermissible under the Prisons Act, 1894. Solitary confinement can only be inflicted by the courts that too subject

69 *Supra* note 43, para 87.

70 *Shatrughan Chauhan, supra* note 20, para 82.

71 *Ibid.*

72 *Supra* note 43, para 204.

73 *Munnuswamj* v. *State of Madras,* ILR 1948 Mad 359.

to the statutory scale and limitations mentioned in the IPC.^^ Prisoners, therefore, do have the right against solitary confinement if their confinement is not in accordance and tune with the spirit and mandate of the Prisons Act, 18947^ Any custodial solitary confinement in violation of these provisions of the Prisons Act, 1894 amounts to additional and separate punishment not authorised by law ^^ and is, therefore, illegal."

Inordinate delay in hanging: hanging death an affront to human dignity?

Because of the requisite confirmation of death sentence by the high court, permissible appeals therefrom to the Supreme Court and thereafter mercy petition by the convict to the President/Governor, considerable lapse of time between the imposition of death sentence by a sessions court and the final acceptance or rejection of the mercy petition by the President/ Governor is bound to exist. During this period, the sentence of death obviously remains hanging on head of the condemned prisoner and lingering in his mind. Fear of death, coupled with anxious uncertainty, reduces him to a living corpse oscillating between a ray of life and the fear of death . The pain, suffering, and mental anguish resulting from horror of death hanging over his head for long time make him a lifeless mummy *J*^ He lives under the hangman s noose and suffers in silence the extreme agony, anxiety and debilitating fear of the hanging death. Between the funeral fire and mental worry, the latter is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one.^' Prolonged detention, awaiting execution of death sentence,^" has dehumanising effect on the prisoner.^^ Brooding horror of haunting him in the prison cell for uncertain years becomes torturous.^^ The prolonged delay in execution of death sentence makes the sentence of death cruel, inhuman and degrading, which is nothing

74 *Supra* note 43.

75 *Supra* note 43. See also, *Shatrughan Chauhan, supra* note 20.

76 *Triveniben* v. *State of Gujarat*^ AIR 1989 SC 142.

77 *Kishore Singh Kavinder Dev* v. *State of Kajasthan*^ AIR 1982 SC 625.

78 T. *V. Vatheesmaran* v. *State of Tamil Nadu,* AIR 1983 SC 361.

79 *Id.,* para 74.

80 Invariably, once the death sentence pronounced is finally judicially confirmed, the convict is sent to solitary confinement.

81 *Supra* note 78.

82 *Ediga Anamma* v. *State of Andhra Pradesh* (1974) 4 SCC 443.

short of another unauthorised punishment inflicted upon the condemned prisoner. Infliction of unauthorised additional and unwarranted punishment contravenes the spirit of article 21 of the Constitution.^^

Mercy petition pending for many years for consideration of the President/ Governor not only causes mental agony but also leads to several adverse physical, emotional and psychological stresses.^^ The only way to undo the wrong, the apex court stressed, is to quash the sentence of death and to replace it by imprisonment for life.^^ Inordinate and unjustified prolonged delay in disposal of mercy petition by the President/Governor is treated as a supervening circumstance and considered a relevant factor^" in commuting sentence of death to imprisonment for life. Exorbitant delay in disposal of mercy petition, not caused at the instance of the convict himself, renders the process of execution of death sentence arbitrary, whimsical, capricious and, therefore inexecutable.^^ Undue delay in execution of death sentence is presumed to be of dehumanising in nature and it deserves to be converted to life imprisonment even though no adverse effect thereof on the convict is established.'*"

83 *Supra* note 78.

84 *Shatrughan Chauhan, supra* note 20.

85 *Supra* note78.

86 See *Vivian Kodrick* v. *State of West Bengal,* AIR 1971 SC 1584; *State of Uttar Pradesh* V. *Paras Nath Singh,* AIR 1973 SC 1973; iV. *Sreeramlu* v. *State of Uttar Pradesh,* AIR 1973 SC 2551; *S. Parthasarthi* v. *State of Andhra Pradesh,* AIR 1973 SC 2699; *'Kagubir Singh* V. *State of Haryana,* AIR 1974 SC 677; *supra* note 82; *Chamala* v. *State of Harjana,* AIR 1974 SC 1039; *Joseph Peter* v. *Goa Daman and Diu,* AIR 1977 SC 1812; *State of Uttar Pradesh* v. *Sugher Singh,* AIR 1978 SC 191; *State of Uttar Pradesh Y. Dalla Singh,* AIR 1978 SC 368; *Sadhu Singh* v. *State of Uttar Pradesh,* AIR 1978 SC 1506; *Bhagman Bux Singh* v. *State of Uttar Pradesh,* AIR 1978 SC 34; *Kajendra Prasad Y. State of Uttar Pradesh* 1979 CrLJ 792 (SC); *State of Uttar Pradesh* v. *Sahai,* AIR 1982 SC 1076; *supra* note 78; *Javed Ahmed Y. State of Maharashtra,* AIR 1985 SC 231. But see, *Kishideo Y. State of Uttar Pradesh,* AIR 1955 SC 331; *Bharamnd Mepadnna Y. State of Bombay,* AIR 1960 SC 289; *Nachiar Singh Y. State of Punjab,* AIR 1975 SC 118; *Maghar Singh Y. State of Punjab,* AIR 1975 SC 1320; *Dajar Mashi Y. State of Uttar Pradesh,* AIR 1976 SC 653; *State of Maharashtra Y. Champalal,* AIR 1981 SC 1675; *Mahendra Nath Das Y. Union of India,* (2013) 6 SCC 253; *Shatrughan Chauhan, supra* note 20; *Ajay Kumar Pal Y. Union of India* (2014) 13 SCALE 762.

87 See K I Vibliute, Delay in Execution of Death Sentence as an Extenuating Factor and the Supreme Court of India: Jurisprudence and Jurists Prudence 35 *JIDI* 122 (1993).

88 *Shatrughan Chauhan, supra* note 20; *V Sriharan @Murugan Y. Union of India,* AIR 2014 SC 1368.

The legal basis for treating inordinate or undue delay in disposal of mercy petition by the President/Governor as a ground for commuting the death sentence to life imprisonment is that the pain-mental, physical and emotional-caused by inordinate delay in disposal of his petition goes against the spirit of article 21 of the Constitution, which inheres a right in every prisoner till his last breath and puts the higher judiciary under the constitutional obligation to protect fundamental right to life and personal liberty of a person even when the noose is being tied on his neck.[89] Death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair. Article 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fair play. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence.[90]

However, in *Devender Pal Singh Bhullar* v. *State of N C T Delhi*[91] the Supreme Court was encountered with a very interesting question as to whether terrorists, who hardly show any mercy to their victims, deserve such a constitutional protection against undue delayed rejection of their mercy petition by the President/Governor and whether it is obligatory on part the constitutional courts to consider it as a supervening circumstance for commuting their death sentence to life imprisonment. A two-judge bench of the Supreme Court, G S Singhvi and S J Mukhopadhaya JJ after a careful perusal of the thitherto judicial pronouncements of the apex court and *dicta* thereof on undue delay in disposing of mercy petitions *vis- -vis* commutation of death sentence to imprisonment for life, ruled that terrorists convicted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (and other similar statutes) do not deserve any sympathy and the question of considering the delayed rejection of their mercy petition as a supervening factor, therefore, does not arise. The bench, speaking through G S Singhvi J observed:[92]

> We are - of the view that the rule that long delay may be one of the grounds for commutation of the sentence of death

89 *Sher Singh* v. *State of Punjab* (1983) 2 SCC 341; *Trivenihen, supra* note 76.

90 *Id. Sher Singh,* para 20.

91 AIR 2013 SC 1975.

92 *Id.,* para 40.

> into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.

The bench dismissed the instant writ petition as it did not find merit for intervening in the Presidents order turning down mercy petition of the petitioner. Rejection of mercy petition by the President/Governor on the ground that a large number of innocent people are killed without rhyme or reason, cannot, in the opinion of the bench, be characterised as arbitrary or unreasonable. The rejection of mercy petition (as well as award of death sentence), on this ground, it ruled, is justified.'^ The bench retained the death sentence awarded to the petitioner. His subsequent review petition failed to give him any respite as the bench failed to see any error apparent warranting reconsideration of its earlier ruling.'^ His curative petition also failed.

93 *Id.,* para 39.

94 *Supra* note 91.

However, subsequently, in *Shatrughan Chauhan* v. *Union of IndiaP* a three-judge bench of the Supreme Court, comprising P Sathasivam the then CJI, and Ranjan Gogoi and Shiva Kirti Singh JJ speaking through P Sathasivan CJI felt that the *Devender Pal Singh Bhullar* dictum is *per incuriam,* erroneous, and there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence.'"' It ruled: "

> Unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument that a distinction can be drawn between the Indian Penal Code and non-Indian Penal Code offences since the nature of the offence is a relevant factor is liable to be rejected at the outset. In view of our conclusion, we are unable to share the views expressed in *Devender Pal Singh Bhullar.*

The three-judge bench, taking clue from the *Mithu* dictum declaring section 303 of the IPC unconstitutional on the ground that it excluded judicial discretion in sentencing and thereby offended article 14 and article 21 of the Constitution, also hinted that the *Devender Pal Singh* dictum is not in tune with the constitutional spirit of equality and of personal liberty and life. The *Shatrughan Chauhan* ruling, though leaves scope for doubting its constitutional propriety as *ratio* of *Devender Pal Singh* was neither directly involved nor articulated arguments from other side were advanced, seems to have relied upon human dignity of a condemned prisoner to assert for sympathy and mercy even though he, by his actions, did not show any mercy to deceased hapless victims of his atrocious inhuman acts. It held that denial of delayed disposal of mercy petition as supervening factor to him offends his fundamental right to life and personal liberty and goes against the principle of equality. The bench, it seems, took cognisance of *ratio* of the *Devender Pal Singh* and adjudged it merely on the suggestion of Ram Jethmalani, who unsuccessfully argued on behalf of Devender Pal Singh BhuUar in all the writ petitions filed by him before the Supreme Court and it

95 (2014) 3 sec 1.

96 *Id.,* para 64.

97 *Id.,* para 70.

happened to be a larger bench than that heard *Devender Pal Singh* on earlier occasions.

Right to meet family members and friends immediately prior to execution - an intrinsic canon of humanity and justice

Another right of a prisoner-in-wait for hanging that springs from the fundamental right to life and personal liberty and inherent therein the right to humanity and human dignity is the right to meet his family members and friends immediately prior to execution of his death sentence. This becomes possible only when certain time lapses between the communication of rejection of his mercy petition and the execution of death sentence.

The apex court, after careful perusal of different prison manuals in vogue in different states and noticing discrepancies therein specifying the requisite time-gap that needs to exist between the communication and execution of death sentence, ruled that rejection of mercy petition by the President/ Governor should be immediately communicated to the condemned prisoner. There should be a gap of at least fourteen days between the receipt of the communication and the scheduled date of the execution of his death to enable him to prepare himself mentally for the execution; make his peace with God; prepare his will; settle other earthly affairs, and meet his family members.'^ Final meeting between the prisoner and family and friends immediately prior to his execution is intrinsic to humanity and justice.'' Denial of these rights to a condemned prisoner not only violates the most cherished fundamental right to life and personal liberty guaranteed under the Constitution, but also goes against the idea of humanity and human dignity assured in the Constitution to a condemned prisoner.

Execution of death sentence cannot be carried out in a hurried and secret manner. He should be given reasonable opportunity to exhaust legal remedies against the death warrant and finally meet his relatives before execution.^"" What is required to be seen is as to whether the condemned prisoner had reasonable opportunity to assail the death warrant. If he had it once, he cannot press for the fourteen days time gap as a rule and assert that the death warrant is void on the ground of non-compliance of the fourteen day s rule, particularly when he has availed a series of opportunities to assail

98 *M,* para 259.7.

99 *U,* para 259.11.

100 *Supra* note 66, para 20.

the conviction.^"^ Staying execution of death sentence, in such a situation, amounts to nothing but travesty of justice.^"^

Right against barbaric mode of execution of death sentence

Human dignity of a convict sentenced to death, articulated in the context and spirit of article 21 of the Constitution, does not end up with the award of death sentence, its confirmation by the high court, appeals, reviews and mercy petitions. It goes beyond this and remains with him till he is finally executed. The convict needs to be treated with dignity and humanity at all the stages. Mode of execution of his death sentence is also required to be in consonance with human dignity and decency. He cannot be deprived of these values because his death is certain. He cannot be executed with a barbaric method of execution or in a brutal manner. The sentence of death *per se* is constitutionally valid and the award of death sentence is free from any legal and constitutional infirmities and does not offend human dignity of the convict, the element of human dignity and decency of the convict remains relevant and becomes crucial even at the stage of execution of his death sentence.^"^

The mode of execution of death sentence^"^ should not be unreasonably painful, barbarous and cruel. It should be certain, humane, quick and decent. Condemned prisoner, as a facet of his human dignity and humanity, has the right to painless and quick execution of death sentence, *sans* torture, cruelty, and indignity. The standards of human decency and dignity *vis- -vis* modes of execution of death sentence need to be understood in the context of these values for ascribing any mode of execution of death sentence as unreasonable, unjust, inhuman, barbaric or cruel. ^°^ The right to dignity and

101 *Yakuh Ahdul Ka^ak Memon v. State of Maharashtra* (2015) 8 SCALE 339, para 28.

102 *Yakuh Abdul Ra^ak Memon v State of Maharashtra* (2015) 8 SCALE 354.

103 *Supra* note 66. See also, *Bachan Singh, supra* note 14.

104 For a comparative account of different modes of execution of death sentence in different countries, including India, See Law Commission of India, 35* Report on Mode of Execution of Death Sentence (Ministry of Law and Justice, Government of India, 1967); Law Commission of India, 187* Report on Mode of Execution of Death Sentence and Incidental Matters (Ministry of Law and Justice, Government of India, 2003); *Deena @ Deen Dayal* v. *Union of India,* AIR 1983 SC 1155. See also. Law Commission of India, 262"" Report on Death Penalty (Ministry of Law and Justice, Government of India, 2015).

105 Law Commission of India, 187* Report on Mode of Execution of Death Sentence and Incidental Matters. The standards of human decency in the execution of death sentence, obviously, do vary from state to state and from time to time and depend upon the prevalent social, ethical and moral values.

106 *Deena, supra* note 104.

fair treatment under article 21 of the Constitution is not only available to a living human being but also to his body after his death.

In *Deena @ Deen Dajia/v. Union of India*^"^' the constitutional validity of the sole mode of execution of death sentence by hanging provided under the CrPC^"^ was challenged on the ground that it is a cruel, inhuman, barbarous and degrading method of execution of death sentence and thereby it is violative of article 21 of the Constitution. It, therefore, cannot be employed for executing the death sentence. It was also stressed that the state is under constitutional obligation to provide a humane and dignified mode of execution of death sentence, which does not involve torture or cruelty of any kind.^"^ The Supreme Court ruled that the mode of execution to be within the constitutional canons of article 21: (i) should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoners apprehension; (ii) should produce immediate unconsciousness passing quickly into death; (iii) should eliminate the possibility of lingering death; (iv) should be decent, and (iv) should not involve any kind of degradation or brutality of any kind. And the court held that death by hanging as a method of execution of death, which meets all these requisites, is neither brutal nor barbaric and dehumanising. It, compared with other modes of execution of death sentence, including lethal injection,^™ is scientific and one of the lesser painful method of execution of death sentence. It is, therefore, *intra vires* to the Constitution.""

Obviously, any mode of execution of death sentence that is cruel or brutal or inhuman is unconstitutional and capricious. Article 21 of the Constitution permits the execution of death sentence only through procedure

107 *Supra* note 17, s. 354(5). It says: when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead .

108 Arguments on the constitutional validity of the mode of execution of death sentence by hanging and judicial responses thereto can also be traced in *Bachan Singh, supra* note 14, though the question of its validity was not direcdy agitated or addressed to.

109 The Seventeenth Law Commission of India has recommended that execution of death sentence by lethal injection until accused is dead as an alternate to that by hanging by neck till death should be provided in s 354(3) of the CrPC and discretion for opting either of the two, after hearing the convict, should be given to the sentencing court. See, Law Commission of India, 187* Report, *supra* note 104.

110 *Deena, supranote* 104, para 82 and 85. See also, *ShashiNayarY. Union of India,* AIR 1992 SC 395.

111 *Supra* note 95, para 259.12 and 260.

112 *Pandit Parmanand Katara Y. Union of India* (1995) 3 SCC 348.

established by law and such a procedure must be fair, just and reasonable. It cannot be either oppressive or capricious. With a view to finding out as to whether execution of death sentence by hanging meets the constitutional requisites of fair procedure, the apex court suggested that *post mortem* after the execution of death sentence should be made obligatory."^

Although execution of death sentence by hanging is *intra vires,* any rule allowing the body of an executed convict to remain hanging beyond the point of death execution becomes *ultra vires* to the Constitution as it violates dignity of the prisoner."^ Execution of death sentence by public hanging is not only a shame on a civilised society, but is also barbaric. A barbaric crime, the apex court stressed, need not to have to be visited with a barbaric penalty like public hanging."^

IV Right to human dignity of convict sentenced to rigorous imprisonment

Prisoners sentenced to imprisonment with hard labour do also have certain rights derived from their right to human dignity and to be treated as human being during incarceration. A few prominent among them are outlined here below.

Right against hard labour with no or illusory wages

One of the punishments provided under the IPC is imprisonment. The IPC (depending upon gravity of the offence) stipulates three forms of imprisonment- simple imprisonment , rigorous imprisonment and imprisonment for life . Convicts punished with rigorous imprisonment or life imprisonment, as mentioned earlier, are required to do hard labour during their confinement.

However, in this context it becomes necessary to note a few interesting but pertinent facts: (i) the term hard labour associated with rigorous imprisonment is neither defined in the IPC nor in any other allied statute; (ii) article 23 of the Constitution, which, *inter alia,* prohibits *begar"^"* and other

113 *Attorney General of India* v. *I^chma Devi^* AIR 1986 SC 467.

114 The term *begar,* which is not defined, is a term of Indian origin connoting the labour or service which a person is forced to do or render it without receiving any remuneration in return. And a factor depriving him of his choice of alternatives and compeUing him to adopt a particular course of action amounts to force. Any labour compelled as a result of such force amounts to forced labour . Labour extracted from a person without his choice or by force, therefore, amounts to *Begar.* See, *People s Union for Democratic BJghts* v. *Union of India^* AIR

forms of forced labour that are similar to *begar,* and mandates to make them punishable in accordance with law; (iii) article 23 equates any similar forms of forced labour (other than *begar)* with *begar,* (iv) article 23, however, carves an exception to the constitutional prohibition of forced labour by allowing the state to impose compulsory service if such service is for public purpose ,"^ and (v) article 21 of the Constitution, as mentioned earlier, guarantees the right to life and personal liberty to all and none (including prisoners) can be deprived of the right except according to procedure established by law.

A concomitant reading of these propositions discloses that forced labour in any form is not merely unconstitutional, but is also punishable in accordance with law and the state is allowed to impose compulsory service for public purposes . It does not exempt the thitherto existed compulsory hard labour (associated with rigorous imprisonment since 1860) from purview of the constitutional prohibition (of *begar* and other forms of forced labour). What it does is that it allows the state to impose compulsory service for public purpose . Compelling prisoner to do hard labour, ostensibly, will not merely be impermissible but will also be *ultra vires* to the Constitution as it will involve an element of coercion unless hard labour is equated with, or read in, compulsory service for public purpose .""^ However, such a view, in the backdrop of historical background of article 23 of the Constitution, seems to be a mere (apprehensive) view-point. The original draft clause (corresponding

1982 SC 1473.

115 Constitution of India, art. 23(2) reads: Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any one of them .

116 Hard labour associated with rigorous imprisonment, it is argued, cannot be equated with either *hegar* or similar forms of forced labour mentioned in art. 23 of the Constitution. Hard labour imposed by a court of law is more as punishment of the prisoner and less as a means of extraction of useful work from him. It is a penal means to condemn the prisoner to inconvenience and unpleasantness. Prisoner is forced to do hard labour as part of punishment imposed by a court of law in accordance with law. Art. 23 has no role to play. The concept of forced labour used therein cannot be applied to prison labour, unless the system of rigorous imprisonment provided in the Penal Code is held *ultra vires.* See P. *Bhaskara Vijaykumar* v *Andhra Pradesh,* AIR 1988 AP 295; *State of Gujarat* v. *Uigh Court of Gujarat,* AIR 1998 SC 3164.

117 See B. Shiva Rao, *The Framing of Indias Constitution -A Study* 252-57 (IIPA, New Delhi, 1968). *Id., State ofGujarat^\ie-reiii* it is observed that hard labour associated with rigorous imprisonment cannot be said to be in the nature of compulsory service imposed by the state for public

to article 23), on approval of the sub-committee on fundamental rights and the advisory committee, expressly exempted compulsory hard labour from the prohibition of forced labour . However, the drafting committee, after due deliberations in the Constituent Assembly, deleted it from the said clause. B. R. Ambedkar, Chairman of the Drafting Committee, justifying the deletion, opined that the exception envisaged in sub-clause (2) regarding compulsory service for public purpose is wide enough to take in its fold hard labour imposed as punishment."^ Imposition of compulsory hard labour on prisoner sentenced to rigorous or life imprisonment, though not expressly saved by article 23(2) of the Constitution, becomes permissible as it serves public purpose."^ The provision allows prison authorities, with impunity, to force convicts sentenced to rigorous or life imprisonment to do hard labour. However, either form of hard labour to be done by prisoner or manner of doing it, by virtue of provisions of article 21 of the Constitution, cannot be degrading or barbaric or inhuman or torturous."'

In the early eighties, courts in India were called upon to delve into: (i) is prisoner sentenced to rigorous or life imprisonment under obligation to do hard labour (as a part of his punishment) with no (or illusory) remuneration?; (ii) do prison authorities, because of the exception carved out in article 23(2) of the Constitution to forced labour, have the right to extract hard labour from prisoner without paying (or paying illusory) remuneration? ; (iii) does free prison labour amount to *begar* or forced labour, in terms of article 23 of the Constitution?; (iv) does prisoner have the right to claim wages for the hard labour done by him and to insist that the wages paid to him should not be meagre or illusory but should be equitable or equal or minimum wages at par with that is paid to free man?; (v) if not paid, does he have the right to

purpose

118 Hard labour imposed on a convict, it is said, has deterrent effect against others from committing crimes, and therefore serves social purpose. See *Peoples Union for Democratic BJghts* v. *Union of India,* AIR 1982 SC 1473.

119 Prison labour should neither be punitive, repressive nor afflictive in nature. It should not become a drudgery and a meaningless prison activity. It should be of such a nature that opens up important avenues of imparting useful values to prisoners for their vocational and social adjustment and for their ultimate social rehabilitation. See, Government of India, Report of the All India Committee on JaU Reforms 1980-83 (Ministry of Home Affairs, Government of India, 1984).

120 See ΙC I Vibhute, Compulsory Hard Prison Labour and the Prisoners Right to Receive Wages: Constitutional *Vires* and Judicial Voices 42 *]IIJ* 1 (2000).

121 *State of Gujarat, supra* note 116. See also, *S P Anand* v. *State of Madhya Pradesh,*

approach the constitutional courts and seek relief on the ground that doing hard labour with no (or illusory) remuneration violates his fundamental right to live with dignity and as human being (read in article 21) and right against exploitation (read in art 23)?^^" All these queries, in essence, revolve around the right of prisoner sentenced with rigorous or life imprisonment against forced hard prison labour and right to receive wages therefor.

The Supreme Court of India ruled that it is lawful for the state to employ prisoners sentenced to rigorous imprisonment to do hard labour, but extraction of hard labour from them without paying remuneration (or paying illusory or nominal remuneration) goes against the spirit of article 23 of the Constitution and they do have right to get equitable wages for their hard labour. For determining such equitable prison wages the apex court directed all the states to constitute a wage fixation body for seeking recommendations for determining wages to be paid to prisoners. Nevertheless, prison wages cannot be so meagre that it is too inadequate to take care of rehabilitation of prisoners. It has to be equitable and reasonable.^^^

Right against illegally extended incarceration

Right to live with human dignity and as a human being remains intact with inmates of a penal custodial institution. Prison officials do not have authority to treat inmates of the penal institution under their control with inhumanity and in an undignified manner or subject them to torture simply because they are proved offenders and confined to custody to undergo punishment. Authorities having control over them, on the contrary, are required to ensure that their safety and dignity is honoured during their custodial detention.

However, instances of custodial violence, including torture and death, are unfortunately not uncommon in India. Custodial violence and torture, which involves infliction of physical and mental pain within four walls of the custodial institution by persons in authority over others who are hapless and weak and signify imposition of the will of the strong over the weak, strikes

AIR 2007 MP 166. K T Thomas J (speaking for himself and M M Punchi the then CJI) and D P Wadhava J suggested equitable wages *(i.e.^* minimum wages paid under the Minimum Wages Act, 1948 minus expenses incurred by the state for food and clothing of the prisoner).

122 See observations of Adriana P Bartow in, *D KBasu* v. *State of West Bengal,* AIR 1997 SC 610, para 10.

123 M, para 11.

124 See generally, *Siinil Batra, supra* note 43 ; *Sita Bdim* v. *State of Uttar Pradesh,* AIR 1979 SC 745;

a blow at the rule of law, which insists that power should not only be derived from law, but should also be limited by law, and disregards humanity and dignity of the inmate. Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself. ^^^ Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity.^^^

It is, through judicial pronouncements, settled that no convicted prisoner can be subjected to physical or mental restraint that is not warranted by the punishment awarded to him by the court or is in excess of the requirement of prison discipline.^^^

Any sort of violence or ill-treatment not only results in denial to him of his right to personal liberty but also amounts to a blow to its dignity. In *Veena Sethi* v. *State of Biharf*^^ whereby attention of the Supreme Court was drawn to the fact that a number of detainees were languishing in jail since more than two decades after their punishment expired, the Supreme Court held that unauthorised incarceration not only exhibits utter disregard to basic human rights but also shocks the conscience of mankind. It constitutes an affront to the human dignity. The court ordered their release.^^"^ In another identical case of unauthorised and unjustified detention of the prisoner for almost eight years after his acquittal, the apex court set aside his detention and ordered his release forthwith.^^^

In *Rudal Sah* v. *State of Bihar*^™ wherein a person acquitted by a court was made to languish in prison for more than fourteen years approached the Supreme Court urging it to direct the state to pay *ex gratia* payment for his

Javed^ supra note 86; *Sher Singh^ supra* note 89.

125 AIR 1983 SC 339.

126 M, para 3.

127 *Rama Dass* v. *State of Bihar,* AIR 1987 SC 1333.

128 *Supra* note 56. See K I Vibliute, Compensatory Jurisdiction of the Supreme Court - A Critique *21 Jr of Constitutional and Parliamentary Studies* 136 (1987).

129 *Supra* note 56, para 10.

130 See *Nilahati Behera @ l^lita Behera* v. *State of Orissa* (1993) 2 SCC 746. See also, *Sher Singh, supra* note 89.

131 See, for example. The Haryana Good Conduct Prisoners (Temporary Release) Act, 1988; The

rehabilitation, to medically treat him at government expenses or to reimburse the expenses which he might incur for medical treatment, and pay him compensation for illegal incarceration and the consequential loss of his fundamental right to life or personal liberty, went a step ahead by ordering payment of compensation for violation of article 21 of the Constitution. Justifying his claim for compensation for unauthorised and illegal confinement, the apex court observed: ^^'

> Article 21which guarantees the right to life and liberty 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 21secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. 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 the powers of the State as a shield.

The apex court awarded him compensation for violation of his fundamental right and kept open his option to seek damages through civil proceedings against the state. Subsequently, it, in a different context and set of facts, explaining the nature of the right to seek compensation under the Constitution for violation of the fundamental right assured in article 21 of the Constitution and its distinct features from that of remedy of damages for the tort resulting from contravention of the fundamental right, asserted that the defence of sovereign immunity is inapplicable in claim for compensation for violation of the fundamental right. The claim for compensation is based on the strict liability for contravention of the guaranteed basic and indefeasible right of an individual. 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 the enforcement and protection of such rights.""

Punjab Good Conduct Prisoners (Temporary Release) Act, 1962.

132 See, for example. The Prisons (Bombay Furlough and Parole) Rules, 1959; Andhra Pradesh Prison Rules, 1979; Delhi Parole/Furlough: Guidelines 2010.

Right to furlough and parole

Re-assimilation and re-socialisation of offenders is one of the prime goals of prisons. Social defence coupled with personal correction of offenders for smooth social re-assimilation and rehabilitation has been motto of the prison administration. It is accepted that punishment should be more reformative and less retributive. Legislature and prison administration, with this goal in focus, design and execute a number of therapeutic programs in and outside penitentiary system.

Two of the measures provided in almost every state are conditional release of convicts sentenced to imprisonment and are undergoing sentencing. Such a conditional release may take label of furlough or parole. Furlough and parole do form integral parts of the prison administration and are aimed at reformation of prisoners and humanise the prison system. Furlough means a leave of absence (especially granted to a member of services or to a missionary). Parole, on the other hand, connotes a temporary or conditional release of prisoner after actually serving a part of his sentence for a special purpose on the promise of good behaviour.

There exist no specific provisions in the CrPC dealing with furlough and parole. However, grant of these measures are regulated by state Acts^^^ dealing with temporary release of prisoners, rules"^ or jail manuals"^ or statutory instruments. Grant of parole, and matters related thereto, are handled by executive authorities. Release of convicts undergoing sentencing in prison on furlough and parole, therefore, is an administrative action.

Furlough is granted periodically irrespective of any particular reason merely to enable him to retain his family ties and save him from ill-effects of continuous prison life. The period of furlough is treated as remission of

Parole, as understood in administration of justice, is a form of temporary release of a convict from penal custody^^^ The release is for a special purpose

133 See Jail Manual operative in different states & the Model Prison Manual.

134 See, Government of India, Report on All India JaUs Manual Committee (1957-59), para 101.

135 For different definitions and explanations see J LGillin, *Criminology andPenolo^y 'i'i9* (Appleton-Century, 3rd edn., 1945); Donald R Taft and England, *Criminoloff* (MacMUlan, New York, 3rd edn., 1956) 485; Edwin H Sutherland and Donald R Cressey, *Principles of Criminology* 575 (Lippincott, 6* edn., 1960).

136 *Budhi Y. State of Rajasthan* (2006) Cr LJ 357 (SC).

137 See, generally. *State of Haryana* v. *Mohinder Singh*^ AIR 2000 SC 890; *State of Maharashtra* v. *Suresh Pandurang Darvekar*^ AIR 2005 SC 2471; *Dinesh Kumar* v. *NCT of Delhi* (2012) Cr LJ

and for a certain period and on certain conditions. Purpose of parole is three-fold: (i) the use of parole as a motivational force for reforming prisoners; (ii) to keep the family ties intact as the family ties are likely to be broken because of the long periods of incarceration; and (iii) to slowly draw the mislead soul back into the folds of the society.""^

Though furlough and parole are the devises for temporarily letting prisoners to go out of the penal custody for keeping their links with family and society intact and thereby facilitating their smooth social re-assimilation and rehabilitation, there is subtle difference between the two. Furlough is made available to certain categories of offenders who have undergone specified period of custodial sentence. It is granted as a remission for good conduct in the prison and for showing tendency to reform. Parole is also a conditional temporary release on the ground of good conduct, but the parolee has to regularly report to a supervisory officer for a specified period. Parole is granted to give some situational relief to parolee in certain specified exigencies. Furlough is granted in case of long term imprisonment, whereas parole can be granted in case of short term imprisonment. Duration of furlough is lesser than that of parole. Furlough extends to fourteen days maximum; while parole to one month. Parole can be granted a number of times whereas there is limitation in the case of furlough. Furlough, which, unlike parole, is not granted for any particular reason, but to break monotonous prison life and to avoid its ill-effects, to enable the prisoner to have family association and links with society, can be denied in the interest of the society"^

However, in this backdrop, two pertinent facets, highlighted through judicial pronouncements, in the law relating to furlough and parole deserve our attention.

In *Sunil Fulchand Shah* v. *State of Haryana,*^^^^ the constitution bench of the Supreme Court ruled that temporary release from custody of detainee, with conditions, under section 12(1) (1) or 12(1A) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1994

2959 (Del).

138 AIR 2000 SC 1023.

139 *Id.,* para 16 and para 19.5.

140 AIR 2002 SC 1109.

141 Though in *SunilFulchandShah, supranote* 138, *andMohinder Singh, supranote* 137, the Supreme Court ruled that the parole and furlough period can be counted as the period of sentence of imprisonment, the question of validity of the said section was neither pressed nor considered

(COFEPOSA) by government or its functionaries for a specified fixed period on parole does not interrupt the period of detention or change his status as his liberty and freedom are not fully restored. It only changes the mode of detention by restraining his movement in accordance with the conditions prescribed in the release order. And the period of temporary release cannot be excluded from the maximum period of detention. The period of temporary release, therefore, needs to be counted towards the total period of detention, unless the rules, instructions or terms for grant of parole, prescribe otherwise.^^' The jurisprudential significance of the dictum and implications, though not directly concerned with law relating to release on parole, but with preventive detention, are obvious. It ruled clearly that the period of temporary release of a prisoner on parole needs to be included in the total period of imprisonment undergone by him, unless it is otherwise provided by legislative act, rules, instructions or terms of the grant of parole.

In *Avtar Singh* v. *State of Haryanaf*^" wherein the petitioner, whose plea for directing the state government to include the period of parole availed by him be treated as a part of his custodial sentence was dismissed by the high court, appealed the Supreme Court and also contested the constitutional *vires* of section 3(3) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988, providing that the period of temporary release, on the grounds specified therein, should not be counted towards the total period of sentence of the prisoner . He contended that section 3(3), being violative of articles 14 and 21 of the Constitution, is arbitrary, illegal, and *ultra vires* to the Constitution."^ Two arguments were advanced by the petitioner to press his assertion of unconstitutionality of section 3(3) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988. *First,* placing reliance on the *Sunil Fulchand Shah* dictum, it was argued that s 3(3) of the Act is unconstitutional and violative of article 21 of the Constitution as it illegally deprives him of his right to life and liberty. *Second,* he contended that section 3(3) of the Act is discriminatory as a prisoner released temporarily on parole under section 3 of the Act is not entitled to count such period of release towards the total period of sentence of imprisonment, whereas the period of

by it.

142 (2012) Cr LJ 2959 (Del).

143 The Delhi Furlough/Parole: Guidelines 2010, rale 26.4.

144 *Jiivan Singh l^khuhhai Jadeja* v. *State of Gujarat* (1973) 14 GLR 104.

145 Nevertheless, it advised the executive to attach strict and stringent conditions for consideration

temporary release of a prisoner on furlough under section 4 of the Act, by virtue of section 4(3) of the Act, is counted towards the total period of sentence. But the Supreme Court observed that the Act, for the purpose of temporary release from custody, creates two classes of prisoners: (i) prisoners who qualify for temporary release on parole, and (ii) prisoners who qualify for temporary release on furlough. It held that the period of temporary release of a prisoner on parole should be counted towards the total period of sentence, as ruled in *Sunil Fulchand Shah,* subject to rules or restrictions or terms of grant of parole, and the legislative rules provided section 3 meet this criterion, hence section 3(3) of the Act is not hit by article 21 of the Constitution. The period of temporary release on parole has been denied while counting the actual sentence undergone by the prisoner by a valid legislative act. Further, it also ruled that the two provisions dealing with the release of prisoners on parole (section 3) and furlough (section 4), on a closer look, operate on different fields in different situations. The former is enacted to meet certain situation of the prisoner, while the latter is enacted as reformative measures. Hence, the classification of prisoners is based on rational criteria. It, therefore, cannot be said to be discriminatory in nature. It, hence, is not hit by article 14 of the Constitution. Nevertheless, the apex court held that the proposition laid down in *Sunil Fulchand Shah* that the period of temporary release of a prisoner on parole is to be counted towards the total period of detention, unless it is otherwise provided by legislative act, rules, instructions or terms of the grant of parole, holds equally good for preventive detention and punitive detention as well.

In *Dinesh Kumar* v. *NCT Delhi,"^* the rule disqualifying a prisoner convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion for getting temporary release on furlough,"^ was assailed on the ground that it is arbitrary, unreasonable, and is not based on any intelligible differentia and hence is violative of article 14 of the Constitution. It was also contended that the rule violates the fundamental right to life and liberty guaranteed under article 21 of the Constitution. The high court, recalling a dictum of the Gujarat High Court, which was called upon to adjudge the constitutional validity of a similar provision of the Prisons (Bombay Furlough and Parole) Rules 1959 on the ground that it, like rule 26.4 in the instant

of such cases for furlough.

146 (2012) 5 ALT 538.

case, violates article 14 of the Constitution as it excludes a certain category of prisoners from the benefit of furlough,"^ and its dictum that the rule which otherwise is rational and purposeful and bears a nexus with the underlying object of the legislation cannot be said to be discriminatory merely because some other category also ought to be brought within the exclusionary class, held that the presumption that prisoners falling in the exclusionary class cannot either be a general rule or a valid proposition. Cases of such prisoners need to be judged in the backdrop of circumstances and facts thereof. They cannot *per se* be made ineligible for furlough, even for consideration for release on furlough. Such exclusion, the high court ruled, becomes discriminatory and arbitrary and it cannot have any rational nexus. Expressing its difficulty to agree with the *Juvansingh I^akhubhai Jadeja* dictum of the Gujarat High Court, the Delhi High Court held that rule 26.4 of the 2010 guidelines, which makes persons ineligible for furlough merely on the basis of the nature of crime committed by them, does not stand judicial scrutiny. It amounts to snatching their right to at least consider their cases for the grant of furlough. The high court, therefore, declared the rule unconstitutional and violative of article 14 and article 21 of the Constitution."^

These two judicial pronouncements do have long term implications on prisoners right to parole and furlough. The *Avtar Singh* dictum, read in the backdrop of, and along with, *Sunil Fulchand Shah* dictum, reveals that the apex court has, in principle, accepted the proposition that the period of temporary release on parole needs to be counted towards the total period of imprisonment, unless rules or conditions of parole, if any, stipulate otherwise. And the *Dinesh Kumar* ruling of the Delhi High Court, on the other hand, widens the scope of grant of furlough. It, deferring from the Gujarat High Court, ruled that exclusion categories of prisoners, in general, and the prisoners convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion, in particular, cannot be presumed hard criminals to make them ineligible even for consideration for realising them on furlough.

Penal humanitarianism and rehabilitation, undeniably, warrant liberal parole and furlough, subject, of course, to public security risks. These judicial pronouncements have made some further significant inroads in this direction.

147 *Jasvir Singh* v. *State of Punjab and Haryana* (2015) Cr LJ 2282 (P&H).

148 The high court directed the State of Punjab to constitute the jaU reforms committee and asked the committee, *inter alia*^ to: (i) formulate a scheme for creation of an environment for

Right to conjugal visits in precincts of prison and to artificial insemination?

A convict-prisoner who is temporarily released on furlough and parole can keep and re-connect ties between him and his family and community intact. These forms of temporary release also enable him to enjoy his conjugal and family life.

However, persons, who are convicted and sentenced with imprisonment for longer terms at their prime age, may, obvious reasons, carry a feeling that the temporary release on furlough or parole is not enough to keep their family ties intact or procreate life . Release of prisoner at advanced age may deprive them of begetting children.

In the recent past, two high courts, in different set of facts, were urged to issue directions to the prison authorities to permit the convict-prisoners to have conjugal visits with their spouses in the prison premises and to facilitate the visits as the right to have sex with spouse and procreate life constitutes a facet of the fundamental right to life.

In *G Bhargavi* v. *State of Andhra Pradesh,"^'* the petitioner, a social worker, sought directions from the Andhra Pradesh High Court to the Government of Andhra Pradesh and the state s director general and inspector general prisons to allow convicts housed in jails across the state to have conjugal visits with their spouses in the jails. The plea was pressed on the grounds that: (i) persons imprisoned at their young age and sentenced to longer term of imprisonment may miss an opportunity to beget children; (ii) longer detention is a ground for divorce in many family laws, and if regular spousal contact is maintained, the number of break-ups may be reduced, (iii) deprivation of heterosexual contact results in adverse psychological effects, and frequent conjugal visits, therefore, may reduce the gravity of such psychological imbalances and will also desist them from getting indulged into homosexual acts with fellow prison-inmate(s), and thereby, in turn, keep them away from taking the risk of getting infected with HIV-AIDS.

The high court was not impressed by the argument, though it appeared to be attractive. Dismissing the petition, the high court observed that conjugal visits, if are to be allowed, it cannot be allowed to all prisoners, but to a few selective class/category of prisoners, whose conduct in the prison has been

conjugal and family visits; (ii) make recommendations for facilitating the process of visitation.

good. In such a situation, the chances of getting the prison environment disturbed cannot be ruled out. It, however, apprehended that the solicited directive will have an adverse effect on the prisoners who are not selected for such conjugal visits. Further, the court ruled that issue raised in the petition is a matter of policy decision, which does not lie within its ambit, but lies in the domain of state. It further viewed that the Andhra Pradesh Prison Rules, 1979 provide for release of prisoners on furlough, leave and parole, emergency leave, therefore it cannot be said that there is no provision in the rules to release the prisoners to enable them to lead family life with their spouses when they are temporarily released for a limited period.

Recently, the Punjab and Haryana High Court was called upon to judicially determine as to whether a convict-prisoner, in the exercise of his right to life and personal liberty guaranteed under article 21 of the Constitution, has the right to have sex with his wife and procreate in precincts of the prison or, alternatively, to have artificial insemination during his incarceration and the prison officials, thereby, are obligated to facilitate him to exercise the conjugal right and the right to procreate."^ It was argued by the convict-prisoner, a death-convict, who wanted to have conjugal visit with his wife, a lifer, confined in the same prison, that the right to life includes in it the right to create life and procreate , and that this right cannot be suspended or taken away even when a person is sentenced and confined in a prison. It remains intact even during incarceration. And denial of the right to procreate merely on the ground that it is not explicitly stated in any Act or rule becomes unreasonable, arbitrary, and amounts to be a monstrous violation of article 21 of the Constitution. Conjugal visitation, like in other overseas jurisdictions, he argued, is one of the basic human rights.

The high court formulated four questions for its consideration and response: (i) whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework; (ii) whether penological interest of the state permits or ought to permit creation of facilities for the exercise of the right to procreation during incarceration?; (iii) whether right to life and personal liberty guaranteed under article 21 of the Constitution include the right of convict-prisoners to have conjugal visits or artificial insemination (in alternate) in the prison premises; and (iv) if the immediately preceding question *(i.e.,* (iii)) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)? After a careful

by considering the best practices and keeping in view the goals of reformation and rehabilitation

review of judicial pronouncements on conjugal visits and artificial insemination in prisons from the United States and some European countries, and of academic research and views thereon, the high court ruled that: (i) the right to procreation survives incarceration, and it squarely falls within the ambit of article 21 of the Constitution; (ii) right to life and personal liberty guaranteed under article 21 of the Constitution includes in it the right of convicts to have conjugal visits or artificial insemination (in alternate); (iii) the state should create facilities for the exercise of right to procreation as there is no inherent conflict between the right to procreate and incarceration, but it may be made subject to reasonable restrictions, social order and security concerns; and (iv) ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated."^

However, the high court made it clear that the exercise of the right to conjugal visits, integrated with the right to live with dignity and ingrained in the right to life and liberty guaranteed under article 21 of the Constitution, is subject to all the reasonable restrictions including public order, and moral and ethical issues. It, not being an absolute right, is also subjected to penological interests of the state. The state, in pursuance of its penal policy, is, by creating reasonable classes of convict-prisoners, allowed to deny the right to a class or category of convict-prisoners. Such a classification, the court indicated, does not contravene article 14, the equality clause, of the Constitution. Further, the right, the court stressed, needs to be regulated by procedure established by law in terms of article 21 of the Constitution.

Nevertheless, the court advised all the stake-holders to sit together and deliberate upon this crucial issue and take a holistic view. Indian society, which is engaged with academic and intellectual debate on gay-rights and recognition of the third-gender, should not shy-away or keep concealed under the carpet the practical concept of conjugal visits of the jail inmates in the precincts of prisons.

Convict-prisoner, thus, in principle, has the right to conjugal visits in the precincts of prison and the right to artificial insemination, as an alternate, during incarceration, subject to reasonable restrictions, and prison officials

of convicts and their needs, and (iii) classify the convicts eligible for such conjugal visits.

149 See, generally. Government of India, Report of the All India Committee on JaU Reforms (1980-83) (Ministry of Home Affairs, New Delhi, 1984).

150 Basic Principles for the Treatment of Prisoners, 1990 pri. 1.

151 See The Constitution of Oregon art. 1 (15); The Constitution of Indiana (art. 18); The Constitution of Wyoming [art 1(15)]; The Constitution of Montana art. 3(24);

are under obligation to concede his request and facilitate exercise of the right. This right will relieve prisoners of the mounting sexual frustration and consequential stress and sex-related syndrome; reduce the incidence of so-called consensual homosexual relation between the prison inmates, and thereby the risk of HIV-AIDS. It will also strengthen the family bonds and keep the family tie functional. It will also pave the way for smooth familial integration of the prisoner.

Right to rehabilitation and reintegration?

One of the primary goals of imprisonment is reformation and re-socialisation of prisoners."' All prisoners need to be treated with respect due to their inherent dignity and value as human beings.^^^ Carefully crafted therapeutic and rehabilitative measures do constitute an integral part of prison system and administration. Prison managers, through varied programs, strive hard to provide opportunities to inmates under their custody to develop personal, social and technical skills and thereby transform them from anti-social to social human beings and transfer them to society for their smooth rehabilitation and re-assimilation in the social mainstream. Almost all the prison reforms done or proposed hitherto give emphasis on, and suggest measures for, within or outside high prison-walls, successful reformation, rehabilitation, and social re-integration of offenders.

Most of the peno-therapeutic measures, in vogue and proposed, are prominently premised on the ideas of humanism, humanity, and human dignity of prisoners. Some of these measures, as mentioned in the preceding pages, have acquired the status of right and thereby can be asserted by convict-prisoners. Caught in the dilemma of the humane and correction-oriented administration of peno-correctional institutions and certain rights conferred on, or acquired by, its inmates and assertion thereof, is the pertinent question as to whether a prisoner has (or has not) the right to reform, rehabilitate and reintegrate when prison administration (or prison laws, regulations, and manuals) fails to address his reformation and social rehabilitation. Further, this question becomes more significant in the backdrop of the fact that the Constitution of India, unlike some other constitutions,^^^

The Constitution of Alaska art. 12; The Illinois Constitution art. 1(11).

152 *Supra* note 35.

153 *Maneka Gandhi^ supra* note 38.

154 See V R Krishna Iyer, Justice in Prison: Remedial Jurisprudence and Versatile Criminology in Rani Dhavan Shankardass (ed.), *J'unishment and the Prison: Indian and International Perspectives* 58 (Sage, New Delhi, 2000) .

does not confer any right to rehabilitation and social reintegration on a convict-prisoner. Nevertheless, it may, with convincing reasoning, be argued that article 21 of the Constitution, which guarantees the right to life and personal liberty to all persons, including convicts,^^^ and which, through judicial pronouncements, has been clothed with a number of very expansive positive facets of life and personal liberty to make the right not to mere a symbolic one but a more meaningful and effective, confers such a right on convict-prisoners. Article 21 precludes the state from depriving a person of his fundamental right to life or personal liberty except in accordance with the procedure established by law and such a procedure must not be capricious, but must be fair, just and reasonable.^^^ It thereby mandates the state (and prison authorities) to respect and recognise humanity and human dignity of prisoners and treat them as human beings, though they have been socially condemned for their proved anti-social acts. Prison authorities are not allowed to subject prisoners under their custody to cruel, inhuman or torturous treatment. Punishment that amounts to cruel, degrading or inhuman is treated as violation of article 21 of the Constitution. Treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast is not acceptable.^^^ Prison authorities are not permitted, with impunity, to create inhuman living conditions or inflictive ambience behind the high prison walls.^^^ Such a humane prison administration helps convicts to attain self-rehabilitation.^^"^ Humane prison conditions obviously create healthy rehabilitative environment for prisoners and boost their inner urge to reintegrate with their dear-ones, re-connect with the community, and return back as a law-abiding person. These obligations of the prison officials, flowing from the constitutional mandate, do, in the Holfendian jural co-relations between duty and right, create a corresponding right to be therapeutically treated or corrected, reformed and reintegrated in favour of the convict-prisoners. Conditional temporary release on furlough and parole, in addition to the in-house corrective and rehabilitative measures, implicitly obligates the prison authorities to ensure that the convicts are socially

155 *Supra* note 44.

156 *Sunil Batra, supra* **note 43, para 57.**

157 **Some of these ideas are borrowed from, Edgardo Rotman, Do Criminal Offenders have a Constitutional Right to Rehabilitation? 77** *]r of Crim* ***L*** *and Criminology* **1023 (1986).**

rehabilitated and they therefor need to create and improve therapeutic and corrective measures.^^^

V Conclusion

Right to humanity, human dignity and to be treated as a human being do not only stand as supreme virtues in themselves, but also play significant role in making the administration of criminal justice humane . The constitutional assurance, in the form of fundamental right, to every person, including convict-prisoner, that he has the right to life and personal liberty, and he cannot be deprived thereof except in accordance to the procedure established by law, puts an embargo on the state authorities to deny human dignity and humanity to convict-prisoners. Constitutional courts, by their innovative interpretation of the key-rights, the right to life and liberty embodied in article 21 of the Constitution, have expanded horizons of the right by reading therein the attributes or contours that are required to make the right to life and liberty meaningful and not merely a symbolic constitutional right. Even the procedure intending to deprive a person of this fundamental right, the apex court asserted and has by this time become a rule, must be fair, just and reasonable. Procedure cannot be capricious or oppressive or whimsical. The right is available to all persons, including the convicts in death-row and dwelling in prisons. The former do have the right against solitary confinement; the right against delayed execution of death; the right against painful method of execution of death sentence, and public hanging. Prisoners sentenced to imprisonment with hard labour, on the other hand, have the right against inhuman, degrading and unproductive hard labour with no or illusory wages; the right against unauthorised additional incarceration and inhuman treatment during custodial detention; the right to be released temporarily on furlough and parole, amongst others. The human dignity obligates the state not to incarcerate a person except as authorised by law. There are enough judicial indications that the right to conjugal rights in the prison premises or artificial insemination, and the right to reformation and social integration, will, in near future, acquire the status of integral attributions of the right to life or personal liberty of convict-prisoners.

These rights of convict-prisoners play a dual role. They protect the prisoners from unauthorised actions of the custodial institution managers and recognise prisoners as human beings and their dignity while they undergo custodial punishment or stand in the death-row.